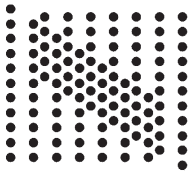

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INTERNATIONAL, CONSTITUTIONAL, LEGAL AND POLITICAL REGULATION AND MANAGEMENT OF ETHNIC PLURALISM AND RELATIONS, INCLUDING PREVENTION, MANAGEMENT AND/OR RESOLUTION OF CRISES AND CONFLICTS AS COMPONENTS OF DIVERSITY MANAGEMENT

THEMATIC ISSUE

Edited by: SARA BREZIGAR, PETER LAVSKIS,
KNUT ERIK SOLEM, MITJA ŽAGAR

Kazalo

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ORIGINAL
SCIENTIFIC
ARTICLE

MITJA ŽAGAR

DIVERSITY MANAGEMENT – EVOLUTION OF CONCEPTS

The article presents the concept, work and development of the International Colloquium on Ethnicity: Conflict and Cooperation *and its* Constitutional Network *that connected worldwide scholars and institutions studying international, constitutional, legal and political regulation and management of diversity and ethnic relations. Among their activities, the series of international scholarly conferences on international, constitutional, legal and political regulation and management of ethnic relations and conflicts at the end of the twentieth and the beginning of the twenty-first century contributed to the development and transformation of the field of diversity management and within it the prevention, management and/or resolution of crises and conflicts. This field underwent a dynamic development that transformed the conflict management and conflict resolution as two initially opposing and incompatible concepts and approaches to conflict into diversity management, of which an important component is the prevention, management and resolution of crises and conflicts that in an innovative way combines approaches of conflict management and conflict resolution. Successful diversity management requires a global (long-term) strategy that includes education and training as its important contents and dimension. Education and training are life-long (learning) processes that shall in formal and informal programs and frameworks include all individuals and distinct communities in a pluralist and asymmetrical society. Their key functions are preparing and enabling every individual, distinct community and diverse society for a successful coexistence, work and life in a pluralist, diverse and asymmetrical environment, developing their knowledge and skills important for peaceful and democratic management of diversity and, especially, democratic and peaceful prevention, management and resolution of crises and conflicts.*

Keywords: ethnicity, diversity, diversity management, prevention, management and/or resolution of crises and conflicts, peace and conflict studies, training and education – life long learning, civic education (education for democratic citizenship)

UPRAVLJANJE RAZLIČNOSTI – EVOLUCIJA KONCEPTOV

Članek predstavlja delo in razvoj mednarodnega kolokvija za proučevanje etničnosti "Etničnost: konflikt in sodelovanje" ter mednarodne "ustavne mreže", ki je povezala v okviru mednarodnega kolokvija strokovnjake in institucije, ki se ukvarjajo z mednarodnim, ustavnim, pravnim in političnim urejanjem ter upravljanjem etničnih odnosov. Serijo petih mednarodnih znanstvenih konferenc o urejanju in upravljanju etničnih odnosov in konfliktov lahko štejemo med pomembne aktivnosti "ustavne mreže", ki so prispevale k razvoju področja upravljanja različnosti ter preprečevanja, upravljanja in/ali razreševanja kriz in konfliktov ob koncu dvajsetega in na začetku enaindvajsetega stoletja. To področje je v tem času doživelo dinamično preobrazbo, ki je upravljanje konfliktov in razreševanje konfliktov, kot dva različna in po mnenju ključnih avtorjev med seboj nekompatibilna pristopa, preoblikovalo in preobrazilo v upravljanje različnosti, v okviru katerega preprečevanje, upravljanje in razreševanje kriz in konfliktov, ki na inovativen način združuje oba prej omenjena pristopa v skupno strategijo, predstavlja pomembno vsebino in ključne aktivnosti. Prispevek se posebej ukvarja z vzgojo, izobraževanjem in usposabljanjem, ki se morajo razviti kot vseživljenjski proces, v katerega so prek različnih formalnih in neformalnih oblik in dejavnosti vključeni vsi posamezniki v posamezni notranje raznoliki in asimetrični skupnosti. Prav uspešni vzgoja, izobraževanje in usposabljanje so ključni pogoji, ki naj posameznika in družbo usposobijo za uspešno življenje in delo v pluralnem okolju, predvsem pa prispevajo k miroljubnemu in demokratičnemu preprečevanju, upravljanju in razreševanju kriz in konfliktov.

Ključne besede: etničnost, različnost, upravljanje različnosti, preprečevanje, upravljanje in/ali razreševanje kriz in konfliktov, mirovne študije in študije konflikta, izobraževanje in usposabljanje (vseživljenjsko učenje), državljanska vzgoja.

INTERNATIONAL, CONSTITUTIONAL, LEGAL AND POLITICAL REGULATION AND MANAGEMENT OF ETHNIC PLURALISM AND RELATIONS, INCLUDING PREVENTION, MANAGEMENT AND/OR RESOLUTION OF CRISES AND CONFLICTS AS COMPONENTS OF DIVERSITY MANAGEMENT [1]

Introduction (to this special issue of the Journal and to the article)

This introduction is actually a general introduction to this special issue of the scholarly journal *Razprave in gradivo / Treatises and Documents* and to my own contribution that as the first and the most general contribution should establish a framework for the following contributions that address some specific issues relevant for the international, constitutional, legal and political regulation and management of ethnic pluralism and relations and diversity.

Almost seventeen years ago I met Otto Feinstein in Dubrovnik and this is where the story begins. After the first post World War II democratic multiparty elections in Slovenia and Croatia, when the first armed skirmishes had already started in Croatia, and just before tragic historic developments and wars in the territory of the former Yugoslavia, we gathered there at the international conference on ethnic conflict and cooperation organized within an international research project coordinated by Rodlofo Stavenhagen and sponsored by UNRISD (United Nations Research Institute for Social Development).[2] This Dubrovnik conference,

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1 This article is based on the research work and findings: within the long term basic research project *Ethnic Dimension of Integration Processes in Plural Societies and the Management and Resolution of Conflicts* coordinated by the author and financed by the Ministry of Science and Technology of the Republic of Slovenia (1993-2002), within the research program *Ethnic and Minority Studies and Slovene National Question* (2000-2008) at the Institute for Ethnic Studies funded by the Public Agency for Research of the Republic of Slovenia, within the *EU Feasibility Study on the Creation of a South-Eastern European Educational Co-operation Centre* coordinated by the Institute of Education of London University, and within the Specific Targeted Research Project under the Sixth Framework Programme of the European Community *Minority rights in the Life Cycle of Ethnic Conflicts - Minority Rights Instruments and Mechanisms: Minority Protection along the Conflict Continuum* (MIRICO 2006-2008) coordinated by Professor Joseph (of the University of Graz) Marko and the European Academy of Bolzano (Accademia Europea per la ricerca applicata ed il perfezionamento professionale Bolzano) in which the Institute for Ethnic Studies participates as one of the partners. The author benefited from the work, activities and results of the *International Colloquium 'Ethnicity: Conflict and Cooperation* and its *Constitutional Network*, and important information was gathered while he participated as a member in the work of the Special Delegation of Council of Europe Advisors on Minorities and while working as a member and chair of the Task Force 1 on Human Rights and Minorities of the Working Table I on Democratization and Human Rights of the Stability Pact for South Eastern Europe (2000 - 2003). In preparing this article the papers and discussions produced within the *Scholars Initiative Project* on the former Yugoslavia coordinated by Professor Charles Ingrao (of the Purdue University) were useful, although they were not directly used and cited. Thankful for all mentioned inputs, the author, of course, is solely responsible for all shortcomings and mistakes. The article was completed while the author was a visiting fellow at the National Europe Centre of the Australian National University in Canberra in the fall of 2007.

2 Main results of this project are presented in: **Stavenhagen, Rodolfo** (1996). *Ethnic conflicts and the nation-*

organized by Silva Mežnarić and the 'Yugoslav team' explored different cases of ethnic cooperation and conflict in the world and provided a framework – in a wonderful historic setting of this ancient city and using facilities of the Inter University Centre – for interesting discussions and plans that (by far) exceeded the scope of the conference.

Among those plans was the initiative of Otto Feinstein (then a Professor at the Wayne State University from Detroit, Michigan) that in a word that was being torn apart by ethnic strife and conflicts, scholars studying these issues should do something to contribute to the improvement of the current global situation in our globalizing world and to the improvement in individual environments, especially those most affected by surges of nationalism and ethnic conflict. He suggested establishing an international network of scholars that would be called the *International Colloquium 'Ethnicity: Conflict and Cooperation.'* Simultaneously, he initiated a new scholarly journal that would discuss issues of ethno-development, a theoretical concept developed by Rodlofo Stavenhagen calling for such a development in multiethnic societies that would take into account specific situation and interests of distinctive ethnic communities based on the principles of (social) equality and justice (Stavenhagen 1990). By coincidence, with Otto Feinstein, Eric Bockstael, Rodolfo Stavenhagen, Siva Mežnarić and some others participants of the conference I became one of founding members of the *International Colloquium*. Although at the time I was just a young member of the research team at the Institute for Ethnic Studies that was one of partner institutions in the Yugoslav part of the UNRISD project, I was trusted with a task to establish an international network of scholars dealing with international, constitutional and legal regulation of ethnic relations. Less than a year later Otto Feinstein already organized the first conference of the *International Colloquium* in Detroit, Michigan,[3] and soon afterwards the first issue of the *Journal of Ethno-Development* was published there. Among important outcomes of the Dubrovnik conference and the *International Colloquium*, I should mention a series of courses and conferences on divided societies initiated by Silva Mežnarić and organized annually at the Inter University Centre in Dubrovnik that in 2007 celebrated their tenth edition, and the establishment of the International Institute for Policy, Practice and Research in the Education of Adults.

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state. Houndmills, Basingstoke, Hampshire: Macmillan in association with UNRISD (**United Nations Research Institute for Social Development**) / New York, N.Y.: St. Martin's Press. More, see: Rupesinghe, Kumar & Tishkov, Valeriĭ Aleksandrovich, eds. (1996). *Ethnicity and power in the contemporary world*. Tokyo, New York: United Nations University Press.

3 Contributions from this conference: Feinstein, Otto, Ed. (1991), *Ethnicity: Conflict and Cooperation*, International Colloquium Reader, Volumes *One* and *Two*. Detroit: Michigan Ethnic Heritage Studies Center, Detroit, 1991.

The international network on international, constitutional and legal regulation of ethnic relations – called the *Constitutional Network* – was established formally at the first conference of the *International Colloquium*, I was appointed its coordinator and the Institute for Ethnic Studies in Ljubljana was determined to be its coordinating institution. Conferences of the *International Colloquium* at least once annually served as the opportunities for the meeting of the *Constitutional Network*. Since 1995 one of its activities coordinated and organized by the Institute for Ethnic Studies was a series of – so far five – international scholarly conferences on constitutional, legal and political regulation of ethnic relations that were all held in Ljubljana and supported by the ministry of the Republic of Slovenia responsible for research. One of results of this process and especially of the fifth conference in December 2003 is this special issue of the journal *Razprave in gradivo / Treatises and Documents*. Namely, the participants of this conference decided that an attempt should be made to prepare a special publication that would address and explore some relevant issues connected with constitutional, legal and political regulation of ethnic relations within the context of diversity management. At this occasion the editorial board – composed of editors of this special issue – was established and entrusted to carry out this task.

The list of possible topics determined at the fifth international conference was expanded with some relevant topics that had been indicated by previous conferences. The fifth conference listed some possible authors for individual contributions that included not only those who participated in the work of the *Constitutional Network*, but other prominent scholars in the field of ethnic relations and related fields. Determining the concept of the publication and instructions for authors (taking into account the rules of the journal) the editors invited selected authors to participate and write their contributions, explaining to them the process and possible problems (including the lack of funding, especially for language editing) that we foresaw in it. As it is usually the case in such projects, unfortunately – for different reasons, not all invited authors were willing or able to participate or to complete their contributions in a determined time. Additionally, following the editorial process and decisions of editors not all contributions that had been revised in accordance with reviews and editorial comments were included in this special issue. However, the editors believe that this special issue of the Journal of Ethnic Studies *Razprave in gradivo / Treatises and Documents* is an important result of the series of the international conferences and a relevant presentation of a part of the work of the *International Colloquium 'Ethnicity: Conflict and Cooperation'* and its *Constitutional Network*. We consider this special issue to be a tribute to the work and enthusiasm of the late Otto Feinstein and Eric Bockstael, two of the initiators of the *International Colloquium* that stimulated related activities and initiatives.

As mentioned, this special issue includes a selection of contributions on relevant issues regarding international, constitutional, legal and political regulation and management of ethnic relations and conflict that express the often diverse views of the authors. As the introduction to this special issue my article tries to establish a broader conceptual framework for the following contributions. Using some personal experiences and perspectives, the *Constitutional Network* and its work as basic references that establish a historic context I address the concept of diversity management as the broadest context for the management and regulation of ethnic relations and the protection of minorities. I focus on the evolution of management and resolution of crises and conflicts, on the development of a concept of the prevention, management and/or resolution of crises and on an attempt to develop a global and universal international strategy of diversity management that would include the prevention, management and resolution of crises and conflicts. Such a global strategy should enable concerted action by all relevant actors at all levels (from local, regional and national to international) mobilizing their resources and creating synergies. An important element of this strategy is education and especially civic education – education for democratic citizenship, observed as a life-long learning process in which a number of different actors take part and which includes diverse formal and informal programs and formats. In the context of diversity management the education should pay special attention to teaching and training in approaches, mechanisms, techniques and skills for the (successful) prevention (of the escalation of crises and conflicts), management and resolution of crises and conflicts.

TRANSFORMATION OF THE WORLD AND EVOLUTION OF CONCEPTS: FROM CONFLICT RESOLUTION AND CONFLICT MANAGEMENT TO DIVERSITY MANAGEMENT

The 1980s and 1990s were an interesting and dramatic period. Some of the great transformations of the Twentieth Century were taking place simultaneously, in many ways intertwined. The Communist world as we knew it after WW II was transforming and started to disintegrate; largely, by the end of the 1980s it was gone, at least in Europe. The process of reforms and transition from Communism started and in many ways it still continues in the beginning of the Twenty First Century. However, contrary to optimistic expectations and beliefs this transition was not always and everywhere a simple transition to democracy. As always in the past, the transitions at the end of the twentieth century were complex and complicated processes, very specific and different in various environments, with their ups and downs. Rather than speaking of a transition we should recognize that there were and are several transitions and transformations. Although their main common characteristic might be democratization, again, to a different extent and

at different levels, outcomes of these transitions could vary substantially. Some societies in transition have actually to a large extent transformed into democracies, while in many other environments one type of the authoritarian and/or totalitarian regime was replaced by another one that by no serious standards can be considered democratic. The same is true of economic and market reforms and transformation. Although in almost all environments they declared the introduction of some kind of market economy, outcomes differ substantially. In some countries market economies developed, at very different levels of development and applying rather different standards, while in other environments command economies hardly saw any changes or were replaced by specific arrangements to a larger or smaller extent dominated by states or other key actors, including new economic tycoons.

Similarly profound and tectonic, as described political and economic changes and transitions at the national level, were changes and transformations in the international community. With the collapse of Communism and centrally planned (communist) economies in Europe, and the disintegration of the Soviet Union and the Warsaw Treaty Organization, the bipolar world that characterized the international community in the post WW II period ended. For a while, the globalization that had been one of the main global processes already seemed to accelerate beyond the wildest dreams. Observing processes of democratization and globalization, some were so thrilled that in their enthusiasm expected the end of the history as we knew it before (Fukuyama 1989, 1992; Huntington 1991).

However, soon we realized that these profound transitions and transformations, as important and predominantly positive as they were in most cases, brought problems and new dilemmas. One of the immediate consequences of these changes was an increased level of instability in individual countries and at the regional and global level. At the global level no adequate mechanisms and ways existed that would be able to replace the formerly existing stable bipolar arrangements; as precarious and unstable as these bipolar arrangements (that stimulated armament race, hoping to deter the opposite side by their arsenal of nuclear and other weapons of mass destruction) were, they still provided a relatively stable and predictable international environment. After the collapse of bipolarism some saw the USA the only remaining super power that will (have to) introduce *Pax Americana* (alluding to *Pax Romana* in the period of the peak of the Roman Empire) and manage the world using its vast resources. However, even the power and resources of the USA proved inadequate for such a role and did not eliminate or substantially decrease global instability. Additionally, the USA continued to pursue their strategic interests and policies – to a large extent determined by the US domestic (internal) affairs and politics – and did not pay necessary attention to all corners of the globe. Furthermore, with their actions and responses, especially with their interventions, they sometimes increased instabil-

ity and fuelled crises and conflicts. On the other hand, when the action of the international community was required urgently in a specific crisis, the USA often proved to be the only international and global actor able to undertake the necessary action. However, this was due to the position and policy of the USA that did not show much interest in developing adequate global international mechanisms (possibly by the reform of the UN) that would be able to play such a role.

This new era of global development required new concepts to be developed that would help in understanding and managing the complexity of the contemporary world, characterized by instability (actually instabilities), escalating crises and conflicts in different parts of the world that were often reflections of ethnic strife and cleavages, which in many environments led to protracted conflicts and civil wars. In such a situation in the 1990s many, including the US administration, believed that there was an adequate (relatively simple and ready made) answer available, which they saw in the concept of the *clash of civilizations* framed by Huntington (1993, 1996). In agreement with several other authors (Rashid ed. 1997), I consider this concept an inadequate and prejudiced one that leads to (over)simplified and mono-dimensional understanding of our contemporary world and its diversities. My main criticism is that this concept, built on a specific ideology, on ideological reductions and interpretations of other cultures and their traditions, which Huntington sees as clashing civilizations, might be considered problematic from the perspective of 'other civilizations' since it implies superiority of the Western civilization, based on Judeo-Christian traditions and a specific type of democracy, based predominantly on individualism and competition. However, due to its seeming and operational simplicity the concept of the *clash of civilizations* was and is used and followed in daily politics and policies, especially foreign policy strategies, policies and measures of the USA, and some other countries (especially in the West), and NATO (within which the USA play the central role). Consequently, in many ways this concept is becoming a self-fulfilling prophecy.

The Yugoslav crisis in the 1980s and 1990s and consequent historic developments in the region could be considered parts of described processes and transformations. This crisis that affected all spheres of life became an obvious context for the observation of the escalation of several diverse conflicts in Yugoslavia. Among these (types of) conflicts I shall mention (at least) the following:

- conflicts between traditionalists and reformers;
- conflicts between advocates of democratic reforms and political pluralism and those who demanded the return to one-party system and reinforcement of the absolute monopoly of the League of Communists (as the Communist Party of Yugoslavia renamed itself following its internal reforms in the 1950s);

- conflicts between those who demanded profound economic reforms, development of market economy and economic liberalization and those who believed that the solution to the growing economic crisis would (re)introduction of some form of command economy;
- conflicts between those who advocated decentralization and increased autonomy of federal units and those who demanded (re)centralization and strengthening of the federal institutions, including the increasing social and political role of the Yugoslav People's Army (JLA/JNA). The JLA/JNA was by many centralists and hard-core communists seen as the ultimate defender of socialism/communism, territorial unity, sovereignty, and glorious traditions of the Yugoslav Partisan Army and the National Liberation Movement during WW II; etc.

Although these conflicts in their nature could be described as predominantly political and economic conflicts, they soon became perceived as ethnic conflicts when different positions were associated with individual republics. In other words we could say that we saw the transformation of social, economic and political conflicts in the former Yugoslavia into ethnic conflicts when ethnicity was used as a key factor for political mobilization. In this context, nationalism and nationalist policies played central roles (Klemenčič and Žagar 2004, Ramet 2002).

This was the time when after my graduation my academic career in law and political science began, building especially upon my previous work, information, knowledge and experiences accumulated in some ten years of my continuous engagement within the UN Clubs of Slovenia and the federal organization of the UN Clubs in Yugoslavia.[4] In the late 1980s and early 1990s I was fortunate to par-

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4 The Organization of the UN Clubs of Slovenia and the association of the UN Clubs from republics and autonomous provinces at the Yugoslav level were NGOs that focused on the study of the UN (structure, activities, projects and processes), their special agencies and other related international organizations. The main aim of the organization was on the promotion of knowledge on the UN and their ideals, especially human rights, peace and peaceful cooperation in the international community among the youth and general public. They participated in different activities of the UN and were, for their contributions, educational activities and promotion of peace, awarded a special peace award (Peace Dove) by the UN Secretary General. The UN Clubs had a strong tradition of studying international relations and specific international developments and produced a number of studies and newsletters that were distributed among their members, mostly pupils and students in primary and secondary schools and at universities, but the interested youth in local communities. At its peak in the mid 1980s, the UN Clubs of Slovenia had more than 12,000 members and more than 650 clubs existed in different environments throughout Slovenia. In the 1980s I was first responsible for the education and research (study) activities of the UN Clubs of Slovenia and for their international cooperation. Between 1982-1986 and 1988-1899 I was the president of the UN Clubs of Slovenia, a member of the federal leadership and in the mid 1980s the representative of the UN Clubs of Yugoslavia in the ISMUN (International Student's Movement for UN). Unfortunately, in the 1990s this organization, that was well integrated into educational system and depended on public funding, almost collapsed due to the lack of public funding and some internal organizational problems. Consequently, currently there are only a few UN and UNESCO Clubs at some primary schools in Slovenia assisted by the UN Association of Slovenia.

ticipate in some activities of the Pugwash Conferences and their efforts organized to raise public awareness, promote peace and human rights in the world, and to demand and stimulate disarmament, especially elimination of nuclear and other arms of mass destruction. These occasions and contact with members of the Pugwash Council and Conferences further shaped my interests in these areas and confirmed my attitude that scholars' role is not just studying their objects, scientific disciplines and scholarly areas but adequately responding to social situation and needs.[5] Being interested in comparative constitutional law and comparative politics and government, I started to study political and constitutional systems and the functioning of their institutions in the East and West, paying special attention to contemporary developments and social processes in Central and Eastern Europe – especially social, economic and political crises in Yugoslavia, attempts and processes of democratization and reforms there, developments following the Perestroika in the Soviet Union and other communist countries of the Soviet block.[6] At that time I started to realize that substantial differences that existed among these countries and influenced contemporary developments in different environments. More and more, I became aware of substantial differences and gaps in development within individual countries that were usually considered a homogenous block. There were a number of colleagues with whom we discussed issues that we found interesting and important, and in these discussions we shaped our views and thoughts.[7] A frequent topic of our discussions was the exist-

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5 After being introduced by Marko Vrhunec to the Pugwash Conferences, an organization aiming at bringing "together, from around the world, influential scholars and public figures concerned with reducing the danger of armed conflict and seeking cooperative solutions for global problems," I participated in a few of their activities and meetings – including one in the village of Pugwash, Nova Scotia, Canada which gave the organization its name after its first meeting was held there in 1957. (See: http://www.pugwash.org/about.htm, accessed 2 October 2007) At these occasions I met several distinguished scholars and led lengthy discussions with them. We developed some common activities and projects. Among them I should mention (listed in alphabetically according their family names): Anatol Rapaport, Rita Rogers, Joseph (Józef) Rotblat – Nobel Peace Laureat (1995), founder and then president of Pugwash Council, Metta Spencer, Vamik Volkan, etc.

6 Here, I should mention especially my participation in the International Project Transition to Democracy in a World Perspective (1988-1992; 1992-1998), coordinated by Bogdan Denitch, professor at the City University of New York Graduate School that gathered a number of scholars on transition from North and South America, Europe and Africa, where I focused mostly on the study of the Yugoslav crisis and transition in the successor states, but on global context of transition and global sustainable development. This project served as the basis for the UNDP / UNESCO Unitwin Project "Global Pilot Project of Linking of Ten Universities in the Policy Studies and Implementation for Sustainable Development" (1991-1993) and the "International Project on the Inter-University Cooperation in Policy Research for Sustainable Development" (1993-1998).

7 In the late 1980s I was fortunate to benefit from meeting and working with several intellectuals and scholars from Slovenia, Yugoslavia and abroad who co-shaped the intellectual space and developments in my immediate environment and globally, among others (listed in alphabetical order of their family names): Stanley Aronowitz, Peter Bekeš, Vlado Benko, Stefano Bianchini, Adolf Bibič, Borut Bohte, France Bučar, Branko Caratan, Bogdan Denitch, Vojin Dimitrijević, Dušan Dolinar, Milan Gaspari, Vladimir Goati, Damir Grubiša, Ferenc Hajos, Michael Harrington, Irving Howe, Albin Igličar, Peter Jambrek, Tone Jerovšek, John Keane, Peter Klinar, Stane Kranjc, Lev Kreft, Ivan Kristan, Slaven Letica, Sonja Licht, Arthur Lipow, Seymour Martin Lipset,

ing ethnic diversity of populations of different countries, changes in their ethnic structures and relations. We tried to determine their impact on historic developments and transformation of these societies. Discussing respective developments in Yugoslavia, and in the Soviet Union we were witnessing how political leaders, especially those who wanted to present themselves as national leaders were using nationalism and nationalist policies for political mobilization of people along ethnic lines. Increasingly ethnic mobilization and nationalism were becoming key factors in social and political processes and in shaping the public and political discourse, bringing in it new formulations of national interests, specific views of ethnic injustices and exploitation, issues of ethnic equality and adequate social position of all or some ethnicities in a certain multiethnic society, and demands for increased autonomy of regions and ethnic communities, protection of minorities, and/or – in some cases – self-determination, independence, dissolution of existing multinational states and/or secession.[8] Following my growing interest I searched for and started to study all available literature and relevant materials on ethnic studies and nationalism in Slovene libraries which at that time due to financial limitations had some problems in acquiring contemporary foreign literature. Luckily, I had the access to some libraries abroad, especially the library of the Johns Hopkins University graduate school in Bologna with its rich collections. This turned out to be the main source of foreign books and periodicals that I used in research and in writing my doctoral dissertation. Here I discovered interesting literature on conflict, conflict resolution and conflict management, which attracted my attention due to my specific interest in ethnic relations and conflict.[9] Taking into account contemporary developments, social crisis and esca-

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Sonja Lokar, Boris Majer, Tomaž Mastnak, Jože Mencinger, Silva Mežnarić, Nenad Miščević, Rasto Močnik, Miloš Nikolić, Mario Nobilo, Vukašin Pavlović, Ernest Petrič, Rajko Pirnat, Janko Pleterski, Matjaž Potrč, Branko Pribičević, Žarko Puhovski, Ciril Ribičič, Rudi Rizman, Franjo Štibler, Mijat Šuković, Zdravko Tomac, Lojze Ude, Andrej Ule, Mirjana Ule, Stane Vlaj, Slavoj Žižek, etc.

8 Similar discourses, concepts and demands were not unknown in the past, see, e.g,. Bučar, Bojko & Kuhnle, Stein, Eds. (1994). *Small States Compared: Politics of Norway and Slovenia*. Bergen: Alma Mater.

9 Among the key authors and their works that at the time had substantial influence on my thinking and on development of my concepts regarding the regulation and management of ethnic relations, peaceful international cooperation and development, and handling of conflicts, especially those with ethnic dimensions, I should list the following: Anderson, Benedict (1983). *Imagined Communities: Reflection on the Origin and Spread of Nationalism.* London: Verso; Armstrong, John (1982). *Nations before Nationalism.* Chapel Hill: University of North Carolina Press; Avruch, Kevin & Black, Peter W. & Scimecca, Joseph A., Eds. (1991). *Conflict resolution: Cross-cultural perspectives*. (Contributions in ethnic studies, No. 28.) New York: Greenwood Press; Azar, Edward E. & Burton, John W., Eds., (1986). *International Conflict Resolution: Theory and Practice*. Sussex: Wheatsheaf Books; Boulder: L. Rienner Publishers; Banac, Ivo (1993, © 1984). *The National Question in Yugoslavia: Origins, History, Politics.* Ithaca, London: Cornell University Press; Banton, Michael (1983). *Racial and Ethnic Competition.* Cambridge: Cambridge University Press; Barth, Frederick, Ed. (1969). *Ethnic Groups and Boundaries: The social organization of culture difference.* Oslo: Universitetesforlaget / Boston: Little & Brown; Burton, John W. (1969). *Conflict & communication: The use of controlled communication in international relations*. London: Macmillan; Burton, John W. (1979). *Deviance, terrorism & war: The process of solving*

lation of conflicts in Yugoslavia and with a goal to ensure equality and recognition of specific interests of distinct communities in ethnically plural societies, my doctoral dissertation on modern federalism and asymmetrical federation in multi

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unsolved social and political problems. Canberra: Australian National University Press (1979); Burton, John W. (1984). *Global Conflict: The Domestic Sources of International Crisis*. Brighton, Sussex: Wheatsheaf Books; College Park: Center for International Development, University of Maryland; Burton, John W. (1987). *Resolving Deep-Rooted Conflict: A Handbook*. Lanham, MD: University Press of America; Burton, John W. (1990). *Conflict: Resolution and Prevention*. New York: St. Martin's Press; Burton, John W., Ed. (1990). *Conflict: Human needs theory.* New York: St. Martin's Press; Burton, John W. & Dukes, Frank (1990). *Conflict: Practices in Management, Settlement, and Resolution*. New York: St. Martin's Press; Connor, Walker (1984). *The National Question in Marxist-Leninist Theory and Strategy.* Princeton University Press; Curle, Adam (1971). *Making Peace*. London: Tavistock Press; Deutch, Karl (1966). *Nationalism and Social Communication: An Inquiry into the Foundations of Nationality.* (2nd Edition.) Cambridge, Mass.: MIT Press; Deutch, Karl W. (1970). *Political Community at the International Level: Problems of Definition and Measurement***.** Archon Books, USA (1970); Deutsch, Morton (1973). *The Resolution of Conflict*. New Haven CT: Yale University Press (1973); Fisher, Roger & Ury, William & Patton, Bruce (1991). *Getting to Yes: Negotiating an Agreement without Giving In*. (The Second Edition.) London: Business Books Limited; Fisher, Ronald J. (1990). *The Social psychology of intergroup and international conflict resolution*. (Springer series in social psychology.) New York: Springer Verlag; Galtung, Johan (1975). Peace: Research, education, action. (Prio Monographs 4.) Copenhagen: Ejlers; Galtung, Johan (1980). *Peace and world structure*. Copenhagen: Ejlers; Galtung, Johan (1984). *There are alternatives! Four roads to peace and security*. Nottingham, England: Spokesman / Chester Springs, PA.: U.S. distributor Dufour Editions; Gellner, Ernest (1983). *Nations and Nationalism.* Ithaca, London: Cornell University Press; Giddens, Anthony (1985). *The Nation-State and Violence: A Contemporary Critique of Historical Materialism*, Vol. 2. Cambridge: Polity Press; Hobsbawm, Eric J. (1990). *Nations and Nationalism since 1789: Programme, Myth, Reality.* Cambridge, London, New York, New Rochelle, Melbourne, Sydney: Cambridge University Press; Horowitz, Donald L. (1985). *Ethnic Groups in Conflict*. Berkeley, Los Angeles, London: University of California Press; Kedourie, Elie (1993). *Nationalism*. (Fourth, expanded edition.) Oxford, Cambridge: Blackwell (© 1960, 1961, 1966); Kellas, James. G. (1991). *The Politics of Nationalism and Ethnicity*. London: Macmillan; Kriesberg, Louis (1968). Social processes in international relations: A reader. / New York: J. Waley; Kriesberg, Louis (1973). *The sociology of social conflicts*. Englewood Cliffs., N.J.: Prentice-Hall; Kriesberg, Louis & Northrup, Terrell A. & Thorson, Stuart J., Eds. (1991). *Intractable conflicts and their transformation*. (First edition) Syracuse, N.Y.: Syracuse University Press (1989); Kriesberg, Louis & Thorson, Stuart J., Eds. (1991). *Timing the de-escalation of international conflicts*. (1st Edition; Syracuse studies on peace and conflict resolution.) Syracuse, N.Y.: Syracuse University Press; Macartney, C. A. (1934). *National States and National Minorities.* Humprey Milford, London: Oxford University Press; Monteville, Joseph V., Ed. (1990). *Conflict and Peacemaking in Multiethnic Societies*. Lexington, Toronto; Lexington Books; Moore, W. Christopher (1986). *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass; Rapaport, Anatol (1971). *The big two: Soviet-American perceptions of foreign policy*. (American involvement in the world.) New York: Pegasus; Rapaport, Anatol (1974). *Conflict in man-made environment*. Harmondsworth, Baltimore: Penguin Books; Rapaport, Anatol (1960). *Fights, games, and debates*. (A publication from the Center for Research on Conflict Resolution, the University of Michigan.) Ann Arbor: University of Michigan Press; Rapaport, Anatol, Ed. (1965). *Game theory as a theory of conflict resolution*. (Theory and decision library, Vol. 2.) Dordrecht, Boston: D. Reidel Publishing Company (1974); Rapaport, Anatol & Chammah, Albert M., Ed. (1974). *Prisoner's dilemma: A study in conflict and cooperation*. (by Anatol Rapoport and Albert M. Chammah. With the collaboration of Carol J. Orwant.) Ann Arbor: University of Michigan Press 1965; Seton-Watson, Hough (1977). *Nations and States.* London: Methuen; Smith, Anthony D. (1986). *The Ethnic Origin of Nations*. Oxford, Cambridge, Massachusetts: Blackwell Publishers; Touval, Saadia & Zartman, I. William (1985). *International Mediation in Theory and Practice*. Boulder, Co.: Westview Press, ; Väyrynen, Raimo, Ed. (1991). *New directions in conflict theory: conflict resolution and conflict transformation*. London: Sage (in association with the International Social Science Council); Wallensteen, Peter & Galtung, Johan & Portales, Carlos, Eds. (1985). *Global militarization*. (Westview special studies in peace, conflict, and conflict resolution.) Boulder: Westview Press; etc.

ethnic societies developed the theoretical model of asymmetrical federation as a possible tool for managing asymmetries and diversities in societies and a normative framework for the (co)existence of (two or more) different institutional and legal arrangements, and for different political systems within the same country (Žagar 1990, 1992). In its main elements this model was welcomed and suggested by the Presidencies of the (Socialist) Republics of Slovenia and Croatia as one of possible options for the reform of the Yugoslav federation that, hopefully, could provide for coexistence of diverse concepts and ideas about the nature and future development of the system, and for coexistence of different ideologies. However, this proposal was rejected immediately by Milošević and those who opposed the introduction of multi-party democracy. They demanded total centralization of the federation and ruling party – the League of Communists of Yugoslavia – that should strengthen the political monopoly and (absolute) power of the communist regime. The rejection of this proposal and consequently of asymmetrical federalism did not surprise me, however, considering the escalating crisis and contemporary situation I expected some interest for conflict management and conflict resolution, especially for models, methods and skills that they were offering for handling of conflicts. On the other hand there was interest for my work and concepts abroad, where conflict resolution and conflict management were developing rapidly. Soon, I discovered that – taking into account several problems in the existing federal systems and federal projects in history and at present – there were many scholars of different disciplinary background and from various environments who shared my view on federalism as a possible and effective tool for the regulation and management of complexity, diversity and asymmetries of modern societies at different levels, from a sub-national and national to transnational/international level (Ortino et al. 2005)

Living there and studying the Yugoslav crisis in the 1980s and early 1990s and reading on conflict management and resolution changed my perceptions and understanding of conflicts profoundly. I was socialized in a traditional way, being taught that conflicts are something to fear, something undesired and harmful, something that we should avoid at almost any cost because of their negative potential and possible destructiveness. Consequently, observing the growing crisis and escalation of diverse conflicts in Yugoslavia, my fears grew. Influenced by literature on conflict management and conflict resolution, but by my own research of conflicts in different environments and situations and at different levels, I soon started to realize that my socialization and traditional perceptions of conflicts were not adequate. True, conflicts if not managed adequately and successfully might destroy social stability in every, especially plural and diverse, environment and result in devastating consequences. However, recognizing a number of diverse and possibly opposing interests in every environment I realized that conflicts were normal social phenomena and the logical state of affairs in every

pluralist society. In other words, conflicts are logical and normal consequences of the existence of diverse, often competing and conflicting interests in an environment. Rather than considering conflicts as negative phenomena and fear them (as most of us have been taught to do), we should realize that a more productive approach from individual and social perspective would be to recognize their existence, life cycles and potentials and learn how we could manage and/or resolve them in a way that would decrease tensions and produce positive results. Namely, as conflicts might carry negative and destructive potentials they might lead to positive and creative consequences, if handled properly. They can be a stimulus to necessary change and positive development; they might help develop innovations and creative solutions that benefit individuals and societies. So, one of central interests and tasks of all pluralist societies should be the adequate handling of conflicts, possibly in a democratic way – especially at the macro levels.

Studying literature and carrying out research, but trying to do some practical work in conflict management and resolution, I came to a conclusion that two competing concepts at the time – conflict resolution and conflict management[10] – with their traditional approaches and specific goals separately often did not offer adequate answers and strategies in concrete situations. As some other colleagues at the times I learned different methods, techniques and skills and started to combine them and both afore mentioned approaches. Although following a traditional view combining both concepts would be described as inconsistent at the time, believing that their approaches and strategies are incompatible, my experiences in practice were that the best results were reached when both approaches were combined, simultaneously or at different times; this proved true in addressing different situations, crises and conflicts that existed in specific environments, even in cases when a specific situation involved only two individuals. When I presented my findings and views at the first conference of the *International Colloquium* (Žagar 1991) they did not provoke many reactions, although some interest and reservations were expressed informally. Simultaneously I realized that rather than being a solution to problems regarding the regulation and management of ethnic pluralism and relations, asymmetries and diversities in modern societies, the concept of a nation-state with its presumption of ethnic homogeneity, determination of an official language, culture and history that is based on perceptions of a titular nation, which sees its nation-state as the ultimate tool for the realization of national interests actually could contribute to problems and might

10 Schematically, we could summarize that conflict resolution was geared at resolving conflicts and developed its strategies accordingly to achieve this (often long-term) goal, while conflict management rather than attempting to resolve conflicts, especially protracted ones focused on their management and developed its strategies accordingly aiming at de-escalation of the current level of conflicts and their management by peaceful and hopefully democratic means.

sometimes stimulate escalations of conflicts in ethnically plural environments; this traditional concept of a nation-state does not correspond to our reality, which is that all societies are ethnically plural – at least to a minimal extent (Žagar 1994, 1994-95, 1996-97). In an actual escalation of crises and conflicts within a state the rivalry of nationalism(s) of dominant (titular) nations and other ethnicities, often defined as minority nationalism(s) can play crucial roles, being used as the basis for political mobilization of masses (Keating and Mcgarry 2001). As the cases of the former Yugoslavia, but other historic experiences from the Balkans show, nationalisms as expansive or defensive (political) ideologies, policies and movements, but exclusive collective (ethnic) identities (mis)use ethnic sentiments and identities of people to mobilize and homogenize members of a respective ethnicity for the realization of *national interests* (as defined by nationalist movements and politicians); in such a situation diverse social conflicts acquire their ethnic dimensions and transform (or predominantly) into ethnic conflicts. Because of their exclusive nature that stressing (internal) homogeneity and unity of a respective ethnicity rejects internal diversity, pluralism and other (political) views declaring them opposing to *national interests* that they advocate, nationalisms might be considered incompatible with a concept of modern democracy that is based on the principle of inclusion and requires the existence of pluralism as the necessary precondition (Žagar 2001).

When the *Constitutional Network* started to work and grow – with the inclusion of scholars and institutions from different parts of the world in the early and mid 1990s – the interest for diverse approaches to regulation and management of ethnic pluralism and diversity, including management and resolution of crises and conflicts was increasing as well. Observing the role of the international community in the Yugoslav crisis and in other crisis situation we started to focus on the international, especially regional and global level. It became obvious that successful regulation and management of ethnic pluralism and relations and adequate prevention, management and resolution of crises and conflicts are important elements of peace and security. By the time the first and following international scholarly conferences on the international, constitutional, legal and political regulation and management of ethnic relations and the prevention, management and/or resolution of ethnic crises and conflicts was organized in Ljubljana the concepts of transformation of conflict, especially the *Transcend* method developed by Johan Galtung and collaborators in *TRANSCEND: A Peace and Development Network*,[11] and different combinations of conflict management and conflict resolution became more common, and a number of new and elabo-

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11 E.g., Galtung, Johan (1996, 1997, 1998). *Conflict transformation by peaceful means (The TASCEND Method).* A Manual Prepared for the United Nations Disaster Management Training Program; Galtung, Johan & Jacobsen, G. Carl & Brand-Jacobsen, Kai Frithjof (2002). *Searching for Peace, The Road to TRANSCEND.* Pluto Press; etc.

rate approaches, methods and concepts were being developed.[12] This remarkable trend of development in management, transformation and resolution of conflicts has continued throughout the 1990s and still continues (Byrne and Senchi 2008, Kriesberg 1997; the same could be said for all other disciplines and fields relevant for the regulation and management of ethnic pluralism and relations, the protection of minorities, but for the development of diversity management in general. The *Constitutional Network* benefited from this development; however, its activities, members and collaborators (at least to a certain extent in different ways) contributed to it in different ways. In this context one could consider every its effort to develop and promote ethnic and diversity studies in all their complexities, including attempts to develop concepts and strategies of diversity management, especially an integrated global (international) strategy for the prevention, management and/or resolution of (ethnic) crisis and conflict.[13] As the framework within which all mentioned issues, concepts and fields could be observed and linked together the concept of diversity management has been developed that

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12 See, e.g., Byrne, Sean (1995). 'Conflict regulation or conflict resolution: Third party intervention in the Northern Ireland conflict: Prospects for peace', In *Terrorism and Political Violence*, No. 7/1995, pp. 1-24; Dukes, Francis (1995). *Resolving Public Conflict: Transforming Community and Governance,* Manchester: Manchester University Press; Galtung, Johan (1996). *Peace by Peaceful Means: Peace and Conflict, Development and Civilization,* Thousand Oaks, CA: Sage; Gurr, Ted Robert & Harff, Barbara (1994). *Ethnic Conflict in World Politics*. (Dilemmas in World Politics.) Boulder, San Francisco, Oxford: Westview Press; Ross, Martin Howard (1993). The Management of Conflict: Interpretations and Interests in Comparative Perspective, New Haven, CT: Yale University Press; Rothman, Jay (1992). *Form confrontation to cooperation: Resolving ethnic and regional conflict.* Newbury Park, London, New Delhi: Sage; Rothman, Jay (1997). Resolving Identity Based Conflict in Nations, Organizations, and Communities, San Francisco: Jossey Bass (1997); Väyrynen, (1991); Zartman, L. William, Ed. (1995). *Elusive Peace: Negotiating and end to civil wars.* Washington: The Brookings Institute; Zartman, L. William & Rasmussen, J. Lewis, Eds. (1997). *Peacemaking in International Conflict: Methods and techniques*. Washington: United States Institute of Peace Press; Žagar (1994); Žagar, Mitja (1997). "Exploring Ethnicity: Constitutional Regulation of (Inter)Ethnic Relations: New Approaches to a Multicultural Education." In *Questions de formation / Issues int the Education of Adults*, No. 16/1997, pp. 141-155; etc.

13 See, e.g., Žagar, Mitja (2000). "Breaking the Vicious Circle: The management of ethnic relations and the management and resolution of ethnic conflict in South Eastern Europe." Paper prepared for the International Conference on Constitutional, Legal and Political Regulation and Management of Ethnic Relations organized by the Institute for Ethnic Studies, Ljubljana, 8 – 10 December 2000 and for the ISCOMET Conference on Democracy, Human Rights and the Protection of Persons Belonging to Ethnic and Religious Minorities in South Eastern Europe, Bled, 23 – 25 February 2001. Ljubljana, 2000 (43 p.); Žagar, Mitja (2000), "Ali je možno razkleniti začaran krog? Strategije in koncepti za upravljanje in razreševanje etničnih konfliktov." ("Is it possible to break the vicious circle? Strategies and concepts for the management and resolution of ethnic conflict.") In *Razprave in Gradivo / Treatises and Documents (Revija za narodnostna vprašanja/Journal of Ethnic Studies)*, No. 36-37/2000), pp. 11-32; Žagar, Mitja (2001). "Kako bi lahko razklenili začaran krog? (2) Posredovanje, mediacija ter usposabljanje za preprečevanje in razreševanje etničnih konfliktov." ("How could we break the vicious circle? (2) Intervention, mediation and training for the prevention and resolution of ethnic conflict.") In Razprave in Gradivo / Treatises and Documents (Revija za narodnostna vprašanja/Journal of Ethnic Studies), No. 38-39/2001, pp. 68-93; Žagar, Mitja (forthcoming 2008). "Strategies for the Prevention, Management and/or Resolution of (Ethnic) Crisis and Conflict: The case of the Balkans." In Byrne, Sean & Sandole, Dennis J.D. & Sandole-Staroste, Ingrid & Senehi, Jessica, Eds., *A Handbook of Conflict Analysis and Resolution*. Studies in Peace and Conflict Resolution. Routledge (28 p.).

tries to address all detected dimensions of diversities in contemporary societies and suggests ways and means for their successful management, if only possible in a democratic way.

Considering the mentioned goal of promoting its activities and fields, with an aim to attract and include interested students, especially young researchers and scholars, and recognizing the importance of the constitutional regulation of ethnic diversity, the protection of minorities and human rights in general in this context in 1994 the Global (International) Students' Research and Action Project *Democracy and Ethnic Relations* was established. Within it the students' research project *Democratization, Ethnic Relations and Resolution of Ethnic Conflict: Management and Resolution of Ethnic Conflict in Democratic Societies* began working in 1995 with sub-projects on the constitutional protection of ethnic minorities and the regulation of human rights, democratic institutions and procedures and on the social integration of marginal communities – focusing on the Roma.[14] While the former was active until 2002,[15] the later that is usually called the *Aristotle Project* still exists and continues to work. Since its establishment almost hundred undergraduate and (post)graduate students of different faculties of the University of Ljubljana, but some other universities, have participated in the *Aristotle Project* that in the 1990s established long-term cooperation with the University of South Australia from Adelaide. Based on a rather complex methodology and criteria within this project more than 120 texts of the constitutions of the countries of the world have been analyzed regarding the constitutional regulation of ethnic pluralism, ethnic relations and protection of minorities and more than 100 constitutions regarding the constitutional regulation of human rights in general; the project has developed a substantial electronic data base that is being updated and revised constantly by the inclusion of additional constitutions and taking into account contemporary constitutional amendments or the adoption of new constitutions in many countries.[16] Some findings and results of this project

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14 The establishment of this project and its initial activities were supported by the grant of the USIS - US Congress Democracy Program - Small Grants.

15 Its work and some research results are presented in Žagar, Mitja with Kostevc, Nuška & Košak, Alenka & Rupnik, Nataša. (1999). "Das studentische Forschung- und Aktionsprojekt 'Roma in Slowenien – die gesellschaftliche Integration von Randgruppen'." ("The Students' Research and Action Project on the Roma in Slovenia: The integration of marginalized communities.") In Klopčič, Vera & Polzer, Miroslav, Eds. (1999) *Wege zur Verbesserung der Lage der Roma in Mittel-und Osteuropa: Beiträge aus Österreich und Slowenien*, (Ethnos, 54). Wien: Braumüller, pp. 52-66.

16 A part of this data-base is currently been transferred and organized on the internet; when the whole data-base is established and operational, and all necessary protection and other system requirements and services that are being developed will be functional, the data-base will be accessible to those who will acquire the password. The initial idea was that based on this data base an educational CD or educational internet site should be developed that could be used in secondary and tertiary education, but this part of the project that would require specific expertise in is development is being delayed due to the lack of resources and time. Basic

were presented at several international scholarly conferences, among them all Ljubljana conferences of the *Constitutional Network* on constitutional, legal and political regulation of ethnic relations and in a few scholarly articles and other published contributions (Žagar and Novak 1998/1999, Novak and Žagar 2007), including the article "Comparing Constitutional Protection of Human Rights in Europe: What Can We Learn From Comparative Analysis?" included in this special issue.

CONCLUSION: GLOBAL STRATEGY FOR PREVENTION, MANAGEMENT AND RESOLUTION OF CRISIS AND CONFLICT IN THE CONTEXT OF DIVERSITY MANAGEMENT – FOCUSING ON THE ROLE OF EDUCATION AND CIVIC EDUCATION

A search for a broader framework of the regulation and management of asymmetries in all contemporary societies, ethnic pluralism and relations, protection of minorities, prevention, management and/or resolution of crisis and conflict (especially of those crises and conflicts that were perceived and interpreted as ethnic ones) in the late 1990s and in the early 2000s led to the recognition and development of a new concept – the concept of diversity management. The name of this concept is to a certain extent accidental, but it reflects its nature and main contents very well. Namely, in (political) debates on multiculturalism and interculturalism at that time a need was stressed to develop a concept that would enable modern societies to regulate and manage all diversities and asymmetries that exist in them; speaking of that need the phrase diversity management started to be used as a catch word. As it is often the case in such situations, this concept was borrowed from different sources, disciplines and fields, such as biology and ecology in natural sciences, where it is most frequently used in the context of preserving and managing biodiversity and existing resources that are crucial issues for the future development and survival, or economy and (business and public) management and in social sciences, where they most frequently use it in connection with the prevention of all kinds and forms of discrimination and regarding the management of resources, human resources and workforce that might be (internally) diverse according to different criteria, including language, culture(s) and ethnicity.[17]

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information on this project and some initial results and data, organized in tables with links to adequate articles and paragraphs of respective constitutions were presented at: **http://www.unisa.edu.au/lavskis/zagar/slovenia.htm**

17 See, e.g., Colfer, Carol J. Pierce, Ed. (2005). The equitable forest: Diversity, community, and resource management. Washington, DC: Resources for the Future / Bogor, Indonesia: Center for International Forestry Research; Cope, Bill & Kalantzis, Mary (1997). Productive diversity: A new, Australian model for work and management. Annandale, N.S.W.: Pluto Press; Pol se, Mario & Stren, Richard, Eds. (2000). *The social sustainability*

In managing diversities in contemporary societies[18] in all parts of the world, we should be aware that there are diversities of diversities and a number of asymmetries in every society. However, a simple post-modern approach or understanding focusing on partial and specific characteristics would not be sufficient, since for successful management of diversities one should take into account the whole, global picture with all its dimensions – including all relevant contexts. In other words, effective diversity management should provide a social and normative framework in which all different existing and possible socially relevant diversities and asymmetries could be detected, expressed and recognized, but taken into account in social and political processes when participating actors desire so and express their interests. In this process conditions, needs, interests, rights (including duties) and actions of every possible and detectable actor (mostly diverse collective entities with their formal or informal forms of organization, but individuals) should be taken into account, however, in the context of global society taking into account specific and common conditions, needs, interests and rights of all other possible/detectable actors. Consequently, diversity management is a useful tool for the creation, promotion and strengthening of social cohesion in diverse societies, based on recognition and respect of existing and possible diversities – taking into account that societies (as well as all their components) rather than being static and permanent categories are processes with their temporal dimension in constant evolution and transformation. Diversity management should establish a normative and actual framework, and provide for democratic expression, reconciliation and coordination of all expressed interests and for the formulation of common interests – shared by all or almost all members of a society – that are the long term basis for internal cohesion and stable existence and development of diverse societies. If such shared common interests do not exist and do not bind together and lead collective actions of diverse collective entities and individuals the consequence might be lack of the necessary social cohesion and possible crises and escalation of conflicts, especially in cases when certain collective entities, most frequently distinct communities and individuals feel exploited and/or discriminated against. For this reason I would like to stress the social importance of the adequate protection of diverse minorities and distinct

of cities: diversity and the management of change. Toronto: University of Toronto Press; Riccucci, Norma M. (2002). *Managing diversity in public sector workforces*. Boulder: Westview Press; Sako, Mari & Sato, Hiroki, Eds. (1997), *Japanese labour and management in transition: Diversity, flexibility and participation*. London, New York: Routledge; Shapiro, Debra L. & Von Glinow, Mary Ann & Cheng, Joseph L.C., Eds. (2005). *Managing multinational teams: Global perspectives*. Amsterdam, San Diego: Elsevier JAI; etc.

18 These societies are very different and are for the purpose of comparative analysis and/or easier understanding often classified in categories according to specified criteria and nature of classification; so, e.g., we could differentiate among pre-industrial, industrial and post-industrial societies that are often described as information societies, or among pre-modern, modern and post-modern societies, while sometimes one hears even of post-post-modern societies; etc.

communities and rights of minorities as the necessary elements of diversity management in contemporary societies.

Considering that diversities, asymmetries, existence of diverse and sometimes conflicting interests, and consequently possibilities for escalation of conflicts are normal phenomena in plural societies, necessary components of diversity management should be strategies and mechanisms for the prevention of escalation of crises and conflicts and for their management and/or resolution in cases, when preventive strategies, mechanisms and measures do not succeed in preventing their escalation. Additionally, specific strategies, approaches and policies are needed for the management of diversity in post conflict situations, where again special attention should be paid to the situation and protection of diverse minorities and distinct communities.[19] Taking into account complexity of diversities that include e.g., gender, social, labor and workforce, professional and all other socially relevant diversities the *Constitutional Network* and our work and research focus on ethnic dimensions of diversities and diversity management, which in its own right is an immense and extremely complex field of research.

As already mentioned in my own research in the past decade, building on the case study of the Balkans I was studying and developing a global strategy for the prevention, management and/or resolution of ethnic crises and conflicts that would adequately coordinate all relevant levels, from the local, regional and national to sub-continental, continental and global international ones. Based on findings my belief is that only concerted, timely and adequate strategies, policies, measures and activities of most, possibly all relevant actors can produce successful and lasting results – especially if preventive strategies, mechanisms, measures and activities prove adequate and manage to prevent the escalation of crises and conflicts in specific environments. Recognizing the importance and the best effectiveness of preventive strategies for successful diversity management they should address all relevant fields and issues/questions in a certain diverse environment that might potentially lead to escalation of crises and conflicts in ways that decrease the likelihood of such escalations. Analyzing situations in different parts of the world, including the Balkans, South Caucasus, Middle East and Central Asia, I came to conclusion that successful long term, but shorter term global strategies for diversity management and for the prevention, management and/or resolution of crises and conflicts should focus on long term strategies, policies, systems, programs, projects and activities in the following key fields (Žagar 2008):

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19 This was the reason for the development of the already mentioned research project MIRICO that is the basis for the development of an international network specialized in these issues and for the development of a joint European doctoral program in diversity management and governance in the European and global context, initiated by the Universities of Bologna, Graz and Primorska / Littoral from Koper and by the New Bulgarian University from Sofia.

- **Economy**, which includes economic and social development that should ensure decent and acceptable living of people, their economic and social security, but offers a decent perspective of life for them and their families. In the context of economy an important issue is planning, regulating and managing migration and successful integration of immigrants and their communities;
- **Education and training** that includes encompass all formal and informal education and training at all levels and in all spheres, understanding education and training as life-long processes and permanent activities that, above all, should enable people to cope with social and technological change and development and actively participate in economic, social and political processes;
- **Institution building, democracy and human rights** that provide the necessary basis for stable functioning and development of democratic institutions and processes, which require permanent institution and human resources building and promotion of the highest standards of human rights, including special rights of minorities.

In these and all other fields that might in specific environments be identified as relevant for successful diversity management strategies should always take into account circumstances, situation, needs and interests that exist there and should be adjusted to these specificities. For this reason it is essential that a strategy for every specific environment clearly defines and specifies and tries to establish the broadest possible consensus regarding the following:

(1) General goals, especially long term goals;

(2) Specific approaches and goals that are derived from general, long term goals and should be considered their concretization;

(3) Institutional and organizational framework; and

(4) Relevant actors, their relations and cooperation, and their roles regarding general and specific goals in all relevant fields (Žagar 2008).

It is equally important that relevant actors agree on their strategy regarding the acquiring of necessary resources of all kinds (financial, material, human, etc.) that should make the common strategy feasible.

My research, especially interviews with several hundred individuals, including some leading politicians, public opinion leaders and intellectuals in the Balkans have confirmed that three listed fields are of crucial importance for diversity management, especially for diversity management in post conflict societies. However, they have to be put into an adequate social context and other relevant fields should be taken into account. Among other fields often they have mentioned security, which they did not understand simply as security provided by police and military, security in the narrowest sense, but rather as human security that links this field with three mentioned but all other fields that are relevant for the life of an individual or community. In this context, again and again a central role of education and training for successful diversity management has surfaced as well.

Consequently, at the end my article I am trying to summarize some key elements of the global strategy for diversity management and for the prevention, management and/or resolution of crises and conflicts in the field of education and training, paying special attention to permanent civic education – education for democratic citizenship that should enable every individual in an environment to actively participate in social and political processes, relevant for (the realization of) individual's diverse interests if she or he chooses to. Although this strategy is based on the case study of the Balkans, its elements might be relevant for other environments – taking into account their specific situations and circumstances.

Following the above scheme, I would define the following general goals in the fields of education and training:

- increasing general level of knowledge, education and training and improving specific skills, considering specific needs of the Balkan societies in different fields, such as economy (especially regarding the possible future demand for workforce and its structure), public administration and services (including education), culture, research and science, etc.;
- improving the quality of education and training, paying special attention to adequate education and training of teachers and support staff and to constant development of educational and training systems and programs taking into account current development and strategies of future social development that are agreed upon in a certain environment;
- improving the accessibility and preventing discrimination in all forms and programs of formal and informal education and training, including the adequate development and functioning of education and training for minorities and persons belonging to them; etc.

Considering the actual and possible importance of adequate civic education for successful democratic development and diversity management in every individual society specific goals could be:

- development and promotion of democratic political and social culture, especially regarding democratic dialogue and democratic procedures;
- increasing and promoting of understanding and general knowledge about human rights, including the rights and protection of minorities;
- increasing and promoting of understanding and general knowledge about democracy in general, about democratic developments and institutions in a respective society, including their competencies and mutual relationship; democracy should be accepted as a key yard-stick of successful social development in a certain environment;
- increasing and promoting the knowledge about possibilities for active democratic participation of individuals and (distinct) communities in diverse social and political processes and the relevance of such participation that would stimulate individuals and communities to actually take part and participate in these processes;
- developing and improving skills necessary for the successful democratic participation in political processes and democratic institutions at all levels, including the knowledge and skills that could enable an individual or community to allocate the level and institutions that would most likely enhance their attempts to realize their specific needs and interests;
- teaching and training everybody in a certain environment for respectful and nonviolent behavior in all situations, based on human rights, respect of everybody and prevention of all forms and types of discrimination; such teaching and training should provide adequate knowledge and skills for the prevention of escalation of crises and conflicts in specific situations and environments, but should develop necessary skills for the management and/or resolution of crises and conflicts in situations when preventive measures and activities did not prove successful; etc.

Approaches, methods and techniques applied in this context might vary from environment to environment. However, considering the nature and pace of social processes and developments it should be an imperative that they are developed and carried out as permanent, life-long processes, programs and activities that would utilize all available teaching and training techniques and stimulate active

participation of all participants. Experiences show that role playing and simulations that base on active participation of all involved produce the best results and prepare participants for their actual participation in democratic decision making processes at all levels and in diverse democratic institutions and structures. Consequently, they are better able to integrate in such processes and institutions and contribute to their better functioning.

The Council of Europe with its concept of education for democratic citizenship and different NGOs, such as e.g., the Civitas, Centers for Human Rights, Forum for Interethnic Relations, etc., bur majority of scholars in the field stress the importance of designing and developing civic education as a life long learning process that would include everybody in respective societies. That would require that the contents relating to civic education become an integral part of all formal educational programs and projects in all environments and at all levels – from pre-school to post-graduate programs; the contents, techniques, ways, methods and approaches of teaching and training, of course, should be adjusted to specific target populations and should take into account all relevant characteristics of participants. However, formal educational programs and systems only include a part of the population. Consequently, it is very important that different forms and/or programs of non-formal civic education and training include those who currently do not participate in formal educational and training programs. These programs could be carried out by different actors and institutions, from formal educational institutions, public and governmental institutions, political parties and politicians, to diverse private educational and training institutions and NGOs. An important role, especially in primary socialization should be played by families and immediate living environment of children. Throughout our lives, in the context of formal and informal civic education important actors are mass media and the system of mass communication that not only transmit knowledge and skills, but diverse ideologies that are relevant for political and social processes. This leads us to the definition of key actors in the field of civic education, among which – not only in the case of the Balkans, but in other environments that I studied – the most important are the following: families and immediate environment of an individual, formal educational systems, institutions and programs from pre-school to post-graduate level, different additional licensed programs of civic education offered by public of private institutions and companies, (at least potentially all) institutions of a political system at all levels, political parties and their structures, politicians and elected representatives, civic society with NGOs and different forms of non-formalized associations (e.g., mass-movements, gatherings, events, etc.) – including ones in culture, sports and entertainment, companies and businesses, etc.; simultaneously, we should not forget the role of different international and external actors that include universal (e.g., the UN, their special agencies and other universal international organizations), regional (in case of the

Balkans especially e.g., the Council of Europe, EU, OSCE) and sub-regional governmental organizations (again in the case of the Balkans e.g., the CEI, Alps-Adria Working Community, the Stability Pact for South Eastern Europe and its successor, the Cooperation Council, etc.), but international NGOs (e.g., the International Helsinki Committee, educational initiatives, etc.) and private companies that with their concerted involvement and activities can contribute to successful developments and increase synergies.

Ideally, specific interests and goals and, consequently, strategies, policies, measures, programs, projects and activities of all actors listed above are concerted and the adequate mechanisms for their coordination exist or are developed. However, the reality is often different from an ideal situation. In reality, different actors have different interests and goals that sometimes are compatible and can be coordinated, while at other times they conflict. For this reason it is very important that relevant actors agree on main elements and goals of their common strategy, realizing that such an agreement and concerted action can improve not only general conditions in a specific society and region, but perspectives for the realization of their specific interests and goals. Again, the ability to develop and pursue common or, at least, shared goals and interests might be key determining factors in developing a successful global strategy for diversity management and for the prevention, management and/or resolution of crises and conflicts in the field of civic education. The existence of common goals and strategies is usually the most efficient basis for the mobilization of necessary resources and for the will of individual actors that they realize their role in the strategy that is (formally) agreed upon; consequently, their willingness to participate and contribute should be considered important guarantees for the success of the global strategy.

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ORIGINAL
SCIENTIFIC
ARTICLE

MICHAEL KEATING

BEYOND SOVEREIGNTY. ACCOMMODATING NATIONS IN THE EUROPEAN COMMONWEALTH

Transformations in the state are weakening its former powers of social regulation and identity-formation but that, far from presaging the end of nationalism, this has encouraged new and reborn minority nationalist demands. Yet, at the same time, it has provided new means for accommodating them. These possibilities are most apparent in Europe, where the transnational order is best developed. The emerging European order dilutes and divides sovereignty, reducing claims to singular state sovereignty and encouraging the emergence of multiple normative orders; provides a framework for rights, divorcing these from state citizenship; and allows stateless nations to act with a certain degree of autonomy in transnational institutions, satisfying symbolic and substantive demands without the need to assume full statehood.

Keywords: nationalism, sovereignty, Europe, self-determination

ONKRAJ SUVERENOSTI. "ZADOVOLJITEV" NARODOV V EVROPSKI ZVEZI DRŽAV

Preoblikovanja (znotraj) države slabijo njeno nekdanjo moč upravljanja družbe in oblikovanja identitete, a to še zdaleč ne napoveduje konca nacionalizma, ampak je pospešilo narodnostne zahteve novih in ponovno rojenih manjšin. Vendar pa je hkrati ustvarilo nova sredstva za njihovo zadovoljitev. Te možnosti so najbolj očitne v Evropi, kjer je trans-nacionalna ureditev najbolj razvita. Nastajajoča evropska ureditev slabi in deli suverenost, zmanjšuje zahteve po suverenosti ene države in vzpodbuja nastajanje mnogovrstnih normativnih ureditev; prinaša okvir za pravice in jih ločuje od državljanstva neke države; in dovoljuje narodom brez države, da z določeno mero avtonomije delujejo v nad-nacionalnih ustanovah, s čimer zadovoljuje njihove simbolične in dejanske zahteve brez potrebe po vzpostavitvi polne državne suverenosti.

Ključne besede: nacionalizem, nacionalno vprašanje, suverenost, Evropa, samoodločba narodov

INTRODUCTION

This paper is part of a project on stateless nations in the transnational order, published as a book in 2001 (Keating 2001b). The larger work is about political theory and, above all, political practice, focusing on the cases of the United Kingdom, Spain, Belgium and Canada. It has the following elements:

- a rethinking of the doctrine of sovereignty; an argument that state and nation need to be distinguished both theoretically and empirically; and an exploration of other ways of thinking about the plurinational state;
- an analysis of the new historiography, which challenges teleological state history; disputes the identification of the consolidated state with progress and democracy; and traces competing traditions of political order grounded in shared and overlapping sovereignty and which allow historic claims to political order;
- an analysis of political demands and public opinion in the minority nations of the four states, showing the emergence of a post-sovereign nationalism, which embraces the new transnational order and does not seek its own sovereign state;
- a discussion of the asymmetrical state in theory and practice, as a way of accommodating national diversity;
- the present paper, which explores the scope for accommodating post-sovereign nationality claims in the emerging European order.

STATE TRANSFORMATIONS

To equate the nation with the state is both a conceptual and a historical error, the product of a partial and teleological view of history, strongly influenced by dominant state traditions. Indeed we might argue that it is specifically the French and German state traditions that, in their very different ways, have insisted on this confluence of state and nation. For the French, the logical conclusion is the unitary, jacobin state without any room for intermediate authority; Germans have a more federalist tradition, but one that also finds it difficult to cope with differentiation and plurinationality. In recent decades the state has come under increasing pressure even as it has assumed new responsibilities. Challenges have appeared to its functional capacity, its ability to mould and sustain identity, and to its institutional structures. These have served to demystify the state and undermine its old monopolies and are one of the key factors in the new historiographies, which have traced other, competing state traditions lost since the rise of the monolithic nations-state (Keating 2000a).

A powerful agent in the changing relationship between function and territory is economic restructuring. National economies are challenged by globalization and, nearer home, the construction of a single European market. At the same time, there is a growing acceptance that economic change responds to very local factors and many scholars have seen the emergence of local systems of production as a key factor in the new economy. Changes in the sphere of social policy have been less dramatic. Welfare states tend still to be national in scope, but there are some trends to decentralization and a search for new forms of local solidarity. It may be in the future that the minority nations, regions or cities, may come to embody the social solidarity hitherto carried by the nation-state.

Culture has also increasingly escaped the framework of the nation-state. Global culture may be little more than an extension of United States influence but, like the English language, is must nonetheless be seen as a universal product. Migration, in response to economic globalization, has created new multicultural societies. The state remains the main framework for citizenship and for the rights that stem from it but here too there are signs of change. A start has been made on detaching human rights from states and citizenship and placing them on a genuinely global basis, although enforcement is highly problematic.

Finally, the state is experiencing institutional change, challenged from above by European integration, from below by regional affirmation, and laterally by the advance of the market and of civil society. There is still no consensus on the political import of these changes. Some see them as eroding the state, while others insist that they merely represent a strategy on the part of states to consolidate their authority by pooling certain tasks and offloading other tasks to subordinate bodies.

What is clear is that these changes together serve to break up the old model of the nation-state, which contained the following elements within a defined space:

- a set of functional systems, such as a 'national economy' and 'national welfare state';
- a national culture and identity;
- a corresponding national population or *demos*, defined by common identity, a range of shared values, mutual trust and interaction;
- a set of governing institutions;
- a claim to internal and external sovereignty.

For many scholars, this disaggregation heralds the 'end of territory' (Badie 1995) as social and political life dissolves into networks based on functional

logic or on shared cultural identities. Some even have even announced the 'end of democracy' (Géhenno 1993). Certainly, it was the coincidence in space of these elements that provided for the possibility of national democracy, and their fragmentation is one factor causing the democratic deficit. Functional systems are fragmenting, with decision making disappearing into networks. Cultures are becoming complex and multiple. The *demos*, if it can be identified, no longer corresponds to the functional systems which democracy is there to control; and power seems to have escaped the control of democratic and accountable institutions. Yet the 'end of territory' and 'end of democracy' theses are as premature as the 'end of history' announced with such fanfares in the 1990s (Fukuyama 1992).

Countering the tendencies to fragmentation are powerful forces for re-territorialization both of functional systems and of the political order. Economic change may respond to a global logic, but there is a large literature now to the effect that the response be less a matter of deterritorialization than of reterritorialization in the form of new, spatially specific systems of production (Keating 1998, Scott 1998, Storper 1997). Similarly, the weakening of the territorial nation-state as a framework for representative and deliberative democracy is one factor in the rise of new nationalist movements below and beyond the state, some with a profound democratizing potential, others more populist or xenophobic in orientation. A combination of functional restructuring and political change has fostered new nationalisms whose whole essence is based on the need to maintain internal social and cultural cohesion while projecting themselves in the new global economy (Keating 1996, 2001a, b). Globalization and the new transnational order in general have thus favoured the rise of new nationalisms, but at the same time they provide new means for accommodating them (Keating and McGarry 2001).

For some minority nationalists, the new dispensation allows them to proceed to statehood without the economic or security risks which this might have posed in past epochs. Global and regional free trade regimes guarantee market access and take care of many of the externalities of independence, while the *Pax Americana* allows them to free ride on a hegemonic security regime. This is the position of a section of Quebec nationalism. Yet in so far as the emerging transnational order is market-driven, it has a strong neo-liberal bias; indeed most of the objections to globalization hinge on the argument that it serves the interest of capital at the expense of social and cultural considerations. Nationalism, on the other hand, is about confronting the market with political and cultural priorities and about establishing public spaces beyond the market-place. Just as regionalism and minority nationalism cannot, *pace* Ohmae (1995) be reduced to a functional logic of market competition, but must be understood also as a response to cultural and political factors, so transnationalism has a cultural and political dimension. This implies a new form of territorial order above as well as below the state.

There are signs here and there of such an order emerging, in the United Nations, or in the increased attention to social issues and matters of 'governance' in the work of bodies like the World Bank and the International Monetary Fund. Environmental and labour matters were incorporated into the North American Free Trade Agreement, albeit in the form of rather weak side agreements. There is an inter-American Convention on Human Rights. It is only in Europe, however, that an effort is being made to establish a comprehensive transnational regime explicitly committed to political as well as economic integration. There is a huge literature on the political implications of European integration although much of it has yet to move beyond the debate between intergovernmentalists and neo-functionalists that has been proceeding for over forty years. In politics, there is a continuing debate between those who want to restrict Europe to a common market, and those who dream of creating a federal state. Since this debate has largely exhausted itself, I propose to pass it by and to postulate a Europe that is a *sui generis* political order, neither a state nor a mere alliance of states, but not without some antecedents in history. To capture this emerging order Neil McCormick's (1999) expression 'European Commonwealth' seems particularly felicitious.

THE USES OF EUROPE

Europe has become a densely organized economic, social and political space, encompassing a variety of transnational regimes which overlap in many places but are not quite co-terminous. At the centre is the European Union, based on economic integration but with officially declared, if contested, political aims. The Western European Union is a defence organization linked both to the European Union and to NATO; it does not, however, include all members of either. Ireland, Austria and Sweden are in the EU but not NATO or WEU. Norway is in NATO but neither the EU nor WEU, while Denmark is in NATO and the EU but not the WEU. The Organization for Security and Cooperation in Europe includes the countries of Europe, the United States and Canada, and the former Soviet republics and is charged with security issues, including minority questions, in the former Soviet and satellite states. The Council of Europe includes all European countries and many former Soviet republics and has an interest in democratization, minorities issues and human rights. Its European Convention on the Protection of Human Rights and Fundamental Freedoms is upheld by the European Court of Human Rights whose decisions have direct force in many member states; and it has generated a series of initiatives on human rights, cultures and democratization.

This emerging European space provides a new context for the articulation and pursuit of nationalist demands. One dimension of this is symbolic but nonetheless of critical importance. In Europe, all nations are minorities, allowing those who are minorities within their own states to project their concerns as part of a

wider issue. As European institutions expand to take in more small nations and cultures, it will look more pluralistic and diverse, and the recognition of the smaller nations, whether these be states or not, will come onto the agenda. As noted earlier, the European theme is increasingly used to frame nationalist demands in the United Kingdom, Spain and Belgium and, in the process, nationalism is itself tamed and modernized. The Europe of the Peoples may be no more than a slogan, but it represents an important discursive turn for nationalists, showing that other ways of realizing nationhood can at least be imagined. It also allows minority nationalists to turn the tables on their own state elites, by demonstrating their greater international commitment and, as nationalists are prepared to wait for the evolution of Europe, it converts the absolute issue of self-determination into a series of arguments about steps within a broader process. Symbols like the common practice of flying minority national flags alongside the state and European flags indicate the linkage of nationality into the wider European order, as do the rapidly developing alliances among minorities across the continent.

There is a debate on whether or not Europe constitutes a cultural space (Puntscher Riekmann 1997) or should do so. This is often a question of definition and how restrictive a culture needs to be in order to exist as a discrete entity. Nor is it reasonable to say that Europe does not exist culturally because the boundaries are ill defined. It shares this characteristic with every social system or aggregate. There is certainly a European culture but it is not monolithic and one feature of Europe is its very cultural diversity. As I shall be arguing repeatedly in various spheres, Europe should not be judged on the template of the nation state and attempts to promote a European culture could be positively harmful. Yet the existence of a European cultural space does allow minority cultures to project themselves as part of this and of a European tradition, rather than being seen as minor branches of state cultures. In many cases, these minority cultures have affinities with other European cultures which they do not share with their state counterparts and can gain fuller expression within a European framework.

LEGAL PLURALISM

A crucial effect of the new European order is the way in which it throws into question the whole state-centred doctrine of sovereignty and opens up the possibility of new and pluralistic normative orders. This too is rejected by statists and intergovernmentalists who argue that the EU is an inter-state alliance built precisely on the principles of state sovereignty. States, in this view, cannot by definition alienate their own sovereignty, just as British Parliaments do everything except bind their successors. The argument is really tautological since the conclusion is embodied in the premise. It is empirically weak, since new states are created constantly through decolonization and secession, while federations are created

through consolidation, with sovereignty reconfigured accordingly. Although the Canadian constitution was repatriated by act of the British Parliament as recently as 1982, nobody seriously claims that the United Kingdom could even theoretically reassert its authority in Canada. The rigorously intergovernmental view of Europe is also historically ill-informed, ignoring the experience of overlapping territorial and functional legal orders in history, and taking the ideological claims of the state at face value - this is particularly ironic for a group of scholars who like to call themselves 'realists'. Of course the radical alternative, that Europe is a new, independent legal order is equally unfounded (Walker 1998) since that too would substitute an ideal for the reality.

Yet between these two extremes there is the view that there exists a corpus of European law with its own foundations and principles, and its own path of development (Shaw, 2000). It is not self-contained, but penetrates and shapes state law, being in turn penetrated and influenced by it. There is certainly a conflict of principle as yet unresolved. The European Court of Justice has held that European law is independent of, and superior to, state laws in its area of application, while national courts have clung to the doctrine that European law is merely the product of delegated authority (McCormick, 1999a). There is an old argument between those who hold that Scots law, the Basque *fueros*, or Catalan and Quebec civil law are founded in their respective state constitutions and those who claim that they represent original law. Again, a more plausible solution is to see them as founded in original law but having to accommodate to state constitutions. So whether we are looking from the supra-state or the sub-state level, it does seem that there are other sources of law than the constitution of the state. With at least three levels for these sources, we have the possibility of pluralistic legal orders. This gives a new meaning to the idea of constitutionalism. Instead of the unitary constitution (whether written or, as in the United Kingdom, embodied in parliamentary sovereignty), being the source of all norms, there are multiple sites of constitutional authority. The relaxation of the condition that the state be the source of all legal authority has opened up myriad new possibilities for plurinational politics.

It is no surprise that among the scholars most open to this possibility have been Scottish lawyers, accustomed to the co-existence of Scots and British law, coexisting with a certain ambivalence over the ultimate source of authority. In a famous case in 1953, Lord Justice Cooper in the Court of Session ruled that the principle of parliamentary sovereignty did not apply in Scotland (Mitchell 1996, McCormick 2000).[1] It has long been clear that there are distinct Scottish

1 The case was brought by John McCormick, father of Neil McCormick, law professor and MEP who is one of leading figures in the debate on legal pluralism. It concerned the question of whether the Queen should be known as Elizabeth 11 in Scotland, when neither Scotland nor the United Kingdom had had an Elizabeth 1.

and English interpretations of parliamentary sovereignty and ultimate authority. A similar ambiguity exists over Catalan civil law, which lacked its own legislative body from 1714 until 1980, apart from the brief period of the Second Republic. Although the Franco regime had abolished the reforms of the Second Republic, it was prepared to update the Catalan civil code on the curious grounds that this had been made in 'Spain' whereas the Spanish civil code was an import from France. Since the 1980s the Catalan Parliament has assumed the task of modernizing the civil code, despite a central government challenge to the effect that it only has the power to alter the code of 1961, not the corpus of indigenous Catalan law itself (Oranich 1997). There is even more confusion over the status of the historic rights of the Basque provinces. As we have seen, these were not recognized in the 1978 Spanish Constitution, which was itself considered to be the fount of Basque autonomy but, under pressure, it was agreed to include them in an annex, the First Additional Disposition. Two interpretations have resulted. Some believe that the historic rights are thus subject to the Constitution; others believe that if this were the case the clause would be redundant and that the rights are original. The Spanish Constitutional Court at first tended to the first reading, but later admitted that the second was possible (Lasagabaster and Lazcano 1999). Basque and Navarrese foral law has been taken over the updated by the new or (in Navarre) newly democratized institutions, which have, like Catalonia, sought to preserve the integrity of their own systems of law, rather than merely filling in gaps left by the Spanish legislature and civil code. This type of legal ambiguity takes us beyond sovereignty altogether, at least in its usual formulations (McCormick 1999a). If purists still insist that sovereignty cannot by definition by shared or divided, then McCormick's formulation of 'normative orders' will do as well. So far, it must be said, courts have not interpreted these forms of original law as trumping state law or constitutions but, with the development of autonomous governments in the United Kingdom and Spain, we may see a new jurisprudence gradually emerging in which autonomous legislatures, entrenched by referendum and drawing on distinct legal traditions and precedents, are conceded original rights. Just as European law developed, contrary to expectations, as an autonomous system, so might the law on devolution.

This might seem like a recipe for anarchy or constitutional deadlock but this need not necessarily be so if the various normative orders developed within a shared community of values. For some, this implies the need for an over-arching European sovereign, in the form of a state, whether federal or unitary. There is a sociological basis for this argument, that any legal order must be underpinned by a unitary political community, and a normative one, that only such which, in accordance with democratic theory, would require a European nation or *demos*. This was, in essence, the view of the German Constitutional Court in the Brenner case, when it refused to allow that the EU was an independent source of law. We

will return to the democratic aspect of this shortly. The sociological argument is to the effect that Europe cannot function as a political order because, unlike the nation-state, it does not rest on the nationality principle and shared identity. Some think that Europe must develop as a federation on American lines, with a founding moment, a constitution and a people (Weale 1995). Anthony Smith (1995, 1999) takes this even further, arguing that Europe cannot forge a common political community since it lacks a core *ethnie*, or common ethnosymbolic base; or at least that such historical myths as it possesses are politically unacceptable or unsuitable. So European integration and other such projects must represent either 'heroic, if doomed, attempts to supersede the nation (or) new, emergent types of national community' (Smith 1995:143). Both, in Smith's view, are futile. Yet this is surely to misunderstand the nature of the European project, which is and must remain rooted both in states and in the nations and regions that compose them (Jáuruegui 1997). It also rests on a contentious view of the European states themselves as the expression of ethnic cores, and a reliance on state-nationalist historiography which ignores the plurinational trajectories of so many states (Keating 2001b).

Europe is not a state, federal or otherwise. The legal pluralism on which it rests implies neither the existence of a single fount of authority (in a constitution, a parliament or a unitary *demos*), within which authority can be devolved, nor a series of independent, sealed legal orders. Rather it implies a series of linked normative orders, intercommunicating with each other (Bankowski and Christodoulidis 2000). This concept bears obvious affinities to the idea of plurinationality, in which national identities are shared and overlap in complex ways, as well as to cultural pluralism and communicative democracy in which cultures are neither assimilated to a single norm, nor exist in isolation (Tully 1995). The result has sometimes been described as post-national constitutionalism (Shaw 2000) but this is an unfortunate term since it conflates the nation with the state; post-statist or postsovereign constitutionalism would be better terms. There is no uniform overall design, nor fixed end point, but rather a deliberative order in which constitutionalism is a part of 'normal' politics (Bellamy 2001). There do need to be common values here and the limits to Europe may be defined by these values; the question as to whether Islamic states could be admitted to the EU has been carefully avoided in principle if not in practice. Yet these certainly do not need to be rooted ethno-cultural homogeneity (Carter and Scott 2000) and may well be universal in application. The countries of the EU, for example, have agreed on the abolition of capital punishment and have not only written this into their fundamental charter in the Amsterdam Treaty, but have also undertaken to promote this globally. Capital punishment is also outlawed under the Council of Europe conventions, although this is an altogether thinner normative order and the ban has not always been accepted outside the EU and its candidate states. Universal health

care and welfare provision are also a shared European value which, like capital punishment, demarcates it sharply from the USA, although there is no single European health or welfare regime but a variety of systems. A common European identity will not be based on cultural and political homogeneity. Indeed, given its very origins in the effort to overcome nationalist particularism, that would be a perverse outcome (Weiler 1999). It will be founded, rather, on a form of 'constitutional patriotism' (Habermas 1998) of shared interests and institutional cooperation. Some people have criticized this as too thin a basis for political order (Weiler 1999)[2] yet it is precisely such 'weak ties' (Grannoveter 1973) that allow common purpose to be combined with flexibility and innovation.

Similarly, although there is no European *demos* on national lines, there is a form of European identity, invoked and used by those who need it. There is a class of Europeans, whose pilgrimages through European space evoke those of Anderson's (1983) nation-builders who he sees as constructing communities of communication. Again, this is not for most people a strong identity, does not monopolize identity and may not even be the most important of an individual's multiple identities but then neither, for most of history, were state identities. If European identity is not something for which people die (Smith 1995), this is surely to be welcomed rather than seen as a problem; being prepared to make sacrifices to maintain human values is another matter. To argue, as do so many, that Europe is divided by religion or values, or to point to its history of wars (Smith 1995, 1999) is beside the point unless we also take into account common values or the political commitment to overcome this history.[3] The whole point of the exercise is to achieve unity in diversity. Communities of identity, like legal systems, can coexist and interpenetrate without domination, as we have seen in the case of those minority nationalist movements who are so keen to work within the broader European space. Democratizing the European order, from this perspective, requires not the construction of a homogeneous community, but a form of democratic dialogue in which parties must invoke arguments that would be valid for the other side, so leading to integrative compromises (Bellamy 2000).

There is a legal European citizenship, founded in the Maastricht Treaty but, appropriately, it is not like a state citizenship with its general rights. Rather it consists of a bundle of entitlements, including free movement around the EU and the right to vote in European and municipal elections in any of the states where one

2 Weiler's argument is unclear since he criticizes the idea of a European nationalism and at one point he seems to imply that a constitutional identity is what Europe needs, but then agrees with Anthony Smith that this is not enough (Weiler 1999), p. 44-46.

3 Critical moments in which nation states decided to set aside a past of civil conflict and forge a new union are not so uncommon in history as to make the European project implausible. One could cite, for example, the Swiss federation of 1848 (Steinberg 1976).

is resident. When linked to civil and social entitlements arising from state citizenship and residence in a region or stateless nation, this gives rise to a complex and multiple regime of citizenship, again challenging the old monolithic state regime. It would perhaps be redundant to note once again that criticisms of European citizenship for not being state-like are beside the point.

EUROPE AS A RIGHTS REGIME

Common European values have been articulated through human rights regimes, notably the European Convention for the Protection of Human Rights working through the European Court of Human Rights in Strasbourg. The Convention detaches individual rights from citizenship and nationality and provides a mechanism for their realization. It does not aspire to universal jurisdiction but is confined to Europe. This regime which, like other European institutions, is less than a state but more than an intergovernmental compact, enables rights discourse to be freed from nationalist or nationalizing rhetoric. Thus Europe has largely escaped the problems experienced in Canada where the Charter of Rights was promoted in the early 1980s as a measure of Canadian nation-building and has consequently been widely rejected in Quebec. It is not that the Québécois reject the specific rights in the Charter; indeed their own charter looks remarkably similar. It is that the Canadian Charter comes as a nationalizing measure rather than a universal one and links rights to a specifically Canadian brand of national citizenship. Human rights are not explicitly protected in the treaties of the European Union but under pressure from states who have wanted to place their rights guarantees above EU law, the EU s European Court of Justice has recognized the need to incorporate both national and the European charters of rights in its jurisprudence (Moravcsik 1995). The EU itself has not become a signatory to the European Convention, but in 2000 began to develop its own charter of rights.

The incorporation of the European Convention directly into the law of Scotland and Northern Ireland as a result of the devolution settlements of the late 1990s is a further illustration of this point. Any purely British charter would have been unacceptable, especially to the minority community in Northern Ireland, as an expression of nation-building. The European Convention is more neutral in this sense, without being completely unfounded in a value community. Of course, the British government maintains the pretext that it is merely delegating power to the Northern Ireland Assembly and Scottish Parliament on the one hand, and to the European Court of Human Rights on the other. Yet there is now a direct interaction of the European jurisprudence with the legal systems in the devolved territories. Parliament, anxious to maintain its theoretical supremacy, has allowed laws in devolved areas to be struck down by the courts where they violate the Convention but not its own laws, which include all the laws of England and, for

primary legislation, Wales. Here the courts can only ask Parliament to intervene. There is thus the possibility of the same law being open to legal challenge in some parts of the UK and not in others.

Europe as a community of rights is, once again, not to be confused with a state. Indeed it is precisely the separation of rights from statehood and nationhood, but not from shared values, that permits the regime to operate. It is easy to dismiss the European rights regime as of no account because it does not displace states or operate like the United States Supreme Court in imposing a European legal order against national law. Again, this betrays a misunderstanding both of Europe and of the way in which legal regimes operate. European human rights law works not by overturning national legal regimes, but by a process of mutual penetration and learning, through jurisprudence. There will always be gaps and even contradictions between the regimes, and European norms will enter national systems in different ways; as we have seen they can even enter the United Kingdom in different ways in England and Wales, in Scotland and in Northern Ireland. Some have criticized the idea of a European rights regime on the ground that there are no common understandings of rights among Europe's various cultures (Bellamy 1995). It is true that, at the margins, there are differences and it is easy to cite examples and, as in the United States, rights issues can easily dissolve into pure politics. Yet this is not a reason to abandon the idea of rights altogether, any more than it is a reason to despair of the possibilty of common European policies on other matters. Europe does have a rather broad understanding of common rights, some of which it shares with the United States and others, such as opposition to capital punishment, which it does not (Weiler 1999).

Of course, an individual rights regime does not address the issue of collective identity and the need to protect and develop people's own cultures and traditions. It is mistake to believe, with Siedentop (2000) that the cause of minority nationalism is simply the failure to integrate individuals into the state culture, and that this can be 'remedied' by guaranteeing individual rights. It may be that the proximate cause of the Northern Ireland troubles in the late 1960s was the failure to accord Irish Catholics the full rights of British citizens but it is stretching matters to suggest that extending such rights would have made the Catholic community into loyal British subjects as Siedentop (2000) suggests.[4] Transnational rights regimes are important for our purpose in divorcing individual rights from state citizenship and the state-nationalist implications of this. Guarantees of collective rights are another matter.

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4 It is also difficult to see how they could have become unhyphenated British citizens when each part of the United Kingdom perceives its Britishness differently.

Legal protection for the collective rights of minorities in Europe is less well developed, but there is a broad consensus that this matter can only properly be tackled at a pan-European level. After the First World War the minorities question in central and eastern Europe was addressed through a series of bilateral and multilateral treaties, mostly on the same template but without creating any pan-European system of minority rights (Capotorti 1991). Britain and France, struggling with rebellion in Ireland and the re-incorporation of Alsace-Lorraine, were completely unwilling to allow the system of minority guarantees in the territories of the former central empires to be extended to their own minorities. This attitude has reappeared since the 1990s, hampering moves towards a genuine European regime of minority rights. Following the Second World War, the emphasis moved to individual rights, as enshrined in the European Convention for the Protection of Human Rights (ECHR), with some bilateral treaty arrangements, for example in the Tirol or Trieste and Istria. Some cases concerning language rights in Belgian were brought under the ECHR but the Court generally upheld the right of the state to impose territorial unlingualism (Hillgruber and Jestaedt 1994). During the 1960s Germany and Austria sought broader protection for ethnic minorities but this made little headway (Fenet 1995). The issue came back on the agenda with the end of the Cold War and since then there has developed a complex net of charters, institutions and guarantees, under the auspices of the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE) and the European Union. While these are separate organizations and the resulting provisions vary greatly in their legal scope and enforcement, they do form an interlinked system, with mutual penetration and influence and a growing tendency for judgements under one to cross-reference the others (Fenet 1995).

The OSCE has been drawn into the question since the Helsinki Accords of 1975 as an inescapable part of its concern with human rights, and because of its intimate connection with matters of security. Gradually it has incorporated the idea of minority rights as opposed to mere individual rights but has been reluctant to be drawn too deeply into broader issues of self-determination. In 1992, following its failure to prevent the conflict in Jugoslavia, OSCE appointed a High Commissioner for National Minorities whose task is to intervene in situations of potential conflict and seek negotiated solutions. His brief limits him to situations where security is threatened and, in practice but not officially, he has been confined to the countries of central and eastern Europe and the former Soviet Union.

The Council of Europe's first real foray into the issue was the Charter on Regional and Minority Languages, adopted at the inspiration of its Conference of Local and Regional Authorities. First suggested in 1981 this was finally adopted in 1992 with reservations from several states including France and the United Kingdom, who would have preferred a very general declaration. There is no mechanism for enforcement except a three-yearly report to the Council of Ministers; otherwise

the Charter depends on changing norms and ways of thinking. This did not prevent the Charter from becoming embroiled in a controversy in France where Jacobin elements of the left and right conspired to prevent the constitutional amendment which, according to the Consitutional Courts, its ratification would have required. The end of the Cold War and incorporation of central and eastern European countries forced the Council of Europe to return to the minorities question in the 1990s with the Framework Convention for the Protection of National Minorities adopted in 1995. This was specifically designed as a 'framework' to be adopted in appropriate form by signatory states but without direct application. It does not define minorities or recognize them as collectivities, but rather addresses itself to the rights of individuals belonging to them. Membership of a minority is determined by a mixture of self-designation and objective criteria. Matters covered include the use of language, education, the media, public administration, commercial signs and cross-border contacts. Despite its focus on individual rights, the Convention stands out among the European instruments for its intention to protect and preserve the minority communities themselves, so going beyond the mere prohibition of discrimination. Signatory states themselves were allowed to designate their own minorities before ratification, so further weakening the Convention's application. So Estonia included only its own citizens in its scope, allowing it to refuse to recognize Russians who had not met it strict citizenship requirements; Russia's own reservation was aimed specifically at denying this. Luxembourg, worried about the rights of immigrants and their descendants, confined its protection to minorities who had been present for 'several generations' and then declared that, on this criterion, there were no minorities in Luxembourg. Other states, however, took the matter more seriously and many national minorities were expressly singled out for protection.

The European Union has also moved slowly to recognize national minorities. Indeed many of the internal market policies can be seen as a threat to minority cultures and languages. Restrictions on outsiders buying property in fragile traditional communities have been disallowed, except in Denmark where a treaty opt-out was negotiated. Requirements to label products in a minority language are illegal under provisions confining regulation to an official community language comprehensible to the customers; since Spanish is comprehensible to Catalans and Basques, any additional requirement is considered an obstacle to the free movement of goods. Ethnic quotas in employment for Germans and Italians in South Tyrol have also come under threat. Gradually, however, the EU has incorporated some measures for minority protection. The Maastricht Treaty had a clause in favour of cultural and regional diversity and this was used by the European Parliament and Commission to fund various measures, including the Bureau of Less Widely Spoken Languages in Dublin (Fenet 1995). The Parliament and the Committee of the Regions have also pressed for wider recognition of culture and

language in the operation of regional policies. Catalan was the subject of a special resolution of the Parliament in 1990, and the Catalan government has made a great deal of political mileage out of this since. The EU has intervened more effectively in candidate countries, as has the Council of Europe, making treatment of minorities a condition for membership.

So there is a great deal of European activity on minority rights, but no single regime. Priority is given to individual rights, although there is more attention on the collective means by which these rights are exercised in matters like educational provision or public services. Broader political issues are avoided. No European regime recognizes a right of self-determination for minorities[5], although the Council of Europe insists on the need for local self-government, and there is always explicit recognition of the integrity of states and their borders. There is a persistent bias towards seeing central and eastern Europe as the seat of the problem, rather than taking a broader pan-European perspective and west European states including France, Spain and the United Kingdom have jealously guarded their own rights to deal with their minorities in their own way. Enforcement mechanisms are still weak and dependent on political negotiation rather than legal application. Much of this is no doubt inevitable. Defining a national minority or ethnic group is scientifically impossible, politically fraught and ethically dubious, since it reifies the group and prevents evolution and change. Giving legal rights to groups as opposed to individuals would create an immediate conflict with European norms of individual liberty and free choice, and would also tend to freeze groups in time. Challenging state borders in the name of group rights would be profoundly destabilizing and counter-productive, as states would then see group rights as a threat to their very existence. So it may be more fruitful to construct a series of pan-European regimes incorporating political principles and norms and encouraging their mutual penetration. The bias to central and eastern Europe is less easy to justify since it perpetuates an old stereotype, and works against the construction of a common European space of values.

DEMOCRATIZING EUROPE

Europe is thus emerging as a complex system of regulation and norms but definitely not as a state. This is precisely the point of the exercise, to transcend statehood, despite the repeated attempts to convert it into some sort of state by giving it a constitution or defined catalogue of competences. Were it to become a state, or even to aspire to being one, then it would provoke a reaction from both

5 The European Court of Human Rights refused to entertain a complaint from the Sudeten Germans against the German-Czech treaty of 1973 (Hillgruber and Jestaedt 1994).

state and minority nationalists, who would resent it as a new form of domination. It would also rigidify its institutions and ways of working, depriving it of the flexibility that has proved its strength. A European state or federation would have to follow a specific model, as we see from the different visions of what is might look like coming from French and German enthusiasts. Constitutionalization would also impose a rigid framework on an evolving political order and encourage the juridification of politics and the constitutionalization of political and social cleavages, as has happened in Canada.

This is not to say that we must just muddle on. Complexity and the proliferation of levels of decision making do reduce democracy as power seeps from elected institutions into networks. If multilevel governance means anything, it is surely a highly undemocratic order in which organizational elites and those with the skills, time and resources to operate in complex sectoral and territorial networks have immense advantages over their fellow citizens. When combined with the New Public Management and its tendency to reduce citizens to market consumers, this raises serious problems for deliberative democracy. For some people, the answer to the democratic deficit is to build systems analagous to parliamentary democracy as the European level, merging the various European regimes, strengthening the European Parliament, and having a European government accountable to it. There is no doubt a great deal that could be done at the European level to strengthen democracy, but the analogy to the nation state again lets us down. The assumption is usually made that in Europe, as in the classic nation state, functional systems, political representation, democratic mobilization and accountability can all be contained within the same territorial framework. This is a highly dubious proposition, relying on a particular model of the state. If Europe is to be democratized, it must be done in new ways, corresponding to the new forms of political authority.

Democratic and accountable government is a complex matter but there would seem to be two basic requirements. The first is the existence of deliberative spaces for the formation of a democratic will. I am assuming here, against the Public Choice school, that citizens' democratic preferences are not the mere sum of individual desires, which could be left to the market or to referendums, but result from deliberation and exchange.[6] It is these deliberative spaces that need to correspond to a sense of common or shared identity, or to a *demos*, if not an exclusive one. The second requirement is a system of accountability corresponding to the areas of decision making in the emerging functional systems. In a complex

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6 Bellamy and Castiglione (2000) draw a distinction between liberalism, which takes choices as given, and republicanism, which is predicated on dialogue and debate.

system with functional and territorial divisions, these can no longer always be done by the same institutions.

For example the European Parliament is probably as good as most national parliaments (admittedly not a difficult test) in scrutinizing executive institutions and holding them to account (the fall of the Santer Commission is exemplary). It does not, on the other hand, sustain a pan-European deliberative community or help form a pan-European democratic will. It probably never will, and possibly never should. We may therefore need to delink these activities. Accountability and scrutiny may take a variety of forms – audit, legal control, parliamentary investigation, adversary politics - and work at various levels. Deliberative democracy and will formation can similarly occur at various levels. In some cases, the state remains the main focus. This is clearly so in Denmark, Portugal and Ireland, and is still largely true in the larger states of France and Germany. In Belgium, on the other hand, deliberation is increasingly confined to the two main linguistic communities. In the multinational states of Spain and the United Kingdom there are deliberative communities within the nations of Catalonia, the Basque Country, Scotland and Wales, as well as at the state level. Northern Ireland presents further complexity, caught as it is between a UK community with which its links are weakening an all-Irish community and an Ulster or Northern Irish community. This last has hitherto been divided into two segments but might find some common interests, especially in economic matters and Europe, as a result of the peace process and the new institutional framework. There is still a residual prejudice against recognizing national communities other than states as deliberative communities or as the building blocks of democracy. Siedentop (2000: 175) for example, referring to the historic regions of Europe insists that 'few such regions have any civic tradition, any tradition of democracy or citizenship in working order.'[7]

Elsewhere, the pressures for participation and democratization have favoured deliberative communities at the city level. This is notably the case in France, where decentralization has strengthened the local level as a political arena, and in Italy, where the crisis of the central state has coincided with a revalorization of the local level. In other cases again, the deliberative community might be a large region, beyond a city but without the characteristics of a stateless nation. In the limiting cases, democratic will and identity may be located at a very small scale, as in the small communes of many countries, which are too small to correspond to any functional system. Reforms of local and regional government in the past have often fallen into the technocratic fallacy of trying to align all systems of decision making and representation with functionally defined units (the British were par-

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7 Even more contentiously, Siedentop compares European regions unfavourably with the original American colonies, without mentioning slavery or the disenfranchisement of women.

ticularly prone to this in their frequent reorganizations). This theme has re-emerged now in the debate about the need for large regions to compete in Europe, or the insistence on the need for a regional level of government across the entire European Union, whatever the local conditions.

Deliberative democracy may therefore be located a various levels and minority nations, fare from being a problem for Europe, may serves as exemplars of such communities. Yet to create a democratic commonwealth, these communities must be linked and not isolated. This inter-communicative aspect of democracy is essential (Tully 1995), with ideas and practices flowing from one to another and a continuing debate on the common good articulated at various levels. Pillarized societies are ill-equipped to do this, which poses one of the main normative objections to consociational democracy. The relationship between English and French Canada has often been described as one of two solitudes, a tendency that may increase with the reassertion of nationalism on both sides. Belgium is in the process of falling into the same problem, as inter-communication between the two communities declines; it is fortunate in this case that both communities are part of a broader European communicative order. Northern Ireland is a deeply divided society, but there is now a conscious policy of building links across the communities, to the Republic, to the United Kingdom and to Europe. There is a historic fear in Scotland of parochialism, and this has placed a barrier in the path of home rule; it is greatly lessened in the European context. Similarly, the traditional isolation of much of Basque society is being overcome by linking it to other European communities.[8] In this vision, the democratization of Europe would come not through strengthening summit-level institutions on the assumption that they correspond to a unitary demos, but through a whole system of parliamentarism, linking Europe, states and sub-state levels (Ferry 1997).

STATELESS NATIONS IN THE EUROPEAN COMMONWEALTH

Europe not only sustains a new context for the symbolic recognition of stateless nations and for legal pluralism. It also provides new opportunities for their institutional differentiation and for their projection as actors in the new political order. One way in which it does this is by permitting greater asymmetry within states. Its unified market regime, allows a loosening of single market rules within states themselves, and a greater diversity of development policies and institutions. EU competition rules are often stricter than those of the states themselves

8 This argument must not be confused with the old liberal hope that, as individuals get to know each other, differences will disappear. I am arguing that differences can be valuable, as can the existence of distinct deliberative communities. What is important is that they not be closed and that there exist strong and, if necessary, formalized mechanisms for inter-communication.

and have created trouble for the German Länder with their state banks, stakes in firms and subsidies to investment. Basque rules discriminating in favour of local investors have been challenged by the European Commission, with the curious conclusion that the Basque government can discriminate against citizens from the rest of Spain but not other Europeans. In a similar case, it appeared that Scotland could impose differential university fees on students from other parts of the United Kingdom but not from elsewhere within the EU. Such European rules have often caused resentment within the regions and accusations of EU-level centralization but they show how the unifying regulation of the nation-state is giving way to a European system of regulation in which regions and stateless nations are operating in European markets. An analogous situation exists with regard to the human rights regime which is increasingly detached from states, so allowing institutional and legislative asymmetry within states, notably in the United Kingdom.

European market integration also provides new opportunities for autonomy and self-government, although one constrained by the needs of economic competition. In modern conditions, territorial self-government is more than a matter of constitutional, legal autonomy. It requires a policy capacity, and the ability to operate through complex networks, at local, state and European level, and crossing the boundaries between the public and the private sector. Economic competitiveness is a critical, although not the only, element of this. Minority nationalists have generally abandoned dreams of self-sufficiency or economic autarky, and embraced global and regional free trade as an integral part of their policy prospectus. They have bought into the new models of economic development, which put the emphasis on the region as a production unit in competition with others, on endogenous growth, and on the mobilization of productive capacities through partnerships, associations and research and development. These new models of economic development are still rather controversial, especially in their neo-mercantilist versions which present regions as engaged in a competition for absolute advantage in European and global markets (Lovering 1999, Keating, 2000b). Politically, however, they have obvious advantages for stateless nation-builders since they replace the old paradigm in which the region was engaged in a relationship of mutual dependency with the state, with one in which the region becomes a more or less autonomous agent within the broader market. It is not surprising then, to find Catalonia, Flanders or the Basque Country presenting economic competitiveness in Europe as a centre piece of the national project. In Scotland, where the nationalists' main focus is still on statehood within an intergovernmental Europe, this emphasis has so far been much less marked.

Self-government in modern conditions also requires social cohesion, both as a contribution to economic competitiveness and sustaining the necessary synergies, and for its own sake as part of the national project. A third part of this project is sustaining a living and vibrant culture in the face of market and social pressures

from outside. These objectives can and do often clash. Market integration may be socially disintegrative, as disparities open up between those groups, localities and sectors that can compete and those that cannot. Local cultures may fall victim to larger ones, or to the global domination of English language and especially American products. While it is possible to use minority languages in the school system, as has been done successfully in Catalonia, the Basque Country and Wales, it is much more difficult to get them accepted as working languages in the economy, where the state languages, or English, prevail (Keating 2000c). On the other hand, nationalists see the local culture as a means of sustaining cohesion and the capacity for collective action necessary to face market competition, transcending the conflict of objectives through a conscious nation-building strategy.

Stateless nations also have opportunities to become more direct protagonists in Europe since, while the EU is fundamentally an organization of states, it is also a complex multi-level system of decision-making with multiple points of access. Territorial actors of various types have become active in this process, giving rise to a substantial literature on the Europe of the Regions (Jones and Keating 1995, Hooghe 1996, Keating and Hooghe 19996, Bullman 1994, Jeffery 2000, Petschen 1993). Stateless nationists have entered into this game enthusiastically, while insisting on their special status as more than mere regions and without renouncing longer term ambitions. The EU itself took significant steps to incorporate the regions as a third level of the European polity in the 1990s, but these soon reached their limits as states reasserted their powers, and as the very heterogeneity of territorial interests prevented a uniform solution. Since then, individual regions or alliances of regions have sought to exercise influence wherever available giving rise to a wide variety of strategies.

Institutional recognition was first given to the regional level in the Treaty on European Union (Maastricht Treaty) which established a Committee of the Regions representing sub-state entities of all types. This has kept the issue of regionalism alive and provided some input into the deliberations of the Commission and the Council but has proved a disappointment to many stateless nationalists because of its weak status and the variety of its membership. By including representatives of municipalities alongside the leaders of Catalonia, Flanders or the large German Länder, it has diluted the regionalist dynamic and undermined the status of the large players. These have consequently demanded a separate institution, representing regions only, or even just regions with legislative powers. This would bring in the Spanish stateless nations, along with Flanders and Scotland. While this would still not create a category of nations as opposed to regions, it would have the advantage of giving them powerful allies. The European Commission has also recognized regional associations for consultative purposes, giving them another channel of access.

A second mechanism for institutional representation is the provision in the Treaty on European Union whereby in systems were regions have governments with a ministerial structure, these can represent the state in the Council of Ministers. The exercise of this power is at the discretion of states and the regions must represent a state position and not their own particular interests. So far this provision has been regularized in Germany and Belgium, with legal provisions for dividing European business between matters of state, regional and shared competence, and for representing the state accordingly. In Germany, regional issues are handled through the Bundesrat, which agrees, by majority vote if necessary, on a common line for the Länder and assigns one of the Länder to speak for them all. Belgium, in consequence of the more conflictual nature of intergovernmental relations, requires unanimity among the affected governments, which may include the federal government, the regions and the language communities, depending on the issue. If no agreement is reached, the Belgian delegation in the Council must abstain. UK devolution legislation provides for the participation of Scottish, Welsh and Northern Ireland ministers in the Council, alongside those of the state. There are non-statutory concordats to regulate relations and the procedure for agreeing the line to pursue, but the UK government has the last word. In fact, the UK system is really a carry-over from the pre-devolution practice whereby ministers of the Scottish and Welsh offices could participate in European business as part of a unified UK delegation. In the event of the devolved Scottish and Welsh governments being controlled by parties other than that ruling at Westminster, the system would come under extreme tension and there might have to be more formalized rules. Northern Ireland raises different questions again, with the possibility of cooperation between its government and that of the Republic of Ireland on European matters of common interest. There have been strong demands from the minority nationalities of Spain for the application of this rule but so far the Spanish state has resisted, preferring to negotiate with the devolved governments within the framework of Spanish politics. There was a bilateral committee with the Basque Country to discuss European matters but it fell victim to the polarization of Basque politics.

The EU has also incorporated regional interests through the Structural Funds which, since 1988 have been dispersed on the basis of partnership programmes in which regional interests must be present. The quality of these partnerships has varied greatly (Hooghe 1996) and the substantive impact of the funds has been questionable, given the complicated national rules whereby states manage to keep the moneys for themselves or subordinate them to national priorities. Politically, however, the Funds have played a vital role in raising the profile of regional policies and linking regional assertion with European integration. Regional leaders, including those from minority nations, have made much of their ability to extract funds from the EU, often giving a misleading impression that they have been able

to bypass the state and deal directly with Brussels. By the late 1990s, however, this movement had peaked. The Commission was increasingly concerned with the administrative and political burden of administering funds, and aware of its limited ability to engage in detailed spatial planning. States were asserting more control over the designation of eligible areas and the terms of partnership while everyone was aware that the EU could not afford to extend to the candidate countries of central and eastern Europe the same generous aid that had been given to Spain, Portugal and Greece.

One might be sceptical about each of these institutional devices and policy programmes; they have certainly not created a coherent 'third level' of government within the EU. Yet they have created a new political space, or a multiplicity of spaces, for sub-state actors. Indeed the fact that there is not a single institutional framework for them all might be seen as the essence of the movement, allowing multiple strategies of working in Europe for the very varied interests involved. Within these new spaces, stateless nations have mounted lobbies and opened offices in Brussels and have forged a multitude of trans-state alliances. These can serve to pursue issues in multiple fora, within different states, through the Commission and via the European Parliament. Cross-border collaboration has developed to cover all the borders within the EU and with the candidate countries. A key factor in these success of these initiatives has been the institutional structures and resources provided by Europe. The EU's LEADER programme does not transfer a lot of money, but unlike most other Structural Fund programmes, it comes directly under the Commission and its funding can, at the margin, give an incentive to work in partnership. It also provides political incentives, allowing politicians to present themselves as good Europeans or as outward-looking and progressive. The absence of any such mechanism in North America goes a long way to explaining the difficulties in sustaining cross-border cooperation there. The Council of Europe also sustains cross-border cooperation, through its Madrid Convention of 1980, which provides a legal framework, and its Convention on Minorities, which deals with the issue of minorities straddling state borders.

Experience here, too, is mixed. Many cross-border operations remain at the level of intentions or symbolism and the willingness to co-operate is often frustrated by the pressures of inter-regional competition. In others, however, they have served to bring together cultural regions or stateless nations divided by state borders. A critical element in the success of these ventures is precisely that they should not challenge state borders and they only really work where border issues are settled. In this way, it is possible to work around the border, to penetrate it peacefully; where borders are contested then almost any proposal for collaboration can be seen by state elites as a threat to the border itself. More generally, stateless nations have been active in 'paradiplomacy' (Aldecoa and Keating, 1998),

projecting themselves in transnational networks without trying to rival the high diplomacy of the nation-state.

EURO-STRATEGIES

Stateless nations have availed themselves of these opportunities in diverse ways.[9] Catalonia has been extremely active in external relations, revalorizing its history as a medieval trading nation embedded in Spanish, European and Mediterranean networks. Its nation-building project places a strong emphasis on language and culture and the projection of the Catalan language abroad. There is an active paradiplomatic effort, based in civil society as much as the autonomous government, and relying on public-private partnerships of various sorts to maintain a presence across Europe and the world more widely. Representation in Brussels is assured by the *Patronat Catal´ Pro Europa*, a public-private partnership founded in advance of Spain's accession to the European Community. Catalonia has preferred to work with the Spanish government rather than against it, seeking to influence the Spanish position within the EU as well as playing in its own pan-European networks. It long hesitated to call for representation of the autonomous communities in the Council of Ministers, ostensibly on the ground that this would require a constitutional amendment, although an important factor appears to have been a concern that Catalonia would be reduced to one of 17 communities rather than an interlocutor of the state. Since the late 1990s, however, the Catalan government has supported the incorporation of the autonomous communities into the European process on the same lines as in Germany or perhaps Belgium. Catalonia has also been very active in the Europe of the Regions movement, in the Committee of the Regions and in the Assembly of European Regions, pressing constantly for a recognition of the regional level and for the particular place of strong and cultural regions within it.

The Basque nationalists have a long history of Europeanism (Ugalde 1998) going back to the Civil War era, but since the transition to democracy in Spain have been less active than the Catalans. The Basque government under the leadership of the PNV has over time placed more emphasis on Europe, but with a more particularlist strategy than the Catalans. Their presence in Brussels is a government office, not a partnership as in the Catalan case, and had to be delayed some years while the Constitutional Court considered the such a political overtly representation. Proposals in the early 1990s envisaged a direct Basque presence in European institutions, although it was not quite clear how this would work

9 The following discussion is brief, as I have discussed paradiplomacy and regional strategies in Europe at length elsewhere (Jones and Keating 1995, Keating and Hooghe 1996, Keating 1998).

according to the Spanish constitution or the European treaties. They were even more reluctant than the Catalans to share a regional representation with the other autonomous communities. With the declaration of Barcelona and subsequent declarations of Vittoria and Santiago de Compostela, however, they have come round to the idea of using the Maastricht provisions for regional representation, but with special consideration for the historic nationalities. The Basques have also been active in the Committee of the Regions, the Assembly of European Regions and other pan-European bodies and have made efforts to mobilize the Basque disapora, especially in North and South America. From the 1990s they have sought to influence opinion makers in other European countries, combatting the unfavourable image given to the Basque Country by political violence.

Flanders was particularly active in paradiplomacy under the former Christian Democrat-led government, with its nation-building programme. Like Catalonia, it used the theme of regional development and its trading history as a motif for external projection, while taking steps to protect its language and culture. Belgian regions and communities have full external competences corresponding to their internal competences, and this has led to a large presence abroad, promoting the image of Flanders in general and its merits as an investment location in particular. Regions and communities regularly speak for Belgium in the Council of Ministers and, while they must promote a Belgian line, they do use the opportunity to press their own concerns. The unanimity rule means that they cannot take a purely selfish line, but it also encourages bargains and trade-offs whereby the communities and the regions can get their own particular concerns onto the agenda. At one time Flanders' protagonism in Europe was so pronounced as to provoke the suggestion that it was trying to promote itself from a 'third (regional) level' actor to the 'second (state-like) level' (Kerremans and Beyers 1996). Another initiative of the government was the Europe of the Cultures Foundation, an alliance among politicians, social actors and others in 'cultural regions'. These were essentially historic nations, but the list was chosen to include both states and stateless territories, carefully blurring the distinction .The theme of the Foundation is the importance of culture and identity for economic development in the modern era, and the need for an institutional recognition of cultural regions in the European institutional design.

Scotland and Wales until 2007 never been controlled by nationalist or quasi-nationalist parties and so the question of carving out their own space in Europe has not arisen. The Scottish National Party is in any case committed to statehood within the EU as its minimum demand, and has given little thought to solutions short of this. The Labour Party s strategy has been tie Scotland tightly into the UK line in Europe. Yet the Scottish presence abroad and especially in Europe has gradually expanded as the Foreign Office has become more relaxed about paradiplomacy, in fields such as culture, inward investment and tourist promoti-

on. It is likely that future Scottish governments whether led by Labour or the SNP will have to explore further the scope for a Scottish presence and influence in Europe. In Wales, where the nationalists have explicitly renounced separatism, there is similarly a search for opportunities within the new European order. The very complexity and asymmetry of the UK system allows for various patterns of alliance while the Northern Ireland peace process, with its involvement of the Irish Republic in cross-border institutions and the British-Irish Council creates a potential for still more.

There is thus not one single place for stateless nations in the European Commonwealth and no single strategy for projecting nationality and self-government. Rather there is a multiplicity of opportunities and strategies, involving not only different actors but different types of actor in each case. Stateless nations can work with their states, they can play the Europe of the Regions game or they can lobby on their own. They can ally on some issues with the German Länder, as in the emerging alliance of regions with legislative powers. They can make common cause with small states as in the Europe of the Cultures concept. They can argue for special recognition within their own states, or join with other regions in pressing for regional joint representation in the Council of Ministers. While Europe remains so fluid, without a clear end point in sight, it makes obvious sense to keep all options open. As Europe develops, these opportunities are likely to expand and regions and stateless nations to seek influence in new policy fields. States may be forced to accommodate this, developing a more plurinational diplomacy' (Aldecoa 1998) in which different instruments are used and different interests are represented depending on the issue at stake. Traditional diplomacy is predicated on the existence of a single 'national interest', defined by the state and underpinned by the idea that in matters of external relations the integrity and very existence of the state is constantly at stake. With the state itself demystified and sovereignty unpacked in the ways suggested so far, this doctrine is increasingly untenable. The principle may be expanded beyond the European Union. There seems to be no reason in principle why for example the UK government should monopolize British representation at UNESCO when there is no UK department for education nor for culture. A similar case can be made for Quebec. Of course, it is always possible that some cataclysmic crisis will destroy the current regime of global and European integration just as the Concert of Europe and the first era of globalization at the end of nineteenth century collapsed; but if current trends continue, there is an ever expanding array of opportunities for nations to express themselves other than as states.

THE LIMITS TO EUROPEANIZATION

Europe thus provides multiple opportunities for accommodating national minority demands. These do not, however, constitute a single or consistent regime and many of them were designed with other purposes in mind. Europe does not resolve the issue of self-determination and indeed it is difficult to envisage what a general European norm on the right of self-determination would look like. We would be back with the old questions of who has the right, what the boundaries of self-determining units should be and under what circumstances the right could be exercised. These are fundamentally political issues and what matters is to establish the right political frameworks in which they can be addressed. Europe helps here in lowering the stakes in independent statehood and introducing the idea of shared sovereignty and pluralism, so helping forms of accommodation short of secession. It also makes it likely that secessions, should they occur, will be peaceful and preserve common market structures and systems of rights.

There are, of course, disadvantages in placing too much stress on rights in the political realm. As Canadian experience shows, political issues rapidly become converted into rights issues which then become absolutes and can be obstacles to flexibility in public policy and the allocation of resources. Individuals who can makes rights-based claims on public resources will win out over those who cannot make such claims. Politics will increasingly be taken into the courts and lawyers will proliferate. Yet it seems that the juridicization of politics is the inevitable consequence of the increasing complexity of government, the existence of multiple levels of authority, and the decline in citizen deference. The answer is not to exclude law from the regulation of social conflicts, but to make the law and the legal profession itself more sensitive to cultural differences and to the political context in which it operates.

Another problem in systems of normative pluralism and multiple-level government is the threat to the territorial equity and the redistributive capacity of government. The nation state has been a powerful agent for inter-territorial resource transfers, partly through explicit programmes of redistribution, but mainly through the automatic fiscal stabilizers provided by state-level taxation and spending programmes. The European Union has sought to compensate for the adverse affects of market integration through the Structural Funds, aimed at helping declining or underdeveloped regions to reinsert themselves into the single market. These, however, are small in scale compared with the effects of state programmes and there is no political will to introduce into the EU a system of full fiscal federalism along United States or Canadian lines. As the state framework weakens, there are signs of increasing competition among regions for inward investment, markets and technology (Keating 1998), with the risk of a 'race to the bottom' or 'social dumping' as regions subordinate social, cultural and environmental concerns

to growth, although this is limited in Europe, as compared to the United States, by EU norms and a shared commitment to welfare. Territorial redistribution through the Structural Funds has been justified as a trade-off among states (Hooghe and Keating 1994) in which the advanced regions get access to wider markets and the poorer ones get help. It has not been underpinned, at least to the same extent, by a wider ethic of pan-European solidarity. Without such an ethic, the policy might become more difficult to sustain and will certainly be impossible to expand. Since the minority nations of Europe include both poorer regions (like Wales) and wealthier ones (like Flanders) as well as many which are in between, there is no automatic relationship between accommodating minorities and redistributing resources progressively. This remains one of Europe's weakest points.

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ORIGINAL SCIENTIFIC ARTICLE

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Comparing Constitutional Protection of Human Rights in Europe

What Can We Learn From Comparative Analysis?

The article aims to demonstrate the usefulness of comparative method in the field of constitutional law, in particular in the field of human rights provisions at the constitutional level. It tries to disprove the common assumption that the human rights provisions in different constitutions are almost identical and that the legal unification is in that respect almost complete. The analysis of the European constitutions unveils a somewhat different picture. In part, that assumption is correct. The vast majority of the constitutions incorporate what the authors have called a 'common core of human rights', some 20 provisions that can be found in almost all European constitutions (e.g. right to freedom, principle of equality, freedom of expression, freedom of assembly, freedom of association etc.). Equally important are, however, certain clusters of human rights provisions (or absence thereof) that are typical of certain groups of constitutions, but not of others. The authors have called these particular clusters of provisions or certain combinations of provision a constitutional profile. Based on the detailed analysis of the constitutions, four distinct constitutional profiles could arguably be recognised, which the authors have described as Nordic, Romanic, Germanic and Common Law group.

Keywords: constitutions, comparative law, constitutional law, human rights, legal families, constitutional profiles, Nordic legal group, Romanic legal group, Germanic legal group, common law

Primerjava ustavnega varstva človekovih pravic v evropskih ustavah – Kaj se lahko naučimo iz primerjalnopravne analize?

Razprava skuša pokazati koristnost primerjalnopravne metode na področju ustavnega prava, zlasti na področju ustavnopravnega varstva človekovih pravic. Ovreči skuša splošno sprejeto predpostavko, da so ustavne določbe o varstvu človekovih pravic v različnih ustavah med seboj skoraj enake in da je pravno poenotenje v tem pogledu domala zaključeno. Analiza evropskih ustav nam pokaže nekoliko drugačno sliko. V določenem obsegu predpostavka drži: pretežna večina ustav obsega 'skupno jedro človekovih pravic', kot so avtorji poimenovali približno 20 kategorij človekovih pravic, ki jih lahko najdemo v skoraj vseh evropskih ustavah (npr. pravica do svobode, načelo enakosti, svoboda izražanja, svoboda zbiranja in združevanja itd.). Enako pomembni pa so določeni sklopi določb o človekovih pravicah, ki so v določenih ustavah prisotni, v drugih pa jih zaman iščemo, in ustvarjajo pomembne razlike med ustavami. Obstoj in določena povezava takšnih sklopov človekovih pravic opredeljujejo nekaj tipičnih modelov ustavnega urejanja človekovih pravic, ki so ga avtorji imenovali ustavni profili. Podrobna analiza ustav razkrije štiri različne ustavne profile, ki so jih avtorji opisali kot nordijsko, romansko, germansko in common law skupino.

Ključne besede: ustave, primerjalno pravo, ustavno pravo, človekove pravice, pravne družine, ustavni profil, nordijska pravna skupina, romanska pravna skupina, germanska pravna skupina, common law pravna skupina.

INTRODUCTION

Comparative legal analysis often reaches far beyond its proclaimed goal – to compare. Mere comparison tells us little. It may alert us to the many differences that exist between various legal systems, and that in itself may serve a variety of practical purposes (Bogdan 1994: 28–39, David and Brierley 1985: 5–11). Frequently, this is the only use the comparative legal analysis is put to. That may be instructive and on some occasions even illuminating, but the real potential of comparative analysis lies beyond that necessary and even entertaining task. Comparison may reveal a more important layer of legal reality that too often attracts less attention. The ambition of this paper is to show to what use comparative legal analysis can be put to apart from the mere compiling of interesting information. Even though such attempts may fall short of the truth they strive to achieve, they may still provide fertile ground for yet other attempts that may prove to be more fortunate.

First step, however, is the gathering of data. The basis of hypotheses put forward in this article is a comprehensive survey of the constitutional protection of human rights entailed in the continent's written constitutions. Since the notion of 'Europe' is a contested one, the delimitation chosen was purely conventional. We focused on the EU countries and added those that form the EEA and Andorra. Such a group is in our view sufficiently homogenous. The countries in the group thus share enough of a common cultural and legal heritage for a comparison. Furthermore, possible results could be explained by some underlying traits rather than by pure coincidence or some vague anthropological truisms.

The data collected were analysed using a rather simple table in which the existence (or absence thereof) of constitutional protection of certain human rights was indicated by virtue of three symbols. A plus (+) denotes the existence of constitutional protection of a certain human right (or the existence of a constitutional regulation of a certain question, e.g. of citizenship), a minus (-), which signifies the absence of a constitutional protection of a human right (or an absence of the existence of a constitutional regulation of a certain question), and finally, symbol P which stands for *principle*, indicating that the constitution takes some notice of a value (e.g. Art. 19 of the Maltese Constitution, which states: »The State shall provide for the protection and development of artisan trades«), but stops short of stipulating a genuine and enforceable right.

Although one might be tempted to regard such an approach as simplistic and prompted solely by the fact that a project including postgraduate students had to resort to an undemanding research method, at least one advantage has to be

pointed out: such an approach provides one easily surveyable collection of information. This was the starting point of our analysis.

The information collected in this way gave rise to two basic hypotheses. The first was readily visible: some basic rights are protected in almost all constitutions. This cluster of basic human rights forms a *common core* of human rights protection shared by the European states. The second hypothesis was less easy to formulate. Our starting point was a quite widespread assumption that the field of human rights protection is governed by a boring uniformity. This assumption rests on a premise that the diversity of constitutional arrangements unveils itself almost exclusively on the plain of governmental structures. The meagre existing research demonstrates this in a rather unequivocal manner (e.g. Finer in Venter 2000: 25). We tried to challenge this assumption by stressing the fact that observable differences in constitutional protection of human rights nevertheless exist. These differences are, we claim, not mere coincidences, but amount to quite a distinct pattern. We have described such patterns as *constitutional profiles,* which are – we claim – idiosyncratic to groups of countries. Countries that share the same history, culture, legal system and/or historic experience, often share a distinct pattern of constitutional protection of human rights as well. In this article, we attempt to outline the basic traits of the existing constitutional profiles in Europe and try – to some extent – shedding some light on factors that might have contributed to their formation. Our analysis has revealed four different groups of countries with very similar constitutional characteristics (constitutional profiles): (1) Nordic group of countries, (2) Romanic group of countries, (3) Germanic group of countries and (4) Common law group of countries.

On the outset, a few caveats are in order. The analysis did not venture further than the textual analysis of the constitutional texts (or rather, their English translations) carried us. A reproach that our analysis is an »inchoate textual analysis« (Venter 2000: 43) is entirely justified. In truth, we did not nor would be able to carry through an analysis of »deeper layers of living constitutional law« (*ibid.*) including the interpretation of the constitutional provisions. Similarly, our analysis did not include the protection of the human rights afforded by laws, other regulations or precedents. And secondly, we did not try to explain everything (Bogdan 1994: 77). Thus, two countries – Austria and Liechtenstein were left unclassified.

1. COMMON CORE OF HUMAN RIGHTS

The first and rather obvious result of our analysis of human rights provisions in European constitutions is that some human rights provisions appear much more frequently in the constitutions than others. The list of these provisions is fairly extensive. It includes:

- freedom from torture (which can be found in 22 out of 32 analysed European constitutions),
- general principle of equality (equality before the law / right to non-discrimination) (found in 31 constitutions),
- right to liberty or freedom (found in 32 constitutions),
- legal principle *nullum crimen*, *nulla poena sine lege praevia et certa* (found in 27 constitutions),
- right to the inviolability of the home (found in 28 constitutions),
- right to the freedom of thought, conscience and religious belief (found in 32 constitutions),
- right to freedom of expression (found in 31 constitutions),
- right to freedom of assembly (found in 30 constitutions),
- right to freedom of association (found in 31 constitutions),
- right to administration of public affairs (found in 26 constitutions),
- right to vote and be elected (found in 32 constitutions),
- right to access to public office (found in 23 constitutions),
- right to petition (found in 24 constitutions),
- freedom to choose one's residence (found in 22 constitutions),
- right to (private) property (found in 30 constitutions),
- right to education (found in 26 constitutions),
- right to freedom of movement (found in 24 constitutions),
- right to social security (found in 27 constitutions).

These human rights form a common core of human rights protection in the European constitutions. The majority of them comes from the first generation of human rights and imposes the obligation on the state to refrain from certa-

in encroachments on the personal sphere of the individual. It is worth noting that a considerable part of these fundamental rights are political rights (at least historically), designed to achieve the political participation of the individual (the right to free expression, to association, to assembly, to administer public affairs, to vote and be elected, to access a public office and the right to petition). Only a handful of these rights, on the other hand, impose a positive obligation on the state, notably the right to education and the right to social security and, arguably, the general principle of equality (positive discrimination). Although this point is not to be exaggerated, we can discern the common values and the shared political heritage underlying the European constitutional thought. It is based on the liberal and individualistic tradition of the French Revolution, tempered only to a small degree with the values of the welfare state.

2. NORDIC GROUP

DENMARK, ICELAND, NORWAY, SWEDEN

All four countries lie in the north of Europe with the geographical core in the Scandinavian Peninsula. They border on each other with the exception of Iceland because of its position as a relatively remote island west of Scandinavia. Therefore, the connections between them, in the cultural and political sense, have always been very close (Zweigert and Kötz 1998: 277).

Denmark is known to be the oldest kingdom in Europe with about 1100 years of history (Ring and Ring-Olsen 1999: 22). The three Nordic kingdoms of Denmark, Norway, and Sweden were unified at the time of the Union of Kalmar (1397–1523) when Denmark played the leading role. On the other hand, Sweden conquered Finland in the 12th and 13th centuries and the latter formed a part of the Swedish empire until 1809 (Zweigert and Kötz 1998: 277–278). Iceland was an independent state from 930 till 1264, when it came under Norwegian rule. Both of the countries were included in the Danish kingdom at the end of the 14th century and Iceland became Danish province two centuries later (Ring and Ring-Olsen 1999: 27). The age of Napoleon broke the connections between Sweden and Finland on one side and between Denmark and Norway on the other. Finland was ceded to the Tsarist Russia in 1809 while Norway and Sweden formed the personal union in 1814 (Zweigert and Kötz 1998: 278).

More important changes occurred at the beginning of the 20th century. Norway seceded from the union with Sweden in 1905 and declared independence. Finland did the same a year after the breakdown of the Tsarist state. Also in

1918, Iceland entered into the personal union with Denmark and finally became completely independent in 1944.

The close interrelationship of the Nordic legal systems was explained already with some historical facts. Here we also have to mention the common history of legal systems. All the Nordic laws were based on old Germanic law with certain local variations. In the 12th century these rules began to be written down in form of numerous local or subsequent city laws. From the end of the 14th century the Danish law came into force in Norway and Iceland after they had become part of the kingdom of Denmark. The first comprehensive codes were produced by the late 17th and early 18th century in Denmark (1683), Norway (1687) and Sweden (1734). Already a century earlier Sweden established close contacts with the legal scholarship from the Continental Europe. Swedish nobleman law students were mostly trained in or influenced by German *Gemeines Recht,* and through that connection they were introduced to Roman law as well (Zweigert and Kötz 1998: 278–279). Nevertheless this never led to its extensive use as it did in Germany (Zweigert and Kötz 1998: 284). The main reason why Roman law never truly penetrated the Nordic countries even earlier was that these countries developed codifications based on their own legal traditions very early (Bogdan 1994: 89).

The Age of Napoleon brought big changes and broke the connections between all the Nordic countries. In 1809 Finland became part of the Russian state, although it had considerable autonomy as an independent Grand Duchy. Therefore, the Tsarist administration interfered very little with its legal system. Sweden, influenced by the success of the Napoleonic codification, fundamentally reformed its old law in 1826. At that time the same kind of modernisation occurred in Denmark as well, which was also heavily influenced by the French *Code civil* (Zweigert and Kötz 1998: 278–279).

Denmark, Norway, and Sweden started to co-operate closely in the field of legislation in the last third of the 19th century. In 1880 the unified law of negotiable instruments came into force simultaneously in all the three countries. From that point on until the Second World War, they had unified many laws on the spheres of trade, marine affairs, and many aspects of civil code (Zweigert and Kötz 1998: 280–281). The close co-operation between the countries has also continued after the Second World War. The Nordic council (*Nordisk Råd*) was established by the three countries in 1951 to discuss common political interests and questions. Finland and Iceland joined it later in that decade (Ring and Ring-Olsen 1999: 5).

One common question and dilemma about the Nordic law has to be mentioned. Some authors consider it a separate legal family, while others classify it as a part of the Continental European Civil Germanic legal family.

For example, Zweigert and Kötz (in Bogdan 1994: 88–89) discuss the Nordic law as an independent group, at the same level as Romanic, Germanic, Anglo-American, socialist and 'other' laws. Others like Arminjon, Nolde and Wolf (*ibid.*) classify it as an independent group and as one of the seven groups of the world: French, German, English, Russian, Moslem and Hindu. In Scandinavia, Malmström (*ibid.*) treated the Nordic law as an independent family of law within the Western law. Those views can be confirmed by the fact that Nordic legal systems have to some extent specific common characteristics, for instance that they are more practical and pragmatically orientated than German and French legal systems. On the other hand it exhibits great similarities with the legal systems belonging to the Civil Law legal family, while similarities with other legal systems are considerably weaker. For example, Sundberg (*ibid.*) considers the Nordic Law as a member of the Continental European legal family.

At the same time the internal separation into two groups, as a consequence of the aforementioned development of legal systems, is also known. The first group is the so called Western Scandinavian that consists of Denmark, Norway, and Iceland; the second is the Eastern Scandinavian group which includes Sweden and Finland (Ring and Ring-Olsen 1999: 3).

2.1 Constitutional Profile

The constitutions of the *Nordic legal family* cover almost exclusively only the first generation of human rights. The most common of them are actually civil and political rights which are also the oldest in those constitutions. Most of the remaining rights were added later with constitutional amendments. Despite these measures, many of the basic rights of this type are still missing.

This is also a special characteristic of the Nordic group. The human rights provisions that are *not* mentioned in (almost) any of the four countries are:

- right to life,
- right to personal and moral integrity (except in Sweden), dignity, development of personality, right to honour, right to security,
- recognition of legal person, *ne bis in idem*, right to access to court, right to legal remedy,
- prohibition of slavery and servitude, prohibition of forced and compulsory labour,
- and right to marriage and family.

Table 1: Categories of constitutional human rights provisions in the Nordic group that stand out in relation to other groups[1]

Country	Life	P&M Integrity		Dignity	Develop. of pers.	Honour	Security	Recog. of legal person	*Ne bis in idem*
		R	Pris.						
Norway	-	-	-	-	-	-	-	-	-
Denmark	-	-	-	-	-	-	-	-	-
Sweden	-	+	-	+	-	-	-	-	-
Iceland	-	-	-	-	-	-	-	-	-

Access to court	Legal Remedy	Slavery & Servitude	Forced & Compulsory Labour	Marriage & Family
-	-	-	-	-
-	+	-	-	-
-	-	-	-	-
-	-	-	+	-

Furthermore, there are almost no provisions speaking about the equality with the exception of the general right (not in Norway) and equal pay for equal work in Iceland. No provisions relating to criminal law are mentioned either; they were only noticed as a general category in the Danish constitution. The Norwegian constitution does not include any provisions relating to fair trial, while the rest of the group do, although without mentioning the presumption of innocence (except in Iceland) and rights of the accused person (except in Denmark).

There are only a few human rights that are mentioned in almost all constitutions of the Nordic legal family. The rest of the human rights included in the constitutions are significant only in the two countries with the highest number of important rights of the first generation - Iceland and Sweden: freedom from death penalty, right to personal and family life, and freedom of movement.

Political and civil rights from the common core of human rights are proportionally better covered. All of the constitutions, again with some occasional exceptions, include the following rights: freedom of expression, assembly, association,

1 The abbreviations used in the table are explained in the Appendix I, below.

administration of public affairs, vote, and access to public office. The general provision of the freedom to form trade unions is recognised only in Sweden and Iceland, and prohibition of censorship only in Denmark and Iceland.

The human rights belonging to the second or the third generation are only a few. The only two covered in all four countries are the right to property and provisions regarding expropriation. Further provisions that are included at least in two countries are: right to education and right to free education, right to work (mentioned with principles), right to social security, to free enterprise, to sound environment and the right of minorities.

In all the constitutions from our group, there is no mentioning of any kind of the right to special protection, right to private schools, right to creativity (generally), rights connected with work, right to asylum, and right to family and parenthood.

The most obvious and important common characteristics of the four analysed countries are the age, and the low share of considerable human rights guaranteed in the constitutions. Although all of the constitutions have been amended in the last three decades, they still include the lowest number of all generations of human rights provisions from all of our legal family groups. In this respect they resemble the Romanic legal family of countries which has also one of the oldest constitutional traditions in the world.

2.2 Hypothesis

The small amount of the human rights included in the Nordic legal family indicates the pre-French revolutionary understandings of constitutionality focusing predominantly on the structure of the government. This can be assumed from the fact that the Nordic countries have one of the oldest constitutional traditions in the world.

All the countries have amended their constitutions in the last three decades. The only exception is Sweden which actually adopted the new constitution in 1975; it has since then been left unaltered.

The biggest share of human rights in the Nordic legal family belongs to Iceland. That is the consequence of the extensive amendments in 1999 and especially 1995. About two thirds of the human rights analysed here (Ch. 7 of Icelandic constitution) were added or phrased in a manner significantly clearer and their wording modernised. This was the result of the internal and international criticism which related to the fact that the Constitution lacked various explicit provisions on human rights. The amendments were influenced by international treaties as well, in particular by the European Convention on Human Rights and

the International Covenant on Civil and Political Rights (Peaslee 1968: 449–458). All of the personal rights were extended or added anew. The articles added to the Human Rights Chapter are: 65/1–2, 66/1–4, 68/1–2, 69/1–2, 70, 76/3, and 77. The modernised and extended rights are included in articles 67, 71, and 73. The rest of them (72, 74, 75, and 76/1–2) were basically left intact.[2]

The human rights that existed in the Icelandic Constitution before the 1995 amendments were mostly political, civil, economical and social rights. The Constitution of Iceland dates back to 1944 when the country became independent from Denmark. Most of the provisions are much older, some of them even from 1874 when the country received its first written Constitution. The provisions concerning civil rights are among the oldest.[3]

Although the Norwegian Constitution was last amended in 2006, it contains only a few important human rights. The reason is that the Chapter 'Rights of Citizens and the Legislative Power', which includes the majority of human rights, has not been altered by the latest amendments.

In fact, the only change was basically the extension of Art. 110 that belongs to the 'General Provisions'. Consequently, it now also covers the rights of minorities (because of their indigenous Sami people), the right to sound environment and the responsibility of the State to respect and ensure human rights. These are known as the special rights and belong to the third generation of human rights. As in all other Nordic countries of this group, there are only few basic human rights protected by the Constitution. The rest of them belong to the civil, political, economic and social rights (Peaslee 1968: 686–705).

The case of the Constitution of Denmark is similar. The last amendment of 1988 did not change the Human Rights Chapter (Ch. 8). About half of human rights originates from the constitution of 1953 which is still valid today, and the rest of the rights were enshrined already in its previous constitution from 1849. Therefore, it guarantees more rights of the first and second generation than the Norwegian constitution.

The Constitution protects a few personal rights but covers also civil, political, economic, and social rights. Denmark had adopted and thereby strengthened the protection of certain human rights through supplementary legislation in order to fulfil its obligations according to international treaties like the European

2 Committee Against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention: Iceland, 10 February 1998, U.N. Doc. CAT/C/37/Add.2 (1998). At: http://hei.unige.ch/humanrts/cat/iceland1998.html (4.6.2007).

3 *Ibid.*

Convention on Human Rights and the International Covenant on Civil and Political Rights.[4]

The Constitution of 1849 brought mostly the protection of civil and political rights, and about half of the rights connected with personality and life of a person. The latter phenomenon resembles to some extent the Constitution of Iceland of 1874. The rights adopted at that time were the following: the right to be brought before a judge within 24 hours; the right to freedom of the individual; the inviolability of one's dwelling and the right of property. It assured also freedom of expression, freedom to form associations, and freedom of assembly. According to the Constitution, everyone had the right to public assistance and free schooling. The courts achieved independence and the constitutional reform in 1915 introduced the universal suffrage as well. The new constitution of 1953 expanded the list of human rights to twice its size. Most of them covered economic and social rights, although some personal rights like fair trial and liberty were extended.[5]

The new Swedish Constitution was adopted in 1975. This fact explains why there are more human rights guaranteed in Sweden than in Denmark and Norway. The Constitution does not contain a separate bill of rights, but consists of separate acts: the Instrument of Government of 1974, the Act of Succession passed in 1810 and amended in 1979, the Freedom of the Press Act of 1949 and the Freedom of Expression Act of 1991.

Today, the Instrument of Government provides protection for civil, political, social and cultural rights, as well as for freedom of the press. The Instrument of Government from 1719 and 1720 represents Europe's first written Constitution. Before the new Instrument of Government the old version from 1809, valid until 1974, contained no human rights provisions at all. They were only found in the Freedom of the Press Act (Peaslee 1968: 847–872).[6]

At the end we can assume that the constitutions of the four countries represent the pre-French revolutionary understanding of constitutionality. This phenomenon can be detected from their historical evolution. Even nowadays the constitutions of the Nordic countries stress mostly the operating of the state institutions and civil rights, and do not set human rights at the first place.

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4 Human Rights Instruments, Core document forming part of the reports of States parties: Denmark, 29 June 1995. HRI/CORE/1/Add.58. At: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3de10cf40 (3. 6. 2007).

5 Constitution - Denmark – Official website of Denmark: http://www.denmark.dk/en/menu/AboutDenmark/GovernmentPolitics/Constitution (4. 6. 2007).

6 Human Rights Instruments, Core document forming part of the reports of States parties: Sweden, 27 May 2002. HRI/CORE/1/Add.4/Rev.1.
At: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3de0152b4 (3. 6. 2007)

3. ROMANIC GROUP

BELGIUM, FRANCE, ITALY, LUXEMBOURG, MONACO, THE NETHERLANDS

The group to be presented and analysed in the following pages consists of 6 European countries: France, Italy, Belgium, the Netherlands, Luxembourg and Monaco. One republic and one of the remaining great powers, one Mediterranean republic, one kingdom and parliamentary federal republic under constitutional monarch and three constitutional monarchies: one kingdom, one grand duchy and one principality. At first glance, it might seem that these countries have very little in common considering their different political systems, different historical experiences, different religious and ethnic structure of population and other relevant factors. However, a comparative analysis of the constitutional provisions regarding human rights has revealed several similarities between the countries in this group.

We cannot understand contents of a particular constitution without knowing the circumstances in which its provisions were written. We will therefore begin our analysis with an overview of the historical context of drafting and adopting of national constitutions in the discussed countries. The constitutional history of these six countries began in the last years of the 18th century and continued into the 19th century, when all these countries, with the exception of Monaco, promulgated their first national constitutions. Although these first constitutions were amended and revised several times in the last two centuries, they still provided the foundations for the present-day constitutional arrangements regarding human rights.

One of the first relevant documents on human rights is the French Declaration on the Rights of Man and Citizen, which was approved by the National Assembly on 26 August 1789 and is still considered to be one of the milestones in the evolution of the idea of human rights. Although the Declaration had no binding force, it had a huge influence not only on further development of the theory of human rights, but also on further relevant documents regarding human rights. The first national constitution, adopted in these countries, was the French Constitution, promulgated in Paris on 3 September 1791[7] (Ciccoteli in Blaustein and Sigler 1998: 81). This document legalised the French revolution and incorporated the Declaration on the Rights of Man and Citizen of 1789 – giving constitutional and

7 According to Ciccoteli (1988: 81) was the French Constitution in 1791 the world's third national constitution, following the one drafted in Philadelphia by four years and the Polish Constitution by four months. While it was in existence less than a year, it was at the time of its adoption the most important and influential constitution in history (Ciccoteli in Blaustein and Sigler 1988: 81).

legal effect to this relevant document (*ibid.*). The Constitution included several other human rights that were not mentioned in the Declaration although they nowadays represent the common core of human rights, e.g. the right to vote, freedom of assembly, the right to petition, freedom of movement. The Constitution also contained the first constitutional provision on economic and social rights[8] (*ibid.*). Despite several restrictions on these rights[9], the constitution incorporated more individual rights than even the U.S. Constitution of 1787 and other important contemporary documents (Ciccoteli in Blaustein and Sigler 1988: 82). The formulation of certain human rights in this constitution even exceeded most modern formulations.[10] Although this document was followed by two other revolutionary constitutions, it is evident, that the French Constitution from 1791 was at that time undoubtedly the most fundamental and far-reaching constitutional document regarding human rights, and has encompassed all the important theoretical and practical ideas of a widespread debate on this subject that took place in France. Its great influence can already be felt in the subsequent French constitution, also called Montagnard Constitution, adopted two years later, in 1793. An integral part of this constitution was also the new Declaration on Rights of Man and Citizen, which at first glance might seem similar to the Declaration from 1789. However, closer reading reveals that some provisions on human rights were taken from the Constitution of 1791, for example the right to assembly, the right to access to public office, the right to petition and provisions regarding the public system of education. This constitution was followed by the last revolutionary French Constitution, adopted in 1795.[11] It remained valid until Napoleon came to power in November 1799 and ended the French revolution.

At the very end of the 18th century France began another chapter of its history. Revolution was defeated and Napoleon began fulfilling his great ambitions – to build a great French empire across Europe. These military conquests and invasi-

8 Title I, section 3: »There shall be created and organized a general establishment of public relief in order to bring up abandoned children, relieve infirm paupers, and provide for the able-bodied poor who may not have been able to obtain it for themselves«.

9 The rights announced in the Declaration were guaranteed to all citizens, but political privileges such as voting and office holding were accorded to only those classified as 'active'. To achieve the preferred classification, a person had to be property owner or a taxpayer (Ciccoteli in Blaustein and Sigler 1988: 82).

10 For example the provision on freedom of speech and press surpasses the protection of the First Amendment to U.S. Constitution. Title I sets forth those »natural and civil rights« that the government was to guarantee. Pursuant to these rights, Section 3 reads: »Liberty to every man to speak, to write, to print and publish his ideas without having his writings subjected to any censorship or inspection before their publication.« (Ciccoteli in Blaustein and Sigler 1988: 82).

11 This constitution also contained provisions on human rights in the Declaration of Rights and Duties of Man and Citizen. Although this document was rather conservative and restrictive regarding human rights and has linked rights with several duties, we can still recognize great influence of the human rights provisions of the Constitution of 1791.

ons reached also all countries in this group – they became a part of the French territory and fell under the authority of French rulers. Furthermore, together with political and military supremacy France also spread its values, ideas, concepts, theories etc. Revolution has indeed ended, but ideas and values of the revolution remained very much alive, including the fundamental and – at the time – very radical concept of human rights. All of the countries in the group were influenced by this revolutionary concept of human rights as well, and subsequently included provisions on human rights in their first national constitutions.

One of the several countries that were influenced by these ideas was certainly the Netherlands. The country was invaded by the French revolutionary troops in 1795 and remained under the political and military predominance of France until 1813, when the Netherlands regained its independence (Alkema in Chorus 1999: 292). Alkema (*ibid.*) claims that all constitutional documents, adopted in this period, introduced revolutionary and Napoleonic ideas. Its first national constitution was adopted two years later, in 1815. This constitution incorporated several fundamental human rights: the right to petition, the protection of property and home, and freedom of the press (Alkema in Chorus 1999: 293).

But radical ideas and values of the French revolution reached other neighbouring countries as well. Like the Netherlands, Belgium was invaded and annexed by France in 1795. Yet with the defeat of Napoleon's army Belgium was separated from France and made part of the Netherlands by the Congress of Vienna in 1815. Only fifteen years later, on 4 October 1830 Belgium won its independence from the Dutch as a result of an uprising of the Belgian people.[12] The first national Belgian constitution was promulgated only few months later, on 7 February 1831.[13]

Similar fate of subjection to the domination of Revolutionary France befell Luxembourg. During Napoleon's reign Luxembourg became a part of the newly formed United Kingdom of the Netherlands, along with Belgium, in 1814. As a result of the Congress of Vienna in 1815, the country became personal property of the King of Netherlands. Luxembourg gained its independence from the Netherlands in 1839, but the personal union between Luxembourg and the Netherlands lasted until 1890.[14] Luxembourg promulgated its first constitution on 17 October 1868.[15]

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12 Federal portal of Belgian government: http://www.belgium.be/eportal/application?origin=navigationBanner.jsp&event=bea.portal.framework.internal.refresh&pageid=indexPage&navId=2452 (20. 6. 2007).

13 International Constitutional Law - Belgium Index: http://www.oefre.unibe.ch/law/icl/be__indx.html (20. 6. 2007).

14 Visit Luxembourg: http://www.visitluxembourg.com/history.htm (4. 6. 2007).

15 International Constitutional Law -Luxembourg Index: http://www.oefre.unibe.ch/law/icl/lu__indx.html

Italy was another country that experienced the French domination in the years of the French revolution, although Italian Peninsula was at that time still divided into different states. Italy attained political unification by official proclamation of the Kingdom of Italy in 1861. The new Kingdom was eager to stress the continuity with the previous Kingdom of Sardinia, and that is why their Charter Statuto Albertino (1848) was retained and became the first national constitution of unified Italy. This document (alongside others) provided for the protection of life, liberty and property as "sacred rights" (Monateri and Chiaves in Lena and Mattei 2002: 33).

The last country in this group also became a part of the French territory in the time of the French revolution. In 1793 the Principality Monaco was attached to the territory of the French Republic under the name of Fort Hercules. In 1814 the Grimaldis of Monaco were re-invested with all their rights. Since then Monaco was constantly under the protection of France or Italy. Its first national constitution was adopted on 5 January 1911 under Prince Albert I.[16]

The historical perspective of the analysis has clearly shown that all countries in the group have been under the political authority of the revolutionary and Napoleonic France, and have therefore been strongly influenced by contemporary ideas present in French public debates. Some of the elements, which contributed to the spread of these ideas, were unquestionably (aside from geographic closeness) also the great similarity of the languages spoken in these countries and the widespread use of the French language across these countries. Moreover, France spread its ideas in revolutionary and Napoleonic times through the Code Civil from 1804, which "was the civilian expression of the Declaration of Human Rights of 1789 and thus praises three main values: Equality, Freedom and Individual Willpower." (Delplanque 2004: 3). This French Civil Code – also called Code Napoleon – became the leading code of the *Romanic legal family*[17] and had an extraordinary influence in many neighbouring regions, including all countries in our group. Zweigert and Kötz (1998: 101) have emphasised that "between 1804 and 1812 the Code Civil came into force in many regions as the result of French military expansion eastwards under the revolutionary regimes and later under Napoleon; they were later to win or win back their sovereignty, but their law retained the impress

(20. 6. 2007).

16 Government of Principality of Monaco - History of Monaco: http://www.gouv.mc/devwww/wwwnew.nsf/1909!/x2Gb?OpenDocument&2Gb (4. 6. 2007).

17 Zweigert and Kötz (1998: 68-69) define Romanic legal family as legal family that consists of the following countries: France as a leading country and all the systems which adopted the French Civil Code (including Belgium, Luxembourg, the Netherlands, Italy and Monaco) along with Spain, Portugal and South America.

of the ideas of the French Code."[18] Strong influence of the French ideas can also be seen in the first national constitutions of other countries in the group that were promulgated in the first decades of the 19th century. Namely, all the countries included several provisions regarding human rights in their first constitutions, presumably still under the influence of the revolutionary and at the time quite radical concept of human rights.

3.1 Constitutional Profile

The aforementioned features of the constitutional history of all the countries in the analysed group have revealed that these countries share similar historical experience, geographic and linguistic closeness and the legal family. Furthermore, similarities can also be found by comparing constitutional provisions in the presently valid constitutions.

During the analysis of the constitutional provisions on human rights, the emphasis has been placed especially on the following categories of human rights which - when compared to the other analysed groups - stand out most clearly:

- right to life, freedom from death penalty, right to dignity and honour, freedom from torture and prohibition of inhuman and degrading treatment and punishment,
- general provisions relating to criminal law,
- right to petition,
- right to compensation,
- freedom of movement, extradition/expulsion, freedom to choose residence and right to asylum,
- special protection of women, mothers, minors, orphans and disabled.

The following table demonstrates the presence or absence of these categories of human rights in all of the constitutions in the group.

18 More on influence of the Civil Code from 1804 in other European and American countries in Zweigert and Kötz (1998: 98-118).

Table 2: Categories of constitutional human rights provisions in the Romanic group that stand out in relation to other groups[19]

Country	Life		Dignity	F. from torture	Honour	Prov.- Crim. law	*Nullum crimen*	*Ne bis in idem*	Petition
	R	ADP							
France	-	-	-	-	-	+	+	-	-
Luxemb.	-	+	-	-	-	+	+	-	+
Belgium	-	+	-	-	-	+	+	-	+
Nether.	-	+	-	-	-	-	+	-	+
Italy	-	+	-	-	-	+	+	-	P
Monaco	-	+	-	+	-	+	+	-	+

Compen.	Move.	Extradition/ expulsion	Asylum	F. to choose residence	Special protection				
					women	mothers	Minors	orph.	disabled
-	-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-	-
-	+	+	-	-	-	-	-	-	-
+	+	+	+	+	-	+	+	-	+
-	-	-	-	-	-	-	-	-	+

Another important characteristic of the analysed constitutions in this group is an apparent emphasis on constitutional provisions regarding human rights of the first generation and absence of the provisions regarding rights of a more recent date, especially of the so-called third generation of human rights. This is also one of the most important distinguishing characteristics of the Nordic group, which is in stark contrast to the Germanic group, where all generations of human rights are adequately represented.

Further special characteristic, which distinguishes this group from other analysed groups, is the absence of the right to life and other human rights connected with a person's life and personality, such as the right to personal and moral integrity, the right to dignity and honour, freedom from torture and inhuman and degrading treatment and punishment, the right to the development of personality, prohibition of slavery and servitude and prohibition of forced and compulsory

19 The abbreviations used in the table are explained in the Appendix I, below.

labour.[20] It is a very interesting paradox that the right to life, which presupposes all other human rights, is not mentioned in any of these constitutions, yet at the same time all of them have (with the exception of France) included provisions regarding prohibition of death penalty.

Furthermore, we have noticed that economic, social and cultural rights are represented to a lesser extent than political human rights. Only some basic social rights (such as the right to social security and the right to health care) and some basic economic rights to work and property are mentioned. Human rights connected to the private life of an individual, such as the right to personal and family life, the right to inheritance and the right to family and marriage, are also predominantly absent from the analysed constitutions in this group. Provisions regarding human rights of the third generation and the rights of special groups are mostly exceptions in these constitutions and are not regulated at constitutional level.[21]

3.2 Hypothesis

The constitutional profile of the group has indicated that the countries of the Romanic group give priority especially to human rights of the first generation that have been a relevant part of the first national constitutions. The countries in this group have therefore decided to follow the tradition – like the countries of the Nordic group – instead of the contemporary international law and important international documents on human rights (which were the exemplar for the countries of the Germanic group).

On the basis of the aforementioned characteristics of this analysed group we set the following hypothesis: **The Declaration on the Rights of Man and Citizen from 1789, the French Constitution promulgated in 1791 and the so-called Montagnard Constitution of France adopted in 1793 are among the most important documents that influenced the inclusion of certain categories of human rights in the present constitutions of the Romanic group**. We would like to stress that the verification of the hypothesis will be limited only to certain categories of human rights that - when compared to other analysed groups - stand out most clearly.

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20 This is also a typical characteristic of the Nordic group, however, contrary to Nordic constitutions Romanic constitutions did not include only the rights which are closely connected to person's right to life and his personality but also general provisions regarding equality and relating to criminal law, *nullum crimen* and other similar personal rights.

21 The exceptions are the constitutional provisions regarding special protection of mothers, minors and disabled in Italian present constitution and provisions regarding special protection of disabled in the present constitution of Monaco.

After a careful analysis of the French historical constitutional documents we formed the following table that helped us to verify the hypothesis:

Table 3: Categories of human rights in The Declaration on the Rights of Man and Citizen (1789), the French Constitution (1791) and the Montagnard Constitution (1793) [22]

Document/ year	Life		Dignity	F. from torture	Honour	Prov.- Crim. law	Nullum crimen	Ne bis in idem	Petition
	R	ADP							
1789	-	-	-	-	-	+	+	-	-
1791	-	-	-	-	-	+	-	-	+
1793	-	-	-	-	-	+	+	-	+

Compen.	Move.	Extradition/ expulsion	Asylum	F. to choose residence	Special protection				
					women	mothers	Minors	orph.	disabled
-	-	-	-	-	-	-	-	-	-
-	+	-	-	-	-	-	-	-	-
-	-	-		-	-	-	-	-	-

We began our comparative analysis with the preliminary assumption that the Declaration on the Rights of Man and Citizen from 1789 laid foundations for all future constitutional provisions regarding human rights in the present French constitution, and also influenced the inclusion of human rights provisions in the constitutions of other countries in the group. The most obvious evidence of the great influence of the Declaration from 1789 on the inclusion of human rights provision in the present French constitution is the fact that the Declaration from 1789 became an integral part of the present French constitution from 1958. Furthermore, there are only several human rights provisions that are included in the valid French constitution but cannot be found in the Declaration: equal right to vote, the right of access to public office and administration of public affairs, the right to vote and freedom of association.[23] Further analysis revealed that although later revolutionary constitutions from 1791 and 1793 extended the list of human rights, these added rights have not found their place in the present French consti-

22 The abbreviations used in the table are explained in the Appendix I, below.

23 All of these human rights can be found – with the exception of freedom of association – in the revolutionary constitutional documents from 1791, 1793 and 1795. This rather surprising finding could lead us to the conclusion that all provisions regarding human rights that are part of the present French constitution have their origins in French revolution 1789. The list of human rights in the French constitution therefore remained unchanged for the last two centuries.

tution. This certainly proves that the mentioned revolutionary constitutions did not have such an influence on the present French constitution as the Declaration from 1789. The founding fathers of the present French constitution therefore gave priority to their first relevant document on human rights.

On the grounds of a partly confirmed assumption and of the fact that France had a leading role in the neighbouring regions in the period of the French revolution we further assumed that the Declaration from 1789 also had a great influence on the inclusion of human rights provisions in the constitutions of other countries in the group. However, the results of this analysis were rather surprising. The comparative analysis of the chosen French historical documents and the present constitutions of other countries in the group revealed that, beside the Declaration from 1789, the revolutionary constitutions from 1791 and 1793 also had a great influence on the inclusion of human rights provisions in other constitutions. This characteristic can especially be seen in the case of certain categories of human rights that stand out in the most apparent way. It is evident from the tables above that the inclusion of a certain human right in the present constitutions of other countries in the group is strongly correlated to whether or not this right could be found in any of the revolutionary constitutions from 1791 and 1793. The best example of such an influence of other revolutionary constitutional documents is the right to petition. The provisions regarding the right to petition can be found in the present constitutions of Luxembourg (Art. 27), Belgium (Art. 28), the Netherlands (Art. 5), Italy (principle in Art. 5) and Monaco (Art. 31). The Declaration from 1789 does not mention the right to petition and that is presumably one of the reasons why we cannot find the right to petition in the present French constitution. However, the French constitutions from 1791 and 1793 did include the right to petition; it was stipulated in Article 7: »liberty to address individually signed petitions to the constituted authority« in the Constitution from 1791, and repeated in Article 32: »the right to present petitions to the depositories of the public authority cannot in any case be forbidden, suspended, nor limited« in the Declaration on Rights of Man and Citizen in Montagnard Constitution from 1793. The right to petition was therefore included in the present constitutions of the countries in the group – with the exception of France – although it was not mentioned in the Declaration from 1789. Another similar example is the right to assembly[24], as are for instance general provisions regarding criminal law, *nullum*

24 The right to assembly can be found in the constitutions of Luxembourg (Art. 25), Belgium (Art. 26), the Netherlands (Art. 9/1), Italy (Art. 17/1) and Monaco (Art. 29) although this human right was not included in the Declaration from 1789 and subsequently in present French constitution. However, the right to assembly found its place in the Constitution from 1791 (Art. 6) and in the Constitution from 1793 (Art. 7). This confirms the great influence of other revolutionary constitutional documents beside the Declaration from 1789.

crimen, and to a certain extent also freedom of movement.[25] These examples confirm the great influence of other revolutionary constitutional documents from 1791 and 1793 on the inclusion of certain human rights provisions in contemporary constitutions of all the countries in the group.

These findings are also relevant in explaining the absence of certain human rights: if a certain human right did not find its place in the analysed historical documents, then a great possibility exists that this right is not included in the list of human rights in the valid constitutions of the Romanic group. Such rights are the right to life, the right to dignity, the right to honour, freedom from torture and inhuman and degrading treatment and punishment, *ne bis in idem*, the right to compensation, freedom of movement, provisions regarding extradition/expulsion, freedom to choose residence. The only exceptions that do not follow this pattern are human rights of a more recent date, such as the right to asylum, prohibition of death penalty and special protection of certain groups such as women, mothers, minors, orphans and disabled.

On the grounds of the above findings and proven assumptions we can confirm our primary hypothesis that The Declaration on the Rights of Man and Citizen from 1789, the French Constitution promulgated in 1791 and the so-called Montagnard Constitution of France adopted in 1793, have indeed had some influence on the inclusion of certain categories of human rights in the present constitutions of the Romanic group. The Declaration from 1789 has especially influenced the inclusion of human rights provisions in the present French constitution, while the other two revolutionary constitutional documents from 1791 and 1793 present important references for the inclusion of human rights categories in the present constitutions of other countries in this group. We may therefore conclude that the countries of this group had given great priority to the earliest constitutional traditions when deciding on the list of human rights to be included in their contemporary constitutions.

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25 Freedom of movement is mentioned only in the Constitution from 1791, which in Art. 4 foresees the »liberty to every man to move about, to remain, and to depart without liability to arrest or detention, except according to the forms determined by the constitution«. Today this human right can be found in the constitution of the Netherlands (Art. 2/4) and the constitution of Italy (Art. 16/1, 2 and 35/4).

4. GERMANIC GROUP

ANDORRA, BULGARIA, CZECH REPUBLIC, ESTONIA, FINLAND, GERMANY, GREECE, HUNGARY, LATVIA, LITHUANIA, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN AND SWITZERLAND

As we can see from the tables, this is the largest group in our analysis. The countries of this group span from the new democracies of Eastern Europe to the old ones in Western Europe. They are not connected geographically[26] nor did their constitutions develop in the same historical context. Yet, however surprising it might seem, they show amazing similarities when it comes to comparing constitutional provisions on human rights.

There are far too many unknown factors and accidental ones that we would have to take into account when explaining why this group shows particular similarities (or differences when compared to other groups of families of law). This is why we will try to explain only the most obvious ones.

First of all, at one or the other point in their history, all of these countries had some linguistic or historic ties with Germany and were hence under some influence of its legal tradition. The German Civil Code (from as early as 1896), for instance, has influenced even the earliest codifications of the Soviet Civil Law. Afterwards, both via the Soviet Union and directly, the German influence spread through most of the legal systems in the formerly socialist countries of Eastern and Central Europe. Even Greece has based its Civil Code on the German model (Bogdan 1994: 197). As we shall strive to prove later on, these German influences can be seen in the sphere of constitutional law as well, or – the subject of our analysis – in the provisions on human rights. This said, the name of the group comes quite naturally to mind: the *Germanic family of law.*

Secondly, we could try to explain the existing similarities with the time-frame of adoption of their constitutions. A large portion of the states from our group has fairly new constitutions. The majority of them (i.e. the countries of Central and Eastern Europe) underwent a dramatic constitutional development after the fall of communism. Each country was a specific case: some countries amended existing communist constitution (e.g. Hungary); some countries initially amended existing communist constitutions, then prepared and adopted their new democratic constitutions (e.g. Poland, Slovenia); some countries replaced their

26 Nevertheless, we might say that the majority of the countries from our group forms a so-called belt or the eastern border of the EU (from Finland on the north to Greece on the south), with some countries from the Central Europe (Germany and Switzerland) and the three 'guarding' the Western shores of the EU (the Pyrenees Peninsula).

communist constitution with their pre-World War II democratic constitutions (e.g. Estonia) (Žagar and Novak 1999: 179). In the case of Latvia, which is in fact the oldest constitution in our group (1922), most of the provisions on human rights were added in the new chapter in the Constitution of October 1998.[27]

In addition, constitutions of Andorra (1993), Finland and Switzerland (both 1999) are recently adopted. Maybe the most surprising one of all is Finland, since one might expect it to be included into the Nordic group. The original legal system of Scandinavian countries is based on the German legal tradition; however, it has also developed under the strong influence of different national traditions (Ring 1999: 5).

Only Germany (1949), Greece (1975), Portugal (1976) and Spain (1978) from our group have fairly old constitutions. We could explain the similarities with a clear tendency towards '*de jure* recognition' of the primacy of international law and incorporation of a large number of human rights provisions directly into their constitutions by the fact that all of these states were either former aggressors or have a totalitarian past. Germany, for instance, showed the attempts of returning to the pre-Nazi Rechststaat tradition, thus making the Bill of Rights of the Weimar Constitution the very beginning of its new Bonn Constitution, placing it in Chapter 1 (Glendon 1994: 69).

The Weimar Constitution from 1919 has been widely proclaimed as one of the most democratic constitutions of the world – it was among the first to include universal adult suffrage along with a generous formulation of human rights. Individual rights set in this constitution included free emigration, the right to form and join unions and the right to property, freedom of contract and the right to inheritance. Comprehensive insurance for medical needs is also provided throughout one's lifetime[28] (Blaustein and Sigler 1988: 357–358).

We should also mention Germany's Frankfurt Constitution of 1848 and its importance regarding the recognition of human rights. Blaustein and Sigler (1988: 358) state that the civil liberties included into the Frankfurt Constitution soon became an essential part of the constitutions of the German states, although they were not included in a national German constitution until the Weimar Constitution (1919). Section VI of this Frankfurt Constitution is entitled 'The Basic Rights of the German people'. Paragraph 130 of this section is designed as a preamble to the objectives of the framers: »The following basic rights are to be guaranteed to the German people. They are to serve as the norm for the consti-

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27 The Chapter VIII which deals with the fundamental rights of the citizens.

28 Art. 163: "Every German must be afforded an opportunity to gain his livelihood by economic labour. Where no suitable opportunity to work can be found for him, provision shall be made for his support."

tutions of the individual German states, and no constitution or legislation of an individual German state may ever abolish or limit them« (Blaustein and Sigler 1988: 202). The list of these rights went beyond the listings in the U.S., Polish and French Constitutions, which exemplified the understanding of human rights at the end of the eighteenth century. These additional rights included the right to free public education, the right to civil marriage, freedom of emigration and the right of any citizen to engage in any form of occupation. This constitution was also the first to limit the death penalty; capital punishment was limited to cases where prescribed by martial law or allowed by maritime law in cases of mutinies. The German Constitution of 1848 also abolished pillory, branding and corporal punishment (Blaustein and Sigler 1988: 202).

As far as the Central-Eastern European countries are concerned, they tried to compensate the typical repressive characteristics of the former communist regimes, for instance, censorship, the prohibition on leaving the country, and drastic penalties (including capital punishment) for political crimes (Bogdan 1994: 205–206). What is more, in order to join the European Union, new states needed to fulfil the economic and political conditions known as the 'Copenhagen criteria'[29], and earlier, in the case of the former Yugoslavia, also the criteria for modern democracy and preconditions for international recognition of new states, set out by the Badinter Commission[30] (Pellet 1992). Among both of these sets of criteria, stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities were the preconditions for joining 'the privileged club'.

In explaining how these similarities in our Germanic group came about, it is also important to point out that the Weimar Constitution was a model for Estonian Constitution from 1920. The provisions on human rights in the Estonian Constitution are similar to those in the Weimar document. But it goes even further. Where the German Constitution of 1919, for instance, protects the right to form and join unions, the Estonian Constitution of 1920 protects the right to strike with no exceptions for government employees. It is the protection of minorities, however, that it is best known and most praised for. Racial, ethnic, and linguistic minorities are all given special rights (Art. 20, 21) (Blaustein and Sigler 1988: 389).

There are only two countries in our Germanic group that are exceptions in themselves, namely Portugal and Spain which would presumably have to fall into the Romanic law group rather than the Germanic one. Yet after comparing the human rights provisions, we saw that the two countries show more similarities

29 EU Enlargement: http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm (28. 5. 2007).

30 More on the Badinter Commission see Pellet (1992).

with the latter one. This can in part be explained with aforementioned tendency to conform to international law after the period of totalitarianism when human rights in those countries (as well as in Germany) were the last on the political agenda.

4.1 Constitutional Profile

The countries' constitutions of the present, and as we could see, resulting from the continuity as well as discontinuity, thus show quite a few similarities. Most telling were the following categories of our analysis which – when compared to other groups (of 'families of law') – stand out in the most apparent way (see table in Appendix 1):

- right to physical and mental integrity, dignity, honour and freedom from torture,
- right to fair trial, petition, compensation, legal remedy,
- right to creativity and free enterprise; right to form trade unions and right to strike,
- freedom of movement, residence and freedom from extradition and expulsion,
- right to education and wide range of special protection provisions, e.g. special protection of women, disabled etc.,
- and, especially, the third generation of rights (rights of children, right to sound environment and rights of minorities).

We have to mention another peculiarity, which – as it turned out – is typical for the Germanic family of law. As already pointed out, Germany, Greece, Spain and Portugal as the former aggressors or states with a totalitarian past have tried to observe the rules of international law, which also served as a kind of 'pledge at the highest possible level' of fidelity to international legal values, also with their constitutional commitment (Vereshchetin 1996). Article 28(1) of the 1975 Greek Constitution,[31] Article 96 of the 1978 Spanish Constitution,[32] Article 8 of the 1976

31 Art. 28/1 of the Greek const.: »The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity«.

32 Art. 96/1 of the Spanish const.: »Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the

Portuguese Constitution[33] and also corresponding articles in some other constitutions may also be viewed as a product of the reaction by the legislature and public of these countries to their former totalitarian or authoritarian regimes, which had quite often blatantly ignored and betrayed international obligations and common human values (Vereshchetin 1996).

We see this tendency of recognising the supremacy of international law also in other Central-Eastern European countries and, in comparison with other families of law, the number of such constitutional provisions clearly stands out. Moreover, we could presume that countries in our group have also incorporated many of the provisions on human rights from different international treaties directly into their constitutions, so as to "doubly" conform or to recognise the importance of the protection of human rights not only at the international level but also in the domestic law itself.

4.2 Hypotheses

1. We have noticed that the following categories, which clearly stand out, are the second generation of human rights: the right to education, work, social security, health care, unemployment, special protection (women, mothers, minors, orphans and disabled) and special protection of family and parenthood. Their inclusion could be the result of: a) on the one hand the influence of important international treaties and documents concerning human rights, b) and on the other, the fairly late adoption of the constitutions of states from our group.

a) International community started to show an unprecedented concern for human rights especially after the Second World War, which is reflected in the second paragraph of the Preamble to the Charter of the United Nations. This is almost the first reference to human rights in an international treaty (Merrills and Robertson 2001: 1–22). The second paragraph expresses the determination of all peoples of the UN:

manner provided for in the treaties themselves or in accordance with the general rules of international law«.

33 Art. 8 of the Portuguese const.: »1. The rules and principles of general or customary international law are an integral part of Portuguese law. 2. Rules provided for in international conventions that have been duly ratified or approved, shall apply in national law, following their official publication, so long as they remain internationally binding with respect to the Portuguese State. 3. Rules made by the competent organs of international organisations to which Portugal belongs apply directly in national law to the extent that the constitutive treaty provides«.

> *»...to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small«.*

A similar account to human rights was given in the Statute of the Council of Europe in 1949, Article 3 of which states:

> *Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the council as specified in Chapter 1.*

This meant that the maintenance of human rights and respect for the rule of law were not merely the objectives of the Council of Europe but were actually made a condition of membership. In 1961 we can see the next important development related to the »generalisation of social democracy«, or in other words, to what are now known as economic and social rights – namely the creation of The European Social Charter which lists nineteen economic and social rights and principles (Merrills and Robertson 2001: 1–22), soon to be followed by the two International Covenants, covering not only before mentioned rights but also civic and political ones.

b) The majority of the countries' constitutions from our group (9 out of 15) have been drafted and adopted in the last decade of the previous century, in the time when economic and social rights had already gained a firm foothold in international law and human rights doctrine. We hence presumed that the new constitutions have looked up to these principles of the international community and also included them into their constitutions. We have analysed the following international documents to see whether human rights provisions, which stand out in our group of countries, have their counterparts in the most important international treaties: Universal Declaration of Human Rights (1948), International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and European Social Charter (1961). The analysis showed, (see Table 4 below) that the categories of the second generation of human rights (Education, Work, Social security, Health care, Unemployment, Special protection provisions and Special protection of

family and parenthood) indeed exist in at least 2 (the right to education and unemployment provisions) or more international treaties (the rights to work, health care and social security, and both categories of the special protection provisions). Notwithstanding the almost absent special protection provisions regarding women, orphans and disabled in international treaties, we can see the endeavours of the Germanic group to fill the void, especially with the remarkable number of provisions for the protection of the disabled.

While other groups of families of law might include only some human rights provisions of the second generation – the most prevalent are the rights to work and education –, the Germanic group is the only one that covers the complete set of this generation of rights and does so bountifully.

Table 4: Categories of human rights in selected international documents[34]

Charter	Education				Work				Social security	Health Care	Unemploym.
	R	Compuls.	Free	Priv. schools	R	Payment	Free choice	Rest			
UN Decl	+	+	+	-	+	+	+	+	+	+	+
EUR Conv	-	-	-	-	-	-	-	-	-	-	-
EUR S.Ch	-	-	-	-	+	+	-	+	+	+	+
ICCPR	-	-	-	-	-	-	-	-	-	-	-
ICESCR	+	+	+	+	+	+	+	+	+	+	-

Charter	Special protection					Family and parenthood
	Women	Mothers	Minors	Orphans	Disabled	
UN Decl	-	+	+	-	-	+
EURConv	-	-	-	-	-	-
EUR S.Ch	-	+	+	-	+	+
ICCPR	-	-	-	-	-	+
ICESCR	-	+	+	-	-	+

2. We presume that the following provisions on human rights are a direct result of trying to heal the past wounds, where the rules of international law were left disregarded and human rights practices very questionable, to say the least: the right to dignity and honour, trade union rights, freedom of movement and creativity, free enterprise and prohibition of and freedom from extradition/expulsion.

Most of the countries in our group are young democracies which – along with Germany, Greece, Spain and Portugal – were in the hands of former authoritarian or totalitarian regimes, some of them till the end of the Second World War, some even longer than that. Greece, for example, saw another military putsch in 1967, after the one which installed the dictatorial regime under G. Papadopoulos, which lasted until 1974, when the military regime resigned and the new constitution was adopted in 1975. In Spain General Franco came to power in 1939 and stayed there until his death in 1975; democracy returned with the adoption of the new consti-

34 The abbreviations used in the table are explained in the Appendix I, below.

tution in 1978.[35] Portugal saw the beginning of the military regime taking over the parliamentary democracy already in 1926, followed by the totalitarian military regime of Salazar (1932–1968) which ended with the first democratic elections in 1975, with the new constitution following shortly after, in 1976 (Leksikon Cankarjeve založbe 2000).

After the fall of these undemocratic regimes most of these countries set out to reaffirm human rights at the constitutional level, especially the rights which were deprived during totalitarianism, namely dignity and honour of persons, freedom of movement, creativity, freedom from expulsion etc. The second hypothesis can in part be validated also with our argument for the first hypothesis, namely the potential influence of important international human rights treaties on the later constitutions. To give one example: in Protocol 4[36] (1963) of The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) four additional rights and freedoms were added: freedom from imprisonment for civil debt, freedom of movement and choice of residence; the right to enter one's own country and the freedom from expulsion; and the prohibition of the collective expulsion of aliens. Most of these can be found in constitutions of the countries in our group.

3. We can also notice the presence of the third generation of human rights in our group, namely the categories 'rights of children, sound environment and rights of minorities'. We presume that, again, this could be the result of the late adoption of the constitutions and the possibility of inclusion of certain rights, newly recognized at international level.

The international community has ratified numerous conventions and declarations (which include the so called third generation of human rights) before the majority of the constitutions from our group were adopted. As far as the rights of children are concerned, the most detailed and developed is certainly the Convention on the Rights of Children from 1989. In the field of the protection of environment, there are quite a few of such declarations, for example: the United Nations Declaration on the Human Environment of 1972 (also known as the Stockholm Declaration), the Hague Declaration from 1989 and the United Nations Declaration on Environment and Development of 1992 (known as the Rio de Janeiro Declaration).

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35 International Constitutional Law – Spain Index:http://www.servat.unibe.ch/law/icl/sp__indx.html (28.5.2007).

36 Protocol 4 to The Convention for the Protection of Human Rights and Fundamental Freedoms. At: http://conventions.coe.int/Treaty/en/Treaties/Html/046.htm (28.5.2007).

The tradition of the protection of minorities is considerably longer and dates back already to the beginning and turn of the 19th century, when provisions on minority protection can already be found in the conclusions of the Congress of Vienna in 1815,[37] the Congress of Berlin in 1878[38] and Paris Peace Conference in 1919, where the whole system of minority protection gets its legal guarantee in the League of Nations. However, it is in the 20th century that we see an unprecedented concern for the protection of minorities, especially after the World War II. Many international instruments have included provisions of minority rights, for example the UN Resolution on Fate of Minorities from as early as 1949, the International Convention on Elimination of All Forms of Racial Discrimination, the Convention on Prevention and Punishment of the Crime of Genocide, to name just a few. Finally, in 1992, the protection of minorities sees its highest achievement in attainment of both the formation of the High Commissariat for Minorities in Helsinki and its own UN Declaration on the Rights of National, Religious and Linguistic Minorities (Komac 2002: 91–104).

Besides this abundant tradition, new sets of criteria – as already mentioned – were imposed on the new democracies of Central and Eastern Europe in order to join the European Union. We can conclude with great certainty that both the Copenhagen Criteria and the Badinter Commission played an important role in what is today the constitutional recognition of the rule of law, human rights and protection of minorities, which as we saw in most cases greatly surpasses the constitutional protection of other groups of families of law.

5. THE COMMON LAW GROUP

CYPRUS, IRELAND, MALTA

The smallest group in our analysis consists of three seemingly unconnected countries. Ireland, Cyprus and Malta are in truth all island states. Malta lies in the Atlantic Ocean, Cyprus and Malta in the Mediterranean. Again, that can hardly support our contention that there exists some strong link between them. We have to turn to history for an explanation why their constitutions exhibit certain similarities that go beyond mere coincidences. All three countries were – at some point in their history – under the British colonial rule.

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37 It is the first document, which mentions the term 'national minorities' (Komac 2002: 47).

38 The protection of minorities becomes the precondition of successful recognition of new or enlarged states (Komac 2002: 51).

Ireland came under the British rule as early as in the twelfth century, and had for most of its history endured strong pressures aimed at uprooting relatively developed traditional customs and laws. In 1366 Statutes of Kilkenny forbade the use of Irish language, custom or laws and thus effectively severed all ties with the Irish legal tradition. This trend was completed – at least formally – when in 1800 Ireland was fully integrated into the United Kingdom by the Act of Union. After a period of turmoil and following almost seven centuries of British rule Ireland gained independence in 1921. It remained a member of the (then British) Commonwealth until the declaration of a republic in April 1949, when its membership under the Commonwealth rules was automatically terminated. Yet the process of political disassociation had almost no adverse influence on the strong affinity between the British and the developing Irish legal systems. The first Irish constitution adopted in 1922 left the common law system intact. Furthermore, Article 73 of the constitution expressly stated that the laws in force in Ireland at the date of the coming into operation of the 1922 Constitution "shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the '*Oireachtas*', the legislature of the new state.[39] Some of the pre-1922 statutes still remain in force in Ireland to this day.[40] The historical connection that existed between Ireland and the United Kingdom for several centuries has left a deep imprint on the Irish legal system, which is among the most prominent common law systems in the world today.

Malta, on the other hand, became a British colony only after the Napoleonic wars in 1814 when the Treaty of Paris recognised British sovereignty over the island. From that time, Malta remained under the British rule, although the structure of government in Malta changed periodically during the 150 years of the British rule.[41] In 1921, Malta became self-governing while power and responsibility were shared between Britain and Maltese ministers. In 1936, Malta came under colonial regime. Malta was granted independence within the Commonwealth in 1964 and became a republic ten years later, in 1974. Malta remains a member of the Commonwealth to this day. Its legal system combines civil law as well as common law features. The influence of the Roman law and the Napoleonic Code is readily visible particularly in civil law. The English law on the other hand has had some influence on certain areas of criminal law and procedure.[42] Perhaps the most visi-

39 An almost identical provision can be found in the subsequent constitution, which was adopted in 1937 (Art. 50).

40 Guide to Irish Law: http://www.llrx.com/features/irish.htm (3.6.2007).

41 Encyclopaedia of Nations – Malta: http://www.nationsencyclopedia.com/Europe/Malta-HISTORY.html (3.6.2007).

42 Ministry for Justice and Home Affairs – Judicial System (Malta): http://www.justice.gov.mt/judicialsystem.asp (3.6.2007).

ble proof of that is the fact that the presiding judge sits with a jury.[43] As in other common law countries, the office of the judge is held in high respect. A lawyer has to practise as an advocate in Malta for a period of not less than twelve years in order to qualify for appointment as a judge,[44] which is typical for the common law culture, but almost completely foreign to the civil law tradition.[45] But it would be wrong to neglect the impact the English common law has had on the Maltese public law in general, event though the English law was never formally part of the Maltese law.[46]

Cyprus came under the British rule some sixty years later than Malta. It was only in 1878 that Cyprus – then under the Ottoman occupation – was ceded to the United Kingdom. In 1914 the British government proclaimed the island's annexation, which was formally acknowledged by Turkey a few years later, in 1923, by the Treaty of Lausanne.[47] But the British rule was not a peaceful one. A political effort, spanning over several years, finally culminated in the uprising of Greek Cypriots in 1955. The struggle came to a successful end in 1960 when the Zurich-London Agreements granted independence to the island. Cyprus became and remained a member of the Commonwealth. But in spite of the troublesome historical experiences with the British, the common law that was brought to Cyprus remained in force. In a constitutional provision very similar to the one we have pointed out in the Irish constitution, the Cyprus Constitution of 1960 states that »all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law, as the case may be, made under this Constitution, continue in force ...« (Art.188/1). On this basis many of the pre-1960 British statutes still remain in force. The basis of the legal system of Cyprus is thus still the common law and the principles of equity applicable at the time of independence as amended or supplemented thereafter by the Republic's statutes and case law.[48] The influence of the civil law tradition is perhaps most visible in the area of administrative and – to some extent – in constitutional law.[49] However, the common law tradition remains

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43 *Ibid.*

44 *Ibid.*

45 More on position of judge in civil law and common law tradition see van Caenegem (2003: 55-9).

46 Association of the Councils of the State – Tour Europe (Malta): http://www.juradmin.eu/en/eurtour/eurtour_en.lasso?page=detail&countryid=18 (3.6.2007).

47 More on the history of Cyprus see Cyprus Brief Historical Survey: http://kypros.org/Cyprus/history.html (3.6.2007).

48 Human Rights Instruments, Core document forming part of the reports of States parties: Cyprus, 2 July 1993. HRI/CORE/1/Add.28. At: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6adfc0 (3. 6. 2007)

49 *Ibid.*

strong. The prevailing influence of the British law is best illustrated by the fact that the pre-independence laws are still in force and that the courts have to apply the principles of common law and equity (Art. 29(l)(b) of the Courts of Justice Law (Constantinides and Eliades 2007: 1–2).

This short overview demonstrates that all three countries have strong historical and legal ties with the United Kingdom. Today, the legal systems of Ireland, Malta and Cyprus exhibit the typical marks of the common law system. Although a prevailing part of law is codified in all three countries, some important parts of law are still governed by the common law. Even more importantly, lawyers still tend to rely on precedents when they interpret statutory provisions. Thus, the most important source of law remains jurisprudence or case-law. This characteristic alone would justify the fact that the three countries should be treated separately and analysed as a distinct group within the European legal systems.

5.1 Constitutional Profile

Because of the small number of countries that comprise the 'Common law group', it is inherently difficult to outline its constitutional profile with equal certainty as in larger groups. It is also worth pointing out that the Irish constitution was adopted in a rather different time period. Notwithstanding that there are only some twenty years separating it from the Maltese and Cypriot constitutions, these two decades were marked by a considerable leap forward as far as human rights are concerned. Some categories (e.g. *nullum crimen* or *ne bis in idem*) that are consistently covered by the constitutional provisions of the Maltese and Cypriot constitutions are lacking in the Irish constitution. This cannot, however, be attributed to a dissimilar legal tradition, but can be explained by an environment less conscious of the importance of constitutional human rights guarantees.

Nevertheless, we can discern at least two evident features present in all three constitutions that may reflect – as we will try to show – a common tradition and distinguish these three countries from other groups to an important degree. These two features are:

- a rather extensive constitutional regulation regarding fair trial and
- absence of the constitutionally guaranteed right to access to public office.

Table 5: Categories of constitutional human rights provisions in the Common law group that stand out in relation to other groups[50]

Country	Fair Trial					Access to public office
	Public trial	Trial within reasonable time	Independent and impartial tribunal established by law	Presumption of innocence	Rights of accused person	
Ireland	+	-	+	-	+	-
Cyprus	+	+	+	+	+	-
Malta	+	+	+	+	+	-

Other similarity present in all three constitutions is that they all guarantee some rights of religious communities. This can serve as a reminder that simultaneous correspondence in a certain category is not in itself proof of some deeply rooted similarity or shared tradition. It can also be a coincidence, as in this particular case. Malta and Ireland are both predominantly Roman Catholic. The Maltese constitution explicitly proclaims the »Roman Catholic Apostolic religion« as the state religion (Art. 2/1), while the Irish constitution stops short of such proclamation, even though several provisions (e.g. preamble and Art. 44/1) leave a careful reader in no doubt as to the inclinations of the legislator. The Cypriote constitution tried to maintain a fragile balance between the Greeks and Turks. The constitutional provisions reflect the wish to give something to the Greek Orthodox Church (namely, exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter, as stated in Art. 110/1 of the constitution) and something to the Turkish religious community (namely, the guarantee that the *shari'a* law institution of *waqf*[51] will remain in force, including those *waqf*s that comprise properties belonging to Mosques and any other Moslem religious institutions, as stated in Article 110/2 of the constitution). Thus, very similar constitutional provisions, guaranteeing autonomy to the religious communities, were a product of quite different circumstances.

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50 The abbreviations used in the table are explained in the Appendix I, below.

51 *Waqf* is a religious endowment in Islam, typically devoting a building or plot of land for Muslim religious purposes.

5.2 Hypotheses

1. Emphasis placed on the constitutional provisions regarding fair trial is influenced to an important degree by the English constitutional history and the procedural nature of the common law.

One of the most thoroughly elaborated differences between the civil law and the common law is the predominantly procedural nature of the common law (e.g. David and Grassman 1999: 311–2, Bogdan 1994: 106ff., Zweigert and Kötz 1998 ch. 18, van Caenegem 2003: 59–62, Glenn 2000: 210ff.). Since the power of the Norman conquerors was initially not yet entrenched, they had to gain the confidence of the locals. The Normans chose one plausible way as they co-opted local priests (who could read and write) to preside over the courts, but it was the locals who – according to the local customs – decided the merits of the case (Glenn 2001: 206sqq.). Any unification of law could therefore begin only on procedural plane and only slowly progress into the realm of substantive law. So, step by step, a body of laws and customs emerged, that were valid throughout the kingdom (Bailey and Gunn 1991: 4, David and Grassman 1999: 308). This body of law was soon called *commune ley* in Law French (or Norman i.e. Old French legal terminology) or common law (David and Grassman 1999: 307–308). This historical insight explains why substantive law is considered to be »secreted« or hidden (Main in Glenn 2000: 211). Since the reasons for their decisions were known only to the jurors who decided the case, the lawyers could effectively influence the outcome only by placing emphasis on the procedural elements of the case (e.g. whether what the other party wanted fell within the scope of the writ) (Glenn 2000: 211, Losano 2000: 267). This background sheds some light on the fact that the common law is marked primarily by its history: »it is a historical and legal phenomenon (*un fenomeno storico-giuridico*) « as one scholar pointed out (Rav 1982: 95) and impossible to understand without the knowledge of its historical development (Bogdan 1994: 102).

So far, it is clear that constitutional arrangements which were influenced by the common law tradition would place heavier emphasis on the procedural constitutional rights. But why these particular ones? Why would fair trial enjoy such prominence? Apart from obvious reasons – that the outcome of criminal procedure could jeopardise some of the most basic values, such as life and liberty, there are again historical reasons, stemming from English constitutional history. We can speculate that a major impetus came from historic documents such as Magna Carta (1215) or the Bill of Rights (1689). Both documents contain provisions which would today be regarded as parts of the right to fair trial. Section 39 of the Magna Carta guarantees that no free man »shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do

so, except by the lawful judgement of his equals or by the law of the land«. The insistence on the »due process« can be seen as an expression of the importance of procedural guarantees. Similar guarantees can be found in the Bill of Rights, for example the prohibition of disproportionate bail, fine or punishment, the proper selection of jurors and the presumption of innocence (expressed rather implicitly) – most of which are connected to criminal law.[52] We can safely conclude that the concept of due process is deeply rooted in English constitutional history.[53] Because of its central place in the English constitutional law it is hardly surprising that it has left a deep imprint on the constitutional thought of countries which were for some time under the British rule.

2. Absence of the constitutionally guaranteed right to access to public office can be explained as a consequence of the highly professional nature of the British civil service, which in all probability served as a model for the developing public administrations in countries formerly under the British rule.[54]

Conspicuous absence of a right represented both in the Universal Declaration of Human Rights (1948; Art. 21/2) the International Covenant on Civil and Political Rights (1966; Art. 25/3) as well as in several other international documents[55] and a vast majority of the constitutions, analysed in this paper (22 out of 30 constitutions) is the second feature common to all three constitutions. At first sight, it is difficult to find out what the reason for that aspect of the constitutional profile of the 'common law countries' is. But the reason behind the shared constitutional arrangement might be the model of public administration inspired by the British civil service.

The British civil service is a corps of professional administrators, who are in principle politically neutral and not dependent on elected politicians for reappointment (Heywood 1997: 347). The present set-up of the service was instituted through a reform, first in India (1853) and two years later also in the United

52 »And thereupon the said Lords Spiritual and Temporal and Commons, ... do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare: ... That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders; That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void...« (The English Bill of Rights, 1689).

53 O'Connor, Tom: The Quest for Justice and The Problems of Constitutional Criminal Procedure. At: http://faculty.ncwc.edu/toconnor/325/325lect02.htm (3.6.2007).

54 We are grateful to Professor Mitja Žagar for this suggestion.

55 E.g. The American Convention on Human Rights; (Art. 23/1 (c)); the African Charter on Human and Peoples' Rights (Art.13/2).

Kingdom. The most important innovation in that time was the adoption of the principle that all candidates are to be admitted to civil service after a competitive examination of their general education (Ridges 1937: 171).[56] Civil service thus became an organisation based on merit, in the first place measured by the education acquired (and not, as the case may be in the USA, on spoils).[57] Because of this threshold, the entrance into civil service could not be regarded as a right, but rather as a privilege. It is this conception of civil service that is a very likely reason for the absence of the right to access to public office. We see once again that the implicit and unexpressed notions of the past shape the constitutional law of today. In the case of this particular group of countries, the irony is even greater: it is shaped by the notions brought to them by a foreign power that they have all tried very hard to become independent from.

CONCLUSION

At the outset of this paper, we posed the question as to what can be learned from a comparative constitutional analysis. We hinted at an important layer of legal reality that is only rarely exposed to our view by the comparative analysis. This article has tried to unveil this amalgam of different factors hidden from our eyes that shape the constitution and its contents. Almost without exception, constitutions are regarded as a rational response to reality that can sometimes be irrational (the balance of political forces, religious disputes and so forth). But the constitution qua law tries to respond in a rational fashion. In an era of human rights, this perception of law as a purely rational response to reality is even stronger. The ideology of human rights treats 'human rights' as something objectively existent, as something that only has to be transformed into a legal document. It follows quite naturally that we can expect an almost complete uniformity in all constitutions trying to protect human rights.

Our analysis demonstrates how different the process of constitutional framing really is. Certainly, a process is fundamentally rational and the legislator does respond to a set of demands posed in all modern European societies. Yet at the same time, a 'legal subconsciousness' is at work, drawing from a number of sources, most notably, from historical patterns embedded in minds of lawyers framing a new document. There is no explanation, for example, why the French constitution does not include freedom from torture. No reasonable person would contend that the French legal system endorses torture. But the French constitution along

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56 This principle was reaffirmed by the Superannuation Act of 1859 and by the Order of Council of 1870.

57 The spoils system favours employing and promoting civil servants on the basis of party loyalty rather than on the basis of their ability and professional skills (so-called merit system).

with those of Luxembourg, Belgium, the Netherlands, Italy and a handful of other European states[58] does not prohibit torture. All these states had no reservations when they ratified the European Convention on Human Rights which expressly prohibits torture, but saw no need to change or amend their constitutions. In such a way, different constitutional profiles emerge, which are characteristic of certain states.

The use of adverbs Nordic, Romanic, Germanic should not be taken at its face value. The analysis we have carried out has shown that the mere linguistic affinity is not sufficient a reason for the inclusion of a country in a certain group. The Germanic group offers a good illustration. It includes such diverse countries as Spain and Portugal or Finland and Greece. Our research work has led us to believe that the framing of the constitution is dominated by four important factors, which determine to which group a country will belong:

- *Historical and geographical factors*: to a large extent shared history and geographical proximity are potent factors, increasing the possibility that a country will belong to a certain group. We can frequently observe how the countries conquered (e.g. Belgium, Netherlands), colonised (Ireland, Malta, Cyprus) or governed by some other country adopt the constitutional patterns of that country.
- *Linguistic factors:* similar (or same) language can be a strong indication that a state will fall into a specific group of countries (e.g. Belgium in the Romanic group, Ireland in the Common law group). Sometimes the reason is the knowledge of the language: Slovenia, Czech and Slovak republics, for example, were under the Austro-Hungarian Empire and thus used German as the official language of the period. This closeness begot also intellectual affinity, especially when the dominant nation appeared to be progressive (France after the 1789 revolution, Germany after the 1848 revolution).
- *Timeframe of the adoption:* Historical, linguistic and geographical factors may not be enough. The constitution of Liechtenstein was adopted in 1862 and bears the marks of that time. For this reason it shows almost none of the characteristics of the Germanic group's constitutional profile, although it is closely connected to this group in all other aspects. On the other hand, the constitutions adopted in the same period exhibit common traits. The Germanic group, for example, was strongly influenced by the adoption of many important international documents concerning human rights. At least in some constitutions this inspiration can be strongly felt and even

58 Liechtenstein, Austria, Ireland, Germany and Denmark.

proven. If this trend continues we can expect the harmonisation of the human rights constitutional guarantees.

- *Discontinuity*: In some cases, a wider picture has to be taken into consideration. The civil laws of Spain and Portugal, for example, both belong to the Romanic legal family, but nevertheless, at the level of constitutional rights protection, they exhibit almost the same constitutional profile as that of Germanic countries. Since the main trait of this group is extensive regulation of human rights at the constitutional level, we can attribute this on the one hand to the post-dictatorial enthusiasm over newly gained human rights, and on the other hand to the desire to never again let the dictatorship reoccur.

In our view, the analysis presented has born fruit. It has provided us with important impetus to further research and has thus enabled us to take a step forward in our constitutional analysis. The chosen method has proven to be valuable. Whatever its methodological shortcomings, the relative simplicity in handling the data and comparatively easy overview of the gathered information have considerable value for further constitutional analysis. On the substantive level, we believe that both of our preliminary hypotheses were vindicated. The existence of the common core of human rights protection in European constitutions is beyond doubt. Almost equally persuasive are the data on important differences in constitutional profiles. Constitutional provisions on human rights in European constitutions differ. Our analysis did not stop at that conclusion, but has ventured into an uncharted territory of the constitutional comparison. This venture has had two interconnected goals: the vindication of the hypotheses set with regard to each constitutional profile, but in no smaller measure also the contribution such an approach to constitutional analysis can make to the comparative law.

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APPENDIX 1: LIST OF ABBREVIATIONS USED IN THE PAPER

Access to court – right to access to court (right to judicial protection)

Access to public office – right to an equal eligibility for appointment to public service

ADP – Abolition / prohibition of death penalty

Asylum – right to an asylum

Compen. – right to demand compensation in case of state inflicted damage

Creativity – Freedom of creativity (freedom of research and art)

Develop. of pers. - right to development of personality

Dignity – right to dignity

Education – Compuls. – constitutional provisions establishing compulsory (primary) education

Education – Free – right to education free of charge

Education – Priv. schools – right to establish private schools

Education – R – right to education

Extradition/expulsion – prohibition of extradition or expulsion

F. from torture – right to freedom from torture

F. to choose residence – freedom to choose one's residence

Fair trial – Independent and impartial tribunal established by law – right to be tried by an independent and impartial tribunal established by law

Fair trial – Presumption of innocence – right to be presumed innocent of an offence

Fair trial – Public trial – right that the trial be conducted openly

Fair trial – Rights of accused person – rights of accused person, such as right to counsel, right to have adequate time and facilities for preparation of his defense, right to interpreter etc.

Fair trial – Trial within reasonable time – right to be tried without unnecessary delay

Family and parenthood – constitutional provisions establishing special protection of family and parenthood

Forced & Compulsory Labour – prohibition of (freedom from) forced and compulsory labour

Free enterprise – right to engage in economic activity

Health care – right to health care

Honour – right to respect of honour

Legal Remedy – right to legal remedy (right to appeal)

Life – right to life

Marriage & Family – right to marry and to found a family

Move. – right to freedom of movement

Ne bis in idem – prohibition of double jeopardy (for being tried twice for the same offence)

Nullum crimen – *Nullum crimen nulla poena sine lege praevia* (the principle of legality in criminal law)

P&M Integrity – right to physical and mental integrity

Petition – right to petition

Prov.- Crim. law – regulations pertaining to punishment and criminal responsibility (e.g. provisions establishing individual criminal responsibility)

R. of children – rights of children

R. of minorities – rights of ethnic, national, linguistic and religious minorities

Recog. of legal person. – right to recognition as a person before law

Security – right to security

Slavery & Servitude – prohibition of (freedom from) slavery and servitude

Social security – right to social security

Sound environm. – right to sound environment

Special protection (of women, mothers, minors, orphans, disabled) – constitutional provisions establishing some sort of special protection for certain groups of population

Trade union – Gen. – freedom to form and join trade unions

Trade union – Strike – right to strike

Unemploym. – right to be insured against unemployment

Work – Free choice – right to free choice of work

Work – Payement – right to payment (remuneration) for work performed

Work – R – right to work

Work – Rest – right to rest (limitations of working hours)

APPENDIX 2: CATEGORIES OF CONSTITUTIONAL HUMAN RIGHTS PROVISIONS IN THE GERMANIC GROUP THAT STAND OUT IN RELATION TO OTHER GROUPS

Country	P&M Integrity	Dignity	F. from torture	Honour	Fair trial					Petition	Compen-sation	Legal remedy	Crea-tivity	Free enter-prise	Trade union	
					Pub.	Time	Trib.	Innoc	R. of accused p.						Gen	Strike
Latvia	-	+	+	+	-	-	+	+	+	+	+	-	+	-	+	+
Germany	+	+	-	-	-	-	-	-	+	+	-	-	+	-	+	-
Hungary	+	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+
Greece	-	-	+	+	+	+	+	-	+	+	+	P	+	-	P	+
Portugal	+	-	+	+	-	-	-	+	+	+	+	-	+	+	+	+
Spain	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+
Slovenia	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Lithuania	+	+	+	-	+	-	+	+	+	+	+	+	+	+	+	+
Estonia	-	-	+	+	+	-	+	+	+	+	+	+	+	+	+	+
Czech r.	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Slovak r.	+	+	+	+	+	+	+	+	+	+	+	+	+	P	+	+
Andorra	+	+	+	+	- op	+	+	+	+	+	+	- op	-	+	+ op	- op
Poland	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+
Switzerl.	+	+	+	-	+	+	+	+	+	+	+op	+	+	+	+	+
Bulgaria	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+
Romania	+	-	+	-	+	+	+	+	+	+	+	-	+	+	+	+
Finland	+	-	+	+	-	+	+	-	+	-	-	-	+	+	+	-

Country	Move-ment	Extrad./ Exp.	F. to choose residence	Education				Special protection					R. of children	Sound environm.	R. of mino-rities
				R	Comp.	Free	Priv. schools	Women	Mothers	Minors	Orphanes	Disabled			
Latvia	+	+	+	+	+	+	-	-	-	P	P	P	P	P	+
Germany	+	+	-	-	-	-	+	-	+	+	-	+	+	-	-
Hungary	+	+	+	+	+	+	-	-	+	+	-	-	+	+	+
Greece	+	+	+	P	+	+	+	-	+	+	P	+	-	P	-
Portugal	+	+	+	+	+	+	+	-	+	+	+	+	+	+	-
Spain	+	+	+	+	+	+	+	-	-	+	-	+	+	+	-
Slovenia	+	+	+	+	+	+	-	-	+	+	+	+	+	+	+
Lithuania	+	+	+	-	+	+	+	-	+	+	-	-	-	+	+
Estonia	+	+	+	+	+	+	+	-	-	-	-	+	-	-	+
Czech r.	+	+	+	+	+	+	+	+	-	+	-	+	-	+	+
Slovak r.	+	+	+	+	+	+	+	+	-	+	-	+	+	+	+
Andorra	+	+	+	+	-	-	+	-	-	-	-	-	-	P	-
Poland	+	+	+	+	+	+	+	+	+	+	+	+	+	P	+
Switzerl.	+	+	+	+	-	-	-	-	P	+	P	P	+	P	-
Bulgaria	+	-	+	+	+	+	+	-	+	+	+	+	+	+	-
Romania	+	+	+	+	+	+	+	-	-	+	-	+	+	+	+
Finland	+	+	+	+	+	+	-	-	-	-	-	-	+	+	+

ORIGINAL
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MANAGEABILITY OF ETHNIC CONFLICTS: CONDITIONS AND LIMITS

The paper provides a philosophic analysis of issues and hidden assumptions in political theory and in real world situations. Conflict avoidance has been treated as a positive value, although its price could be too high: economic competition involves conflicts. Some conflicts between individuals are unavoidable. Therefore, societies have to develop means and strategies of conflict resolution and conflict management (e.g., warrior-shopkeeper (Nicolson) or imperialist-status quo (Morgenthau) strategies). Conflict avoidance is but one strategy of conflict management. Sometimes ethnicity and race are overlays to other sources of conflict. Agrarian societies are based on unequal access to land-ownership. This may be protected or supported by racial and ethnic differences. Politicians may just express common feelings or exploit these feelings for their own personal and party-political aims, thus creating a second overlay. Estonian land-reform in 1920s and land claims by Blacks in Zimbabwean are examples of these overlays. In some cultures, religion may be a constituent property of a culture and religious conflicts in these cultures are inextricably bound up with conflicts about political power. Religious differences between ethnic groups may strengthen conflicts discursively and behaviourally.

Keywords: nationalism, conflict management, democracy, multiculturalism, values

MOŽNOST UPRAVLJANJA ETNIČNIH KONFLIKTOV: POGOJI IN OMEJITVE

Članek prinaša filozofsko analizo vprašanj in prikritih podmen v politični teoriji in v okoliščinah resničnega sveta. Izogibanje konfliktom velja za pozitivno vrednoto, čeprav je njegova cena previsoka: gospodarska tekmovalnost vključuje konflikte. Nekaterim konfliktom med posamezniki se ni mogoče izogniti. Družbe morajo zato razviti sredstva in strategije razreševanja in urejanja konfliktov (npr. strategije bojevnik-trgovec (Nicolson) ali imperialist-status quo (Morgenthau). Izogibanje konfliktom je le ena od strategij upravljanja konfliktov. Včasih etničnost in rasna pripadnost le prekrivata druge vzroke konflikta. Poljedelske družbe temeljijo na neenakopravnem dostopu do lastništva zemlje. Rasne in etnične razlike lahko to neenakopravnost ščitijo in podpirajo. Politiki lahko le izražajo splošna občutja ali jih izrabljajo za svoje osebne cilje in cilje svojih političnih strank ter na ta način ustvarjajo še eno "prekrivanje". Estonska zemljiška reforma iz leta 1920 in črnske zahteve po zemlji v Zimbabveju sta primera takšnega "prekrivanja". V nekaterih družbah je religija lahko sestavna lastnost kulture in verski konflikti so v teh kulturah neločljivo povezani s konflikti za politično moč. Verske razlike med etničnimi skupnostmi lahko okrepijo razsežnost in obliko konfliktov.

Ključne besede: nacionalizem, upravljanje konfliktov, demokracija, večkulturnost, vrednote

INTRODUCTORY NOTE[1]

This paper is a contribution by a philosopher. Philosophers do not produce empirical data. They argue about justifiability, research methods, standards of proof and evidence, meaning of concepts and statements. Philosophic analysis discovers hidden assumptions and coherence or otherwise of arguments and theories. Philosophy is relevant to the world outside philosophy and, therefore, assumes empirical data and empirical knowledge in general. Philosophy is highly relevant to rational decision-making. The latter involves knowledge, values and goals and philosophy helps to understand and justify our values, goals, to draw dividing lines between the moral and immoral. Moreover, internal coherence is a condition of practical realisability.

ARE CONFLICTS AVOIDABLE?

Traditional or strong Hobbesian theory assumes inevitability of conflicts between individual humans. It is human nature itself that, according to Hobbesian theory, human creates conflicts between individuals. Therefore, these conflicts can be suppressed or otherwise managed, but they cannot be avoided. To be effective, suppression has to be institutionalised. Obviously, suppression will involve permissible violence. Hobbes argued that conflicts may be manageable and that there exists a justified mode of conflict management, an absolute monarchy that has been set up by means of social contract.

Realist versions of International Relations Theory extend the Hobbesian view to be applicable to a selected kind of organisations, the states. They do not have to concur with Hobbes on justifiable internal organisation of states. What they do claim is that states are participants of a Hobbesian world, therefore, conflicts between states are unavoidable. There are no instruments for conflict suppression, but there may be instruments for conflict management. This has been a somewhat simplistic description of the realist IR-theory. Actually, the theory is compatible with the view that sometimes states may cooperate and cooperation may be a perfectly reasonable and 'natural' strategy for states (Stein 1990). Obviously, if states can cooperate, other groups can also cooperate in some circumstances.

On the opposite side of the theory spectrum, there is anarchism. Very strong anarchism assumes that the basic human nature is good and conflicts are generated only within the wrong kinds of human social arrangements. More reasonable forms of anarchism can accommodate the idea that conflicts between humans

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are possible, but they claim that conflicts are manageable by free rational agents without a state (and that humans will be free rational agents without a state). Communist anarchism will just add that private property is the second causal factor for conflicts and the abolition of state will have to be complemented by the abolition of private property.

There are in-between positions. A Lockean position will hold that humans are not naturally in a perpetual state of war of everybody against everybody else, but that conflicts do occur sometimes, often due to misunderstandings and insufficient knowledge of natural law. State is a management agency for conflicts. A justifiable state has, of course, to be set up and maintained by social contract (consent) and it cannot have absolute powers in Hobbesian sense. States do commit acts of aggression, but aggression is always unjustified.

Needs theories supply more examples of in-between positions. They claim that conflicts between humans are generated by conflicting needs, in case there are insufficient amounts of needs satisfiers. Needs are objective and the availability of need satisfiers at any individual space-time location is also empirically given. There just may not be enough food for everybody. Certainly, there is never enough money for 90 per cent of individual consumers. Needs-theories allow for some conflict management. They may claim that if there is enough food to keep everybody alive and in good health, then somehow social justice can and has to be maintained and arrangements for minimal social justice will provide a means for minimising conflicts and making them non-lethal.

Marxism is a kind of needs-theory. It claims that needs conflicts between social categories of humans in some societies can only be managed by suppressing the needs-based wants of one category. State is an agency for this kind of conflict management. Marxism, of course, assumes a democratic anarchy under future communist conditions and assumes sufficiency of needs satisfiers under communism. The conflicts themselves, on Marxist view, are generated by the social system, conflicting desires are 'expressions' of systemic conflicts. The latter view may be shared by some non-Marxist theories (they will just adhere to a different theory about the social system).

Needs theories either make a strong claim that conflicting goals and desires are generated by a needs conflict (Marxism) or a weaker claim that some conflicts between goals and desires are caused by conflicts between needs which cannot be fully satisfied for all participants of a particular set of humans. For needs theories, conflict management has to provide needs satisfiers to prevent the conflict from becoming destructive for the participants.

Subjective psychological conflict theories would see grounds for conflicts in conflicting desires, but also in misunderstandings. Strategies for conflict

regulation that derive from this conception are akin to therapy. They call for the existence of conflict management agencies, but they can also be part of milder anarchism.

Psychological theories may be combined with needs theories. Certainly, conflicts sometimes grow out of misunderstandings. Communication failures can increase the intensity of conflict. Any action is justified by means of values, and if the received values support conflict-prone behaviour, then ways of thought and emotional components in values will play an important part in generating conflicts. In any case, arrangements for conflict management might have to employ divergent means to deal with conflicts stemming from different sources.

Conflict avoidance might be a positive value, but if some conflicts are unavoidable, then insistence on conflict avoidance will be just wishful thinking. For example, let us assume that *P* and *Q* both love *R*, who is a person of opposite sex, and under arrangements of their particular society, only either *P* or *Q* may set up a family with *R*. There is a conflict between *P* and *Q*, and, of course, there is a solution: *P* could stop loving *R*.

The conflict in the preceding example was generated by two independent acts, *P* and *Q* falling into love with *R*. Let us assume that *Q* was the first one to fall into love with *R*. Then should a conflict management agency tell *P* not to fall into love with *R*? This is, obviously, nonsense (although at some previous point *P* might be able to manage his/her emotional states). There is also another solution. Social arrangements could be changed to allow both *P* and *Q* marry *R*. This change will help, of course, only if under new arrangements R will be able to love both *P* and *Q*. Otherwise the desire of either *P* or *Q* will still be unsatisfied. Of course, if social arrangements could be changed to do away with romantic love, then there would be yet other possibilities of solution for this conflict. These arrangements would still have to cope with satisfaction of sexual desire without this satisfaction being destructive to human personalities and social system. Romantic love is just one source of possible conflicts. Economic competition involves conflicts. The social price of abolition of all economic competition will be extremely high (if this will be possible at all). Needs theorists are right to point out, that sometimes there are insufficient needs satisfiers and that this insufficiency at any given space-time location is an objective condition. If there is insufficient food for everybody, then either somebody will have to die of starvation, or the health of everybody will be impaired. For the most part of human existence, periods of insufficiency of food supply have been a rule.

Competition in sports is conflict, although managed conflict. Only one party (a team or an individual) can win, and it is considered unfair for a participant not to do her utmost to win. Sports might be a socially avoidable institution, but in the

contemporary world it seems impossible to abolish not just the Olympic Games, but also every sports altogether.

Market competition involves conflicts between competing parties. Free market is a means of consumer needs-satisfaction and suppressing market often leads to suboptimal consumer needs satisfaction both at a certain time point and dynamically, although it might lead to maximum satisfaction of a seller (monopoly or oligopoly conditions). Without any management, market actors sometimes destroy other actors (Mafia-style actions, mediaeval trade restrictions, takeover of firms in occupied territories).

ARE CONFLICTS BAD?

Conflict avoidance involves not only possibility but also desirability of life without any kind of conflicts. Many humans have not shared this goal during large part of human existence. Societies and ideologies have glorified war (Nazis were definitely not the first to do this). Societies and philosophers have glorified power, and, therefore competition for power (even for unrestricted power). Nevertheless, Hobbes was right in stating that a war of everybody against everybody is an undesirable state of affairs. Humans cannot exist in this kind of society.

Some means of conflict solution might also be undesirable, although sometimes unavoidable. Murder seems to be a universal condemnatory category and prohibition of murder seems to be a universal norm. What counts as murder differs of course in different societies. Killing a person in a duel did not count as a murder some centuries ago, at least for public opinion (or opinion of some definite estate of society). If Benjamin wants to kill José, then José either has to exercise self-defence by forcible means even if this means killing Benjamin, or let himself be killed. A conflict management agency (police) may also have no other solution under some particular circumstances apart from shooting to kill Benjamin. Conflict avoidance is but one strategy of dealing with conflicts.

A conflict has at least two parties. There will be no conflict, if one of the parties will not engage. Let us consider an example:

(1) 1. *A* wants to kill *B*.

2. *B* wants himself be killed by *A*.

Therefore,

3. *B* permits *A* to kill *B*.

Submission in this case will not avoid violence, but there will be no conflict.

The result will be the same, if *B* submits, although dislikes being killed by *A* or even just being killed at all.

Let us no assert:

(2) 1. *A* wants to kill *B*.

2. *B* does not want to be killed.

Therefore,

3. *B* prevents *A* killing *B*.

If *B* engages in self-defence, we have a case of conflict. Resistance by *B* will probably make it a violent conflict. Conflict avoidance in case (1) is simple but is it good? Conflict management in case (2) can involve lethal force (*A* may not be susceptible to argument about the sanctity of human life, etc.).

Let us consider another example. If free market competition involves some conflicts (although not necessarily lethal), then some conflicts cannot be considered essentially or absolutely bad. Therefore, the presumption that conflicts are always bad is unsustainable. Moreover, the presumption seems sometimes to be hypocritical. If conflicts are bad, then resistance to an aggressor or a would-be murderer creates a conflict and is, therefore bad. Conflict involves at least two actors and it is patently insufficient to say that conflict is bad without also saying that a party in a conflict may have acted reasonably, rationally and justifiably. In case of a particular conflict, these judgements would have to be supported by the facts of the case and not just general principles.

What follows from the above is that 'ethnic' conflicts ought not to be presumed to be irrational and absolutely avoidable. This does not mean that they are unmanageable or that they can be terminated only and only by lethal means.

Conflict Termination: Results and Means

Distinction needs to be made between conflict termination, conflict dissolution, conflict management and conflict suppression. A 20th century British diplomat and writer, Harold Nicolson (1939: 53-54), pointed out that there are two major schools of conflict resolution: the warrior and the merchant kinds. Nicolson wrote about diplomacy, but his treatment may be extended to conflict management in general.

Nicolson defined warrior school to be an approach with predatory goals. The methods to achieve the goals and the internal justificatory language derive from a military point of view. Negotiations, for the warrior school, are military campaigns or, at least, manoeuvres. War is about victory, and the purpose of negotiations for the warrior school is victory. Any denial of complete victory means defeat. Outflanking the opponent would be a commendable strategy. Weakening

of enemy by all means of attacking behind the lines would be a good strategy. Seeking every occasion to drive a wedge between your main enemy and his allies, holding your opponent to one position while planning to attack elsewhere would be standard stratagems. A concession or a treaty is never seen as a final settlement of an isolated dispute, but as consolidation of strategic positions before the next battle, or as evidence of weakness and retreat of the enemy. These intermediate solutions must be immediately exploited for further triumphs and the final overall victory.

The mercantile or shopkeeper idea is that a compromise between rivalries is generally more profitable than the complete destruction of the other side. Therefore, negotiation is an attempt to reach durable understanding by mutual concessions. Questions of prestige should not be allowed to interfere unduly with sound business deals, national honour means national honesty. For a merchant, there is possible some middle ground between bids and counter-bids which could reconcile the conflicting interests. The aim of negotiations is to discover this middle ground. Frank discussions, placing the card on the table, and just the usual processes of human reason, confidence and fair-dealing will be instruments to achieve this middle ground.[2]

It was obvious for Nicolson, who was writing just after Munich, that adherents of the military school would misinterpret positions taken by their opponents who belong to the shopkeepers. The effects would be disastrous for both. The same applies to the shopkeepers in dealings with the military-minded opponents.

Non-violent solutions are possible within the latter strategy. A mild nationalism on issues of state set-up and political regime (core political choices) is compatible with merchant strategies and non-violent conflict resolution. Within cultures, which have warrior strategies embedded, a mild nationalism could grow into strong or even Nazi nationalism. If a culture has merchant strategies embedded within its core positively valued behavioural traits, then negotiating minority rights for cultural or ethnic minorities becomes possible. An effective and caring conflict management has to steer solutions away from the warrior school strategies.

Strong forms of nationalism are usually accompanied by a warrior school mentality or justify warrior school mentality. For strong forms of nationalism, there exists an absolute priority order of ethnic units and ethnic units are supreme over all other units. Therefore, the tendency to generate demands against other entities is internally unchecked.

Conflicts can be suppressed. If parties to the conflict are governed by superior force, there could be no outward signs of a conflict (although potential and trust-

2 The distinctions between the policies of *status quo* and imperialism put forward by Morgenthau (Morgenthau 1993: 50-83) are analogous to those between shopkeeper and warrior strategies made by Nicholson.

ed outside sympathisers might get a whisper...) Soviet totalitarianism suppressed Azeri-Armenian and Ossetian-Georgian conflicts. It did not succeed in dealing with the root causes and goals.

Rational action is compatible with conflict management. The case for states has been studied by Stein (1990). Of course, if one participant opts for an annihilation strategy towards the others, then there would be limits for conflict management. Conflict may be postponed, but sooner or later either one side will be annihilated or the side will be forced to make a strategy shift. In warrior school terms, this shift means defeat of the proponent of an annihilation strategy. It would have been practically impossible to achieve the defeat of German Nazi expansionism or Taleban-bin Laden strategy to destroy the United States of America without destroying the respective governments or states. It should be noted that the destruction of a state does not always mean erasure of a country or an ethnic unit.

Conflicts could be resolved by dissolution, by dying out. Individual members of an actor set undergo, for example, generational change. With changes in list of members, the goals of an actor made up from a set of persons can change. In case of conflicts between individuals, these will also end with the natural death of the persons involved in particular conflicts. Conflict management cannot always change the goals of participants but it can prevent hem killing each other and the conflict could wither away.

GROUP CONFLICTS AND ETHNIC CONFLICTS

Are there group conflicts? For strict individualistic liberalism and for various forms of nominalism, there are no supraindividual essences or entities, and groups are reducible to their individual members. Organisations can be accommodated within this kind of thought, although with difficulty. Strict individual liberalism tends to reduce a family to its independent individual members (love is notably absent from traditional political theory and the feminist charge of its masculinity and male chauvinistic character is certainly a well-founded claim). Actually, modern legal theory assumes that corporations have interests that are distinct from the interests of its members.

Methodological individualism has difficulties with the concept of ethnic conflict. Methodological individualism accepts individual conflicts and may accept conflicts between organisations. For a methodological individualist, there are no ethnic or racial or other ‘communal’ conflicts, therefore nationalist ideologies are pure inventions without any basis in fact. Artificial labels will just intensify conflicts. Actually, traditional methodological individualism is based on analytical oversimplifications. A set is an individual entity, which is made up from individual

entities. Humans are made up from individual cells, but each cell within a human is not that human.

It is useful to distinguish between groups and categories of humans for the purposes of conflict regulation. . Groups are sets of persons who interact (directly or indirectly). Governments, political parties, armies and families are groups. There are also *social categories*, persons sharing social properties (possessing common properties). Consumers, insurance salespersons, aircraft pilots, artists are categories. Marxian economic classes are categories. Can there be nonreducible category interests or category needs in the same sense as corporate needs might not be reducible to the needs of the individual members of a corporation? Obviously, category desires are reducible to the desires of its individual members. We may loosely talk of category desires ('what the consumers want') if the desire is shared by a majority of category members. Category needs are positional needs, needs of a person who occupies this specific position.

Groups can make decisions, but categories cannot. This is important for conflict management. It is possible to negotiate with groups, but not with categories. Under certain conditions, a category may be transformed into a group or may generate a group, which will be or could be the focus of its loyalty. There are trade unions and there is (or was) an institute of directors in UK Politicians try to mobilise categories, but category mobilisation is not an arbitrary result. Let us imagine politicians telling their voters how good they would have it if they were to consent becoming slaves...

While there are certainly no essences and no supraindividualistic causal entities, there are categories of humans with shared cultures and cultural needs. Ethnicity is a subkind of culture. Cultural incompatibilities or differences can produce significant divergences of value sets and goal-sets. These divergences can become conflict-generating factors both discursively and because they are involved with different need-structures and different interpretation-structures. Ethnic units or *ethnies* are situated between groups and categories. Members of an *ethnie* share a common culture. 'Culture' is used here in an anthropological sense, to refer to a fuzzy set of properties, which usually involve language, behavioural regularities, ordered sets of values and may include beliefs. I am suspicious of the insistence that ethnicity involves common myths about history. Something actually happened in past. Hitler, Attila, Winston Churchill, abolition of slavery are not myths, although there could be myths about them.

Moreover, people are sometimes able to laugh about myths. For Estonians, an important part of their history is a 'national awakening' during the third quarter of the nineteenth century. A number of intellectuals started to claim that Estonians are a nation, should be proud of being a nation and possess all cultural properties of a nation. They could and should organise to produce art and they have created

epic poetry in the past (therefore, they should be equals with Germans who hold dominant economic and government positions within an area which was inhabited mostly by Estonians). Of course, it was a 19th-century myth that only those collections of people who had created epic poems had an ethnic culture ('nationality'). This part of Estonian history is not just taught reverently at schools, but the particular activists of the 'awakening' are held in very high esteem by all (98 per cent) of Estonians. Nevertheless, during a prime viewing time in summer, 2000, Estonian **state-owned** TV broadcast a Monty Python type show about these persons and their doings. The show was part of a celebration of a Midsummer Day holiday (and this holiday, given the present evidence, has been a major part of the cultural tradition of present Estonians and their predecessors since pre-Christian tribal life). People can laugh about their myths and still think some past writers and even politicians were great and are part of *their* past. It is not unnatural to like one's own culture. A.D.Smith has pointed out the political dangers of systematically blocking the needs of ethnic communities (Smith 1988: 225, 277).

A cultural need is not a meaningless concept. Language is part of human life, but we always use **a** language. To talk in a language, I need at least one other speaker of this language. If I am part of a group which consists of persons sharing my native language and if I am not allow to talk with them in our common native language, then I feel oppressed and am oppressed and am discriminated, even if somebody claims that to abandon our language and switch to a language used by a more numerous set of people would be rational in the marketplace of languages. During the late nineteenth and early twentieth century, Estonian schoolchildren were prohibited to talk to one another in Estonian on school premises (even outside classes). They were ordered to talk in Russian. In late 1970s, the Soviet Government tried to reintroduce this practice. This was, obviously, a conflict-generating approach. Strategically, proponents of this approach hoped to achieve conflict-erasure. Switching the language was seen as part of assimilation. There are no ethnic conflicts, if there is just one ethnic group. Of course, switching the language might not always produce the desired effect. There is the case of Ireland.

The present Estonian government supports switching the teaching language of all secondary schools to Estonian. This is not yet equal to the Czarist or Soviet policies, but might still produce long-term annoyances and, therefore, might be inimical to successful conflict management. On the other hand, Estonia is a democracy, the numbers of citizens and voters, who identify themselves as Russians, are growing. This may provide for future influence in a multiparty system (like the influence of religious parties in Israeli coalitions). There are already signs of agreements between nationalistically Estonian-orientated political parties and Russian-orientated parties on local level: some politicians will discard their nationalism in order to keep themselves in power. This is possible only on condition that democracy is an overriding value among politicians and population.

LABELS AND ROOTS

Sometimes ethnicity and race are overlays to other sources of conflict. Agrarian societies are based on unequal access to land-ownership. This may be protected or supported by racial and ethnic differences. Care is necessary in labelling these conflicts as ethnic ones even if the parties themselves use the ethnic idiom. Moreover, politicians may just express common feelings or exploit these feelings for their own personal and party-political aims, thus creating a second overlay.

Estonia was an agrarian society until the beginning of the 20th century. Between 13th and 19th century, the land was monopolistically owned by German-speaking nobility, which used its control of state power to reproduce this kind of seigniorial agrarian structure. Peasants did not own the land, but received allocations for, basically, corvée services. During the 18th century they were also of serf status (could be sold with the land in their use). Originally, the structure was created by alien invasion, although few descendants of the 13th century crusade survived within the nobility by 19th century. By the end of the 19th century, the peasants were free and allowed to buy land, but the market depended on the willingness of the big landowners to sell (and not to use wage-labour). The conflict was viewed in ethnic terms since the middle of 19th century and a sole attempt to construct an overall Baltic identity (complete with invented common myths) failed dismally. Estonian-speaking peasants considered the situation unjust in a kind of Nozickian sense: their goal was rectification of an original injustice. With creation of democracy in 1918-20, Estonian voters demanded and got land reform, free distribution of the estates of nobility to peasants. [3] More than 90 per cent of population identified themselves as ethnically Estonian in these years, and approximately 75 per cent of voters were rurally or agriculturally occupied.

Social conflicts about medieval systems of land-holdings are known from other areas of Europe, like Germany or France. In France, the old agrarian system was finally terminated during the French revolution. Marxists may claim that this conflict is in essence an economic one. Obviously, it is. But with the development of ethnic nations, ethnicity could provide an overlay and blur the identification markers. There were no Estonians among nobility in Czarist Russia, social and ethnic borders strengthened each other and ethnicity was merged with social status.

Land claims by Blacks in Zimbabwean supply another example of the same kind of conflict with overlays. Big commercial farms were created with state support of the colonising power. Decolonization provided for the transfer of state

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3 Under Western pressure, this was modified later and landowners were paid compensation. The land-reform legislation provided for the noble landowner to retain a 'normal-size' holding as his property.

power, but not for the transfer of land. Economic and social borders remained where they were. This kind of situation was prone to conflict-generation. Land is a first requirement of an agrarian society. There is a political difference with the Estonian case. Estonia was a democracy between 1919 and 1934 when the land reform was effected. All political parties supported the land reform (with the exception of the 'German' party). No politician was able to manipulate the reform for the personal gain, apart from using his support for the reform as a justification for staying in politics. Any hypothetical opponent would have committed political suicide.[4]

Religion is sometimes an important constituent part of a culture. If two conflicting groups possess different religions (or varieties within the religion), then it might be difficult to distinguish religious conflict from and ethnic conflict. In some societies, government is charged with suppressing 'wrong' views. Moreover, it is justified to use lethal force to carry out this duty. A conflict between groups with different religions or varieties of a religion in these societies is also a conflict about gaining governmental power. Liberal, libertarian and human rights theories oppose this vision of governmental duties. Mediaeval European attitudes, Nazi and Stalinist theories supported the vision. Iraqi attitudes at the beginning of the 21st century seem also to concur with Mediaeval European attitudes on the issue. Within the suppressive vision, it is possible to argue for preservation of life of the supporters of the 'wrong' ideas, although to discriminate (in Liberal sense) against the latter. The result will be rational from the point of the dominant religion. Only a few rationality criteria are Kantian universal and culture-independent. Rational decisions in real world involve culture-dependent criteria, and, therefore, incompatible strategies could still be rational, although only a single strategy (or a set of strategies) would be rational for a particular actor in a conflict. It is important to notice that comprehensive world-views (religions, totalitarian ideologies) consider all other world-views as 'wrong'. There is no 'shop-keeper' type discourse available between their supporters and Liberals, although realities of a balance of power may be understood by power-wielders in societies with comprehensive ideologies. Therefore, co-existence of states with different world-views is a method of conflict management.

EXTERNAL AND INTERNAL MANAGEABILITY

The actual world has been divided into states and some states have dominant *ethnies*. Internal activities of a government do not create direct conflicts with other states (although they may threaten to create future conflicts). In the pres-

4 The Latvian case was broadly similar to the Estonian one.

ent world, internal violence usually creates a pre-threat situation to order within neighbouring states, but sometimes also within some other states. Therefore, the international community has some interest in conflict management in other states, but the non-interference principle provides grounds for managing possible divergences on 'internal matters of other states'.

Politics is about power to govern. If government is carried out in accordance to some specific cultural values and behavioural standards which are characteristic of one ethnic unit, then other ethnic units may be discriminated against and precluded from participation in power. In a democratic polity, minority opinions can be translated into votes and may become a real factor in politics. This does not always dampen conflict, for there might be no easy solution in case of important conflicts of values.

Switch to non-annihilation strategies is not an easy decision for participants and might be inconsistent with the existence of some participants. Nazis could not switch to equality of all ethnic groups and stay Nazis. Adoption of non-annihilation strategies involves acceptance of significant compromises by all participants in an actual on potential conflict. The founders of the U.S.A. accepted non-establishment of religion as a means of avoiding annihilation strategy on state-religion relations. In the contemporary world, the equivalent of their choice would be a secular state, even in a situation with only one religion being the religion of the vast majority of citizens. Acceptance of secular state will obviously have to be made in mercantile, and not in warrior mode. Otherwise, annihilation will only be postponed. Note that annihilation could mean conversion, switch between faiths, and not just killing of infidels.[5]

Nationalism may justify territorial claims to other states and, therefore, may become a conflict-generating factor between states. I have argued elsewhere (Loone 1999) that some forms of nationalism are compatible with negotiated conflict management between states, while other forms are not compatible.

VALUE INCOMPATIBILITIES

Values are constituent parts of cultures. Values are parts of normative arguments, they provide warrants for practical premises. Therefore values limit what is seen as reasonable by members of different cultures.[6] Cultural values act as

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5 On Millian grounds, secular state is justified by liberty, even if all citizens belong to the same religion (and the same school within the religion). I am not using Millian argument here, because in the actual world liberty might not be the highest value in all cultures. Honour or faith may have higher positions.

6 On warrants for arguments see Toulmin, 1958. A discussion of some issues about Toulmin see Habermas, 1987.

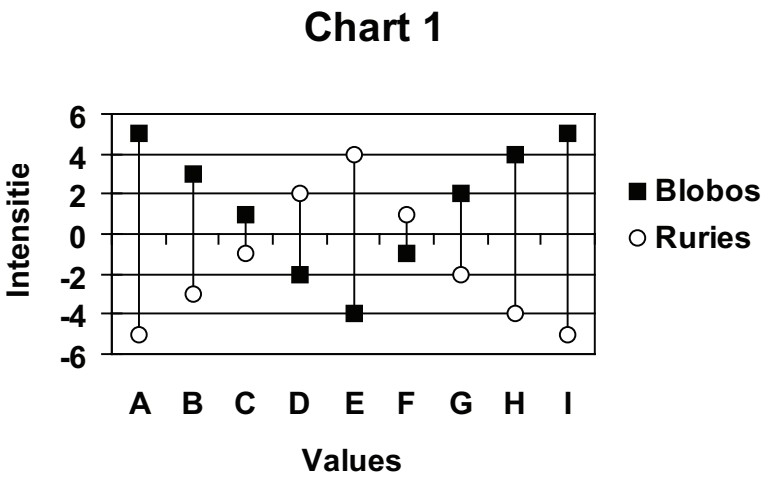
programs or templates for thoughts and emotions. Standard liberal democratic theory assumes that members of a polity share basic values (e.g., about liberty) and are amenable to arguments about the rationality and reasonableness of particular policies. Actually, cultures involve sets of values and there are many dimensions about sets of values.

Each culture includes a list of values. These values possess varied intensities and are assigned different priority orders. It is a standard practice of public opinion studies to discover which issues are important for the voters and which policies are considered to be in line with the voters' preferences on the issues. Values are, of course expressed verbally, but also in body language, customs, etc. Values act as self-evident and, thus, often hidden presumptions.

Let us consider the implications of some of the differences between lists of values.

INTENSITY CONFLICT

The list of values is shared, priority order is shared, intensities assigned to individual items are opposed. The following chart assigns imaginary intensities for unspecified values; negative intensities mean hostility; A, B, C, ... stand for value names. Lines measure difference on each value. There are to imaginary categories of population, Blobos and Ruries (imaginary units are used as placeholders for real units, their use avoids value judgments on particular actual conflicts).



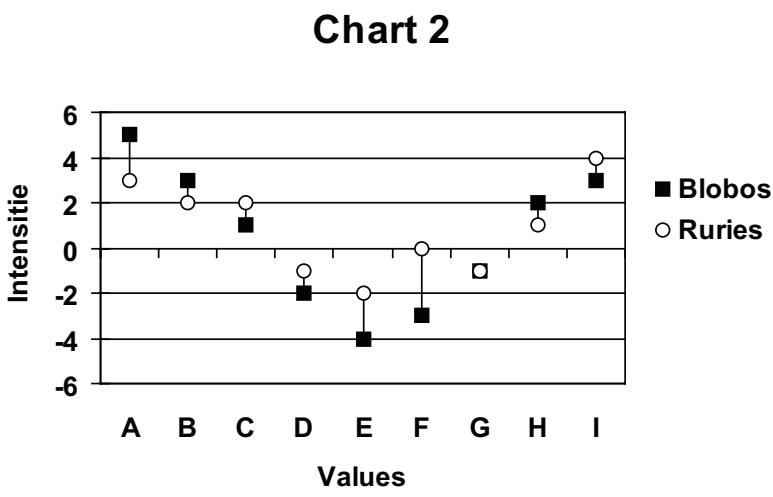
This is a case of cleavage communities. Minority will be always outvoted, and if the categories are roughly equal in membership numbers, instability will follow and hardening of positions on ethnic lines is a real possibility. Any concessions to the minority will be overestimated by the majority and underestimated by the minority. Concessions may be taken as a sign of weakness by both sides. No actual solutions apart from submission or separation are possible. Tolerance by both sides may make submission easier, in particular in cases of small minorities.

Let us say that the value **A** means democracy. Opponents and supporters of democracy cannot very well run the same kind of state. It has to be noted that numbers are important. A large majority (98 per cent) supporting democracy and a small minority of 2 per cent opposing it can coexist. The same situation is applicable if the opposing values are core parts of ethnic cultures, but members of one culture are a tiny minority within a country.

Something like the situation described in Chart 1 happened in Estonian politics in 1990-91. 'Russian' politicians were ready for many concessions, but they were opposed to 'Estonian' politicians on the basic issue of Estonian independence. 'Estonian' parties started to vote in the parliament as a bloc, and nationalist parties strengthened their positions among general population at the expense of more moderate (or devious?) politicians.

A study by Sniderman et al (1997: 191-234) has demonstrated that the views of anglophone and francophone Canadians differ markedly about issues like preserving two official languages of Canada or minority language education rights. They also found that U.S. and Canadian citizens differed markedly on issues like the importance of further strengthening racial equality Sniderman et al. 1997: 86). 50 per cent Canadian respondents thought that it is a job of government to see that every one has a job and decent standard of living, while only 25 per cent of U.S. respondents agreed with this view (Sniderman et al. 1997: 123).

INTENSITY DIVERGENCE



The list of values is shared, priority order is shared, intensities assigned to individual items are different, but they are not opposite in a majority of cases.

Conflicts are manageable, trade-offs between policies on different items are possible. A condition for the success of conflict management is that the majority will have to carry out policies on matters of intensive feeling by a minority. If democracy is present among positive values, then it will function as a warrant for mercantile strategies of conflict regulation.

PRIORITY ORDERS

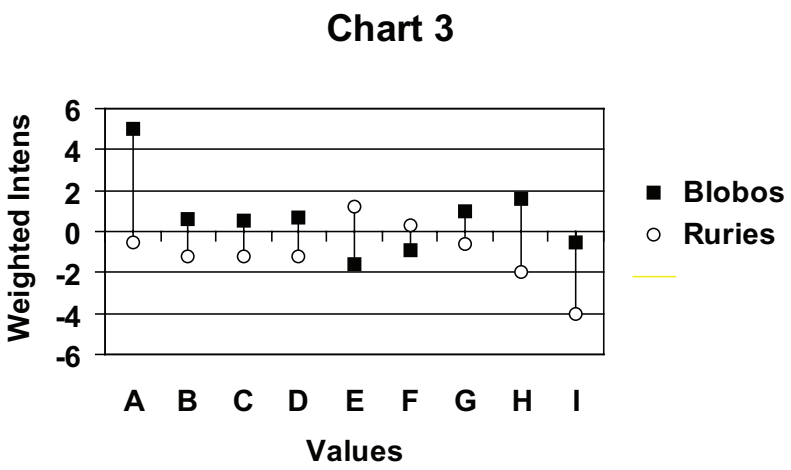
If, within the same list, priority orders are different, conflict management within a polity may be possible. Items with high positive intensity and high priority for the minority may be of low priority and low negative intensity for the majority. This makes trade-offs possible. Certainly, sharing of some basic values (liberty, tolerance, preferability of trader strategies) makes manageability easier. Priority orders may be measurable as importance assigned to an item.

Let us construct a hypothetical case with intensities as in Chart 1, but with two different distributions of importance of items. Each pair of values gives us a product (Intensity x Importance = Product):

Table 1

	Blobos			Ruries		
	Intensity	Importance	Product	Intensity	Importance	Product
A	5	1,0	**5,0**	-5	0,1	**-0,5**
B	3	0,2	**0,6**	-3	0,4	**-1,2**
C	1	0,5	**0,5**	-1	0,9	**-1,2**
D	-2	0,7	**-1,4**	2	0,6	**1,2**
E	-4	0,4	**-1,6**	4	0,3	**1,2**
F	-1	0,9	**-0,9**	1	0,2	**0,3**
G	2	0,5	**1,0**	-2	0,3	**-0,6**
H	4	0,4	**1,6**	-4	0,5	**-2,0**
I	5	0,1	**0,5**	-5	0,8	**-4,0**

The chart of the differences of products of intensities and importance will be:



In this case, although Blobos and Ruries have opposing values, there is an area of possible accommodations. Trade-offs would be possible.

DIFFERENT LISTS OF VALUES

There are many problems. In theory, trade-offs should be possible. If there were no common part, the construction of a viably popular government program would be extremely difficult.

DISCUSSION

Value divergences generate political conflicts if these values are involved in choice of policies. Values cannot be always arbitrarily chosen: we have no choice over our primary socialisation. Full oppositions of core values can be managed externally by limiting the areas that involve common decisions. Even in cases where there is no full opposition, shifting the divergence from internal to external status may lead to disappearance of conflicts and new co-operation. If a group is opposed to government by foreigners and numbers are against it, then separation could become a successful method of conflict management.

Understanding other values does not necessarily solve a conflict. If Blobos feel that the central value of Ruries is something really evil, then understanding the values of Ruries might just enhance their resolution to convert, suppress or kill the Ruries. Understanding Nazi attitudes towards Jews does not mean we ought to condone these attitudes and he actions that stemmed from Nazi values.

There is also a possibility that two ethnic groups share some value-template, but there are no demand satisfiers available. If the value-set includes a value 'power has to belong to us', then the value-template is shared, but the identification of 'us' is not. Warrior approaches will look to power sharing as an expedient, but not as a long-term solution. Let us assume that group *B* constitutes a local majority, but an overall minority. Let us assume there exists significant local autonomy. In these conditions the might be reasons for group *B* to preserve the overall set-up. Now, let us introduce a change. Group *A*, which possesses the overall majority within the state, reduces local autonomy and takes steps towards a more unitary state. There might be even perfectly good administrative and budgetary reasons for these steps, from the point of view of group *A*. Nevertheless, this change will be perceived as a sign of attack on group *B* by members of group *B*. If members of group *B* belong to the warrior school or think that group *A* belongs to the warrior school, this assignment of meaning is more or less inevitable. Now, in a situation of potential conflict, any steps that change status quo to the advantage of one side are destabilising and conflict-generating. A proper conflict management would involve avoidance of conflict generating and conflict enhancing actions, but this is not the aim of the warrior school.

Given an extremely tense situation or a suppressed conflict, even symbolic actions may lead to significant intensification of levels of conflict, if these actions pre-empt solutions which are still contestable or negotiated by the parties. The Soviet Union defeated Nazi Germany (within a coalition), but its armed forces did not liberate Eastern Europe. There was a change of occupying power and that is not a liberation. Therefore, for a majority of Estonians, Soviet war memorials are insults against their state and their ethnic group. For Russians, the war against Nazis was a war of self-defence and liberation. They are proud and reasonably proud of their achievements and the memory of the costs of that achievement is precious for Russians. Memorials to the victims are, therefore, precious symbols and any change in the location or status of these memorials is an insult. Relocation of a widely revered memorial is obviously a symbolic action, seen as a deliberate insult by those who revere the memorial, although seen as an act of justice by those who consider the memorial as a memorial to injustice and crimes.[7]

A minority must accept minority status within a state, to switch from annihilative to non-annihilative strategy. A minority status in a democracy is not apartheid. The *millet* system in Ottoman Empire accepted the existence of religious minorities, but there was no equality between members of minorities and the majority. The system was an apartheid-type system. Obviously, the majority may not vote a minority out of existence. Non-annihilation has to be the strategy of all participants, otherwise the strategy will end in failure. What the acceptance of the minority status means is that in general decisions majority values may be accepted as warrants in supporting reasoning, limited by the minority existence condition. Different sets of compromises become possible. For example, there could be one 'state' language and teaching this language might be obligatory in all schools. Nevertheless, the actual language of teaching may be different from the official language, the only condition being the knowledge of the official language by all citizens.[8]

Non-annihilative conflict management is possible for ethnic conflicts inside a state, if general conditions for non-annihilativeness are present. The actual value-structures, customs and body-languages have to satisfy templates presened

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7 During an actual removal of a Soviet war memorial in Tallinn, Estonia (the 'Bronze Soldier') approximately 1,000 persons participated in riots. The Russian population of Tallinn is around 150,000. Large numbers of Russians laid flowers at the memorial after its relocation. Many rioters used the occasion to loot stores; the numbers of persons with previous criminal convictions were larger than in the general population. There were some pre-arrangments to induce rioting by nationalist Russian groups in Estonia and Russia. The Estonian government combined the pursuit of narrow party political interests with satisfaction of a low level majority value of ethnic Estonian electorate.

8 And a grant from public funds to enable all citizens to learn this language, apart from their 'mother tongue'.

by charts 2 or 3 (or some varieties of different lists of values). In some cases, this option is not available within a state but a nonviolent creation of new states will provide another kind of options for ethnic conflict management.

SELF-DETERMINATION AND/OR GRIEVANCES

Lord Acton claimed that before 1831 revolutionary movements were based either on grievances about misgovernment or rival imperial claims. After 1831 they fought 'usurpers', foreigners (see Connor 1994: 25 n.2). Conflict about self-determination can be solved only by self-determination or suppression by force. Of course, logically self-determination does not mean 'separation' and in practice may mean 'devolution', 'federalism', etc. Self-determination of ethnic nations still has its opponents and probably became accepted in international law as a right as late as in 1990s (the meaning of earlier UN documents is unclear).

In case of self-determination it is not the individual grievances, oppression or relative backwardness which matter. Walker Connor has pointed out that economic or cultural deprivation is not a necessary cause of nationalism (Connor 1994: 176-178). It is just the fact that the set-up of the unit itself is contentious and there exists no way of making decisions on this issue purely on the basis of 'one person, one vote' (Loone 1999). Of course, right to self-determination does not mean it would be prudent in all cases to strive to set up a separate state. It means that the sole justifying decision-making body on this issue is the collection of humans aspiring for self-determination.

Obviously, there may be grievances apart from the overall goal of self-determination. It has to be noted that a claim of self-determination is put against a government that is thus placed into a role of a colonial power (or occupying authority). Violent suppression of the demand for self-determination or symbolic actions that signify refusal to grant self-determination will cause aggravation of the situation and new grievances. This is a secondary layer of conflict above the primary one.

The present author supports the assertion that ethnic nations have the right to self-determination. Justification of this assertion lies beyond the goals of the present paper. It has to be noted that under present international law, the right of self-determination belongs to the ethnie as a whole and not to any of its parts (Müllerson 1994: 112). In philosophy, we may question the law. In politics, we may also question the law, even if we are obliged to submit to the law. In any case, if self-determination is a right, then it applies to all members of the class. Israeli right to self-determination (and preservation of the State of Israel) is (i) non-disputable and (ii) it implies the non-disputable right of Palestinian Arabs to self-determina-

tion. What is subject to negotiations is how to achieve the realization of the latter right.[9]

What has been said does not mean there are no genuine first-order grievances in ethnic relations. Sometimes a group has accepted a state unit as justified, although the group constitutes a minority. A group may be indifferent to governments and territorial states. Value divergences will still exist and conflict management will have to prevent these differences from becoming destructive to participants.

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9 At present, Palestinians are a nation in ethnic sense. It is unimportant whether they were a nation in the eighteenth century and whether there were, indeed, any nations at all in the eighteenth century. Obviously, no state has a *right* to exist if a condition of its existence is starting an unjust war against another state. Whatever were the matters in 1917, 1919, 1928 or 1947, at present the existence of an Israeli state is justified on the foundations of self-determination.

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ORIGINAL
SCIENTIFIC
ARTICLE

KNUT ERIK SOLEM

The Foresight Principle in Government: Needs and Possibilities

This article examines the role of foresight in government and explains why it is both necessary and rare. It outlines the characteristics of foresight, its main methods and techniques with particular reference to holistic models and their use.
The article identifies areas where foresight is needed as well as the types of constraints it faces. The relationship between foresight and planning is discussed, and some prescriptions and recommendations are offered

Keywords: community building, functional integration, environment, forecasting vs. foresight, decision-making.

Princip predvidevanja v vladanju: potrebe in možnosti

Članek razmišlja o vlogi predvidevanja v vladanju in razloži, zakaj je hkrati potrebno in redko. Oriše značilnosti predvidevanja, njegove glavne postopke in tehnike s posebnim poudarkom na holističnih vzorcih in njihovi uporabi.
Članek določi področja, kjer je predvidevanje potrebno in tudi vse vrste ovir, na katere naleti. Razmišlja o odnosu med predvidevanjem in načrtovanjem ter ponuja nekaj predlogov in priporočil.

Ključne besede: oblikovanje skupnosti, učinkovita integracija, okolje, napovedovanje proti predvidevanju, sprejemanje odločitev

INTRODUCTION

This article is meant as a general discussion paper (or "think piece"). Its very first (and by now extensively revised) version was presented to the International Relations Workshop of the Third Norwegian National Conference in Political Science at Bardøla, Geilo, Norway, 4 - 6 January 1995, and addressed - in particular - the linkage from research to planning to decision-making (Solem 1995a). It posed several questions dealing with the **quality** of research, the **utility** of the results, and the **working relationship** between researcher, planner, and decision-maker. Some of the principal ideas, with inputs from subsequent discussions with a variety of different experts, were developed further and presented to the NATO AC/243 (Panel 7) Symposium on "Coping with Uncertainty in Defence Decision Making", an international conference held at SHAPE Technical Centre, The Hague, on 16 - 18 January 1995 (Solem 1995b). Some of the ideas herein were included in a presentation to the 11th Norwegian National Political Science Conference, Trondheim, Norway January 2003 (Solem 2003a) while other ideas were incorporated in a the keynote address to the ISESS 203 Conference, held at the Panhans Hotel, Semmering, Austria, May 27-30 2003 (Solem 2003b). The present, extensively revised, version draws on the three previous papers as well as fresh ideas dealing - in particular - with the global mega-trends which face us as experts in our respective fields as well as collectively as members of the human race.

The analysis and observations contained herein are based on the author's own participation in several research environments; in different academic circles; within "think tanks"; and on the international circuit (mostly at the United Nations, NATO, IAEA, IIASA and OECD) and within the Norwegian national scene. Whereas the conclusions reflect primarily on English - speaking arenas, working conditions and institutions, there is little reason to assume that similar patterns could not emerge elsewhere in the foreseeable future. Hence the ideas and findings will hopefully be of some interest to a wider audience.

PRINCIPAL THEMES

Human survival and well-being largely depend upon our ability to anticipate and cope with future problems and threats. At this stage in the evolution of human affairs such a statement should come as no particular surprise. However, this ability, in turn, depends upon our capacity to perceive, evaluate and control the effects of our actions, present and future; as well as our ability to imagine and create more desirable futures. All these components are essential for a successful enterprise.

As is reasonably well known, several methodologies and techniques are available as aids to decision-making: However, they have so far been used only spasmodically or (in some cases) nearly at all. Why is this?

This article analyzes the rationale for studying the future within the context of some new, emerging challenges on the international arena. As an evolving "think piece" it is largely based upon direct experience in some specific (applied) research contexts and at various international organizations engaged in the production and delivery of research results for policy purposes. More specifically, this article briefly discusses the potential for, and use of, "think tanks" and the necessity and possibility of integrating foresight into the decision-making process. We shall identify some special characteristics of futures problems, as well as implications flowing from the process of looking ahead.

A NEW SECURITY AGENDA?

My level of analysis is the *international system*, and I am particularly interested in decision-making for global problems. Here there are some questions which I think ought to concern us more than most. Among these are the following:

- Which are the principal new trends in the international system, and how do they affect the structure of this system?
- Are future trends and global problems given enough attention in research and planning?
- Are the research results useful? Do they contribute as useful inputs to (political) decision making?
- Which changes, if any, are needed to improve decision systems and process?

As for the "new" trends facing the international system - which may in the final analysis not be really all that new but *re-emerging* - the most prominent among them in terms of political importance and policy-relevance, are the following, in no particular order:

- The question of nuclear proliferation (i.e. nuclear weapons, -material and -technology)
- Biological and chemical acts of warfare
- Resources and conflict (energy as mega-trend)
- ENVIRONMENT (including environmental warfare)
- Terrorism/Crime/Drugs

- Guerrilla wars and activities
- Social and economic upheaval
- "next-to-war" scenarios
- Pandemics, AIDS and SARS

Apart from guerrilla warfare and terrorism (which up to now was seen as a wild card), most of these problems are directly or indirectly related to the **environment**, by way of questions relating to resources and their control. It can be argued that today's environmental problems are in general familiar, that they are quite widely discussed, and that they have, by now, become subject to both public and private scrutiny. It can therefore also be argued that most politically aware individuals "know" today's problems in this minimum sense.

Processes are on the way in several institutions to define and assess the scope, the strength and - where possible - the direction of these trends and problems. Hence, in many quarters there is a search on for solutions, remedies or preventives (although the latter often turn out to be mere palliatives). In many capitals and other centres of decision making, it is understood that the stakes are high, as are the costs and rewards. Since recognised problems are now at the core of public interest, they get the attention of top decision makers, although this is often due to relatively frantic pressures from below and with the sustained help of the mass media.

Environmental concerns, which is what may occupy our attention most of all, have thus gone well past the status of being just another "issue". The **environment** is, after all, where we live. In addition, environmental issues have by now entered the lexicon of "strategic threats", i.e. to national and international security. An alarm bell went off in many foreign and security policy centres, illustrated by Robert Kaplan's in the - by now well-known Atlantic Monthly article – (Kaplan 1994), and in particular by the ways by which this was picked up in important government circles in different countries. Looking specifically at developments in Africa, Kaplan had argued that impoverishment, repression and mass movement were the main factors of a coming global crisis, and that they constituted a self-sustaining cycle. And this, it could be argued, will, ceteris paribus, probably remain so, regardless of the measures undertaken or not undertaken by those same governments. What Kaplan did was - in fact - to re-introduce the "Limits-to-Growth" argument, in a different form, but with the same sense of urgency as that of the original Meadows-Randers-and-Behrens' thesis, which had created the first full-fledged debate way back in 1972 (Meadows, Meadows, Randers and Behrens III, 1972).

These authors were among the first to apply their computer knowledge to the (proposed decision making) of global problems. From a methodological point of view, it is – especially now - relatively easy to find arguments against some of their choices, and several observers have done so. One could state, for example, that Kaplan's article illustrates the misuse of *linear projections*; that it ignores such critical elements of Futures research as the shortcomings of the concept of *exponential growth*", and the process of learning, or *"negative feedback*". It therefore constitutes - in a weird and somewhat convoluted way - a case of *"discounting the future*"; whereas Kaplan's intentions may easily have been the opposite. (Seitz 1995, Hughes 1993).

However, none of these criticisms - only sketched here - should detract from the central points of concern, namely (1) how well are global problems and issues picked up by those who are meant to act on them; (2) how much importance is given to the same problems, and (3) which - if any - are the links between researchers and decision makers with respect to such issues. More specifically, how effective is the link between research and researchers on the one hand and planning and planners on the other? Finally, how useful are the results to the decision maker, perceived and de facto? We shall turn to this question shortly.

Specific global problems and issues which require our attention and the use of good tools as aids to decision-making may be organized under the rubric of **mega-trends**, of which I have identified three major variants (Solem 2007) . By "mega-trends" I mean trends which are so large and all impacting that they cannot be controlled by a single unit, be it individuals, a nation, or a group of nations. They are so broad and all-encompassing that they influence nearly all aspects of social and cultural life. These trends cut across all 'normal' lines of demarcation, i.e. geographic, cultural, religious or economic boundaries. The first such mega-trend is that of **demographics and resources**. The question of population (or demographics) by itself is virtually meaningless. The question of population **and** resources is essential, as it contains the essence and principal determinants of sustainability.

We know full well that humanity is totally dependent upon an environment which has physical limits. We also know that the world population has more than doubled in the past forty years to reach some 5.5 billion, and could exceed 8 billion - perhaps even 10 billion – by the middle of this century. The cost associated with this growth is two-fold: decreased per capita availability of basic human needs (water, food, energy); and regional and global environmental degradation. The latter is highlighted by the spectre of global warming. Since population growth costs will not be anything like evenly distributed across the world, the already underprivileged groups of population will likely suffer most. Resource disparity may be further aggravated at least at three levels of social interaction: intra-social,

intra-regional, and finally along north-south lines. Some of these general tendencies may have been factored in for general strategic consideration by governments. Even so, the study and assessment of these issues is generally spread out among so many different departmental agencies in our western democracies as to be sub-optimal in terms of intended solutions. Whether they are fully taken into account in general strategic overviews, which in turn are being utilized regularly for direct planning purposes, is therefore a much more dubious proposition.

From an historical perspective, **technology** (our second mega-trend) has been utilised quite successfully to avert the most adverse consequences of, for example, rapid population growth. Today's developments in, say, bio-technologies, alternative energy sources and environmentally friendly technologies, have all shown promise (Gaivoronskaia and Solem, 2004; Solem 2005). Without technology we would very likely still be living in trees or caves. Furthermore, recent developments in information and communication technology will undoubtedly have an important impact on - and may even alter our perception of - humanity's full potential. Technology changes thinking in the same way as our thinking changes technology. Following the invention of the airplane, for example, the world shrank. The invention and development of radio-communications simply revolutionised military thinking, for example. Technology, therefore, has been changing man's thinking for a long time, and this process is interactive.

Regardless of which technology is going to be exploited, ***capital*** is as a rule required, most of which is held by the developed world. More specifically, due to the universal character of public debt, the bulk of discretionary capital is held in the hands of individuals and the private sector. Whereas the trend towards a global free market may have the potential of significantly increasing global productivity and prosperity (and some may disagree with this claim also), the effect will likely be somewhat capricious in the short to medium term. It would also likely be skewed towards developed and newly developed countries. Therefore, future trends in technology and economics may **widen** the gap between the have and have-nots, not reduce it; this, of course is assuming no political intervention. However, this process is of course not automatic, as we still have the capacity to plan and to learn. It is here that the idea of my third mega-trend - **human values** - kicks in. As far as planning and learning is concerned, I would like to think that, for example, Enviromatics could and should play an important and critical role (Swayne et al. 2004, Solem 2005).

IMPLICATIONS FOR PLANNING

What does all of this mean in terms of the functioning of the international system in general and for **conflict avoidance** in particular? As a response to some of the above trends, greater regional and some global collaboration could occur in such areas as trade and commerce, physical sciences and technology, and humanitarian assistance. Increasingly, the political primacy and sovereignty of the nation state (loosely labelled) may be called into question. The international community, dominated by the will and perceptions of the developed world could insist on individual state accountability on several major issues, such as economic and environmental management, internal security and human rights. Furthermore, nations may soon be held much more accountable for their actions on the high seas, in the Polar Regions and in international aerospace.

Notwithstanding the advent of an increasingly regulated trans-national environment, individual states may also come to face varying degrees of internal and regional instability. This will likely be fuelled by shifting and growing social disparities, population movements, and the global proliferation of modern weapons systems. It has already manifested itself in a minor upsurge of regional, ethnic and religious rivalries as well as random illegal activities. The future security environment could likely be significantly less polarised and apocalyptic than in the past. However, at a lower level of intensity, it could easily be more volatile, diffuse and anarchical. The lesser developed regions may assume the brunt of the instability, with spill-over effects impacting on developed regions to various degrees. How does all of this impact on the thinking and actions of the planners and the decision makers? More likely than not, they will be faced with a set of new and different problems which will challenge their capacity to adjust, and their ability of "learning to unlearn".

NEW KINDS OF PROBLEMS

The term **well-structured** problem is perhaps easily enough understood. This category consists of problems of the past and the present, as well as those which can be handled by the methods of normal science. Social sciences problems, on the other hand, are frequently **ill-structured**, characterized by the co-existence of very many variables and interactions, and qualitative and/or holistic aspects (Linstone and Simmonds 1977). They have also been referred to as "wicked problems" or "messes" (Ackoff 1974, Mason and Mitroff 1973). To bring the point home further; **Futures** problems often share these characteristics, with the added complication that the number of possibilities increases substantially, depending on the extent and time frame used (Solem 1980). Social sciences, through their techniques and methodologies in general, and those of Futures research (especi-

ally forecasting and foresight methods in particular) regularly address these types of ill-structured problems, and must, therefore, be approached from a longer term and (if possible) holistic perspective.

Whereas well-structured problems are often almost completely definable, either in theoretical treatments or through specific "agreements" by participants/observers, the case for ill-structured problems is very different. The definition of the problem may in fact differ from one observer to the next. There may often be little or no commonly agreed set of assumptions. Consequently, this is an area where perception could turn out to be at least as important as reality. When dealing with global problems we must keep this in mind. For pretending to define the future explicitly is to exclude its chief characteristic - its basic unknowability.

Ill-structured problems are alternately described as "messes" or "mega-problems". They are usually seen as "messes" when nobody can be held responsible and as "mega-problems" when it is thought that they are beyond anyone's capacity or ability to act on. Both are, in a certain sense a "cop-out" by analysts and planners alike. I will argue that both methods and potential organisational forms are available to help us deal with such challenges, much more effectively than has been the case before. Within the armoury of methods and techniques the knowledge and use of information and communication technologies will likely play an increasingly important role if and when applied fully.

PREDICTIVE AND ANALYTIC FORECASTING

Faced with complex situations, increasingly containing ill-structured problems, prime value must be put on the ability to define measure and communicate, in fact to try to incorporate "negative feedback", i.e. the learning process itself into all planning and decision-making. Here the latest breakthroughs in information and communication technology must be applied. There is a large and increasingly important role to be played by the computer use and analysis on environmental problems.

However, human social, technical and political affairs do not by themselves lead to the adoption of an experimental approach, which could guarantee a deeper insight or a better mastery of our social, technical and political environment. Luckily, as we know, the social sciences have been able to produce some relatively sophisticated approaches for the analysis of complex systems. Not all are equally useful for any or all types of problems. Some are under-used; some over-used; while others may have become discarded, perhaps later on to be reconstructed; and some methods and techniques are revered. Delphis, trends analysis, linear projection, dynamic modelling, cross impact analysis, global model building, gaming, human and computer simulation, scenario writing, brain-storming, the

evaluation of alternative outcomes (alternative futures), "prospective analysis" and impact assessment are all in fact quasi-experimental methods which could usefully be gathered under the general category of futures research, or forecasting. These methods exist, they have been developed further, and they are ready to be used. Many of them require the knowledge and use of computers.

It may be important at this stage to draw what amounts to a critical distinction between **predictive** vs. **analytical** forecasting, and to explain why the latter is perhaps more appropriate to many or most problems facing the international system, which is my level of analysis here. "Predictive forecasting" relies almost totally on scientific justification. This calls for an explicit demonstration of the premises (suppositions, facts, data etc.) and the methods used for arriving at the given prediction, as well as (preferably) the assessment of its probability of becoming true. The typical example of predictive forecasting of this kind may be the modern meteorological prognosis, which does not simply predict rain for Sunday, but specifies "75 percent chance of rain on Sunday", which is a much more useful statement for many practical purposes. Often such statements are accompanied by an overview, or a map of already existing weather conditions. Such a map will normally include not only data about the existing situation, but also show the fronts and flows that tend to determine tomorrow's weather. Applied to social research, this would allow the recipient to see (some) of the evidence for the forecast, and maybe form his own views. Environmatics may be of direct use here.

Analytical forecasting, on the other hand, is not directly concerned with what will happen tomorrow, or at any specified date. Its main objective is to survey, as systematically and completely as possible what *chances* for development, and what *options* for action are open at present, and then to follow up analytically to determine to which alternative future outcomes these developments and actions could lead. Hence, in contrast to predictive forecasting, analytic forecasting is often couched in the form of disjunctive hypothetical inference: "Given A or B or C; if A then E and F. If B the G and F. If C then again G but K instead of H..." etc. We could argue that this particular approach is, often instinctively or intuitively, followed by the policy-maker, who will, for example try to assess available options through, say, technology assessments, technology forecasting or other methods of "prediction". Furthermore, policy-makers will, almost automatically, try to consider the natural consequences of their own, as well as the adversary's, possible actions in more or less this way. However, very often this process is done without any type of longer-term vision, in large part due to a pre-dominance of short term issue resolution or so-called "crisis management", which has been the order of the day.

FORESIGHT, PLANNING, AND DECISIONMAKING

Foresight in government (or any other organization for that matter): what does it mean and, as a corollary perhaps how does it work? Foresight could possibly best be described as the overall process or set of analytical activities which creates and improves on the understanding and appreciation of information generated by 'looking ahead' (Coates 1985). This process includes quantitative as well as qualitative means for monitoring signals, clues and indicators of evolving trends and developments. Hence, it stands to reason that foresight as an activity is perhaps most useful when it is linked to policy implications.

To some extent foresight must also be directly applicable to help us prepare for the needs and challenges of the future. It is important therefore, that decision-makers and other political actors be involved in at least a good party of the foresight process early on, so as to allow the establishment of a direct interest, or a stake in what goes on; what goes in and what comes out of the policy making process. IF done well and carried out in a benevolent and mutually supportive manner, much stand to be gained. If done successfully, the process might lead to better co-operation among the decision makers involved in specific tasks, as well as a widening comprehension of the issues involved, and a greater understanding of the larger external environment and its interaction with the policy process itself (Coates 1985).

Turning to some specific problems facing research, bureaucracy and the application of management techniques, we observe the following: Traditional research organisations are becoming tied increasingly closely to governmental or corporate bureaucratic structures. This may or may not be by their choice. However, it normally means that, when facing intensified complexity, turbulence and competition, and with the quest for "efficiency" and "innovation", they are often led into a bewildering and confusing forest of management theories and practices (Rejeski 1994). What is often lacking to a surprising degree is the ability to focus on all the operational aspects of the **total** problem in anything like an unencumbered way. Instead, very often new approaches and management techniques are rushed in and tried out, even before previous approaches or techniques have been completed and found faulty or discredited. Several of these management techniques and practices have now moved from the private to the public sector. By now it should have become increasingly clear that management methods and techniques, by themselves or in some combination with quick fixes, will not help us deal with ill-structured and global problems. So what will?

The answer, I think, lies in some sort of judicious blend of foresight and planning combined with the understanding and use of good communication and information technology. Foresight again! Regarding information and communication technology in particular, new and improved used of environmental decision

support systems (EDSS) are also available (Swayne et al. 2000) and should be applied to their fullest extent.

The overall aim of this article has been to arrive at an understanding of what *foresight* is, why and how this concept is necessary and important, and for which functions in particular it is useful, hence where it could and should be strengthened - and at the same time to show why this type of foresight in (especially government) organizations, at least up to now, has been so relatively rare. The larger question of direct implementation within (specifically) government organizations has been dealt with elsewhere (Solem 1980, 1995, 2003, 2007), and lies outside the scope of the present paper. Foresight, as I have defined it here, is the overall process or set of analytical activities, which creates and improves on the understanding and appreciation of information generated by "looking ahead". This process, or activity, tantamount to analytical forecasting, includes quantitative as well as qualitative means for monitoring signals, clues, and indicators of evolving trends, or - perhaps more importantly - discontinuities, as well as other developments.

Foresight, as a formal activity when direct results are sought, may be most useful when linked to the analysis of specific policy implications. An important concern, however, is how *directly* linked this activity should be. An important counter argument, to examine closely, is the need for positioning at least part of the foresight function at a certain distance from the intrusiveness of day-to-day politics and administrative interference. The former obstacle may not at least at present pose particular problems for universities as they are currently constituted, compared to say more tightly government run or controlled organizations. The future prospect for either type of organization seems much murkier.

Decision-makers and key "actors" should be involved in the foresight process early on. This allows the establishment of a direct interest, or stake in what goes into (and comes out of) the process. Based on considerable personal experience I would argue that, if done in a mutually beneficial, hence supportive and acceptable manner, this approach allows for optimal co-operation between analysts and decision-makers directly involved in specific tasks. It also widens the issue areas. In most cases this approach also leads to a greater understanding of the larger external context. What foresight (in government) cannot and should not do is to **define** policy. What it should attempt to do, is to help condition policies, to make them flexible or robust, whichever the situation demands. Furthermore, foresight is not planning. It may be, and often is, a step in a rational planning process. Whereas it ought to be seen as a necessary precondition for any such activity, it is often - for a variety of reasons which have been examined in this paper - not always found where it could be most usefully applied.

CONCLUSION

Which further lessons may be learned from all of this? One remaining problem i.e. that of the "disappearing decision" should be tackled by someone, preferably a group with sufficient knowledge of global trends and problems, fully computer-literate researchers who care to include futures techniques and prospective analysis in their work, sooner rather than later. Otherwise, could it be that, as Jay Forrester among others argues, the human mind is unadapted at interpreting the behaviour of social systems? (Kaye and Solem 1992). This would indeed be a dismal conclusion. Until now it has not been necessary for humanity to understand these systems, at least in any great detail. Our evolutionary processes have seemingly failed to equip us with the required skills to deal with systemic, interactive behaviour. However, this is no longer the case. Things have changed massively.

We must "learn to unlearn". A second lesson is that of not "discounting the future". Whereas short-term thinking appears to have gained the upper hand in many decision-making circles, at least for the time being; there are some hopeful signs that the tide may now be turning. Since we live in what the Chinese call "interesting times", it is becoming quite clear that something much more profound and solidly rooted than expediency and cost-cutting is needed.

People who study strategic behaviour tend to use a variety of related adjectives to describe what now seems to occur in organisations acting in new, strategic and innovative ways. These include terms such as "hyper-change", "quantum-leaps", "radical innovation", "strategic discontinuities", "cultural transformation" and "paradigm shifts" (Solem 1980, 2002, Rejeski 1994). Whereas the forces behind such changes are often described as "entrepreneurship", "vision", or and strategic leadership, the process itself should not simply be reduced to recipes and the use of analytical tools. It clearly needs *both* an appropriate context and a comprehensive way of understanding the totality of both system and process. This is a major task for communication and information experts, computer scientists and other strategic thinkers alike.

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ORIGINAL
SCIENTIFIC
ARTICLE

ZOLTÁN KÁNTOR

NATIONALIZING MINORITIES AND HOMELAND POLITICS

There is no single state in Europe that is not based – in a way or another – on the principle of nationality. In different places, in different historical periods nationalism was, and is, present is various forms.
The article focuses on the general aspects, mechanisms and processes of what is called "nationalism in East-Central Europe", and illustrates the different nationalisms on the case of the interdependence of Hungarian and Romanian nationalisms. The article presents the different types of nationalisms involved in the relationship between Hungary and Romania, as an emblematic example.
The issue of definition of the nation is not only a scientific issue, but a political one too. The Hungarian status law and the debate on dual citizenship, as well the international consequences of the debate is a perfect example of how scientific and political approaches merge. The real question of social sciences target how does societies transform and institutionalize.
The status law syndrome is post-communist nation building. It is the institutionalization or re-institutionalization of societies on a national basis. The Hungarian case may have put this question on the table for Europe, however, this type of law is not novel. The status laws show that the nationality principle underlies the principles of ECE states, and that all ECE states employ the ethnocultural definition and institutionalization of their societies. The status laws and policies of dual citizenship reflect nothing else but the prolongation of nationalism. The democratizing states in ECE and the enlargement of the European Union created new institutional frameworks also for the managing the issue of national minorities

Keywords: nationalism, nation, citizenship, Hungary, Romania

"NACIONALIZIRANJE" MANJŠIN IN DOMOVINSKA POLITIKA

V Evropi ni niti ene države, ki ne bi temeljila – na ta ali oni način – na principu nacionalnosti. Na različnih območjih, v različnih časovnih obdobjih je bil, in je še danes, nacionalizem prisoten v različnih oblikah.
Članek se osredotoči na splošne vidike, mehanizme in postopke pojava, o katerem govorimo kot o "nacionalizmu v Vzhodni in Srednji Evropi" in razlaga različne nacionalizme na primeru medsebojne odvisnosti madžarskega in romunskega nacionalizma. Predstavlja različne vzorce nacionalizma, ki je vpleten v odnose med Madžarsko in Romunijo, in sicer kot simboličen primer.
Vprašanje definicije naroda ni le znanstveno vprašanje, ampak tudi politično. Madžarski zakon o statusu in razprava o dvojnem državljanstvu, kakor tudi njune mednarodne posledice, sta odlična primera načina, kako se znanstveni in politični pristopi strnejo. Glavno vprašanje družbenih znanosti je, kako se družbe spreminjajo in institucionalizirajo.
Sindrom zakona o statusu je post-komunistični način ustvarjanja naroda. To je vzpostavitev ali ponovna vzpostavitev družb na narodnostni osnovi. Morda je madžarski primer postavil to vprašanje pred evropsko javnost, vendar pa ta vrsta zakona ni novost. Zakon o statusu kaže, da je princip narodnosti osnova principov držav članic ECE in da vse te države temeljijo na etno-kulturni opredelitvi in institucionalizaciji svojih družb. Zakoni o statusu in politike dvojnega državljanstva niso nič drugega kot nadaljevanje nacionalizma /principa narodnostne pripadnosti. Demokratizacija držav znotraj ECE in širitev Evropske unije sta ustvarili nove institucionalne okvire tudi za upravljanje vprašanja narodnih manjšin.

Ključne besede: nacionalizem, narodnostna pripadnost, narod, državljanstvo, Madžarska, Romunija

The paper focuses on the general aspects, mechanisms and processes of what is called "nationalism in East-Central Europe", and illustrates the different nationalisms on the case of the interdependence of Hungarian and Romanian nationalisms. Nationalism may not be the central issue of understanding transition in East-Central Europe, however salient aspects of this process of social transformation cannot be understood without an analysis of the different types of nationalism. I use nationalism as a value-free and descriptive concept, in the sense of a politics based on the nationality principle.

In the first part, I will describe the common characteristics, and then I will turn to the analysis of the different types of nationalisms involved in the relationship between Hungary and Romania, as an emblematic example. In this part I will analyze the nationalizing politics of the Romanian state, the homeland politics of the Hungarian state and the politics of the Hungarian national minority – with a special emphasis on the Hungarian status law. At the end I will focus also on the role played by the European Union regarding nationalism in East-Central Europe.

The analytical framework relies partially on Rogers Brubaker's triadic nexus (Brubaker 1996), which is applicable for basically all the situations where there is a nation-state, an external national homeland and a politically active national minority.[1] Brubaker's concept 'nationalizing state' captures the dynamics of the politics of the nation-state. I will argue that using 'nationalizing minority' instead of national minority serves the analysis of the interplay of nationalisms. In this case we can see the common features of the parallel and usually conflicting nationalizing processes, making the understanding of national politics easier.

In the early 1990s there was a vision that nationalism replaced communism. These explanations are false. One may say that a nationalist rhetoric replaced the communist one. Or one may argue that certain communist leaders suddenly became nationalists. However, this change is no more than a continuation of past politics in a new – more or less democratic – framework. Nationalism, as an ideology, as a sentiment, as a principle of organizing society is present since the 18-19 century. It is a facet of modern European history. One may interpret the history of modern Europe (also) as the history of national-based institutionalizations. There is no single state in Europe that is not based – in a way or another – on the principle of nationality. In different places, in different historical periods

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1 Besides the analyzed example, we could apply the framework to the other Hungarian minorities in the neighboring states, or to the Russians in the Baltic states. Obviously, no one situation is similar to the analyzed one, but resemblances can be easily detected. This has only limited applicability for the nationalisms of stateless ethnic groups (e.g. the Roma), or for national minorities/ethnic groups that do not have political, only cultural goals (i.e. Bulgarians in Romania, Armenians in Hungary, etc.).

nationalism was, and is, present is various forms. The rhetoric of communism only affirmed that it is not based on the ideology of nationalism. The fact is that communism institutionalized nationalism in another form, and often used it for the legitimation of the system (or the leaders of the system). Walker Connor (1984: 6) observes "Marxists not only learned to accommodate themselves to an expedient coexistence with a world filled with nationalisms, but they also developed a strategy to manipulate nationalism into the service of Marxism." The explanation is simple: communist (socialist) ideology or legitimation (backed by the secret services) suddenly became empty. No fraction of the population could have been mobilized invoking socialism or communism.[2] The underlying assumption was that socialism/communism will resolve the national question, and national values will loose their salience. This was false. Nationalism is much deeper rooted, and it is highly questionable whether the European integration will create a new non-national identity.

NATIONALISM

Tom Nairn's (1997: 1) remark shows how central nationalism is in the contemporary world: "[Gellner] demonstrated how industrialization produced modern political nationalities; yet did not got on to suggest that the true subject of modern philosophy might be, not industrialization as such, but its immensely complex and variegated aftershock – nationalism."

Nationalism, according to most scholars, came into being in the 18-19th century. Since then societies have been organized on the basis of the principle of nationality. The invocation of the "nation" is perhaps the main legitimizing principle. Nationalism is inherently related to culture. Nationalism comes into being when culture replaces structure (Gellner 1983). Nationalism emerged first in Western Europe as a consequence of major transformations, explained differently by the major authors. Gellner considers that nationalism is the outcome of the transition from agrarian society to industrial society, while Anderson (1991) detects the emergence of national consciousness – the nation as an imagined community – as a result of the "convergence of capitalism and print technology on the fatal diversity of human language". In all these cases a new legitimation of the state occurred, by institutionalizing nationalism as a principle of organizing society. Since nationalism emerged, the organization of societies is (also) based on the principle of nationality. In this respect, we may consider every European society

2 It is needless to mention that, without the totalitarian or authoritarian control of society, even before 1989 the population were not enthusiastic supporters of the communist regimes.

as being nationalist. In the age of modernization, states tended to homogenize ethnically their societies, doing this in various ways.

States, societies and cultures became more and more institutionalized. The standardization of language, the creation of high culture, the introduction of compulsory education and the nationalization of culture served the titular nation. Non-dominant ethnic groups intended to create their own nation, with leaders from that particular nation, and intended to have their own state. The nationalists' programs and projects of nation-building/nationalizing usually were formulated and made in opposition to dominant groups/nations and other nationalizing processes. The breakdown of empires, the division of states and transitions reconfigured political power and offered new frameworks for nationalist politics.

Almost all the European states have national minorities or ethnic groups. The majority of the European states have co-nationals living in other states. Those states that have co-nationals (kin-minorities) in other states have adopted a policy that supports – financially, culturally, or even politically – their kin-minorities. The support of kin-minorities is based on the idea of the nation as an ethno-cultural entity, not on the political conception of the nation. It is assumed that the co-nationals have, or should have a special relation with the kin-state. The historical process of nation-formation can easily explain this, from the 18th century on. Nations have been formed and have been institutionalized. A sense of national identity emerged within the population, usually due to the (often painful and aggressive) process of nation-building.

It is argued by scholars that western nationalism differs from eastern one (Meinecke 1970, Kohn 1994, Plamenatz 1973, Dieckhoff 2003). This distinction may be conceptually valid, however, what matters are the politics implemented on the basis of one or another conception. There is no one state that employs only one of the conceptions. Usually, an ethnocultural conception is employed regarding the titular nation and the kin-minorities, while a political conception is employed regarding the national minorities and ethnic groups living in the particular state.

The history of nationalism in East-Central Europe can be best understood if we analyze the different – i.e. of the majority and of the minority – nation-building, or nationalizing processes. An important role in the nationalizing process of the national minority is played by the external national homeland. As the borders of states have often changed, different groups have experienced at different times the assimilationist or dissimilationist politics of the titular nation. In other words, they were the suffering subjects of nation-building processes, not infrequently with disastrous outcomes. A description of such policies is presented by Mann (1999) and a theoretical account, describing the mechanisms, is offered by McGarry (1998) – the settlement of majority groups in peripheral regions inhabited by minorities, relocation of minority groups within the state, and expulsion

of minorities from the state. Basically, every national minority, which was once a component of the majority nation, or expressed nation-building goals within the new state, or seemed to be a potential danger to the nation-building of the majority, experienced one or several of the processes described.

One possible approach to national conflicts in Eastern Europe is to stress the parallel and often conflicting processes of nation-building. Once the ideal of the nation becomes important, there does not seem to be any sign that it will loose its significance. Nationalism may be transformed, but it remains an important organizational principle in our world. Nationalist politics is oriented partially on the strengthening of boundaries of the titular/majority nation, and by more or less hostile politics against national minorities.

Rogers Brubaker distinguishes between four types of nationalism, those of the nationalizing state, the external national homeland, of the national minority and populist nationalism (Brubaker 1998). I will focus only on the first three.

Since the 19th century nationalism became the basic organizational principle in this region, too. Every major transformation, be it the peace treaties after the world wars or the breakdown of communism, started a reorganization/reconfiguration of the state. Nationalism did not appear, or reappear, after 1989, it only became manifest in a new form. Hroch considers that post-communist nationalism, especially the nationalism of the national minorities, resembles the path of nation-formation of non-dominant ethnic groups in the 19th century (Hroch 1996). Rogers Brubaker sees similarities between the post-1918 and the post-communist period (Brubaker 1996). Katherine Verdery emphasizes the similarities between the post-colonial and post-communist nationalisms (Verdery 1996).

The emergence, and the strengthening of nationalism in East-Central Europe followed a different pattern. While nationalism in Western Europe was the consequence of modernization, East-Central European nationalisms are mainly adapting the successful western model. Several nations of today were in the 19th century only aspiring to become nations as the western ones. Most of them were encompassed in large empires (the Tsarist, the Ottoman and the Habsburg, later the Austro-Hungarian Monarchy). Hroch describes a model of how these non-dominant ethnic groups became nations (Hroch 1993). In his analysis of non-dominant ethnic groups in the framework of nation formation, he summarizes their goals as follows: (1) The development or improvement of national culture based on a local language, which had to be used in education, administration and economic life; (2) The creation of a complete social structure, including their 'own' educated elites and entrepreneurial classes; and (3) The achievement of equal civil rights and of some degree of political self-administration (Hroch 1995). As Hroch puts it: "the process of nation-forming acquires an irreversible character only once the national movement won mass support, thereby reaching phase

C."[3] (Hroch 1996) Since nationalism has appeared, the process is permanent. Nationalism has become the central ideology of the state, especially – but not only – in the eastern part of Europe.

Breakdowns of regimes, revolutions and transitions are usually accompanied by the redefinition and re-institutionalization of the nation, and by the reconfiguration of the state. The nationally mixed territory of East-Central Europe followed this model. As Beissinger notes: "the goal of nationalism is the definition or redefinition of the physical, human, or cultural boundaries of the polity." (Beissinger 1996) Obviously, when one part redefines the polity in national terms, the other actors will probably react and take similar steps. Titular nations framed their constitutions disregarding, or even opposing the claims of national minorities. As Culic shows, the primordiality of the titular nations determined the central values of the states: "In the preambles of the Constitutions, as well as the public political and cultural discourses, and in the substance of other state policies, *the evidence and elements of the historical existence and continuity of a Nation state represent the most salient and powerful arguments,*" (Culic 2003).

National minorities immediately formed their ethnic (ethno-regional) parties. External national homelands expressed their concern regarding their kin-minorities living in other states.

The following part deals with the politics of the nationalizing state, the nationalizing minority and the politics of the external national homeland.

HUNGARIANS AND ROMANIANS

To put the question very simply, the origin of the problem is the Gellnerian incongruence of the boundaries of both states and both nations.[4] As a rule, the titular nation practiced a nationalizing policy hostile toward the minority. This is true for the Hungarians until 1918, and for the Romanians since then.

After the First World War, Hungary lost a part of its territory, and around three million Hungarians became national minorities in the bordering states. The situation of the Hungarian minorities abroad has been a permanent concern for the Hungarian government. Hungarian nationality politics, as basically every nationality politics in Europe, is based on the assumption that the Hungarian state is responsible for Hungarians living abroad. Between the two word wars, the shock of the Trianon Peace Treaty deeply influenced Hungarian domestic and foreign

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3 In Hroch's approach a non-dominant ethnic groups becomes a nation only if the political projects of the elites gain mass-support.

4 All Hungarians lived in one state only between 1867 and 1918, the Romanians only between 1918 and 1940.

policy. Hungarian foreign politics was characterized by a strong support for the Hungarian minorities abroad, and irredentism (Zeidler 2002). The second Vienna Award[5] granted to Hungary the northern part of Transylvania. However, the end of the WW II saw the redrawing of Hungary's borders to almost as they were before 1938. The Soviet system was based on the assumption that socialism would resolve the problems of national minorities, and that minority issue belongs to domestic affairs. The breakdown of the socialist/communist system brought to the surface the old tensions between the titular nation and the national minorities, and, similarly, this led to tensions between neighboring states. This was the case of Hungarian minorities and the titular nations in the neighboring states. The domestic national tensions are also reflected in the relationship between Hungary and its neighbors. The essence is that the relationship between a kin-state and its neighbors is strongly correlated with the (perception of the) situation of its minorities and the titular nation.

Following World War I, Romania acquired Transylvania. As a result, a sizeable Hungarian population became a national minority in Romania. In other words, a part of an already formed nation, which had been involved in the process of nation-building, suddenly became a national minority. Up to 1918, the Hungarians considered themselves the rightful masters of Transylvania, and acted on the basis of this idea. Consequently, after 1918, while being backed ideologically by the revisionist politics of the Hungarian state, the leaders of the Hungarian national minority in Romania organized their political and cultural organizations on an ethno-cultural basis and promoted a policy of self-defense in regard to the nationalizing thrust of the enlarged Romanian state. The essential point is that the ethno-cultural basis of organization, which increasingly characterized the Hungarian politics of nation-building after the Compromise of 1867, prevailed after a part of that nation became a national minority. Obviously, the framework had changed dramatically, but the politics based on the ethno-cultural conception of the community remained dominant.

The nationalizing process of the national minority has characterized Hungarian social and political life in Romania since 1918. Besides striving for different forms of autonomy and self-government, the political elite, with the help of the intelligentsia, has been engaged in the establishment of separate Hungarian institutions. The idea behind this practice is that without such institutions Hungarian culture cannot be preserved and promoted. The nationalizing process of the national minority has been influenced both by the "nationalizing state" and by the "external national homeland" (Brubaker 1998).

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5 30 August 1940.

In the following section, I will analyze nationality politics in the Romanian-Hungarian context. The three major actors are: the Romanian state, the Hungarian state and the Hungarian national minority in Romania. In the first part, I will briefly present the historical antecedents, followed by an analysis of the post 1989 period.

NATIONALIZING NATIONALISM. THE ROMANIAN STATE.

The nationalizing politics of the nation-state is not new. In the 19th century basically all states in Western Europe pursued such policies. However, nationalizing state policies became characteristic in the region in the inter-war period. The newly formed states conceived themselves as nation-states, and intended to create their ethnically homogeneous nation-states. Governments practiced both exclusive and inclusive policies regarding different national groups. Brubaker summarized the following characteristic elements of the nationalizing state: 1. the existence of a "core nation" or nationality, defined in ethnocultural terms, and sharply distinguished from the citizenry or permanent resident population of the state as a whole; 2. the idea that the core nation legitimately "owns" the polity; 3. the idea that the core nation is not flourishing, that its specific interests are not adequately "realized" or "expressed" despite its rightful "ownership" of the state; 4. the idea that specific action is needed in a variety of settings and domains to promote the language, cultural flourishing, demographic predominance, economic welfare, or political hegemony of the core nation; etc. (Brubaker 1996: 83).

Romania was formed in 1859 with the unification of the Principates Moldova and Wallachia, and gained its full independence in 1877. Greater Romania came into being after the First World War. It was a nation-state that encompassed all the Romanians, who before 1918 lived in different empires, but 28% of the population were members of national minorities: Hungarians, Germans, Jews, Ukrainians, Russians, etc. The simple existence of these national minorities hindered the project of the Romanian state to achieve the status of a homogeneous nation-state. The Romanian state started a nationalizing process, the creation of a state dominated by the titular nation (Livezeanu 1995). After 1918 Romania started an intense nationalizing policy. In the case of nationalizing nationalism, the core nation is understood as the legitimate 'owner of the state', which is conceived as the state *of* and *for* the core nation. In the communist period, Romania followed the Leninist principle of national self-determination, granting – under Soviet pressure (and military presence) – a kind of autonomous status for the counties inhabited by Hungarians. In the 1960s, when Nicolae Ceausescu became the leader of the Romanian Communist party, a nationalist turn could be observed. Katherine Verdery states that Ceausescu realized that only with this nationalist twist would he obtain support for his regime from the intellectuals (Verdery 1991). The

consequence was that nationalism became institutionalized in the communist system.

The breakdown of the Romanian communist system in December 1989 created a new environment for the different processes of national institutionalization, now in a democratic framework. The national projects, that of the titular nation, and that of the Hungarian minority found themselves in an antagonistic situation. Romania's nationalizing policy can be best observed in the process of framing the constitution, when Romania was defined as a nation-state. Later, several laws reinforced the national character and national orientation of the Romanian state. The emergence of nationalist parties, like the Greater Romania Party and the Party of National Unity of the Romanians, tacitly backed by the post-communist party,[6] in power at that time, were the major promoters of state-directed nationalism. After the Democratic Convention came into power, and invited the DAHR to participate in the government, nationalism played a more minor role (Kántor – Bárdi 2002). However, tensions were still present, but their manifestation was more controlled by the state. The elections in 2000 again reshaped the political sphere in Romania. The Social Democratic Party, supported in parliament by the DAHR, clearly realized that Romania's only hope is to join the EU and NATO. The criteria set by these organizations forced the Hungarian and Romanian parts to cooperate.

The policy of the nationalizing state, in our case Romania, questions the legitimacy of the claims formulated by the Hungarian elite as essential for its nationalizing process: the decentralization of power and the establishment of institutions that reproduce the Hungarian elite. Analyzing more carefully the national policy of the Romanian state, we can observe that the Hungarian minority obtains only such rights that minimally affect the Romanian nationalizing process. From a Hungarian perspective, the Hungarians in Romania do not enjoy the rights they need to fulfill their national institutionalization, i.e. administrative decentralization, a state-sponsored Hungarian university, a mode of autonomy for the regions inhabited by Hungarians, return of church property, etc..

NATIONALIZING MINORITY. HUNGARIANS IN ROMANIA.

The following develops an interpretative framework for the study of the national minorities that could help one understand the ongoing developments and explain the process of nationalizing of the national minority. Many possible frameworks can be employed to analyze a national minority. However, to under-

6 Frontul Salvarii Nationale (National Salvation Front), that became later the Partidul Democratie Sociale din Romania (The Romanian Party of Social Democracy), and is at present the Partidul Social Democrat (Social Democratic Party).

stand the essence of this issue, one has to concentrate on the questions related to nations and nationalism. National minority politics are *par excellence* based on the principle of nationality. Furthermore, their organizations are based on national or ethnic grounds. In order to understand the nationalizing policy of a national minority, one must analyze the process through which a particular group became a national minority, and the institutionalization of that national minority on an ethno-cultural basis.

I focus especially on the situations where the national minority was once part of a larger nation within the framework of one state. One of the consequences of the dissolution of the empires is that a part of the nation became a national minority in another state. One part of the ethno-cultural nation, now a national minority, has not accepted the new situation. It has continued the nation-building process, but it has reshaped it. Although this nation-building process is different from the former one, its mechanisms are similar. Ethno-cultural bonds do not loose their strength, on the contrary, generally they are invigorated. Since the nation-building of the majority challenges the nation-building of the national minority, the strengthening of the internal boundaries of the national minority is the logical consequence.

On a theoretical level, I consider that one should focus on the processes of institutionalization of the minority, on an ethno-cultural basis. One should not commit the mistake of essentializing the national minorities. National minorities are constructed and imagined as much as nations are.

In line with Brubaker's conceptual transformation of the *nation-state* into *nationalizing state*, I propose the concept of *nationalizing minority* instead of *national minority* (Kántor 2000). This concept captures the internal dynamics of the national minority and permits the analysis of long-term processes. These processes are slightly different from those of the nationalizing state,[7] but the mechanisms are similar. National minorities engaged in a nation-building process are *nationalizing minorities*. Nationalizing national minorities are distinguishable from the non-nationalizing ones.[8] Empirically, one can present the following distinctive features: (1) A nationalizing minority is sufficiently numerous to have a real possibility of achieving a number of its goals; (2) Nationalizing minorities express political goals, not only cultural ones. Their goal is not only the preservation of national/cultural identity, but also the promotion and institutionalization

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7 The resources of the national minorities are incomparably limited, as those of the state; however, the resources of the minorities are often supplied by the external national homeland.

8 For example, Hungarians in Romania constitute a nationalising minority, while Bulgarians in Romania or Hungarians in Austria do not; in Western Europe, the Northern Irish are a nationalising minority. In the light of the past twenty years' events, Albanians in Kosovo can also be considered a nationalising minority.

of it. The creation of institutions that resemble those of a state is essential, as is the establishment of a minority "life-world"; and (3) Nationalizing minorities attempt to transform the political structure of the state and struggle for political representation on the state level.

The claims of national minorities are also made in the name of a core nation or nationality, defined in ethno-cultural terms, and are not related to citizenship. The difference in this case is that the "core" of the ethno-cultural nation is localized in the nation living in the "external national homeland". However, institutionally, the national minority is distinct from the ethno-cultural nation. The national minority has no state of its own. Therefore, the leaders of the national minority create a "surrogate state", a system of political representation of the national minority, which, as mentioned, is conceived on an ethno-cultural basis.

Usually, a national minority is defined without reference to an external national homeland. The definitions emphasize only that it represents a minority in relation to the titular nationality, and characterize the national minority putting an accent on the numerical element. The question of the ethno-cultural nation, including all the members of the same ethnic group, is marginal. This is, on the one hand, due to the legal and political definitions, that concentrate on the rights of the national minority, and, on the other, due to the practice of social scientists who analyze the transition to democracy, nationalism and ethnic conflicts within a country, discussing only short-term processes, and concentrating on the situational setting. To avoid these narrow approaches one must focus on the national minority and analyze such questions in a historical perspective. In order to do this, one must look for a different approach and Brubaker's definition is useful in this respect:

A national minority is not simply a "group" that is given by the facts of ethnic demography. It is a dynamic political stance, or, more precisely, a family of related yet mutually competing stances, not a static ethno-demographic condition. Three elements are characteristic of this political stance, or family of stances: (1) the public claim to membership of an ethnocultural nation different from the numerically or politically dominant ethnocultural nation; (2) the demand for state recognition of this distinct ethnocultural nationality; and (3) the assertion, on the basis of this ethnocultural nationality, of certain collective cultural or political rights. (Brubaker 1996: 60)

After the definition of the entity, one should also look at the definition of the nationalism of a specific group:

Minority nationalist stances characteristically involve a self-understanding in specially "national" rather than merely "ethnic" terms, a demand for state recogni-

tion of their distinct ethnocultural nationality, and the assertion of certain collective, nationality-based cultural or political rights (Brubaker 1998: 277).

Members of the national minority still consider themselves as belonging to the former ethno-cultural nation, emphasizing the common culture and language. They used to perceive themselves as one nation, and still conceive themselves in such a way. However, they also perceive themselves as a national minority. These two complementary but nevertheless competing images characterize national minorities. National minorities are institutionalized on the same ethno-cultural basis as the nation in the external homeland, but the framework and resources are different. The particular principle of nationality is identical, and therefore there is no reason to search for other explanations why a national minority is engaged in a nationalizing process.

The nationalizing minority's politics is oriented toward strengthening and maintaining ethno-cultural boundaries. This is done by the creation of institutions for achieving the above-mentioned aims. It involves the creation of a parallel social and political system and the striving for a legal setting in which nationalizing can continue in more favorable conditions. Institutions have an exclusive, ethnocultural character. The nationalizing minority acts in a specific political arena, and not all the political actions of the national minority can be subsumed under this process.

The concept of nationalizing minority is thus helpful for a general account regarding the politics of national minorities, but for a meticulous analysis one has to operationalize the concept. These actors can be: the ethnic party and the elite of the national minority. The main promoters of these nationalizing processes on the part of the national minority are the ethnic parties.[9] Ethnic parties are formed in societies that are organized along ethnic or national cleavages. In cases where nationally relevant conflicts exist, for example, in times of revolutions or changes of regimes, it is almost certain that the elite of the national minority will form an ethnic party. An ethnic party is very different from non-ethnic parties in the sense that the national minority usually has a program that is oriented toward securing the individual and collective rights of the members of that particular national minority.

The main concern of national minorities, expressed by the goals and policies of the ethnic parties, is generally the preservation of their culture and the promotion of the interests of the members of the group and the perceived interests of the group as a whole. To achieve this aim, the minority has, on the one hand, to secure

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9 I use the concept of "ethnic party" as a synonym for "national minority party" or "minority party" or "ethno-regional party".

the legal and political framework on the state level and, on the other, to establish those institutions and an internal organization that permits them to form a distinct society. Therefore, one has to analyze every ethnic party as both an ethno-political party and an ethnic organization. The ethnic party has to act simultaneously as a political party, as a representative and promoter of the interests of its community, and has to strengthen the internal boundaries of the community organizing them into an *ethno-civil society.*[10] The key difference is the political arena in which the party acts. As a political party, the ethnic party acts in the political sphere of the state. As an ethnic or minority organization, its sphere of action is the ethnic or national and political subculture.

The DAHR:[11] One of the starting points of our analysis is the fact that the DAHR is a party organized on an ethnic basis. The DAHR as a social organization makes efforts to organize the civilian (non-governmental) sphere (or what is regarded as such) of the Hungarian community in Romania. To this end it strengthens various organizations and institutions, not entirely without the intention of maintaining or perhaps expanding its voting base. The DAHR, formed in December 1989, considers itself, and is considered by the other actors in Romanian politics, as the sole representative of Hungarians in Romania.[12] As an ethnic party, it acts in the Romanian political sphere, and is organized and functions as any other party. In the political arena, the party participates in elections, takes part in parliamentary life either as part of the government, or in opposition. As is characteristic of any ethnic party, the DAHR also fulfils a double function. On the one hand, as a political party, it participates in Romanian political life, while, on the other, it carries out tasks of organizing the society. In the focus of the program and the political activities of such parties stands the representation of the interests and values of the relevant national/ethnic group/community. Like other parties, the DAHR also behaves as a party and its leaders also have their own particular interests, which do not always coincide with the interests of the group represented.

On the one hand, DAHR's goals on the state level can be summarized as follows: it strives for the creation of smaller units within the state, by advocating administrative decentralization, federalism and territorial autonomy, in order to create structures in which the Hungarian minority would be in a relative majority

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10 I use this concept to imply that Hungarian civil society in Romania cannot be interpreted as a civil society of a state, but, being organised on an ethnic basis, the concept ethno-civil society suggest better the nature of that particular society.

11 Democratic Alliance of Hungarians in Romania

12 The DAHR defines itself as follows: "The DAHR is the community of the autonomous territorial, political, social and cultural organisations of Hungarians in Romania. Its main objective is to protect the interests and rights of the Hungarian minority. The DAHR fulfils the task of representation of the Hungarian population both at local and national levels," (The programme of the DAHR).

in order to influence the decision-making process. On the other hand, it attempts to create separate ethnically-based institutions, in which the minority decides over salient issues. These together signify the creation of a Hungarian parallel society, the institutionalization of the Hungarian "sphere" in Romania. The final goal is to create a parallel society.[13] Basically, this is what I call minority nation-building. Minority nation-building can also be described as the creation of a parallel society on an ethnic basis.

KIN-STATE NATIONALISM. THE HUNGARIAN STATE.

The external national homeland, in our case Hungary, supports this process with political and financial resources. At the same time, it also influences the self-perception of the members of the national minority and plays an important role in the power relations within the national minority. After 1989, Hungary openly expressed its concern about the fate of the Hungarian minorities abroad. In the Hungarian constitution a paragraph was introduced, stating Hungary's responsibility regarding the Hungarians living abroad.[14] On the basis of this constitutional and "ethnocultural" responsibility, the Hungarian governments established several governmental institutions and foundations to support Hungarian institutions in the neighboring countries.

The Hungarian state influences the nationalizing process of the Hungarian minority in Romania, and, as such, one may analyze it as an external factor. I analyze only one aspect of this relationship – the law concerning the Hungarians living in neighboring states. Hungary, as a state concerned with the fate of Hungarians living abroad, considers it a political and moral duty to help Hungarians, especially those who live in the bordering countries. Until recently, the Hungarian state supported principally the institutions of the national minorities.

In 1997 Hungary became a member of NATO, and in 2004 it became a member of the European Union. In this connection, Hungary will also join the Schengen agreement, which means that it will have to introduce visa requirements for non-EU citizens. At present, it is obvious that Romania and Croatia will join soon, while Yugoslavia and Ukraine will join the EU at a considerably latter stage.[15]

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13 In opposition to many views, this does not involve territorial separation. Hungarians in Romania, especially after 1945, have accepted the state of affairs and have promoted a policy that searches for solutions within the framework of the Romanian state.

14 Constitution of the Republic of Hungary. Article 6(3): "The Republic of Hungary acknowledges its responsibility for the fate of Hungarians living outside of its borders and shall promote the fostering of their links with Hungary." See *A Magyar Köztársaság Alkotmánya* (Constitution of the Republic of Hungary) (Budapest: Korona, 1998), p. 14.

15 Slovakia and Slovenia joined the EU simultaneously with Hungary.

As a consequence, many Hungarians living in these states will find it hard to travel to Hungary. This poses the fear that a new "Iron Curtain" will separate the Hungarians from the above-mentioned countries and their homeland.

In 2001 the then conservative Hungarian government proposed a Law Regarding Hungarians Living in neighboring countries.[16] Political and scientific discourse refers to it as the "Status Law". The government considered that the existence of such a law, and the facilities offered, encourages the Hungarians to refrain from emigration, and could moderate the process of assimilation.

The intention of the Hungarian government and of the elites of the ethnic parties was to strengthen the minority societies and, by this, the nationalizing process. On a theoretical level, two aspects are important. The first one is that this law defines a relationship between the Hungarian individual and the Hungarian state. The second one is that it redefines, and re-institutionalizes, the Hungarian conception of the nation. The expressed goal of the law is explained as follows:

> While promoting the national identity of Hungarians living in neighboring countries, the Law obviously ensures prosperity and staying within the home country. According to the scope of the Law, the codifier applies different provisions to encourage living within the home country and does not support resettling to Hungary. Most forms of assistance will be applied within the home countries of Hungarians living in neighboring countries; the institutional structure needed for any assistance for the Hungarian minorities in the neighboring countries is established through this legal norm.[17]

The debate on the objective and subjective criteria of belonging to the Hungarian nation brought into light an old, and irresolvable, dispute about the definition of the nation. While the opposition would accept only self-definition (self-identification) regarding Hungarianness, the governmental parties argued that it is necessary to include "objective criteria".

Starting from an ethno-cultural redefinition of the nation, Hungary also plays an important role in the redefinition of the Hungarian national minorities. The Hungarian national minorities in the neighboring countries are involved in nationalizing processes within the framework of their respective states. The "Status Law" strengthens the symbolic boundaries of Hungary and the national minorities living in bordering countries. The theoretical question is whether there are many parallel processes of Hungarian nation-building, or only one. The

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16 Adopted by the Hungarian Parliament on 19 June 2001. Available from http:// www.htmh.hu/law.htm; Internet; accessed 5 August 2001.

17 Information on the *Law on Hungarians Living in Neighboring Countries* (Act T/4070).

situation existing prior to the "Status Law" suggests the former, the post-"Status Law" situation the latter. The "Status Law" binds all the members of the Hungarian ethno-cultural nation (living in the neighboring states) together. In this respect, it has a decisive influence on the politics of the national minorities. Throughout the past decade, Hungary has been supporting most of the important cultural institutions, but from now on, it will also have a decisive role in the life-strategies of Hungarian individuals living in the bordering countries. Hungarian political elites and intellectuals will be even more dependent on Hungary, and Budapest is meant to become the focal point for every Hungarian. However, this connection is mediated by Hungarian organizations in the neighboring countries, and through this mediation, using Hungarian financial resources, they can realize their nation-building project.

Besides the benefits and facilities accorded for the Hungarians abroad by the status law, it also plays a major role in strengthening the boundaries of the Hungarian minority groups. Realizing this aspect of the law, the Romanian government asked the Council of Europe to analyze the law.[18] After recommendations of the Venice Commission,[19] the prime ministers of the two states signed an agreement,[20] in which Romania gave its consent for the application of the law in Romania, but asked that non-Hungarian spouses of Hungarians in Romania should not get a "spouse card".[21]

> This program reinforces Hungary's special relationship with the Hungarian minorities in the neighboring countries, but emphasizes the importance of settling this relationship within the legislative framework. In addition, for the first time it is expressed that, similar to the accession to the EU, the *organic ties* of the Hungarian communities and Hungary are of primary importance. The official argument for framing the *Law on Hungarians Living in Neighboring Countries* is:

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18 21 June 2001, Romania's Prime Minister, Mr. A. Năstase, requested the Venice Commission to examine the compatibility of the Act on Hungarians living in neighbouring countries, adopted by the Hungarian Parliament on 19 June 2001, with the European standards and the norms and principles of contemporary public international law.

19 European Commission for Democracy Through Law (Venice Commission), "Report on the Preferential Treatment of National Minorities by their Kin-State," adopted by the Venice Commission at its 48th Plenary Meeting, (Venice, 19-20 October 2001).

20 Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania concerning the Law on Hungarians Living in Neighbouring Countries and issues of bilateral co-operation. Budapest, 22 December, 2001.

21 Only some months after the agreement Adrian Nastase, the prime minister of Romania edited a book that basically attacks the status law: Adrian Năstase – Raluca Miga - Beşteleiu – Bogdan Aurescu – Irina Donciu: *Protecting Minorities in the Future Europe*. Bucuresti: Monitorul Oficial, 2002.

The main aim of this Law is to ensure special relations of the Hungarians living in neighboring countries to their kin state, the promotion and preservation of their national identity and well-being within their home country; therefore to contribute to the political and economic stability of the region, and through this to contribute to the Euro-Atlantic integration process of Hungary in particular and the Central and Eastern European region in general. In this context the Law promotes the preservation of the cultural and social cohesion as well as the economic consolidation of Hungarian communities abroad.[22]

The central scope of the law is to ensure the special relations of the Hungarians living in the region, despite their state-allegiances, and to convince the Hungarians living in neighboring countries to remain in their home country. Besides the initial idea that the "Status Law" will serve as a basis for according preferential national visas to the possessors of the "Hungarian Identification Document," the public debate focused on the effect of this law on the emigration of the Hungarians from the neighboring countries.

THEORETICAL PROBLEMS REGARDING THE STATUS LAW

Laws similar to the Hungarian status law rest on two widely shared assumptions: 1. The conception of the nation in ethnocultural terms, assuming that a group of people, which had already become a nation and developed a strong sense of national identity, – regardless of the borders that separate them at present – have something in common, which is salient for those persons. 2. The perception that the home state does not sufficiently protect and promote the rights of the national minorities, moreover – especially in East-Central-Europe – it usually seeks to assimilate them.

Consequently, a perception prevails that it is a legitimate right of kin-states to award special attention, institutionalized by laws, to their kin-minorities. While the practices of kin-states differ substantially, the underlying assumptions have the same roots. The only possible explanation for this is that the national boundaries (the ethnoculturally understood nation) are perceived – both by the kin-state and the kin-minority – as being stronger as other types of bonds (i.e. citizenship, or the "political nation").

Laws like the Hungarian Status Law must be analyzed in a larger context. One must analyze the domestic and the international context in order to see how a particular idea becomes a law, and how this law institutionalizes the conception

22 Information on the *Law on Hungarians Living in Neighboring Countries* (Act T/4070).

of the nation. What is of extreme interest is the underlying principle of such laws: the assumed, but rarely explicit nationalism.

Scholars may employ several theoretical frameworks[23] in order to understand the status law syndrome, such as the status laws placed in the framework of nationalism. Nationalism can be observed a value free concept and denotes a process: a process of institutionalizing societies on a national basis. The works of Zsuzsa Csergő and James Goldgeier, János Kis, and George Schöpflin approach the status law syndrome through nationalism.[24]

The nationalisms we encounter are multiplayer games of institutionalizing and defining the nation. The political interests, the ideologies, and the vision of the future Europe each contribute to shaping a "legitimate" conception on the nation.

Nationalism, as a perpetual, multiplayer, institutionalizes the polity invoking the nation, and involves a permanent definition and redefinition of boundaries. Since modernity, societies are institutionalized on national basis valid for both majorities and minorities. In Europe arguably everyone is nationalized.

The redefinition and re-institutionalization of the nation and the reconfiguration of the state usually accompanied breakdown of regimes, revolutions and transitions. As Irina Culic states: "State building and nation building in CEE are also part of a larger process re-institutionalizing and re-organizing political space and political phenomena. Both their innovative concepts and legislation are constitutive to these processes." (Culic 2003) Culic brilliantly demonstrates the centrality of the ethnocultural definition of the polity for the 27 ECE states: "In the preambles of the constitutions, as well as public, political, and cultural discourses and in the substance of other state policies, the most salient and powerful arguments are the evidence and elements of the historical existence and continuity of a Nation state and the need to emphasize its nationhood by promoting its language, traditions, cultural inheritance, heroic history and territory." (Culic 2003)

Laws on education, culture, local administration, language are also further proof of the nationalizing politics of particular states. From our perspective two types of law are of central interest: laws on citizenship and the so-called "Status Laws". Both types of laws imply a definition of who is eligible to acquire citizen-

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23 Other legitimate interpretive frameworks can and were set, such as: approaches focusing on citizenship (fuzzy citizenship – Brigid Fowler), on minority protection (legitimate and illegitimate kin-protection – Halász-Majtényi-Vizi, János Kis, etc.), on transnationalism (Michael Stewart), on ideological clashes (Osama Ieda), etc. See articles in Zoltán Kántor and others (eds.): *The Hungarian Status Law: New Nation Building and/or Minority Protection.* SRC Hokkaido University, 2004. http://src-h.slav.hokudai.ac.jp/coe21/publish/no4_ses/contents.html.

24 See the studies in Kántor et al., ibid.

ship and hence, special favors or benefits. These laws, however, are not framed in a vacuum. Several actors in these political debates influence the framing of a law. These debates take place in at least three arenas: domestically involving the political parties and intellectuals, bilaterally, at times involving the kin-minority living in the host-state with the states whose citizens are affected, and internationally.

TWO WAVES OF NATIONAL REDEFINITION

Analyzing the issue of the nation in the ECE states, we may observe that there are two periods when politics deal with the issue of the nation. In the first period, shortly after the breakdown of authoritarian/totalitarian regimes, debates concerning the constitution and laws on citizenship are accompanied with definitions of the nation. In Culic' words: " ... new states were set as states of and for a nation, and thus state building was conceived as vigorous nation building. Constitutions and citizenship policies – which have a constitutive worth as acts whereby the body politic of the state is set and which are expressive of the nature of the state, followed the national principle. All related legislation was shaped according to remedial and assertive nationalism," (Culic 2003). Later, when the regimes may be considered more or less consolidated (democracies), states *refine* their nation politics. As Halász, Majtényi, and Vizi note: "It is an established practice in Europe that the various national legal systems offer preferences to their co-nationals living outside the borders as compared to other foreigners. Following political transition in Central and Eastern Europe, the regulation of support for these ethnic groups has become a characteristic feature of constitutional legislation,"(Halász – Majtényi – Vizi 2004).

Two interlinked processes must be distinguished. The first concerns the status of ethnic/national minorities living in a particular state. Their demands, backed by the kin-state (external national homeland) and by certain European institutions, become partially satisfied – at least formally, by the governments of the home-states. I shall not enter into the details of such cases, I only wish to stress one facet of this process: *nation-states* recognized that they are *multinational/multiethnic states*. The second concerns the so-called "status laws". These laws, often parallel with the modification of the law on citizenship, aim to settle the status of kin-minorities, or co-nationals living abroad. Again, I stress the fact that the kin-state legalizes the link between the state and the groups and/or individuals living abroad, perceived as kin. Those states that have co-nationals (kin-minorities) in other states have adopted a policy that supports financially, culturally, or even politically, their kin-minorities. Support of kin-minorities is based on the idea of the nation as an ethno-cultural entity, not on the political conception of the nation.

Explicitly or implicitly all those involved (the political parties in Hungary, the Hungarian state, governments of the neighboring states, and international organizations) operate with conceptions of the nation. These conceptions usually do not match, leading to misunderstandings and different approaches to the politics of kin-states, especially in regards to kin-minorities. To put it simply, one may say that the debates center upon who owns the "official" definition of the nation. Hence, the vision, the project of the future of Europe is up for debate. Do we move toward a Europe of states or to one of nations?

USES AND MISUSES OF THE CONCEPT OF NATION

The nation can be defined in many ways. One may distinguish between definitions that emphasize objective elements, and those that emphasize subjective elements. Since Ernest Renan's famous article, literature on nationalism greatly fueled the debates on this subject. And, attempts to refine the definition can be traced back to Friedrich Meinecke. Perhaps these clarified the picture, or the adjective, but not the concept of nation itself. Rogers Brubaker, recently showed that such typologies do not help much in the analysis of phenomena linked to the nation (Brubaker 1999). Furthermore, as already mentioned, scholars argue that western nationalisms differ from eastern ones.

The Hungarian Status Law has drawn attention to the issue of how a nation is defined. While the framers of the law conceived it on the basis of an ethnocultural definition of the nation, the domestic opposition and, to some extent, international organizations (represented in particular by Günther Verheugen and Eric Jürgens) emphasized the political conception of the nation.

Social scientists, the state, the "members of the nation", and the international institutions/organizations define the nation. As is well known, no one definition is accepted unanimously. Nevertheless, social sciences operate with definitions and typologies. The distinctions between political and ethnic nations utilized in politics are usually exemplified by the French and the German nations. In addition, it seems that only European politicians consider *the political nation as the official definition*.[25] If one encounters the approach of European states towards the minority issue in the states of ECE, one may immediately observe that the legitimate definition is that of the political nation, even if in practice this is not always

25 The status law raised the question on the European level of the definition of the nation. As we have encountered, the ethnocultural definitions of the status laws are in strong opposition with the political definitions of the nation that is the official nation-conception of European institutions. Opposite to social science, political institutions (domestic and European) begin their definition from perceived interests. The major interest in the case at point is peace and stability. The idea is that peace and stability can be attained only if a territorial claim or extraterritorial legislation is not made.

true. When this approach became a political norm, it became highly problematic, as it does not always reflect the state of affairs. It is a normative approach based on the idea that stability and peace can be secured only in such a way.

The contest between the two conceptions, the ethnocultural and political, or in George Schöpflin's terms, the particularistic and universalistic conceptions, has surfaced on the European agenda as a result of the Hungarian Status Law (Schöpflin 2004).

Yet, at this moment, two problems remain clear. First, European organizations define the concept of nation as coterminous with that of the state, or with citizenship (especially regarding ECE). Such a definition has nothing to do with scientific ones (Connor 1994). Second, one must ask whether focusing on the concept of nation as an analysis of processes is possible. As we have seen (more exactly, we will see), European organizations (PACE, HCNM, EU – G. Verheugen) operate with the concept of nation, and consider every ethnic, or ethnocultural definition as dangerous, and conflict-prone. Our question is whether such a definition, or politics based on one or another definition, is proper for social scientific analysis? We should not think of nations as really existing and definable groups, rather of politics, and institutionalization that rely on one or the other conception of the nation. Furthermore, we should take into consideration that in practice all nation politics operate simultaneously with both concepts, however, only one – the political or the ethnocultural – can prevail.

In conclusion we should not consider the nation as a central category. One should focus on nationalism, on nation building, or on nation policy. In this framework, one may interpret processes, politics that invoke one or another definition of the nation. By definition, status laws operate with the ethnocultural conception. They extend the borders of the nation beyond the borders of the state.

WHO BELONGS TO THE NATION? THE NATION DEFINED AS A CONGLOMERATE OF GROUPS OR AN INDIVIDUAL LINKED TO THE STATE?

The ECE status laws differ in many respects regarding how they define the targeted subjects. The subject may be a vaguely defined group or a clear definition of individuals who belong to the nation. As Halász, Majtényi, and Vizi observe, "the Romanian and the Slovenian laws status laws differ from other similar regulations inasmuch they focus on supporting communities, while (e.g.) the Slovak and Hungarian laws take an individualistic approach," (Halász et al. 2004).

From a theoretical point of view, the most debated issue concerned who is a Hungarian.[26] The debate focused on both the definition of a Hungarian in the enumerated states in the law, and which nation-definition should the Hungarian state adopt for its foreign policy, especially policy concerning Hungarians abroad.[27]

Like the Hungarian law, the Slovenian law employs an ethno-territorial applicability, targeting "autochthonous minorities". Both laws specify the territories wherein the law is applicable. Without regard to the definition of nation, it basically applies to the persons who live in the "historical" regions of the *core-state (titular-state)*. If we equate applicability with the definition of the nation, we find that the laws are not meant explicitly to define the nation, they do so implicitly.

The Slovak and the Romanian status laws apply to every non-citizen, foreign Slovak or Romanian. In this respect these laws are more universalistic, and the ethnic (ethnocultural) element is stronger. The Romanian law, however, emphasizes both the individual and communities: "the Romanian law that it treats the Romanian communities beyond the borders as subjects of the collective rights provided to them by the status law" (Halász et al. 2004).

The issue of the nation may be analyzed on three levels. The first is the level of domestic politics wherein different parties and ideologies struggle for the legitimate definition of the nation, on which basis they may institutionalize politics regarding individuals or groups from abroad. The second is the bilateral level involving the kin-state and the states to which the law applies. The third level, that of international relation, concerns the involved states and the European institutions that deal with similar issues (Venice Commission, HCNM, PACE, etc.).

THREE LEVELS OF COMPETING DEFINITIONS

Domestic level

In Hungary – since József Antall announced his soul-felt position as Prime Minister of 15 million Hungarians – every Prime Minister, in his first official speech, positions his government's relation to the issue of the nation. The conceptual and practical changes in policy toward Hungarians abroad are described in the articles of Nándor Bárdi (2004) and Osamu Ieda (2004).

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26 See the contributions of Ieda, Schöpflin, Kántor, Kis, Csergő-Goldgeier. For the debate in Hungary, see in the bibliography the books edited on the status law in Hungarian language by the author of the article.

27 One has to add, that in terms of nation-definition – if laws are framed in ethnocultural terms, ethnic and national minorities in Hungary would not belong to the Hungarian nation. Obviously, the law does not regard Hungarian citizens, regardless of their ethnic origins, such an institutionalization on an ethnocultural basis may be seen as offensive for non-ethnocultural Hungarian citizens.

The bilateral level

The neighboring states immediately realized that the Hungarian status law fostered the nation building (nationalization process) of the Hungarian minorities. Romania and Slovakia expressed strong reserves, and opposed the applicability of the law. Both states have laws that extend the boundaries of their nations, but this did not hamper them from questioning the right of Hungary for framing a similar law.[28] Both states perceived the Hungarian status law as impeding their homogenization politics. The Hungarian law attacked exactly the core of the foundation of the two states (as reflected in their constitution and political practice): the national state principle.

The international level

After the law was framed in 2001, Romania and Slovenia expressed their concern that the status law might present a problem on the international level. I will focus only on the aspects of their concerns that directly address the issue of the nation.

1. The first international body to issue a statement on the status law syndrome was the Venice Commission. Their most important conclusions were: "Preferential treatment may be granted to persons belonging to kin-minorities in the fields of education and culture, insofar as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim."[29]

The Venice Commission recognized the right of kin-states to support their co-nationals living in other states. This was a novelty in international minority protection. While this declaration has become a contentious issue, an international recommendation has been put forth for its consideration. The recommendation proves that the Venice Commission implicitly acknowledges special bonds between a state and its kin-minorities. Moreover, they constitute *recognition of the nation conceived in ethnocultural terms*.

2. Rolf Ekeus, OSCE High Commissioner for National Minorities, made a statement a week after the report issued by the Venice Commission. The statement, formulated in general terms, concerns the Hungarian Status Law. The text of the statement highlights the difference between the boundaries of the state and those of the nation, and recognizes the 'interest in persons of the same ethnicity living

28 The Parliament of Slovakia passed a similar law in 1997, while the Romanian Parliament in 1998.

29 European Commission for Democracy Through Law (Venice Commission), 'Report on the Preferential Treatment of National Minorities by their Kin-State,' adopted by the Venice Commission at its 48th Plenary Meeting, (Venice, 19-20 October 2001).

abroad': "National and state boundaries seldom overlap; in fact there are few pure 'nation states'. Borders therefore often divide national groups. ... Although a state with a titular majority population may have an interest in persons of the same ethnicity living abroad ..."[30]

3. The European Parliament appointed Eric Jürgens as the rapporteur on the Hungarian Status Law and other similar laws in Europe. Jürgens used a very one-sided approach to the concept of the nation, interpreting it only in the sense of the *political nation*. Eric Jürgens presented several drafts of the report, which was finally accepted by the Parliamentary Assembly of the Council of Europe on 25 June 2003. The endorsement procedure, with respect to the report, again highlighted the issue of the nation. In the explanatory memorandum Jürgens stated, "The definition of the concept 'nation' in the preamble to the law is too broad and could be interpreted as non-acceptance of the state borders which divide the members of the 'nation'."[31] As the report fundamentally rested on the political conception of the nation, it developed an astonishing distinction between Hungarians and Magyars. In the terms of the report, Hungarians constitute citizens of Hungary, while the Magyars constitute Hungarians living abroad.[32] All Hungarians, in Hungary as well as in the neighboring states, refer to themselves as 'Magyar'. In the Hungarian language, no other word designates those who belong to the Hungarian nation. Hungarian is the term used in English. Romanians use both words, Hungarians (unguri) and Magyars (maghiari), but there is no systematic distinction between Hungarians living in Hungary and Hungarians living in Romania. In the same logic, German citizens would be *Germans*, while Germans living in other states; i.e. Belgium, Hungary; Romania, etc. would be *Deutsch*.

4. During the debate surrounding the Status Law, Günter Verheugen wrote a letter to the prime minister of Hungary, Péter Medgyessy, in which he focused on the issue of the nation: "[T]here is a feeling that the definition of the concept 'nation' in the preamble of the law could under certain circumstances be interpreted – though this interpretation is not correct – as non-acceptance of the state borders which divide the members of the 'nation', notwithstanding the fact that Hungary ratified several multi-and bilateral instruments containing the principle of respect

30 'Sovereignty, Responsibility, and National Minorities,' Statement by Rolf Ekeus, OSCE High Commissioner on National Minorities, in The Hague, 26 October 2001.

31 Erik Jürgens, 'Explanatory Memorandum,'. Cf Erik Jürgens,'Preferential treatment of national minorities by their kin-states: the case of the Hungarian Status Law of 19 June 2001,' (draft report) Council of Europe Parliamentary Assembly.

32 Magyars: people of Hungarian identity (i.e. citizens of the countries concerned who consider themselves as persons belonging to the Hungarian 'national' cultural and linguistic community).

for territorial integrity of a state, in particular the basic treaties entered into force between Hungary and Romania and Slovakia."[33]

Verheugen's letter stated that the phrase 'Hungarian nation as a whole' could be understood to indicate that Hungary was striving to establish special political links with the minorities in neighboring states. Therefore, he recommended that this phrase should be replaced with more culturally oriented ones.

Following the electoral victory in May 2002, based especially on the recommendations and critiques of international organizations, the new government decided to modify the Status Law. Of the major changes, two are relevant for the purposes of this paper. The first regards the use of the term 'nation'. The original law defines its goals as follows: 'to ensure that Hungarians living in neighboring countries form part of the *Hungarian nation as a whole*[34] and to promote and preserve their well-being and awareness of national identity within their home country' (author's italics). The amended law defines the goal as: "to ensure the well-being of Hungarians living in neighboring states in their home-state, to promote their ties to Hungary, to support their Hungarian identity and their *links to the Hungarian cultural heritage as an expression of their belonging to the Hungarian nation*"(author's italics). The modified law thus refrained from using the terminology 'Hungarian nation as a whole', and formulated it in terms of sharing the Hungarian cultural heritage.

DUAL CITIZENSHIP

The offer of dual citizenship to Hungarians from abroad was first formulated in 1996. None of the political parties supported the claim made by the World Federation of Hungarians. The status law was framed partially as a response to this claim. The issue became central again after the amendment of the status law, culminating with the submission of more then 300 000 signatures supporting a call for referendum on the issue of dual citizenship for the Hungarians living abroad. The referendum took place in the 5th of December 2004, where the 'yes'-votes won a slight majority (the referendum was not valid, as less people expressed their opinion as required by the law).

The issue of dual citizenship is a continuation of the status law, but with a stronger emphasis on the political links between the Hungarian state and the Hungarians from abroad. The referendum failed, but one legitimately can expect

33 Günter Verheugen's letter to Hungarian Prime Minister Péter Medgyessy, dated 5 December 2002.

34 'Unitary Hungarian nation' would have been a more appropriate translation.

that this was not the last scene in this theater piece; however, this is the topic of a new study.

CONCLUSIONS

The status law syndrome is post-communist nation building. It is the institutionalization or re-institutionalization of societies on a national basis. The Hungarian case may have put this question on the table for Europe, however, this type of law is not novel. The status laws show that the nationality principle underlies the principles of ECE states, and that all ECE states employ the ethnocultural definition and institutionalization of their societies. Status laws extend the borders of the nation, and thus, the imagined community of the nation does not take into account the political borders of the states.

Apart from the domestic and international political implications, the Hungarian status law has drawn attention to the issue of the nation definition. While the framers of the law conceived the law based on the ethnocultural definition of the nation, the domestic opposition and, to some extent, international organizations emphasized the political conception of the nation. The modified law shifted from an ethnocultural to a political conception of the nation.

In the foreseeable future the nation, as a central value, will not loose its significance, and the politics of the nationalizing state and of the nationalizing minorities will determine the political agenda in East-Central Europe. Therefore, I consider that only such a model can help us understand the national politics in our region.

The policy of the nationalizing state, in our case Romania, exactly questions the claims that are considered by the Hungarian elite as being essential for its nationalizing process: the decentralization of power and the establishment of institutions that reproduce the Hungarian elite. The external national homeland, in our case Hungary, strongly supports this nationalizing process with political and financial resources. At the same time, it influences the self-perception of the members of the national minority and plays an important role in the power-relations within the national minority.

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ORIGINAL
SCIENTIFIC
ARTICLE

SONJA NOVAK LUKANOVIČ

POSITION OF LANGUAGE: CASE OF THE SLOVENE LANGUAGE

The article stresses the symbolic and communicational meaning of the language and analyses the position of the Slovene language in different historical periods, as well as the role of the Slovene language in the formation of the state. The Slovene language as the constitutionally determined official language since the Vidovdan Constitution (1921) till today is mentioned. The contact of the Slovene language with minority languages in the ethnically mixed areas is presented, and due to the processes of globalization also the contact with other languages.
Emphasised is the role of the Office for the Slovene Language, and standpoints for the implementation of the special law regulating the status of the Slovene language in Slovenia are stated.
The article concludes that the basic dilemma of the protection of the Slovene language remains outside the jurisprudence. Even though the official language is protected by the Constitution and special law, it cannot be efficiently protected unless it is a generally accepted value, firmly anchored in every individual's value system.

Key words: Slovene language, languages in contact, legislation, protection

POLOŽAJ JEZIKA: PRIMER SLOVENŠČINE
V prispevku je poudarjen pomen jezika v simboličnem in komunikacijskem pomenu. Izpostavljen je položaj slovenskega jezika v različnih zgodovinskih obdobjih ter vloga slovenskega jezika v procesu oblikovanja slovenske državnosti, posebej je omenjen slovenski jezik kot ustavna kategorija od Vidovdanske ustave (1921) pa do današnjih dni. Slovenščina prihaja v stik z jeziki manjšin na narodnostno mešanih območjih v Sloveniji, s procesi globalizacije pa se povečuje stik slovenščine tudi z drugimi jeziki. Izpostavljena je vloga Urada za slovenski jezik in izhodišča za uveljavitev posebnega zakona, ki urejuje položaj slovenskega jezika v Sloveniji. Prispevek se zaključuje, da temeljna dilema varstva slovenskega jezika kot uradnega jezika ostaja zunaj dometa prava. Tudi če je uradni jezik zavarovan z ustavo in posebnim zakonom, ga ni mogoče učinkovito zavarovati, če ne postane splošno sprejeta vrednota, ki bo čvrsto zasidrana v vrednostnih sistemih posameznikov.

Ključne besede: slovenščina, jeziki v stiku, zakonodaja, zaščita

INTRODUCTION

Language is part of an individual's identity and language customs are among the most important components of the social customs. Language represents the basic social structure and communication is one of the crucial activities of each individual. Language and linguistic varieties are, after all social constructs, and as much sociological, political as linguistic. Through linguistic communication individuals determine their relationships to other people and their position in the society. Even though in modern times, which are marked by a rapid development of the telecommunication technology (radio, TV, Internet, etc.) and in which global communications are increasingly important, language still remains one of the most important means of successful communication, in spite of the fact that it is no longer the only means of communication.

Not even the simplest everyday activities can be performed without the use of language, but the importance of linguistic communication – both verbal and written – becomes really clear when one finds oneself in an environment in which his/her language is not known or understood. On the other hand, language is not only a communication tool and a means of achieving professional and political success, but also the basis for learning about one's environment and for creating perceptions of the world. Language is important for individuals and for the community as a whole (Giles, Copland 1991)

Almost all literature, both scientific and professional, recent and older, discusses language as one of the basic components of the concept of ethnos, which comprises communities from tribes to nations. Language is the basic tool of integration and differentiation for communities from the lowest to the highest ranking ones. For many ethnic groups, language or even non-standard dialects are an important dimension of social identity, which symbolizes their distinction from other ethnic groups, i.e. language somewhat sets the limits in multicultural/multinational areas, and sometimes also poses obstacles. The statement that language is the most important characteristic of an ethnic group is only partially true; language may be the silent dimension of ethnicity and need not necessarily be associated with the ethnic identity of individuals. Various examples throughout the world show that ethnic and language borders do not always overlap. One language cannot be a permanent and eternal mark of a certain ethnos – this means that the members of a certain nation may have forgotten their original language and adopted the language of the environment in which they live, but have nevertheless maintained their identity (e.g. the Roma).

POSITION OF THE SLOVENE LANGUAGE IN THE PAST

Whenever Slovene language and its history are discussed, some developmental stages or points are always emphasised, which in spite of all the unfavourable and negative conditions helped to establish the exceptional life force, cultural resoluteness of Slovenes and their self-awareness of their ethnic identity. The Slovene language is therefore considered to be the path to the understanding Slovenes, an expression of the uniqueness of the Slovene nation and the essence of its identity.

Centuries ago, an enormous amount of work for the development of the Slovene language was performed in order to advance it to a higher level. It can be said that the Slovene language and culture in the 19th and 20th century were very important, Slovene language and culture were even crucial factors in the process of creating the Slovene nation and its development into a nation state. Slovene intellectuals, and politicians used the Slovene language and culture as an important tool for social and political mobilisation, which is proven by the contents of various national programmes. The concept of the perception of the Slovene nation and its national identity was always very traditional and bound to the Slovene language and culture. Various political programmes always contained demands for cultural, administrative and political autonomy, but rarely were there ideas of an independent and sovereign Slovenia as a state (Prunk 1987).

The process of formation of Slovene statehood essentially began after World War II, when the Slovene Republic was first created within the framework of Yugoslavia as a constitutive element of the Yugoslav federation. This process then continued formally with the adoption of the Yugoslav Constitution in 1974, which defined the then socialist republics as sovereign states of their nations (Constitution of the Socialist Federal Republic of Yugoslavia, 1974) with the right to self-determination. This process ended with the proclamation of an independent and sovereign Republic of Slovenia at the beginning of the 1990s, with the dissolution of the then Yugoslav federation.

Actually, the Slovene language became a constitutionally determined official language already with the Vidovdan Constitution from 1921 (Kingdom of Serbs, Croats and Slovenes), which stipulated that the official language of the Kingdom was Serbian-Croatian-Slovene. The Constitution of the Kingdom of Yugoslavia from 1931 also contained this stipulation. The provisions of both pre-war Constitutions formally mentioned the Slovene language not as an independent language, but rather in connection with or as part of the other two official languages. In spite of the formal status of the Slovene language as the official language, one can hardly speak of Slovene as the constitutional category in this respect.

The Slovene language as such became the official language only with the Constitution of the Socialist Republic of Slovenia in 1974. Article 212 of this Constitution stipulated that as a rule, the use of the Slovene language is compulsory before the authorities of the Socialist Republic of Slovenia. The significance of this provision, as stated by Kranjc (1998), can also be understood as evidence of the legislator's awareness of the fact that the Slovene language was endangered. It is interesting, however, that the constitutions of the other republics in the then Yugoslavia did not contain such provisions. Nevertheless, the provision stipulating the Slovene language as the official language cannot be considered a fashion accessory to the then Constitution. Article 212 of the Constitution of the Republic of Slovenia from 1974 created the legal basis for more decisive enforcement of linguistic rights. This article set the foundations for the legal framework and the basis of the Slovene language in public use and at the same time an argument in the process of Slovene independence.

POSITION OF THE SLOVENE LANGUAGE TODAY

After 1991 a sovereign Slovene state was to guarantee the preservation and development of the Slovene language and to ensure that the Slovene language is always present at all levels of public life and that it is used in all speech situations.

Article 11 of the Constitution of the Republic of Slovenia stipulates that Slovene is the official language of Slovenia. As Kranjc (1998: 167), a legal expert, says this does not involve only the better way of communication and understanding or the use of more or less common terms, but the existence of an external mark or sign without which Slovene self-awareness cannot exist, i.e. Slovene as the official language or Slovene as the professional language of individual areas. The Constitution of the Republic of Slovenia also stipulates that in areas populated by Italian and Hungarian ethnic communities, the language of the minority (Italian or Hungarian) has the status of official language.

In these ethnically mixed areas Slovene language is in contact with the Italian or Hungarian language. This contact is not coincidental, both contact language areas are defined as ethnically mixed areas. The use of minority language in ethnically mixed areas of Prekmurje and Slovene Istria is governed by statutes of communes and several regulations.[1] In accordance with these provisions, the use

1 The Constitution of the Republic of Slovenia (The Constitution of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, No. 33/91), provides special territorially based rights for the traditional/classical autochthonous members of the national minorities - **Italians and Hungarians. Special rights**, designed for Italian and Hungarian national minorities are of dual nature, being **collective and individual rights** simultaneously. Special rights for the Italian and Hungarian ethnic communities refer to:
-the right to the use of native language (in ethnically mixed territories Slovene and minority language enjoy

of minority language in contacts with judiciary and other administrative organs is guaranteed; the use of both languages is guaranteed in the work of assemblies and their bodies. Slovene language and minority language (Italian or Hungarian) have equal functions. In these areas Slovene language is not only in the function of the mother tongue (L1), but also in the function of the second language (L2).

The long term project of the Institute for Ethnic Studies "Interethnic relations and ethnic identity in Slovene ethnic area"(Nečak-Luk 1998) was performed in the ethnically mixed areas in Slovenia in different years. Within the multidisciplinary questionnaire the respondents were in different periods asked also about the role and the significance of the languages- Slovene and minority language (Italian or Hungarian).

The majority of the respondents (in Lendava as well as in Izola) – regardless of their ethnic affiliation or mother tongue - are convinced that command of Slovene language is for a citizen of Slovenia a *condition sine qua non*. There are, however, differences about the standpoints regarding the necessary level of Slovene language command (the results about the level of the command of Slovene language were gained by respondent's self evaluation). As an example we can state some data from the above mentioned research that the members of the Italian minority estimate much higher their knowledge of mother tongue than the level of Slovene language, which is for them a second language (L2). This could be explained by the fact that that mother tongue is for the Italians important and strong element of their identity and that is a very important sign of the maintenance of their culture and the important factor of the ethnolinguistic vitality. At the same time the results from the same research show that the criterion of the Slovenes in estimating the level of command of the mother tongue are much higher than the criterion of the Italians.(Nečak-Luk 1996)

Regulation of the position of the Slovene language after 1991

Although in a new, democratic and sovereign state of Slovenia, the Slovene language has become completely established everywhere, even in previous taboo areas (the military, the customs administration), several linguistic shortcomings

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equal status, and all public services are bilingual);
-free use of national symbols;
-the right to establish autonomous organizations and institutions; -the right to foster their own culture;
-the right to education and schooling in their own language and to become familiar with the history and culture of their mother nation;
-the right to be informed in their own language;
- the right to direct representation in the Parliament and in local authorities;
-the right to cooperation with the state of their mother nation.

have been overlooked since 1991, especially in the field of economy and partially also in other areas, for example in certain scientific and technical professions.

Contacts with various foreign languages have become much more frequent (especially with English and German). Naturally, there is nothing wrong with this, and it is even beneficial, provided that Slovenia has an active linguistic policy, which supports the learning, use and reputation of its own official language. Last but not least, we are often not aware that language is a living entity, which cannot avoid contacts with other languages and cultural experiences. It is such contacts that enrich the language with findings and ideas from translated literary, professional and scientific works from other cultural environments, which is often forgotten.

The proposal for a law on the use of the Slovene language as the official language began to be drafted in 1996. Slovene is stipulated as the official language in the Constitution, and it is mentioned in many laws (provisions referring to language are found in approximately 50 laws), but the present legal order has many shortcomings and is ineffective. The proposer[2] believed that the issue of the status or extent of use of the Slovene language in the public is so important that the position of the Slovene language should be regulated with a general, umbrella legal act – law on Slovene language. The proposal for this law has the following objectives (Dular 2000: 248):

- to comprehensively regulate and ensure the use of the Slovene language as the official language in all areas of public communications in the RS;
- an attempt to ensure more consistent enforcement of the legislation with planned stimulative and administrative mechanisms and (only partially) through punitive measures.

A question may arise as to why it is necessary to have a law for the regulation of the position of an official language as the Slovene language is in this case. The use of the official language at all levels of public life should be self-evident in any country. At the same time another general question may be raised: Does legal regulation of a certain issue automatically mean its solution in the society? This question can be applied also to the language issues, and especially in the context of the position and extent of use of a language. The socio-linguistic analyses of several laws and legal provisions in Slovenia points to the question, why there is a differentiation among those who are responsible for certain areas of activity required to master the Slovene language, while the others are not explicitly obliged to do so. In addition, in Slovene legal documents the expression “to master a

2 The initiatives were started at the Ministry of Culture, the minister was dr. Janez Dular.

language" is also disputable from the linguistic viewpoint. The expression does not specify the level of person's linguistic competence. This category is very complicated since the degrees of linguistic ability can differ even among native speakers. The problem of legal regulation of examinations of linguistic competence has also not been solved in a satisfactory manner.

The law on the Public use of the Slovene language[3] is written according to the Scandinavian model and similarly to Scandinavian model stipulates the founding of a linguistic office. Similar laws on language have also been passed in some other European countries, namely Poland and France. The Scandinavian model has an office, which also has research tasks, but in Slovenia research tasks are mainly performed by Institutes and University (for example Institute for the Slovene Language at the Slovene Academy of Arts and Sciences, SAZU). The Office for the Slovene Language of the Republic of Slovenia was established by the Government decree (Official Gazzette of the RS, no. 97/2000) in order to cooperate with the holders of political, administrative and expert competence from the viewpoint of the use, enforcement and development of the Slovene language. It provides for appropriate legislative solutions and their realisation, and it assists those that are interested in obtaining an answer relating to linguistic questions.

On April 1, 2004 is was transferred to the Ministry of Culture as the Sector for Slovene Language.

In spite of the above-mentioned legal regulation regarding the position of the Slovene language, experience from previous years has shown that relying on automatic functioning of socio-linguistic and other scientific findings, on the cultural awareness and political recommendations is deceptive and often unsuccessful/SZDL – Language Section, later the Language Council, the Linguistic Arbitration, activities of the Slavicist Society, etc/ (Pogorelec 2000: 61).

There is also an open question what is the most effective way for the language to be preserved and promoted? Even though there is a special law, the opinions of experts and politicians still differ – should a general law regulate the status of the language? Nevertheless, it is important to emphasise that in spite of Slovenia's rich historical experience there is no professional, empirically supported linguistic policy (Štrukelj 1998:19-31). It can also be said that even in the opinion of some lawyers (Kranjc 1998.) the fundamental dilemma of the protection of the Slovene language as the official language remains outside the scope of law. Even if an official language is already protected by the Constitution, it cannot be effectively protected in practice unless it becomes generally accepted as a value, which is firmly seated in the value systems of individuals.

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3 Uradni list RS (20.8.2004), 86-3841/2004, p.10418.

A question arises, though, of how to preserve the Slovene language from excessive and undesired influences and establish it as the official language in accordance with the nation's interests. A thesis can be postulated (which has a somewhat negative connotation) that the use of a language is legally prescribed and regulated only in those countries in which it is not sufficiently *self-evident*.

The lack of self-evident use of the native language among members of a nation may also have deeper, historical and psychological roots. Members of small nations, such as Slovenes, who are positioned between various cultures due to the geopolitical position of their ethnic territory, and are therefore often multilingual and prone to xenophobia due to the historical conditioning of the ethnopsychological disposition, like to boast their knowledge of foreign languages in international discourses, in which, apart from serving as a communication tool, language also has a representative function, and the linguistic equality of partners is decisive for the equal attainment of their goals. However, Slovenes are insufficiently aware that they are turning their multilingual advantage into a shortcoming in this asymmetric communication process (asymmetric because one person uses their own native language and the other a foreign language, which impairs the balance of powers).

In the term "international", people do not see pluralism, but universalism. Science, trade, tourism, art and computer science know no boundaries, so an opinion that linguistic boundaries also need to be surpassed and that the same language should be used everywhere (possibly the English language) has become increasingly more popular. However, people are not aware or tend to forget that their "foreign, international language" was acquired in school and only serves as a mediator, but cannot always provide quick and accurate responses to difficult communication tasks, so they cannot be in an equal position in conversations to those who are native speakers of the foreign language (e.g. the English language).

CONCLUSION

There is a reciprocal relatedness between language and ethnic identity. Ethnic identity of the Slovenes has always had a strong link with Slovene language. In spite of many obstacles and unequal status in various states, through centuries, Slovenes have been maintained as a nation also through the preservation of the Slovene language. Language has been kept as the core of the Slovene ethnic identity, and has been even transformed into a symbol of the Slovenes who established a special attitude towards it.

On the one hand, Slovenes exalt their mother tongue, and on the other we are permeated by feelings of inadequacy concerning the Slovene language. Slovenes

belong to a small nation and the area in which the Slovene language is spoken is very small in comparison with that of other languages – the boundaries of Slovene are the borders of Slovenia (Rupel 1996). The complex of smallness is deeply rooted in the Slovene culture. This can be indirectly felt in a way in the attitude of Slovenes towards languages. An evident example of this is manifested for example in the fact that Slovenes often put other languages on a pedestal (primarily English, German and also Italian) and neglect the significance of knowing Slovene language and culture well. The significance of learning foreign languages is emphasised also in a well-known Slovene proverb[4]: One's value depends on the number of languages one masters!. At the same time, there is no proverb that would refer to the good knowledge of our mother tongue.

Last but not least, it needs to be said that lately, in the context of the European policy there is an increasingly important question of how the Slovene language and culture will survive and develop with Slovenia's participation in European integration processes. Is the integrative role of the Slovene language sufficiently strong to succeed in preserving the language from the viewpoint of preserving the nation? In order to maintain the spiritual dimensions of the Slovene language in sciences and arts, it is important to develop the economic basis for its use, and strengthen the political and cultural independence and confidence of the Slovenes. Some even fear that Slovene will remain the official language only in this small garden on the sunny side of the Alps, but this fear is unfounded, because the viewpoints of the European Union (EU) are clearly stated in all their basic treaties. Upon accession to the EU, the Slovene language as the official language of the Republic of Slovenia will join other official languages in the EU. The purpose of the linguistic policy of Slovenia is therefore not to fight for an equal position of the Slovene in the EU, but to ensure that the guaranteed equal position is assumed and that Slovene Europeans, as Leban says (2000: 256), will know how to clearly and proudly express themselves in their native language, and at the same time ensure high-quality interpreters and translators who will act as cultural mediators and pass our messages with professional accuracy and authenticity, translating them into the target languages. In view of Slovenia's accession to the EU, one must be aware that nobody is directly threatening the Slovene language, so it need not be protected, but rather preserved and cultivated.

Finally, let me summarise the thoughts of (one of) the leading Slovene philosophers and intellectuals, which also refer to the Slovene language and Slovenia's participation in European integration processes: "The founding of a sovereign state solved not only the cultural but also the political problem of Slovenes. The Slovene national issue no longer exists, but there are the problems of the Slovenes

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4 Similar proverb exists also in other environments .

as a nation, problems related to our statehood...” – and the first among these is the problem of the Slovene national confidence, wrote Tine Hribar (1996: 94), which undoubtedly includes attitudes towards the Slovene language!

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ORIGINAL
SCIENTIFIC
ARTICLE

SARA BREZIGAR

MARKETING MINORITY LANGUAGE AS A VALID TOOL IN THE FIGHT FOR SURVIVAL OF MINORITY LANGUAGES: THE CASE OF THE SLOVENES IN ITALY

The concept of marketing minority languages rests on the model that conceptualises minorities as communities formed by concentric circles of minority members. Every concentric circle corresponds to a group of minority members of different intensity, from those who represent the core of the linguistic minority, to those who merely speak a couple of words in the minority language. Marketing minority languages as an approach towards the preservation of minority languages presumes that it is possible to motivate inhabitants of a territory, where two linguistic communities live, to learn and use the minority language in their everyday life. Therefore, it assumes that linguistic minority members can and do move from one concentric circle to another, and that they can be motivated to come closer to the core of the linguistic minority. As such, marketing minority language can represent a valid tool in the fight for survival of minority languages, as well as a means against assimilation of the linguistic minority members.
The article applies the concept of marketing minority languages to the Slovenian minority in Italy and explores new perspectives of development for the above mentioned community.

Keywords: linguistic minority, marketing minority languages, Slovene minority in Italy, language use, language planning, language prestige, language acquisition, concentric circles minority model.

PROMOCIJA KOT UČINKOVITO SREDSTVO BOJA ZA PREŽIVETJE MANJŠINSKIH JEZIKOV: PRIMER SLOVENSKE MANJŠINE V ITALIJI

Promocija manjšinskih jezikov je pristop, ki stremi k ohranjanju manjšinskih jezikov. Ta pristop predpostavlja, da je mogoče prebivalce območja, kjer živita dve jezikovni skupnosti, spodbuditi, da se manjšinskega jezika učijo in da ga uporabljajo v svojem vsakdanjem življenju. Promocija manjšinskih jezikov torej predstavlja zanesljivo sredstvo v boju za preživetje manjšinskih jezikov, kakor tudi sredstvo za boj proti asimilaciji pripadnikov jezikovne manjšine.
V članku avtorica aplicira koncept promocije manjšinskih jezikov na primer Slovenske jezikovne manjšine v Italiji.

Ključne besede: Jezikovna manjšina, promocija manjšinskih jezikov, Slovenci v Italiji, raba jezika, načrtovanje jezika, prestiž jezika, pridobivanje znanja jezika, manjšinski model koncentričnih krogov.

INTRODUCTION

A minority language is a language that is spoken by a minority of the population of a country or region. The European Charter for Regional or Minority Languages defines minority languages as those that are *"traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and as those that are different from the official language(s) of that State"*.[1] A group of people who speak a minority language forms a linguistic minority.

Legislative and constitutional arrangements in single countries usually define linguistic minorities that could be found in their territory. Most linguistic minorities can and often do get some sort of official support from the state, such as education through/of the minority laguage or financial support for educational, cultural, sports and other activities for linguistic minority members.

However, minority languages are sometimes marginalised within nations for a number of reasons. Occasionally they are viewed as a threat. For some they seem to represent some kind of support for separatism, thus a threat to the political establishment. Moreover, immigrant minority languages are often also seen as a threat and as a sign of non-integration of these communities. Another reason for the marginalisation of linguistic minorities is the small number of speakers. And frequently, the number of minority language speakers is also severely declining.

A considerable number of researchers (Baker 1985, 1992, 2001; Cooper 1989; Crystal 2000; Fishman 1991, 2001; Giles et al. 1977, Williams 2000), have studied strategies and proposed models to combat the decline and death of minority languages. David Crystal in his book Language Death (Crystal 2000) proposed several factors that may help a minority language to progress. He postulates that an endangered language will progress if its speakers increase their prestige within the dominant community, increase their wealth and increase their legitimate power in the eyes of the dominant community.

Marketing minority languages is an approach to linguistic minority issues that focuses on fostering and promoting the use of minority languages in the territory, settled by two linguistic communities. Therefore, such an approach could be used as a means to combat the decline and foster the progress of minority languages.

The Slovene language in Italy is a minority language that has been slightly, but constantly declining in the past decades. The Slovene (or Slovenian) linguistic community in Italy is therefore one of the linguistic minorities that could profit

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1 See Art. 1, Par. a) of the European Charter for Regional or Minority Languages, adopted by the Council of Europe on June 25, 1992, open to signature on November 5, 1992, entered into force on March 1, 1998, ETS No. 148.

from the aforementioned approach towards linguistic minority issues. In this article I shall try to briefly outline how such a line of activities could be developed. In order to do that, I shall devote the first part of the article to a brief outline of the characteristics of the Slovene minority in Italy, in order to frame the current situation regarding the Slovene minority language in Italy.

Marketing minority languages is an approach to linguistic minority issues that rests on the concentric circles minority model. In the second part of the article, I shall delineate the concentric circles minority model and apply it to the Slovene linguistic minority in Italy.

Finally, I shall explore how the marketing minority languages approach could be applied to the Slovenian minority in Italy, and identify the fields where its application could bring most progress to the Slovene linguistic minority.

I shall start with some basic data regarding the Slovene minority in Italy.

THE SLOVENES IN ITALY: WHO THEY ARE, WHERE AND HOW THEY LIVE

The Slovene minority in Italy is an autochthonous minority, often referred to as a national, ethnic or linguistic minority.[2] The Slovenes (or Slovenians) in Italy settle the eastern part of the region Friuli - Venezia Giulia/Furlanija – Julijska krajina, next to the border with Slovenia. Slovenes can be found in the three provinces of Trieste/Trst, Gorizia/Gorica and Udine/Videm. Due to historical, political, legal and geographical reasons, the Slovene linguistic minority in Italy cannot be viewed as a homogeneous community, both from a linguistic point of view and according to the historic perspective on the legal protection framework of the single parts of the territory settled by minority members. Above all, the situation of the Slovene minority in the two territories in the province of Udine/Videm - Slavia Veneta/Beneška Slovenija and Val Canale/Kanalska dolina -, differs to a great extent from the situation in the 14 counties in the provinces of Trieste/Trst and Gorizia/Gorica. The two realities are so different, that a single marketing approach to the two realities would not make any sense. Therefore, this article refers only to the part of the Slovenian minority that settles the provinces of Trieste/Trst and Gorizia/Gorica,[3] and does not take into consideration the two territories in the

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2 In this article I shall predominantly refer to the Slovene minority in Italy as to a linguistic minority or linguistic community. This does not indicate that the Slovene minority in Italy is only a linguistic, and not an ethnic or a national minority. On the contrary, the decision to refer to it as only a linguistic minority stems from the fact that this article focuses on the language as one of the most important criteria of membership of the Slovene community in Italy, and does not take fully into account other aspects of minority membership, such as identity, ethnic origin, etc.

3 When I mention the Slovenes in Italy in the paper, I refer to the Slovenes in the province of Trieste/Trst and

province of Udine/Videm. Moreover, the activities and solutions proposed in this article are not directly applicable to the two aforementioned territories in the province of Udine/Videm.

It is extremely difficult to establish the number of Slovenes in the region Friuli – Venezia Giulia/Furlanija – Julijska krajina. According to international legal agreements and standards the number of linguistic minority members does not constitute a criterion to establish the existence of linguistic minorities.[4] This refers to both the absolute number of linguistic minority members as well as to the percentage of linguistic minority members among inhabitants of the territory under scrutiny. However, there is a difference between international legal requirements and concrete situations (Komac 1987: 43). The number of minority members represents a form of power and legitimacy for the survival and progress of the linguistic minority, and above all for the fulfilment of minority rights.

However, if an educated guess should be given regarding the number of Slovenes in the region Friuli – Venezia Giulia/Furlanija – Julijska krajina, the Italian authorities unofficially estimate that there are 80.000 Slovene speakers in Italy (Popolazioni di lingua Slovena 1994: 273). However, according to a survey carried out in 2002 by the Slovenian Research Institute in Trieste/Trst and SWG, the agency for public opinion surveys from Trieste/Trst, there are 95.000 members of the Slovenian linguistic community, 100.000 speakers of the Slovene language and 183.000 people on the territory understand Slovenian (Bogatec 2004). According to these data, there are approximately 90.000 people in the territory who understand and speak the minority language, and another 90.000 people who can to a certain extent understand the minority language, but are not able to speak it.

The status of the Slovene linguistic minority in the two provinces of Trieste/Trst and Gorizia/Gorica is defined by a comprehensive legal framework, stemming from national legislation and international multilateral and bilateral agreements. The protection of the Slovene minority in Italy rests on Art. 6 of the Italian Constitution, which states that the Italian Republic protects linguistic minorities with special measures.[5] Moreover, there are two Acts that refer directly to the protection of linguistic minorities in Italy: Act no. 482, of December 15, 1999 "Legal provisions regarding the protection of historic linguistic minorities" proposes a general framework for protection of linguistic minorities in Italy. However, it is Act no. 38, of February 23, 2001, "Legal provisions for the protection of the Slovene

Gorizia/Gorica, too.

4 This position has been explicitly put forward by the UN Committee on the Elimination of Racial Discrimination in 1974 on their 10th meeting (Petrič 1977: 92).

5 Constitution of the Italian Republic, published in the Official Gazette No. 298, Special issue, December 27, 1947; and published in the Official Gazette No. 2, on January 3, 1948.

linguistic minority in the region Friuli – Venezia Giulia/Furlanija – Julijska krajina" that deals specifically with the protection of the Slovenian minority in Italy.

Moreover, the protection of the Slovene minority in Italy rests heavily on obligations undertaken by the Italian Republic according to international bilateral and multilateral agreements. The protection of the Slovene minority in Italy was, for example, included in the Peace Treaty signed in Paris on February 10, 1947 between the Allied Powers and Italy[6], and in the subsequent Special Statute as Annex II to the London Memorandum of Understanding among the Governments of Italy, the United Kingdom, the United States of America and the Socialist Federal Republic of Yugoslavia, signed in London on October 5, 1954[7]. Moreover, a protection framework for the Slovene minority in Italy was included in the Osimo Agreements, signed on November 10, 1975 by the Socialist Federal Republic of Yugoslavia and Italy.[8] Furthermore, Italy has also signed and ratified the Framework Convention for the protection of National Minorities[9] and the European Charter for Regional or Minority Languages[10].

The above mentioned legal documents represent a comprehensive legal framework for the protection of the Slovenian minority in Italy. It includes provisions regarding kindergartens and public education though minority language; teaching of the minority language; public use of the minority language, including traffic signs; media and publishing in the minority language; sports' and cultural institutions, activities and facilities; cross-border relationships with the state in which the same language is used in identical or similar form. However, the most prominent trait of the above mentioned legal framework is its orientation towards creating opportunities and possibilities rather than mere obligations.

The above mentioned legal framework and above all the two aforementioned acts[11] offer to the Slovene minority in Italy opportunities that could be taken

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6 Peace Treaty signed in Paris on February 10, 1947 between the Allied Powers and Italy. Međunarodni ugovori Federativne narodne republike Jugoslavije, izdanje ministarstva inostranih poslova, 1947, No. 4.

7 Special Statute as Annex II to the London Memorandum of consensus among the Governments of Italy, United Kingdom, United States of America and Socialist Federal Republic of Yugoslavia, signed in London on October 5, 1954. Službeni list SFRJ, Međunarodni ugovori, Beograd, 1954, No. 6, 7-9.

8 Osimo Agreements between Socialist Federal Republic of Yugoslavia and Italy, signed the 10.11.1975 in Osimo (Ancona). Official Gazette of Socialist Federal Republic of Yugoslavia, Mednarodne pogodbe, Beograd, 1977, No. 1, 2-6.

9 Framework Convention for the Protection of National Minorities, adopted by the Council of Europe on November 10, 1994, open to signature on February 1, 1995, entered into force on February 1, 1998, ETS No. 157.

10 European Charter for Regional or Minority Languages, adopted by the Council of Europe on June 25, 1992, open to signature on November 5, 1992, entered into force on March 1, 1998, ETS No. 148.

11 Act no. 482, of December 15, 1999 "Legal provisions regarding the protection of historic linguistic minorities" proposes a general framework for protection of linguistic minorities in Italy and Act no. 38, of February

advantage of to foster the progress of the linguistic minority. However, the Slovenian linguistic minority in Italy, as similar linguistic communities around the world, seems to be unable to take full advantage of such possibilities (Brezigar 2004: 72-77). The predominant attitude of minority members and institutions toward such opportunities is more reactive than proactive, more oriented toward maintaining the status quo, instead of striving for new solutions and adjusting to the new situations that the linguistic minority is facing. Change is predominantly viewed as a threat and perceived as if *"things were going from bad to worse,"* even if that may not always be the case (Brezigar 2004: 80-83). What is clearly missing in the current activities of the Slovene minority in Italy are a pragmatic, proactive approach toward minority issues and above all, a positive approach toward possibilities and opportunities that could be taken advantage of within the existent legal framework. A set of goals and activities that would help the minority to move into this direction could be developed by using marketing strategies, techniques and tools to foster the position of the Slovene language in the territory. However, the use of marketing strategies, techniques and tools calls for a specific approach toward minority issues, best incorporated into the concentric circles minority model. Therefore, I shall now explain how the approach called marketing minority languages works, and on what foundations, premises it is based.

MARKETING MINORITY LANGUAGES THROUGH THE CONCENTRIC CIRCLES MINORITY MODEL

The concept of marketing minority languages lies on the concentric circles minority model. This model has been developed on the basis of the minority/majority relationship between the German and Danish population on the German/Danish border by Jørgen Kühl (1997). The concentric circles minority model explains the dynamics of organisation and harmonious coexistence of the minority and majority population in the territory inhabited by members of the two communities.

The concentric circles minority model describes who forms a minority. According to this model, the minority is formed by members of different intensity. The degrees of intensity of different members are represented by three concentric circles, which divide the minority into three layers: the core, the medium layer and the outer layer of the minority. The centre of the model is composed by core members of the minority. These are the people that declare themselves as minority members. They master the minority language; they share the values and the

23, 2001, "Legal provisions for the protection of the Slovene linguistic minority in the region Friuli – Venezia Giulia/Furlanija – Julijska krajina".

culture of the minority. They take an active part in the minority cultural and sports life, they respect (local) customs related to the linguistic minority.

The medium layer of minority members is formed by people that use the minority language. But for them the minority language is not the only language they use with family members. This group of people does not tie the language to the affiliation to a linguistic or ethnic minority. Although the majority language is also a language they use with family members, they see themselves as minority members. These people characterise themselves as minority members, they adhere to a strong minority cultural tradition, and they use both minority and majority language with their family members.

The outer layer of minority members is formed by people who do not identify themselves as minority members, but they *"like the minority and minority members so much to enrol their children in minority language medium schools"*. The education of minority members will have an effect on their children, who will not only learn the language at school, but will also capture the values and culture of the minority. The third layer is therefore formed by a group of people who usually do not speak the minority language. However, they might be able to understand it, they enrol their children to minority cultural and sports associations, they participate in other minority activities, and they contribute to minority institutions and cherish typical (local) minority celebrations.

If I apply the concentric circles minority model to the situation of the Slovene minority in Italy, the core of the Slovene minority is formed by those who identify themselves as Slovenes, who take active part in the activities carried out by and for the Slovene minority in Italy. An example of this could be the celebration of the day of culture on the 8th of February. This is a particular feast day, important for Slovene minority members, but unknown to Italian majority members.

The members of the medium layer usually use both the Slovene language and Italian language as their daily family-life language. They identify themselves as Slovenes but they do not see the use of Slovenian language as the ultimate sign of "being a Slovene", or as a prerequisite for membership in the Slovene minority.

The outer layer of the Slovenian community is formed by people who do not speak the Slovenian language, but encourage their children to learn it. They support their children in their inclusion in the minority life through cultural and sports activities.

It is important to stress that all the three layers of people - the core, the medium and the outer layer – are parts of the minority, although in the medium and outer layer we can already notice phenomena of *creolisation*[12].

According to the concentric circles minority model, members of the linguistic minority can move towards the core of minority or away from it. When they move away from the core and they possibly even leave the minority, they are *de facto* moving towards the core of another linguistic community. That could be, for example, the linguistic majority of the territory inhabited by members of the two linguistic communities. Such a process could be perceived as a path towards assimilation of the linguistic minority.

However, we can imagine a reverse process taking place as well. Members of the linguistic majority can be attracted to the linguistic minority, and can be even moving closer to the core of the minority. Such a process could be perceived as a kind of reverse assimilation, where the linguistic minority attracts and retains members of the linguistic majority. In practice, such a process is usually not a *de facto*, active or aggressive reverse assimilation of the linguistic majority, but more an effort to "replace" some of the members that have previously abandoned the linguistic minority. Such a process is usually aimed at counteracting a unilateral flow of loss of members of the linguistic minority towards the linguistic majority.

Even a superficial glance at the Slovenian minority in Italy makes it clear that most minority members could be found in the hard core of the minority. Due to a growing number of mixed marriages, the number of minority members in the outer layer has been steadily growing in the past decades. However, members in the medium layer seem to be scarce, especially due to a minority policy of refusing alleged traitors of the minority.

The fact that the minority is not confined to the core members, but includes also the medium and outer layer, indirectly means that the model dictates a completely different relationship towards people in the medium and outer layer from the previous ones. This is probably the biggest challenge that the Slovenian minority in Italy has been facing in recent years: people in the medium and outer layer should not be perceived as traitors who have abandoned their nest and moved away from the core of the minority toward the majority community, but a category of people who share minority values and are possible candidates for the accession to the core of the minority.

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12 Creolisation refers to the generation of a new, mixed culture that is the result of interaction between the two linguistic communities.

Questions that need to be answered at this point stem from the relationship between the linguistic minority and linguistic majority and regard membership changes between the two communities: how can a person become a member of the linguistic minority, how can he/she move towards the core of the minority and how can he/she move away from the core minority?

Marketing minority languages is an approach to minority languages that tries to explain the dynamics and mechanisms of such membership changes in linguistic minorities. It provides tools to counteract the processes of assimilation of linguistic minority members. In addition, it brings new perspectives to the study of linguistic, ethnic and national minorities. Marketing minority languages relies on approaches and mechanisms stemming from social marketing, best defined as *"the adaptation of commercial marketing technologies to programs designed to influence the voluntary behaviour of target audiences to improve their social welfare and that of society"* (Andreasen 1994: 110). Social marketing is therefore the systematic application of marketing strategies and techniques to achieve specific behavioural goals for a social good (Kotler and Zaltman 1971). Social marketing is sometimes perceived as the planning and implementation of standard commercial marketing practices to achieve non-commercial goals. However, this is an over-simplification of the function of social marketing. The primary goal of social marketing is the promotion of a social good, while in commercial marketing the goal is primarily a financial one. The approach of marketing minority languages therefore sees the language as a social good, important enough to be nurtured and preserved. Therefore, it considers the minority language a social commodity that can and should be acquired.

This view stems from the human capital theory and maintains that anyone who knows two languages – the minority and the majority one – can access to two linguistic and cultural frameworks. Such a person has at his/her disposal two tools for understanding and interpreting the world, and has access to two cultural heritages. Accordingly, the person that only knows one language, for example the majority one, can access to only one cultural heritage, to one view of the world. Therefore, the monolingual person is worse off than the person who knows two languages.

In a territory where two linguistic communities are present, inhabitants have at their disposal two linguistic means that could be taken advantage of. According to human capital theory, there is a big incentive for all the inhabitants of the territory to acquire the knowledge of the minority language. Therefore, also majority language speakers could and should learn and use the minority language. This is, of course, in net contrast with the *de facto* situation in Friuli – Venezia Giulia/Furlanija – Julijska krajina, where the predominant approach has been to teach both languages, Slovenian and Italian language, only to minority members,

while Italian speakers were neither obliged nor encouraged to learn the minority language. The result of such a policy has been that the Slovenian minority can only loose speakers, and not gain them; while the Italian majority can only gain speakers and not loose them. This has been proven to be a lose-lose strategy for the Slovenian minority in Italy, since the membership of the minority has been steadily declining, without any prospects of shifts.

An important consequence of the marketing approach towards linguistic minorities and the application of the concentric circles minority model is that membership of the linguistic minority is not fixed any more. Membership is not predetermined by birth, it is not grounded on decendency or "pure blood" succession and the linguistic minority is not formed by core members alone. According to this model and approach, people who are less devoted to the linguistic minority are also part of it, even if they do not cherish the minority language as members of the core do, or even if they may not be able to speak the minority language properly. They represent a means of spreading information about the minority community, about its culture and customs into the majority community. They represent potential core members of the minority. They can move to the core of the minority, if they wish to do so.

It is important to note that the concentric circles minority model outgrows the questions related to the promotion of minority community and minority language. The model puts forward the fact that the boundary between linguistic and ethnic communities is permeable, transitional in only one direction – from the minority to the majority, while it is obstructed in the opposite direction – from the majority to the minority. This is particularly true in the case of unbalanced language situations and lack of a marketing approach towards the minority language. In such a situation what happens is a one-way assimilation, represented in this model by the one way permeability of the concentric circles.

The concentric circles minority model pulls down the existing boundaries of what represents a minority and creates a theoretical framework for the expansion and progress of linguistic minorities. This represents a big shift from the classical understanding of ethnic and linguistic minorities, where the affiliation to the minority is *de facto* more or less predetermined on the basis of objective criteria, such as ethnic origin, religion, mother's tongue, etc. This model empowers the already established criterion of self determination of every single individual as to which community he/she belongs. The concentric circles minority model empowers such a criterion by stressing the voluntary choice of each individual as to which ethnic and linguistic community he/she belongs. According to this model, members of the linguistic minority may decide to join the linguistic majority, and members of the linguistic majority may decide to join the linguistic minority. Therefore, the concentric circles minority model converts a nearly one-way

transitional boundary into a two-way transitional boundary, where minorities can "gain" members. This is of extreme importance, since a linguistic minority is condemned to decline or extinction, if it sets itself the goal of preserving its current members. However effective the minority is in maintaining its members and their descendants, the minority will lose some of them, primarily due to emigration and assimilation. The strategy for preserving minority communities that rests on "blood purity" of its members is therefore condemned to failure.

One of the ways how minorities can try to balance the transience of the boundary and foster the flow of people moving away from the majority towards the minority community is a suitable marketing strategy of the minority language, and therefore an indirect promotion of the linguistic (and ethnic) minority. With a marketing approach towards minority languages linguistic minorities can replace the drift of leavers from the linguistic minority with a drift of comers to the linguistic minority.

The marketing minority language approach is based on the premise that the linguistic minority can expand in terms of number of members and progress in terms of intensity and activity of members. Someone who is *a priori*, "by birth" a member of the linguistic majority can become a member of the linguistic minority. Someone who is in the outer layer of the minority can move towards the medium layer, or even to the minority's core. Such transitions through concentric circles are possible by acquiring knowledge of the minority language, by increasing the use of minority language, through acceptance of minority values, traditions and customs.

MARKETING MINORITY LANGUAGES APPLIED TO THE SLOVENE MINORITY IN ITALY

Marketing minority languages is an approach that includes a comprehensive set of activities and measures that have a positive impact on the minority language in all domains of a person's life. A comprehensive marketing strategy should therefore take into account the use of language at home, at work, during leisure activities, in contacts with authorities, etc. The ultimate goal of marketing minority languages is to create such an environment, where a person could actually "live" by using only the minority language.

Several researchers (Baker 2001; Cooper 1989; Fishman 1991, 2001; Giles et al. 1977, Williams 2000) have proposed models and frameworks to combat the decline of minority languages. Segments of these models and frameworks have been used by single minorities, such as the Basques, the Catalans, the Welsh, etc. to actually promote their minority languages (Brezigar 2002, 2004). According to the experiences of these communities, an encompassing marketing approach

should focus on four areas of marketing minority language: language acquisition, language prestige, language use and language planning. Therefore, I shall try to provide a short overview of the most significant problems that the Slovenian minority in Italy is facing in these 4 areas that are crucial for marketing minority languages. Moreover, I shall provide some basic guidelines on how to bring the existing approach toward minority issues within the Slovene minority in Italy in line with the principles underlying the marketing of minority languages.

In the domaine of language acquisition we can distinguish between minority language acquisition by children and by adults. Children are expected to know the minority language when they enrol into Slovene-medium schools. Those who are not able to speak the minority language usually enrol into Italian-medium schools. According to the legal framework in place, Italian-medium schools can establish supplementary lessons of Slovene language within their curricula.[13] Some Italian-medium schools have already taken advantage of such opportunity. However, the possibilities in this field are far from exhausted.

If the Slovene minority strives to gain new members, teaching Slovene language to Italian-only speaking children could represent the first step towards fostering the Slovene linguistic minority. Therefore, according to the current situation regarding language acquisition by children and the opportunities offered by the legal framework, the Slovene minority should motivate, stimulate and persuade Italian-medium schools to offer their pupils the possibility to learn the minority language. Later on, some of these pupils should be attracted to the core of Slovenian minority.

However, the situation is quite the opposite. Slovene-medium schools fear that core minority members, who used to enrol their children into Slovene-medium schools, might enrol their children into Italian-medium schools with supplementary lessons of Slovene language. According to this line of thinking, instead of gaining new minority members, the Slovene minority would be loosing the existent minority members faster than it has been happening in the past. The result of such an attitude is that the Slovene minority does not support attempts to gain new young speakers by making the most of opportunities offered by the legal framework, sticks to the old unsuccessful strategy of retaining the existing members and therefore subscribes to a future of slow, but steady decline.

In the field of language acquisition by adults, there seems to be a feeble, but constant interest by Italian-only speakers to learn the minority language (Brezigar 2004: 92). Payable courses of Slovene language are usually well attended, although most of them are not organised by institutions of the Slovene minority. Again,

13 See Bogatec and Bufon (1996, 1999) and Brezigar (2004: 90-114).

the focus of the Slovene minority is on the people who are already able to speak the minority language and not on those who may become minority members in 10 or 20 years, or whose children and grandchildren may represent the core of the Slovene minority in Italy in 30 years. A shift in focus on those who might be ready and willing to join the minority is probably the main task that the Slovene minority should undertake in the field of language acquisition.

In the field of language acquisition by adults the Slovenian minority in Italy faces one major obstacle: the low prestige of the Slovenian language in Italy. The prestige as "perceived status" of the minority language seems to be substantially lower compared to the prestige of the majority language, particularly among Italian-only speakers (Brezigar 2004: 83, 122-124).[14] This situation hinders efforts aimed at increasing the number of Italian speakers who learn and actually use the Slovenian language. Although it is *de facto* impossible to change the perception of language status in a short span of time, particular attention should probably be devoted to activities that would increase the value of the Slovene language and Slovene minority in the eyes of the Italian community.

A second obstacle that should be mentioned when dealing with Slovene language acquisition by adults is the transfer from "knowledge" into "use".[15] Although a certain number of Italian-only speaking adults learn the Slovenian language, they do not actually use it in their everyday life. For them, it is as useful as knowing any other foreign language, or even less. Knowledge of minority language is treated nearly as folklore, and not as a usable or even necessary means of communication in the territory where two linguistic communities live. This kind of behaviour among Italian speakers who have learned Slovenian is supported by the behaviour and values of the Slovenian minority in two ways. Firstly, according to the traditional values of the Slovenian minority, the main reasons to speak the Slovenian language are affective ones, and not economical ones (Brezigar 2004: 97, 103-104).[16] Since Italian speakers cannot easily develop affective reasons to use the minority language, which are basically incorporated in the education and upbringing of most members of the Slovene minority, they stick to the majority one. Secondly, Slovene language speakers do not expect Italian speakers to use the minority language. Even if the Italian speaker is able to communicate in the minority language, members of the Slovene minority would switch to the Italian language when communicating with him/her. As a consequence of the behaviour and values of the Slovene minority, Italian-speakers are not expected to actually use the minority language at any time, although they have learned it. And if Italian

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14 For a thorough analysis of the status of the Slovene language in Italy see Kaučič-Baša (1993).

15 On transfer from "knowledge" into "use", please see also Novak-Lukanovič (2006).

16 See also Bogatec and Bufon (1996, 1999).

speakers do not use the minority language, there is little chance that they could become minority members and move towards the core of the linguistic minority. A small, initial step forward in this field could be made by shaping and promoting economical reasons for the use of minority language both among minority and majority language speakers.

A further obstacle that hinders the progress of the Slovene minority in Italy regards language planning. In this domaine, the situation of Slovenes in Italy is somewhat complicated. The Slovenes in Italy being a part of the nation that mostly lives across the border in Slovenia, where Slovenian is the majority language, the linguistic minority does not have either full responsibility or "full powers" to deal with language planning.[17] In practice this means that several institutions in the Republic of Slovenia de facto take care of language planning, while there's no designed institution that takes care of the language planning that is necessary for the survival of the Slovene linguistic minority in Italy. The minority language, in fact, needs to be adjusted to the Italian legal, political and administrative system, where this system differs from the one in Slovenia. The lack of minority language planning, together with a slow and selective transfer of language planning results from Slovenia, poor language acquisition and decreasing number of speakers, make it difficult for minority members to "live" only in the minority language.

CONCLUSION

Marketing minority languages as an approach towards the preservation of minority languages presumes that it is possible to motivate inhabitants of a territory, where two linguistic communities live, to learn and use the minority language in their everyday life. In accordance with the concentric circles minority model, it assumes that linguistic minority members can move from one linguistic community to another, and that they can be motivated to come closer to the core of the linguistic minority. As such, marketing minority language can represent a valid tool in the fight for survival of minority languages, as well as a means against assimilation of the linguistic minority members.

By applying the concept of marketing minority languages to the Slovenian minority in Italy, it is clear that the Slovene minority in Italy still has opportunities for improvement in the field of marketing minority languages. However, the

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17 Full responsibility and "full powers" refer to the limited function that the Slovene minority has in the field of language planning. The responsibility for language planning lies within institutions and indviduals that deal with language planning in Slovenia, where Slovenian is the majority language. Therefore, the Slovene minority in Italy has only a marginal role and is expected to represent only a small piece in the mosaic of Slovene language planning.

reason for concern in the case of the Slovenian minority in Italy is another: the linguistic minority still seems to be rejecting the only long-term viable solution for its prosperity and progress: a planned, carefully led and managed process to attract new minority members and retain them. The efforts of the Slovene minority in this field are still too sporadic, left to chance rather than planned, feared rather than exploited.

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ORIGINAL
SCIENTIFIC
ARTICLE

MIRJAM POLZER-SRIENZ

The "New Stage" of Roma Policy – a General Survey of Activities at International Level Concerning Roma Issues

The increased attention paid to Roma and Sinti issues at the national and international level in the last decade of the 20th century was an encouraging sign for the development of a clearer understanding of the complexities of policy issues related to Roma. Nevertheless, the numerous attempts of international and national policies to improve the status of Roma and Sinti don't seem to effect significantly the social, political and economic situation of Roma and Sinti. Political and institutional recognition of Roma is a precondition for still needed reinforced activities to combat prejudices, hostilities, discrimination and violence against Roma and Sinti and promotion of social integration. It seems that the Roma policy is developing to a systematic combination of the methods of the social approach, the implementation of minority rights and prevention of discrimination and violation. Despite the fact that systematic national strategies and action plans exist in SEE countries, measures taken often don't have the desired effect. Nevertheless, one improvement that can be mentioned is the realization by the relevant policy makers that single activities without a long-range concept and without cooperation with Roma are not sufficient to secure the implementation of human and minority rights for Roma. Legislative measures alone are very important but still not enough to strengthen the situation of Roma. At the same time positive action and affirmative actions are not enough, if intensive cooperation between state authorities, civil society and the Roma population doesn't exist. If states were to consider this then the new stage of Roma policy will have good chances to bring about some significant positive developments.

Keywords: Roma, protection of Roma, Roma rights, policies concerning Roma and Sinti, human rights

Nova faza romske politike – pregled z romskim vprašanjem povezanih mednarodnih dejavnosti

Čeprav je v zadnjih letih zanimanje politikov in znanstvenikov za Romsko vprašanje naraslo, se očividno ni izbolšal pravni, politični in socialni položaj Romov. Ker so problemi Romov kompleksni je njihova obravnava potrebna iz različnih perspektiv. Zato so ukrepi, ki upoštevajo interdisciplinarnost še najbolj učinkoviti. Na državni in tudi mednarodni ravni so uspešni predvsem ukrepi, ki upoštevanjo tako socio-ekonomske, varnostnopolitične kot tudi politične in pravne aspekte. Torej se zaščita Romov ne more nanašati samo na izboljšanje socialnega položaja. Samo celovita zasnova, ki obsega socialni razvoj in jamči človekove pravice ter posebne manjšinske pravice in tudi učinkovito nasprotuje diskriminaciji in rasizmu, je lahko uspešen. Za to pa je potrebno ne samo sodelovanje Romov, ampak tudi večinskega naroda.

Ključne besede: Romi, mednarodna manjšinska zaščita, ukrepi za izbolšanje položaja Romov, človekove pravice

1. INTRODUCTION

The increased attention paid to Roma and Sinti issues at the national and international level in the last decade of the 20th century was an encouraging sign for the development of a clearer understanding of the complexities of policy issues related to Roma. Nevertheless, the numerous attempts of international and national policies to improve the status of Roma and Sinti don't seem to effect significantly the social, political and economic situation of Roma and Sinti. In general the approaches towards Roma and Sinti issues can be distinguished on the one hand as approaches focusing on social problems or problems of integration, and on the other hand as approaches in the context of discrimination, racism and human rights violation. Policies concerning Roma and Sinti are often narrow-minded in their scope and only concentrate on the social problems, using policy development methods of the past. These policies forget and downplay the influence of permanent prejudice, racism, discrimination and violence against Roma, which is worrying. Also the legal framework and policies often include these prejudices which are then formalized in various policy measures concerning Roma and Sinti. Such policies easily ignore the fact that formal equal treatment can cement ethnic and racial discrimination against Roma and Sinti. Effective measures, therefore, must also include Roma and Sinti representatives in policy elaboration, decision making and implementation.

Nevertheless, there are encouraging new trends and, as the background paper 4 "Public Policies Concerning Roma and Sinti in the OSCE Region" (prepared for the occasion of the 1998 Implementation meeting on Human Dimension Issues under the auspices of ODIHR of the OSCE)[1] calls it, a *new stage* of handling Roma issues becomes visible. This "new stage of public policies concerning Roma and Sinti at national and international level" involves a better articulated security perspective, encompassing socio-economic aspects together with civil and political aspects, especially those related to discrimination, racism and the underlying attitudes which contribute to such manifestations". Thus issues should not be handled separately, but also in the light of the cultural and historical experience of Roma and Sinti population.

In 2003 in its 479th plenary session the OSCE Permanent Council adopted the "Action Plan Improving the Situation of Roma and Sinti within the OSCE Area". The Action Plan "is intended to reinforce the efforts of the participating States and relevant OSCE institutions and structures aimed at ensuring that Roma and Sinti

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1 Background paper 4 to the Implementation meeting on Human Dimension Issues under the auspices of ODIHR of the OSCE

people are able to play a full and equal part in our societies, and at eradicating discrimination against them"[2], i.e. the OSCE for the first time brought together the above mentioned different approaches to Roma and Sinti issues.

2. TRENDS OF *NEW STAGE* POLICIES OF INTERNATIONAL ORGANIZATIONS

2.1. What principles are necessary to consolidate stability in interethnic relations? A theoretical framework for the recognition and protection of minorities

The principle of equality as a basic norm of democratic states has special importance for minority protection: directly connected to the minority issues is the question, which special feature of people or groups should be protected, and whether we require strictly formal adherence to the basic principle of equal rights and equal treatment? Can an exception[3] be justified or even called for? Are special treatments justified, that are then designated as "positive discrimination", "privilege", "special rights", "special measures", "preferential treatment", "affirmative action",...? However, this is not a question of unjustified privileges as some of these terms can misleadingly imply, but the fact - if equality of groups is the criterion of comparison - that minorities - despite, or just because of formal equal treatment - are in fact exposed to inequality.

For example the realization of certain minority rights, like the right to use mother tongue before offices and authorities, education in mother tongue; additionally the participation in state bodies is needed to create an environment the majority population itself can already take for granted. Thus only as a result of special treatment can the minority achieve those identical initial positions that other social groups already have. But only if this precondition is fulfilled can minorities participate equally in social and state structures and processes.

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2 OSCE Permanent Council, 479th Plenary Meeting "Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, 27 November 2003.

3 "Dignity and equality for all individuals and groups are essential components of democracy. The realisation of these rules, by way of non-discrimination and special rights and measures, furthers the fruits of participatory development and improves the quality of life for both, minorities and the society as a whole. This approach reduces internal tensions, prevents dismemberment of states and helps keep the peace." Alfredsson, Minority Rights: Non-Discrimination, Special Rights and Special Measures, in: Ermacora/Tretter/Pelzl. (Hg.)(1993), Volksgruppen im Spannungsfeld von Recht und Souveränität in Mittel -und Osteuropa, Wien, 149.

Integration presupposes the recognition of the differences of ethnic communities. Depending on how the difference of ethnic communities in states is handled, two ideal typical models are conceivable: exclusion of difference and inclusion of difference.

While exclusion is not a positive solution of minority- majority issues, integration of minorities is necessary for effective minority protection. Integration as maintenance of the specific characteristics of specific groups implies various requirements such as the official recognition of minorities, conditions for maintenance of difference (between individuals and groups), separate minority institutions and the integration of minorities into the common state institutions through representation and participation.[4]

The use of existing minority rights can be restricted also by the definition of the term "minority". If we compare documents of international law some generally accepted criteria of the definition of minorities can be found. Most standards of the protection of minorities apply to autochthonous minorities, i.e. minorities that have lived in a state for a long time. So-called "new" minorities are excluded from minority protection. Another widely accepted restriction is also, that persons belonging to minorities must be citizens of the state. The UN- Human Rights Committee, that was set up to monitor the International Convention on Civil and Political Rights, explicitly applies the protection to foreign persons, i.e. noncitizens. Current literature assumes that foreign persons must have been residents of a state for a longer time to be entitled to minority protection rights.[5]

Such restrictive definitions of the autochthonous settlement and of citizenship exclude not only Roma as they are often not citizens of the state in which they live, but also foreign workers, immigrants or persons seeking asylum, who plan to remain for a longer time or permanently in a host country. Minority protection is therefore limited to civil rights.

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4 See Thornberry and Minority Rights Group (1991), Minorities and Human Rights; see also Marko (1995) Autonomie und Integration.

5 Hofman, Minderheitenschutz in Europa, ZaöRV 1992, 7.

2.2. International and regional Roma protection

2.2.1. The United Nations

The basic provision concerning the protection of the rights of minorities is the non-discrimination principle, which is also guaranteed in the Charter of the United Nations (Article 1, paragraph 3) and the Declaration on Human Rights, which prohibits discrimination on the grounds of "*race, colour, sex, language, religion, political or other opinion,* national or social *origin, property, birth, or other status*"1 (Article 2). The non-discrimination principle guarantees equal treatment to every person, irrespective of their origin or status. Actually, the scope of the non-discrimination principle has been expanded by including also the need for special measures to remedy disadvantages for the benefit of (national) minorities and other vulnerable groups. The UN developed many specific minority rights instruments, which are relevant for the protection of Roma. In addition various organs and bodies of the United Nations have been continuously involved in combating racism and racial discrimination. But there had been no reference to the Roma issue until the resolution of the "Sub-commission on the Promotion and Protection of Human Rights" (in the following text: Sub-Commission) in 1991.[6] Since then more attention has been drawn to Roma Rights at the international level.

At its fifty-first session, the Sub-Commission, in its decision 1999/109, decided to entrust Mr. Sik Yuen with the task of preparing a working paper, without financial implications, on the human rights problems and protections of the Roma, for submission to the Working Group on Minorities at its 6th and to the Sub-Commission at its 52nd session, in order to enable the Sub-Commission to take a decision at that session on the feasibility of a study on the subject. At its 52nd session, the Sub-Commission had before it the working paper prepared by Mr. Sik Yuen (E/CN.4/Sub.2/2000/28) [7]. In its decision 2000/109, the Sub-Commission decided to endorse the conclusions contained in the working paper - including the recommendation to undertake an updated study on the human rights problems and protections of the Roma - and submitted to the Commission on Human Rights for adoption a draft decision requesting the Economic and Social Council to authorize the Sub-Commission to appoint Mr. Sik Yuen as Special Rapporteur with the task of preparing a comprehensive study on the human rights problems

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6 Resolution 1991/21 see the working paper "The human rights problems and protection of the Roma", E/CN.4/SUB.2/2000/28 in the 52 session on 23.6.2000 The Unites Nations High Commissioner on Refugees (UNHCR) has recently elaborated an analysis on the situation of Roma in the Czech Republic and Slovakia.

7 Working paper prepared by Mr. Y.K.J. Yeung Sik Yuen pursuant to Sub-Commission decision 1999/109 (E/CN.4/Sub.2/2000/28) .

and protections of the Roma based on his working paper. At its 57th session, the Commission on Human Rights took no action on the above draft decision. [8] Only in the 7th preambular paragraph of its resolution 2001/55, the Commission took note of Sub-Commission decision 2000/109: "*Calls upon* special representatives, special rapporteurs and working groups of the Commission to continue to give attention, within their respective mandates, to situations involving minorities".[9]

Additionally, from the perspective of the Roma and their protection, the following UN documents and bodies are relevant:

UN treaties relevant for Roma issues:

- Convention on the Prevention and Punishment of the Crime of Genocide (9.12.1948) A/RES/260A (III)
- Universal Declaration of Human Rights (10.12.1948), A /RES/2200A (XX)
- International Convention on the Elimination of All Forms of Racial Discrimination (21.12.1965); A/RES/2106 A (XX)
- International Convention on Civil and Political Rights (16.12.1966), A/RES/2200A (XXI)
- International Convention on Economic, Social and Cultural Rights (16.12.1966), A/RES/2200A (XXI)
- Declaration on Principles of International Law concerning Friendly Relations and Co- operation among states in accordance with the Charta of the United Nations (24.10.1970) A/RES/2625 (XXV)
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10.12.1984), A/RES/39/46
- Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which they live (13.12.1985) A/RES/40/144
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Groups, (18.12.1992), A/RES/47/135

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8 Point 132 ff of the Annotations to the Provisional Agenda" prepared by the Secretary-General on the occasion of the 53rd session of the Sub-Commission.

9 Commission on Human rights resolution 2001/55.

Charter (of UN)-based bodies:

- Commission on Human Rights
- Sub commission on the Promotion and Protection of Human Rights

The most important treaty-based bodies:

- Committee against Torture (Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment)
- Committee on Economic, Social and Cultural Rights (International Convention on Economic, Social and Cultural Rights)
- Committee on Elimination of Racial Discrimination (International Convention on the Elimination of All Forms of Racial Discrimination)
- Human Rights Committee (International Convention on Civil and Political Rights)

2.2.2. The efforts of the European Union

The process of EU enlargement towards Central and Eastern Europe has also given higher "visibility" to Roma and Sinti issues at the international level. In preparing European Union accession in 1993 the European Union's Heads of State and Government gathered in Copenhagen for the European Council and agreed upon a set of criteria for countries wishing to join the EU. These "Copenhagen criteria" state that membership requires that the candidate country has – in addition to fulfilling certain economic criteria - achieved stability of institutions and guaranteed democracy, the rule of law and human rights and respect for and protection of minorities. The situation of Roma is therefore an important factor for the fulfilling of the Copenhagen criteria. In July 1997 the European Commission published the document "Agenda 2000" which dealt with the main areas of Community policy, the EU´s financial perspectives for the period 2000-2006 and EU enlargement.

As part of Agenda 2000 "Opinions on the application for membership" of the Union for each of the candidate countries were adopted. Agenda 2000 mentioned, on the subject of minorities, that integration in the societies of applicant countries was in general satisfactory but the situation of Roma gives cause for concern in a number of applicant countries. In 1998 the European Commission produced Accession Partnerships to help countries to fulfill the membership criteria. In the 1998 Accession Partnerships for Bulgaria, the Czech Republic, Hungary and Romania, Roma protection was explicitly mentioned. Also the regular reports of

the Commission showed that in many candidate countries the discrimination of Roma continued.[10]

The European Parliament has published many resolutions in this field.[11] In the resolution on "Racism, xenophobia and anti-semitism and on further steps to combat racial discrimination" (OJ 1999, no. C 98, p.488) the Parliament says that it "attaches great importance to the participation of cultural, racial and ethnic minorities in both the social and political decision making processes" and the Parliament itself should "represent the cultural diversity of Europe"

Some other measures/documents of the European Union concerning minorities are:

- 1981 European Parliament's Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities (based on the Arfe report OJ 1981 no. C 287, p. 106)
- 1983 European Parliament's Resolution on Measures in Favour of Linguistic and Cultural Minorities (OJ 1983 no. C 68, p. 103)
- 1987 European Parliament's Resolution on the Languages and Cultures of the Regional and Ethnic in the European Community (OJ 1987 no.318, p. 160)
- 1991 European Parliament's Resolution on Union –Citizenship (Unionsbürgeschaft)
- Maastricht-treaty 7.2.1992
- 1993 European Council Copenhagen (Subchapter "HR and the protection of minorities", political criteria for accession)
- 1994 European Parliament's Resolution on Linguistic Minorities in the European Community" (OJ 1994 no. C 61, p.110)

The following measures are addressing in particular Roma:

- European Parliament's Resolution on discrimination of Roma (OJ 1995 no C 249, p 15)

10 See also "EU support for Roma communities in central and eastern Europe, European Commission, Directorate General for Enlargement.

11 See Toggenburg, A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities, in: European Integration online Papers (EioP), Vol.4 (2000), No 16, http://eiop.or.at/eiop/pdf/2000-016.pdf, 13.8.2007.

- European Parliament Resolution on the Situation of the Roma in the European Union of 28.4.2005.

The following are other measures important for minorities:

- Articles 3, 6, 7, 29 and 149 of the EC Treaty, which commit the Member States to ensuring equal opportunities for all citizens,
- Article 13 of the EC Treaty, which enables the European Community to take appropriate action to combat discrimination based on racial or ethnic origin,
- Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (OJ L 230, 21.8.1997, p. 19.),
- 1997 and 1998 European Parliaments Resolution on human rights in the world,
- European human rights policy (OJ 1999 no. C 98, p.270, paras.20-26),
- 1997 European Parliaments Resolution on respect for human rights in the European Union (OJ 1999 no. C 98, p.279, para.10),
- European Parliaments Resolution on racism, xenophobia and anti-Semitism and on further steps to combat racial discrimination (OJ 1999 no C 98, p.488 (reasoning N)).

Although the activities of the European Union seem to be less intensive than those of the UN, OSCE and the Council of Europe, many measures concerning Roma issues have been developed.[12] Due to the lack of normative competence of the EU in the field of minority protection it has not been possible to create binding normative acts. Until the Amsterdam[13] Treaty there had not been treaty provisions dealing with the protection of minorities. But in its Art 128 Title IX "Culture" the cultural dimension of the EU was clearly stressed. But the EU eastern enlargement process called for a clearer political and legal dimension.

The Amsterdam Treaty (entered into force on 1.5.1999) represents an important development in efforts to promote and protect human rights at the European level. The possibility, introduced in Art 7 of the Treaty of the EU, to take sanctions

12 See several interdependent reasons for the seeming less engagement of the EU in this field in Toggenburg, A Rough Orientation.

13 However some hints in the Accession Treaties of UK, Austria, Sweden, Finland and Norway.

against states that violate human rights and fundamental freedoms in a serious and persistent manner, has been reinforced by the Treaty of Nice. The Charter of Fundamental Rights of the EU represents a further step in the efforts to reinforce the human rights protection system at the European level.

Art 13 of the EC Treaty (introduced by the Amsterdam Treaty) gives the Commission for the first time the power to take legislative action to combat racial discrimination. A package of measures has been proposed and adopted:

- Council Directive of 29.6.2000, implementing the principle of equal treatment on grounds of racial and ethnic origin, OJ no. L180, 19.7.2000,
- Council Directive of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ no. L 303, 2.12.2000,
- Council Decision of 27 November 2001, establishing a Community Action Programme to combat discrimination (2001-2006), OJ no. L303, 2.12.2000.

2.2.3. The activities of the OSCE

Almost every major CSCE/OSCE document since 1990 has highlighted the situation of Roma. In addition to that, the problems of Roma have been raised at each of the Human Dimension Seminars organized by the Office for Democratic Institutions and Human Rights since the Helsinki Follow-Up Meeting. This sustained interest in the subject of the Roma indicates not only the persistence of problems but also the willingness of participating states and non-governmental organizations to use the CSCE process to address Roma issues, the High Commissioner on National Minorities noted in his Report on Roma in 1993.[14]

As part of its efforts to formalize co-operation between international organizations on Roma and Sinti issues, the ODIHR Contact Point on Roma and Sinti Issues was established. In addition to the ODIHR and the Council of Europe, the European Commission was represented at the first meetings of this group in 2000. [15]

Thus the ODIHR has increasingly been at the forefront of international efforts aimed at improving the situation of Roma in the OSCE area, including within

14 See CSCE HCNM Report on Roma, 1993.

15 See Annual Report 2000 on the Interaction Between Organizations and Institutions in the OSCE Area, (1.11.1999-31.10.2000) of the OSCE.

the framework of the Stability Pact for South Eastern Europe. In early 2000, the Contact Point started to implement a work programme, which comprises a number of activities designed to assist governments in formulating and implementing more effective national policies on Roma and Sinti. Within the framework of its efforts to promote international consultations among government and Roma leaders on the increasingly contentious issue of Roma refugees and asylum seekers, the ODIHR Contact Point for Roma and Sinti Issues organized a series of meetings. The Contact Point has also facilitated the participation of Roma voters in the process in various electoral countries through training programmes, which have included printed voters' leaflets targeting the Roma communities.

In 2000, the ODIHR Contact Point for Roma and Sinti Issues co-operated closely with the UNHCR on activities related to Roma refugees from Kosovo and internally displaced persons. The ODIHR also co-operated with the UNHCR in the preparation of an international consultation meeting on Roma refugees and asylum seekers on 23 October 2000 in Warsaw.

The ODIHR Contact Point for Roma and Sinti Issues has established contact with the UNHCR in preparation for the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance in South Africa in 2001.

In Kosovo, the ODIHR, in co-ordination with the OSCE Mission, has launched an action plan designed to assist in the re-organization of Roma communities by focusing on democracy- and capacity-building programmes, the dissemination of information in the Roma language and the ensuring of proper representation of Roma in governmental bodies. The ODIHR Contact Point has also enhanced its clearing-house function by facilitating exchanges of information among governments, international organizations and NGOs, and has intensified its efforts to document and analyze the situation of Roma and Sinti in crisis areas.

Another important activity/document of the OSCE concerning Roma has been the "Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area", which was adopted in 2003. "Each national policy or implementation strategy should: (1) respond to the real problems, needs and priorities of Roma and Sinti communities; (2) be comprehensive; (3) introduce a balanced and sustainable approach to combining human rights goals with social policies; and (4) maximize Roma ownership of the policies that affect them. At the same time, national policies or implementation strategies should be adapted and implemented according to the specific needs of Roma and Sinti populations in particular situations in participating States. Implementation strategies should also

include mechanisms to ensure that national policies are implemented at the local level."[16]

Some OSCE commitments on Roma and Sinti can be seen in the following:

- Document IV. 40 of the Conference on the Human Dimension of CSCE, Copenhagen, 1990: "The participating states clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds." In this context, they also recognize the particular problems of Roma (Gypsies),
- Moscow meeting of the Conference on the Human Dimension of CSCE Document of 1991,
- Report of the Geneva CSCE Meeting of Experts on National Minorities 1991,
- Concluding Document of Helsinki 1992,
- Budapest Summit Declaration 1994,
- Istanbul Summit Declaration 1999.

In 1992 the OSCE High Commissioner on National Minorities was established. The High Commissioner's function is to identify and seek early resolution of ethnic tensions that might endanger peace, stability or friendly relations between the participating States of the OSCE. His mandate describes him as "an instrument of conflict prevention at the earliest possible stage.

Although Roma and Sinti constitute significant minorities in many countries, they are vastly underrepresented in public institutions across Europe. In December 2000 therefore a European network of parliamentarians, mayors and local councilors of Roma origin was established and the ODIHR and the Czech Ministry of Foreign Affairs in Prague organized the first meeting of elected Roma officials. This was one further step to improve the participation of Roma in public affairs.

16 See point 4 OSCE Action Plan 2003.

2.2.4. The Council of Europe

Since 1993, the Roma/Gypsy issue has been at the heart of three of the Council's top priorities: protection of minorities, the fight against racism and intolerance and the fight against social exclusion. Indeed, the difficult situation facing numerous Roma/Gypsy communities ultimately represents a threat to social cohesion in member states. Moreover, increasingly active Roma/Gypsy associations have repeatedly appealed to the Council of Europe to ensure that minority's fundamental rights.

In this field two Council of Europe treaties deserve special attention:

- European Charter for Regional or Minority languages 1992,
- Framework Convention for the Protection of National Minorities 1995.

Accordingly, the Council of Europe decided to focus more on Roma/Gypsy issues and to bring a long-term improvement in their situation. In order to place these issues on an institutional footing, the Committee of Ministers set up a Specialist Group on Roma/Gypsies in 1995, tasked with advising member states on all Roma/Gypsy-related matters and encouraging international authorities to take action where it was needed. In 2002, the Specialist Group expanded its areas of responsibility to include Travellers and was given a new name, the Group of Specialists on Roma, Gypsies and Travellers (MG-S-ROM). Its role complements that of the Secretary General's Co-ordinator of Activities on Roma/Gypsies[17], who was appointed by the Secretary General in 1994 and who is responsible for promoting co-operation with other relevant international organizations and developing working relations with Roma/Gypsy organizations.

In 1996, the Committee of Ministers launched a Project on Roma/Gypsies in Central and Eastern Europe. In 1998, the scope of the Project was extended so as to include all the member states of the Council of Europe. The Project operates on the basis of voluntary contributions by member states of the Council of Europe and the Programme of co-operation and assistance with member states. The objectives of the project were inter alia to help the member states to establish good relations between the Roma/Gypsy communities and the majority population, to foster the integration of the Roma/Gypsy populations on the basis of equality of rights and opportunities, and respect for their identity and to make an international contribution to the projects concerning Roma/Gypsies running in member states.

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17 See the activities of the Coordinator on Roma/Gypsies **http://www.coe.int/t/dg3/romatravellers/Coordinator/default_en.asp**, 13.8.2007.

One of the main objectives of the Council of Europe, as an intergovernmental organization, is to encourage member states to adopt a comprehensive approach to Roma/Gypsy issues. One of the fundamental principles guiding the Council of Europe's approach is participation of the communities concerned, through Roma/Gypsy representatives and associations. Without this, no lasting progress will be accomplished.

On the initiative of the EU on 10 June 1999 the "Stability Pact for South Eastern Europe" was signed in Cologne. One attempt by the international community has been to introduce a new long-term conflict prevention strategy. Through three areas of activities,[18] conflict prevention and peace building should be developed in the countries of SEE. At its inaugural meeting in Geneva on 18. /19. October 1999 the working table on Democratization and Human Rights noted the need for special attention to the vulnerability and displacement of the Roma and Sinti population. It requested that the Human Rights and Ethnic Minorities Task Force should investigate specific measures to safeguard the rights of such populations on a region-wide basis.[19]

With the Project "Roma under the Stability Pact" the Council of Europe (Project Division (Secretariat): Migration and Roma/Gypsies, Directorate General III – Social Cohesion) and the OSCE-ODIHR became involved in the process of the Stability Pact. The programme, aiming at promoting the status of the Roma population, was composed of 3 elements: (1) addressing the most acute crisis situations, (2) policy development on Roma affairs and (3) participation of Roma in civil society. The Council of Europe concentrated on the second area: supporting policy-development on Roma affairs. The project should also maximize cooperation between the EU, the Council of Europe and the OSCE in the field of Roma-related activities. The Council of Europe started organizing several activities under the joint ODIHR/Council of Europe Project „Roma under the Stability Pact". The second joint European Commission/Council of Europe project started in February 2003 with the project "Roma und Stability pact for Southern Europe". The Council of Europe's part came to an end in July 2005 and consisted in fostering the elaboration and adoption of national comprehensive strategies to improve the situation of Roma in "the former Yugoslav Republic of Macedonia", Bosnia and Herzegovina, Albania and Moldova through a constructive dialogue between state and local authorities and Romani NGOs. The project also aimed at assisting the implementation, at the local level, of strategies that have already been adopted

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18 Working Table 1: Democratisation and Human Rights, Working Table II: Economic Reconstruction, Working Table III: Security Issues.

19 See the conclusions by Max van der Stoel, Working Table on Democratisation and Human Rights, Geneva, 18/19 October 1999 **http://www.stabilitypact.org/wt1/991019-geneva.asp**, 13.8.2007.

in Croatia and Serbia and Montenegro.[20] A further project on Roma in South East Europe focuses on training sessions on participative monitoring and evaluation for members of interministerial commissions in charge of national programmes for Roma and/or Action Plans (Roma Decade, OSCE, etc.) and launches a two-year awareness-raising campaign against Anti-Gypsyism in the countries concerned.[21]

To give Roma a voice at international level some kind of a consultative assembly - the European Roma and Travellers Forum (ERTF) - was set up and registered in Strasbourg as a non-governmental organization in September 2004. Based on an agreement with the Council of Europe, the Forum has certain privileges in relation to the Council of Europe. Among the priorities that the Forum set up for the next years is the fight against school segregation of Roma.

3. CONCLUSION

Without doubt increased awareness for Roma and Sinti issues is observable at national and international level. Political and institutional recognition of Roma is a precondition for still needed reinforced activities to combat prejudices, hostilities, discrimination and violence against Roma and Sinti and promotion of social integration.

At the international level it is necessary to prevent unnecessary duplication of activities among international organizations. Co-operation is necessary such as between the OSCE, the Office for Democratic Institutions and Human Rights and the Council of Europe or between the Contact Point on Roma and Sinti Issues and the Co-ordinator for Roma /Gypsies' activities of the Council of Europe.

Meanwhile international organizations and states should support effective and protective legislation in these fields, civil society organizations should also promote the legal defense, human rights education and community organization.

To sum up, the following measures are necessary to control and prevent conflict producing components in Roma –non-Roma relations:

- effective legislation, including affirmative action,

20 See the evaluation report of the two projects "Roma under the Stability Pact I and II, Alain Phillips, April 2007, **http://www.coe.int/t/dg3/romatravellers/JP3/regions/evaluationreport.pdf**, 13.8.2007.

21 For further information see **http://www.coe.int/T/DG3/RomaTravellers/Default_en.asp**, 13.8.2007.

- training of public officers and persons in state apparatuses most directly in contact with Roma and Sinti, such as police, justice and local administration,
- better management of communities with high Roma populations, focusing on representation and participation in councils and public administration,
- Roma and Sinti should not be treated as the object of protective measures but the subject, i.e. strengthening the right to self-determination.

It seems that the proclaimed *new stage* of Roma policy is developing to a systematic combination of the methods of the social approach, the implementation of minority rights and prevention of discrimination and violation.

With regard to South eastern Europe it can be said that although since over a decade every country in SEE tried to improve the status of Roma, none of the countries, can be pointed out as best practice model. Despite the fact that systematic national strategies and action plans exist in SEE countries, measures taken often don't have the desired effect. Nevertheless, one improvement that can be mentioned is the realization by the relevant policy makers that single activities without a long-range concept and without cooperation with Roma are not sufficient to secure the implementation of human and minority rights for Roma. Legislative measures alone are very important but still not enough to strengthen the situation of Roma. At the same time positive action and affirmative actions are not enough, if intensive cooperation between state authorities, civil society and the Roma population doesn't exist. If states were to consider this then the *new stage* of Roma policy will have good chances to bring about some significant positive developments!

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ORIGINAL
SCIENTIFIC
ARTICLE

VERA KLOPČIČ

LEGAL PROTECTION OF ROMA IN SLOVENIA

The article presents the legal stipulations of special protection of the Roma as a part of minority protection within the scope of human rights protection. The first part of the article focuses on the legal regulation of the status of the Roma at the international level and at the national and local level in Slovenia. It contains the general overview of the legal situation of the Roma in Europe, a brief outline of the legal status of the Roma in European states, and general information on the state policy and the status of the Roma in Slovenia. The author discusses certain characteristics of the status of the Roma in international documents and legislation of individual states with regard to definitions, legal status and special measures aimed either at social integration of the Roma community or their self- determination as a Roma nation.
The second part deals with the legal regulation in Slovenia, enshrined in legal acts and relevant strategies, and sketches possibilities for the participation of the Roma at national and local levels in practice. The English translation of the Roma Community in the Republic of Slovenia Act is presented in Annex 1.

Key words: minority protection, Roma, social integration, Roma nation, prejudices

PRAVNO VARSTVO ROMOV V SLOVENIJI
Prispevek obravnava pravna zagotovila za posebno varstvo Romov kot del varstva manjšin v sklopu varstva človekovih pravic. Prvi del zajema pravno urejanje položaja Romov na mednarodni ravni ter na državni in lokalni ravni v Sloveniji. Vsebuje splošen oris pravnega položaja Romov v Evropi, pregled pravnega urejanja v evropskih državah ter splošno informacijo o vladni politiki in statusu Romov v Sloveniji. Avtorica razpravlja o nekaterih značilnostih položaja Romov v mednarodnih dokumentih in v zakonodaji posameznih držav glede na sprejete definicije, pravni položaj ali posebne pravice, ki so namenjene bodisi socialni integraciji romske skupnosti ali spodbujanju njihove samoodločbe kot romskega naroda.
Drugi del se nanaša na pravno urejanje v Sloveniji, ki je zajeto v pravnih aktih in relevantnih strategijah ter izpostavlja možnosti za učinkovito participacijo Romov na državni in lokalni ravni. V Prilogi I je priložen Zakon o romski skupnosti v Sloveniji v angleškem jeziku.

Ključne besede. varstvo manjšin, Romi, družbena integracija, Romski narod, predsodki.

THE ROMA IN MODERN EUROPE[1]

International reports, studies, legal and political analyses and empirical evidence show that the main common characteristics of the status of the Roma in the European states are segregation, social exclusion and marginalisation, widespread intolerance and racist violent attacks against them[2].

The estimated number of the Roma in Europe is about 12-15 million persons. The majority of them live in the Eastern and Central European countries in poor living conditions. According to some international surveys, e.g. research of the UNDP /The United Nations Development Programme, more than 90 % of the Roma are unemployed, in some regions even 100%[3]. In the years 2003- 2004 some Western countries clearly expressed their fears concerning the consequences of opening their borders and ensuring free movement of persons within the EU when accession process started for several Eastern and Central European countries with a large Roma population. International organizations rigorously monitored the situation of the Roma in individual candidate countries. Different topics regarding the Roma and future developments in enlarged Europe (EU) were extensively discussed at numerous international conferences, meetings and seminars[4].

Some international Roma NGOs claim, that the philosophy behind such a position is that European institutions primarily search for the most effective ways of preventing migration of the Roma from Eastern and Central European countries to Western countries (Cahn, 2002:7). However, the main challenge for international organisations and institutions is how to achieve integration of the Roma at national and local levels in countries where they live, and how to improve the poor socio economic standard of the Roma (Klopčič 2003:79).

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1 We use term the "Roma" as the common term for the Roma and Sinti in Europe.

2 Report of the OSCE High Commissioner on National Minorities "Report on the Situation of Roma in the OSCE area", 2000, p.1;
Recommendation 1557 (2002) "The legal situation of Roma in Europe";
The Situation of Roma in an Enlarged European Union, 2004;
ERRC: Stigmata, Segregated schooling of Roma in Central and Eastern Europe, Budapest, 2004;
Monitoring Reports: Equal Access to Quality Education for Roma, an EUMAP (EU Monitoring and Advocacy Program) project, in co-operation with ESP (Education Support program, http://www.osi-edu.net/esp**) and RPP (Roma Participation Program), Program**, http://www.soros.org/initiatives/roma**);**

3 http://roma.undp.sk.

4 Regional Roma conference in Budapest, June 2003,"Roma in an Expanding Europe: Challenges for the Future", co-sponsored by the European Commission, the World Bank and the Open Society Institute; "Roma Nation and Travelers", NGO Forum, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, August 27-Sept 1, 2001.

Political participation of the Roma and their organisations in this process has an exceptional importance for the evaluation of achievements and progress made; it is important for expressing of actual needs and interests of the Roma community. Their political participation is instrumental also for the further development of their specific national, ethnic, linguistic and cultural characteristics. The vision of joint activity of all Roma on the international level and the awareness of the political power of their community as the nation, brought a new quality in the processes of self-awareness within the Roma community in the enlarged Europe (EU) and in the process of the implementation of legal provisions concerning the effective political participation of the Roma.

Legal status

The most important legal and political international documents regarding the status and rights of minorities are: the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[5], OSCE Copenhagen Concluding Document on the Human Dimension of the CSCE and other CSCE documents, the European Charter on Minority or Regional Languages and the Framework Convention for the Protection of National Minorities adopted within the Council of Europe.[6]

Particularly important for the improvement and development of the legal protection of Roma was the adoption of the Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE in 1990. The Copenhagen Document, although in its nature a political document, was a really substantial shift in the approach towards protection of minorities. It expressed the political consensus and commitment of the European states to establish the base of European standards for minority protection. In Article 40 the Copenhagen Document, inter alia, stresses:

> "The participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds. In this context they also recognize the particular problem of Roma (gypsies)".

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5 Resolution 47/135 adopted on 47. session of the General Assembly UN, 1992.

6 National minority standards : a compilation of OSCE and Council of Europe texts.
Council of Europe (COE) ; OSCE, Published**:** Strasbourg : COE, June 2007, ISBN 978-92-871-6220-5.

The Central European Initiative Instrument (CEI Instrument) for the Protection of Minority Rights (1994) devoted a special article (Article 7) for the status of the Roma in the region, which reads:

> "States recognize the particular problem of Roma (gypsies).They undertake to adopt all the administrative or educational measures as foreseen in the present Instrument, in order to preserve and to develop the identity of Roma, to facilitate specific measures for the social integration of persons belonging to Roma (gypsies) and to eliminate all forms of intolerance against such persons"[7].

The European Parliament Resolution on the Situation of the Roma in the European Union (April 2005) points out the importance of the respect for adopted legal obligations in democratic societies:

> "underlining the importance of urgently eliminating continuing and violent trends of racism and racial discrimination against Roma, and conscious that any form of impunity for racist attacks, hate speech, physical attacks by extremist groups, unlawful evictions and police harassment motivated by Anti-Gypsyism and Romaphobia plays a role in weakening the rule of law and democracy, tends to encourage the recurrence of such crimes and requires resolute action for its eradication (in the para C)"[8].

Nevertheless, it is obvious that the international community recognized the specific needs of the Roma community and wanted to eliminate prejudices. The legal status of the Roma is a more ambiguous issue and various approaches concur at the European level. There is no consensus among experts, NGOs, political sphere and doctrine about the legal status of the Roma. Legally, "Roma" can be defined as: a "national minority", "ethnic group", "dispersed ethnic minority", "socially disadvantaged group", or as "the European nation".

The working group of the Council of Europe Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) held a special meeting in September 1999 on "dispersed" minorities[9]. The Roma were listed among the groups which could be considered "dispersed" minorities within particular states. Although the working group did not formulate the definition, according to the Final Activity Report on "Dispersed Ethnic Minorities", the following characteristics apply to the majority of them: *they have no kin-state; they live in more than one*

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7 Minorities and the Central European Initiative : on the occasion of the 10th Anniversary of the CEI Instrument for the Protection of Minority Rights (1994-2004). [S. l.]: CEI Executive Secretariat: Slovenian CEI Presidency, 2004.

8 European Parliament, joint motion for a resolution on the situation of the Roma in the European Union, Session document, Brussels, 25.4.2005.

9 CM Documents, 694 Meeting, 19 January 2000.

state; persons belonging to these groups share common ethnic, religious, linguistic or cultural characteristics; they do not form a majority in any Council of Europe member State. The DH-MIN emphasized the sensitivity of self-identification and stressed that this terminology should not be used in reference to groups against their will.

The Framework Convention for the Protection of National Minorities (FCNM) does not contain a definition of the term "national minority" and gives discretionary power to the states to implement the principles enshrined in it. Thus it offers a possibility for inclusion of the Roma within the groups, which are protected under the FCNM[10]. Several states explicitly mentioned the Roma in their declarations contained in the instruments of ratification[11]. Some of them, e.g. Germany, underline, that in Germany, only those Roma having the German citizenship should be treated as members of national or ethnic minorities:[12]

> "The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and of Roma of German citizenship".

Although this issue was discussed also in Slovenia, the Declaration of the Republic of Slovenia did not follow that approach. The adopted Declaration does not make such a distinction:[13]

> "In accordance with the Constitution and internal legislation of the Republic of Slovenia, the provisions of the Framework Convention shall apply also to the members of the Roma community, who live in the Republic of Slovenia".

The Parliamentary Assembly of the Council of Europe adopted the Recommendation 1557 (2002) "The legal situation of Roma in Europe"[14]. It offers

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10 Source: http://conventions.coe.int.

11 For example:
Sweden: The Declaration contained in the instrument of ratification deposited on 9 February 2000 - Or. Eng. The national minorities in Sweden are the Sami, Swedish Finns, Tornedalers, Roma and Jews.
Macedonia: The Declaration contained in the instrument of ratification, deposited on 10 April 1997 - Or. Engl. The Republic of Macedonia declares that the provisions of the Framework Convention for the Protection of National Minorities will be applied to the Albanian, Turkish, Vlach, Roma and Serbian national minorities living on the territory of the Republic of Macedonia.

12 The Declaration contained in a letter from the Permanent Representative of Germany, dated 11 May 1995, handed to the Secretary General at the time of signature, on 11 May 1995 - Or. Ger./Engl. - and renewed in the instrument of ratification, deposited on 10 September 1997 - Or. Ger./Engl.

13 The Declaration contained in a Note Verbale from the Permanent Representation of Slovenia, dated 23 March 1998, handed to the Secretary General at the time of deposit of the instrument of ratification, on 25 March 1998 - Or. Engl.

14 The term "Roma" used in this report and Recommendation always refers to the "Gypsy", "Sinti" and

a comprehensive overview of the historical and social background stating that: "Marginalisation and the economic and social segregation of Roma are turning into ethnic discrimination, which usually affects the weakest social groups"(para 3).

Concerning the legal situation of the Roma in Europe this Recommendation *inter alia* points out in para 6:

> "From a legal point of view, the Romany community is still not regarded as an ethnic or national minority group in every member state, and thus it does not enjoy the rights pertaining to this status in all of the countries concerned. Roma must be treated as an ethnic or national minority group in every member state, and their minority rights must be guaranteed".

States should regulate the legal status of Roma in individual countries. In order to promote their position, both individual and collective rights should be respected[15].

European approach

A prevailing approach in Europe in the past, particularly in the period of enlightenment was that authorities should solve the "Gypsy problem, change their lifestyle and force them to work"[16]. Special expulsion protocols/odgonski protokoli/ were drafted as a regular part of legislative policies and legal order in numerous European countries. They demanded accurate supply of data on the migrations and settling of Roma in different municipalities. Specific *circulus vitiosus* was taking place. Only Gypsies/Roma with a official documents of "domicile" status were allowed to stay in a certain municipality or a state. *Vice versa* local authorities were reluctant to grant them such a status. And they rather expelled them to another municipality, which again was not ready to accept them...

On the territory of Austro-Hungarian empire special law on Gypsies was adopted in 1888, aiming to provide "efficient defence" against expected invasion of Roma/Gypsies from Romania and Moldavia who were released from slavery after the years 1855/1856(Halbreiner,2003: 68). Increasing number of police patrols were sent to border regions to prevent illegal crossings of nomadic Romany families. Similar policies of forced relocations, segregated settlements or expulsions of

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"Traveller" categories.

15 para 6: i. to recognise Romany individuals as members of an ethnic or national minority group;
ii. to acknowledge the minority group status of Romany communities.

16 First sentence of the document issued in 1900 in Rudolfovo/ today Novo mesto/ reads: "As it is very well known Gypsies cause lot of troubles for local inhabitants".

Roma/ Gypsies as marginalised group were governed by state and local authorities and implemented by police officials even in some contemporary, democratic societies.

Within the last two decades almost all European institutions started with projects and programs for Roma inclusion within the frame of human rights protection, protection of minorities, anti discrimination legislation, elimination of prejudices, activities against racism, awareness raising, social cohesion projects etc.[17]. Two specialized bodies for the fight against racism and intolerance – ECRI (European Commission against intolerance and racism) and CERD (UN Committee on the Elimination of Racial Discrimination) – have already adopted special recommendations on Roma.

At European level the issue of self determination of Roma and political representation of the Roma at an institutional level have occurred. For the first time in the political history of Europe, the request for adequate political representation of the Roma was extensively discussed as a priority at institutional level and at numerous international conferences and meetings (Klopčič 2004: 44*)*. Proposal for establishment of the "European Roma Forum" as a permanent consultative body forum within the Council of Europe was submitted by the President of the Finland Tarja Hallonen in the year 2001.

Roma leaders and activists demanded the possibility for effective and actual implementation of declared principles in terms of the guaranteed political participation in decision-making processes and recognition of historical injustice towards them. The Parliament of the International Romany Union explicitly defines itself as a "representatives of the Roma Nation" and demands practical and theoretical acknowledgement of their identity. In January 2002, the Parliament of the International Romany Union adopted a Resolution, where they

> "call for an adequate representation of the Roma and of the Roma strategy in the work of the European Convention and other international fora as representatives of the Roma Nation, as a Nation which does not want to become a State and is in search for a representation in the frame of the supra-national European institutions. The Roma are, in Europe, the only Europeans and are fully engaged in the process of transformation of the existing European institutions" (IRU Resolution, Skopje, January 2002)[18].

The perception of the identity of the Roma people as a "Roma nation" has been further developed on the international level since the World Roma Congress

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17 Open Society Institute, EU accession Monitoring Program, Monitoring the EU accession process, Country reports, 2002.

18 Resolution is published in the news paper "Romano them", Murska Sobota, april 2002.

/London, 1971) particularly within the activities of the International Romani Parliament /IRU and European Roma and Travelers Forum/ERTF/. In the theoretical and political evolution of this notion, some parallels could be drawn with the situation of the community rights of indigenous people or other dispersed minorities as groups living in different states (Thornberry 2001: 96-98).

GENERAL INFORMATION ABOUT THE POSITION OF ROMA IN SLOVENIA

It is estimated that about 7.000 to 10.000 Roma live in Slovenia[19]. Most of the Roma are traditionally settled in the region near the Hungarian border (Prekmurje) in the area of the Murska Sobota municipality in the Pušča settlement, and in the surroundings of municipality Novo mesto in the central part of Slovenia, in Dolenjska and Bela Krajina region. The majority of Roma in Slovenia live in isolated settlements located at the margins of villages. Until now, their social position was marginalized by a wider social community in all fields of social and political life. Majority attitudes and estimations are still mostly based on general impressions and prejudices. Due to different historical reasons, the Roma in the central part of Slovenia, the Dolenjska region, face more problems, conflicts and huge rejection by the majority population at local level.

At the moment 22 Romany societies and associations operate in Slovenia, whose membership consists of both the traditionally and non-traditionally settled Roma. Since 1996, they are united within the common umbrella organization – Association of Roma in Slovenia[20]. As in other countries the major problems of Roma in Slovenia are unemployment, housing and living conditions, their low level of education and social marginalisation. Only 13% of the Roma are regularly employed. The prejudices of employers also partially contribute to this, since some data show that unemployed persons who complete one of the employment programs are more likely to be employed if they are not Roma[21]. In Slovenia, a number of activities are going on, directed towards the improvement of the Roma status. The Government of the Republic of Slovenia adopted a special Programme of Measures for Help for Roma in 1995. The Programme is aimed at improving the

19 According to the data from the census 2002, 3246 persons declared themselves as Roma and 3834 persons declared that Roma language is their mother tongue.

20 The President is Jožek Horvat-Muc.

21 See: South East Europe Regional Project to Promote Employment Opportunities for Roma, Final Report: Training workshop for the staff of local employment services working with Roma jobseekers, Workshop I – Slovenia, Strasbourg, 2001.

situation of the Roma, and comprises activities of various governmental bodies and local authorities in this area. Measures for the Roma community in Slovenia outline efforts for the integration of the Roma (housing, employment, education, social participation, preventive health protection) within the paternalistic prospective of the social integration and inclusion process (Perić 2001: 34).

In May 2000, the "Equal Opportunity" program for the employment of the Roma was adopted by the Slovenian government. The central aim of the employment programs for Roma is the education and training of the Roma, thereby increasing the number of regularly employed Roma. At present, opportunities lie either in the public works program, subsiding employment or in the founding of special companies and cooperatives. Several training programs for specific target groups e.g. young Roma, Roma women, illiterate and unemployed Roma, are aimed to improve educational structure of Roma and increase motivation of Roma for participation in the social and political institutions. Strategy for inclusion of Roma in the field of education, which follows the principles of multi-cultural education was drafted in 2004, and in April 2006 action plan for implementation of the "Strategy for inclusion of Roma in the field of education" was prepared[22].

Only recently, the preservation of Roma culture, identity and traditions, standardization of the Roma language, the development of media (Roma TV and radio broadcasts, Roma newspapers), etc., emerged as new topics, as for majority population as well for Roma organisations. After a training program for young Roma journalists within the international project, the Roma journalists prepared the first broadcast in the Roma language for National TV in Slovenia in June 2007.

Status and special rights of the Romany community

Members of the Roma community in Slovenia are entitled to individual and community rights as all other citizens of the Republic of Slovenia. Their status is defined as "special ethnic community", entitled to collective, special rights. The Constitution of the Republic of Slovenia stipulates that the status and special

22 Action plan for implementation of the "Strategy for inclusion of Roma in the field of education" introduces:
employment of Roma assistants in schools with Roma pupils and Roma coordinators at the level of education for adults, aimed to facilitate integration of Roma;
definition of a new occupation "Roma assistant" or "Roma coordinator" within the National Vocational Qualifications system as a regular employment classification;
provides a two years period of preschool education for all Roma children, free of charge.
Adapt programs and courses within adult education system for education of illiterate and under educated Roma / 30% of all participants within adult education system in Slovenia are Roma/.
The chair of the responsible working group is the president of the Roma Union in Slovenia, Jožek Horvat-Muc, and the author o this article Vera Klopčič is a member of the working group.

rights of the Romany community living in Slovenia are determined by a statute (Article 65). In the grounds for its ruling concerning the political participation of the Romany Community at the Local Level, the Constitutional Court of the Republic of Slovenia determined also the approach towards "positive action" and special rights for protection of the Roma in Slovenia.[23]

Individual human rights are ensured for all individuals, not only citizens, in the territory of the Republic of Slovenia in accordance with the Constitution and adopted international obligations. Article 14 of the Constitution states that in Slovenia, all shall be guaranteed equal human rights and freedoms.[24] Any incitement to national, racial, religious or any other kind of discrimination and the inflaming of national, racial, religious or other hatred and intolerance is unconstitutional (Article 63 of the Constitution of the Republic of Slovenia). The legal system of the Republic of Slovenia envisages criminal punishment for the violation of equality, promotion of intolerance and spreading of ideas of racial supremacy. The violation of equality is defined as a criminal offence in Article 141 of the Criminal Code of the Republic of Slovenia[25]. Inflaming of national, racial or religious hatred, discord or intolerance is defined as a criminal offence in Article 300 of the chapter "Criminal Offences against Public Order and Peace" of the Criminal Code of the Republic of Slovenia.[26]

The law on equal treatment is an umbrella law in this field. The "Law on Equal Treatment" was adopted on April 22, 2004 (O.G. No 50/2004). Its intention is to identify common standpoints and to ensure equal treatment for all persons. It does not intervene in the legally determined competences which are derogated to the Human Rights Ombudsman or other institutions in this field. The Law on equal treatment introduces a new body - Council for antidiscrimination as an expert and consultant body.

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23 Ruling No. U-I-416/98-38 of 22 March 2001.

24 In cases of the violation of constitutional rights, provisions of the Constitution of the Republic of Slovenia envisage the possibility of appeal to the Constitutional Court of the Republic of Slovenia.

25 Article 141/1 in the Chapter 16 of the Penal Code, "Criminal Offences Committed in Violation of Human Rights and Freedoms" defines the criminal offence of "violation of equality" : Anybody who out of differences in nationality, race, colour, religion, ethnic identity, sex, political or other beliefs, sexual orientation, economic status, family background, education, social status or any other reason denies somebody a human right or fundamental freedom acknowledged by the international community or defined by the Constitution or law, or if he/she limits any of these rights, or if he/she grants a special right or privilege to the other based on these differences, shall be punished by a fine or imprisonment of up to one year.

26 Article 300 of the Penal Code, "Incitement of National, Racial or Religious Hatred, Discord or Intolerance) provides" : (1) Anybody promoting or encouraging national, racial or religious hatred, discord or intolerance or promoting ideas of racial supremacy shall be punished with imprisonment of up to two years. (2) If the offence from the previous paragraph involves use of force, abuse, threat, defamation of national, ethnic or religious symbols, damage to foreign property or desecration of monuments or graves, the offender shall be punished by imprisonment of up to five years.

Special rights of the Roma are only briefly mentioned in the cited Article 65 of the Constitution. However, the Constitutional Court of the Republic of Slovenia states that constitutional provision in Article 65 of the Constitution "empowers the legislator to grant special rights, apart from general rights held by everyone, to the Romany community as a special ethnic community."[27]

On the basis of the quoted decision of the Constitutional Court, the "Act Amending Local Government Act" (OG RS no. 51/2002) was adopted. It enumerates 20 municipalities in which the Roma are traditionally settled. In these municipalities the Roma have the right to representation in bodies of local self-government and the right to elect a Roma representative as a member of municipal council must be ensured[28]. During the local elections in 2002 and 2006, Romany members of municipal councils were elected in 19 municipalities. Since January 2003, Romany representatives of municipal councils created a councillors' forum as a basis for coordination of activities at national level.

In accordance with the Law on the Roma community/ *the Roma Community in the Republic of Slovenia Act/* which was adopted in 2007, the special status of the Roma community in the Republic of Slovenia is linked to its successful integration into the Slovenian society[29].

The new representative body the National Council of Roma was created in June 2007. The members were elected on the common meeting of the Assembly of Roma associations and the Roma councillors' forum. Elected members stressed the importance of the cooperation of the newly elected members of the National Roma council with the Association of Roma, which has already been operating for a long time as the primary form of organization of Roma at national and local level.

Legal status of Roma in Slovenia and their special protection is based on distinction between the special status of traditionally and non traditionally settled Roma in Slovenia. Such approach has been strongly criticized and opposed by some national NGOs in Slovenia and international organizations. In practice, the elections for members of the National Roma Council softly overcame this problem and among members who were appointed by the Roma Union of Slovenia

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27 Ruling No. U-I-416/98-38 of 22 March 2001.

28 The Governmental Office for Nationalities financed a special program of training and education for candidates for municipal council from the ranks of the Roma community. The program was prepared and in July 2002 implemented by the Papilot institute, together with the Association of Roma of Slovenia. The program embraced basic knowledge about the position of Roma in Europe, legal and political system in Slovenia and particularly the decision-making process at a national and local level.

29 Article 2, see text in the Annex 1

two of them belong to the "non" traditional Roma communities from Maribor and Velenje.[30]

The historical, current and future paths towards achievement of equality and equal opportunities for Roma in Slovenia

Absence of the mutual intercultural dialogue still significantly influences process of the shaping and preservation of stereotypes and distrust between the majority population and Roma in all European countries. Historic circumstances led to the social exclusion of Roma in the past. Their lifestyle was often defined by words as "Vagrancy and begging", automatically associated with criminal offences, e.g.with "gypsy style burglaries" or with drug trafficking and smuggling in modern time. Isolation and marginalization of Roma caused growing distrust towards any measures of the authorities among members of the Roma community. Consequently, distrust was also transmitted to those members of the Roma community who had accepted the values and lifestyle of the majority nation and they were excluded from the Roma community.

Nowadays it is reflected in misunderstandings in interpretation of legal status and social position of Roma in legal and political analyses and strategies. It is still unclear whether legal treatment of Roma should only follow goals of integration of "socially vulnerable community", or should it also create a sufficient basis for the implementation of the vision of the Roma nation. The partnership between the Roma and non-Roma, promotion of political and cultural dialogue and cooperation among Roma and non-Roma in order to overcome segregation and discrimination against Roma, are still insufficiently developed in practice.

The activities taking place on the international scene encourage changes on the political and institutional levels of regulation in individual states of East and Central Europe and inspire some states to recognize importance of compensation for historical injustice towards Roma. This process is until now reflected in passing and only in certain segments in the current discussions on the situation of the Roma on the national and local levels in Slovenia. Clear standpoint of the political elite and among the general public in Slovenia concerning the condemnation of racially-motivated attacks on the Roma people, hate speech, physical attacks on Roma, forced evictions, school segregation, is completely absent from public discourse. They neglect the fact that signatories of several international instru-

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30 Members who were appointed by the Roma Union are:
1. Horvat, Jožek - D 2. Tudija, Bojan, 3. Baranja, Oto, 4. Rošer, Janja, 5. Baranja, Stanko - 6. Bećiri ,Fatmir, 7. Nezirović, Slobodan 8. Brajdič, Nataša, 9. Miklič, Bogdan, 10. Drvarič, Marija, 11. Cener, Slavko, 12. Baranja, Milan, 13. Kosec Suzana, 14. Lah, Albin.
Elected members of the Councillors Forum: 1. Rudaš, Darko, 2. Ratko, Vera, 3. Horvat, Emil, 4. Olah, Jožef, 5. Jurkovič, Silvo, 6. Hrvat, Damjan, 7 Grm, Zoran.

ments, e.g. FCNM have assumed the obligation to create adequate conditions for the expressing, preserving and promoting of national minority identity, as well as to provide for an atmosphere of tolerance and dialogue, which is to allow for cultural diversity to become an enrichment of every society. In this context, creation of "equal opportunities" includes fight against all forms of segregation, manifestations of racism and racial discrimination, particularly in education and housing as essential elements of this approach.

Particularly important is the discussion on positive discrimination of Roma in the field of improvement of their social status, as well as special measures for the elimination of prejudice and racial hatred. Having been subject to hostile historical situation and negative attitudes on the part of majority populations, the Roma continue to live in unfavourable social conditions and are still victims of marginalization and prejudice. That is why some international documents primarily treat them as a disadvantaged/vulnerable community which has to be given the chance of social integration.[31] In 2004 legal experts in EU even proposed a special Directive on social integration of Roma. The question is whether legal treatment of Roma as a socially vulnerable community offers grounds for substantial developments in future. From historical perspective it might be understood as just another pragmatic *status quo* solution which fails to deal with the essential developmental issues and does not try or even dare to challenge the relations of power within the existing political structures. In this context, the paternalistic approach, which always seeks for a continuation of affirmative action, without proper monitoring and evaluation and is primarily reflected in the gradation of social benefits as a "help for Roma" could be sought as a permanent and vital source for strengthening the barriers and mutual prejudices between Roma and non-Roma.

31 General Policy recommendation No 3 (1998) of the Council of Europe's European Commission against Racism and Intolerance on combating racism and intolerance against Roma/Gypsies, which emphasises the double discrimination faced by Romani women; www. coe.int

Report by Mr. Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights on the human rights situation of the Roma, Sinti and Travellers in Europe (2006). www. coe.int.

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(PC Journal ; no. 479, agenda item 4) Vienna, 27 November 2003.

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ANNEX 1

ROMA COMMUNITY IN THE REPUBLIC OF SLOVENIA ACT (ZROMS-1)

Article 1

This act shall regulate the status and define the special rights of the Roma community living in the Republic of Slovenia, the competence of national authorities and authorities of self-governing local communities for their implementation and cooperation of representatives (hereinafter: representatives) of the Roma community in implementing their rights and obligations as provided by law.

Article 2

In taking into consideration the special status of the Roma community in the Republic of Slovenia and its successful integration into the Slovenian society and for the purposes of assuming the responsibility for its development, the members (hereinafter: members) of the Roma community shall have special rights provided by law, in addition to the rights and obligations appertaining to all citizens of the Republic of Slovenia, particularly the special rights provided by law.

Article 3

The Republic of Slovenia shall provide for the implementation of special rights in the area of education, culture, employment, spatial planning and environmental protection, health and social security, notification and participation in public affairs referring to Roma community members in compliance with this Act, other acts, implementing regulations and acts of self-governing local communities and special programmes and measures of national authorities and authorities of self-governing local communities.

COMPETENCE OF NATIONAL AUTHORITIES AND AUTHORITIES OF SELF-GOVERNING COMMUNITIES IN IMPLEMENTING SPECIAL RIGHTS OF THE ROMA COMMUNITY

Article 4

(1) The Republic of Slovenia shall create the conditions for the integration of Roma community members into the system of education, provide for the conditions for the improvement of education level of Roma community members and an appropriate scholarship policy.

(2) In the area of the labour market and employment, the Republic of Slovenia shall pay special attention to the promotion of employment, vocational education and training of Roma community members.

(3) The Republic of Slovenia shall encourage the maintenance and development of the Roma language and culture, information and publication activities of the Roma community.

(4) The Government of the Republic of Slovenia (hereinafter: Government) shall report annually to the National Assembly of the Republic of Slovenia on the implementation of the obligations referred to in the previous paragraphs and in Article 5 of this Act.

Article 5

(1) The national authorities and authorities of self-governing local communities shall provide for the conditions for spatial planning of Roma settlement issues and improvement of living conditions of Roma community members.

(2) The system of spatial planning of Roma settlements referred to in the preceding paragraph shall be realised with appropriate spatial planning solutions. Pursuant to the regulations concerning spatial planning, these spatial planning solutions shall be considered as the spatial planning arrangement of local importance or as- the spatial planning arrangement of national importance, whether the initiative for their planning is transferred to the Government by the city or municipal council of that municipality in the region in which the proposal of such spatial planning is necessary. or it is so decided by the Government.

(3) The Government itself may take a decision referred to the preceding paragraph and other necessary measures for the settlement of conditions in cases where legally undeveloped Roma settlements in the self-governing local community result in posing serious threats to health, long-term disturbance of the public order and peace, or in posing a permanent threat to the environment. On the basis of the national spatial planning act, the Government may, in this case, carry out activities affecting any region of any municipality, however, thus giving priority to the region of that municipality which did not fulfil the obligations referred to in the preceding paragraph. For the purposes of preparing and adopting such a spatial planning document, the procedure defined in the regulations concerning spatial planning in a shortened procedure shall be applied.

(4) For the purposes of implementing the state's tasks referred to in this article, funds shall be provided in the budget of the Republic of Slovenia.

Article 6

(1) For the purpose of coordinated implementation of special rights of Roma community members, the Government, in cooperation with the self-governing local communities and the Roma Community Council of the Republic of Slovenia, shall adopt the programme of measures laid down in Article 9 of this Act on the basis of which the obligations and tasks that are carried out by competent mini-

stries, other national authorities and authorities of selfgoverning local communities shall be laid down pursuant to Articles 4 and 5 of this Act.

(2) The authorities referred to in the preceding paragraph shall adopt detailed sectoral programmes and measures, and shall provide for the necessary funds earmarked in their financial plans.

(3) The Government shall designate a special working body for monitoring the implementation of the programme referred to in the first paragraph of this Article. At least once a year, the competent national authorities and authorities of self-governing local communities shall report to the working body on the implementation of the programme referred to in this Article.

(4) The working body shall consist of eight representatives of national authorities, four representatives of self-governing local communities on the proposal of the self-governing local authorities as laid down in Article 7 of this Act, and four representatives of the Roma Community Council of the Republic of Slovenia, The head of the working body shall be a representative of the national authorities.

(5) For the purpose of its operation, the working body referred to in the third paragraph of this Article shall adopt rules of procedure to be approved by the Government.

ORGANISATION

ARTICLE 7

(1) In municipalities in which representatives of the Roma community shall be elected to the city and/or municipal council (hereinafter: municipal council) in accordance with the law regulating the local self-government, a special working body for monitoring the status of the Roma community shall be established in the municipal council.

(2) The working body referred to in the preceding paragraph shall consist of at least six members (hereinafter: member) out of which not more than one half shall be represented by inhabitants of the municipality who are not municipal council members and out of the latter the majority shall be represented by Roma community members.

(3) A representative of the Roma community in the municipal council shall be a member of the working body referred to in the first paragraph of this Article.

(4) The working body referred to in the first paragraph of this Article shall be set up in accordance with the. act governing the local self-government.

(5) Notwithstanding the provision of the first paragraph of this Article, other self-governing local communities may also set up a special working body for the purposes of monitoring the status of the Roma community in applying the provisions of this Article.

Article 8

The working body referred to in the previous Article shall pursue the following activities, in particular:

- it shall monitor and address the status of the Roma Community in the self-governing local community;

it shall address and present proposals and initiatives concerning issues relating to the status of Roma community members and their rights; ii shall actively participate in the implementation of the development programme of the self-governing local community, particularly in programmes and in solving issues- relating to the status and development of the Roma community in the self-governing local community;

it shall deal with issues relating to the maintenance of the Roma language and culture; it shall cooperate with Roma societies and other organisations in the self-governing local community.

Article 9

(1) A Roma Community Council of the Republic of Slovenia (hereinafter. Council) shall be established.

(2) The Council shall represent the interests of the Roma Community in Slovenia in relation to the national authorities.

(3) The Council shall be a legal entity of public law. The status of legal entity shall be designated on the day of its establishment.

Article 10

(1) The Council shall consist of twenty-one members, of which fourteen shall be representatives of the Roma Association and seven representatives of the Roma community in the councils of self-governing local communities referred to in Article 7 of this Act.

(2) The seven representatives referred to in the preceding paragraph shall be elected by secret ballot from among themselves from the representatives of the Roma community in the councils of self-governing local communities laid down in Article 7 of this Act. In the voting procedure, each representative can cast seven votes but only one vote per individual candidate. Those representatives of the Roma community in the councils of self-governing local communities who

received the most votes shall be elected to the Council. If the membership of a representative in the Council terminates, the next person who received the most votes shall replace the representative. If such a person does not exist, a substitute member shall be elected in compliance with the provisions of this paragraph. For the purposes of the election referred to this paragraph, at least the majority of all the representatives of the Roma community in the councils of the self-governing local communities laid down in Article 7 of this Act must be present. The competent national office for nationalities, which is also accountable for the legality and regularity of the election, shall be responsible for the organisation and implementation of elections.

(3) The members of the Council shall elect a president of the Council (hereinafter: president) from among themselves by a majority of two thirds of the votes cast in a secret ballot by all members of the Council. The president of the Council shall be elected for a term of office of two years. The president of the Council shall represent and act on behalf of the Council.

(4) The Council shall 'be re-established within three months at the latest after each effected regular election to municipal councils. The competent national authority for nationalities shall convene a constituent meeting. The Council shall be re-constituted with the election of the president of the Council.

(5) Membership in the Council shall terminate for representatives of the Roma community when their term of office in the council of a self-governing local community terminates.

(6) The Council shall be deemed to have a quorum if the majority of its members are present at the meeting.

(7) The tasks of the Council shall include, in particular;

- addressing issues relating to the interests, status and rights of the Roma community; presenting proposals and initiatives to competent authorities; promoting activities for the maintenance of the Roma language and culture; encouraging and organising cultural, informative, publishing and other activities significant for the development of the Roma community; developing and maintaining contacts with Roma organisations in other countries.

Article 11

(t) The Council shall adopt rules of procedure by a two-thirds majority of votes of all of its members and shall publish the rules in the Official Gazette of the Republic of Slovenia.

(2) The rules of procedure shall determine, in particular: the address of the Council;

the manner of convening the sessions;

the method for the internal organisation of work; the method for international cooperation;

attendance fees and costs of participation in Council meetings; detailed rules for decision-making in Council meetings;

the manner of notifying the public about the operation of the Council.

(3) The Government shall give prior consent to the provisions in the rules of procedure which relate to attendance fees and the costs of participation at meetings of the Council.

Article 12

(1) The Council may present proposals, initiatives and opinions in matters of its competence to the National Assembly of the Republic of Slovenia, National Council of the Republic of Slovenia, Government(other national authorities, holders of public authorisations and authorities of self-governing local communities.

(2) The national authorities, holders of public authorisations and authorities of self-governing local communities must obtain the prior opinion of the Council for the purposes of adopting and issuing regulations and other general legal acts relating to the status of the Roma community.

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FINANCING

Article 13

(1) Funds for financing tasks and measures for the implementation of special rights of the Roma community shall be provided in the budget of the Republic of Slovenia, in the financial plans of direct users of the budget of the Republic of Slovenia and as funds earmarked for the communities referred to in Article 7 of this Act concerning the financing of tasks confrrrred.

(2) The amount of funds required shall be brought in line with the government programme of measures for the implementation of special rights of Roma community members and shall be laid down in the budget of the Republic of Slovenia.

Article 14

(1) Funds for the operation of special working bodies in the councils of self-governing local communities shall be provided for in the budgets of the self-governing local communities.

(2) Funds earmarked by the communities for financing the needs of Roma community members shall be provided for in the budget of the Republic of Slovenia in accordance with the provisions of the act governing the financing of municipalities.

Article 15

Funds for the operation of the Council shall be provided for in the budget of the Republic of Slovenia.

TRANSITIONAL AND FINAL PROVISIONS

Article 16

(1) The municipal councils referred to in Article 7 of this Act shall establish the working bodies referred to in the stated Article within three months after the entry into force of this Act.

(2) The Council referred to in Article 9 of this Act shall be established within four months after the entry into force of this Act.

A competent national body for nationalities shall convene the founding meeting. At the founding meeting, the president of the Council shall be elected. Until the election of a president of the Council, the oldest member of the Council shall manage the work of the Council.

(3) The national authority competent for nationalities shall appoint their representatives of the Council within eight days of the entry into force of this Act. The Roma Association of Slovenia shall appoint its representatives in the Council not later than within one month after receipt of the invitation.

(4) Within eight days from the entry into force of this Act, the competent national authorities for nationalities shall convene representatives of the Roma community in the councils of selfgoverning local communities referred to in Article 7 to elect from among themselves their representatives to the Council. The elections shall be carried out not later than forty-five days following the entry into force of this Act.

(5) The Council shall be established via the election of the president of the Council.

(6) The Council shall adopt its rules of procedure within three months after the Council has been established.

(7) The programme of measures referred to in the first paragraph of Article 6 shall be adopted within one year after the entry into force of this Act.

(8) Detailed sectoral programmes and measures referred to in the second paragraph of Article 6 of this Act shall be adopted within six months after adopting the programme of measures referred to in the seventh paragraph of this Article.

(9) The working body referred to in the third paragraph of Article 6 of this Act shall be set up within one month after establishing the Council referred to in the second paragraph of this Article.

Article 17

This Act shall enter into force on the fifteenth day following its publication in the Official Gazette of the Republic of Slovenia (Uradni list Republike Slovenije).

ORIGINAL
SCIENTIFIC
ARTICLE

SAŠA ZAGORC

The Constitutional Framework for Regulation of the Position of the Roma Community in the Republic of Slovenia

In the first part, author questions the need to regulate the matters regarding the Roma Community in the highest legal act, as it was done in the Constitution of the Republic of Slovenia. He believes that the introduction of the collective rights in the Constitution may result as inappropriate in the long-term.
The second part deals with normative analysis of the status of Roma in Slovenia, in which the constitutional framework for protection of the national communities mentioned in the Constitution is presented, and, finally, different constitutional status of the national communities (minorities) is elaborated. Such differentiation exposes the question whether the Romany community is entitled to have its own member of the National Assembly. By using all interpretation techniques it can be concluded that the Romany community at present does not enjoy the same level of positive discrimination as the two other national communities in Slovenia.

Keywords: Romany community, national community, collective rights, right to vote, affirmative action

Ustavni okvir za urejanje položaja romske skupnosti v Sloveniji

Avtor najprej izpostavi dvom, da je potrebno urejati zadeve v zvezi s položajem romske skupnosti v najvišjem pravnem aktu države, kot je to urejeno z Ustavo Republike Slovenije. Uvedba katerihkoli kolektivnih pravic v pravni akt ustavne narave se bo prej ali slej izkazala kot neprimerna na dolgi rok.
V drugem delu članka se avtor ukvarja z normativno analizo položaja Romov v Repubiki Sloveniji, v okviru katere je predstavljen okvir manjšinskega varstva na ustavni ravni in so prikazani različni ustavno varovani položaji narodnih in etničnih skupnosti v Sloveniji. Takšno razlikovanje izpostavlja dilemo, ali so tudi pripadniki romske skupnosti upravičeni do svojega predstavnika v Državnem zboru. S pomočjo razlagalnih metod avtor sklene, da pravni red kaj takšnega trenutno ne omogoča.

Ključne besede: Romska skupnost, narodna skupnost, kolektivne pravice, volilna pravica, pozitivna diskriminacija

1. DILEMMA OF COLLECTIVE RIGHTS IN THE CONSTITUTION

If even the most prominent advocates of some kind of collective rights, for example Newman (2004: 127-128), dare to admit that understanding of rights that can be ascribed to groups rather than individuals remains sketchy, there is not much room left to arbitrate on individual and collective rights. Even though, I would like to present my arguments which are in disharmony with the constitutional engineering of collective rights, particularly those of ethnic groups, which have been regularly favored (*e.g.* Polzer-Srienz 2002: 63). For this purpose, I shall deliberately treat collective rights as equally plausible, original and legitimate measure as individual rights although the former may have some value only if some individual rights pre-exist.

A huge step towards a liberal state set on the rule of law was made with the acceptance of rational discourse in political life. In order to provide the highest possible participation in it, political and legal rights of individuals were promoted more and more extensively. It seems that the process of political emancipation ended with an introduction of numerous legal safeguards in the constitutional orders throughout the world, *e.g.* free and equal voting, judicial protection against acts of the state. As a result, constitutional orders predominantly base their regulation of human rights and freedoms on a free individual and his/her formal equality with other individuals. The political and legal theory describes such order as the state ruled by law (*e.g.* Kaučič and Grad 2003: 72-73). Nevertheless, it turned out that certain groups identifiable by various social, national or ethnic denominators were highly limited or practically excluded from participation in the political life. Political perturbations on the eve of the 1920s resulted in the wider formal acknowledgement of collective rights and in emergence of a social state - firstly in the Constitution of the Weimar Republic -, which required a different "political identifier" in comparison with the state ruled by law. The social state therefore uses social characteristics of groups of people in order to guarantee them legal advantages which are not accessible to ordinary "*zoon politikon*". The creation of so called collective (social, educational, family, national communities, ethnic, etc.) rights was imminent. And likewise, the conflict between individual/collective rights apologists.

Abovementioned approaches to regulation in the society are, doubtless, adversary. As Berent (1991: 390) rightly argues, collective rights have been a rather problematic issue within the framework of the liberal tradition. One of the main reasons for this has been the impact of methodological individualism which underlay both Hobbes and the classical liberalism. Contrary to this, some defend cultural pluralism, whereby collective rights would permit each sub-national group to protect its identity and its security as a distinct commu-

nity (Magnet 1986-1987: 170). It seems that a purely theoretical debate between promoters of individual or collective rights would lead to infinite *ad nauseam* argumentation since arguments on both sides rest on different and mainly incompatible values.

Many scholars are not satisfied with sticking only to one end (*e.g.* Jacobs 1991, Isaac 1992). In order to overcome the classical dispute on individual/collective rights issue, Buchanan (1993: 104) proposes, as some kind of a middle way, to pursue individual rights as safeguards for collective rights.

"The presence of institutions to establish certain familiar *individual* rights for group members can reduce the risks associated with collective rights in the strong sense and make the limitations they impose on individual liberty acceptable. The problems inherent in collective rights in the strong sense ... can be ameliorated if these rights are embedded in a framework of appropriate individual rights. The most important of these individual rights are the rights to freedom of expression, freedom of association and assembly, and the right to participate in political processes (including the right to vote on important issues concerning the exercise of collective rights).

Some additional key factors, however, might preponderate the scale in one direction, at least for certain modes of regulation. Brett (1991: 348-349) sets out an important criterion that perhaps legislation of collective rights could only be justified as a temporary measure, relative to the goal of equalization. Permanence of collective rights contravenes their very purpose of existence. Enduring and continuous legal protection that rests on a premise of promoting interests which are incapable of autonomously promoting themselves would in the end prove that results of such legal protection are actually miserable. This position makes a huge contrast with constitutional orders, which are established with an ideal to be long-lasting and value-based, according to the will of the constituent body, and consequently as much as possible principled. The constituent body tends to mark out the text of a constitution in a manner that would make it more lasting than other legal acts. For this reason, substantial provisions of temporary or individual nature are not suitable for regulation in constitutions (Kaučič and Grad 2003: 21). Since collective rights, especially those intended for political integration of underprivileged national minorities or ethnic groups, should only have a transitional character, provisions of such kind in constitutions should be evaded as much as possible.

2. THE CONSTITUTIONALIZATION OF THE SPECIAL STATUS OF THE ROMA COMMUNITY

The first explicit mention of the Romany community in the Slovene Constitution dates in pre-independence year of 1989 when the Constitutional amendment LXVII of the Constitution of the Socialist Republic of Slovenia came into force. It provided that "... [t]he manner in which special rights of the Romany community are exercised shall be regulated by law". Such provision went hand in hand with the collective character of the decaying socialist era on one hand and with the democratic interests of the independence movement on the other. The same provision became Article 65 of the Constitution of the Republic of Slovenia after the Slovenian independence in 1991. The Constitution additionally deals with the Romany community in an indirect manner as it provides formal protection of all persons, irrespective of their ethnicity (Article 14). Members of the Romany community in Slovenia enjoy all rights according to their status in the Republic of Slovenia like other citizens or aliens, combined with special collective rights of the Romany community. Polzer-Srienz (2002: 64) interprets Article 65 of the Constitution similarly to the Magnet's understanding of collective rights; however, not in the line with the systematization of the Constitution and rather extensively in a way that the Constitution has established collective and individual rights of the Romany community and their members (likewise the Italian and Hungarian national community in the Article 64 of the Constitution). A narrow reading of the Article 65 of the Constitution suggests the opposite, that only certain collective rights are pertinent to the Romany community as a whole and therefore guaranteed as a constitutional right. Yet again it seems that the Buchanan-like teleological interpretation would serve in the interest of all since it would give constitutional character to every legal provision - even those pertinent to individual members of the Romany community -, if it would have a factual safeguarding effect on the Romany community as a whole. We shall later see that the Constitutional Court was not completely successful in its interpretation mainly due to the constraints and preciseness of the electoral law.

3. THE LEGAL ASPECTS OF THE DECISIONS OF THE CONSTITUTIONAL COURT CONCERNING THE ROMANY COMMUNITY

A brief sketch of the decisions of the Constitutional Court

The Constitutional court has extensively dealt with the status and special rights of the Romany community. Such an interpretation by the Constitutional Court

of the Article 65 of the Constitution is more than welcome if one bears in mind that the National Assembly had not, at that time, passed the law exclusively on matters of the Romany community. All three decisions (U-I-416/98,[1] U-I-315/02,[2] U-I-345/02[3]) of the Constitutional Court more or less deal with a matter of the Romany representation in municipality councils.

The first decision U-I-416/98 was a declaratory one. The Constitutional Court said that the Local Self-Government Act (LSGA) was inconsistent with the Constitution due to the fact that the provision of Article 39(5) of LSGA is incomplete (a gap in the law). LSGA did not contain any criteria set in advance on the basis of which municipalities could easily establish the existence of an autochthonous Romany community in their territory, and also other criteria (*e.g.* organization, the number of members) necessary for exercising this special statutory right within a municipality. LSGA also did not determine a time limit in which municipalities must implement the mentioned statutory provision, or the time-period within which the municipalities must reach a decision in connection with exercising the mentioned statutory provision.

Different positions of the authorities at the state and local communities level that had been involved in a dispute on the first decision of the Constitutional Court have actually led to the following two decisions. The National Assembly has enacted the amendment to the LSGA in a different manner than prescribed in the first decision of the Constitutional Court. Taking into account its steady practice, the Constitutional Court has in the second decision U-I-315/02 once again confirmed that legislature may regulate the exercise of the special rights of the Romany community differently to the decision of the Constitutional Court, save it does so in an effective and non-arbitrary manner and pursuant to the Constitution. The Constitutional Court has for the safety precautions explained what it would consider as an arbitrary regulation. This would be the case if the legislature would impose obligations on the relevant municipalities without determining the existence of the autochthonous Romany community on their territory or where the autochthonous Romany community does not live. The National Assembly stated in the proceedings before the Constitutional Court that it had taken into account findings of the Governmental Office for Nationalities.

The third decision of the Constitutional Court U-I-345/02 was also a declaratory one. Unlike the first two decisions where the Constitutional court reviewed the constitutionality of the Act of the National Assembly, the Constitutional Court had

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1 Decision of the Constitutional Court U-I-416/98, 22 March 2001, Official Gazzete RS, No. 28/2001.

2 Decision of the Constitutional Court U-I-315/02, 3 October 2002, Official Gazzete RS, No. 87/2002.

3 Decision of the Constitutional Court U-I-345/02, 14 November 2002, Official Gazzete RS, št. 105/2002.

to review the legality of the Charters of municipalities in the last decision. This was the final decision where the Constitutional Court held that certain Charters of local communities are inconsistent with the LSGA, as they did not determine that Romany community representatives are members of municipality councils.

Consequences of introduction of the term" the autochthonous Romany community"

The Romany community is guaranteed a special representative, elected among its members, in the municipality councils of those municipalities in which the Romany community autochthonously lives (Article 39(5) of LSGA). LSGA also ensures members of the Romany community a special voting right in addition to the general voting right of which they are already entitled to as Slovenian citizens. The special (active and passive) voting rights of members of the Romany community and their exercise at local elections are regulated by the Local Elections Act. The Constitutional Court has declared double deviation from the Equality Clause as constitutional due to the fact that Article 65 of the Constitution allows the affirmative action.

The discrepancy between the constitutional provision on the Romany community and the special right according to LSGA strikes the eye. The Constitution guarantees special rights solely to the Romany community as whole. On the contrary, LSGA implements the special voting right for members of the autochthonous Romany community only. Such distinction presupposes that a non-autochthonous Romany community also exists.

Does such a discrepancy cause the unconstitutionality of the LSGA? Although the distinction on autochtonous and non-autochtonous community is more or less legitimately criticized, there are some arguments in our case that justify it. First, the Constitution obliges the legislature to enforce the positive discrimination in a manner and to the extent the legislature believes it is necessary and possible. There would be a clear breach of the Constitution in two situations: in the case the legislature would not adopt any provision on the Romany community or the legislature would adopt the Act explicitly providing that the Romany community enjoys no special rights or status. Several provisions dealing with the Romany community in affirmative manner were enacted in various Acts. One could certainly argue that, bearing in mind the evident low social standard of members of the Romany community, the legislature should be more positively oriented to allocate special rights extensively to the Romany community on one hand. On the other hand, it is up to the will of the legislature when and to what extent it shall adopt special provisions of the Romany community or whether it shall discriminate between members of the Romany community. Secondly, discrimination of mem-

bers of Romany community on terms of autochthonous residence may be regarded as a condition for fair and transparent elections since a precise determination of voting rights is the core of every election. Thirdly, affirmative action measures are justified only in cases if identifiable and significant groups with special needs could be determined. Special voting rights of members of the Romany community in areas where practically no members live or they live scattered would lead to unfavourable and disproportionate treatment of majority population. One could certainly argue if the term "autochthonous residence" satisfies the identification and significance criteria as it reflects a historical, not an actual, perception of residing of some minority groups.

Reasoning of the Constitutional Court in U-I-416/98 that the scope of the Article 65 of the Constitution instructs the legislature how to regulate special rights should be questioned for lack of clarity. The Constitutional Court reasons that when the legislature determined the special right of the Romany community it should also had taken care of their exercise in a manner which would ensure the Romany community living in Slovenia the actual exercise of such special rights. Protection of the actual exercise of the proclaimed rights is guaranteed by the Article 2 of the Constitution ("Slovenia is a state governed by the rule of law and a social state") and not by the Article 65 of the Constitution in our case, *e.g.* nothing significant changes in the perspective of Article 65 if, instead of four, three special rights of the Romany community are provided and actually exercised. It is the rule of law that forbids the situations where the proclaimed rights are not actually exercised, since non-compliance would lead to the legal uncertainty of bearers of these rights.

Article 39(5) of LSGA actually represents "double positive discrimination". First, members of the Romany community which has been autochthonously settled enjoy special rights that the Romany community as a whole has. And secondly, they enjoy, in contrast to other "non-autochthonous" members of the Romany community, the right to vote a representative in the municipality council. Article 65 of the Constitution gives the legislature a free space to regulate the status and special rights of the Romany community meaning it can also abolish such rights in future.

As already indicated, any special right to a certain sub-national group of individuals interferes with the principle of the equality of the law. Consequently the Constitutional Court should first carry out the test whether the Article 39(5) of LSGA is contrary to the Equality Clause and not *a priori* proceed from the standpoint that Article 39(5) of LSGA is a mere implementation of the Article 65 of the Constitution, as the Constitutional Court actually did in the decision U-I-416/98. It should further review if the legislature had taken into consideration the legitimate aims for a differentiation of members of the autochthonous Romany community

on one hand and the whole electoral body (not the "non-autochthonous" members of the Romany community!) on the other and if the measures for implementation had been in reasonable connection with these aims.

4. THE ROMANY DEPUTY IN THE NATIONAL ASSEMBLY?

The question whether the Romany community is entitled to have their own (special) deputy in the National Assembly is raised now and then. When the first out of three decisions of the Constitutional Court concerning special rights of the Romany community was published some journalists and critical public inquired if there was a specific constitutional basis or any other legal basis for the seat of the Romany deputy in the National Assembly. The first reactions denied the possibility for such a manoeuvre mainly due to the common practice at the previous elections to the National Assembly. The stated reasons were obviously not the legal ones. That is why I would like to present in short some legal arguments that refute the legitimacy of the Romany deputy in the National Assembly: argument of the systematics, argument of the equality before the law and argument of the typical *materia constitutionis*.

The Constitution of the Republic of Slovenia defines the National Assembly as the first state authority in the chapter IV. Article 80 of the Constitution says that the National Assembly is composed of deputies of the citizens of Slovenia and comprises ninety deputies. All deputies are elected by universal, equal, direct and secret voting. One deputy of the Italian and one deputy of the Hungarian national communities shall always be elected to the National Assembly. The electoral system shall be regulated by a law passed by the National Assembly by a two-thirds majority vote of all deputies. The fifth paragraph was added by the Constitutional law amending Article 80 of the Constitution in year 2000. It states that deputies, except for the deputies of the national communities, are elected according to the principle of proportional representation with a four-percent threshold, required for election to the National Assembly, with due consideration that voters have a decisive influence on the allocation of seats to the candidates.

The first argument is the systematical one taking into account that the composition of the National Assembly is defined in the chapter IV concerning organization of the state in contrast to the sole mentioning of the Romany community in the chapter II concerning human rights and fundamental freedoms. The latter chapter deals with a relationship between an individual or a certain group of people on the one hand and the state authorities on the other and definitely not with the status, establishment of or relationships between the main state authorities. It is true that all constitutional provisions should be observed integrally; howe-

ver, the composition of the National Assembly is rounded up in Article 80 of the Constitution. No other constitutional provision deals with it.

The second argument bases on the fact that members of the representative bodies should be elected by equal voting. Slovenia is no exception (Article 80(2) of the Constitution). Equal voting presupposes that every voter has one vote with the same value as other's ones and that no vote shall be privileged (Grad 1996: 51-52). This is considered as the main principle of electoral law; nevertheless, there are exceptions to this rule. For instance, in Italy citizens abroad vote certain number of deputies and senators (number is defined in Articles 56(2) and Article 57(2) of the Constitution of the Republic of Italy) or, second example, members of many national communities in Croatia may vote their representative in the Sabor (Article 15(3) of the Constitution of the Republic of Croatia). The same goes for Slovenia. Out of 90 deputies two deputies are always elected by members of the Italian and Hungarian national communities (Article 80(3) of the Constitution). All mentioned provisions are written in the Constitution. Along with that and that all exceptions should be handled with great scrutiny and in our case stated explicitly in the Constitution, we can conclude that the Romany deputy has not been foreseen in the Slovenian Constitution.

The third argument deals with the typical constitutional matter – *materia constitutionis*. Constitutions in the world mostly comprise of the human rights and fundamental freedoms, organization of the state and constitutional revision procedure (Jovičić 1977: 9-12), let alone that the constitutional practice obviously rejects *numerus clausus* of substantial provisions for the reason that some constitutions narrow and some broaden the typical constitutional matter. As concerns organization of the state, constitutional provisions always thoroughly deal with establishing of the main state authorities. The last argument touches another important issue: voting rights for the main representative body belong to individuals and not collective groups of people, meaning that only explicit notion of the Romany deputy in the Constitution would be an adequate solution for a shift away from the right to equal vote.

There are not many arguments in favour of the Romany deputy, certainly not legal ones. One could definitely agree with the observation that no serious arguments for the discrimination between the Italian and Hungarian national communities and the Romany community exist since the former have been recognized with their own deputy in the National Assembly and the latter not. As this discussion area is limited only to legal analysis, it should be stressed for the sake of clarity, that Article 64 of the Constitution does not allow the discrimination between the Italian and Hungarian national communities; nevertheless it allows discrimination between these two minorities and other less recognized minorities in the Republic of Slovenia. Differentiation could be permitted only for the most

necessary aims and the measures for implementation should be in strict connection with such aims.

CONCLUSION

As one of the few constitutions of the world, the Constitution of the Republic of Slovenia explicitly guarantees certain privileged status or rights to an ethnic group (the Romany community). However praiseworthy that is, it does not suffice to fulfill the objective of such provision. As it was shown above, some even argue that the discrimination by using collective rights is ineffective in the long run. Irrespective of this, the Constitutional Court tried in some decisions to strengthen and assure the voice of de facto de-privileged group of the Roma population, albeit results are still not clearly visible at the moment having in mind the recent views of the majority of the Slovenian voting *populus* and their dislike towards some members of the Romany community in the Republic of Slovenia. The Constitutional Court definitely acts as an anti-majoritarian authority due to the fact that it annuls Acts and other decisions of legally and by that legitimately elected representative body at the state or local level. Where the decisions of the representative body and even of the people interfere with the basic standards of modern state (the rule of law, protection of basic human rights and fundamental freedoms) one should carefully stand for the unlimited advocacy of the people's sovereignty.

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ORIGINAL
SCIENTIFIC
ARTICLE

AGNEZA BOŽIĆ ROBERSON

The Role of Rhetoric in the Politicization of Ethnicity: Milošević and the Yugoslav Ethnopolitical Conflict

Slobodan Milošević was the first acting Head of State to be charged and tried by an International Tribunal with the commission of serious violations of international humanitarian law, including genocide. He was the Serbian leader and then president of rump Yugoslavia in the 1990s, during the bloodiest wars in post-Second World War Europe, when hundreds of thousands of people were being killed and misplaced by the wars in Croatia, Bosnia and Kosovo. Although Milošević is subject of many analyses because of his political and war crimes, it should not be forgotten that Milošević established himself as a populist Serbian leader through his rhetoric and spoke his way to power. Analysis of Milošević's speeches should help us to understand the power of his rhetoric to influence and shape the events that contributed to the beginning of ethnopolitical conflicts on the Yugoslav territory.

The purpose of this paper is twofold. First, it provides a theoretical framework for the analysis of rhetoric within the political arena, with an emphasis on the process of the politicization of ethnicity. Second, in a case study, I examine three of Milošević's speeches that represent an important part of the larger Kosovo campaign.

This study will analyze three of Milošević's key speeches. The first public speech of April 24, 1987 in Kosovo Polje, was delivered to the Serbs in Kosovo, the Albanian-populated province of Republic of Serbia. This event marked the public beginning of Milošević's populist leadership strategy. The second is the speech of November 19, 1988, deliv-ered at the Meeting of the Brotherhood and Unity in Belgrade. In this speech Milošević openly invited the Serbs to fight for the establishment of the Serbian state. The third is the speech of June 28, 1989, in Gazimestan, delivered as part of the commemoration of the 600th anniversary of the Battle of Kosovo and Serbia's defeat by the Turks. This speech was the most obvious evocation of the Kosovo myth in celebrating the unity of the Serbs and Milošević's greatest threat to the Yugoslav federation.

Keywords: coercion, ethnopolitical conflict, ethnic entrepreneurs, political rhetoric, politicication of ethnicity.

Vloga retorike v politizaciji etničnosti: Milošević in jugoslovanski etno-politični konflikt

Slobodan Milošević je bil prvi aktualni predsednik neke države, ki so ga obtožili in mu sodili na Mednarodnem sodišču zaradi resnih kršitev mednarodnega humanitarnega prava ter genocida. Bil je srbski voditelj in potem predsednik ostanka Jugoslavije v devetdesetih letih, med najbolj krvavimi vojnami v Evropi po drugi svetovni vojni, ko so bili stotisoči ljudi ubiti in razseljeni zaradi vojn na Hrvaškem, v Bosni in na Kosovu. Čeprav je bil Milošević predmet mnogih analiz zaradi svojih političnih in vojnih zločinov, ne smemo pozabiti, da se je uweljavil kot populistični srbski vodja zaradi svojih govornih sposobnosti, s katerimi si je pridobil oblast. Analiza njegovih govorov bi nam morala pomagati razumeti moč njegove retorike, ki je vplivala na in oblikovala dogodke, ki so prispevali k začetku etno-političnih konfliktov na jugoslovanskem ozemlju.

Namen tega članka je dvojen. Prvič postavlja teoretični okvir za analizo retorike v politični areni, s poudarkom na procesu politizacije etničnosti. Drugič pa na primeru (case study) raziščem tri od Miloševićevih govorov, ki predstavljajo pomemben del širše kampanje za Kosovo.

Ta raziskava bo analizirala tri od Miloševićevih glavnih govorov. Prvi javni govor z dne 24.4. 1987 na Kosovem polju je bil namenjen Srbom na Kosovu, z Albanci naseljeni pokrajini v Republiki Srbiji. Ta dogodek je zaznamoval javni začetek Miloševićeve populistične vodstvene strategije. Drugi je govor z dne 19.11.1988, ki ga je imel na Mitingu bratstva in enotnosti v Beogradu. V tem govoru je odkrito pozval Srbe k borbi za ustanovitev srbske države. Tretji je govor z dne 28.6.1989 na Gazimestanu, ki je bil del spominske slovesnosti ob šeststoti obletnici Bitke na Kosovu in srbskega poraza od Turkov. Ta govor je bil najbolj očitno obujanje kosovskega mita in čaščenje srbske enotnosti in je predstavljal največjo Miloševićevo grožnjo jugoslovanski federaciji.

Ključne besede: prepričevanje, etnopolitični konflikt, etnični pobudniki, politična retorika, politizacija etničnosti

INTRODUCTION

Slobodan Milošević was the first acting Head of State to be charged and tried by an International Tribunal with the commission of serious violations of international humanitarian law, including genocide (Klarin & Bogadi 1999, Amanpour 2006). He was the Serbian leader and then president of rump Yugoslavia in the 1990s, during the bloodiest wars in post-Second World War Europe, when hundreds of thousands of people were being killed and misplaced by the wars in Croatia, Bosnia and Kosovo. Although Milošević is the subject of many analyses because of his political and war crimes, it should not be forgotten that Milošević established himself as a populist Serbian leader through his rhetoric and spoke his way to power (Bozic 1992, 2001). Analysis of Milošević's speeches should help us to understand the power of his rhetoric to influence and shape the events that contributed to the beginning of ethnopolitical conflicts on the Yugoslav territory.

The purpose of this paper is twofold. First, it provides a theoretical framework for the analysis of rhetoric within the political arena, with an emphasis on the process of the politicization of ethnicity. Second, in a case study, I examine three of Milošević's speeches that represent an important part of the larger Kosovo campaign.

This study will analyze three of Milošević's key speeches. The first public speech of April 24, 1987 in Kosovo Polje, was delivered to the Serbs in Kosovo, the Albanian-populated province of the Republic of Serbia. This event marked the public beginning of Milošević's populist leadership strategy. The second is the speech of November 19, 1988, delivered at the Meeting of the Brotherhood and Unity in Belgrade. In this speech Milošević openly invited the Serbs to fight for the establishment of the Serbian state. The third is the speech of June 28, 1989, in Gazimestan, delivered as part of the commemoration of the 600th anniversary of the Battle of Kosovo and Serbia's defeat by the Turks. This speech was the most obvious evocation of the Kosovo myth in celebrating the unity of the Serbs and Milošević's greatest threat to the Yugoslav federation.

This study looks at political rhetoric as a powerful strategic tool by which leaders can influence public knowledge, beliefs and action on political matters. We are interested in finding the meaning of political messages and how this meaning leads to political consequences, in this case, violent inter-ethnic conflict. Through the analysis of Milošević's rhetorical tactics, we are looking for the following uses of political language in his rhetoric: Are the messages of his public speeches used (intended) to promote unification of one ethnic group, the Serbs? Is the unification of the Serbs promoted at the expense of other ethnic group(s)? How does

Milošević treat members of other ethnic groups, their role in history and their leadership? How is the affirmation of unity and identity of the Serbs as promoted in Milošević's rhetoric perceived by other nations and ethnic groups of the former Yugoslavia?

POLITICAL POWER OF RHETORIC

The effect of public speaking on politics cannot be emphasized enough. Throughout history, important issues have been and are argued publicly. With acceptable arguments, people can be convinced to accept changes of all kinds, social, political, and technological (McGee 1977). Rhetoric is the art of using language as a symbolic means, so as to persuade or influence humans who by nature respond to symbols in order to induce some sort of social control, that is, desirable political outcomes (Bitzer 1981, Burke 1969). Public persons have always used the power of words to influence the people of their times and to stir up certain emotions, sometimes violent passions (Cassier 1946).

This study defines the rhetorical act as a public speech where one major political authority addresses a large audience about political issues. Each rhetorical act is a complex, interrelated whole that consists of four major parts: context and audience, speaker, message/speech, and consequences (Andrews 1991, Brock & Scott 1980). As a political phenomenon, rhetoric facilitates the interaction between the political leaders and their audiences. Each political message has a meaning which leads to political consequences. These consequences may affect not only the political communities but individual lives as well. Accordingly, political language can be used to produce both conflict and consensus; it can cause both empowerment and marginalization (Graber 1981).

Sensitive to the power which rhetoric lends to their agenda, politicians have always used rhetoric to manipulate people's beliefs in order to achieve their own political ends (Cassier 1946). Modern ethnic entrepreneurs also see rhetoric as a powerful strategic tool by which they can realize their own political agendas. They can accomplish their task through the process of politicization of ethnicity.

Politicization of ethnicity is a process by which ethnic differences are emphasized and then utilized by ethnic leaders to achieve political ends (Rothschild 1981: 2). Through the process of politicization, the psycho-cultural power of ethnicity can be turned into a source of hatred and stereotyping that can be ultimately mobilized into a confrontational form of nationalism. In these cases, the politicization of ethnicity can result in violent outcomes, i.e., ethnopolitical conflict. The mechanics of politicization and the institutionalization of ethnicity

may involve the use of different kinds of tools available to ethnic entrepreneurs. Political rhetoric can become an especially effective tool, and this analysis focuses on the role of rhetoric in this particular type of politicization.

Since Yugoslavia was a multiethnic state, leaders who would assume the role of the spokesperson of their nation or ethnic group could choose to respect the ethnic balance in order to preserve the multiethnic community, or ignore the balance by appealing only to the members of their own ethnic groups. (Burke 1969: 46) refers to this function of rhetoric as "identification-with and division-from". Rhetoric can be especially dangerous if the speaker chooses to instigate the fear of other ethnic groups who share the resources of the state. Since ethnic problems often exist in the context of economic and political crises, the leader has a choice of whether to deal with the problems in a productive or non-confrontational manner or to present problems as ethnic issues by creating fear and hate and directing major frustrations of his people against specific groups. When rhetors chose to use public argument to deceive and threaten violence, their political rhetoric ceases to be persuasion and becomes coercion (Burke 1982: 49).

Because of the power of political rhetoric, public speakers should ideally use the style of speaking which Graber (1981) refers to as "statesman's oratory." The essence of this style is to appeal to reasoned argument and intellectual explanation of the issues at hand, in moderate language without emotionally charged distractions, appeals to emotions and simplistic explanations and slogans (Graber 1981: 211).

In modern times traditional statesmen's oratory has become rare. In its place is a mixture of charismatic and demagogic rhetoric. The images in the rhetoric are meant to please the crowd and frequently to avoid the truth (Katope & Zolbord, 1970). This is especially true for individuals who speak out in a time of crisis. For these individuals, crises represent opportunities to be seized. They impose themselves as leaders through their rhetoric. They interpret and express the problems of their followers by using other ethnic groups as scapegoats for all of their problems. In situations in which speakers want to guide their audience to action, they take advantage of myths and other symbols whose power in creating and reinforcing social identity and sense of belonging cannot be stressed enough. Myths can serve as preparation for political action by unifying individuals into communities which share perceptions of a common heritage and common destiny (Cassier 1946, Smith 1991).

"Charismatic oratory" appeals to deeply held emotions and ideas shared by large numbers of people. Charismatic leaders and speakers derive their legitimacy from the fact that the public perceives them as people endowed with supernatural, superhuman, or exceptional powers or qualities (Weber 1968). The charismatic speaker seizes upon diffuse, and intense, but unarticulated sentiments and

articulates ideas and emotions in ways that make their audience feel they have a spokesperson who is expressing their most deeply felt needs. The audience identifies with such speakers and has faith in whatever they plead for (Graber 1981: 211).

"Demagogic" rhetoric also appeals to emotions, but on a baser level, with clear intent to stir prejudice, hatred, and bigotry. The appeals used by demagogues are opportunistic; their main goal is to make people believe what they want them to believe, thus leaving little room for truth and fairness. Overall, a demagogue is an unethical speaker who uses available social problems to advance his or her own personal position or goals (Graber 1981: 212).

The major concern of this study is the effects of Milošević's political rhetoric on the politicization of ethnicity. Great emphasis was put on the historical context of the selected speeches, because in order to understand the meaning of the political message, we must understand the situation in which the speeches took place. The following section, analysis of the speeches, is intended to help us understand the power of Milošević's rhetoric to influence and shape the events that contributed to the beginning of ethnopolitical conflicts on the Yugoslav territory.

ANALYSIS OF THE SPEECHES

The Context

At the beginning of the 1980s, Yugoslavia was experiencing complex political, social and economic crises which resulted in frustration, anger, and apathy among many people. In large sections of the public, especially in Serbia and Montenegro, there was a belief that disintegrative processes had destroyed the "former political, economic, cultural and spiritual unity and co-operation and brought Yugoslavia to the brink of decay" (Bilandžić 1985: 506). In Serbia, the conviction that only the Serbian people in Yugoslavia did not have their own state reawakened and became widespread. This time there was no Tito to suppress thoughts of what was historically seen as Serbia striving for hegemony and a centralist state. The drive to reform the political system toward some sort of recentralization came from the Serbian League of Communists (Ramet 1985).

By the mid-eighties, Kosovo was in almost constant crisis, and a factor of instability in Yugoslavia. The seriousness of the Kosovo crisis involved questioning the relationship between Serbia and the federation, and the destiny of Yugoslavia as a unified state. The Serbs and Montenegrins of Kosovo felt that their nation was in danger of extinction by Albanians who allegedly had pretensions to the sacred birthplace of the Serbian nation, where its greatest historical battles had

been fought. Kosovo was the region central to Serbian history and mythology, a source of Serbian heroic pride (Tijanić 1987). In April 1987, the Kosovo Serbs, led by the radical Šolević's "Kosovo Polje Committee," signed a petition denouncing their situation as an oppressed minority; they demanded action and warned the authorities that they would no longer tolerate what they termed "genocide" being carried out against their community (Jajčinović 1988a).

The Rhetor—Slobodan Milošević

Prior to his speech of April 24, 1987 when Milošević found his "populist voice," his career was not different from any other careerist who joined the Communist party. His political position could be described as that of a hard-line communist, a "true believer" in the cause of Communism. On the other side, people who worked close to him said that this "true believer" behavior was a pose, and that he used Communism, as did everybody else in Yugoslavia, primarily to gain power (Thurow 1991).

In November 1984, Slobodan Milošević, who just recently entered the political arena, became associated with the Serbian cause, and won the approval of the conservative faction in the League of Communists of Serbia. Milošević openly insisted on greater jurisdiction over the provinces, and called for more decision-making powers for federal organs, but he refused to call his stand on the issue a plea for centralism or unitarism. Milošević talked as a representative of all Serbs who were tired of being labeled "unitarists" whenever they actually strove for "unity" (Hopken 1985: 41).

Many analysts argued that Milošević did not have a program of his own, but that he had actually taken over the basic assumptions of the Memorandum of the Serbian Academy of Arts and Sciences (SANU), the document that provided the first definition of the Serbian national program which argued that Yugoslavia represented an inadequate solution to the Serbian nation. Serbian dissatisfaction originated form the division of Serbia which granted Vojvodina and Kosovo the status of autonomous provinces, while no other republic has been split in such a fashion. Soon after the Kosovo Polje speech, Milošević openly accepted Memorandum SANU as his program of action, striving to correct the mistreatment of Serbs (Thurow 1991, Djukić 1992).

The radical Kosovar Serbs who launched their campaign against Kosovo Albanian leadership in 1986, became useful to Milošević as organizers of meetings of solidarity. They invited Milošević to speak in Kosovo Polje in April 1987. Milošević willingly accepted the call of the Kosovo Serbs, and prepared well for the occasion–Television Belgrade was there, even though such events were usually covered by local television. Dušan Mitević, Deputy Director of TV Belgrade

described how he introduced Milošević as the leader of the Serbs: "We showed Milošević's promise over and over again on TV. And this is what launched him" (Silber & Little 1997: 39). In Kosovo Polje, Milošević spoke the words that transformed his image "from faceless bureaucrat to charismatic Serb leader" (Engelberg 1991: 32).

The Speech of Kosovo Polje, April 24, 1987[1]

At the meeting before his address, Milošević ordered the police to stop beating the people, "No one has the right to beat the people!" That gesture appeared as an encouragement to a Serbian crowd to assail an official structure, which in Kosovo was mostly Albanian. That sentence alone was very significant because the Yugoslav leaders of Milošević's rank did not encourage demonstrations of one ethnic group against another in such obvious terms.

Milošević delivered a speech that would later be characterized as legendary (Jajčinović 1988a). He was able to identify and express emotions that his public was feeling at the time. By saying, "Comrades, it is clear to all the people all over Yugoslavia that Kosovo is a great problem in our land and that it is being slowly solved," Milošević uttered aloud the words that were until then only whispered. He criticized the leadership of the Federation and the League of Communists as being indifferent to the Serbian issue. "In solving all these problems the League of Communists unfortunately has not always been united and, therefore also could not be sufficiently effective." His party vocabulary was interwoven with emotionally charged statements which were aimed at assuring people that he was aware and understood the seriousness of the problems affecting the Serbs of Kosovo:

The spirit of separatism and often of counterrevolution is still present in the process of education and training, and in cadre policy. The emigration of Serbs and Montenegrins under economic and political and simple physical pressure constitutes probably the last tragic exodus of a European population. The last time such processions of desperate people moved was in the Middle Ages.

Feeling that Kosovo's political problems reflected the feeling of abandonment fostered by Serbs and Montenegrins and that these problems had become psychological problems, Milošević touched something that was a taboo topic for many years: Serbian national pride (Tijanić 1989). Milošević said that "it has never been in the spirit of the Serbian and Montenegrin peoples to give up before obstacles, to demobilize when they should fight, to become demoralized when the going is

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1 This speech is published in Milošević's *Godine Raspleta*, (Beograd: BIGZ 1989), pp. 140-147. All the subsequent quotations are from this speech, unless noted otherwise.

difficult." These words provoked in his countrymen remembrance of their traditions of statehood and military prowess, particularly on the Allied side in both world wars. This entitled them, the majority of Serbs believe, to a position of at least "first among equals" in Yugoslavia (Moore 1988).

Milošević called on the Serbs to remain on their land, where their fields, their gardens, and their memories were. By saying, "Surely you will not leave your land because it is difficult to live there and you are oppressed by injustice and humiliation," Milošević reminded Serbs of their historical duties because with their departure they would "disgrace [their] ancestors and disappoint [their] descendants." And by leaving, they would implicitly validate Albanian claims to Kosovo as an Albanian land. Milošević expressed the emotions and grievances of his fellow Serbs at this time, and for that reason he was declared "the leader of all Serbs" (Jajčinović 1988b).

Speech Effects and the Context for the November 19, 1988 Speech

One of the most important consequences of this rhetorical event was the meteoric rise of Milošević as a proponent of the "Serbian initiative." The Serbs had finally found their long-desired political leader who promised to deal with their problems. The myth of Kosovo and Serbian unity established and maintained by Milošević (Tijanić 1989) served him well since the Kosovo Polje speech. He became the most popular and celebrated Serbian politician, recognized as a truly charismatic leader (Lovrić 1988a). The power his audiences granted to Milošević was one of the necessary prerequisites for the changes in the political and social system he wanted to inaugurate.

Upon returning to Belgrade, he began to carry out the promises made in Kosovo Polje. He fired the Kosovo chief of police, an Albanian. He took control of the Serbian media and reduced the once respected mass media into bellicose pieces of propaganda (Thomson 1994). This media tactic was in service of the most important political solution to the Serbian problem– the revision of the 1974 Serbian constitution and a sharp reduction in the autonomy of Kosovo and Vojvodina.

Although Milošević promised to solve the problems of his people, the period between April 1987 and November 19, 1988, was a period of deepening crisis for the Yugoslav federation. Conditions in Kosovo worsened–the tension between the majority ethnic Albanians and the minority Serbs and Montenegrins could scarcely improve under the strong one-sided propaganda of the Serbian media which promoted stereotypes of Albanians as separatists and irredentists. Kosovo became a paradigm for the unsolved problems and decay of the Yugoslav legal, political, and economic system.

For the first time in modern Yugoslav history, the masses on the streets were dominating the political landscape of the country. The so called "solidarity meetings," orchestrated by Milošević's supporters, presented Yugoslav leadership with the most serious threat because they proved the leadership's inability to deal with the inflammatory political situation. Hundreds of thousands of people waving flags and shouting slogans, such as "As long as Slobodan walks the earth the people will not be slaves to anyone," represented the "will of the people," as Milošević labeled them, and no one could oppose that will (Andrejevich 1988a). The height of mass rallies was in the summer of 1988. They were organized throughout Serbia proper, Kosovo, Vojvodina, and Serbian-populated Montenegro. In the fall of 1988, the organizers of meetings of solidarity staged *coup d'etat* in Vojvodina and Montenegro. One of the organizers of the meeting of solidarity in Novi Sad, Šćepanović, reveals that the removal of the Vojvodina government was not spontaneous event, but planned and "programmed....[i]t took only somebody to...direct the events" (Šćepanović 1988: 8).

The Slovene officials publicly blamed Milošević for open encouragement of the nationalist-inspired rallies and pressure tactics which "reminded many people of central Europe in the 1930s" when Hitler was rising to power (Andrejevich 1988b). Croatian media described these meetings as a pragmatic use of discontented masses for political ends (e.g.. *Danas* 1988, October 11).

Regarding constitutional changes in Serbia, the leadership asked that state security, national defense, foreign policy, and the planning and development systems of Kosovo and Vojvodina be constitutionally incorporated into Serbia's direct sphere of control. These changes were perceived in Serbia as indispensable in order for Serbia to become "one unified state" and as such to establish elementary law and order in Kosovo (Djindjic 1988).

The meeting of the Brotherhood and Unity at the confluence of the Sava and the Danube rivers in Belgrade was conceived to be "the meeting of all meetings," the crown of all the protest rallies and the meetings of solidarity with the Kosovo Serbs and Montenegrins that had taken place since the summer of 1988. The organizer, the Socialist Alliance of the Working People of Serbia, prided itself on organizing the biggest meeting in the history of Yugoslavia. Milošević's address was the most important item on the agenda for the meeting (Marinković 1988b).

THE SPEECH OF NOVEMBER 19, 1988[2]

The beginning, as well as the rest of the speech, was laden with appeals to emotions, especially with appeals to a glorious past of the Serbs. The appeals were utilized by Milošević to distract the audience from remembering his inability to keep up with his promises of resolving the Kosovo problem and of establishing a rich and just society for everyone.

Milošević's claim that the members of all Yugoslav peoples and nationalities gathered "in togetherness" was ethically questionable because the majority of the people at the meeting came from Serbia and Serbian-populated Montenegro. Their transportation was part of the

arrangement by the organizer of "the meeting of all meetings." He did not even mention that the date on which the meeting was held was the anniversary of the liberation of Priština from fascist occupiers (Marinković 1988). Having ignored the facts of importance for one nationality of Yugoslavia, Milošević's announced pro-Yugoslav policy became critically dubious.

Milošević's charisma was already established through his ability to articulate the needs and ideals of his fellow Serbs. To achieve the identification with the Serbian audience he only needed to play on the myth of Kosovo, which Milošević did in this speech as well, "The most important thing that we must resolve at this time is to establish peace and order in Kosovo."

The talk about Kosovo at this meeting was much fiercer than in Milošević's previous speeches. After accusing the rest of the Yugoslav peoples for not extending their solidarity "with the boundless suffering of the Serbs and Montenegrins in Kosovo... [which] represents an incurable wound to their hearts and to the heart of all of Serbia," Milošević quickly switched to another political tactic that Graber (1981) defines as "the use of language to spur or guide action" (Graber 1981: 207). Milosevic asserted,

But this is not time for sorrow: it is time for struggle. This awareness captured Serbia last summer and this awareness has turned into a material force that will stop the terror in Kosovo and unite Serbia... We shall win the battle for Kosovo regardless of the obstacles facing us inside and outside the country.

These militant words uttered in front of 1.3 million people were feeding the emotions and egos of the Serbs. However, the "awareness [that] has turned into a material force," that is, meetings of solidarity, were perceived by non-Serbian parts of the country as Milošević's tactic to increase his political power, and as such

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2 This speech is published in Milošević's *Godine Raspleta*, pp. 274-277. All the quotations below are from this speech unless otherwise noted.

did not bring forward a peaceful solution for Kosovo (Krušelj 1988). Therefore, Milošević's rhetoric did not correspond with the actions he was initiating as Serbian party leader.

To illuminate this point, let us turn to the part of Milošević's address which could be identified as "an appeal to Albanians." Milošević said, "I can tell Albanians in Kosovo that nobody has ever found it difficult to live in Serbia because he is not Serbian." The words Milošević uttered were very much contradictory to the reality for the Albanians in Kosovo. Since the middle of 1987, the Serbs were given special status, in order to prevent their emigration, while the Albanians were denied basic human rights. The Serbian media exaggerated violence in Kosovo, they projected an image of Albanians as chauvinists who wanted to take Kosovo from Serbia and attach it to Albania (Moore 1988). Since Milošević's ascent to power, Albanians were treated like second-rate citizens.

Moore (1988) charges that in this address Milošević used "vague, illogical, intolerant and aggressive" formulations that seem reminiscent of the rise of fascism in Central and Eastern Europe of the 1930s. Krušelj (1988) observed that in this address, Milošević used the word "struggle" 13 times and the word "freedom" seven times (Krušelj 1988: 10). His intention was to make the Serbs feel that they are victims and therefore should fight. Against whom and why Milošević explained in equally obscure language, "Serbia's enemies outside the country are plotting against it, along with those in the country."

The Effects of the Speech and Context for the Gazimestan Speech

In the Croatian media, this speech was characterized as a "warrior's address." The violent words uttered in Belgrade stirred emotions in the Yugoslav public. Milošević's rhetoric was perceived in Croatia and Slovenia as an open threat to Yugoslavia (Lovric 1989). Soon after this speech, the rest of Yugoslavia watched Milošević force out the last Albanian leader and take complete control of Kosovo. For six months after these changes Albanians protested, but their protests, unlike those of the Serbs, were treated as "counter-revolution" (Silber & Little 1997: 63).

The next Milošević's victory was a new constitution for Serbia that removed autonomy from the provinces. In March 1989, a new Serbian Constitution "that united Serbia" was proclaimed. The proclamation took place amid bloodshed after the Yugoslav federal Presidential body enacted a state of emergency in Kosovo. With the new constitution, Serbia was far more powerful than the other republics. By taking control over the provinces and Montenegro, it now had four votes in the eight-member federal Presidency. The Slovene leader Kučan especially feared the new powers of Serbia which meant turning Yugoslavia into "Serbo-slavia" (Zimmerman 1997: 49).

GAZIMESTAN SPEECH, JUNE 28 1989[3]

This speech is the celebration of many things, but mainly of the new Serbian constitution, which was the most important step in the creation of united Serbia. The celebration of the Six hundredth anniversary of the Battle of Kosovo Polje played a crucial role in releasing the nationalist passions of the Serbs. TV Belgrade, controlled by Milošević, devoted much time to the event, broadcasting it live and repeating Milošević's speech several times. The speech delivered in Gazimestan was the most obvious evocation of the Kosovo myth in building the unity of the Serbs and the celebration of Serbdom. The most cited sections of the long speech sent a disturbing message to other parts of Yugoslavia. This speech reflects his usual mixture of charismatic and dogmatic styles and is filled with emotional statements and little respect for historical truths.

The occasion of the speech gave Milošević the opportunity to yet again revive the myth of Kosovo, but this time, since his charisma was so complete, to criticize the disunity of the Serb leadership in 1389, and to use it as an allegory for contemporary problems.

If we lost the battle, it was due not only to the Turkish military superiority, but also to the tragic discord of the Serbian state. The discord, the evil fate, followed the people throughout its history . . . and later, in socialist Yugoslavia, when the Serbian leaders remained divided, prone to compromises at the expense of their people.

This message can be understood as a justification for the removal of the many officials from the Serbian leadership who did not agree with his hard-line policies in the creation of a unified Serbia: . . . "today we are in Kosovo to say . . . that such disunity does not exist."

These emotional messages that pictured Serbs as victims of their past, had a purging effect on the Serbian conscience burdened with the myth of the lost battle. In Milošević, they now found a leader who would restore their identity and remove the sense of guilt (*Politika*, June 28 & 29, 1989).

In this speech, Milošević repeats many of his emotional appeals to "Serbian bravery" and "generosity," again with little respect for historical truth, especially after the removal of Vojvodina, Montenegro and Kosovo leadership:

> Serbs in their history have never conquered and exploited others. Their national and historical being throughout history and two world wars has

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3 The speech of Gazimestan is published in *Politika* (June 29, 1989, pp. 1-3). All the subsequent quotations are from this speech, unless noted otherwise.

> been to liberate. They liberated themselves and when they could, they helped others to liberate themselves.

The largest portion of this speech is devoted to making the audience feel proud of their heritage, turning a defeat from 600 years ago into a source of pride, especially military pride, "the military which was not defeated even when it lost a battle," that would lead to future victories:

> Six centuries later we are in battles again. And facing new ones. They are not armed battles, though such battles should not be excluded yet.

The Serbs in the audience roared with approval. The rest of Yugoslavia was worried.

The Effects of the Speech

The TV spectacular at Gazimestan was designed to promote and strengthen the myth of Kosovo as the cradle of Serbian medieval culture and a foundation of Serbian national identity. The TV reporters reminded the Serbs how the territory which belonged to Serbia until 1974, was unjustly taken from Serbia. They commented how Albanians would sooner or later remove Kosovo from Serbia and unite it with Albania. Serbia, therefore, had to reestablish its authority over Kosovo. Once again, Milošević appealed to self-evident, justified and painful grievances of the Serbs, now victims in the heart of their own ancestral land, denied by Albanians their historic right to live where they belonged. By suggesting that he would stand up for the Serbs, Milošević essentially appealed to justice. Thus, when shortly after the Gazimestan celebration, the Serbian army and police were sent to Kosovo to abolish its political and cultural autonomy, many of Milošević's TV viewers believed that he was doing what had to be done to restore justice. Looking straight into TV cameras, Milošević appeared as a real hero (M. Milošević 1997: 110).

The result of the Gazimestan speech echoed beyond Serbia's borders. Now that the all Serbs of Serbia were united under one leader, they had to be "activated" in other parts of the former Yugoslavia. Milošević turned his attention to the Serbs of Bosnia and Croatia and to the Slovene "counterrevolution."

When Croat and Slovene authorities refused to accept Milošević's policies of domination, Milošević used the media to incite national hatreds and fears. As a strategy to forge and consolidate public support for his aggressive policy, Milošević's media campaign had no precedent in post-1945 Europe. The Kosovo campaign created a media model which was extended to incorporate other targets of the Serbian leadership. This model identified and stigmatized a national enemy, rallied and homogenized Serbs against this threat, and called for resis-

tance. After the Albanians in Kosovo, the enemies were Slovenes and Slovenia, then Croats and Croatia, then Bosnia and its Muslim population (Thomson 1994: 55-6).

Conclusion

For Milošević the politicization of ethnicity was one of the chief ways to achieve and solidify his power. He astutely understood the socio-cultural and political environment and administered his appeals in a way that was appealing to both the working class and to intellectuals. His speeches are a great example of communist orthodoxy, Serbian patriotism and calls to war. Always rich with hidden meanings and connotations, his speeches seemed to seek identification only with the Serbs while alienating other Yugoslav nationalities. Both his speeches and media propaganda encouraged the Serbs to see themselves as the tragic blameless victims in an international conspiracy to destroy the Serb people and their homeland.

A regular use of historical myths and symbols reflected Milošević's ability to harness the frustrations instilled in Serbs in post-World War II Yugoslavia. Working on the realization of his main goal, the establishment of Greater Serbia included the brutal removal of officials and a terror campaign over the Albanian minority in Kosovo, and later war in Croatia and genocide in Bosnia.

In a quest to establish Greater Serbia, and in turn provoke one of the most brutal ethnopolitical conflicts, the rhetoric of Milošević played an important role. The power of rhetoric was supplemented with institutional means. Milošević and his supporters constantly blocked the work of the Yugoslav presidential body by refusing to discuss the critical issues on the future of the Yugoslav federation with Slovenia and Croatia. The fear of Serbian tyranny hastened their moves to secede from Yugoslavia, which from that point existed only with the Serbs and in Milošević's rhetoric.

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ORIGINAL
SCIENTIFIC
ARTICLE

ROBERT K. SCHAEFFER

LAWS OF RETURN AND ETHNIC CLEANSING: THE CASE OF ERITREA AND ETHIOPIA

In 1992, the Provisional Government of Eritrea published a Nationality Proclamation that offered citizenship to ethnic nationals who lived abroad in Diaspora communities. This law, like the "Laws of Return" adopted by other countries (Estonia, Latvia, Lithuania, Israel, and Germany), was designed to encourage immigration, a legitimate purpose. But because this Laws of Return also denied non-national ethnic residents the same rights offered to immigrants, and encouraged the emigration or exit of non-national ethnic residents, it was also discriminatory, which contributed to acrimony and conflict among ethnic groups in Eritrea and also in Ethiopia. When war broke out between Eritrea and Ethiopia in 1998, the Eritrean nationality proclamation was used by governments in both countries to rationalize the unlawful expulsion of non-national ethnic residents, depriving them of their rights and deporting them into involuntary exile. In this context, the law because a weapon of war, a legal instrument of ethnic cleansing for regimes in both Eritrea and Ethiopia. This paper compares laws of return in different countries and examines how they have been used to manage ethnic relations and regulate migration, giving particular attention to the case of Eritrea and Ethiopia.

Keywords: citizenship, laws of return, ethnic conflict, partition

ZAKONI O VRNITVI IN ETNIČNO ČIŠČENJE: PRIMER ERITREJE IN ETIOPIJE

Leta 1992 je začasna vlada Eritreje objavila Razglas o narodnosti, ki je ponudil državljanstvo rojakom, živečim v diaspori. Ta zakon, kakor tudi "Zakoni o vrnitvi", ki so jih sprejele druge države (Estonija, Latvija, Litva, Izrael in Nemčija) je bil zasnovan z namenom vzpodbujati imigracijo, torej legitimnim namenom. Toda ker so ti zakoni hkrati odrekali prebivalcem države, ki so bili drugih narodnosti, enake pravice, kakor so jih ponujali imigrantom in so vzpodbujali emigracijo ali izselitev državljanov drugih narodnosti, so bili diskriminatorni, kar je prispevalo k nejevolji in konfliktom med etničnimi skupnostmi v Eritreji in tudi v Etiopiji. Ko je leta 1998 izbruhnila vojna med Eritrejo in Etiopijo, je razglasitev eritrejskega Razglasa o narodnosti služila vladama obeh držav, da sta uresničili nezakonit izgon državljanov drugih narodnosti, jim odvzeli njihove pravice in jih deportirali v neprostovoljno izgnanstvo. Tako je ta zakon postal vojno orožje, zakonito sredstvo etničnega čiščenja v režimih tako Eritreje kot Etiopije. Članek primerja zakone o vrnitvi iz različnih držav in raziskuje, kako so jih uporabljali za upravljanje etničnih odnosov in urejanje migracij, posebno pozornost pa posveča primeru Eritreje in Etiopije.

Ključne besede: državljanstvo, zakoni o vrnitvi, etnični konflikti, razdvajanje

In 1992, the Provisional Government of Eritrea published a Nationality Proclamation, which offered citizenship to ethnic nationals who lived abroad in Diaspora communities (Provisional Government of Eritrea 1992).

This law, like the "Laws of Return" adopted by other countries (Estonia, Latvia, Lithuania, Israel, and Germany), was designed to encourage immigration, a legitimate purpose. But because this Laws of Return also denied non-national ethnic residents the same rights offered to immigrants, and encouraged the emigration or exit of non-national ethnic residents, it was also discriminatory, which contributed to acrimony and conflict among ethnic groups in Eritrea and also in Ethiopia. When war broke out between Eritrea and Ethiopia in 1998, the Eritrean nationality proclamation was used by governments in both countries to rationalize the unlawful expulsion of non-national ethnic residents, depriving them of their rights and deporting them into involuntary exile. In this context, the law because a weapon of war, a legal instrument of ethnic cleansing for regimes in both Eritrea and Ethiopia. This development highlights the problematic character of laws of return. This paper compares laws of return in different countries and examines how they have been used to manage ethnic relations and regulate migration, giving particular attention to the case of Eritrea and Ethiopia. To appreciate how the Eritrean and other laws of return have been used to manage and mismanage ethnic relations, it is necessary first to review their origins.

THE ERITREAN NATIONALITY PROCLAMATION

In May 1991, after thirty years of war, Eritrean rebels (the Eritrean People's Liberation Front) and their Ethiopian allies (the Tigrean People's Liberation Front) overthrew the Mengistu regime in Ethiopia (Schaeffer 1999: 216-221). The Ethiopian insurgents who seized the capital agreed that Eritrea had a right to secede from Ethiopia (it had been annexed by Ethiopia in the 1950s) and that a referendum would be held in 1993 to determine whether Eritrean voters wanted to exercise that right and create an independent state. In the interim, the EPLF formed a provisional government to manage the country and prepare for the referendum, which they expected to result in a vote for independence. It was during this interim period that the provisional government passed the "Eritrean Nationality Proclamation."

The Proclamation, which identified individuals of Eritrean descent as "Eritrean" nationals, was designed to accomplish three related goals. First, it enfranchised Eritrean émigrés in Diaspora communities around the world, giving them the right to vote in the upcoming, 1993 referendum on Eritrean independence from Ethiopia. During the war, 750,000 Eritrean refugees fled into exile. Most of them—500,000—went to Sudan, and the rest scattered to Diaspora communities, some of

them in the United States (Pateman 1994: 230). When the three-day referendum was held in April 1993, resident voters in Eritrea and émigré voters in the Diaspora voted overwhelmingly for independence, leading quickly to the creation of an EPLF government, now with sovereign authority (Washington Post 1993).

Second, by offering citizenship to Eritrean émigrés living abroad, even to individuals who had become permanent residents or citizens of another country, the provisional government hoped to persuade them to "return" to Eritrea, where they might use their skills and education to help rebuild the country. The government also expected Eritrean immigration to increase the percentage of ethnic Eritreans living in the country. More than 80,000 émigré Eritreans returned, though it was difficult for the war-battered country to absorb them (Pateman 1994: 230).

The Proclamation also had a third purpose. It was designed to deny Eritrean nationality, and citizenship in the emerging state, to residents not of Eritrean descent, particularly ethnic Ethiopians. The law allowed individuals from non-Eritrean ethnic groups and nationalities to obtain citizenship, but only if they could meet stringent qualifying criteria. For example, they could claim citizenship only if they had resided in Eritrea before 1952 (paragraph 3.1), claim descent from someone who resided in Eritrea before 1934 (paragraph 2.2), demonstrate fluency in one of the languages of Eritrea (paragraph 4.2c), and had not "committed anti-people acts" (paragraph 4.2g). These provisions effectively prevented many residents, whom the government regarded as insufficiently "Eritrean," from obtaining citizenship. By preventing "Ethiopian" residents from acquiring citizenship, even if they had been born in the province or had long resided there, the law was designed to encourage or persuade them to emigrate, presumably to Ethiopia, because most of the non-Eritrean residents in the province were of Ethiopian descent or, more precisely, were descended from a wide variety of ethnic groups in Ethiopia.

In effect, the Proclamation offered rights to émigrés (some of the refugees, some permanent residents or citizens of other countries) that were not extended to residents, even it they had been born in the province. The Proclamation discriminated in this fashion because the provisional government wanted to encourage the immigration of "Eritreans" and the emigration of "Ethiopians." The Eritrean government used the unequal distribution of rights both as a carrot (for Eritrean émigrés) and a stick (for Ethiopian residents). As such, it should be understood not simply as a citizenship law, but as a measure designed to regulate ethnic relations and manage migration.

LAWS OF RETURN COMPARED

This kind of law is common in some other "divided states," countries that have been partitioned by international agreement (Korea, China, India, Palestine, and Germany) or by indigenous forces (Pakistan, Czechoslovakia, Yugoslavia, the Soviet Union, and Ethiopia) (Schaeffer 1990, Schaeffer 1999). The Eritrean Nationality Proclamation is very similar to legislation adopted by Baltic states in the early 1990s, and similar in character to laws adopted earlier by Israel and West Germany.

In the Baltics, newly independent governments in Estonia, Latvia, and Lithuania quickly extended citizenship to ethnic émigrés living abroad, even if they possessed citizenship in another country. But they withheld citizenship from ethnic Russians, even if they had been born in one of these countries. In Latvia, laws made it impossible for ethnic Russians to vote, own land, bear arms, or hold civil service jobs (Grigorievs 1996: 126-128). The 1991 law provided for the naturalization of non-citizen residents, but established a quota on admissions, limiting them to only 2,000 annually (Grigorievs 1996: 126). Quotas were eased in 1994 as a result of intense international and diplomatic pressure, but ethnic Russians still had to meet difficult residency and language tests to be naturalized (Erlanger 1994). Laws in Estonia and Lithuania were less stringent, but nonetheless raised substantial barriers to citizenship for ethnic minorities, Russians among them (Grigorievs 1996: 136). In Estonia, only 5,948 non-citizen residents were granted citizenship in the first year, this from an ethnic Russian community numbering 400,000 (Grigorievs 1996: 128).

The President of Latvia explained his country's policy by asking a Latvian-born Russian journalist, "Why do you think you have a right to call Latvia your homeland just because you were born here? For that...you need to have deep hereditary roots in the country (Laitin 1999: 303)."

In the Baltics, as in Eritrea, legislation was designed to facilitate the "return" of ethnic émigrés and speed the departure of ethnic Russians. In Latvia, 1,000 ethnic Russians were involuntarily deported, many separated from spouses, parents, or children (Grigorievs 1996: 128). Human rights groups condemned Baltic legislation, as have Russian officials. For example, Helsinki Watch wrote, "No one denies that the Baltic governments have the right to adopt citizenship laws, yet special consideration should be given to Russians and others who moved to the Baltic states at a time when the Soviet republics were all one country," and that Russian residents "should be presumptively eligible for citizenship, whether [or not] one views the Soviet presence...as an illegal occupation (Schaeffer 1998: 57-58).

In Israel, the 1950 Law of Return identified individuals of Jewish descent as nationals and provided them the right to immigrate and claim citizenship in the

state, even if they possessed citizenship in another country. Jewish individuals with U.S. citizenship have used this law to travel to Israel, vote in Israeli elections, and then return to their residence in the United States (Schaeffer 1990: 166). But the Israeli government did not extend these same rights to non-Jewish residents, requiring them instead to meet difficult criteria before they can be naturalized. The 1950 Absentee Property Law is the domestic counterpart to the Law of Return. It disenfranchised any Arab-Palestinian residents who were away from their homes on or after November 29, 1947, a time when the first Arab-Israeli war was being fought (Schaeffer 1990: 165-166). Together these laws encouraged the entry of ethnic Jews and facilitated the exit of Arab Palestinians.

West Germany also adopted laws extending citizenship to individuals of German descent who lived in Eastern Europe and the Soviet Union (Grigorievs 1996: 121). The West German government, like governments in the Baltics and Israel, grant citizenship on the basis of *jus sanguinis* (ancestry) rather than *jus soli* (place of birth and domicile) (Grigorievs 1996: 121, Schmidt 1999: 92-101, Payton 1999: 29). Government officials adopted the law not because they wanted to encourage German immigration but instead because they wanted to accommodate ethnic Germans who were being involuntarily exiled by Eastern European and Soviet governments after World War Two. But while the West German government was hospitable to ethnic German émigrés, providing them with citizenship and also financial support (the government even paid ransoms to the East German government to allow dissidents to emigrate), they were not welcoming to other non-German émigrés (Schaeffer 1997: 183). Official policy effectively denied citizenship to resident Turks and other "guest workers," who were imported to work but not permitted to become citizens (Grigorievs 1996: 121).

LEGITIMATE AND PROPER FUNCTIONS

If these various laws of return, which have some common elements but also some distinctive features, provided only that émigré nationals in Diaspora communities could claim citizenship if they voluntarily immigrated to their "homeland," they would be unobjectionable. After all, most countries have immigration laws designed to encourage or facilitate the entry of select groups. The United States, for example, permits the immigration of particular individuals—relatives of citizens, applicants from certain geographic regions and from some states (Cuba), as well as refugees and asylum seekers who have been persecuted individually or as a member of a group. This is properly regarded by the international community as a legitimate function of sovereign states.

But these laws of return are not regarded as legitimate, either by the U.S. government or the international community, if they are used to deport or expel citi-

zens of one country to another that claims them as nationals. The United States, for example, has never used the Israeli Law of Return as the basis for deporting a U.S. citizen of Jewish descent without their consent, or deprived them of their citizenship if they took advantage of rights afforded them by Israeli law. In other settings, the United States and Western European governments condemned the attempt by Serbs in Yugoslavia to expel ethnic Albanians from Kosovo, and later opposed efforts by ethnic Albanians in Kosovo to expel ethnic Serbs from their homes in Kosovo after the U.S.-NATO war with Yugoslavia ended.

Nor have these laws of return been regarded as legitimate if they deprived residents of their citizenship and exiled them from their domicile without the individual's consent. The Israeli practice of deporting non-Jewish residents into involuntary exile has frequently been condemned by members of the international community, the U.S. government among them.

Involuntary exile is a practice that has been widely condemned as a violation of human rights and international norms. For example, after World War Two, ethnic Germans were forced to give up their citizenship, emigrate from countries in Eastern Europe and the Soviet Union, and "return: to Germany, even if they had lived outside Germany for generations. Given the animosity incurred by Nazi annexation, invasion, and occupation before and during World War Two, this was not surprising. But even so, governments in some countries now admit they erred in deporting resident Germans. In 1997, for example, the Czech government officially apologized to the German government for the involuntary expulsion of three million Sudenten Germans after World War Two (Whitney 1997).

Although laws encouraging voluntary migration are a legitimate function of sovereign states, laws of return should be regarded as improper because they have four faults. First, they are discriminatory. They do not extend to non-ethnic residents the same rights given to émigrés who are identified as ethnic nationals. Residents who are denied citizenship are frequently denied the right to vote, bear arms, serve in the army, own property, hold public office, or claim important public benefits. They become "denizens" or "subjects," not citizens (Schaeffer 1999a: 11).

Second, they erect substantial legal barriers to citizenship, establishing criteria that make it difficult for non-national residents to qualify for citizenship, even if they lived in this country for years, even if they were born there. Residency requirements and language tests—which have been given in countries where now-official languages were not used as the language of instruction in public schools for many years—are substantial and discriminatory barriers to citizenship. The latter impost the kind of test used by states in the U.S. South to bar African-Americans from voting during the Jim Crow period (1890-1054).

Third, these laws are arbitrary and capricious. Because these laws base citizenship on "blood" or "ancestry," not on "soil" or "domicile," and extend citizenship primarily n the basis of one's ethnic-racial identity, it is difficult for officials to determine empirically the actual ethnic identity of a given individual. This difficulty is particularly evident for the offspring of "mixed" parents. But it is also evident for people who regularly migrated across "borders" or established residency in different places during their lifetime. Because it is difficult to determine empirically the actual ethnic identity of a given individual, officials regularly adopt arbitrary or capricious classifications and determinations to assign identity. Race-based laws in the United States and South Africa (as well as Nazi Germany) were criticized and eventually withdrawn because they were, at bottom, unreliable and arbitrary, as well as objectionable. The use of race-based criteria in laws of return to determine an individual's "real" national identity leads to arbitrary and capricious rulings by government officials in countries that apply them.

Fourth, these laws make retroactive claims to sovereignty and citizenship. Although states in Eritrea and the Baltics became sovereign only in the 1990s, governments there claim that the territories now defined as Eritrea or Latvia were always in their possession, even though for many years these territories were recognized as part of another country (Ethiopia; the Soviet Union). But this is rather like saying that the Russian "owners" of a house in Latvia between 1940 and 1991 were really "renters," even though they possessed a title deed recognized as valid by an international court. This is a dubious legal assertion.

In Eritrea, the government in effect denies to Ethiopian residents the legal standing given them not only by the Ethiopian state but also by the international community, which recognized the sovereign authority of Ethiopia in Eritrea for many years. The U.S. government was one of many countries, as well as the United Nations, that recognized Ethiopian sovereignty in Eritrea. The U.S. government's 1953 decision to lease military bases in Eritrea from Ethiopia (the lease expired in 1978) indicated that U.S. officials regarded Eritrea as part of Ethiopia throughout this period, and recognized its inhabitants as "Ethiopian." To argue now that Eritrea was not part of Ethiopia, and that non-Eritrean residents cannot lay any claim to it, is an attempt to deny Ethiopian tenure and assert sovereign powers that the Eritrean government did not, until recently, possess. Moreover, the Eritrean government first asserted its rights even before it possessed sovereign power (the provisional government adopted the Nationality Proclamation before the 1993 referendum conferred it with sovereign authority), so it can be faulted for making both retroactive and premature claims.

PARTITION, CONFLICT, AND JURIDICAL ETHNIC CLEANSING

When the provisional government in Eritrea first issued the 1992 nationality proclamation, it was uncontroversial. After all, the Eritrean and Ethiopian insurgents that had recently seized power were close allies, with many common bonds. Both regimes were organized by Marxist-Leninist political parties, and together they had formed a political-military alliance that enabled them to defeat and overthrow the Mengistu regime in Ethiopia. Both were preoccupied with the reconstruction of a poor region devastated by thirty years of war. Under these conditions, little attention was paid to the proclamation. But the subsequent partition of Ethiopia, which occurred after Eritrean voters approved the referendum for independence in 1993, created problems that changed these conditions and gave the proclamation a new, more problematic meaning.

After Ethiopia was partitioned, the two successor states encountered problems that have been common in other "divided states." Generally, when countries have been partitioned, three problems have emerged. First, partition typically triggered large-scale, voluntary and involuntary migrations across newly created borders (Schaeffer 1999: 98-104). In India, for example, 17 million people moved across the newly drawn Indo-Pakistani borders in the six months after partition in 1947 (Schaeffer 1999: 99). But massive migrations did not wholly redistribute people to the states "assigned" to them by partition agreements. Large numbers of people simply refused to move, even after violent campaigns were mounted against them. So today, for example, as many "Moslems" live in "Hindu" India as live in Pakistan, an "Islamic" state.

Second, governments in divided states typically discriminated against residual minorities, frequently denying them citizenship. Laws of return were just one expression of this practice (Schaeffer 1999: 97-130). By doing so, governments compromised the meaning of citizenship and democracy. This development has frequently led to internal conflict, insurrection, and sometimes civil war. The "Troubles" in Northern Ireland, the "intifada" in Israel's occupied territories, and irregular war in the Kashmir of India emerged because ethnic minorities were denied important civil rights.

Third, the governments of divided states have frequently disputed the territories assigned to them as a result of partition, challenged the sovereign authority of their neighbors, and quarreled over borders and international recognition (Schaeffer 1999: 131-144). This has led to acrimonious disputes and interstate wars, which have sometimes provoked military intervention by great powers and the international community (Schaeffer 1999: 145-176). Wars in the Koreas, Vietnams, Indias, between Israel and its neighbors, and between successor states in Yugoslavia have all resulted from the problems associated with partition.

As in other divided states, these three problems soon emerged in Eritrea/Ethiopia. At the conclusion of the war, the migration of released POWs, refugees, exiles, and persons displaced by the fighting created new burdens for governments and international relief agencies in both countries. In Eritrea, the new regime summarily expelled 70,000 "Ethiopian refugees," though the term refugee was used to describe and justify the deportation of long-term residents of Ethiopian descent (Hamburg 1992). Of course, there was also considerable voluntary migration. Thousands of people moved in both directions across the newly drawn border. But despite these voluntary and involuntary redistributions, large numbers of "Eritreans" continued to reside in Ethiopia and considerable numbers of "Ethiopians" remained in Eritrea, a familiar pattern in divided states.

Second, both regimes discriminated against residual minority populations, denying them important political and social rights. Of course, this was due in part to their authoritarian character. Except for the 1993 referendum that established its sovereign authority, the Eritrean regime has not held promised elections or permitted the formation of opposition political parties, particularly those that seek to represent ethnic minorities (Bureau of Democracy 2000). In Ethiopia, meanwhile, the regime held elections in 1995, but they were boycotted by opposition parties, most of them identified with ethnic groups that were not represented in the government (Bureau of Democracy 2000a).

Third, because the two regimes did not negotiate a process to address their collective problems with respect to migration, citizenship, and sovereignty as they divided, they were unable to develop comprehensive policies or judicious practices to address these issues or solve disputes. This lead in the mid-1990s to an estrangement of the two wartime allies. These ongoing difficulties were compounded in the late 1990s by a territorial dispute over their common border in the Badme region. This dispute over sovereignty led in 1998 to the outbreak of war between Ethiopia and Eritrea. Tens of thousands of people were killed in the conflict, which continued until December 13, 2000, when an armistice brought an end to the fighting (Fisher 1999, Associated Press 2000, New York Times 2001).

After the war broke out, the Ethiopian regime took advantage of Eritrea's nationality proclamation and used it as a rationale to justify the expulsion of Ethiopian citizens of "Eritrean" descent. According to the U.S. State Department, Ethiopian officials arrested, detained or imprisoned 67,000 Ethiopian citizens and forced them across the seven-mile-wide, no-man's-land between the two armies (Bureau of Democracy 2000a). They did this despite constitutional prohibitions against involuntary exile (Bureau of Democracy 2000a). Another 1,200 Ethiopians of Eritrean descent were held in internment camps and local police stations, and adults who had voted in Eritrea's 1993 referendum were required to register with

the Security, Immigration, and Refugee Affairs Authority (Bureau of Democracy 2000a).

In retaliation, the Eritrean government expelled another 1,000 "Ethiopians" from Eritrea, removed 2,000 ethnic Ethiopians from their homes near the border, and moved them into internment or refugee camps (Bureau of Democracy 2000). A small number of ethnic Ethiopians were also taken into police custody after they had been assaulted by Eritrean mobs (Bureau of Democracy 2000).

As a result of these and earlier developments, governments in Ethiopia and Eritrea had detained, deported, or relocated roughly equal number of ethnic minorities: 68,200 "Eritreans" by Ethiopia; 73,000 "Ethiopians" by Eritrea. For both regimes, the 1992 Eritrean nationality proclamation was used to justify their actions. In this context, the proclamation acquired a new meaning. It had become a weapon of war, an instrument of ethnic cleansing, for both regimes. It was used by both governments to identify and deport citizens or residents as "enemy aliens." By depriving residents of citizenship and deporting them to a belligerent country, governments in both countries violated human rights.

There was also a wider, international dimension to this issue. Many émigrés from Eritrea and Ethiopia live outside the region, many in the United States. Because it was difficult for them to immigrate legally or establish legal residency in the United States, some faced deportation proceedings. For Ethiopians of *Eritrean* descent, U.S. courts deported them to Ethiopia because they held Ethiopian passports. But if they were deported by the United States to Ethiopia, they were subject to detention and deportation by the Ethiopian government because they were of Eritrean descent. Then, if they were deported to Eritrea, they were subject to detention by the Eritrean government, which might not have regarded them as sufficiently Eritrean to qualify for citizenship under the 1992 Nationality Proclamation. In those cases, they were deported, for a third time, because the Eritrean government regarded them as "Ethiopian" (largely because they held "Ethiopian" passports). Alternatively, the Eritrean sometimes naturalized these twice-deported refugees. But if they were naturalized, they might have been drafted to serve in the army of a country at war with their "homeland" (Ethiopia), and subjected to military discipline if they refused. Of course, émigré Eritreans of "Ethiopian" descent faced the same problem: successive deportations from the United States, Eritrea, and Ethiopia.

For émigrés who were associated with the Mengistu regime, which was overthrown in 1991, be they "Eritrean" or "Ethiopian," the problem of successive deportations was compounded by the risk of arrest and imprisonment for collaborating with or participating in the Mengistu dictatorship, what Eritrean law describes as "anti-people acts." Some individuals arrested for collaboration or political crimes in Ethiopia have been held in custody for eight years awaiting trial

(Bureau of Democracy 2000a). A smaller number of civilian political prisoners have been held for some years in Eritrea, where they have been subjected to trial by military courts (Bureau of Democracy 2000).

As a result of these developments, when the United States and other countries deported ethnic Eritreans and ethnic Ethiopians from émigré communities in the Diaspora, they participated, knowingly or unwittingly, in a process that contributed to the violation of human rights and a form of juridical ethnic cleansing.

There is also a related problem. Others states possess laws that are much like Eritrea's nationality proclamation. It is quite possible that they too might be used to rationalize, justify, or sanction ethnic cleansing by states outside the country where they originated. As the Eritrean/Ethiopian case illustrates, the law, which was originally designed to manage ethnic relations in Eritrea, was not only mismanaged by the Eritrean regime but also by the Ethiopian regime and by third-party countries outside the region, who may have been unfamiliar with its application in the Horn of Africa. Where laws of return exist, the potential for similar problems is substantial.

This is particularly evident in Israel and the occupied territories, where the Palestinian Authority has some responsibilities. In negotiations with Israeli leaders in 2000, Palestinian officials argued that the hundreds of thousands of Palestinians who had been forced from their homes during the 1948 war should be given a "right to return" to their original homes in Israel (Wilkinson 2001, Oz 2001). This proposal, for a Palestinian version of Israel's Law of Return, became a major obstacle to negotiations and contributed to the fall of the Israeli government led by Ehud Barak in the February 2001 elections. The Palestinian proposal differed from the Israeli Law of Return in one important respect, because it would have provided ethnic Palestinians the right to return to a state (Israel) in which the Palestinian Authority had no legal standing. It was not clear whether the Palestinian proposal would also have given Jews the same privilege, the right to return to any Palestinian state that might come into existence. But it is clear that the existing (Israeli Law of Return) and the proposed (the Palestinian Law of Return) laws of return greatly complicated efforts to reach a negotiated settlement between the two parties. As was the case with the Eritrean proclamation, the rights given by the Israeli Law of Return have been used by other political authorities in ways that its original authors and contemporary defenders did not imagine. This suggests that efforts to manage ethnic relations using "laws of return" be given careful scrutiny.

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ORIGINAL
SCIENTIFIC
ARTICLE

PETER LAVSKIS

The Rhetoric of Australian Reconciliation

This paper argues that at a rash and impossible promise by Australia's Prime Minister to compete a treaty between the government and Aborigines, in the next two years, resulted in a ten year long process replete with rhetoric which replaced the promised treaty with a process of reconciliation. The conclusion is that this misguided process achieved no benefit for its intended target so that eventually even the concept was redescribed as "practical reconciliation" according to which any improvement in the lives of Aboriginals is attributed to it. The bulk of this paper deals with attempts by indigenous bodies and the government appointed council trying to salvage something of advantage out of the process which has been legislated and funded but whose core meaning was unclear except in so far that its outcome would be seen as having removed Aboriginal disadvantage. The story of that reconciliation process is remarkably similar to another ten yearlong campaign to improve the prospects of Australia's Aboriginals: a change in Australia's constitution removed the prohibition on legislating over Aboriginals. A ten-year public campaign had given the government new powers, which weren't used for over twenty years and then were used to disadvantage Aboriginal interests.

Keywords: reconciliation process, aboriginal, referendum, treaty

Retorika avstralske sprave

Članek dokazuje, da je nepremišljena in neizvedljiva obljuba avstralskega premiera, da bo v naslednjih dveh letih sklenil sporazum med vlado in Aborigini, imela za posledico desetleten proces, poln razpravljanja, ki je nadomestil obljubljeni sporazum s procesom sprave. Sklep je, da ta zgrešeni postopek ni prav nič prispeval k dosegu postavljenega cilja, tako da je bila končno celo zamisel sama na novo opredeljena kot "praktična sprava", kateri naj bi bilo pripisano vsakršno izboljšanje v življenju Aboriginov. Glavnina tega članka se ukvarja s poskusi staroselskih organov in vladnega sveta, da bi potegnili vsaj nekaj prednosti iz procesa, ki je bil uzakonjen in finančno podprt, a je bil njegov bistveni pomen nejasen, razen glede tega, da bo videti, da je njegov rezultat izboljšal položaj Aboriginov. Zgodba tega spravnega procesa je presenetljivo podobna neki drugi desetletni kampanji za izboljšanje prihodnosti avstralskih Aboriginov: sprememba avstralske ustave je ukinila prepoved izdajanja zakonov o Aboriginih. Desetletna javna kampanja je dala vladi nova pooblastila, ki jih niso uporabili več kot dvajset let in so jih potem uporabili v nasprotju z interesi staroselcev.

Ključne besede: spravni proces, staroselci, referendum, sporazum

Anyone visiting Australia for the 2000 Olympics, who sought to learn how Australia was managing ethnic relations with its indigenous population, need only turn their attention to particular features of their surroundings: the prominence of indigenous Australians in the Olympic opening ceremony; an Aboriginal tent embassy in a city park; an Aboriginal media centre aimed at informing foreign media (20,000 reporters) of how Aboriginal Australians live; press coverage of the process of Reconciliation.

This year has seen unprecedented activity on a number of diverse positions on Aboriginal entitlement, obligation from the non-indigenous population, the historical facts, responsibility for the present disadvantage of Aboriginals and the best way of redressing it. Parliament, newspapers, radio talk-back, television documentaries, and public gatherings have debated facts surrounding the stolen generation, the Prime Minister's refusal to apologise to the Aboriginal people, a UN committee's criticism of Australia's actions over its indigenous population, Australia's immediate withdrawal from that committee system, the continuation of mandatory sentencing, and Aboriginal disadvantage in life expectancy, health, imprisonment, especially in comparison with the indigenous peoples of Canada, New Zealand and the USA. Policy on Native Title, Land Rights and a veto on mining exploration on Aboriginal land is undergoing change and has led to the resignation of the shadow Minister for Aboriginal Affairs.

> On the 28th of May 200,000 people marched across Sydney Harbour Bridge in a gesture of solidarity with the Aboriginal cause. That was just one of over one hundred and seventy items in the Reconciliation Events Calendar for May-Jun 2000 in the Sydney area. A small sample of activities (about 30%) includes the following: music and song & dance which explores the conflict & sadness of a convict past, the suffering and survival of Aboriginal people, the grandeur and wildness of the landscape and the voices of animals; indigenous dance groups; documentaries and dramas dedicated to indigenous issues; vigil honouring the stolen generations; Journey of Healing 2000 Concert; student rally re mandatory sentencing; Journey of Healing Fire Ceremony; Indigenous Film Festival: Sand to Celluloid; Series Biennale Symposium "Truth and Lies"; unveiling of the Aboriginal Flag Plaque; art history lecture "Mythologising the Landscape". Another thirty similar events took place all over Australia. They and others are listed on a calendar of events (Reconciliation Events Calendar 2000)

Public support for Reconciliation is near universal, certainly over 90% and comparable to the mood in 1967 when over 90% of Australians supported a referendum to enable the federal government to pass legislation that would advantage Aboriginals. It is near impossible to find anyone to speak against Reconciliation, and it is just as rare to find anybody able to adequately explain what it is. Not for

the first time, the Australian public, the media, opinion leaders, and Aboriginal groups are solidly behind a worthy cause, this time, Reconciliation.

The official program of Reconciliation came into existence because in 1988 the then government found itself enmeshed in a political problem of its own making: in June 1988 the then Prime Minister, Bob Hawke committed his government to completing a treaty with Aborigines. It was a solemn promise and included a completion date, 1990. Aboriginal leaders have never ceased working towards a treaty in international forums. They shared in the development of the UN Draft Declaration on the Rights of Indigenous Peoples. Indigenous representatives have engaged with national policy-makers and legislators to insist upon recognition of the right of self-determination. They view Canadian treaties as possible models for Australia.

The Prime Minister was well practiced in reneging on his promises, usually by saying that circumstances had changed and therefore it would be foolish to act against the public interest just for the sake of keeping a promise, but this promise had attained such a level of expectation that it couldn't just be abandoned without serious political damage.

Instead of directly addressing the question of a treaty the government embarked on a properly structured and funded ten year plan to improve relationships between Aboriginal and Torres Strait Islander peoples and the wider Australian community. In 1991 the Australian parliament established the Council for Aboriginal Reconciliation with unanimous cross-party support. The Council for Aboriginal Reconciliation is a statutory authority (Council for Aboriginal Reconciliation Act 1991). The legislation stipulates that the Council will cease to function on 1 January 2001 - the centenary of Australian federation.

The Council's vision statement for the society it hopes to see at the centenary includes:

> a united Australia which respects this land of ours, values the Aboriginal
>
> and Torres Strait Islander heritage and provides justice and equity for all.

The preamble to the Council for Aboriginal Reconciliation Act 1991 provides at least a hint of some kind of formal relationship, but not a treaty. The relevant statements are:

> there has been no formal reconciliation between Aborigines and Torres
>
> Strait Islanders and other Australians; and
>
> by the year 2001, the centenary of Federation, it is most desirable that
>
> there be such a reconciliation

The only mention of a treaty appears in the Council's documents brochure where it explicitly states, "The document of reconciliation is not a treaty, nor will it prevent discussion of a treaty.". The word 'Reconciliation' is not used in its primary meaning. The Shorter Oxford dictionary gives eight meanings for 'reconcile' and it isn't until the seventh and eighth that it has a meaning like what is in the 1991 act. The first six involve restoration to some pre-existing state or relationship.

There is also some uncertainty to what extent Reconciliation is a process or an outcome. A survey of 58 university students, who were asked "What is Reconciliation?" produced a wide range of answers which showed that ten years of publicity has penetrated their consciousness. Answers related to recognising rights, acknowledging past injustices, bringing people together, understanding prior ownership, valuing native culture, and accepting the need to eliminate economic disadvantage.

But there is precise instruction on how the ten-year Council for Aboriginal Reconciliation Act is to be applied in terms of its rationale, functions, structure, and funding.

Some of Council's functions, as set out in the legislation (Council for Aboriginal Reconciliation Act 1991). are:

(a) to undertake initiatives for promoting reconciliation, particularly at community level;

(b) to promote, by leadership, education and discussion, a deeper understanding of the history, cultures, past dispossession and continuing disadvantage of Aboriginal and Torres Strait Islander peoples and of the need to redress that disadvantage;

(c) to foster an ongoing national commitment to cooperate to address disadvantage;

(d) to provide a forum for discussion by all Australians of issues relating to reconciliation, and of policies to be adopted by Commonwealth, State, Territory and local governments to promote reconciliation; and

(j) to develop strategic plans that include a statement of the Council's goals and objectives in the promotion of the process of reconciliation and of its strategies for achieving them, together with indicators and targets for measuring the Council's performance in relation to those goals and objectives.

The Council's Secretariat is located in the Department of Prime Minister and Cabinet. Staffing information is included in the Department's Annual Report. The salary costs of the Aboriginal Reconciliation Unit come from within the sala-

ries allocation of the Department. In 1992-93, its first full year of operation, the Council had a budget allocation of $4m.

The end product of the Council's work is to be a Declaration for Reconciliation together with recommendations for implementation to be presented to the Minister who is required to deliver a copy to each House of the Parliament within 15 sitting days of that House after they are made to that Minister.

In this tenth and final year of the Council for Aboriginal Reconciliation Act 1991, the Council has produced the "Draft Declaration for Reconciliation":

> Speaking with one voice, we the people of Australia, of many origins as we are, make a commitment to go on together recognising the gift of one another's presence.
>
> We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of traditional lands and waters.
>
> We respect and recognise continuing customary laws, beliefs and traditions.
>
> And through the land and its first peoples, we may taste this spirituality and rejoice in its grandeur.
>
> We acknowledge this land was colonised without the consent of the original inhabitants.
>
> Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.
>
> And so we take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives.
>
> Our new journey then begins. We must learn our shared history, walk together and grow together to enrich our understanding.
>
> We desire a future where all Australians enjoy equal rights and share opportunities and responsibilities according to their aspirations.
>
> And so, we pledge ourselves to stop injustice, address disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples to determine their own destinies.
>
> Therefore, we stand proud as a united Australia that respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all.

The Council's plan for the continuation of the reconciliation process beyond 2000 requires the recognition and protection of the Declaration of Reconciliation in the constitutions of the Commonwealth, States and Territories and necessitates the foundation of a statutory body, to be called RECONCILIATION AUSTRALIA, to oversee the implementation of its "National Strategies to Advance Reconciliation". The actual strategies are very detailed. What follows is a very brief selection from a summary of a draft:

A National Strategy for Economic Independence will facilitate greater economic independence and self-reliance in the lives of Aboriginal and Torres Strait Islander peoples. It seeks to empower Aboriginal and Torres Strait Islander peoples and promote their human dignity. This strategy recognises that economic empowerment will not occur through welfare programs. The strategy will achieve its greatest success when it is built on partnerships between all sectors. This strategy would include:

1. better access to capital, business planning advice and assistance;
2. increased networking and mentoring opportunities;
3. better access to training and development opportunities;
4. promotion and encouragement of Aboriginal and Torres Strait Islander small business;
5. greater strategic and integrated regional economic development plans;
6. fostering partnerships with the business community; and reform of current government economic and funding programs for Aboriginal and Torres Strait Islander peoples.

A National Strategy to Address Aboriginal and Torres Strait Islander Disadvantage aims for better outcomes in health, education, employment, housing, law and justice. Its objective is to achieve social and economic conditions for Aboriginal and Torres Strait Islander peoples which are the same as those enjoyed by other Australians. This strategy will get better outcomes from government and non-government services. It builds on the National Strategy for Economic Independence.

Reconciliation requires practical and real steps to target the disadvantage experienced by Aboriginal and Torres Strait Islander peoples as a result of past injustices. Statistics show that they are the poorest, unhealthiest, least employed, worst housed and most imprisoned Australians.

This strategy will be based on partnerships between Aboriginal and Torres Strait Islander peoples, governments, the business sector and service organisations. It will set out mechanisms to measure progress and report publicly.

A National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights will be based on the principles that all Australians should share equal rights and responsibilities as citizens; should be able to participate, as they choose, in all levels of decision-making on matters which affect them and their communities; and should enjoy equal social and economic conditions, according to their aspirations.

The strategy will recognise the unique status of Aboriginal and Torres Strait Islander peoples as the original custodians of Australia, their continuing cultures and heritage, and their rights under the common law. It will recognise the unique relationships of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters and the importance of traditional land management knowledge in sustaining the natural environment. The strategy will also recognise Aboriginal and Torres Strait Islander peoples' continuing aspirations for greater recognition and self-determination within the framework of the Australian Constitution, and will propose strategies for increased representation in Australian parliaments.

A National Strategy to Sustain the Reconciliation Process will build on the existing peoples' movement for reconciliation. It will promote knowledge and understanding of the history of Australia's colonisation and will assist Australia to celebrate the diversity of the origin of its peoples. It will acknowledge the cultural, social and economic contributions made by Aboriginal and Torres Strait Islander peoples to the nation. The strategy will describe how governments at all levels, organisations and community groups can recognise and adopt appropriate protocols, as well as establish symbols of reconciliation that reflect our shared history and culture.

Public support for this process of reconciliation appears to be in excess of 90% but without any comprehension by the public of the actual means of achieving it, but still believing that reconciliation will compensate for past injustices over dispossession, the stolen generation, the lack of an official apology, and will put other things right

Together with the denial of the existence of a stolen *generation,* the Prime Minister's refusal to make an official apology to Aboriginals has been the most vexing issue. Australians ask if Bill Clinton can apologise for Tuskegee, Tony Blair for the potato famine, and Abdurrahman Wahid for the East Timor atrocities, why can't John Howard make an official apology? He has made a personal apology

but says that it is inappropriate for this government to apologise for something it did not itself do.

State Premiers and the heads of churches have made their public apologies and the leader of the opposition has criticised the Prime Minister. There is no doubt about what many people think about the desirability of a public official apology: they have been signing their names in a number of "Sorry" books. At the same time it must be noted that on the question of an official apology public support is well below 90%. The Prime Minister's defenders say that an official apology would automatically make the government liable for massive compensation. Others say that it could be an apology with no obligation attached as per Clinton, Blair, and Wahid. Still others insist that an apology without compensation would be meaningless. The Prime Minister's latest stance is that even if people now wanted him to apologise, he can't do it because nobody would believe it was sincere.

There is no doubting that Reconciliation is a public relations triumph. When an Aboriginal athlete won the 400m race in the Olympics the Prime Minister said that it will mean a great deal for reconciliation, and the Leader of the Opposition said that it was 400m of reconciliation. The Olympic opening ceremony, with its tribute to Aboriginal culture and history, was widely praised as a contribution to reconciliation and gave the games a new significance. Months before the games there had been expectations that Aboriginal activists would disrupt them and there was a lot of negotiating to prevent this. The compromise position was that there could be demonstrations but not disruptions. After the opening night even demonstration was out of the question.

Given the idealistic phrases of pledging to stop injustice and respecting values, nobody can be found to speak against Reconciliation any more than speak against motherhood. Nevertheless there are doubters, especially in Aboriginal communities. They were asked to participate but the idea didn't come from them, and they saw it as something that could make non-indigenous Australians feel less guilty, without making any difference to the lives of Aboriginal Australians.

Aboriginal leaders did see some value and hoped that some kind of treaty would be drafted. Aboriginal Senator Aden Ridgeway encouraged Aboriginal participation in Reconciliation, describing it as the 'small chink in the armour of white ignorance' with the hope that it might contribute to future changes to the Australian Constitution.

At the community level, where people are acutely aware of the theft of children, land and culture, they firmly believe that it is the other side that should be doing the reconciling. In the words of one Walgett Community member, 'What is there to reconcile, and why should the onus be on us to reconcile, when it was them that did the damage?'

Their leaders tell them that Reconciliation will bring benefits further down the track, but in the meantime, if they don't agree to participate, Aboriginal people will be seen to be divided amongst themselves and ineffectual.

There is no one person who is the leader of Aboriginal Australians. The aforementioned Aden Ridgeway is Senator in the Australian Parliament and his word carries weight. Heads of ATSIC (Aboriginal and Torres Strait Islander Commission), who administer a budget of $1.3bn and are now elected by Aboriginals are prominent spokespersons in the media, as are other prominent Aboriginals. Nor is there any equivalent of the Australian Parliament. Aboriginals vote for the same candidates as other Australians.

The Australian Institute of Aboriginal and Torres Strait Islander Studies has researched the basis on which certain members of Aboriginal communities became leaders (Cranney and Edwards 1998: p15). Relevant factors were membership of larger family groups, bloodline, gender, age groupings, and expertise on some issue. Some of the more common processes include the following:

1. one who is already a 'cultural leader ' is groomed or nominated;
2. someone is thrust into the role by peer pressure and expectation;
3. one is seen to be an expert on a subject or issue;
4. one is elected as a local government representative;
5. one is perceived as a role model and is respected for honesty and integrity;
6. one is publicly in the forefront of media attention;
7. someone has been appointed as a government advisor;
8. some are assertive and good at self-promotion.

The above applies to the roughly 15% of Aboriginals who live in identifiable communities. It was in the mid 1970s that assimilation, as government policy, was abandoned and it was decided that the community was to be the unit for delivering services and welfare. In NSW the state government divided the state into twenty three Aboriginal Land Councils which crossed traditional kinship structures not dissimilar to the way colonial powers drew lines on maps in Africa slicing through traditional tribal lands. This made it very hard for the new communities to create leadership structures through which the state would deliver the services and, not surprisingly, produced a few malfunctioning community administrations.

One assumes that a piece of territory is an essential component to a functioning treaty or at the very least that there is no ambiguity as to which side a participating member would belong. The vast majority of Aboriginal Australians are con-

centrated in the same places as the total population, the east coast and to a lesser extent the south west coast. About 50% of Aboriginals are totally dependent on welfare and this would be more true of those living in remote communities. 64% of Aboriginal couple families are unions between Aboriginal and non-Aboriginal partners and this would be more true of those living along the coasts.

The family structures and distribution of the indigenous population and have a bearing on how a treaty might be implemented. One scenario favoured by the head of ATSIC is that a geographic section which already encompasses a lot of Aboriginal land is to come under its own Aboriginal laws and no longer depend on the larger economy. The economic plan is to do without the $2.3bn spent on Aboriginal Australians at present but to take charge of the $4bn royalties that mining companies pay the government for mining on Aboriginal land.

What has not been addressed is the status of those Aboriginal Australians who live amongst concentrations of non-indigenous people. What family law would apply to the 64% who have non-indigenous partners? The lifestyle of the 50% who are not totally dependent on welfare and who live along the coasts are not radically different from the rest of the population.

A recent demographic phenomenon between 1991 and 1996 is that people who had identified themselves as non-indigenous, changed their self identification. This was common to all states and territories but was most pronounced in Tasmania and in Canberra. Tasmania has had no full-blood Aboriginals since 1876 and the 1991 census records Tasmania having 9,461 people identifying as Aboriginals. The number shot up to 15,322 in the 1996 census, an increase of over 60%. In Canberra the corresponding

numbers were 1,616 and 3,058, an increase of 89%. The federal public service has a policy of employing indigenous Australians and that would have contributed to the increase (Australian Bureau of statistics 2001).

The disparity and geographic dispersion into the wider community of all those who identify themselves as indigenous Australians is so great that it is hard to see how all of them could be beneficiaries of a single treaty. There are fairly homogenous groups, and some of them are economically viable through the resources of their own land, whereby a treaty arrangement could be beneficial to them, but so far all the talk has been of a single treaty between the indigenous population and the rest.

The Prime Minister is totally opposed to any kind of treaty whatever. In a document he wrote as Opposition Leader are the words:

> The Liberal and National Parties remain committed to achieving policies which bring Aboriginal people into the mainstream of Australian society and give them equal opportunity to share fully in a common future with all other Australians. Consequently we are utterly opposed to the idea of an Aboriginal treaty ... It is an absurd proposition that a nation should make a treaty with some of its own citizens.

As recently as 27 July 2000, ATSIC Chairman, Geoff Clark, addressed the 18th Session of the Working Group on Indigenous Populations in Geneva. His address begins:

> The Aboriginal and Torres Strait Islander Commission (ATSIC) supports the proposition that Australia must sign a treaty.
>
> We reject unfounded claims from the government that a treaty is not possible.
>
> The stark truth remains that in Australia the Indigenous Peoples have been treated unequally in the past, and are kept unequal in the present.
>
> We are unable to protect our interests as Peoples because we are denied equal political rights, including the right to self determination.
>
> Two years ago, the Aboriginal Peoples and Torres Strait Islander Peoples of Australia turned to the United Nations to fight a critical case involving racial discrimination by the Australian Government.
>
> Subsequently, the *Committee on the Elimination of Racial Discrimination* (CERD) has, on three occasions in 1999 and 2000, determined that the Native Title Act, as amended in 1998, is racially discriminatory.
>
> The Committee has recommended that the amending legislation for Native Title be suspended and that the government require our informed consent for any replacement legislation ...

Indigenous Australians have been active in international fora on indigenous movements since the early 1970s. They are well aware of how other indigenous movements negotiated treaties but are thwarted by the present lack of any mention of indigenous Australians in the Australian Constitution. Their submissions to the Council for Aboriginal Reconciliation request such constitutional change.

It could be argued that the activities of indigenous Australians with UN committees have been all too successful. They took some of their concerns to the body charged with supervision of the International Convention on the Elimination of All Forms of Racial Discrimination, the so-called "CERD Committee which asked the Australian Government to explain how their amendments to the *Native Title Act 1993* (NTA) are consistent with Australia's obligation under the *International*

Convention on the Elimination of All Forms of Racial Discrimination. The Australian Government has this year withdrawn its participation in that and other UN committees.

Australia's Prime Minister has been promoting what he calls "practical reconciliation", by which is meant systematic improvements to educational, health, and economic disadvantage. Such improvements are a worthy step in the right direction but the danger is that the Prime Minister believes that no more is required apart from speeches aimed at those who don't appreciate how much has been achieved. In fact progress has been painfully slow. There are a number of explanations, one of which is that some non-indigenous Australians are very sensitive to Aboriginals receiving any government service or advantage for they don't qualify. There is a general sentiment in the Australian community that everybody should have "a fair go" and anything less than that is "unAustralian".

A new political party, One Nation, with almost no policies campaigned against welfare that was race based instead of needs based and attracted 23% of the vote in a Queensland state election, as well as winning its founder a federal seat in parliament. Public opinion polls show that Australians see compensationary welfare to Aboriginals as unfair, and they are thereby likely to vote against a party advocating that.

Australia's Governor-General, Sir William Deane, said that Aborigines' standard of living should be equal to that of other Australians, and many have agreed with him. Australia is far from being a classless society. 5% of people own 48% of the wealth and there are many living below the poverty line. There is a prosperous middle class outnumbered by what we call "the working poor" and below them the unemployed and the homeless.

If we decide there must be equality of living standards between Aboriginal communities and the non-indigenous living standards in the capital cities then there arises the question of whether the equality is to the higher standards of the better off city dwellers or equality with the less well off living in the less affluent suburbs.

Any government initiatives that succeeded in raising Aboriginals' living standards would immediately produce an outcry from any non-Aboriginals left behind and One Nation would waste no time letting everybody know. This alone could be enough for the government to do no more than pay lip service to promoting economic advancement for Aboriginals.

The present ten-year campaign for reconciliation is comparable to the ten-year campaign for the constitutional referendum of 1967 to enable the Australian Parliament to pass legislation to benefit Aboriginals (Marr 2000: pp1-5). Where the campaign for reconciliation is run by the Council for Aboriginal Reconciliation,

in 1967 the ten-year referendum campaign was run by the Federal Council for Advancement of Aborigines and Torres Strait Islanders (FCAATSI). Prominent Australians on CAR now were mirrored by equally prominent Australians, both black and white, on FCAATSI including a future Premier, a future Governor, artists, scientists, and women at the center of it. Today's demonstrations and events had their antecedents in the earlier campaign; participants saw themselves as part of a world movement against injustice so that at the time of the Freedom Ride into America's deep south, Australia had its own Freedom ride in October of 1965 when Charles Perkins led a busload of 29 students to a distant NSW country town to draw attention to the de facto segregation there.

Despite the overwhelming public support for a change to the Constitution, the Prime Minister since 1949, Robert Menzies, refused to contemplate making special laws for Aboriginals on the grounds that it would be discriminatory. He was replaced by Harold Holt in 1966, who, in keeping with the spirit of the times, had Australia sign the International Accord for the Elimination of All Forms of Racial Discrimination, abolished the White Australia Policy, and yielded to the overwhelming public pressure for that referendum.

The natural constitutional amendment would have been to empower the Commonwealth to legislate for the benefit of Aboriginals and it was FCAATSI's to give the Australian Parliament the power to legislate for "the advancement of the Aboriginal natives of the Commonwealth". Instead the Prime Minister and Cabinet took a more circuitous path. The original Constitution anticipated a possibility of legislating to remove other races from Australia but had to make an exception of Aboriginals. The relevant section is 51(26) which stated that the Commonwealth is empowered to make laws with respect to "the people of any race, other than the Aboriginal race in any state, for whom it is deemed necessary to make special laws".

The Holt government drafted the referendum question to ask if the voters agreed to excise the eight words "other than the Aboriginal race in any state" from s51(26). Protests at the wording were brushed aside because everybody understood what was meant and public support guaranteed a positive vote.

The nation celebrated the constitutional change and Australians congratulated themselves for their compassion and generosity of spirit towards Australia's Aboriginals. The government sought advice on suitable policies. And that was it, for more than two decades. Not a single piece of legislation was passed.

We now know, from the recent release of the 1967 Cabinet papers, that Cabined had required that a condition for allowing the referendum to proceed was that the Federal government would not use their new powers but leave the States to legislate over Aboriginals.

The new power wasn't used until the 1990s. On one occasion in 1997 it was actually used against an Aboriginal group who sought to use the Heritage Act against the building of a bridge. The Australian Parliament passed legislation preventing them. There was a High Court challenge on the grounds that the intention of the 1967 referendum was for legislation to benefit Aboriginals, not harm them. The High Court ruled that it was bound by the literal meaning of the words to which neither benefit nor disadvantage were relevant. The Aboriginals lost. (Kartinyeri v Commonwealth [1998] HCA 22; 195 CLR 337; 152 ALR 540; 72 ALJR 722(1997)

One can't help noticing an imbalance between the celebratory rhetoric and the practical achievements of recent milestones in Aboriginal advancement. The much celebrated High Court Mabo decision in 1992 overthrew the doctrine of *terra nullius*, the convenient fiction that the original Aboriginals were without laws or significant social organisation. While the judgement was a cause for celebration, many Aboriginals questioned why it had to take a High Court decision to prove that they had been there first. The High Court did not go far beyond recognising the Aboriginals' original sovereignty and stipulated that the Crown's acquisition of sovereignty can not be questioned in municipal Australian courts, and furthermore that indigenous assertions of sovereignty are nonjusticiable.

Historically not all Australians had agreed with *terra nullius* and it was contested in 1889. The case was taken all the way to England's Privy Council which determined that Australia was "a tract of territory practically unoccupied without settled inhabitants". This very judgement was used in a Northern Territory Supreme Court case to deny the Yirrkala Aboriginals common law rights to their traditional lands. The Mabo decision has put a stop to that kind of thing in the future.

At the end of the ten-year Reconciliation process just after the 2000 Olympics Australians are already congratulating themselves on how many indications point to the success of Reconciliation. All we need now for the Federal and State parliaments to make the constitutional changes, adopt an Aboriginal Bill of Rights and pass the legislation that will implement the strategies that will address Aboriginal health, education, and economic disadvantage. Main obstacles are that the Prime Minister thinks that Reconciliation is almost complete anyway and any changes will have to be made in such a way that they don't give Aboriginals anything that other economically disadvantaged Australians don't get.

Some years later, in 2007, and a few months before a federal election, the Prime Minister reacted to public disquiet and media response, to the release of a report on the incidence of child sexual abuse of Aboriginal children. With bipartisan support from opposition parties, and only a few days negotiation with state governments, Aboriginal communities were visited by army, police, and medical

units. There were plans to further limit the availability of alcohol in Aboriginal communities and other measures such as encouraging school attendance. But not a word about reconciliation from either side of politics.

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ORIGINAL
SCIENTIFIC
ARTICLE

VLADIMIR SOLONARI

REGULATION OF ETHNIC RELATIONS IN POST-SOVIET COUNTRIES: THE CASES OF LATVIA AND MOLDOVA COMPARED

This article compares legislation towards national minorities in two post-Soviet countries, Latvia and Moldova. The article argues that though the road of Moldova to independence was mudded by inter-ethnic violence while Latvia achieved its independence in the conditions of impressive political stability and peaceable inter-ethnic relations, in the post-independence era the ruling elites of Moldova consistently pursued more generous policy towards national minorities than did the ruling elites of Latvia. The article argues that the reasons for these differences are to be found in the fateful decisions on granting the citizenship of the new states to its residents adopted in the first years of independence, as well as in some other peculiarities of the Moldovan political culture.

Keywords: ethnic relations, regulation of ethnic relations, Moldova, Latvia, post-Soviet period.

UREJANJE MEDETNIČNIH ODNOSOV IN POST-SOVJETSKIH DRŽAVAH: PRIMERJAVA MED LATVIJO IN MOLDOVO

Članek primerja zakonodajo, ki ureja položaj narodnih manjšin v dveh post-sovjetskih državah, Latviji in Moldaviji. Zagovarja stališče, da so moldavijske vladajoče elite kljub temu, da je bila pot Moldavije v neodvisnost zaznamovana z medetničnim nasiljem, medtem ko je Latvija dosegla svojo neodvisnost v pogojih impresivne politične stabilnosti in miroljubnih medetničnih odnosov, v obdobju po doseženi neodvisnosti dosledno izvajale bolj velikodušno politiko do narodnih manjšin od vladajočih elit v Latviji. Dokazuje tudi, da je treba razloge za te razlike iskati v usodnih odločitvah o podeljevanju državljanstva novih držav svojim prebivalcem, ki so bile sprejete v prvih letih neodvisnosti, kakor tudi v nekih drugih posebnostih moldavijske politične kulture.

Ključne besede: etnični odnosi, urejanje etničnih odnosov, Moldavija, Latvija, post-sovjetsko obdobje

INTRODUCTION

A number of reasons explain why Latvian and Moldovan records in the sphere of inter-ethnic relations are singled-out for comparative analysis here. To begin with, there are important similarities in the countries' recent history. Both of them were part of the Russian empire until the 1917 Revolution and Civil War in Russia, both stayed out of the Soviet framework in the inter-war period and both were forcibly incorporated into it in 1940 when the Soviet Union was a de-facto ally of Nazi Germany.[1] Latvia and Moldova were heavily Russified after World War II and obtained independence in the aftermath of the Moscow August 1991 aborted coup. They are quite comparable in terms of both their population size, Moldova having at the time of the last Soviet census in 1989 4.3 and Latvia 2.7 million people, and their ethnic composition. So, in 1989 titulars[2] constituted 64.5 per cent of the overall Moldovan and 52.0 per cent of the overall Latvian population, followed by 13.8 per cent Ukrainians, 13.0 Russians, 3.5 Gagauzis, 2.0 Bulgarians and 1.5 Jews in Moldova and 34.0 per cent Russians, 4.5 Belorussians, 3.5 Ukrainians and 2.3 Poles in Latvia (Natsional'nyi sostav...: 16). To this it should be added that as in the other Soviet republics the non-titular populations in Moldova in Latvia heavily relied in their day-to-day activity and carrier prospects on the Russian language as their primary means of communication (this is why non-titulars has been quite often referred to as the "Russian-speaking population").[3]

However, despite these differences, the two countries present very different records of inter-ethnic relations and treatment of minorities. In the last years of the Soviet Union Latvia was among the pioneers, together with other Baltic countries, of national revival movements, while Moldova was relatively late in joining this trend. When, nevertheless, the Moldovan national movement finally appeared on the political scene in the spring of 1988 (then under the name of the "Democratic Movement for the Advancement of Perestroika"), it gained momentum and this, in turn, provoked a strong reaction on the part of the non-titular population. Strikes and other public actions of non-titulars against the introduction of the Moldovan (Romanian) language as the sole "State" (i.e., official) language during 1989 summer signaled a considerable worsening of the inter-ethnic relations in Moldova. After the proclamation of the sovereignty of the Moldovan Republic in June 1990,

1 Moldavian SSR, created by Moscow fiat in August 1940, comprised the bulk of the historical province of Bessarabia (a territory between the Pruth and Dniester Rivers) and a tiny strip of land along the left, i.e. eastern, bank of the Dniester which in the inter-war period belong to the USSR being part of the Ukrainian SSR.

2 In the late Soviet as well as post-Soviet jargon the common appellate of those population(s) after whose ethnic name the relevant republic(s) were called, in our case ethnic Moldovans and Latvians.

3 And also a (tiny) number of those titulars who indicated Russian as their mother tongue. On all the complexities connected to "Russian-speakingness", their identity formation and political role cf. seminal book of David Laitin (Laitin 1998).

two regions, Transdniestria in the east and Gagauzia in the south with predominantly non-titular populations announced in August- early September their secession ("independence") from Moldova.[4] Attempts by the Moldovan authorities to forcefully suppress Transdniestrian secession led to the bloody conflict in 1991-1992 with hundreds of deaths. Intervention of the Russian 14th Army in June 1992 and diplomatic and other pressure exerted by Moscow led to a cease-fire agreement and the deployment of a Russian (later also Ukrainian) peace-keeping force in the demarcation zone (King 2000: 120-223).

By contrast, Latvia's move to independence was relatively smooth and non-violent. There were numerous accounts of Russian speakers' loyalty to or even active support of Latvia's move to independence. For instance, when in January 1991 the Soviet OMON police force tried to seize important state institutions in Riga, Latvia's capital, among their defenders were not only ethnic Latvians but Russian-speakers as well (Karklins 1994 and Kolstø 2002).

Independent observers of the political scene of those two countries during the turmoil of late 1980 – early 1990 could have expected the aggravation of inter-ethnic problems in Moldova and non-existence of them in independent Latvia. In fact, the opposite happened. After the tragic events referred to above inter-ethnic relations steadily improved in Moldova. Citizenship was granted to virtually all inhabitants of the new country, languages legislation which had made Moldovan the only official language of the state was applied liberally, the Gagauzi problem effectively solved by granting territorial autonomy to the region predominantly populated by this ethnic group, and even in Transdniestria, though no tangible progress was achieved in the reintegration of the country, tension subsided, free circulation was restored between both banks of the Dniester river and no danger of violence has been eminent since the cease-fire agreement reached in July 1992. Significantly, independent Moldova was never subject to criticism by international human rights or minority rights organisations, either governmental or non-governmental, for its treatment of minorities.

On the other hand, Latvian citizenship legislation is restrictive and requires that the non-natives, i.e. those immigrants who came to settle in the country during the Soviet era from other parts of the USSR and their descendents to go through a complicated process of naturalization. Language legislation is quite strict as well. Since early 1990s Latvia was subjected to criticism for its treatment of minorities

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4 Transdniestria, also known as Transnistria in Romanian/Moldovan or Pridnestrov'e in Russian is a part of the Moldovan territory lying on the left bank of the Dniester River (see note 2 above) plus a right-bank town of Bender (Tighina in Moldovan/Romanian). In this region Russian-speaking Slavs, mostly Russian and Ukrainins, predominate. Gagauzi are small-numbered Turkic people of Orthodox religion living compactly in the Southern part of Moldova.

by various human rights watchdog bodies and though recently this criticism became more muted, the problems remain. (OSCE High Commissioner on National Minorities 1993 and United Nations Human Rights Committee 2003).

Those differences between the records of the two countries become even more striking against the background of continuous economic difficulties in Moldova, which is now one of the poorest countries in Europe with the highest ratio of economic emigrants and remittances from the people working abroad (Mansoor and Quillin 2007: 6). In the first decade following the acquisition of independence the Moldovan economy went through a period of unprecedented decline compounded by quasi-permanent political instability and though since 2000 the situation has improved somewhat, the prospects do not seem particularly bright (see Solonari 2003 and Quillin 2006). On the other hand, the Latvian economy experienced a much shorter period of decline and since 1993 it has been growing more rapidly than other European economies (though as of now it is still on the bottom list of the UE members in terms of per capita income) (see World Bank 2007). Since after obtaining independence Latvian political institutions demonstrated remarkable stability and efficiency.

So, what accounts for these differences in the treatment of minorities? Why did the country which started its independence by having inter-ethnic bloodshed on its territory then move to a rather benign treatment of its minorities despite heavy economic problems, unresolved territorial dispute and a protracted period of political instability while another country, which was never a scene of inter-ethnic violence and has a very impressive record of economic performance and institutional stability, continues to be criticized for its treatment of minorities?

In trying to answer this question this paper will analyze in a comparative perspective legislative provisions concerning minorities in the spheres of constitutional fundamentals, citizenship and naturalization, use of languages in the public sphere, in education and in mass media, and in the registration of non-titulars' names in official documents. This analysis will yield a better understanding of the general principles by which the political elites of each of the two countries are guided in pursuing their policies towards national minorities. And finally, the paper will proceed to explain the origin of the differences in the governmentality of the two countries elites by considering various available explanatory perspectives.

MOLDOVAN AND LATVIAN LEGISLATION ON MINORITIES-RELATED ISSUES COMPARED

A) Constitutional provisions

Presently the Constitution of 1922 (Satversme) is in force in Latvia, which was reactivated after the proclamation of independence in 1991 and variously amended afterwards. In 1998 a new Chapter VIII "Fundamental Human Rights" was added to it, which contains the only Article 114 directly dealing with the issue of minorities. (Discrimination "of any kind" is prohibited under article 91). It reads "Persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity". Noteworthy is the weak nature of this provision; it grants this right to representatives of minorities, but it in no way obliges the state to guarantee or even facilitate its enjoyment. On the other hand, article 4 of the Satversme envisages that, "The Latvian language is the official language in the Republic of Latvia". No other language or languages is/are mentioned in this context.

The Moldovan Constitution first refers to the problem of minorities in its Preamble by expressing the "striving" of the Moldovan constituent legislator "to satisfy the interests of those of its citizens who, while being of a different ethnic origin, form, together with the Moldovans, the people of the Republic of Moldova"[5]. Article 10 "The unity of the nation and the right to national identity" reads: "1. The State has as its foundation the unity of the people of the Republic of Moldova. The Republic of Moldova is the common and indivisible motherland of all its citizens. 2. The State recognises and guarantees all its citizens the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity". Article 13 "The national language, use of other languages", while establishing Moldovan as the (sole) official ("State") language, simultaneously states in par. 2 that "the Moldovan State acknowledges and protects the right to preserve, develop and use the Russian language and other languages spoken within the territory of the country". Discrimination "as to race, nationality, ethnic origin, language, religion, sex, political choice, personal property or social origin" is proscribed by Art. 16. Article 35 "The right of access to education", par. 2 provides that "the State shall ensure, under the conditions laid down by the law, the right of the persons to choose their language of education and instruction". The study of the "State" language in all educational institutions of the country is assured under par. 3. Note the strong wordings of the provisions referred to above, their presenting not

5 The author has to check and correct, accordingly, the official translation. So, in the quotation above the official English version reads "Moldovan people" which does not correspond to the Moldovan original.

only the rights as such of persons belonging to national minorities, the enjoyment of which should not be impeded by the State, but also positive obligation on the part of the State to ensure those rights in practice.

Note also that in some respects, such as the right to choose the language of education and instruction, Moldovan constitutional provisions go substantially further than the internationally recognised minimal standards in the respective domains. This last observation is equally applicable in respect to the provisions of Article 118 of the Constitution: "Language used in the [judicial] procedures and the right to use an interpreter". "1. Judicial procedures shall be held in the Moldovan language. 2. The persons who do not possess or do not speak the Moldovan language shall have the right to become acquainted with all documents and items on file and to talk to the court through an interpreter. 3. Under the conditions laid down by the law, judicial procedures may also be held in a language acceptable to the majority of persons participating in the process." These provisions are applicable in both criminal and civil law proceedings. It should be recalled in this context that the International Covenant on Civil and Political Rights, Art. 14(3) (f) guarantees to the accused person (i.e., in criminal proceedings only) the right to an interpreter if he/she does not speak the language used by the court and, according to an authoritative interpretation of the UN Committee on Human Rights, under no other circumstances this provision provides for the use of any other language but one used by the court. This interpretation is quite commensurate with the case law of the Strasbourg Court on Human Rights in respect of Art. 6(3)(e) of CEDO.

B. Citizenship

The Moldovan June 5, 1991 Citizenship Law[6], in spite of the fact that it was approved under the conditions of high inter-ethnic tension and contrary to the widespread apprehension of the content of the future legislation among non-titulars, turned out to be quite liberal (N 596 from 05.06.1991, M. O. N. 006 from 05.06.1991) . It granted citizenship to virtually every resident of the Republic who was not a citizen of another State. Article 2 granted citizenship to: 1. Persons who resided on the territory of the Republic "as of now" until June 28 1940 (the date of Soviet take-over of Bessarabia and Northern Bukovina) and their descendents in case they resided permanently on the territory of the Republic on the date of the adoption of the Law. 2. Persons who were residents of the territory of the Republic in case they were born or at least one of their parents or ancestors was born on

6 All Moldova legal acts referred to below are rendered in the author's translation into English from the original in Moldovan as published in Monitorul Oficial (hereinafter referred to as M.O.) and other official editions.

the said territory provided they were not citizens of another State. 3. Other persons who, until the adoption of the Declaration of Sovereignty of the Republic of Moldova, were permanent residents of it and had jobs or other legitimate source of income. Those persons had to apply for citizenship during a period of one year from the moment of the adoption of the Law. In that case they were granted citizenship from the moment of deposition of the application. (Decision of the Parliament of 4 August, 1992 N 1138, in Monitorul Oficial,hereinafter referred to as M.O. N 008 from August 30, 1992). Later on this term was prolonged until 1 September 1993 (Decision of the Parliament of June 09, 1993 N 1477, M.O. N 006 from 30 June 1993).

There is no doubt that in reality this was the so called "zero option", though at the time of the adoption of the Law the Moldovan legislature was unwilling to openly recognise this fact, thus providing for the categories cited above. In fact, however, every legal resident of the Republic intent on becoming a citizen of it was able to do so without any major difficulty. More than this, the naturalization procedure, initially intended to be quite complex and difficult (domicile of no less than 10 years, except when he/she is married to a Moldovan citizen, in such case three years domicile being required, legal source of income, proficiency of the State language in a measure sufficient for the integration into the social life of the country, knowledge of the fundamentals of the Constitution of the country, evidence of attachment to the country, renunciation of previous citizenship, if the case be, oath of loyalty, Art. 15 of the Law) in practice was applied very liberally in respect to knowledge of State language and Constitution requirements. Amendments to the Law led in the same direction. So, by the Law N 961 of July 24, 1996 (M. O. from 10.24.1996 N 069) three years domicile requirement for naturalisation (instead of ten years as a general rule) was extended to parents coming for reunite with their children and children coming to reunite with their parents. The new Citizenship Law of June 02, 2000 N 1024 (M.O. from 08. 10. 2000 N 098) confirmed this tendency by making the language knowledge requirement less stringent.

Provisions concerning the acquisition of citizenship by birth were also progressively made more libera, so that nowadays Moldovan legislation on this issue closely approches ius soli principle. Thus, Art. 11 of the 2000 Citizenship Law provides that Moldovan citizenship is automatically granted to a child born on Moldovan soil not only if at least one of his/her parents is Moldovan national, or both of them are stateless persons, but also if both of them are foreigners or one is a foreigner and another a stateless person, in case the respective state does not grant citizenship to the child.

Latvian citizenship legislation gives a completely different picture. First of all, Latvian citizeship Law was adopted after the citizens of the inter-war Latvian

Republic and their descendents were registered as the citizens of the reactivated State according to the October 15, 1991 Decision of the Parliament of Latvia "On the Restoration of the Rights of the Citizens of the Republic of Latvia and General Conditions of Naturalisation." In June 1993 national elections only registered citizens qualified to vote, i.e. between 66% and 75% of Latvian residents (Kotov 1999 and Council of Europe. Parliamentary Assembly 1994).

The Latvian Citizenship Law was adopted on July 22, 1994.[7] Art. 2 of this Law granted citizenship automatically to the following categories of persons: 1) persons who were citizens of Latvia on 17 June 1940 and their descendants, who have registered according to the procedures established by law, except for persons who have become citizens (subjects) of another state after 4 May 1990 (i.e. date of the declaration of independence); 1.1) Latvians and Livs permanent residents of Latvia, who have registered by 31 March 1996 according to the procedures established by law and who have no other citizenship or who have received an expatriation permit from the country of their former citizenship, if required by laws of that country; 1.2) women permanent residents of Latvia who, in accordance with Article 7 of the 23 August 1919 Republic of Latvia Law on Citizenship had lost their Republic of Latvia citizenship, and their descendants, if these individuals have registered according to the procedures established by law, except for those individuals who have acquired the citizenship of another country after 4 May 1990; 1.3) persons permanent residents of Latvia, who have registered according to the procedures established by law and who have completed a full educational course in a general education Latvian language school or have completed their general education in groups with Latvian as the language of instruction in general education schools with both Latvian and Russian languages as languages of instruction, if these individuals are not citizens of another country or they have received an expatriation permit from the country of their former citizenship, if such permit is provided for by the laws of that country. Simultaneously, the citizenship was granted to their children who are less than 15 years old and reside permanently in Latvia.

Effectively, the Latvian approach could be called "culturalist" as opposed to a "civic" one according to the classification proposed by David D.Laitin. It means that "membership in the nation is effectively controlled by racial, linguistic, or religious criteria", while in the second case legislation would have emphasised "territory, work, loyalty" (Laitin 1998: 350, 351).

This same "philosophy" is also observable in the very harsh requirements for naturalisation provided for by Art. 12 of the Law. Candidates for naturalisation

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7 Available at the website of the Latvian Naturalization Board, http://www.np.gov.lv/en/faili_en/Pils_likums.rtf.

had to be registered in the Residents' Register and to meet the following conditions: to have on the submission date of their application for naturalization resided permanently in Latvia for no less than five years counting from 4 May 1990 (for persons who arrived in Latvia after 1 July 1992, the five-year term shall be counted from the date of the issuance of their permanent residence permit); 2) to know the Latvian language; 3) to know the basic principles of the Republic of Latvia Satversme (Constitution) and the Constitutional Law "On The Rights and Obligations of a Citizen and a Person"; 4) to know the National Anthem and the history of Latvia; 5) to have a legal source of income; 6) to have taken an oath of loyalty to the Republic of Latvia; 7) to have submitted a statement of renunciation of their former citizenship and have received an expatriation permit from the country of their former citizenship, if such a permit is provided for by the laws of that country, or have received a document certifying the loss of citizenship, but the citizens of the former USSR who on 4 May 1990 permanently resided in Latvia - a certificate that they have not received another citizenship; and 8) not to be subject to the naturalization restrictions listed in Article 11 of this Law. This last article contains a vast list of exclusions like several categories of Soviet military, former employees, informers, agents or those in charge of a safehouse of the former USSR (Latvian SSR) KGB or other foreign security service, persons who through the use of anti-constitutional methods have acted against the Republic of Latvia's independence, its democratic parliamentary state system or the existing state power in Latvia, after 4 May 1990 have propagated fascist, chauvinist, national-socialist, communist or other totalitarian ideas or have stirred up ethnic or racial hatred or discord, if such has been established by a court decree etc. Note that this exclusion is not limited in time.

Article 20 laid down the following requirements in respect to the knowledge of the Latvian language: the person concerned is able to completely understand information of an everyday and official nature, to freely talk, carry on a conversation and answer questions on topics of an everyday nature; to freely read and understand any instructions of an everyday nature, directions and other texts of an everyday nature, to write an essay on a topic from everyday life given by the commission (this last provision was not to be applied to persons who reached the age of 65, Art. 21.3).

It should be noted that initially the Law contained a so-called "age window system", according to which the right to apply for naturalisation was governed by a criterion of age. More precisely, the population was divided up into various age brackets, each of which was entitled to apply during a specific year, applications from persons in the last of these brackets only being acceptable in 2003.

The combined effect of the restrictive provisions cited above was to severely limit the usefulness of the naturalisation procedure from the point of view of the political integration of the non-titular population.

Latvian Citizenship Law in general and the "age window" system in particular were seriously criticised for their excessively restrictive nature by a number of international fora, and in particular by Mr. Max van der Stoel (see OSCE High Commissioner on National Minorities 1993 and 1997). Under international pressure, the Saeima finally voted to abolish the "age windows" system at an extraordinary session on 22 June 1998. At the same time, the Saeima amended the Law by granting Latvian citizenship to stateless children born in Latvia since 21 August 1991 (the date on which independence was proclaimed) with the application for naturalisation being made by either the parents or the child on reaching the age of 15 years (in this latter case he/she should have gone through the languages test had he/she not been educated in Latvian-language educational institution) and to simplify the language tests for persons aged over 65 years.

36 members of the Saeima called for a referendum on these amendments, which was won by their proponents by a majority of 53 per cent. Even though the voters approved the amendments, naturalization procedure proved to be too cumbersome or humiliating or both to the majority of non-titulars. Since the start of this procedure in 1995 and until the end of 1998 only around 11, 576 people acquired Latvian nationality (Council of Europe. Parliamentary Assembly 1999).

On 12 April 1995 the Latvian Parliament adopted the Law "On The Status Of Former USSR Citizens Who Are Not Citizens of Latvia or Any Other State."[8] Article 2 of this Law stipulates that a non-citizen has the human rights and obligations stipulated in the Satversme of the Republic of Latvia. Along with the rights stipulated in the Satversme of the Republic of Latvia a non-citizen holds the rights: to preserve his/her native language and culture within the frame of cultural national autonomy, should they not contradict with Latvian legislation; not to be expelled from Latvia except if the expulsion takes place according to the procedure, stipulated by law, and if another country has agreed to admit the person to be expelled; expulsion to a country where this person is persecuted due to his/her race, religion or ethnic origin shall not be admissible.

Non-citizens of Latvia do not possess political rights, including those, which in some countries are granted to permanent residents who are not citizens of the respective countries, i.e. the right to vote in local elections. Notwithstanding the high-sounding wording of Article. 2 of the Law on the status of non-citizens

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8 Available at the website of the NGO Human Rights in Latvia, http://www.humanrights.lv/doc/latlik/noncit.htm.

cited above, these persons were deprived of some other rights, which fall in the domain of social rights, such as property rights. Some of those provisions were either abrogated or declared null and void (also due to the international pressure), however, others were added by new laws and regulations, so that the overall number of those differences in rights had hardly changed by 1999, when it was 66 (in 1999 they numbered 57) (Latvian Human Rights Committee 1999).

C) Use of Non-Official Languages in Public Sphere

Article 7 of the Title VII Final and Transitory Provisions of the Moldovan Constitution stipulates that the Law of September 1, 1989 regarding the use of languages spoken throughout the territory of the Republic of Moldova may be amended over the seven years ensuing from the date when the Constitution has come into force, if it has been passed by a two thirds majority. It was this same Law, which in 1989 provoked the most furious reaction on the part of non-titulars who considered it to be "discriminatory" (N 3465-XI of 01.09.89, Veştile nr.9/217, 1989). Ironically, it was the representatives of minorities in the 1994 Parliament who insisted on the transitory provision cited above.

While establishing Moldovan as the sole "State" language of the country, the Law simultaneously made Russian "the language of inter-nationality communication" alongside with Moldovan. It provided for the extensive use of Russian alongside with Moldovan in the public sphere (the private sphere went unregulated, Art. 4, with the exception of advertisements which had to be designed in Moldovan and only later on translated in Russian, if the case be, Art. 29). In communication with public bodies a private person had the right to use the language of his preference and to receive response in that language (Art. 6). The Russian language could be used both orally and in written as a language of official records-keeping within public bodies and enterprises (the Law was silent as to private enterprise, which was non-existent at the time) and in correspondence between them. Acts of public authorities[9] were to be elaborated in the State language and afterwards translated in Russian (Art.10). All official documents had to be issued in one of those two languages at the decision of the person concerned. Article 2 provided for the free use of the Gagauzi language in the localities were majority of the population comprised Gagauzi people.

Article 7 envisaged that persons employed in public bodies as well as in all organisations, institutions and enterprises, which in their official business communicate with the general public had to possess both the Moldovan and Russian

9 And of "social organisations", but mind that those were Soviet-type trade-unions, Komsomol, etc.

language. In June 1994 the Moldovan Parliament adopted a Decision "On the provision of State language learning..." whereby it effectively interpreted Article. 7 of the said Law making it applicable exclusively to persons employed in the public sector and making it mandatory that the employment thereby be conditional on the knowledge of the State language starting from 1 January 1997. However, this provision was rather infrequently applied in practice. It was never requested, for example, that candidates elected to public office possess Moldovan, so that several mayors of villages and even Balți, second largest city of the country where Russian-speakers predominate (not counting Tiraspol which is in Transdniestria and thus outside of Moldovan authorities control), often barely speak Moldovan. More than this, according to Article 3 of the Law N 344 of December 23, 1994 "On Special Legal Status of Gagauzia (Gagauz-Yeri)" (M.O. N 003 of January 14, 1995), official languages in this autonomous region are Moldovan, Gagauzi and Russian, but Russian in practice clearly predominates.

The Latvian May 1989 Law on the State Language closely resembled provisions of Moldovan Law referred to above (in fact, the Moldovans followed the Baltics, including the Latvian example). Its Preamble referred to Russian as "the second most widely used language in Latvia, and one for inter-nationality communication". Art. 3 recognised Russian as the language of the Supreme Soviet of the USSR, border guards, and railroad police stationed in Latvia. Acts of organs of State power and government were to be adopted and published in Latvian. They were to be published in a Russian translation as well "in cases defined by legislation" (Art. 6). Those employed in government and State institutions, and those institutions which are in contact with the citizens (unspecified) were to possess both the State and Russian languages. According to one observer, if the 1989 law was aimed at bilingualism and provided for the functioning of Russian in some spheres, the 1992 law was explicitly aimed at further consolidation of Latvian as the sole language of the State (Kamenska 1995: 7-10; cf. Druviete 1998: 158-160, 167-171).

It is not in the content of the Law, but rather in the practice of its application that the real difference between Moldovan and Latvian Languages policies lies. Unlike the Moldovan law, the Latvian Law was relentlessly and systematically applied, and the general evolution was not in the direction of liberalisation, but, to the contrary, of stiffening of the languages legislation. On 21 December 1999 the Saeima adopted a new State Language[10] Law, Article 1 of which states: "the purpose of this Law shall be to ensure: 1) the preservation, protection and development of the Latvian language; 2) the preservation of the cultural and historical heritage of the Latvian nation; 3) the right to use the Latvian language freely in any

10 Available at the website of the NGO "Minorities Electronic Resources": http://www.minelres.lv/NationalLegislation/Latvia/latvia.htm.

sphere of life in the whole territory of Latvia; 4) the integration of national minorities into Latvian society while respecting their right to use their mother tongue or any other language; 5) the increase of the influence of the Latvian language in the cultural environment of Latvia by promoting a faster integration of society." Besides Latvian, the State committed itself to ensure the protection, preservation and development of the Liv language as the language of the indigenous population (autochthons) (Art.4). All other languages the Law considered to be foreign in Latvia (Art.5). "Culturalist" philosophy is manifested here in its pure and undiluted form.

While ostensibly trying to avoid interfering in the use of languages in the private sphere, the 1999 Latvian Law defines that sphere in the narrowest possible way ("the unofficial communication of the residents of Latvia, the internal communication of national and ethnic groups, the language used during worship services, ceremonies, rites and any other kind of religious activities of religious organisations", Art. 2) while at the same time defining the public sphere as widely as possible, i.e. " state and municipal institutions, courts and agencies belonging to the judicial system, state or municipal enterprises and companies in which the state or a municipality holds the largest share of the capital" (Art. 7 et al.). Employees in all those entities have to know and use the state language to the extent necessary for the performance of their professional and employment duties. But even in the private sector the State language is to be known and used by employees if their activities relate to legitimate public interests (public safety, health, morals, health care, protection of consumer rights and labour rights, workplace safety and public administrative supervision) (Art. 6).

"Formal meetings" in the public sector have to be in the State language, and when a foreign language is used, translation into the State one has to be provided. In all other cases (unspecified) when a foreign language is used at formal meetings and other business meetings, the organiser shall provide translation into the state language if so requested by at least one participant of the meeting (Art. 7). Record-keeping in the public sector has to be effected in the State language while all companies have to keep correspondence with public entities in the State language and to have record-keeping in the State language if their activities relate to legitimate public interest (Art. 8). Contracts of natural and legal persons about the provision of medical and health care services, public safety and other public services in the territory of Latvia are to be in the State language. If the contracts are in a foreign language, a translation into the state language shall be attached (exceptions are provided for emergencies, etc.). Any institution, organisation and enterprise (or company) has to ensure acceptance and review of documents prepared in the state language. Documents submitted by persons in a foreign language are to be accepted if they are accompanied by

a translation verified according to the procedure prescribed by the Cabinet of Ministers or by a notarised translation (Art. 9-10). All legal proceedings are to be conducted in the State language with only very limited exceptions (Art. 13). Public bodies have to issue documents and other information intended for the general public only in the State language, and information on signs, billboards, posters, placards, announcements and any other notices have to be in the state language if it concerns legitimate public interests and is meant to inform the public in places accessible to the public with limited exceptions established by the Cabinet of Ministers (Art. 21).

D) Education

The Moldovan 21 July 1995 Education Law (M.O. N 062 of 11 September 1995), in its Article8 stipulates that the State ensures, in conformity with the Constitution and Languages Law, the right to choose a language of instruction at all levels of education. The right of citizens to education in the mother tongue, the article goes on, is ensured by the creation of a necessary number of educational institutions, classes, groups, as well as conditions for their functioning. Learning of the State language is obligatory in all educational institutions. Requirements in respect of its teaching and appropriation are established by the State educational standard. Responsibility for guaranteeing the appropriation of the State language lies with the Ministry of Education.

Despite a quite vague regulatory base and notwithstanding periodic complaints about nonobservance of the provisions of the Law in respect to education in the Russian language, in practice general education is available in Moldova for free in public educational institutions in both the State and Russian languages. Art. 25 par. 3 of the Education Law explicitly provides for the possibility to establish institutions of higher education with the language of instruction other than the State one. In public educational institutions at the secondary and higher levels sections in Russian are often available as well. Besides, Art. 18 and 20 of the Languages Law oblige the State to "create conditions" for the education in languages of "other nationalities residing in the Republic," meaning in languages other than Romanian and Russian; some progress was achieved in this respect since after the independence.

The Latvian 1998 Education Law, Art. 3 provides that "every Latvian citizen and a person who is entitled to the alien's passport issued by the Republic of Latvia, a person who has received a permanent residence permit... as well as their children shall be equally entitled to acquire education irrespective of his/her social or

financial status, race, nationality, sex, membership in religious and political organisations, status of health, occupation and the place of residence."[11]

Article 9 stipulates that State and municipal education institutions shall work in the State language. Simultaneously, it provides that education may be acquired in another language: 1) at private education institutions; 2) at State or municipal education institutions, which implement education programs of national minorities. The Ministry of Education and Science shall determine the subjects of these programs which have to be taught in the State language; or 3) at education institutions prescribed by special laws. Note that this is a very "soft" provision and that the State in no way is committed to provide facilities necessary for the persons who so desire to be educated in minority language(s). Simultaneously requirements concerning the knowledge of the State language are much stricter in Latvian than in Moldovan law. So, par. 3 of the same article stipulates that any person, in order to acquire primary or secondary education, has to master the State language and take examinations on the knowledge of this language to the extent and in accordance with a procedure set by the Ministry of Education and Science. Examinations for professional qualification have to be taken in the State language.

Par. 9 of the Transitory provisions provides that since 1 September 2004 higher education in the State and municipality educational institutions is to be conducted in the State language and starting from the same date the State and municipal general education institutions with other language of instruction have to start implementing the programs for national minorities or to pass to the education in the State language. According to art. 19, it is the responsibility of the municipalities to provide children residing in their territory with a possibility to acquire pre-school and primary education as well as to provide youth with a possibility to acquire secondary education. Given that the majority of non-titulars are bereft of the right to vote in the municipal elections, the future of public education in minority languages (in the majority of cases in the Russian language) appears to be precarious.

E) Names of the non-titulars in the official documents

The Moldovan 1989 Languages Law established very strict rules concerning registration of the names of the persons of Moldovan nationality in official documents, but it explicitly refrained from regulating the form of the names of non-titulars. The December 1994 Identity Documents Law in its Article 3 prescribed that

11 Available at the website of the NGO "Minorities Electronic Resources": http://www.minelres.lv/NationalLegislation/Latvia/Latvia_Education_English.htm

the names (and surnames) in Moldovan identity cards be indicated in Moldovan, Russian and English (par. 5). If a person belonging to a national minority so desired, than his/her patronimic may be indicated in Russian (par. 6). If in the mother tongue of a person another script than Latin is used, than transliteration of the said person's name and surname in the Moldovan and English languages must be effected in conformity with the orthographic norms of the Moldovan language in respect to names of foreign origin (para. 7). (Paras 6 and 7 were introduced by amendment in July 1996).

The Latvian 1999 State Language Law in its Article 19 stipulates that personal names be reproduced in accordance with the Latvian language traditions and be transliterated according to the accepted norms of the literary language while observing the requirements of paragraph 2 of this article. In a person's passport or birth certificate, the person's name and surname reproduced in accordance with Latvian language norms may be supplemented by the historical form of the person's surname or the original form of the person's name in another language transliterated in the Latin alphabet if the person or the parents of a minor so desire and can provide verifying documents. Mind that the "main" official name of a person must be rendered in accordance with the norms and traditions of the Latvian Language and that the use of any other script than Latin is not provided for.

F) Minority languages in electronic mass media

The Moldovan October 1995 Radio and Television Law initially did not contain any restriction on the use on non-official languages either in private or in public sphere (in reality, National Radio and TV broadcast Russian and other minority language programmes about 20 per cent of all broadcasting time due to internal regulations). In October 1999 amendments to Article 13 were introduced, which provided that Radio and TV stations, both private and public, broadcast at least 65 per cent of their emissions and programmes in the State language. This provision does not apply to the TV emissions and programmes translated via satellite and cable, as well as to foreign stations and stations which broadcast over the territory populated by national minorities. This rather vague formula led to different interpretations, inter alia as to whether those Moldovan Radio and TV stations which retranslate Radio and TV signals from abroad (in reality, it was signals from Russia and in Russian that were implied) must broadcast 65 per cent of all their time in State language or this requirement applies to only the time during which they broadcast their own programmes and emissions inserted over those of the primary broadcaster. In September 2000 a group of Moldovan citizens sued Radio and TV Broadcasting Council for what they considered "too liberal" application of the Law, i.e. in the latter rather in the former sense. Appeal Court upheld their

case and ruled that the licenses of several Radio and TV stations broadcasting in Russian language be withdrawn.

The Latvian 1990 Radio and Television Law[12] allows to broadcast in other than the State languages up to 20% of broadcasting time on the second public channel (the first public channel can broadcast in Latvian only) and 25% on private TV and radio channels. In fact, the regulations look much more complicated, for there are also rules stemming from the EU orders about the percentage of broadcasts produced in Europe, and among them certain share is reserved for broadcasts produced in the Latvian language, etc. There were several cases when those companies, which violated these criteria were punished (warned, fined, and even temporarily suspended) by the National Radio and TV Council.

Besides, Article 17 of the Latvian 1999 State language Law, reads: "Feature films, videofilms or their excerpts shown in public shall be provided with a voice-over, dubbed in the State language or shown with the original sound track and subtitles in the State language while observing accepted norms of the literary language. In the cases mentioned in this article, subtitles in a foreign language are also permissible. Subtitles in the State language shall be placed in the foreground and shall not be smaller in size or less complete in content than the subtitles in the foreign language". It is clear that this provision cannot but create very serious technical difficulties for retranslating of signals from abroad in minority languages in Latvia.

CONCLUSIONS: A DYNAMIC OF "CULTURALIST" AND "CIVIC" PROGRAMMES

We compared minorities-related provisions of Moldovan and Latvian constitutions, legislation in the fields of fundamental rights and rights of minorities, citizenship, use of languages in public sphere, education, preservation of names of non-titulars in their original form in the official documents and the use of non-State languages in electronic mass media. In all those domains we ascertained quite substantial differences both in the letter and spirit of the legal texts of those two countries. These characteristics form up what David D. Laitin called civic and culturalist types of programmes of the ruling elites of Moldovan and Latvian nationalising states[13]. Why then did the ruling elite of Moldova opt for the former, while Latvian for the latter type of programme?

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12 The text of this Law is not available in a language that the author possesses. All information contained in this paragraph was kindly supplied by Mr. Boris Tsilevich.

13 The notion of nationalizing state was successfully introduced by Rogers Brubaker. (Cf. Brubaker 1996).

One possible explanation belongs to Latvian political leaders themselves and tends to emphasise a negative demographic dynamic in Latvia during Soviet occupation. In 1935 Latvians comprised 75.5% and Russians 12% of Latvia's overall population, in 1959 62% and 26.6%, and in 1979 53.7% and 32% respectively (cf. Brubaker, Rogers). Seen in this perspective, the Latvian nation appears to be endangered by the influx of immigrants, and the Latvian language as being in need of urgent protective measures. According to this logic, one could expect a much less dramatic demographic dynamic in Moldova[14] and then take it as an explanatory hypothesis.

Such an approach would, however, overlook the fact that demography alone is an extremely poor predictor of a type of policy a nationalizing state opts for. One could refer to the example of Kazakhstan, where titulars comprised in 1989 only 39.7 per cent, while Russians 37.8, Germans 5.8, Ukrainians 5.4 etc. of the population as a whole (Natsional'nyi sostav: 13); the Russian language clearly dominated in everyday business, and nevertheless the elites opted for civic programme, granting citizenship to all residents of the Republic and making Russian the second official language. One should also bear in mind that in Moldova itself there were and are groups (in the early 1990s they even dominated political scene and for a short while government) which use the same kind of reasoning ("foreign invasion", "domination", etc. in favour of more vigorous "culturalist" approach). The real question then would be not why a "culturalist" agenda was never put forward in Moldova (to affirm this would be simply incorrect), but rather why the political elite refused to accept and promote it, choosing instead a more inclusive "civic" one.

One could be tempted to employ what could be called "essentialist" arguments invoking "national character", "inherited cultural traits", like the supposed "kindness" of a given people or their inability to consequently promote a necessary and beneficial though harsh programme, etc. This kind of reasoning, though still current in political discourse and media coverage, is now (rightly) considered utterly discredited.

It may be useful to restate the problem and to put the question thusly: "Why did the Moldovan political elite, which at the turn of the 80s and 90s was clearly in favour of a quite "radical" solution of inter-nationalities issues, then refrain from continuing radical policies and why did it opt in favour of a more "civic" program, while Latvians relentlessly promoted a "culturalist" agenda, despite strong international pressure?" The answer seems to be twofold.

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14 In fact, this is to an extent true. In 1940 Moldovans comprised approximately 70 per cent of the overall population of the Republic, while in 1989 63,5 per cent, the proportion of Russians and Ukrainians increased respectively.

Firstly, one has to consider reasons and consequences of the fundamental difference between Moldovan and Latvian citizenship legislation. The apparent generosity of the Moldovan 1991 Citizenship Law, which was in clear contradiction with the radical discourse and initially radical intentions of its authors, can be easily explained. It was due to the sheer impossibility of implementing "restorationist" strategy in the case of a new State, which previously never existed.[15] It was neither psychologically, nor technically possible to "restore" the citizenship of inter-war Romania and then to "use" it as a basis of a new State. Even more absurd would have been to try to do it in respect to citizens of the former Soviet Union and their descendents in Transdniestria, a region not under control of Moldovan authorities already in June 1991. Finally, insurmountable difficulties would have arisen in respect to residents of those parts of Bessarabia and Bukovina, which previously belonged to Greater Romania, and in August 1940 were incorporated into the Soviet Ukraine.

In the absence of any alternative, Moldovan politicians had, though grudgingly and surreptitiously, to accept territorial principle as a basis for granting nationality of the newly independent republic. In the longer term, this decision could not but have far-reaching political consequences. By enfranchising the national minorities of the new State, the Moldovan political elite had henceforth to reckon with them as with a serious factor, given their numerical strength.

Secondly, shortly after obtaining independence Moldovan leaders became divided over the issue of the future of a new State. While the majority of the political elite opted in favour of consolidation of it, a small but vociferous and potentially powerful minority wanted immediate or gradual reunion with Romania. Eager to isolate and marginalise this pro-unificationist minority, the pro-independence elite came to see in national minorities, which were feverishly anti-unionist, as their important allies, smaller partners in a pro-independence coalition (see King 2000: 145-177, 224-230). This, in its own right, strengthened the ability of the minorities to have their voice reckoned with.

But if the reasoning exposed above is correct, one could probably not illegitimately extend it. And more precisely, if a choice in favour of a "civic" or a "culturalist" program is rationally explainable, and if in Moldova a decision to grant citizenship on a territorial basis determined to a large measure the future dynamics of Moldovan politics, than in Latvia opting in favour of "culturalist" agenda could not but create its own inertia, entrenched interests and clichés which would make a change in Latvian minorities policies ever more difficult in the future.

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15 During several months of 1917-1918 Moldovan Democratic Republic existed in Bessarabia, but it was never internationally recognized and no citizenship enacted. See Levit 1997 and 2000.

ADDENDUM:

The above text had been written by the summer of 2001 and since then I moved to another country and subsequently developed a different research agenda. I have not been following developments in Moldova and Latvia as closely as I was doing before though I never lost my interest in them. This short addendum is not intended to provide a complete update on these developments since it would require a more intimate knowledge with the politics and social dynamics in the two countries and would also take more space than provided. However, even without a more detailed and thorough analysis there is still no denying that the basic patterns remained the same as they were described in my 2001 paper.

In particular, in Latvia, despite strong international pressure, no revision of the citizenship law, which would make naturalization easier for non-citizens was enacted, nor was the procedure itself made free of charge for the applicants. Other recommendations of the international human rights bodies, such as the facilitation of the acquisition of Latvian citizenship by the children born from non-citizens and stateless persons after the proclamation of independence, and simplifying the tests on the knowledge of Latvian language, history and legislation for the elderly and the people with disabilities were not acted upon. There indeed was an increase in the number of requests for naturalization after 2004 so that 16 064 individuals were naturalized in 2004, 19 169 in 2005 and 15 794 in 2006 as compared with 10 046 in 2003, but this increase is attributable to Latvia's accession to the European Union, an accession that resulted in Latvia's citizens becoming citizens of the EU, with all the attendant rights and privileges, among which the freedom of travel is by far the most important. Since Latvia non-citizen residents do not have these rights, this fact became a serious incentive for the non-citizens to go through the complicated naturalization process. But the slowing down of the pace of the acquisition of citizenship in 2006 in comparison with 2005 might suggest that the increase is not sustainable and represents a spike rather than a long-term trend. As of April 1, 2006 Latvia comprised 1 836 609 citizens and 411 054 non-citizens, i.e. almost 18 per cent of the population among whom ethnic Russians constitute 66.5%. Among the non-citizens, 38.1 per cent are between ages of 41 and 60, and 28.9 per cent are over the age of 60 (Council of Europe 2007). Barring the substantial revision of the citizenship law and naturalization procedure, the prospects of which seem to be rather poor, these people will probably never become Latvian citizens – a situation which is without precedent in Europe.

Nor was there any progress achieved in such spheres as the use of minority languages in public administration, either at the local or national levels, the participation of non-citizens in political process, in particular elections, at the local and municipal levels, or the right for the electronic media to broadcast in languages

other than Latvian: the application of restrictive legislative provisions remains as strict as it was back in 2001. In 2001 and 2002 Latvia lost two cases, before the UN Human Right Committee and the European Court of Human Rights respectively, against her citizens belonging to national minorities whose names were removed by the central electoral commission from the lists of candidates of political parties on the grounds of their insufficient command of the Latvian language. On the other hand, education reform envisaged by the 1998 law proceeded as foreseen, despite numerous protestations of members of minorities, in particular the Russian minority, and the international human rights bodies' recommendations to the government of the country to initiate consultations with those affected by the reform. To cite a recent memorandum of the Council of Europe Commissioner for Human Rights, "the reform was carried out as scheduled without any genuine dialogue" (Council of Europe 2007; Cilevičs 2007).

The situation in Moldova also largely remained the same, though at the beginning of the current decade events seemed to be taking a very different direction. The Party of Communists, which won the February 2001 parliamentary elections with more than 50 per cent of the popular vote and 71 seats in the 101-strong Parliament, initially appeared as a radical pro-Russian and anti-Western force. During the election campaign of that year it promised to make Russian the second official language of the state and to bring the country into an economic, political and military alliance with Russia and Belarus. It also was confident that it would be able to settle the Transdniestrian issue speedily by undercutting popular support for the separatist regime in the region and thus forcing it to sign a deal with Chişinău while making dramatic gestures towards Russia on the international arena and towards Russian-speakers in Moldova.

Though the party ditched its most radical slogans immediately following its advent to power, in early 2001 its government sparked a wave of nationalist protests in the capital, Chişinău, by adopting an ill-conceived decision to make the study of Russian an obligatory subject in all schools with the language of instruction other than Russian and to replace the history of Romanians as subject matter in all schools by the history of Moldova. Since to many nationalists this smacked of the Soviet-era forced Russification and cynical manipulation of their national identity, nationalist mobilization was so powerful that it was reminiscent of the street protests of the late 1980 and early 1990s. The situation provoked the intervention of the Council of Europe, which expressed its strong concern and requested that both decisions be suspended. Having found itself under the strong pressure from within and from without the Government backed off (see Council of Europe. Parliamentary Assembly 2003 and Skvorţova 2003).

The Party's policy towards Transdniestria underwent radical revision as well. Having encountered the stubborn refusal of the separatist authorities to negotiate

in good faith the government adopted a more confrontational approach towards them already in the fall of 2001 and since then there was no progress in this respect. Disappointed by what they consider as a duplicitous policy of Moscow leaders toward the Transdniestrian issue, the party, which won reelection in 2005 parliamentary elections, gradually moved away from its pro-Russian and towards a more pro-European and pro-Western stance, though to what extent this foreign policy reorientation is sincere and long-lasting is open to doubt (see Solonari 2003 and The Economist 2005).

This shift in the party's domestic and foreign policy orientation resulted in its pursuing a policy in the sphere of inter-ethnic relations which is barely distinguishable from the modus operandi established in the first decade after independence. In July 2001 the parliament adopted a law "On the Rights of Persons Belonging to National Minorities and the Legal Status of Their Organizations." The draft of this law was elaborated by the previous parliaments but the vote on it was constantly postponed while its substantial provisions were integrated into various particular legal acts as shown above. The law, in effect, repeated all already existing constitutional and legal provisions in the areas related to the rights of minorities, in particular the use of languages, but added two provisions, which were substantially novel in their content. The first (Art. 10), stipulated that all names of localities, streets, public institutions and buildings had to be indicated in the Moldovan and Russian language while in the localities to which a special autonomy status was accorded it could be indicated in other official languages having this status by law. The second (Art. 11 par. 1), provided for the same for all information "which has a direct relevance to the health protection, guaranteeing public order and security, as well as [for all] visual information [available for public use] in the Ministries of Internal Affairs, Justice, Public Prosecutor's offices, in medical establishments, in [public] transportation vehicles, on the auto-, railway and fluvial stations, in the airports, [and] along the highways." However, in May 2002 Constitutional Court declared the sintagma "and Russian" in both articles unconstitutional and the parliament changed these provisions in December 2005 by granting to the local authorities the right to provide such information "also in other language, in accordance with the legislation in force," This provision makes little sense in so far as the Ministries of Internal Affairs and Justice, as well as Public Prosecutor's offices are concerned since local authorities have no jurisdiction over their premises. Thus the situation returned to the status quo before the advent to power of the Party of Communists.

The Party's unwillingness to risk a new confrontation with the nationalists over its policy towards the minorities was even more evident in its handling of another controversial peace of legislation, titled "Concept of the State National Policy." Adopted as an organic law in December 2003, it was primarily intended to affirm the Party's devotion to the ideology of "Moldovenism" as opposed to

"Romanianism": while the former affirms separate (national) identity of ethnic Moldovans, the latter sees them as being the same as ethnic Romanians though having some regional cultural differences. At the same time the document contains several provisions, which bear on the policy toward national minorities in the country, mostly when it emphasizes the values of multiculturalism, mutual tolerance and respect which are allegedly characteristic to the "people of the Republic of Moldova" (which is distinguished from the "Moldovan people" understood as an ethnic nation, see also Solonari 2002). In the initial redaction, par. 6 of part I read: "The Russian language, which, in conformity with the legislation in force, has a status of the language of inter-ethnic communication, is also used [alongside Moldovan] in various domains of the state and societal life." Though this draft provision was not, as the rest of the document, directly applicable and constituted rather a pious aspiration than an article of law stricto sensu, its psychological and possibly political consequences could be far-reaching. This is why it became the main focus of criticism of the opposition in the debate on the draft and was eventually dropped from the text (M.O. N 001 of January 1, 2004, with rectification in M.O. 6-16/01.01, p. 103; Flux, December 19, 2003 and BASA-PRESS January 5, 2005)[16]. Since that moment no changes in the legislation and law-applying practices in the spheres relevant to the national minorities intervened.

This summary analysis of the developments after 2001 validates the basic conclusions reached in 2004. The only rectification I would like to introduce concerns the use of Laitin's dichotomous terms "civic" and "culturalist." While Latvian elites' governmentality can certainly be designated as a case of the latter type, it would be a mistake to unqualifiedly use the former term in reference to the guiding philosophy of Moldovan political elites. In fact, they are, too, beholden to thinking about the nation in ethnic terms, a mental habit that makes them, in their great majority, whether supporters of "Romanianist" or "Moldovanist" conception of Moldovan identity, closer to culturalist rather than to the civic paradigm (see Solonari 2002). But, as the record of the Moldovan communists government indicate, and in particular the rhetoric of toleration, mutual respect and multiculturalism enshrined in the Concept of State National Policy cited above suggests, the partisans of "Moldovanism" tend to pursue more inclusive policy toward Russian-speaking minorities than their political opponents, the Romanianists.

16 Flux and BASA-PRESS are available at ournet.md.

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Latvian Naturalization Board (English version): http://www.np.gov.lv/index.php?en=par_en&saite=par_en.htm. Contains texts of Latvian laws and regulations and statistics of naturalizations.

Moldovan Ministry of Justiice, Legislation: http://lex.justice.md/index.php?search=true&current_page=1. This site is an excellent source for Moldovan laws and regulations (in Moldovan and Russian) in force.

NGO "Minorities Electronic Resources": http://www.minelres.lv/. Contains English translations of the bulk of the relevant Latvian laws and regulations on minorities as well as other important information on the country (reports and opinions of International bodies, US Department of State, international and national NGOs).

www.ournet.md: news reports from Moldova.

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