Eduardo J. Ruiz Vieytez and Robert Dunbar (eds.)

Human Rights and Diversity: New Challenges for Plural Societies

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Eduardo J. Ruiz Vieytez
Robert Dunbar
(Editors)

Kevin HR Villanueva
(Managing Editor)

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Bilbao

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Introduction

Eduardo J. Ruiz Vieytez

The limitation of democratic principles to the interior of each of the States that comprise international society has carried with it an inevitable adulteration of these principles. The dominant liberalism of the last two centuries has not only legitimized the structuring of political power in nation-States but has done whatever possible to extend this division to all areas of the planet and to organize the present-day international community around it. This has meant that within the framework of each national society, the political structures were seriously conditioned by the dominant parameters of identity in each case, which at the same time has meant that human rights, theoretically universal, cannot be applied except through canons of interpretation which each dominant group has imposed in its respective space. In this sense, discerning the authentic meaning of certain human rights is a need that has been felt for a long time, inasmuch as all countries incorporate, to a greater or lesser degree, different sources of diversity. While this is true, it is no less true that, once the ideological conquests of liberalism and socialism seem to have been consolidated, the greatest challenge now faced by reflections on human rights is that of cultural or identity justice. The present-day panorama in which, starting with societies that are already plural, there are important movements of population which increase diversity, demands a deep reframing of our most basic concepts of coexistence and the adaptation of the idea of democracy to a multicultural reality.

The idea of diversity implies the assumption of differences between human beings, between groups of people identified by more or less concrete elements: cultures, languages, religions, values or beliefs, life directions, physical aspects, capacities, and so forth. They exist despite a series of differentiating criteria, involved in the definition of social groups, that are not necessarily relevant as regards the organization of public space; while, on other occasions, the criteria that mark these differences are relevant only to the extent that they reflect inferiorities or disadvantages that affect certain groups exclusively, regardless of their position in one or other specific society. Nevertheless, there are also certain elements that form a substantive part of what we call collective identities and which, considered in themselves, do not imply a situation of disadvantage or inferiority with respect to other human beings. They are factors like language or religion which constitute

an important part of the identity of individuals and the groups in which they are integrated, which at the same time affect the regulation and arrangement of the public spaces, and which, in effect, do not by themselves imply an objective factor of disadvantage or, for that matter, of superiority. For this type of element to have socio-political consequences it is necessary to place it in relation to the structures that organize our political life. To the extent to which the exercise of democracy and human rights, of politics in fact, is compartimentalized in differentiated legal entities (which we identify as States), the majority or minority nature of these elements within each specific entity is what in fact conditions the position of those who share them.

States have successfully adopted, and possibly required, certain specific identity elements as referential (official, dominant or simply majority, according to the case), which implies that they have constructed their legal and political system, the organization of public space, from or through the perspective of a specific identity. In the best of cases, some States, through conviction or (more habitually) necessity, have adopted a plurality of referential elements, which in any case constitute a closed group, explicitly or implicitly, of such elements. With the generalization of formally democratic procedures, political dynamics have led to a position where, in each State, it is the elements characteristic of the majority of the population which have received privileged treatment, in some cases, in addition to others which are or were the heritage of certain, especially powerful minority groups. Nevertheless, this way of constructing politics, around sovereign entities that are territorially and personally exclusive, leads to the existence of minority communities which, being part of the State (in a formal or factual sense), see elements of their identity subordinated to those that are referenced by a State in which, by definition, they lack the numerical force necessary to impose their aspirations without the approval of the majority group. This fact, that historically has been present in the construction of all Europe's state societies, is increasing nowadays as a product of the movements of population and the establishment in Europe of more and more diverse groups from different places in the world and bearing different parameters of identity.

It is within this framework of permanent multiculturality, increasing and changing, that the politics of the early 21st century is being constructed. At the same time, this politics is projected in societies that confirm themselves as democratic and in which the numerical rule of the majority constitutes the maximum source of legitimation of collective decision-making, with the diffuse limit of respect to human rights whose configuration is also decided through the habitual mechanisms of creation of the law.

Along the lines just mentioned, what we aim to do with the reflections that are contained in this work is to contribute a critical and practical consideration of such issues that suggests the path that politics should take in societies that are in process of pluralization or of constant and progressive diversification. Starting off from the fact that all States on our continent have always been diverse societies as regards culture, religion or language, the accelerated contemporary complexification of identities and differences in daily coexistence is of particular interest to us, precisely because it does indeed take place in societies where there is a considerable degree of "traditional" diversity. There is no doubt that the democratic

management of diversity becomes more complex, but at the same time more interesting and fruitful, in those spaces which combine significant historical diversities with the impact of a new diversity. In essence, one of the most exciting subjects that can today guide political reflections in formally democratic societies is that of the response that should be offered to plurality, considering within this response the interaction that arises between traditional forms of diversity and new minority realities caused or reinforced by recent flows of population.

Really, the great challenge for political reflection today is that of the democratic management of diversity, facing the obsolescence of the territorially partial application of the ideas of democracy and human rights, and devising structures and formulas that allow us to progressively approach the creation of fully democratic societies, able to assume the plurality of identities from an equilibrium that allows all persons to enjoy their human rights through their identity and not in spite of it. It implies, as we have already argued on previous occasions, deciding on a de-territorialisation of political power, but also and mainly on constructing post-identity political societies, not with the intention of maintaining an impossible cultural neutrality, but to actively facilitate respect for the dignity of all persons, incorporating their identities as far as possible in a more versatile, inclusive and integrating system.

In this framework it is necessary to ask oneself about the current relevance of the normative options that we know by the traditional name of multiculturalism. In a context which complicates the management of public space, Sia Spiliopoulou askes in her article about the reasons for legitimation of the norms and institutions that allow for protecting diversity and the position of minorities in any society. The present panorama does not allow us to glimpse a single answer to the necessary readjustment of multicultural policies, but at the same time, it demonstrates that the reasons for managing in a more democratic way, including diversity, are increasing. Particularly relevant in this respect is the incorporation of a new perspective of diversity protection that Sia Spiliopoulou Åkermark identifies as democratic participation. What is proposed, therefore, coincides with our proposal on the need to redefine the idea of democracy (and through it of constitution and human rights) in politically managing the cultural and identity diversity that characterizes our societies.

Javier de Lucas advances in the same line of reflection when he indicates that our main challenge in politics is to manage democratically multicultural societies, maintaining two objectives at the same time: to guarantee the cohesion and stability of society, and to assure the necessary democratic legitimacy in its mode of organization. Again, the need to redefine democracy from an inclusive and plural perspective appears here. Not for nothing, as Sia Spiliopoulou Åkermark suggests, do we ask ourselves about the reasons that may lead us to give greater legal or political cover to some cultures or identities than to others, normally based on reasons relating to history or affinity. It here that the option of a new model of citizenship based on residence, as Javier de Lucas proposes, acquires its meaning. Thus, we find that it is necessary to advance by separating the concepts of citizenship and nationality, a thesis with which Francesco Palermo also agrees, from a different starting point, in his proposal for a Law of Diversity.

As Sipiliopoulou Åkermark indicates, multiculturalism can be defined as one of the results of the post-Enlightenment opposition to to the existence of a single truth. In the context of the States in which present-day politics is (still) organized, this leads to a more plural, more flexible approach, which implies a permanent negotiation through diversity, as Javier de Lucas demands in his contribution. Francesco Palermo, on the other hand, maintains the important role that must be given to the law in this process. This is a question of finding legal criteria that serve to limit the numerical capacity of majorities to impose their decisions, but without forgetting that the law cannot in itself cease to be a cultural product that reflects the perceptions of the majorities that construct it, so that, to be able to adapt to a democratic and multicultural society, the law must be reconverted into a law of diversity.

This option of a Law of Diversity, and not for a mere partial adjustment in favor of specific minority rights, is not totally congruent with our proposal for a multicultural re-reading of human rights. Javier de Lucas also deepens these reflections, always from the perspective of inclusivity as a constant in the discourse that not only complements, but explains and legitimizes the option for a simultaneously multicultural and democratic political organization.

The more legal perspective of Francisco Palermo means an approach that is aimed at reconverting the law as an instrument of coexistence and equipping it with new value as a guarantee of diversity. The key to this transformation would not merely be political, but would include a sort of relocation of the law in a more ideological and not merely instrumental framework. This does not prevent Francesco Palermo, coinciding with the perspective of Sia Sipiliopoulou, from arriving at the conclusion that nowadays, in multicultural societies, what is most relevant in the matter of human rights is not so much their objective content, always subject to the interpretations of the dominant groups, as we have been pointing out, but the procedures that must be followed to define them in each case.

In this sense, here the idea is advanced, via diverse approaches, that an *a priori* definition of the idea of human rights is not desirable, and that to effect this definition from within existing closed structures, inevitably contaminated by the dominant parameters of identity within them, is in fact a prostitution of the idea of democracy and human rights. On the contrary, to construct a Law of Diversity means a re-reading of the basic political concepts that order our societies and focussing more on the means of contributing more to these consensuses, with democratic participation as the foundation of the protection and promotion of diversity. In fact, it is a question of emphasizing democracy and participation in procedures, giving the political and legal institutions greater doses of flexibility, adaptability and asymmetry. The desired social stability cannot be obtained by means of the *a priori* fixing of the values and developments to be protected, but rather by means of their permanent subjection to discussion and negotiation through procedures open to all the identities that constitute society.

Possibly, the greatest practical problem that needs to be solved is that of finding the path that can lead to a similar reconversion. Inevitably we will meet the permanent obstacle of the numerical legitimation of majority decisions and a state of affairs whose alteration necessarily implies the consensus of the majority or fa-

vored groups in the present dynamics. Beyond the perspective of an open conflict that can force a renegotiation, the adventure of reconsidering democracy, of promoting inclusivity of citizens, of the multiculturalization of rights or of the Law of Diversity, will in any case run up against the necessary consent of those who have the necessary means to facilitate these transformations. This implies obligatory consent to these changes by the majority or dominant sectors in society, which can perceive such changes as a threat to a particular equilibrium that is favorable to their interests. On this point, a dilemma arises as regards the strategy that can lead to the result that is desired and advanced here as being the advisable one. Either a new discourse is legitimized by means of ethical-political arguments, which do not guarantee endorsement of these arguments by the dominant sectors, or a pragmatic, utilitarian discourse is articulated which demonstrates the appropriateness of the required transformations, which can, depending on the conditions of conflict, facilitate the desired result or lose site of it irremediably, fragmenting still more the use of political power between groups. Neither option in itself guarantees a necessarily positive result.

This is in fact one of the dilemmas which are considered in the articles included in the second part of this work, in which emphasis is transferred from proposing general political repsonses to the analysis of the impact of the most relevant elements of identity in our environment, that is to say, language and religion. Thus, François Grin explores the use of intercomprehension within linguistic families as a more reasonable and realistic alternative compared with a supposedly panarchic system (like the one that is formally followed within the European Union), which at its heart can simply conceal a hegemonic system in which, *de facto*, one language prevails exclusively over the rest. Intercomprehension would therefore play a mediating role in the democratic management of diversity, contributing a more realistic approach and at the same time avoiding a dynamic tending to undesireable uniformity.

The approach of valuing the impact of linguistic diversities in our present societies is also taken by Robert Dunbar and Xabier Aierdi in their respective contributions. In partial contrast with the institutional scope to which François Grin refers in his analysis of the utility of intercomprehension, Robert Dunbar provides an exhaustive review of the international legal and political instruments which they have emerged with respect to minority languages and with linguistic rights. The most remarkable thing is the existing imbalance in the present panorama in which the statehood conditionates in a substantial way the development of linguistic identities. The instruments analyzed by Robert Dunbar in his article show this thesis, and also the very philosophy of the system of intercomprehension studied by François Grin, as well as the theoretical-historical development that Baskin Oran presents in the first part of his contribution.

Linguistic diversity effectively constitutes an especially fertile field for reflection and polical criticism from the moment when, as at present, the disappearance of the language from the public and institutional space is shown to be nonviable. When, in addition, the linguistic diversity that is considered is not only the product of recent flows of immigration, but also within the framework of a historically plural and bilingual or multilingual society, the study of the specific data of the

relationship between linguistic normalization and the impact of immigration is especially relevant, as shown in the article presented by Xabier Aierdi. Once again, immigration acts here as an incentive to a plurality that in any case existed beforehand and which, on the one hand, constitutes a stimulus to a debate on diversity, but at the same time, can be perceived as a threat, in the framework of processes of recovery or consolidation of the historical minority identities. This same conclusion can be read in the comprehensive contribution of Robert Dunbar, when he reflects on the possibility of extrapolating the linguistic rights of traditional minorities to the so-called "new" minorities. On this question, the political and legal debate is relatively recent, but the tendencies point, in line with what Sia Spilipoulou Åkermark raised in the first part, to the idea that the justification of protection of the former can extend to the latter. In any case, it must be within the margins of flexibility and asymmetry that Francesco Palermo and Javier de Lucas demand, in which the treatment that a multicultural democracy must offer to these dilemmas is resolved, where, again, the enjoyment or otherwise of state official status by languages should be a decisive element when configuring a more or less firm public support for a diversity of linguistic expression.

The fact that language constitutes an essential element of public space does not have to eclipse the understanding that religions, and the cultural environment that is related to them, continue to project important and symbolic references of coexistence in any present-day society. Even more so, the impact of migration tends to provoke greater religious than linguistic plurality in present-day European societies, inasmuch as the processes of linguistic assimilation take place with much greater ease than those of religious assimilation. The duality of roles developed by language and religion as factors of identity in the two halves of Europe are emphasized by Baskin Oran. The construction of European political entities through the assumption of exclusive national identities, which we have denounced on several occasions, is highlighted not only with historical evidence, but also in the simple analysis of political practices and legislation that are today fully in place in most of the States. Even those countries that presume to develop an active secularism conceal religious or axiological options strongly linked to a particular dominant identity. The cases of Greece and Turkey (or in Western Europe those of France or Belgium) are paradigmatic in this respect, demonstrating, once again, that language and religion are the two great elements in the construction of political identities in the European continent.

In any case, present population movements are creating new realities that bring to western national societies a religious plurality that was not perceived as real until a short time ago. To traditional diversities, basically anchored in linguistic facts, a diversity that is recent, but numerically very significant and rapidly growing, must thus be added, which contributes a religious pluralism that projects in fact more demands for recognition in the public space than the linguistic diversity that accompanies it. This is the main reason for the need to provoke critical reflections such as those included in this work, which helps public opinion and the political class to redefine our structures of coexistence. Not in vain do great legal-political transformations take place, arising from changes in social realities that motivate new situations of conflict in which new balances are required. From this perspec-

tive, the present situation of increasing plurality, coming on top of traditional diversities, provides an excellent opportunity to complement liberal and social democratic dynamics from a cultural viewpoint. At the same time, it is without doubt the most exciting challenge for politics for the beginning of the 21st century, in which the construction of consensuses for coexistence will have more to do with the processes of participation and inclusion that with content defined in an *a priori* fashion. In any case, in to take place, this re-evolution requires greater support than that which in their day the liberal and social advances of the 19th and 20th centuries received, inasmuch as it implies an alteration of the equilibria that have traditionally benefitted certain majority groups. The challenge is in the transformation of the present political communities into post-identity States, the de-territorialization of political power and the true universalization of the exercise of so-called human rights, which can no longer remain subject to the exclusive identity filters that history has legitimized in the different nation-States of our continent. To this end, the post-identity, inclusive and plural democracy requires not so much new legal or political instruments, as a qualified re-reading of the same ones, in a way that allows the progressive transformation of political communities into multi-identity spaces for coexistence to take place.

Part I

Human Rights and Democratic Management of Diversity: Challenges and Solutions

Diversity, Immigration and Minorities Within a Human Rights Framework

Eduardo J. Ruiz Vieytez

1. **Approach**

The cultural or identity diversity of European societies is not the product of postmodernity. Nor is it the result of more or less recent processes of immigration. On the contrary, multiculturality has been always present in the history of the political communities of our continent. Actually, there is no European State that does not show some type of cultural, ethnic, linguistic, religious or identity diversity. By the same token, the design of these political spaces has always implied a degree of conflict, when several identities have demanded access to them. Traditionally, this conflict has been resolved in favour of particular dominant or majority groups in their respective political contexts, and has pushed others to struggle to obtain their own spaces in which to be able to reproduce the same pattern. Historical examples in this respect are numerous. The same can be said with regard to the assumptions which have been used to try and resolve the coexistence of differentiated groups in an open or plural way, since the treatment of one group or another, even under these adjustments, has traditionally been very unequal, based on the real or potential force which each group has been able to wield at historically crucial moments.

The extension of formal democracy in our political-cultural surroundings has not served to solve the questions posed by diversity. In effect, democratization has taken place in nation-States that had already made their own cultural and identity decisions. For that reason, the debate on the democratic management of diversity has until now been largely ignored. Normally, with sporadic exceptions, the non-dominant groups of the different States have not had the force necessary to be able to satisfy their demands. The consequence of all this has been the generalized understanding in which the political spaces, States, mark legitimate borders for identities and their public expression, with the result that human rights are interpreted in each political community according to one or several dominant identities.

Present-day immigration to Europe, which is recent from an historical perspective, is helping to raise this debate again. As a result of this process, new minority situations are being created in Europe, at the same time that those that existed previously are being transformed. Thus, the cultural bases that formerly served to organ-

ize State political spaces are today questioned by new social realities, the result of immigration and the technological and ideological changes generated by the process of globalization. The increasing plurality of contemporary European societies raises urgent and exciting challenges for the management of political coexistence.

Traditionally, European States have been based on the classic "us and them" dichotomy, which supposedly forced the elements of "our" own identity to be defined clearly and "theirs" to be excluded from the public space. The State, in addition, had to collaborate in the reaffirmation of elements on others within its own space. In effect, adopting the corresponding identity decisions, the State does not merely take part in the cultural or national scene, but it feels forced to defend or prioritize those elements of identity which have been chosen by the majority or dominant group. That is to say, European political communities have been constructed based on the more-or-less explicit assumption that cultural and identity uniformity is desirable. This uniformity also contributes to reinforcing the closing of communities to immigrants or foreigners. Rationalism has proclaimed that the cultural and identity uniformitization of closed political spaces (States) is something desirable and even natural. According to this view, we have learned that the State must seek its own homogeneity, because the efficiency of the state implies the need for a common language and a feeling of identity shared by all its members (the citizens). This ideological construction is more effective today than ever before, and present international relations are also based on it. The symbolic value of the State as a referent of identity (of an identity), and as a natural element of assimilation, is stronger today than at any other historical moment.

Everything said so far seriously affects the idea of citizenship and includes a conception of the idea of democracy that is, at least, insufficient. As we said previously, the European reality was always multicultural. But it is also true that present-day population movements, and the increase of transnational relations, emphasize this preexisting plural reality and, in some cases, contribute to it with unusual strength. At the same time, immigration constitutes not only a challenge to the traditional model of the nation-State, but is also a challenge for the political perceptions and aspirations of those minority groups that are considered as different nations or identity realities within the State[1]. In this sense, new dynamics, whether real or symbolic, can lead traditional minorities or even the majority to a greater reaffirmation of elements of their identity or even to redefine or specify their presence in public space. Thus, for some traditional minorities, the arrival in their vicinity of new minority groups can be a salutary experience for their capacity to mobilize, while in other cases the greater complexity can result in a feeling or perception, real or imagined, of new risks of assimilation or loss of specific presence. The new realities can be perceived by traditional minorities as an opportunity for the cultural opening of the system, but also as a threat to their preservation or the specific policies of protection from which they may benefit. For that reason, the study of the democratic management of diversity is still more interesting in those

[1] W. Kymlicka (2003), *La política vernácula. Nacionalismo, multiculturalismo y ciudadanía*, Paidos, Barcelona, p. 321.

societies where there are historical identity differences, over which the modern population movements take place.

In this order of things, we need to reflect on the historical or temporary legitimacies when organizing public spaces. The processes of immigration not only raise challenges to the traditional organization of the nation-State, but also force us to rethink the traditional concepts of minority, and the distinction between historical minorities and new minorities. What is true is that, with greater or lesser historical roots in the territory of another political space, people who immigrate and settle permanently in that territory become part of it. They contribute to its formation and development. They contribute to the public welfare system, and, in turn, deserve to be treated as members of the political community. Is it legitimate, in contemporary democracies, to make this membership conditional on identity filters? What legitimacy, if any, should we assign policies that privilege certain identities and damage others for numerical or historical reasons? And, if we respond affirmatively to this, although partially, then who is legitimized to make decisions about what identity elements will mark belonging or political privilege?

Democratic deepening demands a new consideration of these and other problematics, on a basis of inclusion and plurality. Just as social realities are increasingly plural, institutional realities must be adapted to this diversity. For that reason, we do not here wish to raise the question as a process of integration of immigrants or displaced native populations. We understand this approach as unfortunate in a democratic perspective. The challenge is not the incorporation of different populations that arrive late to a society that has already been constructed and is satisfied with its position, but the revision of political schemes used to construct political communities, based on the parameters of a democracy that reflect a contemporary debate that has not yet been incorporated in all political contexts. The central question is, therefore, that of democratic management of diversity. We should forget the immigratory dimension as a process and take on board the reality of the everyday formation of the political community, of the nation. We should not see residents as immigrants or foreigners, but as citizens who form part of the cultural and identity mosaic that is already part of the country. We need to resituate historical pluralities in a present-day perspective, to reaccommodate consensuses and dialogues, and to redefine the essential elements of a common political project. To put it in a nutshell, we need to manage diversity in a democratic way; to deepen the traditional liberal and national concept of democracy so as to develop it in such a way that it serves to maintain present political spaces without harming the human dignity of all those who compose them. In the last instance, the reflection should lead us to raise the question of the future utility of present-day political contexts of reference, once they have been subjected to the sincere and deep filter of democratic accomodation, understood from a basis of diversity and inclusiveness.

2. **Diversity and Democracy: A Proposal for Re-Reading the Key Concepts**

In the present article, I seek to offer some guidelines or answers to the questions formulated above. To this end, it is necessary first to order the questions

raised according to a contemporary approach of the concepts of democracyand human rights. It is necessary because at the present, the normative responses that are offered to cultural diversity are not only incoherent, they are also nationalized. They are not coherent, because they do not face diversity as a phenomenon, or if they do it is viewed negatively. And if they do not face all aspects of diversity, this is surely because they respond to a partial predisposition that sees diversity as an obstacle to the desired homogeneity. On the other hand, the answers are nationalized, in the sense that they are articulated from and through States, which are in practice the only agents that create the law. Even international documents, when they are applied to a specific society, must pass through the interpretative filter that predominates in this society; that is to say, they can only be recognized, implemented and guaranteed, once they are nationalized.

This demands that we look for new theoretical and practical schemes, which are coherent and whose general application is possible. If we speak from the perspective of the theory of human rights, it is not acceptable that their implementation should be subject to State or national filters. On the contrary, the hermeneutic filters or canons that can and should be applied to the different rights are in fact those that correspond to the essential elements of human dignity, which in any case includes the identity of each person, independent of the nationality to which they belong.

Our proposal for reflection is based on the need to review four basic political concepts, from a new conception of democracy adapted to inclusivity and diversity. Thus, the four concepts on whose deep meaning it is essential to reflect are those of immigrant, minority, constitution, and fundamental rights. This reflection is aimed at questioning the interpretation of these concepts in our contemporary European societies, as well as identifying their meanings which are submerged or annulled in the legal systems that are considered democratic. In fact, when going into depth on any of these four concepts, we are studying a systematic whole that is projected on the meaning of the concept of democracy. A detailed consideration of this idea means reconsidering the application that is made of the four previous concepts. At the same time, we can distinguish two ideas that are instrumental in organizing the reflection on these four terms. In the case of the first two, immigrant and minority, the emphasis is placed on the idea of citizenship, that is to say, belonging to the State. In the case of the last two, constitution and fundamental rights, our reflection will emphasise the idea of political community, of *civitas* or *politeia*.

Finally, it is also very relevant to emphasize that we do not seek so much to elaborate new concepts or to propose new rules, but to defend a new interpretation of the idea of democracy through four complementary axes. Traditionally, new demands as regards human rights have been addressed from an indefinite extension of the original nucleus of legal protection of rights. That is to say, that the defense of new perspectives and arrangements for the best protection of the dignity of persons and groups has been focussed on extending the list of political and legal texts that recognize rights, as if the mere positivization of the latter were sufficient for their protection. On the other hand, the effect of adding new rights to an already overabundant list or the sort of hierarchial structuring that takes place

when the listing becomes too extensive has not been considered sufficiently. This has ended up being detrimental to the most recent demands and, possibly, to the whole. There has existed and exists an excessive obsession with positivizing all the advances and extending the written list of human rights. Here we defend, on the contrary, the need to locate the focus of our efforts in the reinterpretation of the more solidly established rights. In order to reach the result of a democracy based on inclusivity and diversity, it is not necessary to widen the scope of protection with new (and unavoidably weak) instruments, but to reorientate the most solid and unquestionable aspects of our political systems. For that reason, the channel of reflection will be the need to unmask the true meaning of old terms in today's world. We do not propose specific or novel recognitions, but we understand as necessary a re-reading of human rights in accordance with the present demands of reality and the deep meaning of democracy. For all these reasons, the proposal is, first of all, reinterpretative and seeks to be viable in the present state of development of comparative and international law.

3. **Reinterpreting Citizenship**

As we indicated previously, the first two reflections that we propose here (referring to the ideas of immigration and minority) are centred on revising the concept of citizenship, or what amounts to the same thing, of the instrument that dertermines the basis of belonging to the political community. Citizenship acts, as we know, like a technique that justifies belonging and participation, as opposed to its absence, which would imply exclusion and marginalization. The construction of citizenship obviously affects the design of public spaces[2]. In the first place, this is because it is only the citizens who have the right to decide on this design. Secondly, it is because belonging or citizenship itself can be conditional on a previously formulated cultural or identity design.

In effect, in our political culture, the idea is firmly based that the construction of public space (also with respect to cultural or identity aspects) flows from two basic premises, which are used to respond to the phenomenon of diversity, whether traditional or recent. The first premise prioritizes positions of native origin against the contributions of those who come later to an already established system. In colloquial terms, this argument is summed up by the phrase "we were here first". The second premise is based on the exclusively numerical operation of a supposedly democratic system. In this case, the position is colloquially summarised by the phrase "there are more of us". Both premises, deeply rooted in our societies, definitively condition the capacity of both sectors to influence the design of public space. Both considerations are also strongly linked to the idea that cultural uniformity within closed political spaces is a legitimate and natural situation.

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[2] A. EIDE (2004), "The Rights of 'Old' versus 'New' Minorities", *European Yearbook of Minority Issues*, vol. 2, 2002/3, European Academy / European Centre for Minority Issues, Martinus Nijhoff, pp. 374-375.

The first of the premises just cited merely confirms the traditional view of the immigrant or foreigner as a stranger, someone outside the titular group (owner) of the community. From this perspective, immigrant communities are considered, in the best case, as groups of guests, potentially destined to become citizens to the extent to which they adapt gradually to the identity consensuses which were established before their arrival. Their greater or lesser possibility of integration and future belonging is based on whether their cultural or identity differences with respect to the dominant parameters in the host society are greater or less. From this perspective, it is desirable first to identify those groups whose allegiance to our cultural or identity values and elements is more certain or, at least, more likely. For that reason certain groups are considered "more easily integrated" than others. From this perspective, the political community is not equivalent to a permanent construction. On the contrary, there is a sort of cultural essence that cannot be eliminated, unless the initial holders or their descendants permit it.

It is still very odd that this same approach is applied even in those cases where the dominant groups are not really the first historical occupants of the State territory. This is particularly evident with respect to indigenous peoples or minorities that exist from distant times within the State. This is a situation that can easily be seen in countries of the American continent, for example, although it could also without difficulty be observed in certain States in Europe. This merely demonstrates that the priority which legitimizes an appropriation of political space does not in fact operate only temporarily, but it alludes to the patterns of participation at the moment of construction of the modern State. Only from this perspective, and not having had the opportunity to participate in the original foundation and structuring of the State (basically by being excluded from it), is it feasible to apply the scheme of priority to those who form part of groups that historically have lived in the place now occupied by that State in whose public design they seek to participate.

As for second of the premises, that relating to the justification of identity decisions on numerical criteria, it seeks to justify the supposedly democratic character of the political options that relegate cultural identities, benefiting the domination by one of them. This approach consists in fact of a prostitution of the adjective "democratic", inasmuch as it is reduced to a mere numerical expression, which operates within the limited scope of a political community. It is merely the concrete reflection of the risk of the tyranny of the majority that is present in any apparently democratic system, and which was already understood from its beginnings by thinkers like Alexis de Tocqueville or John Stuart Mill. According to this perspective, the political options that privilege certain referents of identity or culture over others, would be justified by the existence of a demand by the majority of the population or of a consensus of this majority in favour of these options. At the same time, since we start from the premise that cultural uniformity is desirable for better social integration, we conclude that integration demands that we adapt ourselves to the characteristics that are shared by the greatest number of citizens. Nevertheless, this conception perverts the very idea of human rights, inasmuch as these in fact consist of exceptions to the numerical rule of the majority. The question to be resolved is the minimum treatment that must be assured

to the members of the minority groups, as opposed to the numerical strength of the majority. A total concept of democracy demands the balanced participation of all in the construction of the public space, and an idea of human rights that assures protection of the elemental dignity of all persons, regardless of decisions by the majority.

Majorities, and even many members of traditional minorities, usually employ these two arguments as a basis for opposing the debate that suggests a greater cultural or identity diversity. For that reason, it becomes necessary to rethink the ideas of minority and immigration, and to redefine them on a more democratic basis. The understanding of democracy at the start of the 21st century cannot identically reproduce the schemes that we have inherited from the construction of nation-States in the 19th century.

3.1. *The Idea of Immigration: An Inclusive Citizenship*

There is no doubt that the present movements of population are substantially altering the identity and cultural panorama of European societies. Europe is traditionally a continent of expansion, which during centuries has populated other areas of the planet. Nevertheless, the second half of the 20th century has marked an historical change of tendency, whose consequences have not yet been perceived in their totality. Thus, Europe is today a continent of immigration, and European societies are losing their traditional national homogeneity, consisting as they do of ever more heterogenous communities, which results in increasing linguistic, religious and cultural diversity.

Notwithstanding this, European States continue to treat immigration as if it were a conjunctural phenomenon and a fact associated exclusively with the economic-employment context. In the cultural order, immigration is perceived as a problem that impedes the necessary and natural uniformity of society. From the legal perspective, in fact, the concept of immigrant does not, as such, exist. Legal relevance is granted to the legal nationality which each State regulates for itself. The legally operative concept is that of foreigner, and within this, the diverse categories or situations in which the foreigner may be.

The status of foreigner, nevertheless, remains an instrument of closure of the political community, which excludes non-nationals. The non-national, for their part, is one who does not share our community of origin and who, presumably, does not share our elements of identity. Thus, nationalization is understood as being bound to the assumption of dominant cultural elements and the acquisition of nationality is linked, in ever more States, to mastery of the official language or to knowledge of the history, customs and institutions of the respective country.

This clearly assimilationist approach ceases to be legitimate in a 21st century democratic model. In effect, the cosmopolitan State is only constructed from open systems of belonging. In the new multicultural reality, citizenship, understood as a legal bond with the State, cannot be conditional on the assumption of certain identity parameters. Today one can only respond democratically to the reality of immigration by constructing flexible models of citizenship. These models must allow, on the one hand, more cultural elements to be associated with the

construction of the community identity and, on the other hand, should facilitate access to citizenship to those persons who reside with permanent intent in the community[3]. In reality, effective integration in the host society does not derive so much from access to the labour market or administrative legality, but from the incorporation of the individual into the political community as a citizen. The exclusion of non-nationals based on traditional identity arguments prevents an effective and just management of cultural diversity. Citizenship is not reduced to being a mere legal instrument of belonging, but in itself implies a symbol, a bond of identity with the respective political community[4]. Nowadays, the democratic legitimation of the State demands the participation of all residents in the processes of political decision-making in a fair balance with their contribution to the prosperity of the country[5].

Starting off from these considerations, what is habitually viewed as a question of social integration of immigrants becomes a debate about the democratic management or accomodation of diversity. The immigrant person who enters a European society with the intent to stay, and who subsequently contributes to its development, must be considered a member of this community. The new citizen also places new cultural and identity elements into the public space, with their corresponding demands and needs. This will force almost permanent renegotiation of access by these elements to this public space. But the democratic response to integration cannot consist exclusively of the cultural assimilation of the new citizen, or the condition of assimilation for the recognition of citizenship. This way, we would only obtain societies that are ever more disintegrating and constitutional rules that are ever more distant from the social and cultural reality that they govern.

It is necessary, then, to rethink the concept of immigrant and its legal and institutional treatment. Permanent immigrants should not be considered as foreigners in the process of integration but as participants in a political community, whose cultural characteristics change frequently. It is not a question so much of debating the models of integration of immigrants in the host society, as of managing democratically the diversity created when the old and new citizens interact. The immigrant is, generally, a new citizen, whose elements of identity have the right to be recognized in the public space that the same new citizen finances and promotes with their labour and their mere social presence.

Inclusive citizenship is the only coherent answer to this issue. At the same time that we recognize inclusive citizenship, linked exclusively to factual residence, we must turn aside the question of the immigration debates, to focus on the political treatment of diversity, which possibly constitutes the greatest and most exciting challenge for politics in the 21st century.

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[3] J.C. Velasco Arroyo (2004), "Republicanismo, constitucionalismo y diversidad cultural. Más allá de la tolerancia liberal", *Revista de Estudios Políticos*, no 125, p. 203.

[4] J. De Lucas (2003), *Globalización e identidades,* Icaria, Barcelona, p. 107.

[5] Recomendation 1500 (2001) of the Parliamentary Assembly of the Council of Europe, "Participation of Inmigrants and Foreign Residents in Political Life in the Council of Europe Member States", 26 January 2001, paragraph 4.

3.2. *The Idea of Minority: A Plural Citizenship*

The idea of inclusive citizenship also incorporates a plural model of citizenship, which, starting off with the affirmation of legal equality, rejects uniformity of identity. The society must recognize itself as plural, and it is precisely that diversity which we seek to manage democratically.

As has already been said, European societies have not become diverse merely as the result of the contemporary processes of immigration. On the contrary, European reality has always been plural. There is hardly a European State in which we cannot speak in its origins of some kind of religious, linguistic or cultural diversity. It is nevertheless true that globalization and immigration have increased this diversity, but this does not negate the existence of traditional diversities such as those that we habitually refer to with the concept of minority.

This concept of minority, whose definition and application in different countries have generated not a few doctrinal and political controversies, also needs to be reviewed and adapted to the contemporary reality[6]. Numerous European countries and international organizations react negatively to the idea of extending the traditional concept of a minority to the new cultural communities that are the product of recent processes of immigration. The consideration of minorities, or national minorities, would thus be limited to those groups that have traditionally lived in the State or which have some long-standing legal bond with it. At least in the European context, this legal link generally takes shape in legal nationality, which excludes immigrants in principle, since many of them will not normally have obtained this condition yet.

For that reason, this second reflection is intimately joined with the first. The exclusion of immigrants as non-citizens has direct repercussions on their non-consideration as minorities or, at least, national minorities. This is another source of exclusion and a cause of regulations that are not in accordance with reality. Communities of permanent immigrants, as we previously indicated, must be considered as groups of citizens who exhibit cultural or identity elements different from those of the majority of the population. And this indeed turns out to be exactly the substance of the idea of minority that is applied to traditional groups considered as such. In fact, the presence of new cultural communities implies an increase in the number of minorities that exist in a given society.

In this sense, the debate is turned in a more accurate and real direction. We do not seek so much to consider whether immigrants or foreigners can be minorities without being full citizens. Nor is it a question of arguing about the preference for traditional minorities compared with groups that have appeared more recently. Considering persons who live stably in the State as citizens with diverse cultures, the question is again directed towards the debate on the democratic management of diversity. It is a question of ordering the balance between majorities and minorities and sharing the presence of their respective elements of identity in the public space. This negotiation cannot be deferred any longer. Equally, it is necessary to

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[6] E.J. Ruiz Vieytez (2006), *Minorías, inmigración y democracia en Europa. Una lectura multicultural de los derechos humanos*, Tirant lo blanch, Valencia, pp. 125-321.

think about the extent to which the identity elements of the new citizens must give way to those of persons belonging to other traditional groups that may in some cases be less numerous than such new citizens.

Really, the revision of the concept of minority implies extending it conceptually. It is not necessary from this perspective to start byzantine arguments on the supposed conflict between collective and individual rights. The question of rights must be considered at a moment subsequent to this discourse. First, we simply intend to continue considering new residents as citizens and defending the possibility of a plural and multicultural citizenship. Citizenship being conceived in this way, the State will have to make room within it, in the most reasonable and just way possible (subject to a certain margin of appreciation, but in no case with unfettered discretion), for the cultural and identity elements of its diverse citizens. To this end, it will have to open a permanent process of negotiation between majorities and minorities, traditional and new, about designing and sharing public space.

4. **Reinterpreting the Political Community**

If the two first conceptual revisions that we have proposed had to do with the citizenship concept, is now necessary to reconsider our idea of the State as a political community or space of political coexistence. In our political culture, extended in fact to the whole of the planet, the political community is identified with the nation-State. In spite of numerous voices that point to the contemporary erosion of traditional nation-States, it is certain tday that the construction of international legal and political frameworks is based almost exclusively on traditional nation-State divisions. Certainly, it is possible that the power of the State has diminished in the social or economic order, but is no less certain that the political power of States in the creation of norms and of symbolic references is as important, if not more so, than it was 100 years ago.

Our custom of understanding States as closed political communities, within which cultural or identity policies are legitimized, is not an appropriate one for deepening the idea of democracy in the 21st century. Until recently, democracy was justified as a system that worked within the closed limits of each political organization. Nevertheless, in today's world, where population movements are multiplied, globalization accelerates contacts and people are more than ever conscious of their identity and cultural differences, the democratic nature of this scheme is severely questioned. Political borders can no longer be an instrument of closure that justifies the adoption of exclusionary decisions. Nowadays, the political community is a reality that is under permanent construction and transformation, simply because the society that composes it is subject to the same processes.

This forces to us to raise two different questions, but which allude to the same ideological basis. One is to unmask the national or identity character of contemporary States and to reformulate them based on the increasing diversity of their societies. The construction of this State, which we have called the cosmopolitan

or "post-identity" State[7] requires, on the one hand, an updating of the idea of the Constitution. Constitutionalism, which played an excellent role in the construction of the State of Law, must now be adapted to the cultural diversity of society. In other historical moments, liberalism opened spaces to the civil and political liberties of citizens, demanding of the State the role of guarantor of these liberties. Later, socialism raised social and economic vindications, and justified a state interventionism that acted as a palliative for the unjust effects of the free market. Nowadays, a new effort is necessary which organizes State intervention in cultural and identity contexts so as also to guarantee equality of opportunities to persons in these dimensions. To this end, there is no option but to make constitutional law more flexible and to understand the Constitution as an open and flexible instrument at the service of social reality.

On the other hand, the reconsideration of the State as a frawework for coexistence demands consideration of human rights without excluding filters. In today's world, human rights can only be understood as universally applicable values. Their implementation cannot be totally conditional on their conversion into internal fundamental or constitutional rights. Human rights transcend legal recognition and they cannot be nationalized. For this reason, it is necessary to rethink the idea of fundamental rights or, what amounts to the same thing, the way that States internalize in their domestic rules rights that by definition cannot be understood as a function of each State, but precisely through it.

4.1. *The Idea of the Constitution: An Open State*

The law of a State is an instrument created by and for the political community, as this has been defined at a given moment. Even though the State has a democratic facade, minority communities are normally excluded from the established centers of power. The Constitution is the supreme legal norm of the law of a country and, at the same time, it is an instrument of legitimation that also affects cultural and identity elements, and that bears a considerable symbolic value. Nevertheless, from the multicultural perspective, the presence of elements of identity in the public space must be partly alien to the capacity for collective decision-making. Along these lines, it could be considered that it makes no sense to speak in terms of official status, since the globally understood reality is what must condition the public presence of diverse elements of identity. Thus, the officialization of certain elements of identity (or the officialization of their negation, as frequently happens in the religious context) should not be considered a political decision subject to the criteria of numerical majorities, but the concretization of a democratic adjustment of those elements that reality raises and that, without a doubt, will condition the enjoyment of human rights by those who in fact form a part of this public space.

Multicultural Democracy forces us to reconstruct the State, denying uniformity and the monopoly of power on the part of a specific group, independent of its condition as a majority. Thus, multicultural Democracy, like the whole idea of hu-

[7] E.J. Ruiz Vieytez, *op. cit.*, p. 508.

man rights, constitutes a corrective or a limit to the numerical rule of the majority. Diversity obliges us, based on democratic and inclusive parameters, constantly to negotiate the design of public space between all the identities present in society. In constitutional terms, this implies a new concept of the Constitution as a flexible, balanced and open pact. The Constitution cannot, in this sense, be a closed and static formula, decided by the imposition of the majority group on the minority, or of traditional groups on new ones. In multicultural societies, it is seen as less and less legitimate that constitutional agreements should be protected by rigid processes of reform. Just as reality is plural and changeable, the Constitution must adapt to multiculturality, incorporating more and more elements into public space, and allowing for constant reform to make room for new balances and consensuses[8].

In this same sense, it is appropriate that the exercise of power should not be considered as bound exclusively to territory, as corresponds to the dominant political tradition in western Europe, in which the conflicting correlation between individual freedom and group property seems to constitute a political taboo. The new plural and dynamic society demands that the personal, not merely the territorial, models of self-government be rescued as appropriate formulas for the distribution of power, in combination with the possibilities for territorial reference. Power must be de-territorialized and decentralized to give a democratic repsonse to cultural and identity diversity.

Lastly, constitutional law cannot become the absolute limit that prevents extension of the cultural basis of society. Nowadays, constitutional law is the framework in which citizenship is restricted, the foreigner is excluded and the already-dominant elements of identity are made official. Sometimes, constitutional law is used to ensure that rights recognized for certain traditional groups cannot be extended other groups of more recent formation[9]. Compared with all this, we must rethink the very idea of the Constitution as a daily pact, and the idea of the law as a peaceful solution of differences. The Constitution is the framework of public coexistence, which in a plural society demands open and flexible formulations, that can be revised permanently based on broad participation.

4.2. *The Idea of Fundamental Rights: A Post-Identity State*

Democratic States cannot impose an identity-based reading of human rights that does not acknowledge the plural and diverse reality of contemporary societies. By definition, the idea of human rights allows us to go beyond what positive,

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[8] J.C. Velasco Arroyo, *op. cit.*, p. 205.

[9] A good example in this respect is offered by the case *Waldman v. Canada*, presented before the Committee of Human Rights of the United Nations (Decision of 5 November 1999, communication no. 694/1996, CCPR/C/67/D/694/1996) and which constitutes the international extension of the Adler case, previously presented before the Supreme Court of this country. In this case it can be seen how the constitutional adjustments of 1867 are fossilized with regard to the possible extension to other minority communities that at present are in similar or comparable situations. The Committee found violation of the principle of nondiscrimination for reason of an unjustified treatment, differing from equivalent situations among minorities, without the constitutional provisions constituting, in the opinion of the Committee, a sufficient argument to justify this differentiation.

internal or international law establishes in a given historical moment. Human rights transcend positive law and legitimize, in the last instance, our present-day political communities. In this sense, human rights constitute the best rhetorical weapon to fight against the identity-based State.

One of the consequences of the organization of the planet into nation-States has in fact been the nationalization of human rights through constitutional law. Human rights have been incorporated into each national legal order, normally through the Constitution or constitutionally-relevant laws, and as a result of this, new normative categories or concepts have been created, like those of fundamental or constitutional rights. Nevertheless, the interpretation made by States and their institutions of the content of each of the fundamental rights does not always respect the essence of human rights. This happens especially in relation to identity differences. Thus, there is a habitual understanding that particular fundamental rights may be exercised through the official or dominant languages of the respective State, but not using other minority languages. The content of the right being the same in each case, the responsibility for cultural adaptation must fall to the State and not to the citizen. The contrary case would be equivalent to a return to the idea of the State as the preferential heritage of a certain culture or identity, of a majority that uses the State to guarantee its own rights, but which denies the same level of protection to those who do not belong to that cultural group.

At the same time, the possession of the most basic human rights by the members of minorities cannot be questioned. These are also holders of the rights to participation in the public, cultural, social and political life of the country and of the right to equality and non-discrimination[10]. This implies that the State is simply forced to incorporate its elements of identity when it configures the essential content of each right. At the same time, identity and cultural differences can be protected to a substantial degree through individual rights, without requiring the problematic construction of collectivizing categories that are difficult to apply practically in our legal systems[11]. In a multicultural reading of human rights, the question is not so much the holding of these rights by minorities, but their conditions of applicability. It is necessary to take a new multicultural reading of rights and to understand them based on inclusion and diversity. Human rights are not only rights within a State, but universal rights which must be respected, independent of the State where they are exercised. The international and universalist dimension is co-substantial with the idea of human rights. Therefore, the holding of rights cannot be conditional on identity, but universal rights must be able to be exercised through any identity. It is a question of being able to exercise human rights through one's own identity, and not despite it. Thus, freedom of expression will include in its protection not only the content of what is expressed, but also the language used to express it. And the same can be said with respect to languages or religious or cul-

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[10] K. Henrard (2005), "Ever-Increasing Synergy towards a Stronger Level of Minority Protection between Minority-Specific and Non-Minority-Specific Instruments", *European Yearbook of Minority Issues,* vol. 3, 2003/4, Martinus Nijhoff, p. 16.

[11] A. Diaz Perez de Madrid (2004), *La protección de las minorías en Derecho internacional*, Universidad de Granada, Granada, p. 261.

tural demands with regard to rights like education, private and familiar life, political participation, or freedom of association, among others. This all implies the need to accommodate the State, in terms that are reasonable and proportional, to be able to effect this multicultural principle through the concrete exercise of each of the rights that are recognized to all persons.

It is necessary, therefore, to rethink the idea of human rights and its application. The democratic management of the diversity implies that each citizen can independently exert their human rights through their own identity and not in spite of it, whether they are in a majority or minority situation. With this approach, we are getting closer to a different conception of human rights and of the State itself. Along the same lines, in order to build a framework of intercultural coexistence, the public powers should not limit themselves to tolerating diversity, but rather must adopt an active and interventionist role, both in their constitutional design and in their daily action. The organs of the democratic State must today interpret human rights not as rights nationalized by and for majorities, but through diversity and the minority. Thus, human rights will be able to be exercised universally. This is an inescapable condition for the democratic deepening of the State in the multicultural reality of the present day.

5. **Conclusion: Towards a Democratic Diversity**

Intercultural coexistence implies the attainment of a stage at which cultural freedom reaches its greatest development while safeguarding the autonomy of the individual as opposed to the groups of belonging. The referent defended here is a post-identity State, where a new interpretation of the concepts treated here finds total application. According to this model, it is not the identity elements that are subject to the State, but the latter is placed at the service of the former. The State is thus commited to promoting, respecting and democratically articulating diversity, starting off from the most basic rights that belong to all citizens. The State enlarges its conception of citizenship and at the same time pluralizes it, thus making room for multiple elements of identity in the public space. Definitively, the political community is responsible for ensuring that these cultural elements have access to public space, enjoy opportunities for development, and for guaranteeing the freedom of its citizens to participate in these elements, or not.

A State constructed on these premises must do without an exclusive or excluding definition of identity constructed for the benefit of the traditionally dominant groups in society. Against that old worn-out scheme of the identity-based State, the new multicultural reality of Europe demands, in a democratic sense, the redevelopment of the public apparatus and the construction of a post-identity-based State, through which the political community is denationalized, political power is deterritorialized and multiculturality gains institutional recognition.

However, this post-identity-based option is not equivalent to defending an impossible State neutrality in the management of cultural diversity, nor a cultural abstention of the State. Recognizing the impossibility of State identity neutrality, it is a question of intervening in linguistic, cultural or religious processes to assure their

protection and development in terms that are reasonable and just, considering social reality and the situation of the different cultural groups that form society.

The post-identity-based State thus appears as the only democratically viable political formula in societies of increasing multiculturality. This State is sustained, as we have seen, on the basic principles of inclusive and plural citizenship, on the one hand, and of multicultural democracy, on the other hand. Through the ideas of inclusive and plural citizenship, and multicultural democracy, the essential content of human rights is extended to the members of all minorities. At the same time, the constitutional structure of the State adapts to cultural diversity and identity, offering real possibilities of participation to the greatest possible number of cultural groups that live within it. Only in this way, by constructing a post-identity-based and cosmopolitan democracy within each State, can the deep meaning of the concepts of human rights, diversity and democracy be brought together in harmony.

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Multiculturalism in Crisis?

Sia Spiliopoulou Åkermark

1. The Rhetoric of Multiculturalism and of Intercultural Dialogue

It is easy to see today that at one level, perhaps the level of rhetoric, multiculturalism has never been more revered and used broadly as a concept. London is reported to have won over Paris and been given the honour of organising the 2012 Olympic games thanks to its multicultural society. The EU Youth Program "Youth in Action" has announced the theme of "intercultural dialogue" as its main priority for the coming years. The Russian presidency of the Council of Europe has had the banner of 'intercultural dialogue' as its main theme last autumn, while conferences on multiculturalism succeed one another in the Western hemisphere and especially in the old continent.

Some authors have even established that there is no true alternative to a multiculturalist paradigm even though one could imagine (still within the realm of liberalism) a unitary republican citizenship adjusted to deal with issues of ethnocultural diversity[1]. The paradox is that all this talk of intercultural dialogue, multiculturalism and diversity coincides with phenomena at odds with them. Firstly, in the age of al-Qaeda and of perceived massive migration flows 'we have grown accustomed to thinking of the world as divided among warring creeds, separated from one another by chasms of incomprehension' as aptly put recently by Kwame Appiah[2]. While intercultural dialogue is our emblem, divisions and polarisation, globally and within societies, is blatant as we shockingly learned during the Paris riots of the autumn 2005. On the other side of the Atlantic, while the cultural diversity of the United States has become one of the most pious of the pieties of our age, the proportion of foreign-born Americans is far less than it was seventy years ago; rates of mixed marriages have soared in the past few decades and fewer and fewer Americans live in neighbourhoods with a concentration of people with the same 'national origins'.

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[1] See discussion in B. Barry (2001), *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Harvard University Press, Cambridge (Massachusetts), pp. 5-8 with references to the work of Will Kymlicka.

[2] K.A. Appiah (2006), *Cosmopolitanisn. Ethics in a World of Strangers*, Penguin Group, London (cover text).

Exceptions exist and affect, first of all, blacks who have not had 'the privilege' of becoming white[3]. But also third and fourth generation Irish-Americans, Greeks, Armenians and others are re-emphasising their roots and cultural distinctiveness and never before have claims for a status of Spanish as an official language been so strong[4].

What is undoubtedly true is that the question of how to respond to ethnocultural, linguistic and religious diversity is one of the most urgent issues in societies in Europe and North America but also in most other parts of the world. The acuteness of the issue in Europe and North America is due to the fact that the state has been shaped following the dominant theory of 'neutrality', that is, the presupposition that it is possible for the state to remain neutral and objective in most issues touching upon peoples' identities and cultures. As the state has been expanding its powers in more and more areas, in legislation, education, the health sector, and so on, while at the same time, technological developments put new challenges to identities in fields such as biotechnology, genetics, medical treatment, surveillance and telecommunications, questions of cultural distinctiveness and diversity have resurfaced with renewed force. Migration flows, armed conflicts forcing people to flee and ecological disasters add to the possible explanations of today's pressing need to confront, think and respond coherently to issues of cultural diversity. Perhaps the West is especially responsible for such a task, since it has been presenting itself as the safe haven for individuals, with its wealth, its welfare systems as well as with its constant references to the importance of human rights.

These paradoxes and contrasts in rhetoric and in real life form the background against which I will discuss the question of whether there is a crisis in the theories and practices of multiculturalism. This is not an easy task, as discussions and arguments about culture and identity tend to get overly emotional. After all, as some advocates of multiculturalism would say, our autonomy (that is, our spectrum of possible choices and practices) is determined to a large extent by the cultures and identities we are born into. For surprisingly many people, ethnicity, the nation, the tribe and religion are all things they are even prepared to sacrifice their lives for. It is certainly not a coincidence that one of Amartya Sen's latest books is entitled 'Identity and Violence. The Illusion of Destiny' and draws upon the memories of the author of clashes between Hindus and Muslims in India[5].

At an individual level we know that even in countries with high levels of education and in wealthy countries like Sweden, Sami children are today still harassed at school, immigrants with excellent knowledge of the Swedish language are excluded from the labour and housing markets to a far greater extent than persons with typical Swedish names and looks, and Finnish-speaking social workers are prohibited to use Finnish in their workplace during work breaks.

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[3] K.A. Appiah (2005), *The Ethics of Identity*, Princeton University Press, Princeton, New Jersey, 115.

[4] Ruth Rubio-Martín for instance discusses a possible right to bilingual ballots for Hispanics in the US Southwest, in R. Rubio-Martin (2003), "Language Rights: Exploring the Competing Rationales" in W. Kymlicka and A. Patten (eds.), *Language Rights and Political Theory*, Oxford University Press, Oxford, pp. 52-79.

[5] London, Penguin Books, 2006.

The first conclusion to draw, then, is that debates about and claims for 'multiculturalism' may be a symptom of and a reaction to experiences of discrimination and degrading treatment. Such claims need to be taken seriously. First, because they may amount to violations of human dignity and human rights and as such should be condemned and stopped. Second, because they may evolve into explosive pools of social discontent with destructive consequences for social stability and peace. However, multiculturalism as an idea and as a political theory purports to go beyond such remedial and compensatory claims and involves "the politicization of group identities", "the politics of recognition", "deference to identity" and sometimes even "differentiated citizenship"[6]. It requires, then, the reconceptualisation of the political space.

2. **Singular Cultures and Singular Identities?**

As I was preparing materials for this paper, I came to think of my ongoing debates with two good friends. Both would claim that they are supporters of the idea of human rights. One is a legal philosopher who adheres to the theory of moral realism and thereby argues that in issues of moral significance (that is, in issues of how we treat others) there may be a single correct answer, a best option, even though it may be difficult to establish. Finding the best path of action requires, according to this legal philosopher, that the different opposing views are rehearsed, that possible incommensurable values are identified, and that choices are consciously argued for and made. The way to proceed is, in her view, constant debate with those claiming different answers to be the truth. My other friend is a practicing Catholic who argues that there is objective truth and that this truth is transcendental, metaphysically foundational and materialised in the holy scriptures and the teachings of wise theologians. Both are well educated, Western Europeans, cosmopolitans; one is a man and the other is a woman. My two friends are likely to give very different answers to questions such as euthanasia, abortion, positive measures against discrimination or the exclusion of women from the higher orders of most religions around the world. So, obviously there is not one single Western European "perspective" or "culture".

The second conclusion in this introductory part, then, is that we often find, within us and around us, a tendency to oversimplify and polarise a few distinct "cultures" and "identities". This makes it easier to divide individuals, groups, countries, and religions into benevolent or evil, black or white, "us" and "them". The human need for categorisation is satisfied by such clear and simple distinctions.

For those reasons I have also chosen to reject any geographic limitations for this paper. While using writings and arguments predominantly from a European and North American context, I strongly maintain that the ideas identified are not

[6] B. Barry, *op. cit.*, p. 5; C. Taylor, (1992), "The Politics of Recognition", in A. Gutmann (ed.), *Multiculturalism and the 'Politics of Recognition'*, Princeton University Press, Princeton, New Jersey, pp. 25-73; J. Tully (1995), *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Press, Cambridge.

geographically bound. Liberalism as a political theory and its implications for law is not limited to North America and Europe and within liberalism there are hundreds of variations, for instance with regard to the various conceptions of the minimal or the proactive state. In many ways, Canada has more in common with Europe than with the United States, in particular with regard to the ideal of the welfare state as well as with regard to the coexistence and struggles of two or more "founding peoples". Some of the most inspiring readings in today's debates on multiculturalism are produced by people with their origins in India, Ghana, the Middle East or, for that matter, in Greece—albeit some 2,500 years ago.

3. **The Structure of the Analysis**

How, then, should one proceed in attempting to find out whether there is a crisis of multiculturalism? First of all, the question itself assumes that 'multiculturalism' is the correct response to the challenges posed by our diverse societies and that we are worried that there may be a crisis. In order therefore to assess whether there is a crisis, one needs to understand first of all what the conceptual tools and ideas of multiculturalism are. My analysis takes as its starting point the assumption that crisis is not necessarily a bad thing, that it offers an occasion for assessment and re-evaluation, and at the same time that we cannot take for granted that the models put forward until now are appropriate for future needs or for other contexts and parts of the world. They may or may not be appropriate, and this itself needs to be assessed and discussed continuously.

In order to embark on such an enterprise, we need to take at least the following steps:

1. Look at the conceptual tools employed in multiculturalist debates;
2. Look at the tensions existing between multiculturalism and human rights;
3. Identify any gaps in multiculturalist arguments;
4. More specifically, examine any gaps in the justificatory grounds proposed in law and in political theory in favour of multiculturalist accommodation;
5. Finally, look at recent shifts in multiculturalist debates, in particular as they are shaped by and through international law.

My argument will be that there are two main critiques of multiculturalism today:

1. the first derives from the fact that we do, in fact, treat different cultures differently and we lack good arguments for why we do so.
2. the second is that multiculturalism (including minority rights) is at odds with the ideas of autonomy and a common humanity which underpin human rights.

The first of these two arguments reveals itself in the debates concerning, on the one hand long-standing ethnic, national, religious and linguistic minorities (as understood in most international legal documents and in particular in Europe and the conventions of the Council of Europe) and, on the other hand "new minori-

ties", that is, more recent migrants. If we value cultural diversity and culture as an intrinsic value, how can we defend recognition and special rights only for "old minorities"? This, as we shall see below, has much to do with the justificatory grounds of multiculturalism and of minority regimes.

The second criticism attacks multiculturalism on the ground that certain cultural practices violate individual human rights. This argument is often used in relation to the rights of women. A further element in this argument is the alleged subordination of the individual to the group in multiculturalist theories. The tension between multiculturalism and human rights will be discussed further below, but we should at this stage establish that there is something fraudulent in an automatic attack on an entire culture, or a religion as a whole. As we shall argue below, cultures are complex sets of values, beliefs and practices; they are contextual and contingent, and they change over time. We can, and should, discuss and criticise the specific practices of a culture (including religions) when they violate the human dignity of individuals. As regards the issue of the subordination of individual autonomy to the group, this argument underestimates first of all the fact that we are all, to some extent, subordinated to the cultures surrounding us, whether we belong to minority or majority cultures, or live in between them. The power of majority cultures is not always as easy to see, because it is so dominant and permeates all social activities. We still often speak, in particular with regard to children and young people, about "group pressure" and "youth culture". But the subordination of individual autonomy to the group, whether it is ethnic, religious, linguistic or other, is never total. There is always a range of options and choices that we make every day in our lives and which define us as unique persons. According to theorists of multiculturalism, culture actually enlarges the freedom of individuals, as it gives access to "a range of meaningful options", since the context of individual choice is the range of options given to every person by his or her culture. Understood in this way, culture is vital as a "context of choice"[7].

In this paper I will not go through all these steps outlined above systematically, but rather I will focus on the conceptual tools, the tension between multiculturalism and human rights and the shifts in recent debates and justificatory grounds. The other issues and arguments will be infused in this analysis.

4. **The Conceptual Tools: Culture, Diversity, Identity and Human Rights**

The concept of *culture* is problematic, as it leaves a number of questions open[8]. It is not by coincidence that "culture" has not been given a generally accepted definition in international law. Rodolfo Stavenhagen has distinguished between three concepts of culture as they appear in international legal instruments:

[7] W. Kymlicka (1995), *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Oxford University Press, Oxford, pp. 75-91, 121-130.

[8] A. Spiliopoulou Akermark (1997), *Justifications of Minority Protection in International Law*, Kluwer Law International, Dordrecht, pp. 78-83.

a) culture as the accumulated material heritage of humankind as a whole or of particular groups;
b) culture as the process of artistic and scientific creation; and
c) culture as 'the sum total of the material and spiritual activities and products of a given social group which distinguishes from other similar groups'.[9]

Stavenhagen emphasises that culture is never a static thing and that it should not be treated simply as an object. The emphasis, according to him, is on the way people perceive their culture, on the discourse about culture, rather than the culture itself.

I have earlier argued that minority protection in international law is based on three main distinct justificatory arguments:

— as a conflict prevention and peace preservation effort;
— as tool for the preservation of cultures;
— as a necessary complement to classical individual human rights, in order to ensure the protection and self-fulfilment of individuals, that is, human dignity.[10]

These three justificatory grounds already create tension within the system of law, since they pull in different directions in concrete situations. Security considerations may lead to limitations of individuals rights, as we very well know after a few years of 'war on terror'. Acceptance of practices presented as essential or traditional to a culture, such as not allowing girls to fulfil basic education, pose obvious threats to individual dignity.

However, the very concept of "a minority" does not operate in a vacuum and can only be properly understood in juxtaposition to other concepts such as 'indigenous peoples', 'citizens', 'non-citizens', 'immigrants', as well as concepts such as woman and man, handicapped, worker, or homosexual. According to Eisenstadt and Schluchter[11], all these collective identities are constituted through the social construction of boundaries, which allows a distinction to be made between those who belong and those who do not. There is thereby a constant dialectic between those defining and those who are defined and self-defined. Categorisation and hierarchisation are undoubtedly methods for the distribution of rights and resources, and as such may have as a consequence the marginalisation of groups and individuals and often their exclusion from power.

What, then, is this culture that is to be preserved and protected? Let us turn to binding international law and Article 5 of the Framework Convention for the Protection of National Minorities (the "Framework Convention").

Article 5 provides:

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[9] R. Stavenhagen, (1995), "Cultural Rights and Universal Human Rights", in A. Eide *et al.* (eds.), *Economic, Social and Cultural Rights. A Textbook*, Kluwer Law International, Dordrecht, pp. 63-77.

[10] A. Åkermark, *op. cit.,* pp. 68-73, 294-299.

[11] "Introduction" in S.N. Eisenstadt.; W. Schluchter and B. Wittrock (eds.)(2001), *Public Spheres and Collective Identities*, Transaction Publ., New Brunswick.

> *"1. The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.*
>
> *2. Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation."*

So, Article 5, even though it does not explicitly define what a minority is, speaks of the 'essential elements' of the *identity* of minority members, 'namely their religion, language, *tradition and cultural heritage*'. These elements are to be preserved and developed, and persons belonging to minorities are not to be subjected to forced assimilation. The Explanatory Report to the Framework Convention comments on the concept of 'tradition', and clarifies that the reference to 'tradition' 'is not an endorsement or acceptance of practices which are contrary to national law or international standards. Traditional practices remain subject to limitations arising from the requirements of public order'.[12] This is not, of course, a very transparent provision, in that the notion of public order may vary from one legal order to the other. Also, the context of the concrete situation will vary from one case to another. But, what is clear is that traditional practices are not immune from legal scrutiny and discussion, and must be evaluated against valid legislation and international standards, in particular those protecting individual human rights.

Of those elements, language has been granted a privileged position in the Framework Convention and in law in general as marker of identity. Perhaps this is so in order to bypass the obvious risks in defining ethnicity and the concept of minority on the basis of common ancestry transferred between generations through blood relations, while not falling into the ambiguity of a reference to 'culture'. After all, while some of us could imagine a perfectly happy life without practicing any religion or claiming any particular ethnicity, we all need to use a language, both in the private sphere as well as in public affairs.

Article 6 of the Framework Convention makes further reference to Parties' obligations concerning '*intercultural dialogue*':

> *"The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living in their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media."*

Article 6 takes a stand against the option of a right of minorities to isolation, often discussed by political theorists and philosophers, and requires contact and even co-operation among all persons in a country. This provision is complemented by other provisions in the convention, such as the learning of the official language

[12] Framework Convention for the Protection of National Minorities, Collected Texts, 3rd ed., Strasbourg, Council of Europe, 2005. The text of the Convention, the Explanatory Report and many other documents are found in the website of the Council of Europe: www.coe.int/minorities

by persons belonging to minorities (Article 14.3), which require contacts and understanding among different groups and persons in a country.

Article 9 of the Framework Convention obliges Parties to adopt "adequate measures in order to facilitate access to the media… in order to promote tolerance and *cultural pluralism"* (emphasis added).

Again, and as pointed out earlier when looking at the definition of 'culture' offered by Stavehagen, culture can (and should) be perceived as an evolving system of values, beliefs, attitudes and practices for 'making sense of the world'.[13] But it can also be perceived as a constant, homogenous and rigid set of such values and practices.

The trickiest of arguments about culture and identity is the (often) unbearable weight of history. As earlier mentioned there is a link in the logic of the Framework Convention, and indeed of most minority debates, between culture, tradition and heritage. Very often this link is even stronger: there is a link between *culture, history* and *territory*. This is also evident in provisions of the Framework Convention such as Article 10.2, on the right to use the minority language in contacts with administrative authorities, or Article 14.2, concerning minority language education. Both provisions refer to "areas inhabited by persons belonging to national minorities *traditionally or in substantial numbers"*.

This account and simplification ignores, of course, the fact that the borders of territories change regularly, the fact that people do move voluntarily or involuntarily, and that many of the countries which are now considered as immigrant-receiving were big sources of emigration less than a century ago. The 'territorialisation' of solutions does not seem to be a good answer.

So now the difficult questions appear. If we protect minorities mainly for the sake of culture, why, then, is the culture of old minorities more valuable and worthy of protection than the culture of recent, and perhaps more vulnerable, immigrants? The argument of consent, proposed by Will Kymlicka, does not seem sufficient. Many migrants feel forced to move to another country for a variety of reasons and many do not consent at all to the idea of abandoning their original identities. So why should they have lesser rights? Why do our liberal democracies, or at least many of them, accept the obligations of the Framework Convention but reject the obligations of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) which, *inter alia*, requires respect for their cultural identity (Article 17, para.1)?

One possibility would be to argue that history matters. But if history matters, how does it matter? I believe that this is one point on which we need further thinking: are we proposing an argument based on the special responsibility of states towards those that have lived within their boundaries for a long time? But most of our states have not existed for all that long! Does that mean that new states do not have as strong a responsibility? Or, is there a form of state succession in this respect? Are we proposing that there is a compensatory element? Because

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[13] The term culture as the key for 'making sense of the world' has been used by U. HANNERZ (1992), *Cultural Complexity, Studies in the Social Social Organization of Meaning,* Columbia University Press, New York.

some states have suppressed their minorities for a long time, the argument goes, they now need to make up for past injustices. Of course, the risk exists that this compensatory spiral can be driven back a long way in history and in between all kinds of groups, all claiming to be 'native' and 'autochtonous' and suppressed. The compensatory argument also has other weaknesses, such as the difficulty in weighing human suffering which may have occurred very long ago. The monetarization of human suffering is perhaps the most fundamental of the problems of the compensatory argument.

Am I then asking the reader to abandon the idea of collective identities and of culture? This is not my intention. I just wish to draw your attention to the historical usages of the term 'culture' in late 19th century, at the peak of colonization, when Sir Edward Burnett Tylor, the ethnologist, defined culture as the 'complex whole which includes knowledge, belief, arts, morals, law, customs and any other capabilities and habits acquired by man as a member of society'.[14] In contrast, when the Western colonizing powers wished to describe themselves, they use the term 'civilised nations', as we all know very well from the provision on the sources of international law in the Statute of the International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice. Article 38 of the ICJ Statute refers to 'the general principles of law recognised by civilised nations' as one of sources of law to be used by the court in deciding disputes submitted to it.

So, culture has very different meanings for different people. For some, for instance, it means making sense of the world, for others it means making claims to territory, and for others it emphasises difference, and perhaps even inferiority.

5. **The Struggle Between Similitude and Difference**

What, then, are the conceptual tensions between multiculturalism and liberal individual autonomy? Well, this is indeed a well rehearsed subject, for instance recently in Brian Barry's *Culture and Equality* (2001). The starting point here is that equality and non-discrimination assume that people are inherently alike, or that there is at least a potential or hypothetical equal status between individuals. On the other hand, one can indeed argue that the principle of non-discrimination presupposes in fact that people are unalike. The idea of a common humanity is also a core underpinning of the entire human rights project. It is not a coincidence that John Stuart Mill used the vocabulary of human rights precisely in the context of the abolition movement. Slaves are like us, slaves are 'human beings, entitled to human rights'[15].

By contrast, multiculturalists start off from the position of difference and, in most cases, assume that complete equality is by definition impossible. The struggle between ideas of similitude and ideas of difference is, I would argue, one of the main reasons why there is a perception of tension between multiculturalism and human rights. The other main reason is that human rights supporters argue that

[14] As cited in K.A. Appiah, *The Ethics of Identity… cit.*, pp. 119-120.
[15] As cited in K.A. Appiah, *The Ethics of Identity… cit.*, pp. 145.

many cultural practices violate the integrity and dignity of individuals. The universalistic similitude of human rights does not accept the fundamental otherness accepted in multiculturalism. Human rights universalism assumes, further, that there is a universal truth, that is, a common, even of minimal, understanding of human dignity. Multiculturalism can be seen as a consequence of the post-Enlightenment rejection of a single truth. And this rejection happened to coincide historically with and gain force from the anti-colonisation movement.

Egalitarianism and multiculturalism are, as was done above, presented as each other's opposite. They have, as political and philosophical projects, very much in common. First of all, they are responses to the same experiences of ill-treatment, discrimination, degrading treatment, suffering and even extinction. Second, it can be argued that the principle of non-discrimination has been evolving under the influence of multiculturalist debates. The European Court of Human Rights has carefully been developing its case law, saying for instance in the case *Thlimmenos v. Greece* that the principle of equality and non-discrimination does not mean that all cases should be treated alike. On the contrary, it also requires that different cases are treated differently[16]. The Court said:

> *"The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification…. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different"*[17].

It may of course be surprising that it has taken us so long to come to such a seemingly obvious conclusion, but the example shows quite clearly how egalitarian thinking has slowly moved towards more nuanced, more substantive and less formal assessments. This development is perhaps even more obvious in the so-called "race directives" adopted by the European Community in the year 2000[18]. They embrace the concept of indirect discrimination, include harassment under the concept of discrimination, and require positive action to combat discrimination[19].

The concrete results of the struggle between similitude and difference can also be seen in the diverging responses which States as well as international human rights organs have given to the headscarf problem. Some European countries do not introduce any legal restrictions, others introduce such restriction only in primary education, some limit only headscarves covering the entire face, and yet

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[16] *Thlimmenos v. Greece*, Application No. 34369/97, Judgment 6 April 2000.

[17] *Ibid*, para. 44 (emphasis added).

[18] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22; Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.

[19] D. Schiek, (2002), "A New Framework on Equal Treatment of Persons in EC Law?", *European Law Journal*, vol. 8, no. 2, pp. 290-314.

others prohibit any kind of religiously-tainted symbols[20]. In the Leyla Sahin case, the European Court of Human Rights accepted that the principle of secularism was so fundamental for Turkey that the prohibition of the headscarf among university students was acceptable and not in violation of the ECHR's right to religion or right to education[21]. In a similar case concerning Uzbekistan, the Human Rights Committee argued that the freedom to manifest one's religion had been violated[22]. So, multiculturalism must be in crisis if such different answers are given to the same basic question. It is of course possible to argue that this is completely normal, since the context and the circumstances of the two cases differ. Surely, according to this argument, the Turkish principle of 'secularism' is of great importance and relevance. While this is true, what is interesting about the headscarf debate is that it is a microcosm of the arguments concerning multiculturalism. What is striking in the arguments of the European Court and the Human Rights Committee is that the importance and contextualisation of particular rights for particular individuals is absent. The context and the circumstances are only those of the States, not those of the individuals concerned. There is no discussion in either case of the perceived importance and relevance of different options for the women concerned, for Leyla Sahin and for Raihon Hudoyberganova. It is almost as if these cases were argued while the applicants were completely absent. The only exception to this is the dissenting opinion of Judge Mrs Tulkens, who enquires about the effect of the measure on the right of the applicant's rights to education.

6. **A Shift in The Justifications of Minority Protection**

It was argued earlier that the justifications for, the logic of minority protection is threefold, that is, conflict prevention, preservation of cultural diversity and protection of human dignity. In recent years, another justificatory ground has gained in prominence. That is the principle of democracy and democratic participation. This argument emphasises two reasons why minorities should be included in democratic decision-making. First of all, there is a right to participation in public affairs and in matters affecting minorities, for example, in Article 25 of the International Covenant on Civil and Political Rights, Article 15 of the Framework Convention, in many other international instruments, and in numerous constitutions. Secondly, in order to have all the necessary information and all possible options available in the democratic decision-making process, the views of minorities must be heard and be taken seriously. This improves the quality and legitimacy of the decisions.

The implications of this shift are not yet fully intelligible to us, and discussions about them is likely to continue in the years to come. What seems to be obvious is

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[20] D. McGoldrick (2006), *Human Rights and Religion. The Islamic Headscarf Debate in Europe*, Hart Publ., Oxford.

[21] *Leyla Sahin v. Turkey*, European Court of Human Rights, Grand Chamber Judgment 10 November 2005 (Chamber Judgment 29 June 2004).

[22] *R. Hudoyberganova v. Uzbekistan*, Views of the Human Rights Committee, 5 November 2004.

that the right to participation is both a substantive right as well as in instrumental right for the defence of other rights and for good decision-making. However, the right to participation is in itself not a sufficient guarantee to protect and promote the interests of weaker groups.

In a pictorial representation of this shift, we could argue that the original paradigm was:

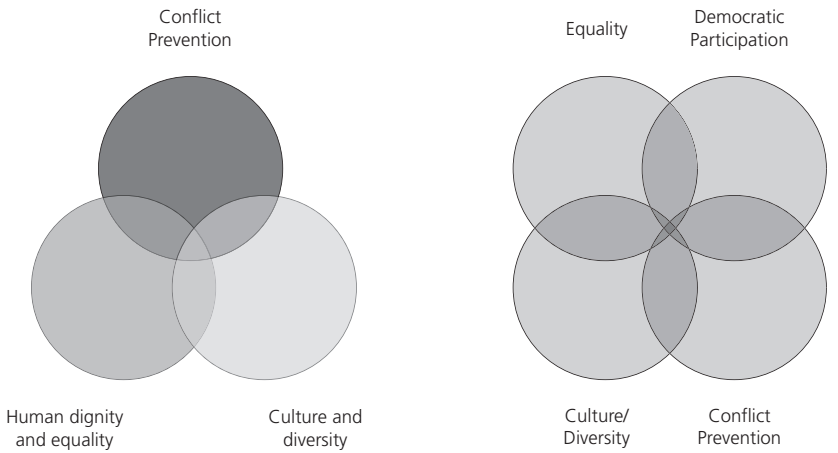

Figure 1

Shifting focus in minority protection?

7. **Diversity**

The three quotes below represent cornerstones of western political and legal theory and thinking on issues of diversity and multiculturalism:

1. But the inclinations of men are diverse, according to their diverse Constitutions, Customes, Opinions; … Whilst thus they doe, necessary it is there should be discord, and strife: They are therefore so long in the state of War, as by reason of the diversity of the present appetites, they mete Good and Evill by diverse measures.
2. If it were only that people have diversities of taste, that is reason enough for not attempting to shape them all after one model. But different persons also require different conditions for their spiritual development; and can no more exist healthily in the same moral, than all the variety of plants can exist in the same physical atmosphere and climate.
3. Human plurality, the basic condition of both action and speech, has the twofold character of equality and distinction…Human distinction in not the same as otherness (…).

The quotes belong in turn to Hobbes, Mill and Arendt.

Hobbes takes for granted that diversity creates conflict. For how are we to live in a society where there is no consensus about how to achieve a peaceful life when there are all those competing needs? Hobbes put the question long before we ever came to reflect about our multicultural societies.

Mill, on the other hand, utilises the language of nature, as he often did, in arguing that diversity in nature and by consequence among humans is perfectly normal and all we need to do is to create differentiated conditions to meet the needs of different individuals. Both Hobbes and Mill operate at the level of individuals.

Hannah Arendt is more complex. In adopting an Aristotelian point of view, she emphasises action and speech. In acting and speaking, men and women show who they are, reveal actively their unique personal identities, and thus make their appearance in the human world, she argues. Humans are distinct and unique but they reveal their uniqueness through social interaction, in defining and responding to the question about identity. The answer to the question 'Who are you?' necessitates a narrative, a story identifying and distinguishing the person speaking. What is interesting, then, is creating space for such narratives to be told, and to be listened to.

8. **Final Remarks**

All this sounds strangely abstract, perhaps. In fact, it has immense consequences for the solutions we adopt in law. And law, at the moment, is shifting its emphasis. From the original model of tripartite justificatory grounds of minority protection (equality, culture, conflict prevention) that I outlined earlier, it is here argued that law is turning into a four-point platform with the new fourth point being increasingly at the heart of debates. The fourth point is democratic decision-making and political participation. So, as has been said, the politics of recognition push us back to the recognition of politics. It is not, then, a coincidence that participation is one of three thematic areas of interest identified by the Advisory Committee of the Framework Convention (the other two being education, the arena *par excellence* of multiculturalist debates, and media, which is again closely related to the ability to give accounts of different realities) nor that many studies are conducted at the moment by academics, governments and international organisations alike on issues of participation of minorities, immigrants, and non-citizens. Nor is it a coincidence that in a recent affirmative action case, the US Supreme Court stressed that affirmative action in higher education is crucial in the preparation of a diverse body of students not only for work but for citizenship[23].

As we do not seem able to agree on the question of whether there is a universal truth, we need conversation in order to understand the values and preferences of others and negotiation in order to find common points of experience and values. Some would say that this is an expression of the proceduralisation of human rights.

[23] *Grutter v. Bollinger et al,* Supreme Court of the United States*, 539U.S.(*2003)

Instead of defining *a priori* what a human right is, we establish the procedures necessary to define what human rights are. Together with Arendt and Appiah, I would argue that even if the commonality in human nature is limited to the ability to give accounts, to create intelligible narratives, this is not at all too little. It allows us to realise what Amartya Sen has recently described as the 'illusion of unique identity' and how it is more divisive than the universe of plural and diverse classifications that characterize the world in which we actually live. This presents us with an agenda for research and action. Which legal and political solutions promote multiple identities? Multilingual education, mixed marriages, dual citizenship, free movement of persons? Which human conditions allow for complex human experiences to be told? Good and tolerant forms of education? Inclusive participation in private as well as in public life? Public service media accommodating those voices with the fewest resources? The agenda is ours to define.

Turning for a final time to the original question, "is there a crisis of multiculturalism"? Yes there is, both because we care too much about cultural identities and because we care too little about them.

But we cannot deny that Joseph Raz is correct when he writes the following:

> *Having left the morally worst century of human history, we may on occasion seek solace by reflecting on aspects of the recent past which can count as moral advances, as pointers to a more decent future for our species. When my mind turns to such thoughts perhaps one feature stands out. I will call it the legitimation of difference. I have in mind a change in sensibility, a change in what people find obvious and what appears to them to require justification and explanation. Such changes are never universal. This one may not have gone very far yet. But I think, and hope, that there has been such a shift in the moral sensibility of many people in the West, a shift towards taking difference (in culture and religion, in gender, sexual orientation or in race) for granted, acknowledging its unquestioned legitimacy, and seeking justification only when hostility to difference is manifested, or where advantage is given to one side of such divides*[24].

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Managing Multicultural Society Democratically: Identities, Rights, Citizenship

Javier de Lucas Martín

1. **Introduction**

The importance of the fact of multiculturality as a distinctive characteristic of our social reality is unquestionable, although it is subject to very controversial interpretations that affect not only management models (the debate on multiculturalism, republicanism, etc.) but also an often self-interested terminological and conceptual confusion. Practically nobody today doubts its condition as a structural characteristic of the globalization process. It is enough to pay attention to the increasing visibility of the different endogenous manifestations of multiculturality (so often silenced within the framework of the nation-State) and the increase and transformations of migratory flows that are its main exogenous factor.

Nevertheless, the interpretation of its legal and political consequences, of the repercussions of that multiculturality in terms of democracy and human rights, is not unanimous. This is largely thanks to the simplifying cliché marked by the debate over the conflict between civilizations and the threat represented by vindications of identities (only certain identities, it seems) for democracy and human rights. Thus, we lose sight of what is most interesting, the challenge (that is to say, the risk, but also the opportunity) offered by those *new* characteristics of our societies. The aim of my paper in this third meeting is to try to reiterate the importance of orienting the debate towards this second perspective, far from the habitual effectualist but unfruitful rhetoric of *killer identities*.

The difficulties and at the same time the most important opportunities which our societies must face today, and which will be increased in coming years, both in terms of legitimacy and effectiveness, are based on the challenge of managing our inevitable transformation into multicultural realities in terms that guarantee that we reach two objectives: assuring the requirements for democratic legitimacy and the State of Law, which implies the primacy of human rights, as well as maintaining the minima of cohesion and stability without which our social and political communities are in danger of disappearing. I speak of the risk of disappearance, not transformation, obviously, because that is another one of the difficulties, the confusion between homogeneity and social cohesion that leads us to assume that

a precondition for social survival is the preservation of a supposed essential identity, forgetting that transformation is not disappearance, but in fact, the form in which cohesion and survival are guaranteed. For that reason, there are few tasks as important as reviewing the assumptions on which democracy can and must be constituted as a plural democracy, beyond the postulates of liberal democracy, which today are insufficient.

2. **On The Challenge of Multicultural Democracy**

The most interesting element of the challenge of pluralist democracy, of the democratic management of the new social plurality, has to do with the need to review our response to the demands of recognition, respect and representation/participation raised by the agents of the "new" multiculturality in two terms, the recognition of cultural difference (linked to autonomy) which implies the need to guarantee rights related to it, and, secondly, overcoming the situation of disadvantage, social and political exclusion, as opposed to how they vindicate their *empowerment*.

But multicultural democracy is not a uniform question, nor are the exigencies and problems raised by the different agents of the multicultural condition, although there may be some common threads, such as the apparent contradiction between the process of globalization and the resurgence of identity demands, which usually center the most well-known contributions, such as those of Habermas (*The inclusion of the other)* or Castells, to mention two names that are not located in the same line of analysis.

Nevertheless, in my opinion, the key is in the redefinition of the conceptual map of democracy, beyond the architecture provided by the liberal model. Because the Gordian knot is the determination of the exigencies derived from a pluralist democracy in relation to the social bond and the political contract. And if we spoke of the social bond and the political contract as the keys of a multicultural society, we are ourselves led to redefine a good part of our political-legal categories; to start with, those of sovereignty, citizenship and equality. In other words, the first task is probably a discussion of notions as basic as those of citizenship and sovereignty, the principle of pluralism or the catalogue, hierarchy and even definition of human rights.

If I seek to call attention to such elementary considerations, it is because, as I have recalled more than once, it is enough to look around in order to confirm the continued validity of the qualification used by Schmid and Cohn-Bendit in an initial work on the multicultural crossroads, which they identified as an authentic "labyrinth of ambiguities". One might even say that the paths continue to branch off and complicate navigation still more. That is what has happened, without a doubt, in the Spanish case: a society plural in itself from the cultural and, even, the national point of view, to which has been added vertiginously in the last twenty years an increase in the presence of the exogenous agent *par excellence* of multiculturality, immigration. The consequence is that, as Machado might have said, the discussion of the management of multiculturality in Spain is a good example of the difficulty

of separating voices from echoes, or, to formulate it more clearly, a land of conceptual confusion, an authentic minefield of deceits, simplifications, and prejudices. In my opinion, all this cacophony basically responds to the fact that the same phenomenon, the fact of multiculturality, also remains the object of self-interested stigmatization and, although to a lesser extent, to the fact that it is understood in ingenuously idealistic terms.

In any case, we will not escape this labyrinth if we insist on discussions of philosophical anthropology, nor, less still, on essentialist discourses (holistic or atomistic) on the models of diversity management, because what interests us is mainly to know what has to be reformed in the legal-constitutional structure of our national States to accommodate a diversity that does not endanger the basic principles of democratic legitimacy. We have to emphasize the political dimension and for that reason the importance of the question of citizenship, with regard to inclusivity, plural and open belonging, in addition to titularity of rights and sovereignty, the condition of agent or subject of public space. The two key ideas in this reformulation (as emphasized, for example, by Professor Ruiz Vieytez) are those of inclusive and plural citizenship based on stable residence and that of multicultural interpretation of human rights, that at the same time is based on the notion of complex equality as the way to universality.

The really decisive thing, as Ruiz Vieytez proposes, is that the political logic that still remains the State logic assumes plurality as a constituent value, and that this produces political inclusion, on equal terms, of the agents of plurality, their right to participation based on that plurality, and on the recognition of their right to difference. And it means that the same structure in which the practice of the political task is based (the constitutional framework) must be the object of negotiation, open to all those agents. In other words, the ascent, visibility and qualitative and quantitative increase of the demand for recognition of agents of social plurality raises, in the first place, the recognition of their right to exist as such and, in the second place, the recognition of their right to negotiate (not to impose as evident or irrenunciable) the consequences of their specific identity (social values, principles, practices, norms and institutions). But what I am interested in emphasizing is that this all forces us to approach legal-political questions, not culturalist or, less still, metaphysical discussions. Plural democracy, taken seriously, demands much more than the reiteration of responses, traditionally formulated, to conflicts of individual freedom. The Kantian solution is not enough, because we do not only gamble in the context of the conjugation of each individual's freedom with the freedom of the 'other'. The problem is the constituent deficit of that interplay of liberties, the limits that are the prerequisites of the exclusion of others, a deficit that liberal democracy does not want to examine or to review. And which in my opinion provides good arguments to those who claim, critically, that liberal democracy maintains a *comfortable pluralism* and for that reason it experiences apparently insoluble difficulties faced with serious pluralism. Which makes a poor connection with the thesis that the touchstone of democratic quality is, in fact, the capacity to include dissidence, which is none other than plurality.

What interests us is mainly to know what needs to be reformed in the legal-constitutional structure of our national States to accommodate a diversity that does

not endanger the basic principles of democratic legitimacy and that does not put at risk in the first place its elementary prerequisite, the *transcendental condition* (if I am once more allowed the Kelsenian analogy) of political society: to establish what is unavoidably common. Although that task involves many more difficulties than it seems, mainly if it is not understood (if it is not accepted) that establishing the common does not mean discovering irrenouncable truth, the essence of the social body, that must be preserved against all change. I will try to explain myself.

There is a fallacy behind that transcendental condition. In effect, I believe that one of the most serious difficulties which we face in this discussion is in fact born from accepting for that transcendental condition the same characteristic of a postulate that Kelsen proposed for his pure theory of law (and, indeed, of the State). I speak of the pretense that that nucleus without which we cannot think of a viable society and, less still, a viable political community, is a sort of forbidden boundary, transcendental and evident, which is outside all discussion and which we must, or, to say it more clearly, *they* (all those who join our society) must accept without discussion. Furthermore, I believe that if we can speak of our democracies as *unmediated* democracies in terms of pluralism, it is due to the fallacy of maintaining that there is an unquestionable truth with respect to which the rest, the *others*, neither can nor should do anything but accept and proclaim, because they are not its authentic possessors, but its adherents, its victims. And those others are still more victims to the extent that they do not agree with the assumptions that allow that truth to be formulated. By the way, determining what those assumptions are is also a task to be approached. There is, therefore, a problem, a deficit of extension, not only of contents and procedures, but of the subjects of pluralism. The others, those who arrive later and mainly as visible others, do not have the legitimacy to establish/define the terms and scope of pluralism. In any case, they will be able to benefit from that definition if they are located within the range of previously-established options and which remains unquestionable, at least for them.

For that reason, I said before that it is also necessary to escape from the *iron cage of culturalist argument*, if I may be allowed the expression; that is to say, from a debate that pays obsessive attention to the comparison, worse, to the contrast, the conflict of cultures. That iron cage consists of placing cultures in terms of comparison with each other and also with the red line which is usually considered as the foundation and limit of the discussion, that is to say, the universality of human rights (considering the requirements of democracy), ending up by establishing hierarchies of goodness and compatibility, according to the hackneyed approach of Hungtinton (but also of Sartori). This is an approach that is absolutely incongruous with the very principles of liberal theory, in that it requires us to speak about specific behaviors, judgments on behaviours, and not about generalizations that are hipostatic, and which imply adopting, in an illegitimate and contradictory way, a holistic point of view, incurring a fallacy of generalization by belonging, to justify stigmatization, criminalization.

This should lead us to revise what some present in terms of mutual incompatibility or incongruence, as between the vindications of multiculturality, on one side, and maintaining the requirements of the model of law in accordance with the principles of State of Law and with democratic legitimacy. I have already referred on

other occasions to the most extreme version of that argument, of those who see in the advance of multiculturality (a factual condition which these critics tend to confuse with a model for managing it, which is usually called communitarianism) a cancer that is incompatible with our legal culture of equality in the recognition of liberties of all individuals as such, as human beings. In sum, to speak brutally, those who claim that this increase in multiculturality puts at risk the soil of legal culture that is human rights endlessly multiply the examples of threats to fundamental rights, from sexual freedom to physical integrity, from equality in education to equality of sexes, from religious neutrality (authentic religious and ideological freedom) to freedom of expression. The famous affair of the cartoons initially published in the Danish newspaper *Jyllands Posten*, the controversy over the speech of Benedict XVI in Ratisbon, or the cancellation of the performance of the opera Idomeneo would be (according to their arguments) the penultimate episodes of that fundamentalist and fragmenting wave that multiculturalism would cause.

Nevertheless, I believe that most of the legal conflicts derived from the rise of multiculturality are not novel, nor are they basically cultural conflicts, but that they present us mainly with old questions of legal technique, of interpretation, relating to two orders of problems. The first and most fundamental one is that of the legal model of equality and difference, or, to speak with more clarity, the management and justification of the treatment granted to difference. The question here is whether we can continue to maintain the criteria that until now we have used to justify discriminatory treatment, whose fundamental mirror is perhaps the distinction between national and foreigner in the attribution of rights. The problem, in my view, resides mainly in the requirement of abstraction imposed on the principle of equality, so graphically expressed by the North American formula of a *colour-blind* law, in essence not so far away from the fold that should blind justice if it wants to be impartial and thus grant equal treatment: to abstract the questions of ethno-national identity seems a condition *sine qua non* for equality. But that abstract individualism, which is rather atomism, is not only a methodologically and deontologically reproachable approach, but also is not viable, and is disproved by the facts. And that is the force of a certain type of multiculturalist positions. We can formulate it by saying that when faced with questions such as those relating to who is deprived of the right to decide, to construct the law, and why that deprivation occurs, the Law, belonging to a group, is a relevant question if we know that the supposed reason for that discrimination, for that legal and political exclusion (which still goes beyond discrimination) is the assignment of identity, no matter that public debate considers it in simplifying terms of humillation / victimism and risk / threat to cohesion.

The second question is also very well-known. This is the meeting point of the limits to rights, which leads us to the *vexata quaestio* of the weighting of rights, legally protected interests, legal-constitutional arguments. I will express this in other words. I do not believe that, speaking of immigration as a source of social and cultural plurality, the problem consists of conflicts derived from the vindication of new rights. I do not deny that these exist, and I believe that the question of cultural identity and, in particular, that of the right to one's own language and culture and to its practices, values and institutions, together with the revision of the place of

religious beliefs in the public domain and of the statute of laicism, to speak in general terms, are two outstanding and particularly difficult examples. But there is little more. And less still do I believe that the question consists, as it is so often said, in the generalization of the violation of rights as a result of the naturalization papers that would be granted to barbaric cultural practices by the fact of being different. If we leave aside laboratory examples and fantasies, it is easy to see that in most cases the conflicts are relatively simple to decide in principle, although perhaps it is not so easy manage their resolution in practice. And for that reason, the greatest difficulty in the management of multiculturality falls on the judges, because the legislators tend not to notice the need for this refinement in treatment, and because the management of difference is mainly a task for the judges.

3. **Questions of Method in Multicultural Democracy**

What I have tried to point out, I maintain, in an introductory and very general way, can be summarized in a few modest suggestions. I will make three, which condenses what has been said up to now, because, in my opinion, all debate on the challenges raised by multicultural societies in the legal and political order that seeks to go beyond rhetoric and to permit the adoption of solutions that are acceptable for all requires three conditions: realism, patience, and the willingness to negotiate without exclusion, within the framework of the principles of democratic legitimacy.

a) Realism, so as not to dramatize superfluously (as when multiculturality is identified with barbarism, as a cancer of democracy), to understand real demands and not their caricatures (which always compare multicultural vindications with demands that are incompatible with human rights), to avoid essentialist debates. Realism, to recognize that multicultural societies mainly recreate old problems, although the demands in which these take shape vary according to the agents of each manifestation of multiculturality (migratory flows, national, linguistic and cultural minorities, indigenous populations, peoples without a state, etc). Realism, to admit, finally, that as we have already found, there are conflicts faced with which there is no alternative but to dissolve them in such a way that, with all the argumentative or justificatory force which they are given, they will not be convincing for all sides.

   Because what is raised by the demands for recognition of multiculturality is not so much to draw up the catalogue of the *true identities* with a right to presence in our society, but something much more important and not exactly new: the problems of political, economic and cultural access and participation of different social groups and, in particular, of those who do not achieve equal integration in the distribution of power and wealth, due to their real or presumed cultural differences. The awareness of this unjust treatment, of this failure of recognition that goes beyond mere discrimination, and which cannot be satisfied with the substitute of tolerance nor

with the sophism of neutrality which leaves the basic inequality intact, is what questions the sufficiency and suitability of the mechanisms of liberal democracy to deal with the management of multicultural society.

b) Patience, which means the need to begin to accept the multicultural character of our own societies, and to prepare ourselves to manage their consequences democratically. And that first of all obliges us to discover our internal multiculturality (pre-existing but buried), because the political management of cultural diversity has consisted mainly of denying, of eliminating that diversity, based on a model (that of the nation-States) that in most of its historical manifestations bows to an obsession with homogeneity and unity and ignores the distinction between difference and inequality, between equality and uniformity, cohesion and homogeneity, union and unity. Patience, because it also forces us to accept complexity, which adds difficulty to the democratic management of these societies. We cannot rely on simple solutions, short cuts (that of brutal sasimilationism or that of blind relativism that ignores conflicts), and for that reason there are no magical solutions here, in the short term. Not all cultural institutions and practices are cliterodectomy, nor all vindications of recognition of specific rights consist of suttee. But nor does any sufficiently old fact comprise a right. And in addition, the primacy of rights is not a simplistic prescription. It is enough to think for a moment, without leaving our cultural tradition, about the dilemmas raised by the recognition of the right to life and personal freedom.

c) Negotiation, without exclusions. Pluralist democracy demands a garanteeist and inclusive logic, that postulates the notion of complex equality, shared or consociative sovereignty, differentiated or multilateral citizenship, that fulfills the function of identity without eliminating basic equality in sovereignty and rights. It also postulates taking seriously culture and recognition as primary goods, needs worthy of satisfaction, with legal and political consequences. And that forces us to discuss approaches to the conditions to negotiate egalitarian participation in the public space, from plurality, without this destroying either cohesion or equality. All this demands a calm, political and legal debate, neither metaphysical nor religious, as I have recalled on occasions, evoking Rawls; that is to say, a debate that moves away from dogmatism and the prejudice of those who preach in favour or rage against, as if they were theological virtues or capital sins. A debate about the appropriateness of measures of positive discrimination or affirmative action to obtain integration by those who, by the fact of their difference, are deprived of participation in public space on terms of equality. A debate that allows us to guarantee everyone a voice and a capacity to participate in decisions (also as a discrepant minority). It is important to ensure that agreements can be obtained based on the respect for the rights and rules of the democratic game, but it is still more important above all to guarantee respect for dissent, which is the point of departure and not an annoying subsidiary cost. Because, as I will later have occasion to maintain, what is most valuable in democratic terms is the maintenance of a space for reasonable dissent, which is the guarantee that all can take part in public space with a mini-

mum of conditions of fairness. And to this extent, I believe that the notion of complex equality, which seeks to combine redistribution and recognition faced with inequality and disadvantage (exclusion), and as formulated by, among others, Ferrajoli or Santos, is useful. We could summarize it with the criterion formulated by the latter: "people and social groups have the right to be equal when differences make them inferior and the right to be different when the rules of equality unduly accredit them with uniformity."

4. Appendix: Recognition of Political Rights and Opening to Inclusive Citizenship for Immigrants

To conclude, I wish to offer some arguments around a thesis that is very much discussed nowadays and which I consider to be crucial in defining the model of democratic management of societies in which the increase of multiculturality has to do largely with the increasing presence of immigration. I am speaking of changing the definition of the subject of public space, of the citizen as the agent of democracy. This is a change, as I said at the start, in terms of inclusive citizenship.

The construction of a concept of citizenship that allows us to open to immigrants the condition of citizens is an objective that is still far off. At the moment, a good many of them still aspire simply to visibility, that is to say, to a residence status that allows for conditions of stability and security. But that, obviously, is insufficient. We must ensure that those who contribute to common well-being and submit to the law, can participate in decisions about that common well-being and, therefore, can create the law. In other words, we must make specific the conditions for their political integration. It is not merely a utopia.

In my opinion, the most appropriate route to reach this objective is to combine the principle of political integration with those of multilateral citizenship and local citizenship. To this effect, it may be useful to reclaim the notion of policies of presence, of participation in public space, enunciated by Phillips in relation to groups dispossessed of power, as Sassen proposes, and in particular immigrants, and women. In fact Sassen includes in that policy of presence two different objectives, that of giving power to those who are deprived of access to power and wealth, and that of explaining the paradox of the increasing right to exercise civil rights for groups to whom the possession of citizenship is refused. For that reason he resorts to the notion of presence and that of *de facto* citizenship to try to go beyond the nationalization of citizenship and its contamination by gender. Beyond an interest in Sassen's specific proposal with regard to the question of gender, I would like to indicate that his suggestions point in the same direction that I was proposing. We are talking about opening those two *iron cages* that imprison citizenship, the linking of nationality-formal work-citizenship, and that of citizenship-public space-gender. It is a quesiton of creating new forms of citizenship, plural, multilateral, and gradual in character, that connect citizenship with the right to the city, the right to mobility, the right to presence, above all of those who have been marginalised to those territories where officially (at least for those who follow Foucault without understanding) power does not reside, does not play, considering that from those

spaces, those actors - women, immigrants, especially the undocumented - are weaving a new politics.

As regards the principles of multiple or multilateral and local citizenship, as a concretization of inclusive and plural democracy, what I propose is to take advantage of the theses advanced by Bauböck or Rubio (and welcomed by Castles) with regard to transnational citizenship, to define the idea of citizenship or civic integration previously expressed. This is citizenship understood not only in its technical formal dimension, but its social one, able to guarantee to all those who stably reside in a certain territory full civil, social and political rights. The key is in avoiding the rooting of citizenship in nationality (whether by birth or by naturalization), an identification that accentuates the inability of the liberal proposal to go beyond the ethnocultural roots of the so-called republican model of citizenship. Citizenship must return to its roots and be based on the condition of residence. For that reason, the importance of the neighourhood, of local citizenship is stressed, which on the other hand is what allows us to understand more easily how immigrants share with us (the citizens of the city, the residents) the tasks, the necessities, the duties and therefore also the rights of the neighbourhood.

Based on these criteria from the start, I believe that I can formulate *half a dozen measures* that make specific, in the political and the legal arena, the status of citizen and that of the subject of rights, based on the notions of civic integration and citizenship that are now the object of discussion in the EU:

1) The unequivocal recognition of the basic principle of equality of rights, of access to goods, services and channels of citizen participation under conditions of equality of opportunities and treatment. This is an equality that brings with it an equality of duties, as is obvious. I do not speak of equality as a hermeneutic principle (as established by the Organic Law 8/2000), nor even of the tendency to a progressive equalisation. We are dealing with the guarantee of formal equality in fundamental rights between citizens and stable residents in the host countries for immigration. That formal equality is formulated as a necessary although insufficient condition for political integration that, also, goes beyond the habitual vindication of social integration.
2) The equality of rights must include not only civil rights, but also social, economic and cultural ones in a full sense: from health to education, to wages and social security, to access to employment and housing. This consideration, together with the objective of integration, requires that we adopt, in my view, two complementary measures that are basic from the point of view of rights: 1. - The total recognition of family regrouping as the right of all members of the family, without the condition of ethnocultural prejudices—I repeat, as a right, not as an instrument of immigration policy, or as a step of documentation. 2. - The establishment of a plan of urgent and specific action for immigrant minors and particularly those who are on EU territory without their family, in accordance with the UN Convention on the Rights of the Child.

3) Also, in my opinion, there is need for a recognition of political rights (not only active and passive suffrage, but also the rights of meeting, association, demonstration, participation). This consists of the recognition that those who reside stably among us as a result of their migratory project (which does not mean that they necessarily have the desire to remain definitively) should be recognized on terms of equality as agents of our societies, protagonists of these societies' cultural, economic and political wealth on an equal level with nationals of the States in which they reside stably. And also, as agents of negotiation from which public space is constructed.
4) The principle of civic integration demands, from the point of view of guarantees, the adoption of effective measures against discrimination for reasons of nationality, culture, religion or sex, in relation to immigrants, whether workers or not. Cultural diversity cannot be used as a factor for discrimination in the effective recognition and guaranteeing of rights, nor, as is obvious, as relates to the fulfillment of duties. By the same token, very specifically, access to a basic cultural goods like the language of the host society, more than an imposed obligation or a requirement previously demanded of the immigrant to be able to obtain integration and legal recognition, is a right to which specific efforts should be made to guarantee access. And that implies costs in terms of the provision of personnel, in specific lines in schooling and in economic means: integration policies are not zero-cost. And this must be undertaken without imposing the loss of the language of origin. In the context of the antidiscriminatory dimension of this policy, we must emphasize the relevance of prioritizing the fight against legal-political discrimination / subordination of gender that the instruments of immigration policy have created and which affect women immigrants.
5) The principle of civic integration also demands the commitment of fulfilling and developing the directive relating to the legal status of immigrants permanently resident in the EU countries to guarantee and to make effective the full equality of rights and political participation with nationals of the member States, which a plural and inclusive citizenship makes possible.
6) The recognition of the full, local citizenship, for those who have the status of stable residents, a status that can have a first step in the recognition of legal effects of municipal registration. This is a question of advancing in the construction of a multiple or multilateral citizenship as a specific realisation of inclusive and plural democracy, in line with the theses advanced by Bauböck or Rubio (and welcomed by Castles) with regard to transnational citizenship and with the idea of citizenship or civic integration previously expressed. This is a citizenship understood not only in its technical-formal, but its social dimension, able to guarantee to all those who stably reside in a certain territory, full civil, social and political rights. We must avoid linking them with naturalization or the acquisition of nationality, nor with an imposed renunciation of the citizenship of origin. The condition of being municipal resident or neighbour should carry with it the recognition of political rights to participation and to active and passive municipal suffrage.

> The key is in avoiding the anchorage of citizenship in nationality (whether by birth or by naturalization), an identity that heightens the inability of the liberal proposal to go beyond the ethnocultural roots of the supposed republican model of citizenship. Citizenship must return to its roots and be based on the condition of residence. Hence the importance of vicinity, of local citizenship.

The difficulty, as I mentioned above, is based on how to make that condition of stable resident balance with that of citizen, and we must argue whether this must be a status that is acquired simply after a period of stable residence (and in this case, its duration: 3, 5, or more years) or whether it is necessary in addition to pass a test of adaptation or integration and constitutional loyalty, such as those that, in the image of those practiced in the U.S.A., have been established by recent reforms in some of the EU countries (language tests, knowledge of the Constitution). As for me, in agreement with Carens or Rubio Marín, I understand that citizenship must be an automatic effect derived from stable residence. In spite of the reasonable nature of some of the requirements enunciated, we cannot ignore the fact that they present a model of cultural assimilation as a condition of political integration.

In that sense, and as regards the initial period of residence, it is decisive to review the legal factors behind the precariousness or vulnerability in the legal condition of the immigrants: dispositions such as those effective ones in Spanish or Italian law that allow legal residents to fall into illegality, as a result of the circularity between residence and work permits and the rigidity of the latter (linked to activity and geographic area and, even more so, to the procedure of hiring in the country of origin), based on the dogma of quotas as a condition of integration and which contradicts the liberal principles of autonomy and free circulation. The present philosophy of immigration policy, which establishes as a postulate of the defense of the empire of law and the effectiveness of those policies the mechanisms of quota and contingency and hiring in the country of origin, is one that prevents immigrants from coming legally in accordance with their right to free circulation. On the contrary, it places these demands on a collision course and forces many immigrants who are looking for work to cross the border on a tourist visa, although their intention is different, and therefore to enter situations that infringe legality. An initiative such as the creation of residence permits for seeking work, linked to visas of short duration, as existed in the old Italian legislation (the Fini-Bossi Law) and as proposed by the final Communication 757. And together with that, the establishment of programmes of cooperation and codevelopment with the countries of origin, that guarantee free circulation. And here, by the way, I must also emphasize the blindness of the Central State Administration in our country, which still fails to understand that the Autonomous Communities are States and that the initiatives that the latter can promote in the framework of codevelopment and immigration (for example, those contained in the Plans of the Generalitat de Catalunya or the Junta de Andalucia, or the measures adopted by the former with regard to the creation of offices of immigration (which are notable by their absence in the case of the Kingdom of Spain, which could take notes from the policy of Canada in this

matter), or the promotion of the strategy of investment in the countries of origin of immigration) are necessary instruments and not challenges to a sovereignty that, by the way, is outrageously Hobbesian.

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Legal Solutions to Complex Societies: The Law of Diversity

Francesco Palermo

1. **Introduction**

For centuries, the main task of constitutionalism was to establish majority rule and the principle of formal equality. Having reached this to a large extent (at least in some relevant parts of the world) the future challenge seems to be to enhance guarantees for minority positions and the principle of difference.

This is not an easy task. On the one hand, the quest for diversity and its backlash against established legal categories makes it extremely difficult to find workable legal solutions to diversity issues. On the other hand, in a peaceful context based on the rule of law, only law can be the response to diversity claims, as arbitrary instruments would jeopardize the very foundation of a pluralistic society, which is the primacy of the law and its certainty.

In such a context, the need for more (and more reliable) legal instruments is clearly perceived. Therefore, legislators, judges and scholars are facing a tremendous challenge: how to modernize the legal system(s) in order to cope with diversity requirements, without abandoning the very essence of law, that is, its being general and abstract? In other words, the task is to provide flexible instruments which are general enough to be reliable and to some extent predictable.

This paper argues that such a complex task cannot be achieved using only the classical instruments of minority protection. These are of course the backbone of a legal discipline, but at the same time more sophisticated interpretative tools are required to cope with the challenges posed not only by 'minorities', but, more generally, by groups as such, within a legal framework that involves many more actors than before. After trying briefly to demonstrate this assumption (2.), the paper aims at developing some general "guidelines" for the emerging "law of diversities" (3.). It argues that, by more closely analysing recent legislation and case-law in a comparative perspective, most of the solutions have already been elaborated: they just need a systematic approach and a broader recognition by the subjects of the law of diversity, that is, decision-makers, judges, scholars and, not least, also the very groups asking for the legal recognition and accommodation of their diversity claims.

In the first part, the current challenges to the rooted legal instruments are considered. Then, some of the most visible elements of the emerging "law of diversity" are presented, singling them out from existing legislation and case-law. Finally, some general remarks are made as to the new relationship between the law of diversity and some of the most established legal concepts (4.).

2. **The Challenge of Complexity: Away From Standards, Exclusiveness and Protection?**

2.1. *Standards*

By its very nature, the law regarding the protection of minorities (and, more generally, the accommodation of differences) is always a work in progress. Due to the permanent change in the external context as well as to the internal dynamics of the respective groups, all normative solutions and legal instruments need constant rebalancing, adaptation and reconsideration. This makes 'one size fits all' and 'once and for all' solutions nearly impossible and counterproductive.

Besides, standards might be a minimal base and a focal point for the treatment of diversities, particularly when it comes to avoiding gross discrimination. However, when basic non-discrimination is granted, standards are either mere political goals (or slogans)[1], or, if legally relevant, by definition necessarily uniform and thus neither flexible in adjusting to different situations nor easy to agree upon as binding law, for example, in treaties under international law[2]. Moreover, the countless (and in the end futile) attempts to find a legal definition for 'minority' (although the identification of a group in a minority position rarely poses practical difficulties)[3],

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[1] For example, in the pre-accession process to the European Union, reference to European or even international standards is constantly made in the reform processes in the concerned countries. This is inevitable: with the European integration being the final aim of the transition for all countries, the adoption of "European standards" (and in future of the acquis) into their domestic legislation is the basic precondition from the perspective of accession. However, the risks attached to the frequent, sometimes superficial or even ritual use of the concept of "European standards" must be faced. Looking more to the details, it clearly emerges that in fact even in Western Europe there are only few (if any) concrete and uniform "standards". This is due to the different historical experiences and the underlying political and societal culture which determines the legal and institutional culture, including, more specifically, the sector of minority protection and legal treatment of differences. However, important political and legal guidelines for orientation are provided by the well-known Copenhagen Criteria (and their stress on the rule of law) as well as with the obligation of respecting and promoting 'cultural diversity' in EU law. The Copenhagen Criteria have become the most important element of 'conditionality' for accession to the European Union, despite their uncertain legal nature and their quite general and open contents.

[2] The experience of the (failure with an) Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms and the compromise in the form of the Framework Convention for the Protection of National Minorities can be seen as a confirmation of this. See A. Alen, B. De Witte, P. Lemmens, A. Verstichel (eds.) (2007), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, Intersentia, Antwerp.

[3] The former OSCE High Commissioner on National Minorities, Max van der Stoel, also refused to offer a definition of minority. Instead, drawing on the famous answer of a US Supreme Court Justice when asked to define pornography, he said: "Even though I may not have a definition of

show that it is next to impossible to elaborate binding standards and abstract catalogues containing identification criteria and instruments for the protection of minorities[4] and, more generally, groups. Moreover, such an attempt is also potentially dangerous for the same groups that are to be protected, as these abstract standards might not serve their concrete needs: linguistic minorities and indigenous peoples, for instance, generally have different needs and different claims, thus requiring different instruments for recognition and protection[5].

2.2. *Definitions*

A minority or a group 'as such' does not exist, as diversity is the rule in human life: "Rather, there exist large and small, numerous and otherwise, social groups. In abstract, all groups, each endowed with its own identity, equally represent the natural and cultural diversity of the human species. A social group may be seen as transformed into a minority when, on the basis of a *shared and single feature of reference*, it establishes relations with another group which, by virtue of a largely (but not solely) quantitative criterion comes to constitute *the* majority"[6].

In other words, diversity claims only exist with regard to certain distinguishing criteria. Traditionally, the State (of the majority) has been the main point of reference and is still the central actor in minority issues: in other words, the classical criterion for identifying a minority and for establishing forms of legal recognition was the State. Only the State had the power to say what a minority is and to at-

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what constitutes a minority, I would dare to say that I know a minority when I see one" (M. Van Der Stoel, address given at the CSCE Human Dimensions Seminar "Case Studies on National Minority Issues: Positive Results", Warsaw 24.5.1993 (http://www.osce.org/hcnm/documents/speeches/1993/24may93.html). On the long-lasting issue of the definition of a minority see J. Packer, 'Problems in Defining Minorities', in D. Fottrell, and B. Bowring, (eds.)(1999), *Minority and Group Rights in the New Millennium*, Martinus Nijhoff Publishers, The Hague, pp. 223-273.

[4] Because they necessarily depend on the ideological perspective adopted. See J. Packer (1996), "On the Content of Minority Rights", in J. Raikka (ed.), *Do We Need Minority Rights?*, The Hague, 121-178. For broader elaboration on the issue of definition of minorities see G. Pentassuglia (2002), *Minorities in International Law*, Council of Europe, Strasbourg, pp. 55-75.

[5] Therefore, for instance, while the criteria of blood and race are the natural points of reference in order to determine who is member of a native nation in the U.S., the use of the same criterion for identification is firmly rejected in Europe as regards the membership of a recognized minority group: article 3 of the Council of Europe's Framework Convention for the Protection of National Minorities (1995), states that "every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice". Another example, based on the same provision, could be the use of the census to determine the official affiliation to a minority group: in some cases, this is considered to be by the same minority representatives a non-negotiable constitutive element of an effective system of protection (such as, for example, in the Autonomous Province of Bolzano/Bozen, South Tyrol); in others, this instrument is seen as a tool for discrimination and is therefore firmly opposed by minority leaders (such as in most of the Central and Eastern European countries). See K. NEGRIN (2003), 'Collecting Ethnic Data: An Old Dilemma, the New Challenges', *Online Journal of OSI's EU Monitoring and Advocacy Program*, http://www.eumap.org/journal/features/2003/april/oldilemma/.

[6] R. Toniatti (1995), "Minorities and Protected Minorities: Constitutional Models Compared", in T. Bonazzi and M. Dunne (eds.), *Citizenship and rights in multicultural societies*, Keele, p. 200.

tach legal protection to it[7]. Today, in the era of increasing political and legal interdependence, the State is far from representing the only counterpart of minorities and groups and, by consequence, the sole and exclusive legislator authorized, if not to "recognize", at least to regulate minority positions and to accommodate differences[8].

It seems evident that the 'sovereignty over minorities', once vested exclusively with the State, has now definitively ceased to be concentrated in one sphere of (central) government only[9]. It is rather part of the same phenomenon of polycentric diffusion which characterizes an increasingly large share of public tasks and functions. These phenomena of 'subsidiarity' can have vertical or horizontal dimensions: regarding 'vertical subsidiarity', that is, between different levels of government, on the one hand, through the increasing importance and role of the international and supranational systems and, on the other, of sub-national legal systems which assume greater importance due to the processes of decentralization; and, regarding 'horizontal subsidiarity', that is, between the public and the private sectors, through instruments like personal or cultural autonomy as well as through an active role of the same minority groups in the determination of their own right to be different.

In other words, a 'multilevel minority governance' is being created, with some important consequences following from this tendency. In the first place, the 'protection' of minorities ceases to be a 'competence matter' (if indeed it ever was such) vested with one subject or another. Rather, it becomes a transversal and shared objective which is to be realized by different actors and instruments in a combined approach[10]. While minimum denominators are determined at the international and supranational level, the State acts as the motor for macro-policies in the field of equality, whereas the sub-national and local authorities and the minority groups themselves are the main actors of micro-policies of diversity[11].

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[7] For an in-depth-analysis of the historical development see E.J. Ruiz Vieytez (1999), *The History of Legal Protection of Minorities in Europe (XIIth – XXth Centuries)*, University of Derby, Derby.

[8] Paradoxically, in contexts still characterized by a higher degree of ideological attachment to the mirage of State sovereignty, as is the case in many countries in Central and Eastern Europe, international monitoring and pressure towards the adoption and implementation of criteria elaborated at other levels are even stronger. See again the experience of the FCNM and of its practical role in Central, Eastern and South Eastern European Countries, as demonstrated by several papers published in A. Alen, B. De Witte, P. Lemmens, A. Verstichel (eds.), *The Framework Convention for the Protection of National Minorities*, cit.

[9] In a recent document, also the Council of Europe's Commission for Democracy Through Law (Venice Commission) has noted that citizenship cannot be any longer considered the sole criterion for the recognition of minority rights and that also non-citizens should benefit from specific minority protection. See European Commission for Democracy through Law, *Report on Non-Citizens and Minority Rights*, adopted at the Commission's 69th plenary session (Venice, 15-16 December 2006), Study no. 294/ 2004, CDL-AD(2007)001.

[10] As an example, this tendency in 'minority protection' can be compared to the 'protection of the environment' which is by its very nature an objective of collective interest and thus shared by all governmental subjects and spheres of government and has to be reached through a variety of instruments. Like the clear general interest in a healthy environment and in "biodiversity", a similar interest exists in a pluralist and "differentiated" society.

[11] The case of Italy might serve as an example, which presents a territorial differentiation at the constitutional level, with the establishment of special regions as distinct legal systems, and a State

As a consequence, looking at the present situation (especially in Europe) the law of minorities and groups is constituted by a large variety of instruments of protection, different sources and interrelated levels as well as determined by a great number of different actors[12]. This complexity manifests itself with increasing clarity for at least two more reasons. First, this is because the plurality of levels with which minority groups are confronted results in a constant exchange of positions as minority or majority. These vary according to the territorial level and competences concerned[13]. All of us are majority and minority more often each day, depending on the issue, and this should contribute to the understanding and the respect of positions and needs of others. Second, this complexity manifests itself with increasing clarity because the appropriate instruments of the rich 'tool box' for the protection and promotion of diversity are increasingly chosen by the groups themselves according to their needs. The groups thus become the first (but certainly not the only) 'mechanics' of the complex 'machinery' assembled for their own protection, with all the inevitable consequences in terms of potential (not yet fully explored)[14], but also in terms of responsibility (towards themselves and towards the other actors of the complex scenery of accommodation of differences).

3. **Accommodating Differences Through Law: Towards the "Law Of Diversity"**

It follows from the aforesaid that the factors for difference are potentially countless, that the classical supplier of the law of diversity (the State) is no longer the sole actor responsible for the recognition and the accommodation of differences and that the extraordinary amount of instruments and sources produced by different (and differently legitimized) actors make general approaches to diversity

framework law for the protection of linguistic minorities outside these regions (law no. 482/1999). The single provisions and instruments provided by this law are to be activated and implemented upon the initiative taken by the provincial and/or municipal assemblies thus giving these levels an active role in determining the concrete contents at the local level while allowing for a high degree of differentiation.

[12] See also, beside the other instruments cited in the paper, the CEI-Instrument for the Protection of Minority Rights (1994), the Copenhagen Document of the Conference on Human Dimension (1990), the OSCE Charter for European Security (1999), the OSCE Charter of Paris for a New Europe (1990), etc. *Cfr*. R. Hofmann (2005), "New Standards for Minority Issues in the Council of Europe and in the OSCE", in J. Kuhl and M. Weller (eds.), *Minority Policy in Action: The Bonn-Copenhagen Declarations in a European Context 1955-2005*, ECMI-Syddansk Universitet, Flensburg-Aabenraa, pp. 239-277; and K. Henrard (2004), "Ever-Increasing Synergy towards a Stronger Level of Minority Protection between Minority-Specific and Non-Minority-Specific Instruments", *European Yearbook of Minority Issues*, no. 3, pp. 15-41.

[13] As outlined e.g. by the Parliamentary Assembly of the Council of Europe, Resolution 1301 (2002), Protection of minorities in Belgium.

[14] For instance forms not directly linked to territorial autonomy, which are nothing really new, especially in a historical perspective. As highlighted by different scholars, there seems to be a tendency to return to a regime of personal rights which move together with the individuals they belong to, with a certain analogy to the legal system in medieval Europe. *Cfr.* P. Grossi (2001), *L'ordine giuridico medievale,* Roma.

claims rather useless. In simple words, the very foundations of the modern legal thought, based on general assumptions, on the legal fiction of the completeness of the legal system and on abstract criteria to adjudicate a claim, are put into question[15].

What can thus be the legal answer to these profound uncertainties lawyers are confronted with? At a first glance, the increasing complexity of the diversity challenge seems to make legal instruments quite obsolete, for a number of reasons. First, the factors for difference are potentially countless and the complexity of the reality constantly deranges the rules and the legal categories elaborated in order to accommodate the increasingly numerous requests for different legal treatment[16].

Second, extra-legal determinants are crucial in defining the very approach to the law of differences: matters such as cultural aspects, numbers, not to mention costs, as acknowledged also by the courts[17].

Third, it is worth noticing how quickly legal instruments get old in the modern law of diversity: whereas legal instruments were traditionally conceived to be eternal, it is now the case that, particularly in this field, they become outdated in an ever shorter time, thus jeopardizing the certainty of the law itself.

Finally, and more importantly, law is always a cultural phenomenon, and as such tends to reflect the cultural attitude of the majority: democracy, in other words, is itself the basis of the law and the origin of discrimination vis-à-vis minority claims, because what is a rule for the minority is generally exception for the ma-

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[15] Even a general rule such as the uniform application of criminal law is put into question. See for example the landmark decision of the U.S. Supreme Court in the Oliphant case of 1978 (*Oliphant v. Suquamish Indian Tribe et al.*, 435 U.S. 191). In this decision, the Court affirmed that Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians for violations of tribal criminal law.

[16] It is a legal, and thus ultimately a majority choice to determine which groups can be considered (and treated as) a recognized minority, and this choice can be dependent on places and circumstances. For example, specific identities that are generally not recognized, as differential grounds might become relevant in specific places, such as prisons. In the United Kingdom, "although prisoners have few 'rights' enforceable through the courts, they are accorded certain privileges and can expect certain standards to be followed in the light of various sets of circular instructions issued to prison establishments by the Home Office. The current guidelines allow, *inter alia*, orthodox baptized Sikhs to wear the five symbols of their religion, together with a turban; Muslim women to wear clothes which fully cover their bodies; Hindu women to wear saris; and Rastafarians to keep their dreadlocks" (S. Poulter (1992), "Limits of Pluralism", in B. Hepple, E.M. Szyszczack, *Discrimination: the Limits of Law*, London, p. 183). Similarly, in a rather interesting decision issued by a Court of Appeal in California (*Friedman v. S. Cal. Permanente Med. Group*, 102 Cal. App. 4th 39, 66, 125, Cal. Rptr. 2d 663, 682 (2002)) about whether Vegans could or not be considered a religious group, the Court made clear that the recognition as a religious group (in this case it was denied) could not be made in general, but only for the purpose of the specific law concerned. This means, in other words, that even the very legal recognition can be variable from single law to single law.

[17] In its leading case in this regard, *Mahe v. Alberta* (S.C.R. 783, 2000), the Canadian Supreme Court, with regard to educational rights in a 'minority' language (French-speaking schools in the almost entirely English speaking Province of Alberta) established the famous criterion "where numbers warrant". In other words, diversity rights can be (and in fact are) dependent on factors that have nothing to do with the right itself, such as the number of people involved, the costs of the rights, and so forth.

jority, such as in the case of minority schools[18] or of the derogations in electoral law for minority representatives[19]. As already pointed out by John Stuart Mill, "nothing is more certain than that virtual blocking out of the minority is not necessarily a consequence of freedom, but instead is diametrically opposed to the first principle of democracy: representatives in proportion to numbers (…)"[20]. Whereas law has traditionally been the expression of the majority's will (the *volonté générale*), it is often very difficult to distinguish the rule from its exception in a given case and thus the general right from a specific right, the overcoming of disadvantaged positions in a specific case from a privilege. What is a rule for the minority is generally an exception for the majority. This is why provisions in international and supranational law expressly declare highly differentiating mechanisms, such as positive or affirmative action, to be non-discriminatory[21].

From such a background, the need for more sophisticated legal instruments to accommodate diversities in pluralistic societies is clearly perceived. Accommodation of differences is a permanent challenge to legal systems, and at the same time it is precisely this complexity that requires more and not fewer legal responses. Only the rule of law can set limitations to the tyranny of the majority, elaborating criteria that at the same time avoid the tyranny of a minority. In other words, the complexity challenge does not ask for less law, it imposes a different type of law, which

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[18] An instructive and classic example is the case of education: All citizens have the right to instruction in their respective mother tongues. However, a problem arises only with regard to members of minority groups speaking a different language, because the school system is organized for the needs of the majority population. 'Special' classes or even schools in minority language can therefore re-establish the original equality principle according to which everyone has the right to be educated in his or her own language. Accordingly, this case does not represent a privilege, but the concrete application of a right taking into account cultural differences. This example does not argue in favor of one specific model of minority schools, as it has already been mentioned that 'one size fits all' solutions are not conceivable due to the different contexts. While a separated school system has successfully addressed the security concerns of some minority groups such as the German-speaking group in South Tyrol, the Basques and the Catalans in Spain, etc., in other cases, establishing particular, separate educational institutions might set the stage for heightened levels of discrimination and social segregation (as it has been the case, for example, in Bosnia and Herzegovina, Georgia, Azerbaijan and Armenia, or, recently, in the so called "Ostrava case" decided by the European Court of Human Rights: E.Ct.H.R., 7 February 2006, *D.H. and others v. Czech Republic*, no. 57325/00, ECHR 2006-113, on the alleged discrimination of Romany pupils in the Czech Republic).

[19] There are countless examples in this regard. It is important to notice, however, that in electoral issues the courts normally tend to be deferential to the choices made by the legislatures. Two examples might be mentioned. On the one hand, the issue of the legislation of the Northern German Land Schleswig-Holstein, where a Danish minority is settled; in a first phase, the regional electoral law did not provide for an exemption to the 5% threshold for minority-parties, then a derogation was introduced. In both circumstances, the German Federal Constitutional Court argued that the legislator is entitled to adopt differentiations in favour of minority parties, but it is not obliged to do so. See BVerfGE 1, 208 (5.4.1952) and BVerfGE 4, 31 ff. (11.8.1954). For additional examples *cfr*. F. Palermo and J. Woelk (2003), "No representation without recognition: the right to political participation of (national) minorities", 25 *Journal of European Integration*, no. 3, pp. 225-248.

[20] J.S. Mill (1874), *Considerations on Representative Governments*, New York, p. 146.

[21] *Cfr*. e.g. Article 5, Council Directive 2000/43/EC on prohibition of discrimination based on racial grounds, OJ L 180, 19/07/2000, 22 ("Race Directive"). Similar: Article 4(3) of the Framework Convention for the Protection of National Minorities.

more effectively tackles the ever more numerous issues arising in terms of recognition and accommodation of diversity claims.

The first conclusion to be drawn is that the classical approach in terms of 'protection of minorities' is no longer able to provide workable legal solutions to the claims of diversity[22]. Such an approach, in fact, is based precisely on those traditional criteria that are massively challenged by the new reality: State sovereignty, standards, "top-down" recognition of a minority, scrutiny of strict proportionality in order to justify a 'different' treatment, where 'different' necessarily means 'different from the rule of the majority'. For this reason, a new terminology is proposed: the 'law of diversity' indicates the complex bunch of legal instruments that can be adopted at all possible levels in order to deal with the requests for accommodation of potentially endless claims for diversity. A gradual move away from the majority's perspective of a 'law of minority protection' is needed, towards a more complex 'law of diversities', much more in line with today's culturally complex societies, addressing groups in general instead of simply 'minorities'[23].

How can a new legal paradigm be developed that acknowledges that difference tends to become the rule and (formal) equality the exception? In the following pages, some general guidelines will be delineated on the basis of concrete examples that (subjectively) seem to show interesting developments, which might have general significance in determining some fundamental elements of the law of diversity.

4. **The Law of Diversity: Pluralistic, Transnational and Mild**

However difficult and subjective, it seems that there are some elements common to the various fields of law confronted with the challenge of diversity.

4.1. *Pluralistic*

First, as already mentioned, the modern law of diversities cannot be but *pluralistic*: it is characterized by a plurality of producers and suppliers and the 'sovereignty' over diversity issues is diffused. Particularly in Europe, the monopoly of the State's authority over the recognition and the implementation of diversity claims is increasingly diluted against the backdrop of a much broader picture. It has been effectively pointed out that today's European law is the outcome of the integration of (at least) three "geo-juridical spheres", marked by different degrees of integration and by different interactions between law and politics[24]. The first,

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[22] See also N. Lerner (2003), "Historical Overview: from Protection of Minorities to Group Rights", in *Group Rights and Discrimination in International Law*, Kluwer Law International, The Hague, pp. 7-28.

[23] Similarly, E. Heintze (1999), 'The Construction and Contingency of the Minority Concept', in D. Fottrell and B. Bowring (eds.), *Minority and Group Rights in the New Millennium*, Martinus Nijhoff Publishers, The Hague, 1999, pp. 25-74

[24] R. Toniatti (2000), "Los derechos del pluralismo cultural en la nueva Europa", *Revista vasca de administración pública*, no. 58, pp. 17-47.

more densely integrated sphere is the European Union, the core of legal integration in the continent; the 'second Europe' is the Council of Europe, territorially and socially broader, aiming at enhancing compatibility of European legal culture(s) by means of intergovernmental cooperation in the field of human rights protection and enforcement; the 'third Europe' is represented by the Organization for Security and Cooperation in Europe (OSCE), the broader and less homogeneous integrative sphere, mostly based on merely politically binding agreements and on soft-law. In the integrative spill-over, the OSCE is a sort of 'waiting room' for the Council of Europe and the Council of Europe the 'pre-chamber' for the European Union[25]. In addition, the constitutional spheres of the single States interact with all these legal orders and increasingly also among themselves. Thus, if this is true, it is necessary to gradually abandon the idea of accommodation of diversities being linked — and, to some extent, confused — with the concepts of uniformity or equality.

4.2. *Transnational and Comparative*

Second, an important outcome of such an intertwined system of sources and suppliers of law, is the impressive circulation of legal models and solutions within the integrated legal space, making the law of diversity increasingly *transversal*, *transnational* and based on *comparative* elements[26]. Two examples help illustrate this point. On the one hand, it is well known that the European Union does not have a direct power to regulate minority issues. However, an impressive number of decisions of the European Court of Justice, formally grounded on different subject matters such as the free movement of people and the principle of non-discrimination on the ground of nationality, have been issued over the last couple of decades[27], introducing *a de facto* EU-system of minority protection[28] which has also had important consequences in terms of European legislation[29]. On the other hand, the role of the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) can be mentioned, which in some domestic judicial decisions has been given a binding effect much beyond its formal rank in the domestic legal system. This tendency, particularly evident in Central and Eastern European countries, demonstrates that the FCNM has an operational, judicial potential

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[25] See also J.F. Flauss (1994), « Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe », *European Journal of International Law*, no. 5, pp. 1-22 (also available at: www.ejil.org/journal/Vol5/No3/art6.pdf).

[26] The importance of comparison not only for cultural purposes, but also as an instrument for judicial interpretation has been pointed out by P. HABERLE (1989), "Rechtsvergleichung als fünfte Auslegungsmethode", *Juristen-Zeitung* (JZ), 913.

[27] See, further, F. Palermo (2001), "The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ", *Maastricht Journal of European and Comparative Law*, vol. 8, no. 3, pp. 299-318.

[28] For a complete picture see G. Toggenburg (2007), *Das Recht der Europäischen Union und die Minderheiten Europas. Spielräume und Schranken in einem neuen Gestaltungsrahmen*, Nomos, Baden Baden.

[29] Including the Treaty establishing a constitution for Europe (29 November 2004, OJ 16 December 2004, C, 310), whose article I-2 provides that the Union is grounded on several values "including the rights of peoples belonging to a minority".

which is much superior to its formal role[30], thus becoming a typical instrument of the modern law of integration, based on the use of comparative arguments[31], trespassing the borders of the formal rank of the legal sources and operated by the very dynamics of integration.

4.3. *Mild*

Third, and even more importantly, the law of diversity tends to become '*softer*', that is, it is determined to a large extent by non-strictly binding factors. This field of analysis is particularly telling and paradigmatic for a larger evolutionary trend which seems to affect the entire system of law. Law has always been the

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[30] Some domestic courts referred to the FCNM not only as a source of inspiration but as a real parameter for adjudication. This was the case, for instance, of the Romanian Constitutional Court and of the Croatian Constitutional Court, both invoking the Convention, ratified by the respective country, as an instrument able to produce direct effects within the domestic legal system due to the status of ratified international treaty law according to the national constitution. The Romanian Court was asked to rule on the constitutionality of the law on local public administration, which established the right of persons belonging to national minorities to interact in their mother tongue with the local public administration in the areas where they constitute at least 20% of the whole population (Romanian Constitutional Court, 9 April 2001, no. 112/2001). In rejecting the claim and thus maintaining the constitutionality of the law, the Court directly applied article 10.2. of the FCNM ("In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities". For the Court, the contested law was nothing but the implementation of the provisions of the FCNM: "the law of local public administration merely states and fixes the details of the enforcement of the provisions in Art. 10.2 of the Framework Convention for the Protection of National Minorities, which, according to Art. 11.2 and 20.2 of the Constitution, may be directly enforced". The Croatian Constitutional Court declared the constitutionality of the constitutional law on the representation of national minorities in political bodies (establishing affirmative actions for national minorities in the political process) also on the ground of Art. 4.3 of the FCNM, which states that the promotion of "full and effective equality between persons belonging to a national minority and those belonging to the majority in all areas of economic, social, political and cultural life ... shall not be considered to be an act of discrimination" (Croatian Constitutional Court, 12 April 2001, U-I-732/1998, Official Gazette 36/2001).

[31] Sometimes comparative arguments have also been used quite arbitrarily in order to neglect minority claims, such as, for example, in the case of the Latvian Constitutional Court: In a very delicate decision on the linguistic rights of the Russian community in Latvia, adopted just a few days before the country ratified the FCNM (the decision was adopted on 13 May 2005 and the FCNM was ratified by Latvia on 8 June 2005), the Court affirmed that signing the convention and its content do not restrict Latvia in realizing an education policy which basically excludes educational rights in the mother tongue for the Russian minority. In its argument, the Court mentions (its original view of) the other European States' practice in implementing the Convention in order to provide arguments for the legitimate exclusion of the Russian community from the scope of the FCNM, even after its entry into force in Latvia: "The practice of the European Union Member States in realization of the Minority Convention testifies that the aim of the above [mentioned] Convention usually is to protect the assimilated ethnic minorities from vanishing. In fact, in the understanding of this Convention, in Western Europe there are no ethnic minorities, the greatest part of which does not know the State language. In the same way, in the greatest number of the European Union Member States this Convention is not applied to the post-war settlers an the greatest part of Russians of Latvia may be regarded as such" (Latvian Constitutional Court, 13 May 2005, no. 2004-18-0106, part I, at 9).

expression of values, and as such (at least implicitly) of the majority's values. In a society characterized by differentiation and thus complexity, there are two fundamental options for the law: on the one hand, to limit its use to an instrument of conflict resolution in order to settle controversies which inevitably arise within any society. This means decreasing its ideological component in favor of increasing its technical character. On the other hand, there is the option of transforming it into an inclusive law, which does not only express the values of the majority, but more generally those of pluralism; in this inclusive approach, minorities and groups are a fundamental expression of social pluralism. From a perspective of complexity, both functions do not mutually exclude one another.

Thus, the experiment of a law of complexity aiming at conflict prevention can coexist with increasingly sophisticated instruments for governing conflict. In between, there is a proliferation of forms of soft law or 'mild law'[32], which are based on (the presumption of) broadly shared values, within which the differentiation of specific legal settings becomes the rule. Altogether, this is a very pragmatic reason for this: in conflict situations, soft law can be more efficient than prescriptive norms. In fact, where a majority demands mindless obedience and submission from a minority, this is usually regarded as subjugation, and increases the chances of not being respected[33]. Thus, the more pluralistic a society is, the higher is the need for tolerance and persuasion instead of imposition and sanctions.

This makes up a rich and varied panorama with an increasing number of single pieces of a mosaic which, if put together correctly and in a systematic way, are able to form a much more beautiful picture than the single pieces have been before.

Reflecting a pluralist attitude, this 'mild' law of complexity protects fundamental and individual rights, providing at the same time for the procedures leading to negotiated choices, without predetermining or imposing such choices, but guaranteeing that they can be made in full autonomy. Above all, such a 'mild-law-approach' seems to be inevitable in a long-term perspective: the more the society becomes free, and reluctant to accept strict impositions, the more the law can be effective by means of persuasion, obviously within a framework of a stable rule-of-law-dominated legal system. This basic common denominator shows that "pluralism in togetherness"[34] requires some basic common rules and (probably) also a minimum of shared values in order to guarantee the peaceful co-existence of different communities. In this regard, modern versions of older theories like 'personal federalism' focus on the concept of 'multicultural citizenship', contrary to the exclusive traditional concept of citizenship understood as equal to 'nationality'[35].

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[32] Corresponding to the expression coined by G. Zagrebelsky (1992), *Il diritto mite*, Torino.

[33] This is common to all phenomena of integration, being a societal integration of groups or a legally-driven process of integration in terms of supra-national polity-building. For the latter example as regards the principle of tolerance instead of obedience in the framework of European integration, see J.H.H. Weiler, *Federalism and Constitutionalism. Europe's Sonderweg*, Jean Monnet Working Paper no. 10/00, www.jeanmonnetprogram.org.

[34] A. Eide (1993), "Protection of Minorities. Possible Ways of Facilitating the Peaceful and Constructive Solution of Problems involving Minorities", UN Doc. E/CN.4/Sub.2/1993/34, 38 *et seq.*

[35] See, for example, W. Kymlicka (1995), *Multicultural Citizenship. A Liberal Theory of Minority Rights,* Clarendon Press, Oxford (esp. pp. 75 and seq.) and K. Renner (1918), *Das Selbstbe-*

The examples of such a 'mild law of diversity' are countless. Specific mention should be made of the 'soft' approach chosen by the OSCE High Commissioner on National Minorities in the second half of the 1990s[36]. He presented a set of recommendations (named after the places in which these were elaborated: Oslo, The Hague and Lund) on the most relevant issues for minorities, practically-speaking, such as linguistic rights, educational rights and rights to effective participation in public life[37]. The aim of these soft-law recommendations, elaborated by a group of independent experts, is to show the wide range of possible solutions for different and frequently-arising practical issues, thereby persuading (especially governments) rather than imposing uniform 'standards'. As a matter of fact, the persuasive force of the recommendations has increased over the years. Reference to them is often made in legal doctrine and in political documents, and these non-binding instruments are useful orientation criteria both for groups claiming recognition of their difference and for governments looking at possible instruments for accommodating it.

Among other examples, the European Charter for Regional or Minority Languages and the role of the Advisory Committee under the FCNM should be mentioned. In 1992, the former provided for the first time a flexible system of 'selection' of linguistic rights to be attributed to the target groups, thus guaranteeing a broader leeway for the State Parties and abandoning the utopian 'take-or-leave', 'all-or-nothing' approach to international norms, and the mantra of uniformity of (human and minority) rights[38]. The latter, in spite of being a merely advisory body of the Committee of Ministers[39], has in practice gained an extraordinary persuasive power[40], and its output has been effectively defined as "soft jurisprudence"[41]. Many other examples could be made, such as the role of the Council of Europe's 'Commission for Democracy through Law' (so called 'Venice Commission'), which

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stimmungsrecht der Nationen in besonderer Anwendung auf Österreich, Leipzig, Wien; see also E. Froschl, M. Mesner and U. Ra'Anan (eds.)(1991), *Staat und Nation in multiethnischen Gesellschaften*, Wien, 61 *et seq.*

[36] W. Kemp (2001), *Quiet Diplomacy in Action. The OSCE High Commissioner on National Minorities*, Kluwer Law International, The Hague.

[37] See http://www.osce.org/hcnm/documents/recommendations/index.php3; and J. Packer (2000), "The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life", *Helsinki Monitor,* no 11, 41.

[38] See A. Bultrini (2003), "Developments in the Field of the European Charter for Regional or Minority Languages", *European Yearbook of Minority Issues,* no. 2, pp. 435-443.

[39] Articles 24-26 FCNM.

[40] R. Hofmann (2003), "Review of the Monitoring Process of the Council of Europe Framework Convention for the Protection of National Minorities", *European Yearbook of Minority Issues,* no. 2, Leiden/Boston, Martinus Nijhoff Publishers, pp. 401-433 and A. Verstichel (2003), "Elaborating a Catalogue of Best Practices of Effective Participation of National Minorities. Review of the Opinions of the Advisory Committee regarding Article 15 of the Council of Europe Framework Convention for the Protection of National Minorities", in *European Yearbook of Minority Issues,* no. 2, pp. 165-195.

[41] J. Packer (2004), "Situating the Framework Convention in a wider context: achievements and challenges", in *Filling the Frame. Five years of monitoring the Framework Convention for the Protection of National Minorities*, Council of Europe Publishing, Strasbourg, p. 45.

plays a *de facto* fundamental role in guiding the constitutional transition in several Eastern and South Eastern European counties[42].

5. **Law and… : Trends in the Law of Diversity?**

5.1. *Legitimacy and Procedures*

These and other examples[43] show not only that a 'soft' law of diversity can in fact be much 'harder' than its formal rank within the system of the sources of law would suggest, and therefore that, in modern complex societies, persuasion might be more compelling than sanction. They also tell that the legitimacy of the various suppliers of the law of difference is variable, rather technical than 'democratic', maybe less transparent but certainly more efficient. All this implies a radical mental shift not, only for legal scholars in managing classical categories such as democracy, sovereignty, legitimacy and binding powers, but also for the very groups claiming for diversity: the politics is no longer the sole, nor maybe the most important instrument in order to guarantee diversity rights[44].

Instead, the law of diversity is increasingly based on a *plurality of legitimacies* (political, technical, judicial, international, supranational, and so forth) and therefore, instead of 'values', it is increasingly made up of *procedures*. Procedures are in fact the most relevant legal consequence of the law of diversity. In fact, only a procedural instead of a value-based approach to law can realize the greatest possible expression of each of the different interests at stake in the concrete case, especially in the complex system of multilevel governance in Europe. Modern legal instruments created to cope with diversity challenges shall avoid the domination of one position over the other and guarantee the necessary (permanent but never stable) balance between equality and difference, protection and living together, rights and obligations, autonomy and integration[45]. Due to the continuous need for readjustment, the positions as well as the instruments (including the balances which the latter represent) can never be considered as established once and for all. Legal categories are fundamental, but one should not forget, in the end, that law is all but a stable artifact.

The rules of the 'law of diversities' are thus inevitably subject to constant revision, in terms of their proportionality, their efficiency and their sustainability, and

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[42] See e.g. the fundamental opinions issued with regard to the necessary constitutional amendment in Bosnia and Herzegovina: European Commission for Democracy Through Law, *Opinion on the Constitutional Situation of Bosnia and Herzegovina and the Powers of the High Representative*, adopted at its 62nd Plenary Session, Venice, 11-12 March 2005, CDL-AD(2005)004, http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp?PrintVersion=True&L=E.

[43] Other examples can be the Minority Ombudsman established e.g. in Hungary, or the Minority (advisory) Councils existing in several Central and South-Eastern European Countries.

[44] If this is true, the old motto according to which minority rights are nothing but successful political claims is no longer valid.

[45] *Cfr.* J. Marko (1995), *Autonomie und Integration*, Böhlau, Wien.

directly linked to the changes of the societal reality which they regulate[46]. In simple words: What is legitimate today might not be tomorrow.

In such a context, law tends to become similar to technology, where even the more modern achievements quickly become outdated. In an increasingly integrated, trans-national legal community, problems and solutions tend to converge, mutually fertilizing different legal systems and different branches of law. The plurality of instruments, rules, actors and responsibilities seems to oblige minority groups to accept their being part of a greater reality and to think (to their own advantage) in terms of integration and cooperation. It also seems to force the majorities to accept that they are not the only masters in 'their' house and to think (again to their own advantage) in more complex terms. In such a context, law should provide for adequate normative instruments and procedural solutions to enable the accommodation of legitimate diversity requirements, being in line with the societal evolution.

Only a sound procedural framework can allow for the expression of all possible factors of difference without being previously subject to the 'ideological' scrutiny of what can be considered a recognized 'diverse group' (in the eyes of the majority). If access to decision-making is determined on the basis of neutral procedures, the risks of ideological discrimination are reduced. The groups claiming for the recognition of their diversity and their majority-counterparts will thus increasingly be guided by procedural grids, and mastering procedures seems gradually to become more important than putting forward political claims: the more technical the law, the more important the details. By further elaborating on the details, the apparently untouchable principles can also be deeply transformed in the long run.

5.2. *Equality and Democracy*

As already stated above, the task of the scholar in dealing with diversity is made more difficult by the lack of certainties deriving from the absence of clear definitions of the concepts involved. It follows that, instead of looking for standards and comprehensive definitions which in the long run prove to be fallacious, the legal analysis should be more ready to deal with uncertainties, paying greater attention to the procedural side of possible diversity conflicts. A greater pragmatism in identifying problems ('I know it when I see it') can and should be balanced by a sound systematic analysis of their possible legal solutions, based on the application of tests and procedures that might help advance the systemic role of the law.

This seems particularly true as regards equality. Equality in its purely formal sense is not sufficient for the management of the complex situation of a plurality of groups which find themselves (as a consequence of their diversity) in a structural minority position. The role of the law consists of balancing the democratic criterion (majority rule) through corrective measures aiming at overcoming structural and

[46] *Cfr.* as an example in this sense, regarding political representation, recommendation no. 22 (last point) of the Lund Recommendations (1999): "periodic review of arrangements … can provide useful opportunities to determine whether such arrangements should be amended in the light of experience and changed circumstances".

permanent minority positions by highlighting the pluralistic dimension. 'Diversity' rights which do not provide for 'anti-majoritarian' limits are not conceivable. For this reason, the equality principle cannot be interpreted merely in its formal dimension of treating all citizens in the same way. Only when the substantial dimension of equality is also considered can the specific structural social and factual disadvantages of the minority group be and addressed by differentiating rules.

Consequently, equality cannot be evaluated from the perspective of a majority and must thus be separated from a purely democratic dimension. It is evident that the democratic principle is intimately linked to the evolution of the homogenous nation-State. In some historical cases, this fiction has been necessary for modern State building, but it cannot be applied in its 'pure' form to highly differentiated contexts like our modern societies. In the latter, the democratic principle requires constant adjustments: not through majority rule, but based on the rule of law. This, again, means the rule of procedures.

The role of law consists precisely of balancing the democratic criterion through corrective measures aiming at overcoming structural and permanent minority positions by highlighting the pluralistic dimension. The resulting normative provisions only have the objective of enabling minorities to do the same things as the majority population can do, within an established procedural framework. Minority rights which do not provide for "anti-majoritarian" limits are not conceivable.

5.3. *Asymmetry and Negotiation*

The constant search for a balance between equality and difference, the protection of individual rights and the safeguarding of the ethnic and cultural characteristics of groups thus constitutes the legal foundation of living together in diversity. Research and maintenance of those balances cannot occur except with different and specific instruments in relation to the intensity of the past disturbance of balances in the single case. In fact, it is evident that in a situation which requires redressing the domination of one group over others (as is typically the case in open conflict), the operation of 'rebalancing' has necessarily to be more 'drastic', less sophisticated and above all focused on the 'protection' (in the strict sense) of the weaker group(s) in order to address their concerns for security.

Unfortunately, this is still the case for many minority groups in Europe. For them, the fundamental question is their own survival as a group. In these situations, it does not seem possible to move beyond the dimension of 'mere' legal protection and, from the perspective of the majority, legal recognition of the minority. In many cases, the explicit recognition of basic rights of protection (in the fields of language, culture, participation, and so forth) would already be a major step forward.

However, it is evident that there are also different situations of consolidated protection in which the minority is recognized and accepted and its survival no longer a matter of discussion; in short, where a sufficient level of protection, and consequently of trust, has been reached. In this context, the most radical instruments for 'rebalancing' gradually lose their necessity and legitimacy, in favour of mechanisms, which allow for greater cooperation in the management of the 'ques-

tion of diversity'. In these situations, one cannot any longer automatically count on the presumption that the interests of the minority generally prevail over other constitutional objectives. Consequently, the differentiating norms have to be justified more specifically. The legal instruments, subject to the stricter scrutiny of proportionality, reasonableness and adequateness, thus become necessarily more sophisticated. In the end, in these situations mere 'protection' might even risk becoming counterproductive for the same minority which may find itself in a rather isolated position (in an extreme hypothesis, confined to a sort of humiliating 'reservation') instead of fully participating in the development of its own group as well as of the complex society as a whole.

In short, looking at the different legal treatment of differences, it ranges from non-recognition or assimilation (often justified by the formal dimension of the equality principle, for example, the famous 'colour-blind' Constitution) to recognition and protection (with exceptional character and generally simple rules) to diversity as the rule requiring a whole set of complex rules.

Especially in the European legal space (consisting of the three concentric spheres of the OSCE, the Council of Europe and, as the inner circle, the more integrated constitutional space of the European Union and its member states) with its objective to overcome the excesses of the nation-States as well as to reach "unity in diversity",[47] it is increasingly the dimension of complexity requiring normative answers moving from the perspective of an accentuated social pluralism of subjects, of levels and of rights[48].

The issue of minorities—of their protection, but also of their promotion through their participation in the governance of diversity, and thus complexity, and by means of the instruments of the new "law of diversities"—is particularly telling and paradigmatic for a larger evolutionary trend, which seems to affect the entire system of law. Law has always been the expression of values, and as such, at least implicitly, of the majority's values. In a society characterized by differentiation and thus complexity, there are two fundamental options for the law. On the one hand, one option is to limit its use to that of an instrument of conflict resolution, in order to settle controversies which inevitably arise within any society. This means decreasing its ideological component in favour of increasing its technical character. On the other hand, there is the option of transforming it into an inclusive law, which does not only express the values of the majority, but more generally those of pluralism; in this inclusive approach, minorities are a fundamental expression of social pluralism[49].

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[47] See Article VI-1 and the Preamble of the Constitutional treaty establishing a Constitution for Europe, *cit*.

[48] Of course, the complexity of the new 'law of diversities' can also mean additional costs, especially of an economic nature. However, even mere 'protection' does have its costs, and the question is whether the promotion of diversities might not bring benefits which at least equal the costs. In the end, the judgment on this issue is not economic, but highly political in nature.

[49] As an example of an attempt in this direction, Article 4 of the Trentino-South Tyrol autonomy statute can be quoted. While indicating the "national interest" among the limits of regional and provincial legislation, it specifies that the national interest includes the protection of minorities. By

Such an understanding of the law of diversities can even help to bridge the famous gap between historical and 'new' minorities (that is, immigrant communities). Within a set of basic fundamental rules that can, and must, be accepted by all persons sharing the same territory, only a high degree of legal differentiation allows for the accommodation of cultural differences.

The resulting complex 'law of diversity', deriving from several legal sources, increasingly procedural and softer as regards its contents, is necessarily characterized by two additional elements: *asymmetry* regarding its application as well as the particular instruments (differentiation in the legal position of the groups thus becomes the rule) and *negotiation* of its content in a quasi-contractual framework, creating the obligation of mutual recognition, consideration of the position and interests of others and, in the end, mutual acceptance; that is,. going beyond pre-established majority and minority positions (and making the distinction between rule and exception increasingly difficult if not obsolete).

These instruments and procedures should favour cooperation, by giving up as much as possible ideological, and thus irreconciliable approaches to law. Law should no longer be seen as what is 'just' (a concept which is ideologically biased, normally by majority perspectives), but merely as a procedure for determining the necessary common ground. The legal rules on diversity, in other words, should tend to become more and more similar to the economic constitution: The legislator ceases to intervene in determining the details, and performs a regulatory role,[50] moving from being the direct source of the differential legislation to 'referee', centre of control of the basic, framework rules as well as of the principle of equality. Other actors, such as sub-national and local levels of government, and finally the groups themselves, should determine the operational rules for their difference.

Beside the 'basic' regulatory and procedural legal provisions, it is quite evident that at least a minimally cooperative attitude is necessary from the start for making these provisions work[51]. A cooperative attitude is inherent in the principle of the rule of law. An illuminating example in an extreme case is provided by the Supreme Court of Canada in its 1998 opinion on the question of a possible secession of Quebec[52]. The judges unanimously deemed a secession of that province to be possible in the event of absence of the will to remain connected to the rest of the country as the minimum basis for cooperation. However, they also underlined that any possible separation according to the rule of law—the only possible way—would have to occur within the framework of the Constitution. The latter neither

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this means, the limit has to respect a counter limit, and the positions of the majority (the national interest) and of the minority (its own protection) have to be balanced within a unitary framework.

[50] See on this phenomenon G. MAJONE (ed.)(1990), *Deregulation or Re-regulation? Regulatory Reform in Europe and the United States*, London, New York.

[51] This includes an organization of the minority groups which would permit (and guarantee) the cooperative and consensual formulation of the operational rules of diversity within like in the case of the apartment-owner's assembly regarding issues of common interest. This is why, for instance, it is so extremely difficult in several western countries to establish permanent dialogue between institutions and Islamic groups, which normally lack an organized representation.

[52] Supreme Court of Canada, *Reference re Secession of Quebec* [1998], 2 S.C.R. 217; 20 August 1998.

allows for unilateral secession nor for the sole use of the majority principle as the guiding principle in such a delicate process. According to the Court, the criteria imposed by the Constitution are that a "clear majority" in favour of secession in the respective province imposed an obligation on the rest of the national community to negotiate the concrete terms in good faith.

Indeed, terms like 'uniform', 'simple' and to some extent even 'democratic' should be gradually abandoned in the vocabulary of the law of differences, leaving room to new concepts such as 'asymmetric', 'complex' and 'procedural'.

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Part II

Linguistic and Religious Diversity: Cases and Models

European Traditional Linguistic Diversity and Human Rights: A Critical Assessment of International Instruments

Robert Dunbar

1. **Introduction**

Europe is a continent of considerable linguistic diversity. For example, *Ethnologue*[1] estimates that there are 239 languages native to Europe, which are still spoken on the continent. Most (though certainly not all) European states have a single "national" language, in the sense of one language which is spoken by the majority of the population and is both the language of wider communication within the state and is the *de jure* or *de facto* official language for the purposes of the conduct of public business. However, so-called "autochthonous" minority languages (languages which have been spoken by a minority population within the territory of the State for considerable periods of time) are present in virtually every European State[2].

There is a rather complex typology of autochthonous minority languages. First, some are national languages of another State or States (for example, German in Italy, or Russian in former Soviet Republics). While such languages are generally not "threatened" languages, in the sense that they may cease to exist as spoken languages, their loss within a particular State may diminish the linguistic diversity of that State. And, perceived mistreatment of these linguistic minorities have the potential to lead to international tension, particularly where the "kin-state" (the State in which the language is the national language) shares a border. Second, some autochthonous minority languages are spoken in two or more States, but are not "national" languages of any European State (for example, Basque, Frisian, Sami or

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[1] See R.G. Gordon (ed.)(2005), *Ethnologue: Languages of the World*, SIL International, Dallas, available on-line at http://www.ethnologue.com/; for the statistics just cited, see http://www.ethnologue.com/ethno_docs/distribution.asp?by=area.

[2] The term "autochthonous" language appears in the Explanatory Report to the *European Charter for Regional or Minority Languages*, a Council of Europe treaty which will be discussed below. It is intended to describe minority languages which could be said to be indigenous to a State, and to distinguish these from languages of more recent immigrant populations.

Romany)[3]. Third, some autochthonous minority languages are spoken in only State: examples would include Scottish Gaelic and Welsh in the UK, or Sorbian in Germany, and there are many such languages in Russia. These latter two types of autochthonous minority languages (languages which are not the national language of another State) are generally less likely to give rise to threats to international peace and stability (although they can be associated with nationalist struggles which have witnessed violence within the State)[4] but they are often languages which have suffered long-term decline in numbers of speakers, and are to a greater or lesser extent demographically "threatened" languages. The vulnerability of many of these languages poses a considerable challenge to Europe's linguistic diversity.

When discussing Europe's linguistic diversity, it is, however, also important to remember that a large number of languages have been brought to European states by more recent mass immigration. Many of the languages of these so-called "new minorities" do not originate in Europe, and are therefore not included in the Ethnologue estimate of 239. This process has been enhanced within the 27 member States of the European Union (the "EU") by virtue of the mobility rights guaranteed under the Treaty of Rome[5]. In the UK, alone, it is estimated that from the accession of ten new member States in May, 2004 until August, 2006, some 427,000 migrant workers from eight of those States came to the UK, with 264,560, or about 62%, coming from one State alone, Poland[6]. Thus, there is considerable linguistic diversity in Europe, and also much diversity in the sociolinguistic and demographic situation of Europe's languages and in the needs and aspirations of their speakers.

2. **Language Management and the Modern State**

Typically, this linguistic diversity has been viewed as a problem. This perception is, to a significant degree, a product of rise of the modern nation-state as the preferred model for the organisation of political communities. The importance of language in both the identification and the construction of national identities, and in the building of the modern State is well-known, and is reflected, for example, in these observations:

> *"Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist. The influences which form opinions and decide political acts, are different in the different sections of the country. An altogether different set of leaders have the confidence of*

[3] The reference might more appropriately be to Sami and Romany "languages". Catalan is spoken in several autonomous communities of Spain (Catalonia, Valencia, Aragon and the Balearics), in southern France and in Italy (in Sardinia), but since it is the "national" language of Andorra, it should, strictly speaking, be placed in the first category mentioned.

[4] For example, Basque in Spain and France, Corsican in France, Kurdish in Turkey (particularly the south-east of the country), and Irish in Northern Ireland are obvious examples.

[5] As amended from time to time.

[6] See BBC News On-line, http://news.bbc.co.uk/1/hi/uk_politics/5273356.stm.

> *one part of the country and of another. The same books, newspapers, pamphlets, speeches, do not reach them."*[7]

The author, the nineteenth century British liberal John Stuart Mill, did not define nations solely by reference to language, nor did he rule out that "national feeling" could exist in a multilingual State, although he did observe that community of language greatly contributed to such national feeling. Unlike the "German Romantics", such as Fichte, Herder and Humboldt, Mill also did not view national, and linguistic, identities as being immutable. Indeed, he argued that the likes of the Bretons and Basques of French Navarre, as well as the Welsh and the Scottish Gaels of Britain, benefited by being "brought into the current of ideas and feelings of a highly civilised and cultivated people", as members of a French or a British nation, as opposed to being left "to sulk on their own rocks, the half-savage relic of past times"[8]. Liberalism has, of course, moved on, with modern liberal thinkers like Will Kymlicka grappling with ethnic and linguistic diversity in a much different way[9]. Contemporary political correctness also dictates that the sort of chauvinism apparent in Mill's observations on the Basques, Bretons, Welsh and Scottish Gaels is less commonly expressed, though it has not quite disappeared. However, the assumptions at the core of the passage just quoted have played an important role in informing State language policy and wider minority policy. Indeed, they continue to find echoes, for example, in some of the debate of the last couple of years on the supposed failures of multiculturalism and the need for more successful policies of integration and the rekindling of "national feeling", often defined from a linguistic majoritarian perspective. In Britain, for example, Gordon Brown, formerly the Chancellor of the Exchequer and now the Prime Minister, has recently had much to say about a revival of a sense of a shared core "British identity[10]. This comes at a time when other members of the Blair government, notably the then-Home Secretary, John Reid, were contemplating the introduction of legislation that would impose an English language competence test on migrants wishing to settle in Britain[11]. Such overlapping discourses has the potential to create a sense that language is not merely of instrumental importance (the acquisition of English in an English-language dominant society is necessary for full participation in wider society) but it is a marker of identity and of belonging.

At the heart of Mill's argument is the notion that linguistic diversity poses a serious challenge to the modern democratic State. Linguistic difference is perceived to be a barrier to communication, and therefore to the public discourse which

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[7] J.S. Mill (1962), *Considerations on Representative Government*, Gateway Editions, South Bend, pp. 309-310.

[8] *Ibid*, pp. 313-4.

[9] See, for example, W. Kymlicka (1995), *The Rights of Minority Cultures*, Oxford University Press, Oxford.

[10] See, for example, Gordon Brown's keynote speech to the Fabian Future of Britishness conference, 14 January, 2006, available at: http://www.fabian-society.org.uk/press_office/news_latest_all.asp?pressid=520.

[11] P. Wintour (2007), "English tests to be part of a tougher new strategy on immigration", *The Guardian*, Saturday, 24 February, 2007, at http://www.guardian.co.uk/immigration/story/0,,2020478,00.html.

is fundamental in a democracy. However, for Mill, linguistic difference had other dangers. It was perceived to hinder the creation of an integrated political community, thereby sowing the seeds of division, instability and ultimately threatening the political unity of the State. Although Mill did not touch on it, the rise of the modern administrative State and of the mass production industrial economy also contributed to this sense that linguistic diversity was a problem. Linguistic barriers were thought to make the management of a modern state bureaucracy, a modern army or modern industry more difficult.

The language policy implications of this logic are clear: the State should foster the acquisition of a common "national" language by all of its citizens. In the United Kingdom, for example, universal, state-supported public education was introduced in 1870 and 1872; however, the sole medium of instruction was English, even in monolingual Welsh-speaking parts of Wales and monolingual Gaelic-speaking parts of Scotland[12]. The conduct of local government business during this period followed the same monolingual English pattern[13]. The negative impact which such policies have had on the maintenance of autochthonous minority languages (and on linguistic diversity) is not surprising: in Wales and Scotland, successive censuses have shown dramatic declines in numbers of speakers of Welsh and Gaelic. The negative effects of such policies are exacerbated where, as is often the case, they are accompanied by the sort of linguistic and cultural chauvinism evident in the passage quoted from John Stuart Mill.

3. **Linguistic (Human) Rights and International Law**

What, if anything, has international law had to say about the management of linguistic diversity? The development of international legal norms in this area has generally been piecemeal and reactive. Indeed, with one prominent exception[14], standard-setting has not been explicitly directed at language issues at all; instead, relevant norms are contained in instruments concerned with the protection of human rights or the protection of minorities. And standard-setting in these areas has generally been most intense in the wake of crises perceived to constitute threats to international peace and security in Europe. Take, for example, the first period of standard setting, which took place in the aftermath of the First World War. The creation of new nation-states out of the remains of the defunct multi-national Austro-Hungarian, Ottoman and Russian empires did not eliminate sizeable ethnic, linguistic and religious minorities. A system of minority protection, created under the aegis of the League of Nations, was established in part with a view to ensuring that the perceived mistreatment of such minorities would not serve as a reason, or

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[12] See, for example, J. Davies (1993), *The Welsh Language*, The University of Wales Press, Cardiff, pp. 48-50, and K. MacKinnon (1991), *Gaelic: A Past and Future Prospect*, The Saltire Society, Edinburgh, pp. 74-97.

[13] J. Davies, *ci.t*, pp. 52-3.

[14] The Council of Europe's *European Charter for Regional or Minority Languages*, which will be discussed further, below.

at least as a pretext, for intervention by neighbouring States with which a particular minority had close affinities. This system, which effectively ended with the outbreak of the Second World War, contained some of the earliest explicit "language rights", including a right to use minority languages in the courts, a right for linguistic and religious minorities to establish their own private schools, and a right for linguistic minorities to have their children receive primary education in public schools through the medium of the minority language[15]. However, the system was limited in scope, as it only applied to certain new, or newly re-emergent States, mostly in central and eastern Europe[16]. The hypocrisy and double-standards were palpable: many of the western European States which were involved in the creation of this system did not themselves have a spotless record with respect to the protection of their own minorities, but these States rejected any suggestion that they should be subject to the same standards which were being imposed on other States.

3.1. *Post-War Developments*

The atrocities of the Second World War led to the proclamation by the United Nations in 1948 of the *Universal Declaration of Human Rights*, and subsequently to the conclusion of major international human rights treaties, including the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* (the "European Convention on Human Rights", or the "ECHR"), the first such treaty, in 1950, and the two major United Nations instruments, the *International Covenant on Civil and Political Rights* (the "ICCPR") and the *International Covenant on Economic, Social and Cultural Rights* (the "ICESCR"), in 1966. In general, however, these treaties create a rather limited regime for the protection of language rights, or the management of linguistic diversity more generally. Under both the ECHR and the ICCPR, there are only three provisions which could be said to create what could be described as "language rights". The first is the right of every one who is arrested to be informed promptly, in a language which he understands, of the reasons for his arrest and the charges against him[17]. The second and third are the rights of everyone charged with a criminal offence to be informed

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[15] See, for example, articles 7, 8 and 9, respectively, of the *Treaty between the Allied and Associated Powers and Poland ("The Polish Minorities Treaty")*, Versailles, 28 June, 1919; See P. THORNBERRY (1991), *International Law and the Rights of Minorities*, Clarendon, Oxford, pp. 399-403, and in M.O. HUDSON (ed.)(1934), *International Legislation, vol. I*, Carnegie Endowment for International Peace, Washington:, p. 283, which was generally used as a model for the other instruments which formed part of this "system". For a good discussion of the League of Nations "minorities system", see P. THORNBERRY (1991), *cit.,*pp. 25-54, or F. CAPOTORTI (1991), *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, New York, pp. 16-26.

[16] The League of Nations "minorities system" was comprised of the following four types of instruments, involving the following States and/or territories: minorities-specific treaties with newly-created states such as Czechoslovakia and Poland or states which obtained new territories under the peace treaties, such as Serbia, Romania and Greece; chapters on minorities in the peace treaties imposed on four of the defeated states, Austria, Hungary, Bulgaria and Turkey; further treaties with respect to particular minority territories, such as Danzig, the Åland Islands, Upper Silesia, and the Territory of Memel; and, unilateral declarations in respect of minority populations made by Albania, Lithuania, Latvia, Estonia and Iraq on their entry into the League of Nations

[17] Article 5, paragraph 2, the ECHR, and Article 9, paragraph 2, the ICCPR.

promptly, in a language which he understands, of the nature and cause of the accusation against him, and to have the free assistance of an interpreter if he cannot understand or speak the language of the court[18]. However, these rights are more concerned with guaranteeing procedural fairness than the protection of linguistic rights, *per se*, and are in any case of a fairly limited nature. The European Court of Human Rights (the "Court") has made clear, for example, that speakers of minority languages who also speak and understand the language of the court cannot avail themselves of the right to an interpreter, set out in Article 6, subparagraph 3(e), in order to use their preferred language, the minority language, in court[19]. Given State education policies in Europe, which have generally sought to equip all citizens with the national language, most speakers of autochthonous minority languages also speak and understand the national language, and so these provisions are of little practical value to such speakers, though they may be of some value to non-citizens or members of migrant populations, many of whom often have a limited grasp, at best, of the national language[20].

The rather limited nature of the major human rights treaties as instruments for the protection of what could be described as "language rights" and the management of linguistic diversity more generally is illustrated by the way in which the right to education, set out in Article 2 of the First Optional Protocol of the ECHR, has been interpreted. It provides that no person shall be denied the right to education and that the State shall respect the right of parents to ensure such education and teaching is in conformity with the religious and philosophical convictions of those parents. In the famous *Belgian Linguistics Case* of 1968[21], however, the Court rejected the argument that the "philosophical convictions" protected under Article 2 of Protocol 1 extended to the linguistic preferences of parents, and concluded that the right to education did not recognise a right to be educated through any particular language, including the language of the home; if it did, the Court argued, anyone would be free to claim any language of instruction in the territories of the contracting states[22].

The implications of the *Belgian Linguistics Case* for minority language education policy would appear to be that the State is under no obligation to offer minor-

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[18] Article 6, paragraph 3 (a) and (e), the ECHR, and Article 14, paragraph 3 (a) and (f), the ICCPR.

[19] See, for example, *Isop v. Austria*, No. 808/60, 5 YBECHR (1962), p. 108, in which a Slovenian speaker claimed the right to use Slovene in criminal proceedings; he also spoke German, and the European Commission (which no longer exists, but which had formerly effectively been used to screen admissibility of cases to the full Court) ruled that Article 6, paragraph 3(e) did not include a right to be heard in one's own language. See, also, *K v. France*, No. 10210/82, 35 D.R. 203 (1983). Similarly, in *Bideault v. France*, No. 11261/84, 48 D.R. 48 232 (1986), the Commission ruled, in respect of Breton-speaking witnesses who also spoke French, that witnesses were not entitled under this provision to use the language of their choice. See, also, A. CONNELLY (1993), "The European Convention on Human Rights and the Protection of Linguistic Minorities", *I.J.E.L.* 277, pp. 281-3.

[20] See, for example, *Twalib v. Greece*, No. 24294/94, 9 June, 1998.

[21] Judgment of 23 July, 1968, Series A, No. 6.

[22] For a comment, see B. DE WITTE (1992), "Surviving in Babel: Language Rights and European Integration", in Y. DINSTEIN and M. TABORY (eds.), *The Protection of Minorities and Human Rights*, Martinus Nijhoff, Dordrecht, pp. 277-300.

ity language education. However, where instruction is offered through the medium of more than one language, the application of the principle of non-discrimination may, as we shall see shortly, support a claim to similar provision from members of a linguistic minority which does not benefit from such a regime, if they can establish that they are in a similar situation to the minority to which such instruction has been extended.

It is not clear how significantly the position with respect to minority language education rights under the ECHR will change as a result of the decision of the Court in *Cyprus v. Turkey*[23]. One of the complaints brought against Turkey in this case related to the closure of the only secondary school in Turkish-controlled Cyprus which offered education through the medium of Greek; Greek-medium education continued to be available at primary level. Surprisingly, given the decision in the *Belgian Linguistics Case*, the Court found that the discontinuance of Greek-medium education at secondary level in these circumstances amounted to a complete denial of the substance of the right to education contained in Article 2 of Protocol 1[24]. The Court was clearly influenced by the fact that, given the tense situation on the border between the Turkish-controlled part of the island and the rest of Cyprus, sending children across that border for their education was not practicable, and that, as the children had already received their primary education in Greek, it was not practicable for them to be placed in Turkish-speaking secondary schools, where they would effectively be unable to understand what was being taught to them.

While this decision clearly does not amount to a dismantling of the position articulated in the *Belgian Linguistics Case* (it would not, for example, create a generalisable right to minority-language education) it may create the basis for the extension of a right to minority-language education in circumstances that are broadly analogous to those in *Cyprus v. Turkey* (where, for example, children from a linguistic minority who do not speak the language of the school are required to attend schools in which the majority language is the only medium of instruction). Even if the principle in *Cyprus v. Turkey* could be extended to such cases, however (and it is not at all clear that it will be) it would still be of limited assistance to children from linguistic minorities who do, in fact, have some facility in the majority language, and this is often the case for children from autochthonous minority language communities.

The deference which the international human rights canon gives to the State to choose its own linguistic regime is illustrated in other case law. One such example is the case of *Podkolzina v. Latvia*[25]. The applicant, a Russian-speaker, was a candidate for election to the Latvian Parliament. Like many of the former Soviet Republics, Latvia had after independence sought to reverse the effective linguistic dominance of Russian which had been characteristic of the Soviet period, and made Latvian the official language of the State. Latvian electoral legislation provided that no candidate could stand for election to the national parliament unless

[23] No. 25781/94, Judgment of 10 May, 2001.

[24] See paragraphs 273-280.

[25] No. 46726/99, Judgment of 9 April, 2002. For a similar decision under the ICCPR, see *Ignatane v. Latvia*, Comm. No. 884/1999, CCPR/C/72/D/884/1999, 25 July, 2001.

he or she could demonstrate the highest level of competence in Latvian under prescribed tests. The applicant had obtained certification for this level of competence, but was nonetheless struck off the list of candidates after an effectively *impromptu* test of her competence by a State official (a member of the Language Board which had been established to implement the new language policy) determined that she lacked sufficient command of Latvian. The Court found that this determination had amounted to a violation of Article 3 of Protocol 1 to the ECHR[26], which has been interpreted by the Court as enshrining not only a right to vote but a right to be elected. What the Court found objectionable was not the basic requirement of competency in Latvian, but the manner in which the test of competence had been carried out: the reassessment of the applicant's linguistic competence had not followed the normal procedures for certification in that it had left the decision to the full discretion of a single civil servant, thereby failing to guarantee objectivity, and was also incompatible with the requirements for procedural fairness and legal certainty[27]. With regard to the basic requirements for linguistic competence in Latvian, however, the Court found that States have a wide margin of appreciation with respect to the regulation of elections, and that the requirement that a candidate for parliament have a sufficient knowledge of the official language was both a legitimate aim and was proportionate; the Court noted that the choice of the working language of a national parliament "is determined by historical and political considerations specific to each country" and "is in principle one which the State alone has power to make"[28].

A similar deference is evident in some of the case law involving the right to freedom of expression[29], a right of obvious relevance to the question of management of linguistic diversity. On the one hand, international tribunals have recognised that this right imposes limits on the ability of the State to restrict communication by members of the public through the language of their choice. The best example of this is *Ballantyne, Davidson and McIntyre v. Canada*[30], a communication brought before the UN Human Rights Committee under Article 19 of the ICCPR. It involved a challenge to provisions of Quebec's Law 101, the *Charter of the French Language*, which required that all commercial signage in the province appear in French only. The Human Rights Committee agreed that, by effectively prohibiting the use by the authors of the communication of English signs, this requirement vio-

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[26] It provides that States parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

[27] Paragraph 36.

[28] Paragraph 34. Another ECHR case which illustrates the generally "hands-off" approach taken with respect to the choice of a national language and the requirement to use that language, and that language alone, in the political process is *Fryske Nasjonale Partij v. Netherlands*, No. 11100/84, 45 D.R. 240 (1985). Whether such a restrictive approach would still be taken, given the development of COE treaties with respect to the use of minority languages, is unclear; the Court has shown some inclination to take such broader developments into consideration in the consideration of certain ECHR rights, such as the Art. 8 right to private and family life: see, for example, *Chapman v. UK*, Application No. 27238/95, judgment of 18 January, 2001, especially paragraphs 93-4.

[29] Article 10, the ECHR, and Article 19, the ICCPR.

[30] UN doc. A/48/40 (1993).

lated their right to freedom of expression, thereby clarifying that the right covered not only the content of expression but the linguistic medium chosen. The Human Rights Committee noted that the ICCPR provided that the right to freedom of expression could be restricted by the State where such restrictions are provided by law and are necessary for the achievement of a range of legitimate purposes, such as respecting the rights of others. Furthermore, they agreed that the purposes here of the Province of Quebec were legitimate (namely, to protect the vulnerable position of the French-speaking minority of the Canadian population which happened to live in Quebec). However, the Human Rights Committee did not consider the complete prohibition on the use of languages other than French was "necessary". Here, they used the concept of proportionality[31]: the protection of the French language could be achieved without completely prohibiting the use of French (the law could, for example, have accomplished the objective by requiring the use of French as well as English).

While the Human Rights Committee did place some limitations on the ability of the State to restrict the use of languages, the decision (like that in *Podkolzina*) does give some comfort to those who support a relatively strong legislative approach to the promotion of a minority language. The Human Rights Committee did, after all, recognise that measures which interfered with the use of a language would be permissible if the goal was to protect a vulnerable linguistic community, so long as any such interference was proportionate. The case also makes clear that an attempt to enforce the use of a particular language in the private (i.e. non-State) sphere would, *prima facie*, constitute a violation of the right to freedom of expression. Thus, any attempt by a State restrict the use of a minority language *per se* in private (i.e. non-State) communication would constitute a violation of the right to freedom of expression. Furthermore, it is difficult to see that any such restriction would be in pursuit of any legitimate purpose described in the ICCPR. Thus, aggressively assimilationist State language policies which involve broad restrictions on the use of a minority language in private communication, in privately-owned media, and in the private and voluntary sectors of the economy would be restricted.

On the other hand, however, both the Court and the Human Rights Committee have made clear that different considerations apply with respect to the use of language by the State itself, and that the right to freedom of expression does not guarantee the right to use the language of one's choice in dealing with the State itself or in official contexts. In *Inhabitants of Leew-St. Pierre v. Belgium*[32], for example, a complaint that the refusal of municipal authorities in an area in which Flemish was the only official language to provide documentation in French was ruled inadmissible, on the ground that the right to freedom of expression did not include a guarantee as to the choice of language by the State. Similarly, in *X v. Ireland*[33], the requirement to fill in a form in Irish, even where the applicant spoke only Eng-

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[31] For a discussion of this concept within the context of the ECHR, see, for example, C. Ovey and R.C.A. White (2006), *Jacobs & White, The European Convention on Human Rights*, 4th ed., Oxford University Press, Oxford, pp. 232-9.

[32] 8 *Yearbook of the ECHR* 388, (1965).

[33] 13 *Yearbook of the ECHR* 792, (1970).

lish, was not considered a violation of the right to freedom of expression. And, in *Fryske Nasjonale Partij v. Netherlands*[34], where the applicants claimed that their right to freedom of expression was violated when they were prevented for standing for election because their registration forms were not in Dutch but in Frisian, it was decided that the right to freedom of expression does not guarantee the right to use one's language of choice in administrative matters. Thus, as in the *Belgium Linguistics Case, Podkolzina* and *Ignatane*, we see the deference given to the State in relation to the use of language for public or "official" purposes or in the public sector.

This discussion of the relevance of the international human rights canon to the management of linguistic diversity will conclude with a consideration of the principle of non-discrimination. It may ultimately be through this principle that the traditional deference to State language policy, just described, may begin to erode. The most dramatic example of this to date is in the views of the Human Rights Committee in *Diergaardt v. Namibia*[35]. Under the constitution of Namibia, English was the only official language of the state, even though it was spoken by only a tiny percentage of the population. The communication involved a community whose language was a form of Afrikaans. Staff members in local public offices were instructed by the government not to communicate with the public in any language other than English, even though public servants could speak the minority language and that at least some members of the community allegedly could not speak English. The Human Rights Committee found that these instructions violated Article 26 of the ICCPR, which provides that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Discrimination on any grounds, including language, is prohibited.

Unfortunately, the Human Rights Committee did not set out its reasoning in any detail, and we are therefore left to speculate on the implications of this decision. The facts of the case suggest that, where the State has the capacity to provide services through a minority language, and where at least some of its speakers do not speak the national or official language, the principle of equal protection of the law ensures that the State cannot deny the use of such a language. However, it is not clear whether we can go further. Where, for example, all the speakers of the minority language also spoke the national or official language, would the State still be under an obligation to provide minority language services, where it had the capacity to do so? In such circumstances, an equal protection argument might be somewhat weaker, as the refusal to use the minority language would not necessarily disadvantage speakers of that language in their access to public services (presumably, it is the inability to gain access to public services on the same terms as those who can speak the national language which would engage Article 26). If, however, speakers of the minority language could not speak the national language, would the State be required to provide minority language services if, unlike in *Diergaardt*, it did *not* have the capacity to do so? In terms of equal protection of the law, this surely would be a stronger case, as the non-use of the minority language

[34] 45 Decisions and Reports (E Comm. HR) 243, (1986).
[35] Comm. No. 760/1997, 6 September, 2000.

would place speakers of the minority language in a disadvantageous position with respect to access to public services, *vis-à-vis* those who can speak the national language. Even if the principle in *Diergaardt* could be extended this far, it would still be of more potential use to many speakers of languages of so-called "new minorities" than those of autochthonous minority languages, as many members of such "new minorities" do not speak the language of the State to which they emigrate, while members of many autochthonous linguistic minorities can, in fact, speak and understand the national language.

The views of the UN Human Rights Committee in *Waldman v. Canada*[36], provide an illustration of the difficulties that the provision of special measures of support to one group but not others can raise. It involved a law of the Canadian province of Ontario which provided public funding for Roman Catholic schools but not for schools of other religious denominations. The author of the communication was a parent of a child enrolled in a Jewish school who claimed that the preferential treatment of Catholic schools violated Article 26 of the ICCPR, and that similar measures of State support therefore had to be provided to the schools of other religious groups, including Jewish schools. The Human Rights Committee noted that if a State chooses to provide public funding to religious schools, it should make the funding available without discrimination. This does not mean that the State must provide the same treatment to schools of every religious denomination, but that any difference of treatment must be based on "reasonable and objective criteria"[37]. The Human Rights Committee concluded that the provision of public funding to Roman Catholic schools and not to Jewish schools was not based on "reasonable and objective" criteria.

The relevance of this case to linguistic minorities was made clear in the separate views of Human Rights Committee member Martin Scheinin, who noted that these same principles would apply in respect of minority language education; the provision of such education for one minority language alone would not, as such, amount to discrimination, but "care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds"[38]. Scheinin suggested that "constant demand" for minority language education and the question of "whether there is a sufficient number of children to attend [the minority school] so that it could operate as a viable part in the overall system of education" were relevant considerations[39]. Indeed, it is difficult to see why this principle should only apply in respect of minority language education; it would likely extend to any minority language service provided to speakers of one minority language but not others. This may be highly significant in the context of minority language policy. To the extent that provision of minority language services is made by States, it tends to be restricted to autochthonous linguistic minorities. The *Waldman* case creates at least the possibility that such services may have to be extended to speakers of languages of so-called "new minorities", if it can be es-

[36] Communication No. 694/1996, CCPR/C/67/D/694/1996, 3 November, 1999.
[37] Para. 6.10.
[38] Appendix, para. 5.
[39] *Ibid*.

tablished that there are no "objective and reasonable grounds" for providing such services to autochthonous linguistic minorities and not the new ones.

It should be noted that the ECHR does not have an exact equivalent to Article 26 of the ICCPR. The closest provision is Article 1 of the Twelfth Protocol to the ECHR[40], which provides that the enjoyment of any right set forth by law shall be secured without discrimination on any ground, including language. This protocol only entered into force on 1 April, 2005, and has only been ratified by fourteen of the forty-six Council of Europe member States. The non-discrimination provision within the ECHR itself, Article 14, is of more limited scope. It prohibits discrimination on any grounds, including language, but only in respect of the enjoyment of the rights and freedoms set forth in the ECHR. In other words, if an applicant has been discriminated against, but not in the context of a right protected under the ECHR, then the applicant has no basis for complaint. It is therefore not clear whether the principle of non-discrimination as embodied in Article 14 of the ECHR would be of use with respect to many areas of language policy; as already noted, there are few, if any, "language rights", as such, under the ECHR. However, although there is, as noted, likely no right to minority language education outside, perhaps, of the limited scope for such a right created by the decision in *Cyprus v. Turkey*, where a State does provide minority language education rights to a particular minority, the *Belgian Linguistics Case* showed that similar rights must, as a result of Article 14, be provided to members of another linguistic minority whose circumstances are similar. So, as in the *Waldman* case, the principle of non-discrimination may have consequences where the State has decided to provide certain minority language services to one linguistic minority but not another.

The one provision in the international human rights canon that is of more immediate relevance to linguistic minorities is Article 27 of the ICCPR, the famous "minorities provision". It provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their culture, to profess and practice their own religion, or to use their own language. Although there have been several communications under Article 27, they have generally not involved language issues. Thus, the Human Rights Committee has not yet had to consider in any detail the implications of this provision in respect of State language policy. Famously, the Article is framed negatively (it provides that the State shall not interfere with the use of language) and therefore does not explicitly place upon the State a positive with respect to the use of minority languages. However, even this "negative" formulation may be of importance, in that it would likely ensure that any attempt by States to restrict the use of minority languages in the private or voluntary sector would fail. Also, in its General Comment on Article 27[41], the Human Rights Committee noted that in spite of the "negative terms" used in Article 27, "positive measures of protection" are nonetheless required "not only against the acts of the State party itself, (…) but also against the acts of other

[40] CETS No. 177.

[41] General Comment No. 23: The rights of minorities (Art. 27), 8 April, 1994, CCPR/C/21/Rev.1/Add.5.

persons within the State party", presumably private actors which seek to deny the right of enjoyment of the minority language[42]. Furthermore, while acknowledging that the rights in Article 27 are individual rather than collective rights, the Committee says that they depend on the ability of the minority group to maintain its culture and language, and that accordingly "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language . . . in community with other members of the group"[43]. However, it has not specified what such measures would include. Thus, the best that can be said is that the potential of Article 27, in respect of State language policy, has not been fully explored.

To conclude this discussion of the relevance of the international human rights canon to the management of linguistic diversity, although cases such as *Diergaardt* may have sown the seeds of change, the canon has until now created a rather limited regime of "language rights". With respect to the management of linguistic diversity more generally, while certain core rights, particularly the right to freedom of expression, may play an important part in restricting the use by States of strongly coercive assimilationist measures, and while the principle of non-discrimination may force changes in the nature of the beneficiaries of language policy, particularly in respect of the treatment of members of so-called "new minorities", the canon has generally shown a considerable deference to States in determining their language policies. As we have seen, where, as in Quebec and Latvia, the State has chosen to pursue a policy aimed at the strengthening of a previously vulnerable "national" language, such deference can have positive consequences for the maintenance of linguistic diversity; however, the canon does not require of States such an orientation.

3.2. *Recent Developments*

With respect to the most recent burst of standard setting relevant to the management of linguistic diversity, once again, international law was largely reactive. This time, it was the outbreak of violence between different ethnic and religious groups following the collapse of communism at the end of the 1980s (particularly in the former Yugoslavia) which led to further developments. The Organisation for Security and Co-operation in Europe (the OSCE, formerly the CSCE) was instrumental in this process. The 1990 *Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE* (the "Copenhagen Document")[44] was particularly important in expressing a range of general principles relating to the protection of minorities, and a number of these made reference to language. To a significant degree, the Copenhagen Document served as a model for, and its principles were reflected in, the Council of Europe's *Framework Convention for the Protection of National Minorities* (the "Framework Convention")[45], to which I shall re-

[42] Paragraph 6.1.
[43] Paragraph 6.2.
[44] See http://www.osce.org/documents/odihr/1990/06/13992_en.pdf.
[45] Council of Europ (2005), *Framework Convention for the Protection of National Minorities: Collected Texts*, Council of Europe Publishing, Strasbourg, CETS No. 157. The Framework Conven-

turn in a moment. The OSCE has continued to play a role in standard-setting, most notably through the Office of the OSCE High Commissioner on National Minorities, established in 1993. The High Commissioner's office has, for example, developed a range of guidelines which have been used to inform the High Commissioner's work as an instrument of conflict prevention, all of which focused to a significant degree on language. These include *The Hague Recommendations Regarding the Education Rights of National Minorities* of 1996, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities* of 1998, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life* of 1999, and *The Guidelines on the use of Minority Languages in the Broadcast Media* of 2003[46]. While the Copenhagen Document and the principles articulated by the Office of the High Commissioner have been significant, they do not create binding international legal obligations.

The United Nations continues to be active in respect of minorities issues, and some of this activity has resulted in standard setting of relevance to the management of linguistic diversity. The most notable development is the 1992 UN General Assembly Declaration on the *Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (the "UNGA Minorities Declaration")[47], which contains a number of useful principles, some of which will be considered below[48]. The UN Working Group on Minorities, created in 1995 under the auspices of the Sub-commission on the Protection and Promotion of Human Rights, has contributed to the dialogue on the management of linguistic diversity at the UN level through, for example, the production in 2005 of a Commentary on the 1992 UNGA Declaration, which further elucidates and develops its principles[49]. Like the standard-setting of the OSCE, both the UNGA Declaration and the output of the Working Group on Minorities do not create any binding international legal obligations. The 1989 United Nations *Convention on the Rights of the Child*, which does create binding international legal obligations, is also relevant. Article 30 of this treaty effectively restates Article 27 of the ICCPR[50]. Article 29 provides that the

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tion was opened for signature on 1 February, 1995, entered into force on 1 February, 1998, and has been ratified by 39 member States of the COE, (of the COE member States, only Andorra, Belgium, France, Greece, Iceland, Luxembourg, Monaco and Turkey have not ratified it). See, also, http://www.coe.int/T/e/human_rights/Minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/1._Texts/index.asp#TopOfPage.

[46] These are available at: http://www.osce.org/hcnm/documents.html?lsi=true&limit=10&grp=45.

[47] See http://www.ohchr.org/english/law/minorities.htm.

[48] See, also, Article 2, paragraph 1, which provides that persons belonging to minorities, including linguistic minorities, have the right, *inter alia*, to use their own language, in private and in public, freely and without interference or any form of discrimination.

[49] See http://www.unhchr.ch/html/menu6/2/minorities/part1-2.doc. It should be noted that at the fifth session of the new United Nations' Human Rights Council, the Council decided to replace the Sub-commission on the Promotion and Protection of Human Rights with a new Human Rights Council Advisory Committee, having a reduced mandate. The Council decided at its sixth session (10 to 28 September, 2007) to wind up the Working Group on Minorites, and it is not yet clear how or whether it will be replaced.

[50] It provides that, in those States in which ethnic, religious or linguistic minorities exist, a child belonging to such a minority shall not be denied the right, in community with other members of his

education of the child must be directed to certain ends, including the development of respect for the child's own cultural identity, *language and values*[51]. Finally, Article 17 makes reference to the recognition by States parties of the important function performed by the mass media, and requires states to encourage mass media to have particular regard to the *linguistic* needs of the child who belongs to a minority group[52]. Although no explicit "language rights" are created here, these provisions are clearly supportive of an educational and media policy that is sensitive to the linguistic identity of minority children.

As important as all of these developments have been, the Council of Europe has made the most significant contribution to the development of contemporary binding international legal standards of relevance to the management of linguistic diversity. More recent Council of Europe instruments create a more extensive basis for a "language rights" regime than the ECHR, although these instruments are not free from ambiguities and limitations. Of particular importance are the Framework Convention, which entered into force in 1998, and the *European Charter for Regional or Minority Languages* (the "Languages Charter")[53], which also entered into force in that year. The Languages Charter is a rather distinctive instrument, and it shall be treated separately, below.

Taken together, instruments such as the Copenhagen Document, the UNGA Minorities Declaration, and the Framework Convention provide a relatively clear outline of the general contours of a regime for the management of linguistic diversity. Whether this regime is appropriate to the needs of the various linguistic groups described at the outset will be considered at the end of this paper.

The Framework Convention (and the Copenhagen Document and UNGA Minorities Declaration) echo a number of provisions in the ECHR and the ICCPR, including the requirements with respect to the provision of translation services to those in detention or before the criminal courts who do not speak the national language, and the right to freedom of expression. In some respects, however, they go beyond analogous provisions in the ECHR. Take, for example, the non-discrimination provision of the Framework Convention, set out in Article 4, paragraph 1. In addition to prohibiting any discrimination based on belonging to a national minority, it also guarantees the right of equality before the law and of equal protection of the law to persons belonging to national minorities. Furthermore, paragraph 2 of Article 4 recognises that States may need to take additional measures in favour of certain minorities to promote full and effective equality in all areas of economic, so-

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or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

[51] Article 29, paragraph 1 (c).

[52] Article 17, paragraph (d).

[53] Council of Europe (2000), *European Charter for Regional or Minority Languages and explanatory report*, Council of Europe Publishing, Strasbourg, CETS No. 148. The Languages Charter was opened for signature on 5 November, 1992, entered into force on 1 March, 1998, and has been ratified by twenty-two member States of the COE (seven of the eight COE member States that have not ratified the Framework Convention have also not ratified the Languages Charter—Luxembourg being the exception). See, also: http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/1_The_Charter/List_Charter_versions.asp#TopOfPage.

cial, political and cultural life, and not only requires States to adopt such measures, but, in paragraph 3 of Article 4, provides that such measures of "positive discrimination" do not themselves constitute acts of discrimination.

What of more specific provisions on the management of linguistic diversity? The recent minorities instruments have recognised the importance of States taking active and positive measures to support linguistic minorities. For example, Article 1 of the UNGA Minorities Declaration provides that "states shall protect the existence and the national or ethnic, cultural, religious and *linguistic* identity of minorities within their respective territories and shall *encourage conditions for the promotion of that identity*"[54], and that they must adopt appropriate legislative and other measures to achieve those ends[55]. With regard to the general policy which States should take, Article 5, paragraph 2 of the Framework Convention recognises that States may take measures to integrate minorities, but requires them to refrain from policies or practices aimed at the assimilation of persons belonging to national minorities against their will. Furthermore, Article 5, paragraph 1 requires States to undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, including their religion, *language*, traditions and cultural heritage.

With regard to minority language education, while the recent minority instruments contain certain identifiable linguistic rights in this area, and therefore go well beyond the ECHR, they are also subject to a range of qualifications. For example, they often impose a general obligation on States to ensure that, "wherever possible", linguistic minorities may have "adequate opportunities" to learn or have instruction in their mother tongue[56]. The provisions are not specific, however, on how this is to be delivered and what is the real extent of State obligation. In addition to guaranteeing the right of persons belonging to national minorities to set up and manage their own educational establishments (albeit with no right to financial support for such establishments by the State)[57] States are required to recognise that every person belonging to a national minority has the right to learn his or her minority language[58]. Of particular importance is Article 14 of the Framework Con-

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[54] Paragraph 1. This is reiterated in Article 4, paragraph 2. See, also, Article 33 of the Copenhagen Document, and Article 5, paragraph 1 of the Framework Convention.

[55] Paragraph 2.

[56] See, for example, Article 4(3) of the UNGA Minorities Declaration, and Article 34 of the Copenhagen Document. The parallel provision in the Framework Convention is less conditional and ambiguous.

[57] Framework Convention, Article 13, paragraphs 1 and 2.

[58] Framework Convention, Article 14, paragraph 1. The precise implications of this are not clear, and are made even more opaque by the Explanatory Report which accompanies the Framework Convention, paragraph 74 of which asserts, on the one hand, that the right to learn one's minority language "concerns one of the principal means by which [members of national minorities] can assert and preserve their identity", and that there can therefore "be no exceptions to this", but on the other hand, makes clear that Article 14, paragraph 1 "does not imply positive action, notably of a financial nature, on the part of the State." This, it would appear that Article 14, paragraph 1 is meant to restrict the ability of the State to interfere with attempts by members of minorities to learn their language, but does not require the State to actually assist them in doing so.

vention. At paragraph 2, it contains a right to State-supported minority language education. Once again, though, the content of the right is far from precise, and it is hedged with a number of conditions.

The basic right is that of persons belonging to national minorities to have "adequate opportunities" for either "being taught the minority language" or "receiving instruction in this language". What constitutes "adequate opportunities" is undefined, although the Explanatory Report which accompanies the Framework Convention seems to anticipate that "instruction in" the minority language refers to the use of the language as the medium of instruction, and notes that "bilingual education" may be one means of achieving the objective of this provision. It also notes that the two options ("being taught" and "receiving instruction in" the minority language) are not necessarily mutually exclusive[59]. Also, it is not clear to which stages in the education system this provision applies (whether, for example, it is limited to primary education, or extends to secondary or even tertiary level education) although the Explanatory Report does note that it may extend to pre-school education[60]. However, the right is subject to a number of conditions. First, it applies only in areas of the State "inhabited by persons belonging to national minorities *traditionally* or *in substantial numbers*"[61], and the Framework Convention gives no guidance as to what "traditional inhabitation" implies or what would constitute numerical sufficiency. Second, even in such areas, the right applies only where there is "sufficient demand", and once again, this crucial term is not defined. However, paragraph 75 of the Explanatory Report makes the point that the Article was drafted to give states "a wide measure of discretion". Finally, even should such demand exist, Article 14, paragraph 2 only requires States to "endeavour", "as far as possible", to satisfy the right. Again, paragraph 75 in the explanatory report expresses sympathy with states for the "possible financial, administrative and technical difficulties associated with instruction of or in minority languages", and that such provision can only be "dependent on the available resources" of the state concerned. Some of these ambiguities (and similar ambiguities in other provisions of the treaty, discussed below) are being addressed in the ongoing treaty monitoring work of the body created under the Framework Convention to oversee its implementation, the Advisory Committee[62].

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[59] Explanatory Report, paragraph 77.

[60] *Ibid*.

[61] Significantly, though, both the Article 16 of the Framework Convention and Article 5 of the Proposed Minorities Protocol attempt to prevent states from avoiding their obligations under this and other similar provisions by providing that states are prohibited from making deliberate changes to the demographic composition of a region in which a minority is settled (by gerrymandering or otherwise) which is to the detriment of the minority or its rights.

[62] Space does not permit an analysis of this work; for a comprehensive evaluation, however, see M. Weller (ed.)(2005), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford University Press, Oxford, in which the treaty provisions and output of the Advisory Committee in respect of each article of the treaty is explored. It should also be noted that the Advisory Committee has itself sought to give guidance on issues relating to education, including issues under Articles 12, 13 and 14, in its "Commentary on Education under the Framework Convention for the Protection of National Minorities", 2 March, 2006, ACFC/25DOC(2006)02, the first such document it has issued.

As noted earlier, the human rights canon provides no guarantee as to the right to use one's language in dealing with public institutions. Recent minorities instruments do address this issue. Take, for example, Article 10.2 of the Framework Convention[63], which provides for the use by persons belonging to national minorities of their minority language in dealing with the "administrative authorities". However, Article 10.2 does not create any clear "right" to such services, only an obligation of sorts for States, and one that is subject to the same sorts of conditions that apply to the right to minority language education. First, it is territorially restricted: the State is only under an obligation "in areas inhabited traditionally or in substantial numbers" by persons belonging to national minorities[64]. Second, persons wishing such services must request them. Third, there must also be a "real need" for such minority language services. This is somewhat different from the test of demand sufficiency that applies in respect of minority language education, and its meaning is not altogether clear. Paragraph 65 of the Explanatory Report makes clear that the State alone will assess this need, but that it is to apply unspecified "objective criteria". This condition is potentially more limiting than demand contingency, and while the Advisory Committee has clarified that "real need" is not, in fact, dependent upon the lack of proficiency in the national languages[65] (members of a minority should, under this provision, be entitled to use their minority language even if they spoke the national language) it is still not clear what constitutes "real need" or how speakers of the minority language must demonstrate it. Finally, even where all these conditions are met, the obligation on the State is not to provide minority language administrative services, but to "endeavour" to do so "as far as possible".

Paragraph 64 of the Explanatory Report to the Framework Convention justifies this "wide measure of discretion" given to states "in recognition of possible financial, administrative, in particular in the military field, and technical difficulties" associated with minority language use in official contexts such as these. The report specifically provides that the financial resources of the State may be taken into consideration here. States are apparently concerned that it may be difficult to recruit civil servants who speak the minority language, and that the cost of providing such services may be high. Yet, the discretion given to the State on these grounds po-

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[63] Article 10, paragraph 2 echoes and to some extent expands upon the principle set out in Article 34 of the Copenhagen Document.

[64] States sometimes establish numerical thresholds which trigger a right to request and a duty to provide public services through the medium of a minority language. While the Advisory Committee has not been prescriptive here—it has not, for example, suggested any specific minimum threshold—it has made clear that certain minimum thresholds are too high, and are therefore unacceptable. See, for example, its opinions on Estonia, Moldova and Ukraine, in which it made clear that a requirement that the linguistic minority constitute a majority of the inhabitants of a municipality in order to be entitled to use their language in dealings with administrative authorities was too high: Advisory Committee, Opinion on Estonia, ACFC/INF/OP/I(2002)005, para. 40; Advisory Committee, Opinion on Moldova, ACFC/INF/OP/I(2003)02, para. 62; Advisory Committee, Opinion on Ukraine, ACFC/INF/OP/I(2002)010, para. 51.

[65] Advisory Committee, Opinion on Germany, ACFC/ING/OP/I(2002)009, 2002, para. 49: "the fact that persons belonging to national minorities also have a command of the German language is not decisive as the effective use of minority languages remains essential to consolidate the presence of those languages in the public sphere."

tentially allows States to avoid taking the very measures necessary to redress such shortages. Once again, the Advisory Committee has played, and will continue to play an important role in mediating the tension between the administrative convenience of the State and the needs of the minority.

Article 11.3 of the Framework Convention requires states to display traditional local names, street names and topographical indications intended for the public in both the minority language and the majority or official language. However, this obligation is limited geographically to those areas "traditionally inhabited by substantial numbers" of minority language speakers, is conditional on there being "sufficient demand". Again, where these conditions are met, the State is still required only to "endeavour" to meet the obligation[66]. Other obligations in this area include the right of persons belonging to national minorities to use their surnames and first names in their minority language, and to official recognition of these forms of their names[67].

The pervasive presence of modern communications media and their profound impact on autochthonous minority languages, and on the ability to maintain those languages, cannot be overstated. Yet the provisions in most of the recent minorities standards are of a fairly limited nature. Article 9.3 of the Framework Convention, for example, requires states to ensure, as far as possible, that members of national minorities have the possibility of creating and using their own radio and television broadcasting media, although no obligation is imposed on states to actually fund or otherwise assist such efforts. Article 9.4 does provide that states "shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities", and it should be noted that, thankfully, the treaty body responsible for overseeing the implementation of the Framework Convention, the Advisory Committee, has interpreted this provision in a very positive way in order to address the question of minority language television and radio broadcasting[68].

As the only international instrument which relates exclusively to language, the Languages Charter merits special mention. As the Explanatory Report to the Languages Charter makes clear, its overriding purpose is to preserve and promote autochthonous languages of Europe, all of which are characterised by "a greater or lesser degree of precariousness"[69]. It recognises that the threat posed to such languages is due "at least as much to the inevitably standardising influence of modern civilisation and especially of the mass media as to an unfriendly environment or a government policy of assimilation"[70]. Thus, in Article 7.1, States are required to base their "policies, legislation and practice" on a number of principles, including the need for resolute action to promote regional or minority languages in order to safeguard them.

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[66] Again, the Advisory Committee has clarified this provision to some extent. For a useful discussion, again see the relevant chapter in M. Weller, *cit.*

[67] Article 11(1) of the Framework Convention.

[68] Again, see the relevant chapter in M. Weller, *cit.*

[69] Paragraphs 2 and 11.

[70] Paragraph 2.

The substantive provisions of the Languages Charter are set out in two parts[71]: Part II, which contains a number of general principles which should guide State policy in respect of regional or minority languages, and Part III, which, in seven articles, sets out much more detailed provisions with respect to the use of regional or minority languages in education, the legal system, public administration and public services, the media, cultural activities and facilities, economic and social life, and in transfrontier exchanges. The provisions of Part III of the Languages Charter are far more detailed than in any other instrument relevant to the management of linguistic diversity[72]. However, from the point of view of creating a "language rights" regime, the Languages Charter also suffers from certain limitations.

First, it makes clear that it does not create any legally enforceable rights for minority language communities or for individual speakers of the protected languages[73]. Part III does, however, impose obligations on States, and the treaty body charged with the responsibility of overseeing the implementation of the treaty, the Committee of Experts, has indicated that in certain circumstances, the creation of a right is the appropriate way to implement the treaty.

A second limitation is that not all speakers of regional or minority languages benefit from the protection of Part III. The Languages Charter provides that only those regional or minority languages chosen by the State itself will benefit from Part III. And, with respect to languages which *are* designated for the purposes of Part III, the State still has a considerable range of choices in determining which obligations will be applied. The Part III obligations are set out in 65 paragraphs or subparagraphs in seven articles, and a State which designates a language for the protection of Part III is only required to select 35 of these in respect of any particular language chosen. Thus, while the Languages Charter has enriched considerably our appreciation of the range of measures available for the appropriate management of linguistic diversity, because so many crucial decisions rest with the State, it is difficult to argue that the Charter creates a "language rights" regime.

4. **Language Rights for New and Autochthonous Minorities**

Having briefly outlined a range of international legal principles relevant to the question of "language rights" and the management of linguistic diversity, this paper shall conclude with a consideration of certain issues of crucial importance to linguistic minorities which have not yet been adequately resolved.

The first is the question of the beneficiaries of international protection. We have seen at the outset that there are a large variety of languages spoken in Europe, and the sociolinguistic position of such languages, and, crucially, the needs

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[71] For a good introduction to the Languages Charter, see P. THONBERRY and M.A. MARTIN ESTEBANEZ (2004), *Minority Rights in Europe*, Council of Europe, Strasbourg, pp. 137-168.

[72] Once again, space does not permit a detailed discussion of the provisions of Part III, or of the treaty body created under the Languages Charter to monitor its implementation, the Committee of Experts. For an excellent description of both, see J.-M. WOEHRLING (2005), *The European Charter for Regional or Minority Languages: A Critical Commentary*, Council of Europe, Strasbourg.

[73] See, for example, paragraph 11 of the Explanatory Report.

of their speakers can differ considerably. One major issue is the extent to which the existing regimes apply to speakers of different types of languages. The fundamental issue here is the extent to which the rights of speakers of autochthonous minority languages differ from those of speakers of languages of so-called "new minorities". The human rights canon generally does not make distinctions between different categories of speakers, although, as we have seen, it creates a rather limited regime. However, the practical consequences of this regime might turn out to be more favourable for members of new linguistic minorities than members of autochthonous ones. This is because speakers of autochthonous languages, thanks to monolingual and assimilative State language policies that have too often been the norm in Europe, tend to be bilingual (indeed, many are more proficient in important linguistic domains in the national language than in the mother tongue) whereas many immigrants have only a limited grasp of the national language. Thus, the guarantees relating to the provision of interpretation in the criminal justice system may, practically speaking, be of more use to members of new minorities. If the principle in *Cyprus v. Turkey* can be extended to require at least some initial mother tongue instruction for children who have no grasp of the language of the school, this may once again be of greater practical value to members of new minorities, for the reasons alluded to in the discussion of this case, above. Similarly, if *Diergaardt* can be extended to require provision of public services to persons who are unable to speak language the language through which public services are delivered (typically, the national language) this may once again be of greater practical value to members of new minorities. Finally, as we saw in *Waldman*, it may be possible, where the State does offer services to an autochthonous minority (including mother tongue education) for members of a new minority to obtain similar services based on the principle of non-discrimination.

With respect to the contemporary minorities instruments and, crucially, the Languages Charter, a different picture emerges. Generally, the beneficiaries of any rights created under these instruments are members of "national minorities"; this, for example, is the approach taken in the Framework Convention. Famously, however, the concept of what constitutes a minority in international law has never been defined, and instruments such as the Framework Convention have no explicit definition. The question of whether so-called new minorities can and should benefit from the protection of these instruments is now a topic of considerable scholarly debate. Under the Framework Convention, although the Advisory Committee exercises some oversight with respect to how the concept is applied, it is generally up to States themselves to determine the scope of the concept "national minority". And generally, States have tended to take a rather restrictive view, limiting the application of the treaty to autochthonous minorities. A few States, notably the UK have taken a wider approach. The UK has noted that the concept "national minority" does not exist in British law, and therefore applies the treaty based on the definition of those groups protected under domestic anti-discrimination law, the *Race Relations Act 1976*. Most new minorities are certainly covered by this legislation, and therefore benefit from the protection of the Framework Convention. Perhaps signalling its own inclinations towards a wider, more all-inclusive application, the Advisory Committee has warmly welcomed the UK's approach. However, when it

came to those provision such as Article 10.2 and Article 14, which provide for public services and education through a minority language, the UK has made reference only to the measures it takes in respect of certain autochthonous minorities, implying by this approach a differential treatment between autochthonous and new minorities when it comes to such minority linguistic services.

Under the Languages Charter, the "regional or minority languages" that benefit from the significant protective measures of the treaty are defined in such a way that effectively only autochthonous languages, and not the languages of new minorities, will benefit. Thus, when it comes to the role of the State in actually taking measures that would tend to maintain or even promote linguistic diversity, the law seems to distinguish, or at least accept the distinction, between different types of linguistic minorities. This seems to mirror State practice: as Kymlicka and Patten have pointed out, States that are disposed to permitting linguistic diversity seem to draw the line at languages spoken by new minorities[74]. From the perspective of the ideology of the nation-state, this is in at least in one sense strange: while geographically-concentrated autochthonous linguistic minorities, particularly those with a kin-state in the neighbourhood, could threaten the physical integrity of the State, new linguistic minorities seldom do. It is likely, however, that the distinction between "new" minorities and autochthonous ones is explained by two other preoccupations, both of which may also be attributed to the idea of the nation-state. The first is the fear that, if the languages of new minorities receive some significant state support, such minorities will not integrate. The second is probably practical: in increasingly linguistically diverse States, how does the State go about offering a range of services through a potentially large number of languages? It is also possible that different types of linguistic minorities may have different aspirations. Amongst immigrants, language arguably presents greater practical than ideological problems. They tend to be highly motivated to learn the State language in order to integrate more fully and derive the full benefits for themselves and their families for which they came. The normal pattern in the life-cycle of the languages of immigrants is that the grandchildren of the immigrants have become fully linguistically assimilated. There is therefore generally few of the historical tensions that often mark the relationship between the State and its autochthonous minorities; rather, tensions tend to centre on discrimination based on colour and religion, and non-language-based aspects of ethnic difference.

The final set of issues to be addressed here is whether the international legal regimes for the management of diversity are "fit for purpose" from the perspective of the speakers of minority languages themselves. For both "new" minorities and for autochthonous linguistic minorities, there appear to be a number of important gaps[75]. For many members of "new" minorities, the immediate concern is

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[74] W. Kymlicka and A. Patten (2003), "Introduction: Language Rights and Political Theory: Context, Issues, and Approaches", in W. Kymlicka and A. Patten (eds.), *Language Rights and Political Theory*, Oxford University Press, Oxford, pp. 7-9.

[75] The distinction here between "new" and autochthonous minorities is not meant to imply any acceptance of such a division of linguistic minorities; such a simply bifurcation does not adequately recognise the diversity of needs and aspirations within both groups, or the extent to which those needs and aspirations might overlap. There are, however, often differences between the needs and

often, as just noted, successful integration, and for them, a limited or non-existent command of the national language of the new State is a significant barrier. Some members of such groups, especially pre-school aged children, old people, and, sometimes, wives of the migrant, are simply in a weaker position to acquire the national language. This creates immense practical barriers in gaining access to public services. For children going to school for the first time, a poor or non-existent command of the language of the school is a significant disadvantage, and often one which leads to longer term difficulties, including poorer educational performance, and all that leads on from this. As we have seen, there is little in the current international legal regime for the management of linguistic diversity, either in the human rights canon or in the more recent minority instruments, which explicitly addresses these problems. As already noted, cases like *Diergaardt* may open the door to the provision of key public services in the languages of new minorities, but the ultimate implications of this and other case law is, as noted, still far from clear, particularly given the rather weak reasoning in the decision and the rather specific and unusual factual situation, which involved a State that was actually in a position to offer minority language services, which is hardly the usual situation. Similarly, *Cyprus v. Turkey* may open the door to provision of early mother tongue education, at least as a transition to dominant language education for children who do not speak the language of the school, but we cannot be assured that this will be the case, given the ambiguities in this case, discussed earlier.

What of autochthonous minorities? In some cases, members of such minorities have a limited or non-existent command of the national language of the State, and for those people, the same considerations as were just discussed in respect of "new" minorities would apply; as we have seen, however, the regime generally creates relatively little for people in these circumstances. Generally, though, members of autochthonous language communities (at least, those in western Europe) tend to be bilingual, and their concerns will be more sharply focused on ensuring the survival of their language and of those communities in which it is spoken. For them, the existing international regimes are also disappointing. Part of the reason for this disappointment is the rather weak and conditional way in which certain rights are tend to be expressed, such as the right to minority language education or minority language services[76]. Also relevant, though, is the limitations of the scope of existing international regimes, when set against what may actually be needed, from a sociolinguistic perspective, in order for these languages to be maintained.

It is often said that one of the mistakes military planners make is to prepare to fight the last war, rather than the next one. This could also be said of our regimes for the management of linguistic diversity. It is certainly the case that part of the reason for the decline of many autochthonous minority languages was their

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aspirations of members of at least some "new" minorities and of some autochthonous minorities, and this bifurcation is therefore retained here in order to highlight some of the gaps in the present arrangements.

[76] Again, the relevant treaty bodies are addressing many of these concerns, and as they continue to oversee treaties such as the Framework Convention and the Languages Charter, some of these disappointments may come to be addressed.

exclusion from the education system, from the public sector and from the media, particularly powerful State-supported broadcast media. Thus, when it comes to addressing the precarious state of these languages, these same domains are the ones to which attention has been paid. It would be inappropriate to suggest that minority language education, minority language public services and minority language media are not important to any strategy aimed at the maintenance of a minority language. It may, however, be the case that action in these domains alone is not sufficient to ensure the maintenance of a minority language, particularly in the age of globalisation.

First, although the public institutions to which obligations apply under the various regimes described in this paper do play an important role in the daily lives of speakers of minority languages, they are not necessarily the most important institutions, or the most influential ones, from a sociolinguistic perspective. Meirion Prys Jones, the Chair of the Welsh Language Board, has made the point that perhaps only about ten percent of our daily linguistic contacts are with the sorts of institutions to which obligations apply under the current international regimes for the management of linguistic diversity[77]. A majority of our linguistic contacts are with institutions in the private and voluntary sectors. Though it is possible to regulate language use in these sectors (take, for example, the language legislation of the Province of Quebec, the Autonomous Community of Catalonia, or of post-Soviet States such as Latvia and Estonia as examples) none of the relevant international instruments considered here seeks to do so. The result is that the international regimes for the management of linguistic diversity have only a limited impact on the overall linguistic environment; practically-speaking, even with the protection that these international instruments provide, most speakers of autochthonous minority languages will continue to live in linguistic environments in which the national language of the State, together with powerful international languages of wider communication, especially English, retain their dominance.

Second, even in those areas in which international instruments do seek to regulate linguistic practices in order to ensure the delivery of minority language services, the emphasis is placed simply on the delivery of services. The instruments generally say less about the crucial question of institutional control. Article 15 of the Framework Convention does provide that States must create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them. However, "effective participation" in decisions is not the same as effective control over such decisions. It is not clear that such a provision changes the fundamental power relationships in important social institutions impinging on the daily life (and on the linguistic practices) of the minority. Similarly, Article 7, paragraph 4 of the Languages Charter, a provision which is in Part II and which therefore applies to all of a State's regional or minority languages, provides that in determining their policies with regard to regional or minority lan-

[77] Opening address, "The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities" conference, The School of Law, The University of Wales at Swansea, 20 November, 2006.

guages, requires that States must take into consideration the needs and wishes expressed by the groups which use such languages, and encourages them to establish bodies for the purpose of advising authorities on all matters pertaining to such languages. Again, it is doubtful that these obligations result in any fundamental changes in power relationships. The result is that the public institutions which are expected to deliver minority language services tend to remain institutions in which the national language is dominant. Thus, the providers of minority language services are constantly negotiating and renegotiating the basis of their work within institutions in which the national language continues to exert dominance. For the leading expert on maintenance and promotion of minority languages, the American sociolinguist Joshua Fishman, such questions of institutional control and community autonomy are crucial, and without the power to address fundamental power inequalities between the linguistic majority and the minority, efforts to address the decline of minority languages are hamstrung[78]. The relative silence of the main international instruments on such issues is perhaps their single greatest limitation.

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[78] See J. FISHMAN (1991), *Reversing Language Shift*, Multilingual Matters, Clevedon.

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Bringing Anxieties Together: The Impact of the New Linguistic Diversity on the Process of Normalization of Minority Languages

Xabier Aierdi Urraza

1. **Introduction**

The arrival of new flows of immigration to Euskadi, in this case foreigners, has once more sounded alarm bells in sectors that are concerned about the social recovery of the Basque language, Euskara. On the other hand, these sectors are ideologically the most open to the settlement and rights of immigrants[1]. This position does not alter their linguistic preoccupation. New immigration reduces the percentage of speakers of a language that was already experiencing a slower recovery than anticipated and in which acquisition of a knowledge of the language does not guarantee a transition to its daily use. Evidently, immigration is not solely responsible for this situation; it simply intensifies the symptoms and raises new challenges. In this context, what are the linguistic concerns of the foreign population? There may not be any: it may be the case that for reasons of economy of effort, they only study the state language, and many immigrants will be surprised to find themselves in a territory about which they know almost nothing, with a native language and a native minority that they did not expect to find. What may happen in the near future with Euskara, what different relations will be established between immigrants and Euskara, its possible repoliticization, and so forth, are dimensions that will be dealt with in this article, although not in an exhaustive way.

This type of situation, in which a native minority confronts an immigrant population in a territory considered as homogenous as regards its cultural identity, is very stimulating theoretically and, especially, practically. These casuistries are characterized by mutual imputations of ethno-centrism and xenophobia, by transference of responsibilities and faults, and by mutual accusations of the instrumentalization of languages and cultures. With the establishment of the immigrant population, top-

[1] X. Aierdi (2007), "La traductora de Gerd Bauman. Notas sobre etnicidad y actitudes ante la inmigración en el País Vasco", in J.J. Igartua and C. Muñiz (eds.), *Medios de comunicación, inmigración y sociedad*, Ediciones Universidad de Salamanca, Salamanca, pp. 281-309.

ics will be reframed which had been considered closed or which are poorly healed, and unresolved problems will be intensified in some respects, linguistic ones among them. In other words, concerns, and even anxieties, will proliferate. To bring these together so they can get to know and recognize each other seems to us a sufficient task. To articulate mechanisms and adopt necessary measures for this to take place, making rather more than less compatible the cultural rights of minorities and the socio-political rights of the immigrants, is a fundamental task, and one that will depend on many historical vicissitudes. To elucidate what rights concurs, their hierarchy if any, and to make specific how they may be made compatible, are tasks to which we invite, successively, those concerned about the cultural questions of the national minority, foreigners established in Basque society, and both Basque and Spanish society in general.

2. **To Begin**

Before starting to analyze these subjects, in the first place I wish to say that I am not a specialist in linguistic questions. I do not know if over the years the advance of Euskara could have been greater, to what extent the measures adopted have been correct or fruitful, to what extent more effective routes have been consciously ignored, but in spite of all this, I believe that Euskara has experienced a really significant advance. I do not know to what extent my ideological and political positions influence this evaluation, because my political support for the present Basque institutional regime since its beginnings may be playing tricks on me and deceiving me about the real effectiveness of the lingustic policies that have been adopted by the Basque Government.

Therefore, I will not speak from a socio-linguistic, but from sociological perspectivel not from a mere sociological point of view, but from that intersection between sociology and political philosophy in practical aspects of management of plurality, whether cultural, social, political or linguistic. All of this is framed in this country of ours, in which, as I will later maintain, the alliance of neurotics of which Charles Taylor speaks is very present. Consequently, I will focus more from my knowledge of the context than from sociolinguistics. Bourdieu[2] says that he refused to make an analysis of Japanese social reality in Tokyo. He preferred to speak of the reality that he knew better, the French, treating it as a "figurative case in a finite universe of possible configurations", convinced that if what he said served to explain the French case, it would then serve also as a model to understand other social realities and other similar situations.

The reality that I know best is the Basque reality, and based on that knowledge I will speak about Euskara. In general, I am a person who is concerned about Basque society, obsessively concerned. I think I know about the anxieties of "us". I hear echoes of the anxieties of "the others", and in this brief discourse, at least, I would like to try to understand and attend to these crossed anxieties, because as

[2] P. Bourdieu (1997), *Razones prácticas. Sobre la teoría de la acción*, Anagrama, Barcelona, pp. 11-16.

Clifford Geertz says[3], to destroy fear must be the greatest aspiration of the social scientist.

A couple of years ago I wrote that I had been born twice[4]. First, I had been born as a nationalist. Second, I had been born as a nationalist, but in another way. I do not know if I will be born a third time. I wish to present these biographical data because they are the basis on which to understand everything that comes next, because when faced with the dominant sociological entomology, I prefer to dedicate myself to the analysis of those realities that in some sense cause pain: Euskara, for example, among my family and friends[5]. Normally, many pains are collective, but it is possible to interpret them from a personal perspective. For that reason I move away from the habitual manner of interpreting the development of Euskara among my circles. In sociology it is not appropriate to be very much on the side of your own people.

I do not know if the following story that Eduardo Galeano tells is true, but it sounds true and, in addition, it agrees with a whole contemporary sociological vision. He states that on a wall in Lima, he saw the following painted: "Just when we had all the answers, they've changed the questions on us". This imbalance between the known and the required is similar to the sensation that one usually encounters when one is a member of an "abnormal" people or society, and when one has been socialized in a minority and socially discredited language. No part of normal knowledge is valid. In cases like this, perspicacity must face up to abnormality. More so today, when many certainties have disappeared thanks to the impact of zombie realities, institutions that have lost their solidity or which have joined the "living dead"[6].

To be member of a people that has arrived late at all the crossroads[7], and in the present conditions of fluidity, has the advantage of being more open to anxieties. Not to have one's own State or not to be able to feel the reality—the pride or arrogance on many other occasions—of being a citizen of one's nation of birth, can lead to a personal minoritization. There has been personal and collective minoritization of Basque-speakers and Euskara, but despite this, the generations that have been able to retain and transmit Euskara in absolutely unfavorable political conditions, can feel proud of having maintained a language, insignificant in market terms, between French, a language of culture and civilization during a long period

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[3] C. Geertz (1996), *Los usos de la diversidad*, Paidós, Barcelona.

[4] X. Aierdi (2004), "¿Por qué soy nacionalista", in J.I. Ruiz Olabuenaga and J.L. Orella, *¿Nacionalista? ¿Cómo? ¿Por qué?*, Grupo Delta, San Sebastián, pp. 223-249.

[5] Marx said that his motto was that nothing human was foreign to him. Also he said that we the people make history, but added, not in conditions chosen by us. Both the motto and the sentences are basic for good sociology.

[6] See the whole sociological trends that speak from many fronts of the process of deinstitutioinalisation of liquid modernity, that unite different currents and schools in an analytical consensus, and among the most outstanding authors we recommend reading Zygmunt Bauman, Ulrick Beck or Anthony Giddens.

[7] A. Calsamiglia (2005), *Cuestiones de lealtad. Límites del liberalismo: corrupción, nacionalismo y multiculturalismo*, Paidós, Barcelona. This author affirms that "belonging to nations, which is the result of the lottery of the life, is one of the sources of social inequality and crucially affects autonomy and the possible life plans of the individual", p. 91.

of time, and Spanish, a world language. This all prevents me from agreeing with the famous poem of Jon Juaristi which gives the following question and response: "you ask, traveller, why died young, and why we have killed so stupidly? Our parents lied: that is all"[8]. Mine specifically did not lie to me; they passed on to me an affection towards and a pride in their small country and its almost unique language. They had few tools with which to rationalize their pride, and they did not fall into mere market calculations with Euskara. They made me better.

In another context, Charles Taylor spoke about a mechanism that is very present in Québec, the alliance of neurotics, which in summarized form means "your dreams are my nightmares and vice versa". According to Charles Taylor, in this mechanism each side "has a tendency to act unconsciously on the fears of the other". This lethal mechanism, sometiems conscious, many other times unconscious, but always operating, cannot but lead to the maintenance of fears and a problematic intercommunitarian relationship. I have here, in the words of Charles Taylor, the mode of operation of this mechanism:

> "*For Anglo-Canadians, who are deeply conscious of the diversity of the country, of the weak and indefinable nature of the links that unite the inhabitants, the question of unity is of vital importance. That a part of the Canadian society demonstrates their private roots to the detriment of the whole, for them has a whiff of treason. The Anglo-Canadian believes that, if that feeling were to become general, it would lead to confrontation. Thus, all demonstrations that present the 'French Canadian' nation as receiving the fundamental loyalty of French Canadians makes him nervous. He appeals with all his strength to unity. On the other hand, the French Canadian has a long experience, has often been dragged into a war or something similar by a more powerful partner. So, when the Anglo-Canadian decides to get togehter and insist on unity, the French Canadians are worried. An English Canada that is overexcited and decides to make everybody march in step awakens terrible memories. Autonomist reflections are raised. Which provokes, as well, the rage of the Anglo-Canadians. We then return to the point of departure*"[9].

This game of dreams and nightmares is well evident in the competitive relationship established by the two nationalisms operating in Basque society, and extends to any object of dispute: identity, language, territorialidad or symbols. This alliance demands the exaggeration or oversizing of the adversary's accomplishments. Something of this was perceived by Merton when he noticed that the most complete catalogue of illustrious Jews had been drawn up by the Nazis[10]. This game is based on the mimesis of which Rene Girard[11] speaks, and in the situation of the matrioskha syndrome, in which each unit subsumes and presents in its interior the conflict that characterizes both the preceeding and the following unit.

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[8] J. Juaristi (1987), *Suma de varia intención*, Pamiela, Pamplona, p. 28.

[9] C. Taylor (1999), *Acercar las soledades. Federalismo y nacionalismo en Canadá*, Gakoa, San Sebastián, pp. 70-71.

[10] R.K. Merton (1964), *Teoría y Estructura sociales*, FCE, pp. 505 y ss.

[11] R. Girard (2006), *Los orígenes de la cultura. Conversaciones con Pierpaolo Antonello y Joao Cezar de Castro Rocha*, Trotta, Madrid.

Based on mimicry, each player knows perfectly the behavioral logic of the adversary, because it is the same which s/he would play in the same position. It is an authentic vicious circle, but comprehensible and, mainly, very predictable and manageable: although all are harmed, they know what they are playing. Something of this happens with Euskara. Any advance of Euskara is interpreted by non-Basque-speakers as an attempt at nationalistic homogenization. Every non-advance, any hint of an obstacle or of the backward motion of Euskara, is interpreted by Basque-speakers as an attempt at Spanish assimilation. In general, little tends to be spoken of the French part of our country. I include myself in this. However, French assimilationist republicanism is insatiable.

With its basis in the matrioskha syndrome, in the linguistic context, as in so many others, consensuses are not really easy. One was arrived at 25 years ago, and no one dares to revise it, as if we were starting from the hypothesis that the same opening of Pandora's box made it impossible to obtain a better or more ample consensus than the previous one. This fear indicates that we are not speaking of culture or language, but of politics, because the theoretical or practical hierarchial structuring of languages contains more of politics than of linguistics, and as serious political scientists say, in the absence of basic consensus, and considering the limitations of procedural consensus, any object in dispute, any policy to be developed, shakes up the whole system. Linz says:

> "*Any democratic political system that works is based on the assumption that the loyalty of citizens to the State, independent of the regime or government that is in power, must be greater than their loyalty to another State that is in existence or in the process of being created.*"
>
> "*What happens is that the scope in which democratic institutions are established is not decided democratically. This is a reality that is imposed by history, by circumstances.*"
>
> "*The legitimacy of the State within its territorial limits is a prior condition to the legitimacy of any regime and is especially important in the case of a democracy that has to guarantee civil liberties for all citizens... A stable political system assumes that citizens in all the parts of the country must feel obligated by the decisions of the authorities and not feel loyalty to another State.*"

As can be seen in the case of the Basque reality, the indisputability of the State is not fulfilled, nor is loyalty guaranteed, and the framework of democracy is a reality imposed by history. This is the playing field on which the complex processes of plurality must be managed.

3. **Of the Complexification of the Whole**

The metaphor most frequently related with Euskara is that of its precarious health, which requires both knowledge of the symptoms that it suffers from, and a search for the most effective remedies to cure them[12]. The causes of its present

[12] D. Anaut (2006), "Euskararen botikak", in D. Anaut, *Txokotik Zabalera*, Alberdania, Donostia.

situation are, among others, an abnormal and de-institutionalised historical development, a process of minoritization and its social assumption by speakers, the depreciation of the established powers in society, and the absence of a state political umbrella. In addition, at a time when its minoritization was being rebalanced, again it was faced with the arrival of a new immigrant population, although not in an intense way. This new migratory process can be a moment for the generation of new preoccupations, some of which we seek to analyze in this paper.

Normally, immigrants, whether foreigners or not, tend to be a big mirror in which the characteristics of the host society are reflected, which normally go unnoticed by the native population, who experience them as natural and without observing their potential internal incoherences. Thus, quite often the immigrant is required to fulfill certain cultural or social norms that are not required of natives. Independent of problems of nationality, which are what really divide the global population into the integrated and the discarded[13], other, assimilationist types of demands are also often made. In Germany recently, a test of knowledge of German reality has been established that very few Germans would pass. In other countries, knowledge of the language, the history of the country, and so forth, is demanded. In the Basque Country, Euskara is one of the recurrent topics of the Basque-speaking population, mainly native and nationalist. But Euskara has a series of problems that, although they may be intensified with the arrival of new immigrants, were not created recently and are especially maintained by Basque society itself, in which social normality does not occur through knowing Euskara.

Social integration is an ever-more-discussed zombie social object, whose content is ever less certain. Social reality looks ever more like a relatively manageable chaos and as rightly affirmed by Berger and Luckmann, the integration of societies is easier to find in processes of reflection on them than in their intrinsic, empirical processes. To demand the integration of immigrants may lead to the discovery of the disintegration of a great many natives, although these will always be able to confront their practical de-linking with their unquestionable political membership. But as Sami Naïr says, the compulsive desire to know about immigration expresses more the fears of the host society that the reality of the others[14].

Consequently, until recently, the integration scheme has been clear: to become one more member of the host society. This alongside the paradox indicated by Ridao that in

> *"times of a suffocating omnipresence of economic analysis, it remains a surprising paradox that the only scope in which it yields to a cultural analysis is where, indeed, economic decisions acquire the dimensions of a formidable human drama: immigration. As it is easy to discern after a little plot analysis of the majority of discourse on the movements of people through borders, it will be observed that the economic analysis of the causes is limited to describing*

[13] See Z. Bauman (2005), *Vidas desperdiciadas. La modernidad y sus parias*, Paidós, Barcelona. Some authors speak of global apartheid: R. Falk (2002), *La globalización depredadora*, Alianza, Madrid; E. Balibar (2002), *Nosotros. ¿Ciudadanos de Europa?,* Tecnos, Madrid; L. Ferrajoli (1999), *Derechos y Garantías. La ley del más débil*, Trotta, Madrid.

[14] S. Nair (2006), *Y vendrán... Las migraciones en tiempos hostiles*, Planeta, Barcelona.

> *imbalances in the countries of origin, as well as establishing that the disparity of income with the host countries gives immigration its reason for existence. Based on these two elementary ideas, it is the cultural analysis that usually takes the foreground, either to say that host identities will sooner or later be perceived as in danger and to then proclaim the need to adopt directed policies to defend national essence, or to say that the future will or will not be racially mixed, going on to praise the virtues of variety and difference"*[15].

This omnipresence of the cultural element, to the detriment of the social, makes it impossible to focus in depth on citizen integration[16], convinced as we are that a greater social integration would resolve most of the cultural demands[17]. It also allows us to reflect sensibly on cultural plurality, because as Eduardo Ruiz Vieytez rightly says, "the increasing identity and cultural plurality of present-day European societies, rather than the mere provisional phenomena of immigration or foreigner status, constitutes the object on which it is necessary to reflect and to propose alternative models"[18].

Nonetheless, cultural plurality has come to prominence at a period when the preponderant and implicit scheme for the analysis of modernity and social sciences, methodologic nationalism[19], has been shown to be useless. The criticism of this principle deconstructs, and destroys the assumption of uniformity formed by the triad of state, nation and culture[20]. Now nothing is as it was, and all that was solid vanishes into air. Where it was thought that each State subsumes a single nation and each nation a single culture and/or vice versa, we see that all must be rethought: the triad does not work, although the vertiginous forward flight of the state keeps the elements united by its own inertia. However, methodological nationalism has characterized both those who have had a single State and those who wish to constitute one. Professor Lucas Verdú has said: "every State wants to be a nation and every nation wants to be a State".

This reframing in the theoretical scope legitimizes what in societies such as the Basque society has been understood intuitively for some time, that the relations between culture, nation, identity and politics are much more complex than has been affirmed and that they are not easily resolvable. Amin Maalouf already said: "I do not dare give a universal explanation for all massacres, still less to propose a miraculous remedy. I believe as little in simplistic solutions as in simplistic identities. The world is a complex machine that cannot be disassembled with a screwdriver"[21]. The presumption that there is no political community without cultural homogeneity is no longer sustained; the future of politics will have to start off from the opposite

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[15] J.M. Ridao (2004), *Weimar entre nosotros*. Galaxia Gutemberg/Círculo de Lectores, Barcelona.

[16] M. Pajares (2003), *La integración ciudadana*, Icaria, Madrid.

[17] In these times when interculturality is so much talked about, it would perhaps be appropriate to revise the formula by affirming that "the more inter, the less culturality".

[18] E.J. Ruiz Vieytez (2006), "Políticas de inmigración y diversidad lingüística", in J. Gonzalez and M.L. Setien (eds.) (2006), *Diversidad migratoria. Distintos protagonistas, diferentes contextos*, Universidad de Deusto, Bilbao, p. 110.

[19] U. Beck (2002), *Libertad o capitalismo. Conversaciones con Johannes Willins*, Paidós, Barcelona.

[20] R. Zapata-Barrero (2004), *Multiculturalidad e inmigración*, Síntesis, Madrid.

[21] A. Maalouf (1999), *Identidades asesinas*, Alianza, Madrid, p. 40.

principle. In any case, the recovery of Euskara has always occurred in that context of nonconfluence: it has never had a State to protect it, a detail that should not be depreciated when people like Samuel P. Huntington start to get nervous about the Hispanic threat in the United States or Sarkozy demands the French langauge in the face of immigration that is endured, not desired.

The logic of methodological nationalism imposes that of monoculturalism, monolinguism, nationalism, and so forth. Also, the recovery of Euskara has taken place implicitly and manifestly from this logic, because possibility and desirability are on two different planes. What has not been possible thanks to the coexistence of Euskara in its own territory with more powerful, state-protected languages, does not reduce the desirability of someday reaching a position where a single language is dominant. It has not been possible, but it was desired and it cannot in itself be criticized, because it is more likely that the idea of plurality finds more resistance in States than among national minorities; aristocracies are difficult to get rid of. States behave in this and other topics like true aristocrats, afraid to lose their status, which they will hardly abdicate. National minorities put up with it because they cannot do the same. Be this as it may, a new model of linguistic recovery is still to be invented.

In this new context, the future of Euskara is a textbook case, and shares a whole set of circumstances that appear in theoretical models: a national minority with its own language within a State, without the capacity to repair previous processes of minoritization, and without sovereign political instruments, must face the arrival of a foreign population that for cultural affinity adapts better to the profile of foreigners desired by the State than by the minority. This casuistry has been raised by Kymlicka in the following way: "In recent years a great debate has taken place as much on minority nationalism as on immigration. As a result, we have learned a good many important lessons on the challenges raised by these two forms of ethno-cultural diversity to the theory and practice of liberal democracy. Nevertheless, these two questions have been debated, as a rule, separately; the interaction between them has received much less attention. Since both minority nationalism and immigration are challenges for the traditional model of the "culturally homogenous nation-State", they are frequently considered complementary but separate processes of deconstruction of the State-nation. Nevertheless, in fact, they are often intimately related and not always in a complementary way"[22].

Kymlicka adds that in situations like this, "many minority nationalists... have seen immigrants as a threat to the national minority instead of a potential benefit", before which and in the topic that concerns us, the recovery of Euskara, we only have to decide about elements like the setting in action of resources, structures, essays, tests, will, and so forth. Facing us are the errors, incapacities, and social black holes. A situation that at least generates anxiety in its promoters, because it comes on top of a situation that in itself was weak, new challenges accumulate in a social context which in itself could already do without Euskara. What is more, the recovery has been in and of itself a historical experiment never before made, after starting from such adverse circumstances and parameters.

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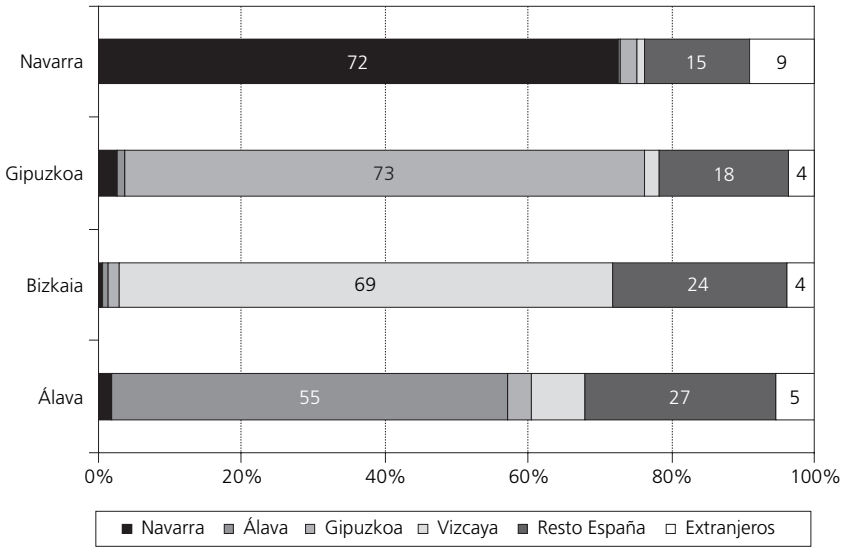
[22] W. Kymlicka (2003), *La política vernácula. Nacionalismo, culturalismo y ciudadanía*, Paidós, Barcelona, p. 320.

4. **Data on Euskara**

In order to analyze the central topic of this dissertation, I present some data on the social reality of Euskara and foreign immigration, basically within the Spanish state territory. Basically two types of data are presented: those referring to the territorial distribution of Euskara and foreign immigration, and those referring to the education system. With these data, which are in no way exhaustive, we wish to raise hypotheses on the possible relation between Euskara and foreign immigration, based in their respective territorial ecologies[23].

Beginning with the first set of data (see figure 1) we can see that the Basque-Navarran population is distributed as follows according to its ethnic composition: 35% of the population is native, 20% is of Spanish origin, 40% comprises descendants of mixed marriages or marriages of immigrants. Also, we can see how around 70% of the population of each territory tends to have been born in its respective territory, except in Álava (55%). The population of Spanish origin is high in Álava (27%) and Bizkaia (24%) and smaller in Gipuzkoa and Navarra.



Graph 1

Composition of the Basque-Navarran population by territories based on place of origin. 2006

[23] For greater detail, X. Aierdi (2006), "Inmigración extranjera", in EUSTAT, *Informe socioeconómico de la CA de Euskadi. 2006*, Eustat, Vitoria, pp. 39-92.

The population of the territories is completed by the contribution of the foreign population, around 140,000 people, a total of 5%. In table 1 their absolute and relative development and the different percentages by province are given. Thus, 9.21% of the population of the Foral Community of Navarra is of foreign origin. It is significantly smaller in Álava (5.58%) and much smaller in Gipuzkoa and Bizkaia, with 3.6% and 3.8% respectively.

Table 1

Development of foreigners in the Basque Country - Navarra. Absolute and relative numbers. (1998-2006)

	1998	1999	2000	2001	2002	2003	2004	2005	2006
CF NAVARRA	530.819	538.009	543.757	556.263	569.628	578.210	584.734	593.472	601.874
Extranjeros	4.313	5.971	9.188	19.497	30.686	38.741	43.376	49.882	55.444
% Extranjeros	0,81	1,11	1,69	3,5	5,39	6,7	7,42	8,41	9,21
ALAVA	284.595	285.748	286.497	288.793	291.860	294.360	295.905	299.957	301.926
Extranjeros	2.460	2.801	3.818	5.462	8.031	10.445	12.058	15.141	16.857
% Extranjeros	0,86	0,98	1,33	1,89	2,75	3,55	4,07	5,05	5,58
GIPUZKOA	676.439	677.275	679.370	680.069	682.977	684.416	686.513	688.708	691.895
Extranjeros	5.301	6.359	7.903	8.856	11.716	14.878	18.232	21.536	25.290
% Extranjeros	0,78	0,94	1,16	1,3	1,72	2,17	2,66	3,13	3,66
BIZKAIA	1.137.594	1.137.418	1.132.729	1.132.616	1.133.444	1.133.428	1.132.861	1.136.181	1.139.863
Extranjeros	7.437	7.633	9.419	13.120	18.661	23.908	28.876	36.217	43.395
% Extranjeros	0,65	0,67	0,83	1,16	1,65	2,11	2,55	3,19	3,81

According to origin, table 2 and figure 2, those Latin American, European community, North African and European non-community origin are most numerous across the four provinces.

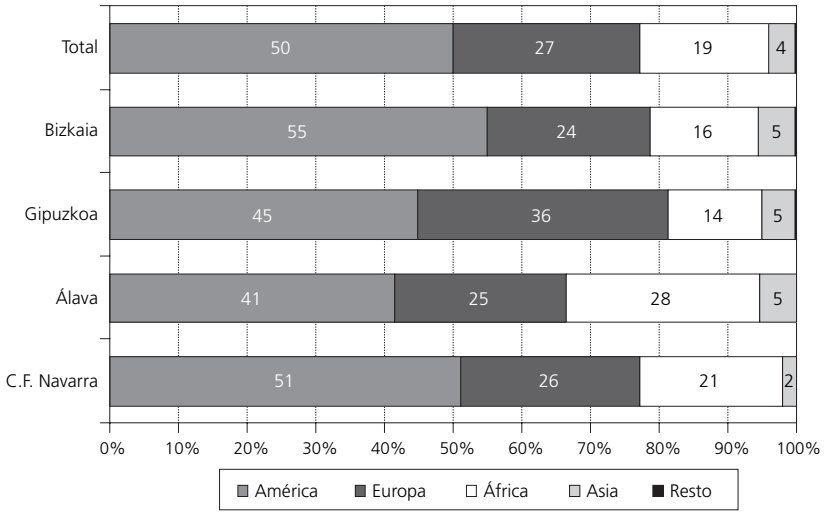
Table 2

Composition of the foreign population in the Basque country-Navarra according to geographic areas. 2006. (%)

	C.F. NAVARRA	C.A. EUSKADI	ALAVA	GIPUZKOA	BIZKAIA	Total
EU 25	11,6	16,7	15,6	25,5	12,0	14,7
Resto Europa	14,6	11,1	9,4	10,9	11,8	12,5
Magreb	16,0	12,0	22,7	11,0	8,5	13,6
Resto África	4,7	5,5	5,4	2,7	7,1	5,2
Canadá y EE.UU.	0,7	1,1	0,5	1,2	1,2	0,9
Latinoamérica	50,4	48,3	41,0	43,7	53,8	49,1
China	1,1	3,0	3,0	1,6	3,7	2,2
Resto Asia	0,9	2,3	2,5	3,1	1,7	1,7
Oceanía y Resto	0,1	0,1	0,0	0,2	0,2	0,1
Total	100	100	100	100	100	100

Grouping these areas by continents, the Latin American population contains almost half of the foreigners resident in the Navarran and Basque communities, with a greater presence in Bizkaia (54%) and Navarra (50.5%) than in Gipuzkoa

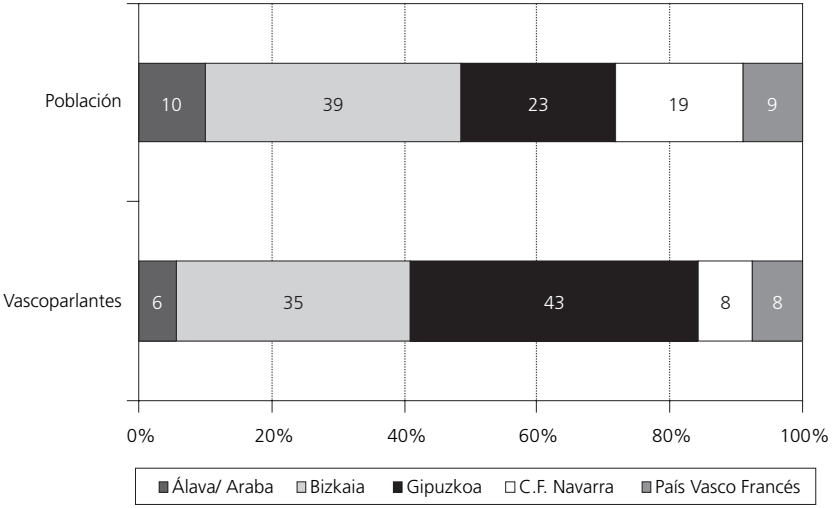
and Álava. A quarter of the foreign population is of European origin, with a greater presence in Gipuzkoa (36%) than in the rest of the territories. One in five foreigners comes from Africa, the continent with the greatest presence in Álava (28%), basically thanks to the contribution of the North African population (22.7%). The Asian population is around 5% of foreigners resident in both independent communities, with a smaller presence in the Navarran foral community (2%).



Graph 2

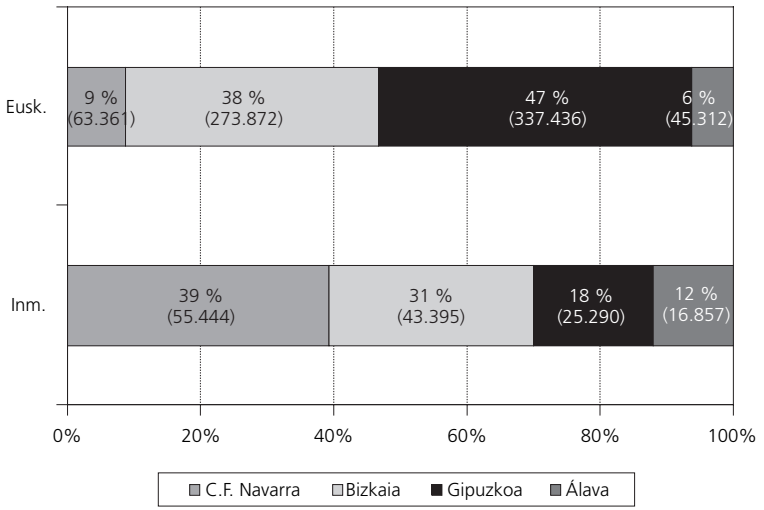
Foreign population according to continents. Navarran Foral community and territories of the Basque Autonomous Community. 2006 (%)

Proceeding to the relation between the distribution of the population and that of Basque-speakers, we observe the unequal distribution of both series according to territory. We find the greatest equilibrium in the French Basque Country, which contains 9% of the population and 8% of the total of Basque speakers. A situation of relative equilibrium can also be found in Bizkaia, with 39% of the population and 35% of Basuqe speakers. The greatest imbalances occur in the provinces of Gipuzkoa and Navarra, which maintain an inverse relation between population and Basque speakers. Gipuzkoa contains almost a quarter of the population and half the Basque speakers. Navarra has almost one in five inhabitants and does not have even one in ten Basque speakers. A similar situation to the Navarran one can be seen in Álava which includes one in ten inhabitants and more than one in twenty Basque speakers. This first distribution leads us to conclude that there is a relative discordance between the territorial distributions of Euskara and the population, which increases when introducing the foreign population.



Graph 3

Distribution of population (2005) and Basque speakers (2001) by territories %



Graph 4

Distribution of Basque speakers and foreign immigrants in the Basque and Foral Navarran autonomous communities, by territories (absolute numbers and %)

Map 1

Regions according to knowledge of Euskara

Map 2

Regions according to percentage foreigners

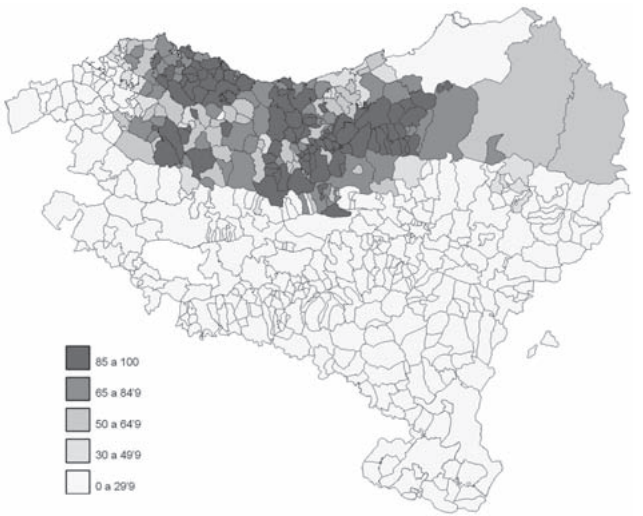
This different distribution is also observed when we compared the territorial location of Basque speakers and foreign immigrants in the independent Basque and Navarrese communities, in graph 4. The Foral Community of Navarre welcomes in 40% of the foreigners and 10% of the Basque-speakers, and Bizkaia to 40% of the Euskaldunes and 30% of the immigrants. The inverse case is the one of Gipuzkoa, in

which almost half of the Basque speakers of these two communities reside and one fifth of the foreign immigrants. Finally, 6% of the Basque speakers and 12% of the resident foreigners in these two communitarian territories reside in Àlava.

This unequal distribution can also be seen according to regions in the three maps that are shown next and which give us a more accurate image of the territorial realities of Euskara and foreign residents.

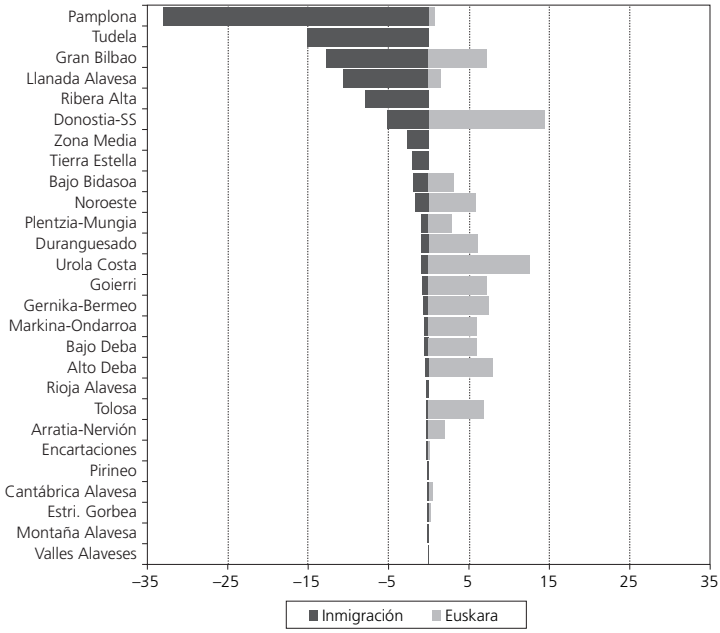
Map 3

Knowledge of Euskara by municipalities (%). 2001



These maps show us that immigration and Euskara run in parallel, in such a way that where there is a high concentration of Basque-speakers there are few foreigners, and vice versa. What is more, these distributions in the maps confirm on the one hand the relative territorial segregation of Euskara and of immigration but, on the other hand, they blind us to a more intense segregation than jumps out at us in the map of knowledge of Euskara by municipalities. This map represents the geography of the security of Euskara, the social base that guarantees its permanence. The Basque capitals, where the greatest number of both Basque-speakers and immigrants reside, are outside of this structure of security, which weakens still more the contact between Euskara and foreign immigration. Finally, in the following table 3 and figure 5, we can see the distributions of immigration and foreign residents, according to regions, by density[24].

[24] In order to calculate the density of each phenomenon (Euskara or immigration) we have used the following formula. We have multiplied the percentage that it represents (Euskara or immigra-



Graph 5

Indices of density of extranjería and Euskara by regions (%)

The density data allow us to see that the regions of Pamplona, Tudela, Greater Bilbao and the Alavan Plain are the most important from the point of view of immigration while in Euskara those of Donostia and Greater Bilbao are the most important. Following this, the most important, based on the presence of Euskara, are relatively insignificant from the point of view of immigration. In other words, in only two contexts do immigration and Euskara concur: in Greater Bilbao and Donostia-San Sebastián, but they do so with the peculiarity that territorial segregation gives way to social segregation, or the possibility that either the places of residence of immigrants and Basque-speakers do not coincide, or that given the volume of the populations, the reality of Euskara is dispersed due to its lack of concentration or absence of social visibility, except in the case of Donostia-San Sebastián. This does not mean, in the first place, that in more reduced areas or contexts with mainly Basque-speakers, experiences of interaction cannot take place that are later applicable to other contexts, less favorable to the language, or that, secondly, the education system does not generate, by means of its own mechansims, other

tion) in each region by the percentage of the total of the respective phenomenon that corresponds to each region, and reduced the resulting number to a range of 100, so as subsequently to represent it on the graph for better visualization.

modes of interaction. For all these reasons, we will now look at data that allow us to see what type of relationship there is between Euskara and immigration through the education system.

Table 3

Indices of density of extranjería and Euskara by regions (%)

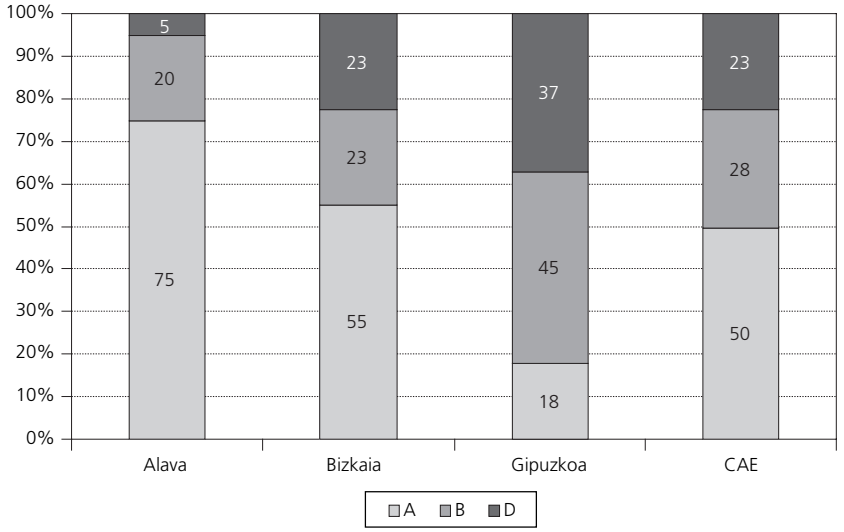
	Densidad inmigración	Densidad euska
Alto Deba	0,41	8,03
Arratia-Nervión	0,26	2,03
Bajo Bidasoa	1,88	3,18
Bajo Deba	0,52	5,97
Cantábrica Alavesa	0,18	0,49
Donostia-SS	5,21	14,49
Duranguesado	0,88	6,10
Encartaciones	0,24	0,15
Estri. Gorbea	0,13	0,29
Gernika-Bermeo	0,64	7,55
Goierri	0,72	7,34
Gran Bilbao	12,77	7,35
Llanada Alavesa	10,58	1,58
Markina-Ondarroa	0,56	6,00
Montaña Alavesa	0,12	0,01
Noroeste	1,59	5,88
Pamplona	33,00	0,70
Pirineo	0,21	0,11
Plentzia-Mungia	0,90	3,03
Ribera Alta	7,88	0,00
Rioja Alavesa	0,35	0,05
Tierra Estella	2,01	0,06
Tolosa	0,28	6,91
Tudela	15,18	0,00
Urola Costa	0,82	12,67
Valles Alaveses	0,08	0,01
Zona Media	2,61	0,02
Total	100	100

The data on education will be limited to the Autonomous Community of the Basque Country during the scholastic year 2005-06[25]. By linguistic model, 50% of the foreign children that go to school in the Basque Autonomous Community

[25] Several strategies can be used, but we have decided to limit ourselves to the sociopolitical context of the Autonomous Community of the Basque Country, which is the only one that, so far as not promoting it, does not legally place obstacles in the path of the development of Euskara. To focus on the French Pays Basque or to analyze the cultural persecution that the Navarran government exerts would move us away from the subject, although this type of obstacle and policy are decisive elements, the more so when these policies are said to be based on liberal arguments. That is the advantage of defining situations made-to-measure.

study in the model A, 28% in the B and 23% in D[26]. According to these data, a majority does not choose the model with the predominance of Euskara, model D, which implies a model of integration.

The distribution of Bizkaia is relatively similar to the one of the Basque Autonomous Community. The predominance of Spanish is absolute in Álava while, on the contrary, in Gipuzkoa, though there is not a total reversa., model A is reduced to 18%, D is increased to 37% and B is dominant, at 45%. In essence, these data tell us a great deal about the different linguistic reality of the three historical territories that comprise the Basque Autonomous Community.



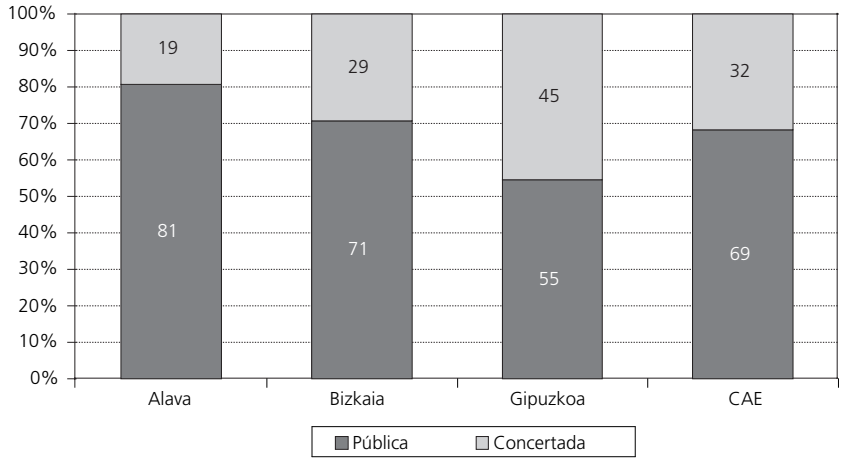
Source: Prepared by the author from data of the Council of Education, Universities and Research. Basque Government.

Graph 6

Historical distribution of foreign students of the BAC by models and territories. 2005-06. (%)

Territorially, foreign-registered students are distributed as follows: 55% are in Bizkaia, 25% in Gipuzkoa, and 20% in Alava. On the other hand, 68% choose state schools and 32% grant-maintained ones. This distribution is much more favorable for the public schools in Álava (81%) and Bizkaia (71%). However, in Gipuzkoa, the distribution favours the grant-maintained schools (55%) as opposed to the public schools (45%).

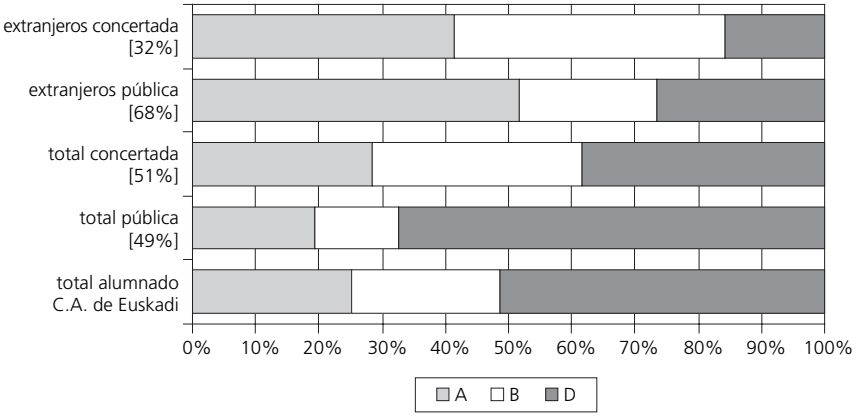
[26] Model A is mainly in Spanish, B is mixed and D is mainly in Euskara.



Source: Prepared by the author from data of the Council of Education, Universities and Research. Basque Government.

Graph 7

Distribution of the foreign students of the BAC according to matriculation by historical territories and type of school. 2005-06. (%)



Source: Prepared by the author from data of the Council of Education, Universities and Research. Basque Government and Eustat.

Graph 8

Distribution of foreign pupils and the total of the pupils according to models and type of school. 2005-06. (%)

Whereas 51% of all Basque pupils study in model D, 23% in model B and the remaining 25% in model A, among foreign pupils these data are inverted, and 48% of them study in the model A, 29% in B and 23% in D. The greater frequency of matriculation of the foreign pupils corresponds to the model A in public schools: 35%. These data and their converse, the 5% that study model D in grant-maintained schools, inform us that immigrants choose little integration if the most frequent assumptions to interpret the form of matriculation are to be believed.

However, to what extent do foreign students decide on a model of integration, or do they simply adapt to what they find in their specific schools? The place where they live tells us a great deal about the resources they have at their disposal, the models to which they have access, and, therefore, will explain to us a considerable amount about the decisions that they make. This is incontestable in the Guipuzcoan reality: foreign immigration, which for reasons of social stratification and space segregation tends to register in the public network, adapts to the distribution available in its vicinity; this is the reason why, in Gipuzkoa, with a very weak model A (18% of matriculations in this territory as opposed to 50% in the whole Community), 45% are registered in model B and 37% in model D (23% in the BAC). Nonetheless, we think that on many occasions, the option for the mode of insertion (and later integration) depends more on what is supplied by society than the immigrant's own choices. In sum, the host society also reduces or amplifies the possibilities of the foreign population, which is true for the education and many other contexts. To recapitulate, integration is partly in the hands of the foreign population, but at least as much is in the hands of the host society. That is to say, immigrants normally adapt pragmatically to (and in) the specific physical and social spaces in which they find themselves throughout their lives, which also includes cultural elements, but it is very important that they have them in hand, that they should be vivid realities.

5. **Some Concerns**

For those interested in the promotion and development of Euskara, concern arises from the possible influence of the Latin American population, which knows the language of the State and which, in addition, can be considered as preferred immigrants, thanks to the links, problematic or otherwise, that bind them to Spain, both on the linguistic and cultural as well as on the imaginary plane. But what is the influence of these new flows of immigration?

For some, there is a sensation of having arrived late to many of the social processes. Immigrants arrive when assimilation is impractical, when integration is a more complex process and when the lottery of nations prevents them having their own State. Nationalism experiences a contradiction between requesting the right to difference and guaranteeing the equality principle. The pre-existing problems of Euskara are intensified. Its social delay in terms of the linguistic market on the one hand, and the objective of its total recovery on the other, leads its advance to be overestimated in non-Basque-speaking sectors, and underestimated by Basque-speakers.

It is important not to forget that the relationship with Euskara is also a class question. For certain sectors of the population, Euskara is absolutely non-essential, which is shown in many social options, mainly the choice of linguistic model for children's schooling. Thus, the choice of model A means at least two things: either a certain social marginalization due to lack of social capital or an absolute social independence due to an abundance of social and economic capital.

In Simmelian terms, Euskara has gone from a communitarian to an associative logic, from being transmitted predominantly through family channels to doing so via formal channels, basically through education. Thus, in an authentic dilemma that is still insoluble, it gains in extension and quantity but loses in intensity and quality. Logical processes, but with consequences that are also logical: passing from affection to calculation.

Finally, Euskara has other limits related to its lack of existence as a refernce in certain sectors of the population and in urban contexts. A historically abnormal development brings an abnormal language that does not cover all the needs of its speakers, who find themselves very much impelled to choose between a language of habitual use and another language that requires a permanent commitment. In this sense, great relevance is shown by the intense abandonment of Euskara by adolescents, who introduce a biographical disconnect in its development, limiting it to the academic context rather than life as a whole. Logically, there is an increasing disharmony between knowledge and use of Euskara.

Another series of extra-linguistic phenomena also concurs in the (re)situation of Euskara. Thus, the State promotes its own preferential immigration at the same time as it monopolizes the policy on foreign residents, leaving independent communities as mere subsidiary organizations, without the capacity to establish their own policies of immigration and the subsequent modality of integration.

As a result of considering the State as a neutral organization on the cultural plane, State nationalism appears as patriotism or non-nationalism or, in any case, as liberal nationalism compred with the nationalism of the national minority which would naturally be illiberal. That is to say, a strategic distinction is made between a civic nationalism and another, ethnic nationalism, which allows the fact to be hidden that immigration policy, the exclusive right of the State, like any immigration policy, is always and also a policy of identity. What is more, many analysts consider that minority nationalisms are by their nature ethnic and exclusive. In these cases, the minority nationalism usually undergoes a double process: 1) of negative transference, in such a way that the minority nationalism is accused of what historically the state nationalism has been more responsible for (policies of racial purification or legal postponement of immigration), and 2) of characterization as ethnic by virtue of the self-categorization as civic of the state nationalism, which is possible by the transference of the xenophobic nature of the immigration policies to their state control apparatuses. All laws of immigration are based directly or indirectly on a state citizenship, which actually implies a direct exclusion of non-nationals. In the recent history of Spain, only certain declarations by the wife of Jordi Pujol or the Catalan leader Heribert Barrier are remembered as being "ethnic," whereas the ethnic bases of the immigraiton laws go unnoticed.

At the root of the "ethnic/civic" distinction of the nationalisms there persists a certain arrogance of political liberalism, imperceptible to its followers, but extremely hurtful to the members of the national minority, who are conscious that their cultural guidelines will never know the protection that the State provides to members of its own nationalism. A paradigmatic sample can be seen in an article by Garzón Valdés, defining five confusions[27] to which in his opinion promoters of the recognition of cultural differences normally succumb. To be able to be liberal in economics and culture must be an exciting, although not an enviable, experience[28].

In the game of oppositions between particularism/universalism I prefer the words of Scartezzini. This author says:

> *"opposition in the theoretical plane is not necessarily identical to opposition in the practical plane, nor does a theoretical universalism necessarily lead to a practical cosmopolitism; and, vice versa, relativist conceptions unavoidably end up as egoistic and particularist conceptions. Especially, the universalism-relativism opposition is not immediately superimposed on the tolerance-intolerance opposition. Certain conceptions based on universalist paradigms lead historically to intolerant policies; whereas some theoreticians of the relativist conception are very far from falling in the sin of etnocentrism, and demonstrate great tolerance in the face of differences"*[29].

In this world of affect and based in the Durkheimnian sociological fact, it must be said that collective identities exist and that the abstract individual of political philosophy is an anthropological aberration. I agree with Ignatieff when he explains that he starts from ethnic conflicts based on the "narcissism of the lesser difference"[30] (narcissism which on the other hand is only possible thanks to the exist-

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[27] The five confusions indicated by Garzón Valdés are: the confusion between tolerance and moral relativism; between cultural diversity and moral enrichment; between personal identity and social identity; between cultural unity and institutional unity; and between legal subjects and moral subjects. Faced with these perspectives one always gets the same impression: that if one can agree with them when they affirm that "no purely cultural point of view has, by the mere fact of being such, ethical value", it seems that they only refer to the points of view of national minorities or immigrant societies, the points of view sanctioned by existing States being beyond criticism. It hurts to see extremely intelligent people worry so much about abstract humanity yet simultaneously be insensitive to specific humanities. E. Garzon Valdes (1997), "Cinco confusiones acerca de la relevancia moral de la diversidad cultural", *Claves de razón práctica,* núm. 74, pp. 10-23.

[28] The liberal attitude at most accepts differences in private: "German in the street, Jew in house".

[29] R. Scartezzini (1996), "Las razones de la universalidad y las de la diferencia", in S. Giner, and R. Scartezzini (ed.), *Universalidad y diferencia*, Alianza, Madrid, p. 18.

[30] This example from Ignatieff is extraordinary: "In the next bunk, supported against the wall and in battle uniform, there is a massive man, middle-aged and of good presence, with eyes of a savage brightness and a thick moustache, stylish. With a somewhat false naivete, I dare confess to him that I do not see how the Serbs and the Croatians distinguish themselves. "Why do you think you are so different?" He watches with disdain as he removes a small box from the khaki jacket "Look, these are Serbian cigarettes. Over there", he says indicating the window,"they smoke Croatian cigarettes". "Yes, but they're still cigarettes". "Foreigners don't understand anything". He shrugs his shoulders and carries on cleaning his sub-machine gun, a Zastovo. But the question has worried him, because two minutes later he lays down his weapon in the bunk that separates and says to me: "Look, it's like this. The Croats think they're better than us. They love to think they're

ence of relations between groups). But it is a stretch from there to the denial of the existence of collective organizations that condition the lives of individuals, and even knowing that the discussion between nominalists and realists goes back to time immemorial, that negation implies the negation of the social as the founding organization of the individual. Among many critics of Basque nationalism, the mere mention of collective rights is anathema, because only rights of individuals can exist and because all group logic is the negation of the individual. To confuse the normative ideal of modern citizenship with the nonexistence of collective logics, for private interest, is to refuse to understand reality, a practice that is very common among virtuosos of pluralism[31]. Jean Amery asks: "How much motherland does a person need? ... A human being needs more motherland according to how little s/he can take with him/her"[32]. In this regard, some opinions of Ignatieff are also very relevant. This author says: "Nationalism creates communities of fear, groups convinced that they are only safe if they stay together, because human beings become "nationalists" when they fear something, when to the question "who protects me now", they can only respond "my folk."[33]. Substitute fear for crisis, and the understanding of many nationalisms, including those of the state ones, is served.

Consequently, in facing linguistic plurality, two types of measures will be necessary: linguistic and political. Among theories and policies, a liberalism that is respectful towards cultural differences becomes essential. Among policies, the resource of what Ferran Requejo calls "soft borders" is interesting. In his words,

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very fine Europeans, but you know what I say to you, that we're all Balkan shit". M. IGNATIEFF (1999), *El honor del guerrero. Guerra étnica y conciencia moderna*, Taurus, Madrid, 1999, pp. 39-72.

[31] P.L. BERGER and T. LUCKMANN (1997), *Modernidad, pluralismo y crisis de sentido. La orientación del hombre moderno*, Paidós, Barcelona. Appiah calls them "uprooted cosmopolitans" and he considers himself one of them: "I confess that I share his [Ignatieff's] position: I am skeptical about excessive concessions to subnational groups; I am even, like him, skeptical with respect to the right to self-determination, which is supposedly integrated in international law; also, like him, I am a moderate enthusiast of the Nation-State and of civil rights associated more to the place than to the ancestors. And I believe that it is very easy to discover why these points of view are not attractive to us. Michael Ignatieff is a Canadian of western European ancestry, educated in Harvard and who lives in London. Shortly I will discuss the work of a Ugandan intellectual of Asian ancestry who was his roommate at Harvard: a man who has recently been transferred from Cape Town University to the University of Columbia. I myself am Anglo-Ghanaian; having been born in London and educated in Ghana, at the moment I live in Boston. The week prior to the conference on which this essay is based I traveled from Kumasi, in Ghana, to the capital, Acra, in a car in which the languages that were used were Japanese, English and Asante-Twi, with a man whom I knew from childhood, because we grew up in the same street, and who now lives with his Japanese wife in the outskirts of Tokyo. The last time that Michael and I met was at a Catholic university in Brabante, Holland, a country that here we consider the protestant society *par excellence*. We are of the type of international travellers whom our enemies describe as "rootless cosmopolitans", who lack the authentic group identities which allow them to demand collective rights: we are useless people for the interests of the groups because our own movements through the borders of States require of the protection of our individualities, not the recognition of our groups". K.A. APPIAH (2003), "Los fundamentos de los derechos humanos", en M. IGNATIEFF, *Los derechos humanos como política e idolatría*, Paidós.

[32] J. AMERY (2001), *Más allá de la culpa y de la expiación. Tentativas de superación de una víctima de la violencia*, Pre-textos, Valencia, p. 114.

[33] M. IGANTIEFF, *op. cit.,* p. 49.

> *"[w]hat is now promoted by the minority nations of the plurinational democratic States is, in reality, the constitutional establishment of what we can call 'soft borders' of a protective nature which allow the promotion of national characteristics... This is a vindication that, in the normative plane, pluralizes the values of the liberal-democratic legitimacy and which, on the institutional plane, does not have to tolerate a necessarily secessionist process, but that, in a majority of cases, can be regulated through the constitutionalization in agreements of a confederal type in some matters and of a federal type, asymmetric and symmetrical, in others... The "non-soft" borders, those of the States, have allowed us to impel, also in most of the democracies, the nationalising characteristics of the State from a single-nation perspective".*

This logic of soft borders has much to do with the two norms that Kymlicka proposes for the protection of plurality: external protections and internal non-restrictions. From this perspective, it is illogical that the principle of external protection that the State implies with respect to other states is not applicable by national minorities with respect to the State. This is the provision that is expected of the soft border, as a metaphor of cultural and identity self-protection, because it often sounds ethnic in the mouth of national minorities just as it sounds civic when spoken by state representatives. This is another triumph of the logic of the State, the self-limitation of the legitimate requests of national minorities. Guaranteeing the norms of Kymlicka for the national minority, the *a posteriori* logic would be the one to complexify the scheme, extending both norms to societies of immigrants, so that the plural matrioskha is coextensive with another of rights.

In this concurrence of rights, a notable aspect is the cultural fact that it is the same socio-political sectors of the population, left-nationalist and merely left-wing[34], which simultaneously demand the linguistic rights of Euskara and the socio-political and cultural rights of the immigrants. This supposed concurrence between collective cultural rights, which seek to assure the progressive and accelerated development of Euskara, and others of individual (or group) character, that seek the legal equivalence of natives and immigrants, generate a generalized confusion in these sectors because they do not know which way to turn, do not know how to hierarchize these rights because they simultaneously condemn the legal inequality of the foreign population and experience a certain fear of the backwards movement of Euskara.

Thus, it is most likely that in the next few years, while the foreign population becomes settled, acquiring social visibility and the status of national citizenship, with the resulting right to vote, strategies will be implemented to optimize the positions of the political parties, both state-wide and of the national minority. This will all impact on the scope of the multiple identities and on the positions that are adopted in the cultural and political spaces, because the hierarchial structuring of languages is located in the political arena and involves little in the way of linguistics. It is not improbable that part of the foreign population joins in more or less

[34] We cannot forget that between the two sectors there is a latent conflict over Euskara, between sectors that consider it postponeable if not inessential, and sectors for whom it is the essential base of a common future.

obvious forms of passive or active resistance to the demands of linguistic recovery by the national minority group. These forms of resistance already exist, as part of the national conflict that the minority group maintains with the majority one, and with the presence of the new immigration, this resistance will intensify, with a consequent malaise in the minority group. This malaise today can be deferred for various reasons: 1) because within minority nationalism a form of transference also often operates, based on a sort of nationalist international[35]; 2) because the present ethnic confrontation is not with the foreign population, but with the population loyal to state nationalism, as has been demonstrated for the Catalan case by Gerd Bauman[36]. Today, the foreign population is not an electoral rival, to the extent and in the sense that Spanish immigrants are. When it is, will a new conflict arise?

6. **To Conclude**

Considering what we have seen, is the concern of those who think that the new arrival of the foreign population can slow down the recovery of Euskara justified? Frankly, yes. Another question is how great the concern should be, and whether the situation that is proposed does or does not have a solution in a context where cultural vindications will be superimposed. The most radical question is, whose are the territories? Historically, they have been cultural, today they belong to the nation-state, but tomorrow? Years ago, Rubio Carracedo proposed an interesting model to articulate complex forms of citizenship. According to Rubio Carracedo, complex citizenship is one that appropriately deals with a threefold requirement:

> "a) equal fundamental rights for all citizens, which implies a universalist policy of integration of such irrenunciable common minima;
>
> b) differential rights of all groups, both majority and minorities, that comprise the organizational structure of the State (every State is, to a greater or lesser degree, multisocial and multicultural), which implies a policy of recognition, both in the private and the public sphere; and c) minimum conditions of equality for dialectic or free and opened dialogue between sociocultural groups, which entails a multicultural policy that includes transitory dispositions of "inverse discrimination" (precisely to balance the starting conditions), multicultural curricula, stimulaton of ethnocultural interchange, and so forth, as well as the strict prevention of all homogenizing or assimilationist deviation in the hegemonic culture[37].

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[35] The logic is more or less as follows: "if our cultural difference must be preserved by the mere fact of being a national difference, all differences must be preserved, so also all those that the foreign population contributes...". All difference is legitimate in itself in a sort of cultural relativism.

[36] G. Bauman (2001), "Tres gramáticas de la alteridad: algunas antropo-lógicas de la construcción del otro en las constelaciones históricas", in N. Mary and M. Diana (eds.), *Multiculturalismo y género. Un estudio interdisciplinar*, Bellaterra, Barcelona.

[37] J. Rubio Carracedo (2000), "Ciudadanía compleja y democracia", in J. Rubio Carracedo, J.M. Rosales and M. Toscano, *Ciudadanía, nacionalismo y derechos humanos*, Trotta, Madrid, p. 34.

This proposal hierarchizes and equalizes the possible policies on national minorities and majorities, but in this scheme we must still introduce the requests of the foreign population, so as not to end up excluding them by means of a strategic alliance of those who populated the territory before the arrival of the immigrants. Territory is very important in these disquisitions because primacy of the rights of the national minority over the immigrant societies is rooted, among other characteristics, in its territorial nature, "in the fact that these are groups that are based in a geographic zone which they consider their own and in which in normal circumstances they constitute a majority of the population. The connection with it may be conceived in various ways, but it is a necessary condition for the sovereignty to which it aspires as a nation[38]. This territorial characteristic is the last resort for the minorities to claim the right to self-government as opposed to the multi-ethnic groups suhc as foreign immigrants who are different from the groups of the host society. Territorial characteristics, let us not forget, are also the last resort in the assignation or refusal of rights of citizenship[39].

However, given this primacy in the legitimacy of the minority over the society's immigrants, and without avoiding the location of both in a State which will use its own legislation to promote its own cultural guidelines, we would not have advanced excessively in elucidating the policies to follow, except that Euskara should be a preferred language, inasmuch as it is the language of the territory and the minority, in the scholastic curriculum, compared with other third or successive languages.

The concern for the future of Euskara in any case must logically be understood by those who are not located, with a vested interest, in an alliance of neurotics. Thus, in a world in which Huntington is again worried because the Hispanics are reluctant to learn English in the United States and because they are going to create an irresoluble identity problem[40], in a world in which Calvo Buezas[41] is reasonably happy for precisely the opposite reason, the unstoppable advance of Spanish in

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[38] X. Etxeberria (2004), *Sociedades multiculturales*, Alboan, Bilbao.

[39] On this aspect I recommend a book that must certainly be read: L. Ferrajoli (1999), *Derechos y garantías. La ley del más débil*, Trotta, Madrid . In this and other texts, Ferrajoli pleads for the destruction of citizenship, which denies in practice the necessary equality of people. Another recent book that is also very interesting: W. Kymlicka (2006), *Fronteras territoriales*, Trotta, Madrid. In the beginning of his essay, Kymlicka affirms: "Territorial borders are a source of frustration for all kinds of liberals and, particularly, for liberal egalitarians. It is not clear what principles the liberal egalitarians would have to invoke when defining or redefining political borders. In fact, it is not clear whether liberal egalitarianism can satisfactorily justify the existence of territorial policies, especially if these borders prevent individuals from freely circulating, living, working and voting anywhere in the world that they wish" (p. 35).

[40] When faced with the exagerrations of Huntingon, talking of the path towards Mexiformia or Mexamerica, Portes' response is implacable: "Written from his professor's office in the University of Harvard and without the endorsement of an original, empirical investigation with which to support his reflections, the essay spreads alarm about what Hispanics, and more specifially Mexicans, will cause in American society and directly attributes to them the responsibility for all these "problems". Huntington's affirmation about the resistance of Hispanics to learning English and American ways is so ridiculous and contradictory that it does not even deserve a retort", in A. Portes (2006),"*La nueva nación latina: inmigración y la población hispana de los Estados Unidos*", REIS, 116, Madrid, p. 87.

[41] T. Calvo Buezas (ed.)(2006), *Hispanos en Estados Unidos, inmigrantes en España: ¿Amenaza o nueva civilización?,* Los Libros de la Catarata, Madrid.

the United States, concern for Euskara is not out of place. Huntington's reasons are intrinsically bad, and the evaluation cannot depend on how well me and my friends do out of it. However, although it may only be a question of magnitude, in addition to being irrational, it does not seem reasonable that the representatives of a language whose recovery cannot be but abnormal, should also be worried about the future of their language, because perhaps for them there is no question of doing well, because they are afflicted by a problem that is invisible in social terms: having thought that the recovery process was going to be faster, intense and universal, the relative inefficiency of its recovery can make them doubt the legitimacy of their objective.

The request for a new policy for the recovery of Euskara and the invitation to immigrants to contribute to this task is understood perfectly from the situation of extreme weakness of the Basque language. On the other hand, there will necessarily have to be the establishment of effective lignuistic policies that lessen the suffering that such learning will involve, because in the same way that non-Basque-speakers exaggerate the extraordinary development of Euskara and its unstoppable imposition, Basque-speakers undervalue the social suffering that its recovery can generate, particularly in those sectors with less social and cultural capital, less power to elude it and greater need to learn it so as to be part of the social ascendency that it may achieve, if any.

Independently of what has been said, and convinced that the situation of linguistic balance is quite improbable, if not impossible, I take on board all the complexity contributed by the SWOT analysis that Mario Zapata has made in a wonderful synthesis of the possibilities and limits of Euskara in its relation with immigration, especially the sections on weaknesses and threats[42].

To conclude, we wish to say that it is likely that there will be reasons for concern and anguish about the future of Euskara, which will continue having its social limits, its places where expansion is difficult, its impossible territories, parts of which will correspond to immigrants, but many problems already existed with the native population. These limits do not, however, reduce its legitimacy as the home language of the Basque territory, a legitimacy that can be extended to:

1. Its preferential treatment and priority in the Basque territory, for both natives and foreigners,
2. Priority that will be given to its encounters with resistence in certain sectors of the population who believe that do not require it socially and who turn their backs to Euskara,
3. Priority which will also find new resistance in the foreign population, either because ecologically they do not coincide with Euskara or because it will be incorporated into strategies that are already present in sectors of the native population, and

[42] M. Zapata (2006), *Etorkinak eta hizkuntza-ereduak,* Soziologiazko Euskal Koadernoak, Eusko Jaurlaritzaren Argitalpen Zerbitzu Nagusia, Lehendakaritza, Gasteiz, pp. 97-100. Another excellent article is by Amelia Barquin: "Euskara eta etorkinen hizkuntza integrazioa", which I have only in its electronic version.

4. Taking into account that rights to reparation do not exist, that the processes of justice always begin in new historical point-zero starting points[43], that much of its success will depend on achieving models of effective teaching and management and considering that it is necessary to look for common futures where nobody is left out.

But, also, this priority should not impede Basque linguistics of the future from incorporating what Ruiz Vieytez calls the "design of a kind of 'linguistic (or cultural) sustainable development'". As this author says, in a context of the criteria of reasonableness and proportionality derived from the sociolinguistic situation, the "present-day States would have to tend to guarantee coexistence in equal conditions of all the linguistic communities that live in their territory, recognizing an equalizing status for all languages and acting on them based on their sociolinguistic situation. A flexible system of several levels of officialness and guarantee... At the same time, States would traditionally have the role of intervenor in this reality, promoting situations that are traditionally weaker. In other words, it is not languages that should be subordinated or at the service of the State, but the State, the public apparatus, at the service of the languages or, more accurately, of the linguistic communities". Where he says 'State', one could also say 'sub-state government'. Although more difficult to manage, everything will be better in these parameters[44].

To finish, although in some of its territories it currently has institutional protection and in others it is undergoing a sort of ethnicidal persecution, I am convinced that the maintenance of Euskara has evolved in exceptional circumstances and its future development will occur in similar circumstances.

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[43] In a brilliant booklet, Amos Oz, based on 11-S, speak of justice in the following terms: "The key to the 11 September attack against the United States is not only necessarily to be found in the confrontation existing between rich and poor.... It is not only a question of "have" and "have not". If it were that simple, one would expect that the attack came from Africa, where the poorest countries are, perhaps against Saudi Arabia and the Gulf Emirates, which are the petroleum producing States and the richest countries. No. It is a battle between fanatics who think that their aim, any aim, justifies the means. It is a fight between those who think that justice, however that word may be understood, is more important than life, and those who, like us, think that life has priority over many other values, convictions or creeds". He goes on to claim as his own a phrase by Israeli poet Yehuda Amijai: "Where we believe we are right, the flowers cannot grow": A. OZ (2002), *Contra el fanatismo*, Siruela, Madrid, p. 35.

[44] E.J. RUIZ VIEYTEZ, *op. cit.,* pp. 135-150.

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Traditional and New Linguistic Management: Political and Economic Implications, the Case for Intercomprehension

François Grin[1]

1. **Introduction**

In contrast to other papers in this collection, this paper is not primarily concerned with the normative questions that normally surround the thematic area of human rights. Rather, it examines one linguistic management solution whose adoption would have direct bearing on the more or less equitable, or fair, character of communication between people having different mother tongues. And fairness is, of course, a relevant issue in any discussion of human rights.

"Linguistic management" is at the heart of the endeavour generally known as "language policy". Language policy, however, covers a wide range of interventions, normally by the state or its surrogates[2]. It would be well beyond the scope of this paper to attempt a general account of what language policies are about, even under the more specific angle of the economic approach to language policies.

In order to address "new" linguistic management, this paper emphasises one particular language planning strategy, and proposes a preliminary economic assessment of it. The case in point is that of "intercomprehension", that is, the use of receptive competences in foreign (but usually related) languages, enabling participants in a multilingual exchange to speak their own language and yet be understood by other participants who have acquired receptive skills in this language. The term "intercomprehension" itself does not seem to have gained currency in English-speaking countries, and its use in English appears to be confined to special-

[1] The author thanks Gilles Falquet and Michele Gazzola for helpful comments on an earlier version of this paper.

[2] See e.g. R. Cooper (1989), *Language planning and social change,* Cambridge University Press, Cambridge; L.-J. Calvet (1996), *Les politiques linguistiques,* Presses Universitaires de France (Coll. *Que sais-je ?*), Paris ; R. Kaplan and R. Baldauf (1997), *Language planning. From practice to theory,* Multilingual Matters, Clevedon; G. Iannnacaro and V. Dell'Aquila (2002), *Modelli europei di pianificazione linguistica,* Mondo Ladino 26/02, Istitut Cultural Ladin, Vich; T. Ricento (ed.)(2006), *An Introduction to Language Policy. Theory and Method,* Blackwell, Malden (USA).

ist circles; it is, however, well-established in other languages, and it will be used in this paper as well, as a direct *calque* from the French.

Although the *practice* of intercomprehension is not new and can, in fact, boast a distinguished history[3], it is currently enjoying renewed interest as a useful strategy to counter linguistic hegemony and foster, instead, a living, sustainable and fair multilingualism.

Whereas intercomprehension is generally approached from an applied linguistics or pedagogical standpoint, I will look at it on a more "macro" level, focusing on its relevance as an ingredient in language policy, and assessing it from an economic standpoint. Consequently, this paper is organised as follows. In section 2, I recall a few essential concepts of policy analysis. In section 3, I propose a simple characterisation of the thorny problem of the choice of official and working languages in the institutions of the European Union (EU). In section 4, I introduce intercomprehension and try to see how a generalised resort to it might alter the problem of multilingual communication in the EU. Section 5 discusses possible extensions to the very basic analysis developed in this paper, pointing in particular to specific problems that need to be examined at closer range. Finally, Section 6 offers a brief conclusion, and reconsiders the issue of intercomprehension from the perspective of human rights, particularly so-called "linguistic human rights".

2. **Key Distinctions in the Economic Analysis of Language Policy**

The aim of this section is merely to recall some essential distinctions in policy analysis, particularly as applied to language policies; these distinctions are presented as four simple vignettes, but readers interested in a more systematic treatment can find it in several recent papers[4].

2.1. *The Concept of Counterfactual*

Policy evaluation rests on the notion that no policy can be assessed on its own, but only in comparison with an alternative, which may be another policy, or possibly the absence of any explicit policy (although clearly doing nothing is *per se* a form of policy). The "counterfactual" is precisely the alternative against which a particular policy is assessed. In many cases, the counterfactual can be defined as "what would happen in the absence of the policy under evaluation". Clearly, the choice of counterfactual has major implications. Assume for example that a regional government is contemplating a move from a bilingual to a trilingual administration (where the additional language may be a local minority language, say

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[3] See e.g., C. Blanche-Benveniste (2006), "Comment reprendre l'ancienne expérience des voyageurs qui comprenaient toutes les langues romanes?", paper presented at the University of Geneva, 11 November 2006; on the use of intercomprehension in the days of Christopher Columbus.

[4] E.g. F. Grin (1999), "Language planning as diversity management: some analytical principles", *Plurilingua,* no. XXI, pp. 141-156; F. Grin (2003), "Economics and language planning", *Current Issues in Language Planning*, no 4, pp. 1-66; F. Grin (2003), *Language Policy evaluation and the European Charter for Regional or Minority Languages*, Palgrave Macmillan, London.

language γ, coming in addition to the hitherto official languages α and β). Part of the cost of this change is made up by the need to provide public services in three languages *instead of just two*, taking account of the fact that under a bilingual system, native speakers of language γ would have used civil servants' time anyway, even if interaction would have had to take place in one of the hitherto official languages α or β. Thus, the proper identification of the counterfactual enables us to identify the proper cost of the proposed policy, that is, *not* the entire cost of the provision of service through γ, but only the additional cost (if any) of providing the same amount of service through γ instead of α or β.

2.2. *Allocation* versus *Distribution*

When comparing two scenarios (which then serve as mutual counterfactuals), it is important to apply a standard break-down of economic theory and to set clearly apart resource *allocation* from resource *distribution*.

Resource allocation is essentially concerned with efficiency: are society's scarce resources well spent? Could they be used more efficiently, whether in terms of *what* is done with them (which raises the question of to the choice of policy goals) or in terms of *how* these resources are used (which harks back to the technical efficiency of the measures through which the policy goals are implemented)?

Resource *distribution*, by contrast, focuses on matters of fairness: given that a policy purses certain goals in a particular way, can the outcome be expected to be fair? Who would win and who would lose a result of the proposed policy? Could winners, at least in principle, compensate losers so that ultimately, nobody is made worse off by the policy?

When assessing a policy scenario, it is important to check that is both allocatively efficient and distributively fair. A policy that fails on either count should be rejected in its existing form and, if action is nevertheless seen as indispensable, the policy should be amended to eliminate these flaws.

2.3. *Market* versus *Non-market Effects*

Applying the criterion of efficient resource allocation to an object as complex as language can be dauntingly difficult. At this time, there are no complete procedures that satisfactorily cover all the dimensions of such an exercise. However, precisely in order to identify these dimensions (even in very general terms), it is useful to distinguish between effects that can be observed in a market, and effects that arise outside of the market.

For example, including another foreign language (say language δ) in the school syllabus carries market effects: the main consequence will be an increase, after a time lag of a few years, in the number of persons who are able to speak language δ. This *may*, for example, drive *down* the labour market value of skills in language δ (because such skills will have become more common). This is a typical market effect. However, the same policy may have non-market effects: by endowing learners with skills that they can use when travelling to δ-speaking countries, it affords them opportunities for direct contact with native speakers of δ and the associated culture. This is a typical non-market effect.

Normally, both market and non-market effects ought to be taken into account in the economic evaluation of language policies. In practice, however, if language policies are subjected to *any* economic evaluation, non-market effects tend to be overlooked, either because of a lack or data or because of an excessive focus on some (financial or material) aspects of economic value.

2.4. *Private* versus *Social Effects*

Finally, both market and non-market value can be assessed at the private and at the social level. In mainstream economics, the effect at the social level is generally assumed to be equivalent to the sum of effects observed at the private (or individual) level. While this holds true in some cases (usually for relatively simple goods and services), it is quite unsatisfactory in the case of language, because language functions like a network[5]. The issue is complex and cannot be discussed in detail here; suffice it to say that when comparing language policies, it is important to consider separately the market and non-market benefits and costs of the policy at the private level and at the social level.

For example, it is perfectly understandable that parents in non-English-speaking countries want their children to learn English, because competence in English is generally seen as a significant asset in the labour market. However, this focus often comes at the detriment of the learning of other languages, and it does not follow from the mere existence of actors' *private* preferences that it is in the interest of society as a whole (even if society were entirely made up of young learners and eager parents) to generalise, let alone prioritise, the teaching and use of one hegemonic language[6].

3. **Choosing Official and Working Languages in the European Union**

The choice of official and working languages in the EU is the object of an abundant literature. However, very little of it addresses it in policy analysis perspective. Exceptions are Pool[7], Grin[8], Ginsburgh and Weber[9] or Gazzola[10].

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[5] F. Grin and F. Vaillancourt (1997), "The Economics of Multilingualism: Overview of the Literature and Analytical Framework", in W. Grabe (ed.), *Multilingualism and Multilingual Communities* (ARAL XVII), Cambridge University Press, Cambridge [MA], pp. 43-65; S. Dalmazzones (1999), "Economics of language: A network externalitites approach", in A. Breton (ed.), *Exploring the Economics of Language,* Canadian Heritage, Ottawa, pp. 63-87.

[6] F. Grin (2005), *L'enseignement des langues étrangères comme politique publique,* Rapport au Haut Conseil de l'évaluation de l'école, Ministère de l'éducation nationale, Paris, http://cisad.adc.education.fr/hcee.

[7] J. Pool (1996), "Optimal language regimes for the European Union", *International Journal of the Sociology of Language* no. 121, pp. 159-179.

[8] F. Grin (1997), "Gérer le plurilinguisme européen : approche économique au problème de choix", *Sociolinguistica*, no XI, pp. 1-15; F. Grin (2004), "On the costs of linguistic diversity", in P. Van Parijs (ed.), *Linguistic Diversity and Economic Solidarity,* De Boeck-Université, Brussels, pp. 189-202.

[9] V. Ginsburgh and S. Weber (2005), "Language Disenfranchisement in the European Union", *Journal of Common Market Studies,* no 43 (2), pp. 273-286.

[10] M. Gazzola (2006), "Managing Multilingualism in the European Union: Language Policy Evaluation for the European Parliament", *Language Policy,* vol. 5, no. 4, pp. 393-417.

Although the EU aims and claims to operate multilingually, it is well-known that multilingualism is only practised in a limited number of contexts (such as oral communication at the European Parliament), and that the actual operations of the European Commission, for example, prioritise English (plus French, decreasingly, and German, marginally). In fact, the growing presence of English leads many observers to worry about a drift towards an almost uncontrollable linguistic hegemony[11].

Interestingly, there is no *obviously* superior solution to this problem, as initially shown by Pool[12], who considers six different language regimes (a similar analysis has been expanded to seven languages in Gazzola[13] and Grin[14]). Depending on the evaluation criteria chosen, it may be advisable to maintain full-fledged multilingualism, to prioritise a small subset of languages (for example, English, French and German) or to retain only one official language which, depending on the criteria adopted, could be English or Esperanto. Surprising as it may seem to some readers, the adoption of English as the sole official language of the EU would not be the economically preferable solution, because of the allocative and distributive flaws of this scenario. More precisely, it would force about 85% of the European population to invest considerable sums in the teaching and learning of English, and (short of a very unlikely transfer from the United Kingdom and Ireland to all the other member countries of the EU), place an enormous financial burden on these countries, while sparing English-speaking countries any serious foreign language learning effort (this fact alone amounts to savings of about € 6bn per year to the UK), at the expense of other countries[15]).

Depending on the evaluation criteria adopted, a policy of fully-fledged multilingualism may be equally defensible, even applying purely economic reasoning. One argument often levelled against it is that multilingualism carries a considerable cost, mainly in the form of translation and interpretation. In fact, extrapolating from official European Commission figures suggesting that the cost of translation and interpretation *per direction* is of the order of € 10.3m[16], the theoretical cost of full multilingualism, in those EU institutions where it is supposedly applied, stands at about € 10.6 per European citizen and per year; and by using relay translation and interpretation, the European Commission claims to be keeping this expenditure down to about € 2.14 per resident and per year.

These figures are, in fact, surprisingly modest, and it is very likely that Europeans' "willingness to pay", through taxes, in order for EU institutions to remain genuinely multilingual (and, by implication, for their respective languages to remain relevant in Brussels) significantly exceeds the amounts just quoted. This it not to

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[11] See e.g., R. Philipson (2003), *English-only Europe?,* Routledge, London; C. Durand (2004), "Les impostures des apôtres de la communication", *Panoramiques*, no 69, pp. 105-122.

[12] J. Pool (1996), *Optimal…cit.*

[13] M. Gazzola (2003), La relazione fra costi economici e costi politici del multilinguismo nell'Unione europea, Tesi di Laurea, Università commerciale Luigi Bocconi, Milan.

[14] F. Grin (2004), "Coûts et justice linguistique dans l'élargissement de l'Union européenne", *Panoramiques,* no 69, 4e trimester 2004, pp. 97-104.

[15] See F. Grin (2005), *L'enseignement… cit.*

[16] see M. Gazzola (2006), *Managing… cit.*

say that savings should be disdained, but simply that the main weakness of a multilingual regime for the EU, rather than its monetary cost, is its very cumbersome nature (let us recall that with 23 official languages, the number of directions of translation and interpretation that must, in principle, be guaranteed, is 506!).

It is therefore relevant to look for alternatives and if, for a variety of reasons (whether political, social, cultural or economic), multilingualism is regarded as appropriate for Europe, we should look at solutions which, while remaining truly multilingual, are less cumbersome and also cheaper. Intercomprehension may represent a very valuable strategy for these purposes.

4. **Intercomprehension as a Language Policy Instrument**

Let us define "intercomprehension" as a context in which native speakers of different, yet (linguistically) related languages within a language group *M* have developed receptive competence in the other languages of the group, without necessarily having acquired productive competence in these languages.

A typical example would be the romance languages, including Catalan, Corsican, French, Friulian, Gallego, Italian, Ladin, Occitan, Portuguese, Romanche, Romanian, Sardinian and Spanish, abstracting, for the purposes of this paper, from variants within the above languages (for example,, the five different forms of Romanche in Eastern Switzerland) or additional lects such as varieties of franco-provençal. Of the above, five (French, Italian, Romanian, Portuguese and Spanish) are now full-fledged official languages of the EU.

Although intercomprehension has been the object of a considerable literature in applied linguistics or language didactics, what matters here is its possible import for language policy, particularly in the context of the EU. Since this question has hardly been explored so far, we shall confine ourselves to a general treatment, starting with four basic assumptions, numbered H1 to H4:

- H1: intercomprehension occurs between related languages, that is, within the same language group;
- H2: intercomprehension can be achieved without major difficulties by most native speakers of any of the languages in the group;
- H3: intercomprehension implies that it is no longer necessary to offer translation and interpretation services within a language group where the conditions for intercomprehension have been created;
- H4: intercomprehension comes in two versions, one "strong" (encompassing all languages within a language group — e.g. the "romance language group" of the Indo-European family of languages), on "weak" (where it is assumed to occur only within specified subgroups of a language group);

We may add a specific hypothesis to the effect that no intercomprehension will be assumed between Hungarian on the one hand, and Finnish and Estonian on the other hand, although they all belong to the Uralo-Altaic family of languages.

In the context of the present-day EU with its 23 official languages, the "strong" version of intercomprehension gives rise to nine "intercomprehension sets", namely:

Table 1

Strong Form of Intercomprehension

1.	IE/Romance: French, Italian, Portuguese, Romanian, Spanish
2.	IE/Germanic: Danish, Dutch, English, German, Swedish
3.	IE/Slavic: Bulgarian, Czech, Polish, Slovak, Slovene
4.	IE/Baltic: Latvian, Lithuanian
5.	IE/Celtic: Irish
6.	IE/others: Greek
7.	non-IE/FO 1: Finnish, Estonian
8.	non-IE/FO 2: Hungarian
9.	other: Maltese

IE: Indo-european; FO: Finno-Ugric

However, it is admittedly a bit of a stretch to assume that for speakers of Germanic languages, for example, all the other languages are equally accessible; in fact, morphosyntaxic proximity is likely to make Dutch more accessible than Swedish to a native speaker of German, to take just one example. Similar situations can arise in the romance and Slavic group. Let us therefore assume that intercomprehension occurs only within narrower subgroups, and (pessimistically) assume that no intercomprehension occurs between different subgroups of the same group. We then end up with a revised table comprising twelve intercomprehension sets, namely:

Table 2

Weak Form of Intercomprehension

1.	IE/Romance 1: French, Italian, Portuguese, Spanish
2.	IE/Romance 2: Romanian
3.	IE/Germanic 1: Dutch, English, German
4.	IE/Germanic 2 ("Scandinavian"): Danish, Swedish
5.	IE/Slavic 1 ("northern"): Czech, Polish, Slovak
6.	IE/Slavic 2 ("southern"): Bulgarian, Slovene
7.	IE/Baltic: Latvian, Lithuanian
8.	IE/Celtic: Irish
9.	IE/others: Greek
10.	non-IE/FO 1: Finnish, Estonian
11.	non-IE/FO 2: Hungarian
12.	other: Maltese

IE: Indo-european; FO: Finno-Ugric

Let us now reconsider the case of full multilingualism in European institutions, where all 23 official languages are used for translation and interpretation (that is, the regime sometimes called "panarchic" in the literature). As we have seen, this implies a staggering 506 directions of translation and interpretation.

Assume now that European MPs and all civil servants working for the European Commission and other EU bodies have received the linguistic training enabling them to achieve intercomprehension as defined above. In this case, it will no longer be necessary to guarantee translation and interpretation between the languages of the same subgroup (as defined in Table 2). For example, a document written in Swedish would no longer need to be translated into Danish; a speech in Spanish would no longer need to be interpreted into Italian. We can quickly assess the impact of this move towards intercomprehension by revising our formula for the number *D* of directions of translation and interpretation required.

Whereas the initial formula is:

$$D = N * (N-1)$$

where N is the number of official languages, the number of directions required with intercomprehension, which shall be written D^{IC}, is much lower.

First, we can subtract from it all the translation and interpretation that occurs within the subgroups. The savings corresponding to the omitted *intra*-group directions, written S_{INTRA}, can be expressed as:

$$S_{INTRA} = \sum_{i=1}^{M} R_i * \left(R_i - 1\right)$$

where *M* is the number of subgroups considered (twelve, under the assumption of "weak" intercomprehension) and R_i is the number of languages in a given subgroup L_i. At first sight, this implies a saving of 32 directions of translation and interpretation: 12 among Romance languages, 6 among non-Scandinavian languages, 2 among Scandinavian languages, 6 among "northern" Slavic languages, 2 among "southern" Slavic languages, 2 among Baltic languages, and 2 among Finno-Ugric languages).

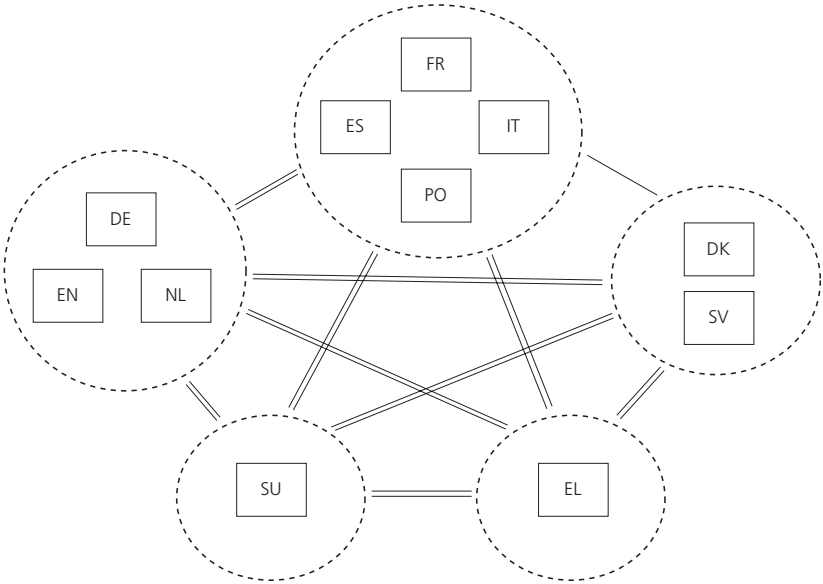
However, this is only a small part of the total savings, because many more directions of translation and interpretation can be economised. Consider the case of a text initially produced in, say, German. We know that it will no longer need to be translated into Dutch and English. It will still have to be translated into other EU languages (but then, *one language per subgroup* will suffice). Suppose that the text is translated into Swedish; thanks to intercomprehension, it will cover the needs of Danish readers too. In the same way, if the text is translated into Italian, it will not be translated into French, Portuguese or Spanish.

However, it is not the case that we can simply replace, in the original formula, "language" by "language group", because messages, whether oral or written, can still be emitted in any of the *N* languages. Thus, the number of translation directions that still need to be guaranteed is:

$$D = N * (M-1)$$

where all symbols have the same meaning as in the preceding equations. It is important to observe that intercomprehension introduces an asymmetry, in the sense that the full range of languages is retained as a source, while only one language per group is used as a target.

The *actual* number of directions of translation and interpretation taking place whenever a message is uttered in a language from a given group is, however, equal to *M-1*, implying that the total of combinations actually used is given by *M*(M-1)*, a situation that can be described by a diagram (Fig. 1) where the double lines represent the language-*group* combinations (each counting for *two* directions of translation and interpretation) actually used under intercomprehension, when a message is uttered. For the sake of simplicity, I shall not attempt to represent the EU example (which would require drawing no less than 66 double lines), but a simplified case (*for example*, a pre-May 2004 situation with only eleven official languages) comprising five language groups: Romance (French, Italian, Portuguese, Spanish); Germanic 1 (Dutch, English, German), Germanic 2 (Danish, Swedish), Finnish, and Greek (each constituting a group of its own).



DE: German; DK: Danish; EL: Greek; EN: English; ES: Spanish; FR: French; IT: Italian; NL: Dutch; PO: Portuguese; SU: Finnish; SV: Swedish

Figure 1

Actual Translation and Interpretation in an 11-Language Setting with 5 Language Groups

Nevertheless, in order to ensure comparability with the standard panarchic case, we need to compare the original total (given by *N∗(N-1))* with the formula that takes account of the asymmetry just described, that is, *N∗(M-1)*, as defined above.

Clearly, under our assumptions, the number of directions of translation and interpretation is reduced from 110 (that is, [11×(11-1)]) to 44 (that is, [11×(5-1)]). In the current situation with 23 official languages, the number of directions of translation and interpretation is reduced from 506 (that is: 23×(23-1)) to 184 (that is: 23×(9-1)) under "strong" intercomprehension, and to 253 (that is: 23×(12-1)) under "weak" intercomprehension. Even under restrictive assumptions, the number of directions of translation and interpretation needed could be cut by half. Let me stress the fact that hastens this reduction in the number of directions of translation and interpretation does not imply the elimination of any current language combination from the inner workings of EU institutions. Quite apart from the fact that any text affecting the public (such as a piece of EU legislation) would still be translated into all the official languages of the Union, all 23 languages could still be used within EU institutions. Any of the 23 languages could be the source of an internal document to be studied and discussed by Commission officers with any native language. The reduction in the number of translation and interpretation directions just suggested concerns the translation and interpretation occurring *at a given time* for the dissemination of *one particular document*, because it would only be translated into one language per group.

Let us now propose a more systematic view of the figures involved. Table 3 considers three cases arranged in rows: the pre-May-2004 European Union with 11 official languages; the pre-January 2007 European Union with 20 official languages; and the post-January European Union with 23 official languages, following the accession of Bulgaria and Romania to EU membership, and the recognition of Irish (Gaelic) as a fully official language.[17] In columns, I consider the number of directions of translation and interpretation that must be guaranteed under standard multilingualism (that is, without intercomprehension), noted *D*; the same number under "strong" intercomprehension (D_{IC}^{1}) and under "weak" intercomprehension (D_{IC}^{2}). For the latter two, I provide an indirect indicator of the corresponding rate of return, namely, the decrease, in percentage terms, in the number of directions of translation and interpretation required under both assumptions (r_1 and r_2).

Extrapolating from current cost estimates (according to which each direction of translation and interpretation carries a theoretical average cost of a little over € 10m), the expected decrease in expenditure, even under "weak" intercomprehension, stands at about € 2,606m every year[18]. This is, of course, a theoretical fig-

[17] Though formally recognised as an official language of the EU, Maltese still is not treated as such, largely because of the difficulty of recruiting a suitable number of adequately trained translators and interpreters into Maltese. This case is currently governed by a 30-month transitional regime that came into force on 1 May 2004 and should, in principle, end by 31 October 2007.

[18] According to official EC figures for 1999 applying to the erstwhile 20-member Union (see e.g. M. Gazzola (2006), *Managing… cit.*), the total cost for translation and interpretation stood at about € 686m, of which roughly 60% were spent on panarchic communication (that is, for 110

ure, because the EU actually spends less than the € 5,212m (over € 5 billion) that it could in principle be spending if it actually devoted € 10.3m per year on all 506 directions of translation and interpretation that it is supposed to offer. However, it provides a useful indicator of the potential import of resorting to intercomprehension.

Table 3

Intercomprehension and Reduction of Intra- and Inter-Group Directions of Translation and Interpretation

	No IC	*Strong IC*			*Weak IC*		
N	*D*	*M*	D_{IC}^{1}	r_1	*M*	D_{IC}^{2}	r_2
11	110	4	33	70.0%	5	44	60.-%
20	380	8	140	63.2%	10	180	52.6%
23	506	9	184	63.6%	12	253	50.0%

In the following section, we shall discuss, among other implications, those that relate to wider policy concerns, in particular the EU's professed objective to ensure multilingualism, a worthy goal repeated in many official declarations (see for example the European Commission 2004-2006 *Action Plan*[19] or the *New Framework Strategy for Multilingualism* issued in November 2005, which actually contains a fair bit on language learning but studiously avoids the more intricate language policy questions)[20]. However, before doing so, it is interesting to venture a back-of-the-envelope estimation of the financial rate of return on intercomprehension.

For this purpose, let us keep assuming that we are only interested in intercomprehension *within* EU institutions; that is, we are not even considering the range of possibilities that would be open if intercomprehension were offered to European citizens at large. This concerns, therefore, EU staff, numbering about 32,000 civil servants, as well as 785 European MPs; for the sake of simplicity, let us assume that the total number of people concerned is equal to 35,000. Given that persons working for EU institutions do not spend their entire career in Brussels, and that European MPs are elected for five-year terms, a certain turnover in EU staff and MEPs must be taken into account. Let us assume an average career length of ten years (which will tend to be longer than ten years for EU officers, and shorter for persons elected to European Parliament); this means that on average, about 3,500 people enter the system per year, while just as

directions) and 40% on oligarchic communication (that is, for 3 directions encompassing English, French and German). Thus, the weighted average of directions coverage is equal to 68.4, yielding an *average cost per direction* of € 10.3m.

[19] See http://ec.europa.eu/education/doc/official/keydoc/actlang/act_lang_en.pdf.

[20] See http://europa.eu/languages/servlets/Doc?id=913.

many leave it. Let us ignore re-entry into the system and assume that all hirings and elections amount to "fresh" entries. This implies that the number of people who would need to be trained for intercomprehension to be roughly 3,500 per year.

On the basis of aggregate figures on the cost of foreign language education[21], the *average* per-person cost of imparting strictly *receptive* skills in *related* languages (that is, in English and Dutch for German speakers, in Bulgarian for Slovene speakers, in French, Italian and Portuguese for Spanish speakers and so on) can be estimated at € 3,000. This translates into a total expenditure of € 10.5m per year. If, in the long run, an outlay of € 10.5m gives rise to a savings of € 2,606, year in, year out, this amounts to a return on investment of almost 250% (more precisely: 248.19%).

As has been pointed out before, the major problem with multilingualism is not its financial cost, but its complex and, in fact, cumbersome nature (to the point that the actual operations of the EU are significantly less multilingual than could be expected). However, financial savings are not to be disdained, and implementing intercomprehension is, in purely economic terms, a rather attractive proposition.

So far, we have only developed a very general line of argument. Let us now, in the following section, consider various issues that deserve attention if this general argument is to be used in actual language policy design.

5. **From Principles to Practice**

Our way of approaching intercomprehension is exploratory, and accordingly, numerous issues need to be explored at closer range. Eight such sets of issues have been identified and are discussed in this section. Some of them are mainly theoretical, some empirical, but most should be investigated at both levels.

5.1. *Language Pair-Specific Intercomprehension*

In the foregoing discussion, I have assumed away all differences between language pairs. However, at least $M \times R_i \times (R_i\text{-}1) \div 2$ pairs $(\forall\ R_i > 1)$ have to be investigated; therefore, each specific pair has to be considered separately, because not all pairs allow for equally easy and symmetrical intercomprehension. Consider the pair of languages α and β. We need to come up with an index of accessibility, x, varying from 0% to 100% (or, equivalently, expressed on a scale from 0 to 1) that can, for any language pair, take three different values, as indicated in Table 4:

[21] See e.g., F. Grin and C. Sfreddo (1997), *Dépenses publiques pour l'enseignement des langues secondes en Suisse,* Schweizerische Koordinationsstelle für Bildungsforschung/Centre suisse de coordination pour la recherche en éducation, Aarau (Switzerland); F. Grin (2005), *L'enseignement… cit.*

Table 4

Accessibility Indexes in a Language Pair

Listener's language → Speaker's language ↓	α	β
α	$x_{\alpha\alpha}$	$x_{\alpha\beta}$
β	$x_{\beta\alpha}$	$x_{\beta\beta}$

where $x_{\alpha\alpha} = x_{\beta\beta} = 1$ (or, more generally, $x_{ij} \rightarrow 1 \ \forall \ i$), but we have no guarantee that $x_{\beta\alpha} = x_{\alpha\beta}$ (for example, Spanish is reportedly easier to understand for speakers of Portuguese than the other way around). These indices ought to be established empirically, which requires overcoming considerable measurement difficulties, because actual "comprehension" of a message in a foreign language depends on a host of contextual variables, in addition to inter-speaker variability that may not be entirely erased even by high-quality training. Let us also note that this question carries normative implications: in order to agree that intercomprehension indeed occurs within a language pair, an adequate benchmark value (say, x^*, which would presumably be close to unity) ought to be defined. This benchmark value must, of course, apply to both directions. What would happen in cases where $x_{\beta\alpha} > x^* > x_{\alpha\beta}$ remains, to my knowledge, an unexplored question.

5.2. *Oral* versus *Written Intercomprehension*

No difference has been made so far between oral and written communication, and we have assumed that intercomprehension was equally feasible for both. Casual experience of communication across language boundaries, however, is enough to show that all other things being equal, it is often easier to understand written materials than oral speech. This may be due to several contextual factors, some quite mundane like the surrounding noise level that hamper the (foreign) listener's ability to differentiate between what are (at least to him) very similar phonemes; it may also be due to the variety of accents used by different speakers; and, more generally, not all languages are phonetically equal, and it can be shown empirically that some languages are simply easier to understand than others[22]. By contrast, reading a text in a foreign language is often easier, largely because the receptor has a much larger degree of mastery over the conditions under which reading takes place.

Though very likely, this general rule would require empirical testing, in order to estimate the respective values of written accessibility (say, x_{ij}^{w}) and oral accessibility (say, x_{ij}^{o}). This amounts to estimating two different versions of Table 4 above. It is very likely that $x_{ij}^{w} > x_{ij}^{o} \ \forall \ i,j$. However, the difference between both may depend

[22] C. Piron (2002), "Communication linguistique: étude comparative faite sur le terrain", *Language Problems and Language Planning,* no. 26 (1), pp. 23-50.

on the language pair, and even on the direction of "comprehension"; in other words, the difference $x_{ij}^{w} - x_{ij}^{o}$ may represent very different values.

On the basis of such empirical estimation, it is possible that the potential of intercomprehension, while considerable for written texts, is more modest for oral communication. At the same time, it is useful to point out that forms of intercomprehension can be observed *across* language families. Thus, whereas the distinction just made between oral and written communication may led us to consider restrictions on the actual extent of intercomprehension, the fact that it can occur within pairs such as, say, English and French, could in fact mean that its scope is broader than allowed for so far.

5.3. *Actual Processes of Multilingual Communication*

Not only is communication a complex process in itself, but multilingual communication is even more so. It is the object of sustained attention in the field of applied linguistics, where it has given rise to a substantial, if fragmented literature. It would be well beyond the scope of this paper (and the field of competence of its author) to attempt to summarise the main trends in recent research in multilingual communication, let alone point out the questions that would arise if it the main results of this research were revisited by explicitly introducing inter-comprehension. Circumstantial evidence suggests that in practice, intercomprehension is already widely used in conversation between native speakers of different languages, as has already been observed in classical sociolinguistic work on code-switching. However, observations are, in the main, generated by case studies that lack an overarching framework which could serve systematically to explore the question of how intercomprehension works (or could work), if people were actually trained in it.

5.4. *Developing More Precise Cost Estimates*

Given its exploratory nature, our discussion has relied on extremely simple estimates of cost. These, however, should be refined in several directions. They regard (i) the cost of *teaching* intercomprehension; (ii) the cost of *achieving satisfactory information transfer* in a context of intercomprehension; (iii) the cost of all the *translation and interpretation that would still be needed* in this context.

First, the cost of teaching intercomprehension, which we have quite summarily estimated at € 3,500 per civil servant or European MP, does of course depend on at least two things: the inter-linguistic distance between a person's first language and the other languages in the same group in which this person is expected to develop adequate receptive competence; and the number of languages in the group concerned. Under "weak" intercomprehension, the number of languages in question varies from zero (for native speakers of Hungarian, Romanian, Greek, Maltese and Irish; the latter admittedly being a somewhat contrived example, since native speakers of Irish can hardly avoid becoming bilingual in Irish and English well before they take up a job in Brussels or are elected to the European Parliament) to three (for native speakers of French, Italian, Portuguese and Spanish). Clearly, the cost is not the same, nor is the effort expected from learners, which warrants more

precise estimates. Let us therefore repeat that the figure of € 3,500 has been used as an average value.

Secondly, the cost of ensuring successful communication is also likely to depend on context, including in terms of the language pair considered. In relation with this point, it is important to give some thought to the continued need for some kind of professional language assistance to language users, particularly listeners or readers who are expected to understand a message provided in a language which is morpho-syntactically close to their own, but still remains a foreign language. Strictly speaking, they would no longer need a *translator* or an *interpreter* to understand this message. However, users of intercomprehension reading a document in a language closely related to theirs may still need a *language assistant* who would help them make sense of the odd sentence where the use of colloquialisms would reduce transparency. This points to possible evolutions in the professions of translators and interpreters.[23]

Thirdly, our estimates of the cost of translation and interpretation (and hence of the savings achieved through a resort to intercomprehension) are based a on a very simple cost function which includes only *variable costs*. Let us remember that if total cost is defined (as we have done here) as the simple product of the number of directions of translation and interpretation by an average "per-direction" cost (which we have estimated at a little over € 10m per year), we are implicitly assuming the total cost function to be linear, while at the same time ignoring all fixed costs. A much more refined cost function ought to be estimated, taking account of the fact that even under intercomprehension, *any* source language is possible, and that if intercomprehension is combined with a rotation system, *any* target language is possible too. Therefore, the capacity to guarantee any of the *N(N-1)* directions of translation and interpretation needs to be maintained, and this carries fixed costs. The question of the possible non-linearity of the cost curve is a point which cannot be addressed properly without much closer investigation. However, its importance may be secondary, taking account of the fact that some factors suggest a rising, and others a decreasing marginal cost[24].

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[23] At this point, it is useful to point out that some costs of linguistic hegemony have not been addressed, and are generally ignored in all discussions on possible language regimes for the European Union. These costs relate to the fact that (i) non-native speakers of the hegemonic language, because of their non-perfect command of the language, may miss some of the information directed at them (notwithstanding the notoriously dodgy Eurobarometer survey results on foreign language competence in the European Union) and that (ii) when having to express themselves in a language of which they have less than full command, they may feel constrained and unable to convey the entirety of their ideas. On this question, see C. PIRON (1994), *Le défi des langues. Du gâchis au bon sens,* L'Harmattan, Paris ; C. PIRON (1998), *Language Constraints and Human Rights,* Paper presented at the Anniversary Symposium on *Language and Human Rights*, United Nations, Geneva, 28 April 1998.

[24] On the one hand, an increase in the number of directions of translation and interpretation used implies more complex, and hence costlier operations, implying a rising marginal cost. On the other hand, some economies of scale may be possible through the development of more efficient language data bases, which would tend to bring average cost down and imply decreasing marginal cost.

5.5. *Intercomprehension and Linguistic Justice*

The preceding discussion of intercomprehension has focused on matters of allocative efficiency, in the sense that I have attempted to show how information transfer can be achieved at a lower cost in terms of translation and interpretation, notwithstanding associated effects, some of which would dampen it (for example, the need for the services of language assistants), while others would reinforce it (for example, the reduced opportunities for delays linked to the fact that fewer directions of translation and interpretation would need to be activated in all cases; or, of course, the more efficient dissemination of ideas that their authors would express with more precision, once given the possibility to do so in their native language). However, as pointed out in Section 2, the distributive implications of language policy scenarios are essential dimensions of their evaluation. This leads us to a brief discussion of the implications of intercomprehension for linguistic justice.

Linguistic justice has been explored by Pool[25], and re-examined by Van Parijs[26] and De Briey and Van Parijs[27]; the costs of linguistic injustice, particularly as they proceed from linguistic hegemony, are explored by Grin[28]; for a recent survey on linguistic justice, see e.g. De Schutter[29].

It should be clear that intercomprehension, in that it implies that *everyone* (except, in the very basic forms of intercomprehension considered here, native (and unilingual) speakers of Greek, Irish, Hungarian and Maltese) must make an effort to broaden the scope of his or her receptive competence, constitutes a significant improvement, in terms of equal treatment of speakers of different languages, on the linguistic hegemony that seems to be currently gaining ground. The actual extent of the reduction in unfair transfers that would result from formally introducing intercomprehension into the workings of the European Union remains to be assessed. To the extent that linguistic hegemony gives rise to *unfair* transfers, and given that linguistic hegemony runs contrary to the spirit, and even the letter, of the regulations that govern (at least in principle) EU institutions, restoring a fairer regime through intercomprehension does not require compensation of the current beneficiaries of linguistic hegemony (or of linguistic oligarchy, in those contexts where German and French are used alongside English).

However, it remains necessary, from a distributive standpoint, to ensure that the contributions made by all to an intercomprehension-based regime are fair. In the example developed in this paper, speakers of Romance languages (with the possible exception of speakers of the Romanian, in the "weak" version of

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[25] J. Pool (1996), "The official language problem", *American political Science Review,* no. 85, pp. 495-514.

[26] P. Van Parijs (2001), "Linguistic Justice", *Politics, Philosophy & Economics,* no. 1, pp. 59-74

[27] L. De Briey and P. Van Parijs (2002), "La justice linguistique comme justice coopérative", *Philosophie économique,* no. 5 (1), pp. 5-37.

[28] F. Grin (2004), "On the costs of linguistic diversity", in P. Van Parijs (ed.), *Linguistic Diversity and Economic Solidarity,* De Boeck-Université, Brussels, pp. 189-202 ; F. GRIN (2005), *L'enseignement des langues étrangères comme politique publique,* Rapport au Haut Conseil de l'évaluation de l'école, Ministère de l'éducation nationale, Paris, http://cisad.adc.education.fr/hcee.

[29] H. De Schutter (2007), "Language policy and political philosophy. On the merging linguistic justice debate", *Language Problems and Language Planning* , no. 31 (1), pp. 1-23.

intercomprehension) would have to consent to a considerable effort and learn to understand at least three other languages, while speakers of, for example, Danish could get away with just one, and speakers of languages that make up a group of their own as shown in Table 2 would be spared any such effort.

We have seen that the total cost of ensuring intercomprehension would stand at about € 10.5m annually, which is the product of a per-person expenditure of € 3,000 and a number of new "entrants" into the system of 3,500 per year. Now, these € 10.5m are spent on developing 32 different forms of intercomprehension, where 32 is simply the value of the indicator S_{INTRA} introduced earlier, with N=23 and M=12 (assuming "weak" intercomprehension). In other words, the average per-IC type cost can be estimated at € 10.5m/32, that is, € 328,125 per year. Dividing this number by the number of persons on which it must be spread, that is, 3,500 new "entrants", yields a per-person and per-IC type cost of € 93.75, which we shall round up to € 100 for the purposes of this discussion. Thus, while all member countries should contribute to the total cost of € 10.5m in accordance with the general rules governing country contributions to the EU budget, countries whose nationals have to develop intercomprehension skills for three languages would get a payment of € 300 per civil servant joining the EU staff (or MEP elected to the European Parliament) while countries whose nationals are not expected to develop any particular intercomprehension skills would receive no payment. The schedule of payments is provided in Table 5 below.

Table 5

Per-Person Payments Accruing to each Member State (yearly average, euros)

Member state	Amount	Member state	Amount
Austria	200	Ireland (Irish spkrs)	0
Belgium (Dutch spkrs)	200	Italy	300
Belgium (French spkrs)	300	Latvia	100
Bulgaria	100	Lithuania	100
Czech Republic	200	Luxembourg (1)	250
Denmark	100	Malta	0
Finland (Finnish spkrs)	100	Poland	200
Finland (Swedish spkrs)	100	Portugal	300
France	300	Romania	o
Germany	200	Slovakia	200
Greece	0	Slovenia	100
Hungary	0	Spain	300
Ireland (English spkrs)	200	United Kingdom	200

(1): Lëtzbuergesh is assumed not to be an official or working language of the EU, and MEPs and EU civil servants from Luxembourg are considered native speakers of either German or French in equal proportions.

Let me hasten to add that the schedule described in Table 5 is based on the particular series of assumptions made so far; however, it exemplifies the type of

calculations that ought to undertaken, on the basis of more precise figures, in order to guarantee the fairness of the system.

5.6. *Intercomprehension as Part of a Broader Language Policy*

So far, we have been looking at intercomprehension as a strategy that should offer an efficient and equitable alternative to some language policy regimes for the European Union, particularly the regimes that give undue priority to one language only (English) or to a troika of languages (English, French and German)[30].

However, intercomprehension is particularly apposite when used in conjunction with other language policy tools, in particular rotation. In fact, rotation systems are impossible without intercomprehension. Under a system of rotation, the official languages used by the authorities of a multilingual country (or inter- or supra-national organisation) first choose a "complete" set of official languages, but a distinction is made between official status and actual use. In practice, the subset of languages actually used changes on a regular (usually annual) basis. Typically, a rotation system is designed to apply only to the internal workings of government or administration, the right of citizens to be addressed and to receive service in their first language being unaffected. The number of official languages used in any given year may be one or more; the periodicity may be the same for all languages, or quicker for some languages than others (in the limiting case, one or more languages may be official at all times, while other languages enjoy official status every few years; true rotation, however, should imply that no single language is official all the time.

To my knowledge, South Africa is the only country to have seriously considered a rotation system, according to Section 5 of the proposed *South African Languages Bill*. Even more interesting, the *Bill* defines four language groups and institutes a rotation across groups rather than languages themselves. However, at the time of writing, this piece of legislation, though adopted by cabinet, has been shelved for an indefinite period; in practice, while 11 languages, in theory, remain co-official[31], the national authorities increasingly rely on English alone. In the European context, the political choice to combine rotation and intercomprehension could constitute a powerful message that member states mean to take multilingualism seriously.

5.7. *Intercomprehension and Language Dynamics*

Even though intercomprehension is a widespread reality, its systematic use in an institutional context remains a novel idea. Hence, the ways in which a wider resort to intercomprehension would affect micro- and macro-level language dynamics remain largely unexplored. We may, for example, ask ourselves whether patterns of convergence towards so-called "central" or "super-central" languages (using here

[30] There may be other, even more efficient and equitable language regimes, but these will not be discussed here; for a general comparison, see F. Grin (2004), *Coûts et… cit.*

[31] Zulu, Xhosa, Afrikaans, Northern Sotho, English, Tswana, Sesotho, Tsonga, Swazi, Venda and Ndebele (in decreasing numbers of L1 speakers).

a terminology proposed by De Swaan[32]), would be significantly affected, whether the convergence towards English as a common language, which has been predicted (even advocated) by van Parijs[33], would occur, and, more generally, whether an intercomprehension system is stable.

Investigating this las question unavoidably requires embarking on highly conjectural considerations, and this exercise will not be undertaken here. Let us simply observe that even if intercomprehension may not guarantee absolute stability, it certainly offers more stability than the current uncontrolled drift towards English (incorrectly described as a *lingua franca*, since a true *lingua franca* results from the combination of elements of the languages spoken by the participants in the exchange, rather than the mere imposition of one of these languages).

In any event, although language policy is intended to steer our linguistic environment in a desirable direction, it cannot (nor is it intended to) dictate speakers' language choices: even if some policies are more interventionist than others (such as the Singaporean well-known campaigns to promote English as the language of interethnic contact, and then to promote Mandarin Chinese as an alternative to southern Chinese dialects), long-term, macro-level evolutions still occur, and the philosophy that underpins the resort to intercomprehension is fully compatible with the recognition of these dynamics.

5.8. *Towards an IC-Europe?*

Finally, it is important to consider a wider application of intercomprehension. The preceding discussion has been deliberately restricted to the issue of intercomprehension within EU institutions. We have seen that intercomprehension offers significant advantages in terms of allocative efficiency and distributive fairness, making it, in general terms, an attractive public policy. However, it is also an approach that directly embodies some of the core political and cultural values of the European project, owing in particular on its emphasis on diversity, and because it allows European authorities to take multilingualism seriously.

Therefore, it could also be interesting to investigate the implications of a more general application of intercomprehension, particularly by revising the goals of national education systems. Instead of a stampede towards English, which implies a massive transfer in favour of the barely 14% of its citizens who have English as their first language, a coordinated foreign language teaching policy could emphasise the development of receptive competence in related languages. Such a strategy does not imply the abandonment of standard foreign language teaching, which also aims at developing productive competence. However, it could powerfully contribute towards modes of communication that actually reflect and respect the multilingual agenda proclaimed by the European Commission. Investigating this question requires designing and comparing scenarios that encompass the issues al-

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[32] A. De Swaan (2002), *Words of the World. The Global Language System,* Polity Press. Cambridge [MA].

[33] P. Van Parijs (2004), "Europe's Linguistic Challenge", *Archives européennes de sociologie*, no. XLV (1), pp. 113-154.

ready mentioned in this section, while also incorporating the workings of national education systems.

6. **Conclusion**

In this paper, I have proposed looking at language policy issues as a form of public policy, which should therefore be assessed using the tools of policy evaluation. Key concepts of language policy analysis have been presented in section 2; we have then turned to the particular case of the European Union with its 23 official languages (section 3). In section 4, we have introduced the concept of intercomprehension, exploring the implications of its use for the internal workings of the European Commission and the European Parliament.

We have shown that intercomprehension can make multilingualism considerably cheaper and less cumbersome in the day-to-day operations of a linguistically diverse institution, while also meeting much higher standards of distributive fairness than the current drift towards linguistic hegemony (which essentially means "English only"), or the unsatisfactory "oligarchic" alternative, which gives a prominent role to English, French and German but largely sidelines all the other languages of Europe.

For both classes of reasons, intercomprehension may contribute to make multilingualism an easier, more acceptable, and therefore more realistic proposition than the so-called "panarchic" regime, according to which *all* languages not only are fully official, but should be treated equally. Ample evidence indicates that this is not the case, and even if the Commission regularly proclaims its commitment to multilingualism, nobody believes it any more. Therefore, if multilingualism is to become (and remain) a reality in the operations of the European Union, it is sensible to look at more complex solutions. Intercomprehension serves precisely this purpose.

We should also add that intercomprehension meets core human rights concerns, in that it treats speakers of all languages much more equally than the current practice of EU institutions, under which some very basic human rights are denied to the vast majority of Europeans[34].

Clearly, many aspects of intercomprehension remain to be investigated. Until now, it has been examined mostly from the perspective of applied linguistics or language didactics. However, given its potential importance as a language policy instrument, a broad, interdisciplinary assessment of various language policy scenarios embodying intercomprehension appears very necessary.

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Religious Differences and Human Rights: Historical and Current Experiences from Southeast Europe

Baskin Oran

1. **Introduction: Theory and Concepts**

In Western European experience, Religion[1] is the cohesion ideology fought, superseded, and finally replaced by Nationalism[2] during the historical process. This process can be illustrated in the table below[3]:

Table 1

Cohesion Ideology and its Focus of Supreme Loyalty

REPRESENTED BY	The Church (Clergy/ Aristocracy)	Parliament (Bourgeoisie)	*Communist Party (Nomenklatura)*	?
FOCUS OF SUPREME LOYALTY	God	Nation	*Labour*	?
COHESION IDEOLOGY	Religion	Nationalism	*Proletarian Internationalism*	?
MARKETPLACE ("MOTHERLAND")	Manor	Independent National State	*Proletarian State*	The Globe
MODE OF PRODUCTION	Feudalism	(National) Capitalism	*Communism*	International Capitalism (Globalisation)
Phase	1 →	2 →	2a →	3

[1] Religion is both a sentiment (belief in God, prophet, angels, and so forth) and an ideology. Here, the reference is of course to the latter, as expressed by the term "cohesion ideology".

[2] Here again, Nationalism means the "ideology" of nationalism (see chart), and not the "sentiment of nationalism" (deep attachment to one's "nation"). For sentiment and ideology of nationalism see H. KOHN (1956), *The Idea of Nationalism, a study in its origins and background,* MacMillan, New York.

[3] See B. ORAN (2001), "Kemalism, Islamism, and Globalization: A Study on the Focus of Supreme Loyalty in Globalizing Turkey," *Journal of Southeastern European and Black Sea Studies*, Vol. 1, no. 3, Frank Cass, London, pp.20-50.

The terms used in the above table can be defined as follows:

a) Mode of production (MP): The fundamental socio-economic order, or the "infrastructure". It is mainly concerned with the question "who owns the main means of production (land, capital, and so forth) and how the surplus value is distributed among social classes/strata". MP is the starting point of the process represented in the above table.
b) Every MP is realized within the boundaries of a "Marketplace". This territory, which can also be defined as the frontiers of trade, broadens every time a new (and more developed) MP replaces the old one. As a matter of fact, history can be conceived as the process of broadening this Marketplace. This is what people instinctively call "Motherland" simply because the whole process of social and economic activity, in short, the very life itself, takes place within its boundaries.
c) Every new MP formulates its own cohesion ideology (CI). CI is the main ideology formulated by the dominant group/the ruling class[4] to keep the society firmly together under the set of values and interests of this group/class[5].
d) Every CI, in turn, points up to a new Focus of Supreme Loyalty (FSL) to reshape the society. FSL represents the highest concept around which the individuals in a given society agree to gather to build a cohesive entity.

The process can thus be formulated as follows: New MP → New CI → New FSL. Here, it is important to keep in mind that every FSL is embodied in an institution, which itself is represented by the elite of the said group/class.

To concretize this process, European history from the Middle Ages to our day can be summarised as follows.

2. **Western Europe: "History and Language" Formula**

The feudal order sprang from the ashes of the Dark Ages, during which the only institution which escaped the destruction of the Vandal attacks, thanks mainly to its fortress-like monasteries, was The Church. The latter was the only sanctuary for the desperate masses and accumulated immense wealth mainly through their donations and bequests. Its Clergy, on the other hand, was the only possessor of the unique "hi-tech" knowledge of the period, reading and writing in Latin. The Church therefore became the strongest of the feudal lords and it was only normal that its CI became the CI of the period: Religion[6].

During Feudalism, Religion pointed up to God as the FSL. God was of course represented by The Church, in other words, The Clergy (Phase 1 of the Table). As

[4] "Dominant group" for classless societies or societies in which classes are not fully structured yet, and "ruling class" for "modern" class societies.

[5] But it must be pointed out that, to be accepted by the society at large, this CI must also provide acceptable solutions to the needs and expectations of the masses.

[6] It should also be kept in mind that Religion (Christianity) was the only common denominator of a feudal society composed of a multitude of immensely varied agricultural entities.

the MP evolved from Feudalism to Mercantilism[7], the Marketplace became much larger because trade, transcending the lands of the Manor, came to encompass the whole territory of the Absolute Monarchy and even further (actually, that was the reason why the bourgeoisie helped the King to set up this monarchy).

This radical change in the concept of territory, as always happens in history, had very deep effects on the minds of the people. Expansion of trade to the outer corners of the kingdom unavoidably took along the "national" language first, then common feelings, and so on. Instead of the Manor only, people slowly started to call the whole kingdom the "motherland", and started to speak a common language. In this nation-building process, where the rational atmosphere of the Enlightenment prevailed, the FSL seemed for a moment located in The Prince. Leviathan, the benevolent monarch of Hobbes, no longer received its mandate from God.

Then, as the process continued from Mercantilism to Capitalism proper, a chain of philosophers, with Rousseau as the final and crucial link, came to propose the concept of Nation as the FSL. With the revolutionary fever of 1789 helping, Nationalism as the CI was finally born[8]. When the King was decapitated, the Nation as FSL was represented by the national Parliament, or more realistically, by the national Bourgeoisie, to whom the monopoly of trade within the realm of the National State now belonged (Phase 2 of the Table).

After 1917, this order of things was challenged by a newer MP (Communism) that pointed to Labour as the FSL (Phase 2a of the Table). This column of the Table is printed in white Italics to point out that only some countries have experienced it. Nowadays, we witness the advent of still a newer MP, International Capitalism, rarely expressed as such and generally called Globalisation[9] (Phase 3 of the Table).

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[7] For the sake of simplicity, this transitory phase is omitted in the Table.

[8] "Robespierre has been to Rousseau, what Lenin has been to Marx". For the best account of this story, see Royal Institute of International Affairs (RIIA) (1963), *Nationalism, A Report*, 2nd printing, Frank Cass, London, p.30.

[9] Globalisation is a much-discussed concept and therefore it needs further evaluation. Globalisation can best be defined as the expansion of the Western system, carrying with it both its infrastructure (capitalism) and superstructure (anything from rationalism, secularism, human and minority rights, democracy, and so forth, to child pornography). Globalisation today (from the 1990s) is actually the third expansion of the West. There have been two previous waves, both corresponding to the needs of capitalism then:

1) The expansion of 1490s: Geographical discoveries necessitated by the trade policies of the Mercantilist period that ended up what we call "Colonialism"; and,

2) The expansion of 1890s: Western expansion required by the needs of the Industrial Revolution's monopoly stage (cheap flow of raw materials, new markets, new territories to increase the marginal productivity of the capital, new lands for the excess population, and so forth); in short, what we call "Imperialism". The first globalisation was naturally weak; the second was much stronger and paved the way for the third, which is actually its continuation after a break of some 50 years, a break mainly due to Soviet Union and its ideology.

The third expansion today is created by three successive and complementary developments that took place during the last thirty years: a) The advent of Multinational Companies in the 1970s, b) Revolutionary developments in Communications in the 1980s, and c) The fall of the Soviet system in the 1990s.

This phase 3 is the antithesis of both phases 2 and 2a. Communism, at least for today, exists no more as a world system. National Capitalism is also over (or, will soon be over) along with all its attributes: import substitution in the economy, monopoly over jurisdiction in the national territory, nationalism in cultural life, and most important of all, the concept of Nation as the FSL. All this happens because the concept of territory is changing (that is, being enlarged) again: the same "national" boundaries that once created the bourgeoisie are now strangling it.

In this phase, all we are sure of is the new MP (international capitalism) and its new marketplace (the globe). The new CI is not there yet, and cannot be expected to appear so soon in this "new world disorder". The FSL seems to be turning towards the Individual, but the question as to who will represent the Individual remains unanswerable yet.

From all this, the important message we can draw for our subject matter is as follows. Religion represents many important and paradoxical things at the same time. It is: i) an identity-forming concept, and therefore, ii) a difference-creating concept between the majority and the minorities, and therefore iii) a conflict-generating concept, and finally, iv) a generator of human rights violations. In other terms, Religion is the cohesion ideology for the majority, and by extension, a cause of human rights violations for the minority. In this sense, the four remarks expressed above concerning Religion are also *mot-à-mot* valid for Nationalism, a cohesion ideology which stands out with the language of the dominant group, the "national language"[10].

3. **"History and Religion" in South East Europe**

This "History and Language" formula of Nationalism in western Europe is significantly different from that in South East Europe, however. This is illustrated in many countries by numerous examples.

When the Greek invasion of Anatolia in 1922 (the "Mikrasiatiki catastrophe") ended in a debacle, and Greece and Turkey decided to make a compulsory exchange of populations, those who were asked to compulsorily emigrate were not Greeks and Turks. As formulated by article 1 of the Convention, "the *Rum*[11] Orthodox" of Turkey were to leave for to Greece and "the Muslims" of Greece were to

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The first development enlarged the marketplace to embrace the whole globe now (hence, "globalization"). The second development made it possible to conquer the minds of people instead of their country (and that made it very difficult to challenge the conquest this time). The third practically gave the West monopolistic control over international developments, political as well as economic.

[10] It goes without saying that Religion, the most durable of all human feelings, did not disappear in Europe; but it no longer formulated the FSL and was essentially limited to a sentiment between the individual and his/her God.

[11] *Rum*, from Romios/Romioi meaning Roman, is how the Greeks of Istanbul called themselves even before Ottoman Empire/Turkey. The name Byzantium was invented after the Holy Roman Empire declared itself the successor of Rome.

leave for Turkey[12]. In other words, at the end of the war between the two Nationalisms, the exchange was made on the basis of Religion. Thus, some Orthodox of Turkey (like the *Karamanlis*) who spoke only Turkish and some Muslims of Greece who spoke only Greek were compulsorily exchanged. As a result, the former came to be called "*Turko Sporos*" (Turkish Sperm) in Greece, and the latter "*Yari Gavour*" (Half Infidel) in Turkey.

Even under communism, Bulgaria forced the Muslim-Turkish minority to abandon their Muslim names and adopt Bulgarian/Orthodox names. Among fundamental Muslim practices officially prohibited after 1984 were circumcision, sacrifice, Ramadan fasting, celebration of religious holidays, the religious marriage ceremony, ablution before burial, burial in a Muslim cemetery, and worship in mosques[13]. Pomaks of Bulgaria, a Slavic people who had become Muslim, and the Muslim Roma were pressured as much as the Turks.

When in the 1990s Yugoslavia, the "paradise of minorities", disintegrated into a hell of minorities, it did so along the Catholic/Orthodox divide. Serbs, Croats, Slovenes, and Bosnians, who are from the same Slav ethnicity, jumped at each others' throat (or, rather, the majorities did it to the minorities) because they were Orthodox, Catholic, or Muslim, in that same order. Bosniaks, the worst victims of this catastrophe, spoke the same language as their worst oppressors, the Serbs.

I would like further to illustrate the situation by putting emphasis on the religious minorities in Greece and Turkey. These two nation-states have had a rather difficult common history. The former built its national identity using the Turk as the "other" in 1820s, and the latter did it using the Greek in exactly the same way, exactly a century later. In both cases, the religious element is a *sine-qua-non* of the national identity. Therefore, they perfectly fit within the "History and Religion" formula.

3.1. *To Be a Muslim Minority in the Greek State*

Greece, an EU member since 1981, only considers Muslim-Turks of Western Thrace, Jews, and Catholics[14] as "official" minorities. For instance, Vlachs, a Romanian minority of Orthodox denomination, or the Macedonian minority, equally Orthodox, have no status. On the other hand, human and minority rights of Muslim-Turks, who enjoy minority status according to a number of bilateral and international instruments (1913 Athens Treaty Protocol no.3, 1920 Sevres Treaty be-

[12] For an account of the Exchange and its results see B. Oran (2003), "The Story of Those Who Stayed, Lessons from Articles 1 and 2 of the 1923 Convention", *Crossing the Aegean: An Appraisal of the 1923 CompulsoryExchange of Populations between Greece and Turkey*, in R. Hirschon (ed.), Berghahn Books, Oxford, New York, pp. 97-115.

[13] For a detailed account on the Turkish-Muslim minority in Bulgaria see A. Dayioglu (2005), *Toplama Kampindan Meclis'e, Bulgaristan'da Türk ve Musluman Azinligi* (From the Concentration Camp to the Parliament, Turkish and Muslim Minority in Bulgaria), Istanbul, Iletisim Publishers, p. 512.

[14] Catholics only enjoy religious minority rights while Jews and Muslims have linguistic rights as well.

tween Greece and the Great Powers, and the 1923 Lausanne Peace Treaty Art. 45) have been strongly discriminated against in multiple fields[15].

Immediately after the signing of the Exchange Convention, the *Rums* fleeing Turkey, or coming through the exchange, occupied the lands and the houses of approximately 50.000 Turks. Greek authorities did not prevent this[16]. The Evros province adjacent to the Turkish border was completely emptied of the Turkish minority by administrative measures, except for some Roma. Although the minority was extremely keen on calling itself "Turkish", the Greek State always denied this identity, and referred to it as "Muslim"[17]. Associations bearing the adjective "Turkish" were closed in 1984 on court orders (Xhanty Turkish Union, founded 1927; Komotini Turkish Youth Union, founded 1928; Western Thrace Turkish Teachers Union, founded 1936)[18].

Law 376/1936, on the Forbidden Zone, insulated the Minority of Pomak origin living in the Rodopi Mountains, and separated them from the Turks[19]. Freedom of movement was violated, as "No-return passports" were issued to analphabetic members of the minority travelling to Turkey[20]. Pomak children educated by the State in the Thessaloniki Special Pedagogy Academy were appointed on preference to minority schools as Turkish teachers[21]. The school books that ought to arrive from Turkey according to the 1968 Culture Protocol were not permitted. Likewise, newspapers and books from Turkey were also banned and radio and TV broadcasts from Turkey were prohibited in public places such as coffee houses[22].

Although Law 2345/1920 required, by virtue of the 1913 Athens Agreement, Protocol 3, that the Muftis be elected, these religious heads were always appointed by Greek authorities. A Head Mufti, also mentioned by the same international instrument, never existed. On January 1991, the law of 1920 was repealed and the Mufti was thereafter named by the President of the Republic on the proposal of the Minister[23]. Community Administrative Councils and the trustees of the pious foundations were also appointed by the State after the military coup of 1967[24].

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[15] For a detailed account of the Turkish-Muslim Minority in Western Thrace see B. Oran (1991), *Turk-Yunan Iliskilerinde Bati Trakya Sorunu* (The Western Thrace Problem in Turco-Greek Relations), second updated edition, Bilgi Publishers, Ankara. For those who cannot read Turkish the following summary: "The Sleeping Volcano in Turkish-Greek Relations: The Western Thrace Minority", K. Karpat (ed.) (1966), *Turkish Foreign Policy, Recent Developments,* Madison, Wisconsin, pp. 119-138.

[16] A. Alexandris (1992), *The Greek Minority of Istanbul and Greek-Turkish Relations, 1918-1974*, second printing, Athens, Centre for Asia Minor Studies, p. 120-121; B. Oran, *Turk-Yunan Iliskilerinde…*, pp. 81, 236 and 277-279.

[17] The minority is composed of three ethnic groups: Turks (65%), Pomaks (30%) and Roma (5%), but its common identity is Turkish. What's more, Pomaks consider themselves more Turkish than the Turks and Roma consider themselves more Turkish than the Pomaks for reasons easy to understand: the Turks are the heirs of the Ottoman Empire, they are economically stronger, Turkey is the kin-state that cares for all, while the other two have no kin-states, and so forth.

[18] B. Oran, *Turk-Yunan Iliskilerinde…*, p. 172-176.

[19] *Ibid.*, p. 116-117, 219 and 290-291.

[20] *Ibid.*, p. 217-218.

[21] *Ibid.*, p. 124, 127-134 and 220-221.

[22] *Ibid.*, p. 149-151 and 211-212.

[23] *Ibid.*, p. 170-172.

[24] *Ibid.*, p. 157-159.

Mini pogroms took place against the minority in Komotini (29 January 1990) and in Xanthi (23-24 August 1991)[25]. Some 60,000 minority members were deprived of Greek citizenship as a result of Art. 19 of the Greek Citizenship Law 3370/1655, which stated that "*Greek citizens of non-ethnic Greek origin*" may lose their citizenship during their stay abroad[26].

Candidates from the minority have been unable to enter the Parliament as independent MPs because they too, like political parties, have been subjected in November 1990 to a nationwide election threshold of three per cent[27]. Various licences were denied to the Turkish-Muslim minority: licences to build and repair houses and mosques, tractor driving licences (of the utmost importance to this mainly rural minority), hunting-rifle licences, business opening licences[28]. Turkish university diplomas were not recognized by the State organization called Dikatsa[29]. The Minority was dispossessed of its lands through several processes like unification of divided lands (*anadazmos,* Law 821/1948), discriminative expropriations, refusals to recognize the title-deeds or possession, claims of illegal occupation, and so forth. In the meantime, soft-loans were extended to those Orthodox Greeks intending to buy Muslims' lands by the Central Bank and the Agricultural Bank, while a discriminative application of Law 1366/1938, requiring special permission to buy or sell land on border and seashore areas, prevented the minority from buying new land[30].

Since the end of 1990s, these open violations significantly diminished in some fields. The most recent amelioration is Law 3497, enacted in 2006, Article 27 of which repealed Law 1363/1938 giving the local Orthodox clergy the authority to obstruct construction and repair of mosques, and also to decide over the height of the mosque minarets, which should be lower than that of the church tower.

The diminution of discrimination in the 2000s did not mean, however, the end of human rights violations. Although the then-foreign minister Yorgo Papandreou admitted in March 2001 that the identity of the minority was indeed Turkish, the State still refers to them as Muslim only, thereby trying to insulate the minority from Turkey. The adjective "Turk" is still forbidden in the names of associations, and these remain closed. The government still insists on the preferential appointment of the Thessaloniki Special Pedagogy Academy graduates as Turkish teachers, thereby injecting an element of discord between Pomak and Turkish ethnicities. Community Administrative Councils and the pious foundations' trustees are still being appointed by the State. To oblige minority candidates to run on Greek parties' ticket only, the three per cent election threshold on a national level is still applied to independent candidates as well.

But the most blatant violation of human rights that continues as of today is the appointment of the Mufti. In a country where autonomous Orthodox clergy

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[25] *Ibid.*, p. 191-194.
[26] *Ibid.*, p. 213-216.
[27] *Ibid.*, p. 209-210.
[28] *Ibid.*, p. 221-228.
[29] *Ibid.*, p. 151-152 and 228-229.
[30] *Ibid.*, p. 236-263.

is considered the *sine-qua-non* of public order and its appointment by the State is unthinkable, the Muslim-Turkish minority is not permitted to elect its religious head. On the other hand, this awkward situation paves the way for other violations of minority rights, because the Mufti is the head of many important Muslim institutions in Greece (pious foundations, imams in urban areas, the madrasahs (religious schools), and so forth). These Muslim institutions are therefore controlled by an appointee on the payroll of the Orthodox Greek government.

3.2. *To Be a Non-Muslim Minority in the Turkish State*

In Turkey, probably the most "laicist" of all existent laic States[31], the case of the religion is no different. To start with, the Alevis[32], unlike the Sunnis, are denied public funds for their places of worship. The fact that compulsory religion courses in schools teach Sunni Islam only is the source of intense protest from the Alevi community, which took the matter to the European Court on Human Rights. There has always been a ban on associations bearing the name "Alevi"; it was partly lifted in mid-2000s only. Mass lynching parties against them have occurred throughout Anatolia from 1978 through 1993, not to mention countless mass killings in the Ottoman Empire. Many Alevis have to hide their identity to find work, and so forth[33].

The case of the non-Muslims is distinct. Turkey, the successor of the Ottoman saviours of the Iberian Peninsula Jews in 1493, tried to get rid of its non-Muslim minorities by various methods. As already mentioned, the *Rum* minority faced a compulsory exchange in 1923 and the great bulk of the non-exchangeable *Rums* had finally to emigrate to Greece; after that, in 1964 the State expelled some 12,000 of them bearing Greek passports and blocked their assets at the Central Bank[34]. In 1925, the non-Muslims of Istanbul were required to have a special permit to travel outside the confines of the municipal area[35]. In the 1920s and

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[31] "Secular" is an attribute of the society; "laic" is that of the State. "Laicist" means a State policy exerting strong pressure on religion and clergy to secularize the society "from above". Turkey, France, and Tunisia can be counted among these States. See my "Kemalism, Islamism…" and also my paper at the Birzeit University, Palestine symposium on 3 June 2006: "Religion-State Relations and Political Transformation in Turkey," in *Religion, the State and International Society*, Birzeit University Press, Birzeit, Palestine 2006, pp. 25-34.

[32] To define the Alevis is not easy because there are at least five different interpretations even among themselves as to who they are from the point of view of religion: some consider they are "the best Muslims", some other think they are shamans. In fact the Alevis, forming roughly twenty per cent of Turkey's population, are quite different from the Sunni Muslims, the majority.

[33] B. Oran (2005), *Turkiye'de Azinliklar, Kavramlar – Teori – Lozan – Iç mevzuat – Içtihat – Uygulama* (Minorities in Turkey, Concepts – Theory – Lausanne – Legislation – Case law), third edition, Istanbul, Iletisim Publishers, p. 111. For those who cannot read Turkish, a summary of some parts of this book is available at: B. Oran, "Minority Concept and Rights in Turkey: The Lausanne Peace Treaty and Current Issues," in Z.F. Kabasakal Arat (ed.) (2007), *Human Rights in Turkey,* Philadelphia: University of Pennsylvania Press, pp. 35-52. Some of my articles concerning minorities are also available in English or French at: www.turquieeuropeenne.eu.

[34] A. Alexandris**,** *The Greek Minority…***,** p. 280-285.

[35] A. Alexandris, *The Greek Minority…*p. 140; D. Guven (2006), *Cumhuriyet Donemi Azinlik Politikalari ve Stratejileri Baglaminda 6-7 Eylul Olaylari* (The Incidents of 6-7 September in the Context of Republican Turkey's Minority Policy and Strategy), Istanbul, Iletisim Publishers, p. 111.

1930s, campaigns of "Citizen, speak Turkish!", repeated in the 1960s, harassed the non-Muslims as well as the Kurds[36]. At the end of 1925, on the promulgation of the new Civil Code, non-Muslims were pressured to renounce their rights under Lausanne Treaty, Art. 42(1)[37].

In 1927, the Rum minority living on the two islands at the entrance of Dardanelles (Bozcaada/Tenedos and Gökçeada/Imbroz) encountered many pressures, including expropriation of their lands and the violation of their rights under article14 of Lausanne Peace Treaty (education in Greek, and special administration). In 1934, under attacks from local civilians and unable to obtain official aid and comfort, the Jews of Thrace were forced to leave Thrace for Istanbul[38]. In 1941, non-Muslims between the ages 25-45 were drafted and assigned to the infamous unarmed Labour Battalions[39]. In 1942, the notorious Wealth Tax, which had no judicial recourse, fully discriminated between Muslims and non-Muslims belonging to the same income group (the latter had to pay 8 to 10 times more than the former[40]). Those non-Muslim businessmen unable to pay the exorbitant sums were sent to work camps in eastern Turkey.

Non-Muslims were registered in a "Foreigners' Book" until the 1940s[41]. On 6-7 September 1955, non-Muslim property was devastated during a pogrom that lasted two days in Istanbul and one day in Izmir[42]. In 1961 (under Law Number 222), minority schools were considered under the "private schools" category and were treated as foreign schools. According to Art. 24/2 of the Law on Private Institutions of Education (no. 625), enacted in 1965 and only abolished in February 2007, the head assistant-director in these schools was required to be "*a Turkish citizen of Turkish origin*"[43]. On 29 July 1964, the Ministry of National Education issued decision no. 2690 and closed *Rum* schools in Gökçeada and Bozcaada (that had been closed in 1927 and reopened in 1950). Their real estate was transferred

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[36] B. Oran, Turkiye'de Azinliklar…, p. 108-109; D. Guven, *Cumhuriyet Donemi…*, p. 113-115; R.N. Bali, *Cumhuriyet Yillarinda Turkiye Yahudileri: Bir Türklestirme Seruveni (1923-1945)* (Jews of Turkey in the Republican Years: An Adventure in Turkefication), 6. B., İstanbul, Iletişim Publishers, 2003, p. 131-148; A. Alexandris, *The Greek Minority…*p. 183 and 271; H. Poulton (1997), *Top Hat, Grey Wolf and Crescent: Turkish Nationalism and the Turkish Republic*, London, Hurst and Company, p. 116 and 121.

[37] A. Alexandris, *The Greek Minority…*, p. 135-139; A. Aktar (2001), *Varlik Vergisi ve Turklestirme Politikalari* (The Wealth Tax and Turkefication Policies), 5th printing, Istanbul, Iletisim Publishers, p. 112-113; R.N. Bali, *Cumhuriyet Yillarinda…*, p. 54-102.

[38] R.N. Bali, *Cumhuriyet Yillarinda…*, p. 243-265; A. Aktar, *Varlik Vergisi…*, p. 71-99; H. Poulton, *Top Hat,…* p. 116; D. Guven, *Cumhuriyet Dönemi…*, p. 123-128.

[39] A. Alexandris, *The Greek Minority…,* p. 213-214; H. Poulton, *Top Hat…,* p. 116-117; R.N. Bali, *Cumhuriyet Yillarinda…*, p. 411-423; D. Guven, *Cumhuriyet Donemi…*, p. 133-135.

[40] H. Poulton, *Top Hat…,* p. 117; D. Guven, *Cumhuriyet Donemi…* p. 139.

[41] F. Çetin (2002), "Yerli Yabancilar" ("Domestic Foreigners"), *Ulusal, Ulusalüstü ve Uluslararasi Hukukta Azinlik Haklari* (Minority Rights in National, Supra-National and International Law), (prepared for publication by Ibrahim Kaboglu), İstanbul, İstanbul Bar Association Human Rights Center, pp. 285-294.

[42] D. Guven, *Cumhuriyet Donemi…*, p. 25-42; Alexandris, *The Greek Minority…,* p. 256-266; *6-7 Eylül Olayları, Fotoğraflar-Belgeler* (6-7 September Incidents), Fahri Çoker Arşivi, İstanbul, Tarih Vakfi Yurt Publications, 2005, passim; M.H. Dosdogru (1993), *6/7 Eylül Olayları* (6-7 September Incidents), İstanbul, Bağlam Publishers, passim.

[43] A. Alexandris, *The Greek Minority…*, p. 287.

to local administrations on 25 September 1964 by decision no. 701-16/0-41156[44]. On 10 April 1964, the *Rum* Orthodox Patriarchate of Phanar's printing plant was closed on grounds of the rule that "only private individuals and legal persons can own printing plants". The Phanar Patriarchate was not a legal person[45].

In 1971, the Halki Seminar of the *Rum* minority was closed because on 12 January 1971 the Constitutional Court ruled that all private institutions of higher learning should be nationalized. Although these have now been reopened, Article 3 of Law 5580 (which replaced the former Law 625 on 14 February, 2007) still bans the opening of private higher institutions of military, police, and religious education[46]. Church repair licences were refused in the 1980s. Between 1985 and 1987, non-Muslim students were forced to participate in religious lessons teaching Islam[47]. Article 5.j of the by-law against sabotage, enacted in 1988 and repealed in 1991, called the non-Muslims: "*Domestic foreigners*". As a matter of fact, the said article counted the following among potentially dangerous categories: "*Domestic foreigners in the country (Turkish citizens) and those from foreign race*"[48].

Fearing that Phanar would become a sort of Vatican, investigations were started in October 1993 against Rum citizens buying houses in the neighbourhood of the Patriarchate[49]. On 17 April 1996, Administrative Court No. 2 of Istanbul called a *Rum* citizen of Istanbul "*[a] foreign subject Turkish citizen*"[50]. In February 2006, a report of the State Supervisory Council attached to the President of the Republic classified non-Muslim pious foundations under the category "*Foreign Legal Persons*"[51]. Between 1971 and 2003, decisions of the Court of Cassation (*Yargitay*) permitted the seizure of non-Muslim foundation property acquired after 1936. The issue came to be notoriously known as the "1936 Declaration", which merits special attention.

3.3. *The "1936 Declaration"*[52]

The "1936 Declaration" relating to non-Muslim foundations (referred to as "Community Foundations" in Turkish law) is a striking example of discrimination against non-Muslims, and its story deserves to be summed up as follows. In 1936, the new Law on Foundations ordered all foundations to submit a property declaration, which was later called the "1936 Declaration", listing immovables and other properties possessed by each foundation. The underlying reason for this law was to

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[44] B. Oran, *Turkiye'de Azinliklar*…, p. 109, footnote 93.

[45] A. Alexandris, *The Greek Minority*…, p. 299.

[46] *Ibid.*, p. 293 and 305.

[47] See daily newspapers *Milliyet*, August 10th, 1985; *Cumhuriyet*, November 19th, 1986 and *Cumhuriyet*, January 15th, 1987.

[48] F. Çetin, *"*Yerli Yabancilar*"*…, p. 70.

[49] B. Oran, *Devlet Devlete Karsi* (State vs. State), Ankara, Bilgi Publishers, 1994, p. 27-38.

[50] B. Oran, *Turkiye'de Azinliklar*…, p. 90-91.

[51] Daily *Vatan, August 12th 2006*. For the text of the Report see presidential website http://www.cankaya.gov.tr/tr_flash/DDK/yte.htm

[52] B. Oran, *Turkiye'de Azinliklar*…pp. 90, 100, 101, 103, 104, 111, 129, 155, 158, 179; Y. Reyna and Y. Şen (1994), *Cemaat Vakiflari ve Sorunlari* (Non-Muslim Foundations and their Problems), Istanbul, Gozlem Publishers, passim.

dry out the financial resources of the "Islamist" foundations, which were seen as threats to the new laicist regime. After Atatürk's death in 1938, those property lists were forgotten, however.

The escalation of the Cyprus conflict to a military confrontation between Turkey and Greece in the 1970s changed the situation. The General Directorate of Foundations required, this time non-Muslim foundations only, to resubmit their regulations/constitutions, called "*Vakıfname*." However, none of them had one, because these foundations had been established under the Ottoman rule by individual decrees of the Sultan of the day. The General Directorate of Foundations responded to this problem by ruling that the declarations of 1936 would be considered their *Vakifname*. In case these declarations did not carry a special provision entitling the foundation to acquire immovable property, the General Directorate would expropriate all the immovable property acquired after 1936.

The non-Muslim foundations challenged the ruling by arguing that the declarations submitted in 1936 were merely a list of immovable properties possessed by each foundation at that date, but that could not persuade the General Directorate to change its decision. No matter how these properties were acquired (purchases, donation, lottery, inheritance, and so forth) expropriations went ahead, despite the fact that they were in violation of the Lausanne Treaty, Articles 40 and 42(3). The expropriated properties were returned to their previous owners or to their beneficiaries at no cost; and when there were no inheritors (which was most often the case), they would be acquired by the Treasury at no cost.

When the case was brought to the Court of Cassation, the Second Legislative Branch of the Court upheld the policy in its unanimous ruling of 6 July 1971, which included the following statement in its justification: "*It is evident that the acquisition of immovable property by non-Turkish legal persons is forbidden ...*" However, the legal person that the Court referred to and banned from acquiring property, the *Balikli Rum Hastanesi Vakfi* [Balikli Greek Orthodox Hospital Foundation], was not a "foreign" pious foundation. When the issue was brought before the General Board of Legislation of the Court on 8 May 1974, the same ruling and justification were maintained. The following year, the Court's First Legal Department reached a similar verdict:

> "*... Except under the conditions specified by either the law no. 1328 or in Article 44 of the law no. 2762, foreign nationals are forbidden from acquiring real estate in Turkey. Because these decrees concern the public order, there is nothing against the law for the plaintiff institution to challenge the unlawful behavior of the defendant institution, or in taking legal action for the annulment of the unlawful disposal. Therefore, based on the reasons explained above and on the other reasoning indicated in the court verdict, it is unanimously decided that the improper appeals be rejected and the court decision be approved.*"[53]

[53] Supreme Court of Appeals, First Legislative Branch ruling dated June 24, 1975, no. 3648-6594; see Y. Reyna and Y. Şen, *Cemaat Vakiflari...*, p. 91-92.

The attorneys of the Balikli Greek Orthodox Hospital Foundation appealed for the re-evaluation of the verdict. This time the same branch supposedly admitted the mistake in considering some Turkish citizens as foreigners because they are non-Muslim, but insisted on its discriminatory position in the new ruling of 11 December 1975: "… *the reference to 'the laws that forbid foreigners to own real estate' in the decision of approval is due to an error. [The court decides] to delete that phrase by amendment [and] otherwise […] denies the request for correction of judgment.*"[54]

This problem, which resulted in the seizure of many valuable immovables of the non-Muslim foundations, was taken up during the reform process that took place between 2001 and 2004, called the EU Harmonization Packages. But it was to take more than one package to tackle such a deep-rooted problem. The third package of 03 August 2002 amended the Law on Foundations to enable non-Muslim foundations to acquire immovable property with the authorization of the Council of Ministers and also to register any un-registered property (see below) in their use. The fourth package of 02 January 2003 amended the law again to replace the Council of Ministers' authorization with that of the General Directorate of Foundations (GDF). This time, too, the inequality between Muslim and non-Muslim foundations prevailed, because the new Law (no. 4771/4) required that the GDF "solicit the recommendations of the related Ministries and Public Agencies" prior to approving non-Muslim Foundations' requests to buy or dispose of real estate (a procedure not required for the applications of Muslim foundations). Since the State agencies alluded to here were the Ministry of Foreign Affairs and the security and intelligence agencies, it can be deduced that the reformed law still treated the non-Muslim citizens as "foreign" and therefore suspect. The implementation, on the other hand, showed that out of 1,813 applications made by non-Muslim foundations for registration of their real estate, 574 were refused, 579 were found "incomplete," and 226 applications were returned as "invalid"[55]. The sixth package (19 June 2003) prolonged the submission period for applications for registration of properties. In other words, it took three successive laws in one year to tackle problems concerning immovable property of the non-Muslim foundations[56].

The result of an over four years-long continuous and painstaking reform effort was a new Law on Foundations of November 2006. Nevertheless, the law failed to bring meaningful amelioration to all the three main problems underlying the issue. These can be summarized and analyzed as follows:

1) Property illegally seized since early 1970s and transferred to the Treasury or put under the jurisdiction of the GDF: The law foresees the restitution of the said property. It fails, however, to describe how this will be implemented. The land registry authorities in Turkey will never undertake such a property transfer without a court order.

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[54] Decision dated 11 December 1975, no. E:975/11168, K:975/12352; see Reyna and Şen, p. 93.
[55] Daily *Radikal*, May 5th, 2003.
[56] B. Oran, *Türkiye'de Azinliklar…*, pp. 117-118.

2) Property illegally seized and sold to third parties: The law provides no solution whatsoever to this problem.
3) Properties actually possessed and used by the non-Muslim foundations, but not registered in their names. These were in fact registered to fictitious names, mostly to the names of Armenian saints, and also to the names of trustworthy clerics of the time. This was because until 1913 foundations were not considered legal persons and therefore were not entitled to possess immovables. The result concerning this category is as follows: Because GDF resists the reform, only 27.6 per cent of these have been registered to the foundations as of August 2005; that is, exactly three years after the EU Harmonization Law of 03 August 2002, mentioned above[57].

This picture was further accentuated when the President of the Republic vetoed, in December 2006, this new Law on Foundations because it might bestow upon non-Muslim foundations too much "political and economic power", and this might undermine Turkish national interests and divide the country. The latest news was a decision of the European Court of Human Rights on January 2007, the very first one on this deep-rooted problem. It determined that Turkey should pay 910,000 Euros in damages to the Phanar *Rum* High School Foundation for violation of property rights, protected in Protocol I, Art. 1. It has been reported that a similar decision concerning a court case filed by Surp Pirgic Armenian Hospital Foundation for damages amounting to 2.2 million Euros is due in only a matter of months[58].

4. **A Re-Evaluation of the Theory**

Now, let us go back to where we started. Historically, Nationalism is the cohesion ideology that dethroned Religion as far as cohesion ideology is concerned. In light of the information given above, this observation should be further studied and qualified so as to explain the particular role of Religion in South-East Europe. As a matter of fact, in the reciprocal case of Greece and Turkey, we witness many instances where Religion is a very important component of national identity, and by extension, contributes to strengthening Nationalism and therefore to the violations of human rights of minorities. Reasons for this regrettable symbiosis can be summarised as follows.

To start with, we can point out to at least four general principles explaining the prominent role of Religion in societies dominated by Nationalism:

1) The superstructure (ideas, ideology, law, and so forth) of a particular infrastructure continues to be effective, albeit decreasingly, when this infrastructure gives way to a new one.

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[57] *Milliyet*, daily, 02 August 2005.

[58] B. Oran (2007), "AIHM Uzerine Ibretlik Yorumlar" (Exemplary Comments on ECHR Decision concerning Non-Muslim Foundations), weekly *Agos*, January 19th, (www.baskinoran.com, no. 344).

2) The new superstructure gladly adopts certain aspects of the old one in case it finds them either difficult to oppose or profitable to appropriate[59].
3) When the Religion of the invader/majority is different than that of the invaded/minority, Religion strongly supports national identity/Nationalism.
4) Religion is the CI of lesser industrialized societies.

Further still, the following explanations peculiar to our area of study come to our mind:

1) The Table on CI and FSL is a general scheme mainly pertaining to the experience of western Europe, where a strong bourgeoisie, developing very early, succeeded in secularizing the society. Due to the relatively late development of the bourgeoisie/capitalism in both Turkey and Greece, the modern constituent elements of the "nation" are weak, resulting in a low degree of secularization and a high dose of Religion.
2) In both countries, Religion and Nationalism had an important common enemy in the very recent past: Communism. Therefore, they cooperated closely.
3) In both countries, the factor "we" is built by using each other as "they" at an interval of 100 years**.** In this particular process of nation-building, we cannot help but notice that, using the terminology of Professor Samim Akgonul, the "otherness of proximity" (the Millet System) concept is transformed into "constitutive enmity" (national enemy). On the other hand, this "constitutive enmity" is itself embodied in another version of "otherness of proximity", which is "minority"[60].
4) In both countries, Religion had an important historical role to play. In Orthodox Greece, the Greek Church was a "national church" because it had been very instrumental during the War of Independence. For the Ottomans, the concept of "*Ghaza*" in Islam had served as the ideological justification for military expansion.
5) In both countries, the Nation-state dominates the ideological framework. The Nation-state can best be defined as "the type of State which views its nation as a homogenous entity and uses assimilation to realize this dream". Religious homogeneity thus becomes very important in our respective cases.
6) In addition to these reasons highlighting the role of Religion in mutual Nationalisms/human rights violations, we can detect a purely regional factor that accentuates (an even re-creates) the historical role of Religion in human rights violations: the residue of the "*Millet* System".

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[59] For example the *Dies Natalis Solis Invicti* (the birthday of the unconquered sun) festival of the Romans held on December 25 became Christmas, pagan tree worship became the Christmas tree, pagan spring festival became Mardi Gras/Fasching, Pharaoh the son of the Sun became Jesus Christ, and so on.

[60] S. Akgonul (2006), "From the "constitutive enmity" to the "otherness of proximity": Turkish and Greek minorities in the nation making process in Greece and Turkey", paper delivered at the conference *The Making of Modern Greece: Nationalism, Romanticism, and the Uses of the Past (1797-1896)*, September 6-10, 2006, King's College, London.

4.1. *The Millet System*

The *Millet* System, started in 1454, was the backbone of the Ottoman society, which it divided between the Dominant Nation[61] (*Millet-i Hakime*) and the Dominated Nations (*Millet-i Mahkume*). The former melted in one single pot all Muslim communities, regardless of ethnic differences, and the latter was made up of different non-Muslim "*millets*": Armenian, Rum, Jewish, Catholic, Protestant, and so forth.

In this System, the Muslims were legally and practically superior to the non-Muslims, who were second-class subjects, but were nevertheless autonomous to the degree of collecting taxes and exercising legal jurisdiction over the adherents. The *Millet* System, of course, could not survive the arrival of Nationalism to the Empire. It therefore resulted in the formal secession of Greece in 1829, and was legally abolished in the Empire by the Tanzimat Firman of 1839 because this document declared all subjects equal before the law.

The *Millet* System thus formally disappeared from the laws but never from the minds of the people. It had cloned itself in each of the Nation-states born out of the ashes of the Ottoman Empire. What is more, for Greece and Turkey, it cloned itself even in the text of the Lausanne Peace Treaty of 1923, Section Three, Protection of Minorities (articles 37 to 45). Articles 38 to 43 defined as non-Muslims the minorities to be internationally protected in Turkey, and Art. 45 represented the other side of the coiin: "*The rights conferred by the provisions of the present Section on the non-Moslem minorities of Turkey will be similarly conferred by Greece on the Moslem minority in her territory*". The examples we have seen above bear profuse witness, in the field of human rights, to the lamentable results of the state of mind created by this in both countries.

5. **Conclusions**

In this area of the globe, Religion (and Denomination), instead of Language, emerges as the main component of national identity. By the same token, this "History and Religion" formula becomes, in many instances, the main source of violation of human rights of the dominated/minority groups by nationalist majorities. Among the many reasons already cited, the impact of the *Millet* System, representing the very History and Religion itself, appears to be the most important one.

In Greece today, the "Dominant Nation" is represented by Orthodox Greeks and the "Dominated Nation" by Muslim Turks, Orthodoxy being the *sine-qua-non* of *the* Greek. The exact opposite is, of course, true in Turkey, where Islam is the *sine-qua-non* of *the* Turk. The official ideology of the Nation-state claims that "Turk" is the identity of each citizen and therefore the supra-identity[62] of the na-

[61] "*Millet*", now meaning Nation, was used to describe a religious community well until the beginning of the 20th century.

[62] Infra-identity is the identity of the group in which the individual is born. Supra-identity is the identity imposed by the State upon its citizen.

tion. But "Turk", necessarily a Muslim, is in fact the infra-identity of ethnic Turks (the "objective identity"[63]), or only represents those Muslims who define themselves as Turks, like the Bosnians in Turkey (the "subjective identity"). The term "Turk" leaves out the non-Muslims and those Muslims who do not define themselves as Turk, like in the case of many Kurds. Worse still, the *Millet* System was not content with cloning itself in the Nation-states of South-East Europe, and from the point of view of human rights it became much worse in the steamroller framework of the Nation-state. Because they were "different", the Dominated Nations/Minorities lost their autonomy and gained another attribute: that of potential traitor.

To portray the might of the Dominant Nation mentality, it is particularly important to take note of the fact that the Alevis and the Kurds in Turkey, two groups which strongly demand group (and therefore, minority) rights and which are defined as "minority" by European sources and official documents, strongly react to being called "minority", saying: "We are not minority; we are essential and constituent elements of this country". This categorical refusal and declaration, along with the examples cited above concerning certain legal terms and court decisions in Turkey, should be considered the symptom *par excellence* of the historical *Millet* System's Dominant Nation mentality, entrenched even amongst dominated groups.

All this discussion could perhaps lead us to the conclusion that Religion is the most important and durable feature of South-Eastern European countries. And perhaps this could well be extended to a great many western countries, given the role that Religion begins to re-assume today in the resurgence of xenophobic Nationalism under the rubric of Islamophobia.

Last but not the least, the Millet System now embraces not only South-East Europe but the whole continent where the Muslims became the New Jews and where the Dominant Nation and the Dominated Nations switched places between Muslims and Non-Muslims.

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[63] Objective identity is the innate historical-anthropological identity of the individual and is therefore involuntary. Subjective identity is the identity voluntarily chosen by the individual and can thus be different from the objective identity.

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Note on contributors

Xabier Aierdi Urraza
Senior Reader in Sociology at the University of the Basque Country.
Director of the Basque Observatory on Immigration.

Robert Dunbar
Senior Reader in International Law at the University of Aberdeen (Scotland).
Member of the Scottish Gaelic Language Board (*Bòrd na Gàidhlig*).

François Grin
Professor in Economics at the University of Geneva (Switzerland).
Director of the Observatory "Economy-Languages-Formation".

Javier De Lucas Martín
Professor in Legal Philosophy at the University of Valencia (Spain).
Director of the College of Spain (Paris, France).

Baskin Oran
Professor of International Relations at the University of Ankara (Turkey).
Columnist of the Weekly *Agos*.

Francesco Palermo
Senior Reader in Constitutional Law at the University of Verona (Italy).
Director of the Institute of Studies on Federalism and Regionalism at the European Academia of Bozen/Bolzano (South Tyrol).

Eduardo J. Ruiz Vieytez
Senior Reader in Constitutional Law at the University of Deusto (Bilbao, The Basque Country).
Director of Pedro Arrupe Human Rights Institute.

Sia Spiliopoulou Åkermark
Associate Professor in International Law at the Raoul Wallenberg Institute at the University of Lund (Sweden).
Director of the Peace Institute of the Åland Islands (Finland).

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The democratic management of cultural diversity is the greatest political challenge for present-day European societies. The plural character of our societies forces us to rethink the basic political concepts, starting off from a new idea of inclusive and plural democracy. The application of human rights must be reconsidered in the light of present-day reality so that democratic states are able to guarantee the benefit of these rights to all persons through their identity and not in spite of it, thus creating political spaces that are open to a multi-identity coexistence.

University of Deusto