

The protection of linguistic diversity through fundamental rights

By

Bruno De Witte

Volume I

Volume II

Volume III

January 1985

LAW
Fhm9
WIT



LAW Fhm9
WIT



new

ACKNOWLEDGEMENTS

I owe a debt to all the professors and researchers of the Law Department of the European University Institute, and particularly to professor Cappelletti, my supervisor, and professors Mény and Weiler, for their intellectual stimulus and personal encouragement.

To me, the European University Institute, despite its many temptations, has offered ideal research conditions, for which I feel grateful to all persons involved in its creation and present running.

Outside the Institute, I would like to thank especially Paolo Carrozza (Firenze) and Antoni Milian (Barcelona) for their invaluable documentary help.

Mijn dank ook aan Veerle en Floris, omdat zij mij er voortdurend aan herinnerden dat er, behalve thesissen schrijven, ook nog wel andere dingen bestaan.

Firenze, 31 January 1985.

TABLE OF CONTENTS

Introduction	I
<u>PART ONE : LINGUISTIC DIVERSITY</u>	1
<u>Chapter One : The Concept of Linguistic Diversity</u>	2
Sect. 1 : A Definition	2
Sect. 2 : A Description	13
<u>Chapter Two : Historical Overview of Linguistic Diversity</u>	24
Sect. 1 : The Emergence of Linguistic Nationalism	26
A. Ideological Origins	26
B. Social-Economic Origins	29
Sect. 2 : The Decline of Linguistic Diversity	31
Sect. 3 : A Re-Emergence ?	36
A. Ethnic Mobilisation	37
B. Migrations	42
C. European Integration	43

<u>Chapter Three : Linguistic Conflicts and Policies</u>	45
Sect.1 : Elimination or Protection ?	45
A. Territorial Change	46
B. Population Transfer	48
C. Assimilation	49
D. Pluralism	54
Sect. 2 : The Case for the Protection of Linguistic Diversity	56
A. Protect. for the Sake of the Political System	57
B. Protection for the Sake of the Individual	64
Section 3 : Instruments of Protection	70
A. Federalism and Regionalism	72
B. Consociationalism	88
C. Fundamental rights	91
<u>PART TWO : FUNDAMENTAL RIGHTS</u>	97
<u>Chapter One : A Concept of Fundamental Rights</u>	98
Sect. 1 : Rights	99
Sect. 2 : Fundamental Rights	102
A. National Fundamental Rights	104
B. International Fundamental Rights	112

<u>Chapter Two : Which Fundamental Rights ?</u>	125
Sect. 1 : At the National Level	125
A. Fundamental Rights v Linguistic Rights	125
B. Beyond the Dichotomy	138
Sect. 2 : At the International Level	147
A. Minority Protection after the 1. World War	151
B. The Shift from Minority to Human Rights Protection	161
C. Development of the Human Rights Program	165
D. Survival (and Revival ?) of the Minority Approach	170
 <u>Chapter Three : The Enforcement of Fundamental Rights</u>	 175
Sect. 1 : Enforcement of National Constitutional Rights	177
A. Judicial Review	181
B. Problems of Standing	187
Sect. 2 : National Enforcement of International Human Rights	201
A. Domestic Status	201
B. Rank of the International Treaties	204
C. Caveat and Conclusion	210
Sect. 3 : International Enforcement	216

A. State Reports	218
B. Inter-State Disputes	220
C. Individual Petitions	223
<u>PART THREE : FREEDOM OF EXPRESSION</u>	235
<u>Chapter One : Comparative Constitutional Law</u>	236
Sect. 1 : Freedom of Expression and Language Use	236
Sect. 2 : Limitations to Free Language Use	255
Sect. 3 : Positive State Action under Freedom of Expression	275
Sect. 4 : Free Expression in the Broadcasting Media	288
A. The Role of Freedom of Expression	290
B. Linguistic Diversity in the Broadcast Media	309
<u>Chapter Two : International Law</u>	315
Sect. 1 : Does Freedom of Expression Include the Freedom of Language Use ?	316
Sect. 2 : The Limits of Freedom of Expression	320
Sect. 3 : Freedom of Expression and Positive State Duties	331
Sect. 4 : The Special Regime of the Communication Media	335

Sect. 5 : The Free Circulation of Information	339
<u>PART FOUR : EDUCATIONAL RIGHTS</u>	353
<u>Chapter One : Comparative Constitutional Law</u>	353
Sect. 1 : Language and Education	354
Sect. 2 : Freedom of Education	363
A. The Constitutional Recognition of Private Education	364
B. Claims to State Subventions and their Consequences for Language Use	375
Sect. 3 : The Right to Education	385
A. General Guarantees of Educational Rights	386
B. Other Guarantees of Language Use in Public Education	396
C. Conclusion	413
<u>Chapter Two : International Law</u>	416
Sect. 1 : The European Convention	416
A. The Right to Education	418
B. Freedom of Education	430
Sect. 2 : Universal Human Rights Conventions	436
A. The Right to Education	436

B. Freedom of Education	439
<u>PART FIVE : EQUALITY</u>	444
<u>Chapter One ; Comparative Constitutional Law</u>	445
Sect. 1 : The Scope of Equality	451
A. Equality before the Law or Equal Protection of the Laws ?	451
B. Control on Differentiations and Equiparations?	460
Sect. 2 : The Meaning of Equality	480
A. General Remarks	480
B. Non-Discrimination	496
C. Pluralistic Equality	510
D. Affirmative Equality	543
.	
<u>Chapter Two : International Law</u>	569
Sect. 1 : The European Human Rights Convention	569
A. Scope of the Principle of Non-Discrimination	569
B. Meaning of the Non-Discrimination Principle	582
Sect. 2 : European Community Law	601
A. The General Principle of Equality	606
B. Specific Non-Discrimination Provisions	609
Sect. 3 : Universal Human Rights Instruments	619

<u>PART SIX : THE RIGHT TO USE ONE'S LANGUAGE</u>	634
<u>Chapter One ; Comparative Constitutional Law</u>	635
<u>Chapter Two : International Law</u>	651
Sect. 1 : Beneficiaries	652
Sect. 2 : Contents	664
Conclusion	675

INTRODUCTION

This study aims at being, first of all, a contribution to the legal analysis of the problem of linguistic diversity within states. As such, it arises from a dissatisfaction with the way this problem is currently treated by large part of scholarly writing. In the social sciences, there is widespread interest in ethnic and linguistic movements, and the political behaviour in relation to them; fewer studies concentrate on the influence of those movements on governmental policies and institutions, and they refer mainly to instruments of conflict regulation such as consociationalism and regional autonomy. There is little or no interest in the role of individual rights as an element of ethnic politics and policies. This theme is left to more outspokenly legal studies.

There is general agreement in legal writing that fundamental rights play an important, and even increasing, role in the protection of minorities. Yet, it is added that this applies above all for common values, in which minority members do not structurally differ from the rest of the

population, as well as for minorities who are willing to assimilate in the mainstream. Now, this is typically not the case with language minorities, the main object of this study. In matters of language use at least, they want to be treated differently from others, in order to be able to use their mother tongue, in addition to the language of the majority, in the educational system, the public administration, broadcasting, etc. Therefore, it is usually said, general fundamental rights, granted to all, are of little use for them; what they need are institutional measures of autonomy, and special language rights.

There is a large measure of truth in this. Yet, I will attempt, in this study, to relativise this accepted view and to show that 'generic' fundamental rights can, in fact, play a very meaningful role in the protection of linguistic diversity. A number of rights that can be found in all Constitutions and Bills of Rights, namely freedom of expression, educational rights and equality, provide important guarantees against linguistic assimilation, and may display, potentially at least, the same positive impact as explicit language rights. Because their linguistic consequences are largely implicit, they tend to be overlooked in legal writing and adjudication. Yet, this study wants to

prove the existence of those aspects and to situate them within the general theory of fundamental rights.

Bringing linguistic rights within general fundamental rights theory has a double advantage : from the methodological point of view, the sharp distinction between the two types of rights is unsatisfactory, as their entrenchment responds to the same legal need of placing certain essential attributes of human dignity beyond the reach of day-to-day political decision-making. On the substantive level of protection of linguistic diversity, special minority rights have the disadvantage of appearing as supplementary measures, as derogations from a basic pattern needing some special justification. They do not benefit from an aura of 'inherent rights of man' which makes of fundamental rights such a strong weapon in political argumentation, but are considered as strictly dependent on the peculiarities of a given country.

At the same time, I hope that this study may also be a contribution to the general theory of fundamental rights. Through the investigation of a particular societal problem (linguistic diversity) rather than a particular and explicit right, I want to show that the single fundamental rights complete each other into a relatively coherent whole,

and can thereby display some unanticipated consequences in less traditional fields.

In trying to prove those points, I have used two different legal disciplines : comparative constitutional law and public international law.

The virtues of the comparative method have been aptly described by others, and need therefore no extensive elaboration. Suffice it to say that the comparative method bridges to a certain extent the dichotomy between positive law and natural law : it remains safely within the bonds of existing positive law, but by comparing the various legal systems, it points automatically to possible improvements of the single national norms. But the specific type of comparison used in this study needs perhaps more explanation. I have not made a systematic study of a number of representative countries, to be exhaustively analysed from the viewpoint of the protection of linguistic diversity. this would not only be rather tedious, but runs the risk of privileging once again the same group of 'classical' and well-known plurilingual systems. I chose rather to center the comparison around certain substantive issues (the single fundamental rights and their various dimensions and components), and to illustrate each theme with an eclectic

view of the various national solutions, highlighting each time another set of legal systems, according to their specific relevance.

The advantage of the latter method seems to be that many more countries can be examined; language diversity is, despite many superficial opinions to the contrary, not a problem which is confined to a few classical multilingual countries, like Belgium, Switzerland, Canada, Finland, but is a problem with which practically every country is confronted. Apart from Iceland, Portugal and tiny Liechtenstein, there is no Member state of the Council of Europe which is immune from problems arising from the fact that it is not linguistically homogeneous. Indeed, linguistic diversity in Western Europe is no longer caused exclusively by the existence of traditional, endogenous ethnic minorities, but also, in some formerly unilingual states like the Federal Republic of Germany, by the mass immigration of migrant workers and their families. I felt that the richness of all those various experiences would get lost in a comparison restricted to a few countries. Reference to a large number of legal systems is also inspired by the purpose, mentioned above, of showing a common approach to plurilingualism in constitutional law, linked to common conceptions of fundamental rights. Because

of the particular instrument of protection which I selected - fundamental rights - the study has been restricted to those European states that are liberal democracies in which fundamental rights have an effective legal function to play. In addition, I made also references to the United States and Canada who share the same problem of linguistic diversity and the same doctrine of fundamental rights.

The rigour on which this study wants to be judged is therefore not that of the systematic presentation of any single legal system, but that of the exhaustive exploration of the meaning of the various fundamental rights for linguistic diversity, through the inclusion of as large as possible a sample of national problems and solutions.

The second legal discipline from which I have drawn in the study is public international law, and more particularly international human rights law. In a certain sense, international law plays only a secondary role in a domain like this. At the substantive level, the formulation and main theoretical elaboration of the various fundamental rights occurs mainly in the national legal orders, and the international instruments contain only an (often feeble) echo of them. At a procedural level, this study privileges

judicial enforcement as the criterion for the effective existence of rights; this criterion derives from national law and is only sparingly met at the international level. Even international human rights have the national courts as their main forum of enforcement.

At the same time, the international law part seemed an indispensable addition. Substantively, international law has perhaps been more aware of the special needs of ethnic and linguistic minorities in society, and the minority treaties after the first world war have been the forerunner of the more global and ambitious post-war human program; moreover, the philosophy behind the minority treaties has not entirely died out in present international law. At the procedural level, one should not underestimate the capacity of international courts (especially at the regional European level) to supervise national law and to impose a 'common' (not necessarily 'minimum') standard of human rights protection on the states who are lagging behind. There is a dialectical relation between national and international law : common trends at the national level lead to the adoption of new standards at the level of international norm-making or adjudication, which in turn influence the evolution of single national systems. Furthermore, in certain countries the absence of judicial review of the constitutionality of

(national) legislation, and the simultaneous recognition of the supremacy of international law, makes international human rights more effectively enforceable than the similar rights contained in national Constitutions.

After this short introduction regarding the methodology of the thesis, I will now give a short presentation of its contents. In Part One, I will sketch the socio-political and historical background of the legal analysis which will follow in the rest of the study. In presenting the 'problem' of linguistic diversity, I did not aspire to any original or innovatory approach, but merely attempted to give a succinct but faithful presentation of the existing academic literature on the subject. The last pages, describing the various institutional responses to the problem of linguistic diversity, gradually introduce to the legal parts of the study; they also situate 'fundamental rights' among the other, competing, instruments for the regulation of language conflicts.

In Part Two, I will set the general legal scene, for all the following Parts, which will deal with specific fundamental rights. Part Two will consider three general

preliminary questions arising for a study of the protection of linguistic diversity through fundamental rights :

1. As 'fundamental rights' is no term of art with a well-defined meaning, what criteria does one use to delimit such rights from other legal norms, both in the national and in the international legal order ?
2. Which, among all the fundamental rights thus defined, are relevant to the particular object of the study, namely linguistic diversity ? Because of the traditional reluctance to recognise the implicit language aspects of generic fundamental rights, this selecting process is particularly important.
3. Under which conditions can those fundamental rights have an effective impact on the human problem of linguistic diversity ? What is, in other words, the judicial enforcement regime of fundamental rights, both before national and before international courts. The 'secondary' rules described in this chapter, and which vary from country to country and from treaty to treaty, are a necessary complement to the analysis of the 'substantive' content of the fundamental rights, to which the following parts are devoted.

It will be argued that general fundamental rights that are significant in language matters can be grouped in three principal categories : first of all, there is freedom

of expression which, although this feature is seldom spelled out in the literature, protects the freedom to choose the language of one's choice in all 'private' relations (Part Three); secondly, there are the educational rights, consisting of the freedom of education and the right to education, which both have some implications as to the linguistic content of the education (the educational process being absolutely crucial for the maintenance of linguistic identity) (Part Four); thirdly, and most importantly, there is the right to equality, which has undergone an important evolution and can no longer be restricted to the (still important) rule of formal non-discrimination, but also implies the need for special 'positive' measures in favour of certain groups, among which the linguistic minorities. In the final Part Six then, I will have a quick overview of the specific constitutional language rights, which cannot be incorporated in the above three categories of generic fundamental rights, but really constitute supplementary rights limited to certain minorities in certain countries.

Each of those 'substantive' Parts will consist of two Chapters : the first (and normally the longest) dealing with comparative constitutional law; the second with the same right as it is guaranteed under international law. This order expresses the subsidiary function of the international

protection : the analysis of the national Constitutions will show the countries which fall behind the general standard on any specific point, and for which the international 'common standard' may therefore be specially meaningful.

At the end of this introduction, I may add that I do not claim to present a 'pure' scientific study which is free from any ideological bias. My personal attitude is already apparent from the choice of the subject and the emphasis on the protective role which fundamental rights may play. This bias may be tempered, and the study become readable also for persons who do not share it, by the choice of the object of the study : I do not propose a grand new scheme for a better constitutional and international protection of language values, but only want to present the existing positive law in a new way. My conviction is that general fundamental rights theory is a goldmine which has too rapidly been abandoned by the minority champions, and that it is still possible to extract some valuable nuggets from it.

PART ONE

L I N G U I S T I C D I V E R S I T Y

CHAPTER ONE

THE CONCEPT OF LINGUISTIC DIVERSITY

Section 1

A Definition

Linguistic diversity will be defined, for the purpose of this study, as the existence, within a state, of more than one language group. Men on earth speak, and have always spoken - at least since the Tower of Babel- numerous languages; yet I will not consider this phenomenon of multiplicity of languages in the absolute, but only in relation to a given state. This restriction seems meaningful because linguistic policies, i.e. interventions tending to influence linguistic diversity, usually do not occur at a supranational level; or, to put it in another way, relating more directly to the subject of this study, fundamental rights protecting linguistic diversity can be invoked against action by state authorities (or lower bodies or individuals

within that state), but normally not against action by transnational organs or foreign states, the main exception being the European Community.

A. In this section, I shall consider some preliminary conceptual problems raised by the definition given above. First of all, in order to speak of linguistic diversity, one must be able to distinguish, among the infinite number of idioms, between full languages and other idioms that can be called dialects. This distinction is not to be made just for the sake of intellectual clarity, but because important legal consequences may hinge upon it. As will be seen in the course of this study, the exercise of some rights, like e.g. freedom of expression, do not, to a large extent, imply the necessity of such a distinction; but in many other cases, especially where positive state action is involved, the benefit of a certain right is made dependent on whether the claimant belongs to a real 'language' group or not (1). Indeed, downgrading a given idiom to the status of a dialect has been a favourite device of policies of linguistic assimilation in recent history (2).

How then is this distinction to be made? An obvious possibility is to use scientific and supposedly

'neutral' criteria which have been elaborated in linguistics. Unfortunately, there is nothing like an unfallible method here. One classical indicator is 'mutual intelligibility' (3) : when the idioms spoken by two persons are understandable to both of them, they belong to a same language. The limit between two languages is where this intercomprehension ends. The main weakness of this criterion is that it is only seemingly objective : "between total incomprehension and total comprehension there is a large twilight zone of partial comprehension" (4). All depends, also, on the circumstances, the persons involved and the subject of conversation. Moreover, it flies in the face of social reality : there is a large degree of intelligibility between people speaking two undisputedly separate languages like Czech and Slovak, or Occitan and Catalan; while on the contrary a Bavarian and a Schleswegian, or a Tuscan and a Sicilian will not understand each other's local idiom, though they will not question the fact that both speak, respectively, German and Italian (5). This lack of certainty has led certain authors to prefer another linguistic criterion based on the presence of selected characteristic linguistic features (6). A borderline can then admittedly be drawn in a fairly neutral way, but again in many cases against all socially accepted dividing lines. Also, none of these purely linguistic theories has an explanation for the emergence of one of the related idioms,

within a language cluster thus defined, as the 'cultural' or 'high' language, while all others remain with the status of dialects.

An accurate distinction between language and dialect, therefore, can not stick to purely linguistic criteria, but has to take into account sociolinguistic factors. The status of language is then "a reflection of the societal success of the argument presented rather than of the distance between any variety of reference and any other" (7). There is a qualitative distinction between a language and a dialect, which is not in the natural order of things - as some 'essentialist' theories would make believe - but is, rather, the present outcome of historical circumstances, and of social pressure (8), which may be challenged at any time by countervailing forces. The number of languages is therefore not fixed once and for all and may give rise to controversies. In practice, there is usually a large consensus on whether a given idiom is a language or dialect. But if one compares the lists of West European languages given in three specialised works on the subject (9), one finds disagreement on the nature of some ten idioms: Luxemburgian, Alsatian, Scots, Greenlandian, Corsican, Sardinian, Piemontese, Friulan, Ladin, Occitan and even

Catalan. How can one reduce the uncertainty in this matter, for the needs of this study ?

According to G.Braga (10), the evolution from an idiom or 'linguistic custom' to a fully-fledged language or 'linguistic code' takes place through two separate but interrelated social processes : systematisation and institutionalisation (11). Systematisation helps a certain idiom to bridge the barriers of space (through 'standardisation') and time (through 'stabilisation'). This work of cultural engineering can result from a conscious state policy, but is often, to a large extent, a personal achievement of what could be called 'language strategists' (12), who are specially qualified by their expertise (13) or by their influence (14). Through institutionalisation, on the other hand, certain idioms are given a privileged status in legal-political terms, either within private groups or in the public sphere; this concept needs no specific comment here, as it constitutes the very object of my study.

Both processes usually coincide, but not always so

i) a language may be systematised but not yet (or no longer) institutionalised : the standardisation of, say, Hebrew or Catalan, has preceded their institutionalisation as a

SI
difference between DK DR

language of public life. The fact that such a uniform code is nevertheless not just an erudite's fancy but a real systematisation is proved by its ready acceptance by the whole population, which thereby indicates its desire for a future institutionalisation.

ii) a language may also be officially recognised before a standard variety has emerged. This is e.g. the case with Ladin in South Tyrol and Rhetoromantic in Switzerland, closely related to each other and both divided in a number of local varieties with very slow progress towards standardisation.

When both criteria of identification of a language do not coincide, I will give precedence to the latter (institutionalisation), not because of its intrinsic superiority but because it suits better for my purposes. The difficulty that will be encountered now and again in this study is that of interpreting the concept of 'language' when used abstractly in a legal text; what better criterion than to look which languages have been effectively given a recognised status in the legal order? That this is not a tautological definition, nor a flat endorsement of official (and possibly 'imperialistic') language policies, can be proved by the following arguments :

a) once a language has been recognised as such in one particular legal text, then this status can no longer be

denied for any other purpose within this same legal system. This rule of 'internal consistency' might prove useful in a number of circumstances; a variation upon it has recently been used by the Italian Constitutional Court (15);

b) to this can be added a rule of 'external consistency' : when a language is officially recognised in one country, then its status as a language cannot be denied in another country; this might apply to the Albanian or Croat minority in southern Italy, or to Basque and Catalan in France.

The criterion of institutionalisation thus helps solving a number of uncertain cases : Catalan, Greenlandian and Faroese are, beyond doubt, languages as they have official status within a certain territory. Some other idioms, while not official (16), benefit from some legal recognition and must therefore also be considered as languages : Ladin, Luxemburgian, Occitan, Breton, Corsican. Finally, some languages have only an embryonic legal status, but general agreement on their separateness in purely linguistic terms may dispel uncertainty : Sardinian, Friulan. This leaves us with only very few really doubtful cases (17).

B. Linguistic diversity, as defined at the outset, requires not only an analysis of the concept of language, but

also of that of language group. A country is not linguistically diversified when only one individual or one family has a distinct mother tongue; there rather should be a significant group of people speaking the same language. I will not deal here with the, largely artificial, problem of the minimal size of such a group, but rather with the question of identifying the single members of such a group. Again, this is not merely a theoretical question. Language is often used as a criterion for the allocation of resources and benefits, and it may then be crucial to determine to which language group a person belongs.

It may seem obvious to define a language group as "those persons speaking a given language". Yet, it has been sometimes suggested that a linguistic group or minority may also include a number (or even a majority) of people who do not actually speak the language, but who identify themselves, in social terms, with the language community (18). It seems however advisable to reserve for such larger groups (think for instance of the Welsh or Basque case) the term of 'ethnic group' or 'nation', which is based on a subjective feeling of identification, and define 'language group' in strictly objective terms.

Yet, such an objective approach is not always easy, because language is not an immutable personal characteristic, like some other socially relevant traits such as race or gender. It rather depends, to some extent, on a personal choice. An individual's adherence to a language may vary over time. More importantly, even at a given point of time, language is not open to such relatively easy assessment as e.g. gender. Indeed, language groups living within one country are not hermetically isolated from each other, but come necessarily in contact. This social phenomenon of language contact, analysed in the classical work by Uriel Weinreich (19), leads to linguistic conflict, the competition for scarce resources (linguistic and other) between the language groups. But, more importantly for present definitional purposes, this contact also leads to a blurring of the dividing lines between language groups. A number of individuals will be bilingual, i.e. they will use alternately two or more languages (20). Apart from 'isolated bilinguals' (21), whose parents e.g. speak different languages, bilingualism normally depends on societal factors ("necessity is the mother of bilingualism" (22)), and is more widespread in some areas or countries than in other. It may be due to the physical proximity or intermingling of the two groups, but also, more often than not, to the existence of a diglossic pattern of linguistic coexistence.

Etymologically, 'diglossia' means of course nothing else than 'bilingualism'; but it has been coined by Ferguson in 1959 (23), and widely accepted in sociolinguistic literature ever since, as a concept with its own specific meaning, namely 'the functional differentiation between two (or more (24)) linguistic varieties', often in the form of a 'higher' and a 'lower' language. The relation between a full language and a local dialect could be described as diglossia in the wide sense, which then becomes a quasi-universal phenomenon. In the narrow sense, diglossia is used for the relation between two full languages (or two standardised forms of a language, such as katharevusa and dhimotiki in Greece, or perhaps standard English versus Caribbean Creole). It may be a purely social phenomenon, opposing a prestigious or international language to a disparaged or small language, but more frequently the diglossic relation is legally entrenched : language A, of current usage at home and in the local community, may be excluded in certain 'higher' social domains like public administration, the mass media or educational institutions, where only language B is accepted. There will therefore often - but not always (25)- be a correlation between the degree of bilingualism in a given society and the existence of a diglossic language domination (26). The percentage of bilinguals is likely to vary from high to low according to the following scale :

- persons whose mother tongue has no recognised legal status;
- persons whose mother tongue, while recognised to some extent, is not an official language of the area;
- persons whose mother tongue is an official language with small diffusion;
- and persons whose mother tongue is an international language.

How to classify now a person who speaks a language A at work and to his children, and language B to his wife and in the local shops, or any other possible and more complicated combination ? In legal practice, the linguistic location of a person is made on the basis of two alternative principles : the objective and the subjective principle (27). The objective principle assesses a person's linguistic identity from the outside, either through an ad-hoc investigation for each relevant case (a very time- and money-consuming practice) or through a once-for-all assessment, whose extreme form is the so-called territorial principle, according to which all persons living in a given area are considered to belong, for given purposes, to one and the same language group. This latter method is of course only 'objective' in the formal sense, as it does not intend to be a true reflection of linguistic reality, but has other,

political motivations to which I will come back at later stages of this study (28).

The subjective principle, on the other hand, leaves it to the persons concerned (or their parents) to decide to which language group they want to be reckoned. Kloss (29) distinguishes further between an absolute form or 'Gesinnungsprinzip' leaving entire discretion to the individual (who therefore might make a declaration contrasting with reality - a very real hypothesis in cases of diglossia), and a relative form or 'Selbstinterpretationsprinzip', leaving to the person concerned the final choice in cases of reasonable doubt.

In reality, various combinations are possible between the two principles. Thus, one 'subjective' declaration (e.g. at a population census) may be decisive for a whole number of other legal situations, where it then acts as an 'objective' criterion (30). Or, a subjective choice is allowed, but with the express stipulation that it should correspond to reality, and this conformity can be checked by public authorities (31).

Section 2

A Description

After the short analysis of some of the pitfalls inherent in the apparently simple concept of linguistic diversity, I will try, in this section, to give an approximate idea of the quantitative dimension of the phenomenon in West European countries. As this is a study of legal norms, full statistical accuracy is not aimed at; the purpose of this section is merely to place the legal analysis within the perspective of the human reality with which it deals, and to suggest that the problem of linguistic diversity is not marginal at all.

Even if one wanted to present accurate statistics on linguistic usage and behaviour, this would largely be impossible. While otherwise flooded by statistical information of all sorts, we have astonishingly little knowledge of these matters. As Petrella rightly observes :

"Tout ce qui a trait à la situation des langues reste dans un brouillard épais, comme si en savoir davantage, de façon systématique, complète et régulière, n'intéressait guère les responsables publics, pourtant si soucieux de recueillir tant de données quantitatives sur tant d'autres aspects de nos sociétés

contemporaines. On se demande sur quelles bases de connaissance adéquate des problèmes nos autorités compétentes élaborent leurs politiques linguistiques (...)" (32).

As far as immigrant language groups are concerned, a fairly reasonable approximation of their numerical consistency can be gathered from the statistics on the resident foreign population, which exist for nearly every country. Some caution is warranted however.

First of all, statistical accounts of the number of foreigners are notoriously inexact. They are often underestimated, due to the large number of illegal entries on the state's territory; they can also be overestimated, when one includes within the household of foreign residents those members of the family who still reside in the country of origin.

Secondly, the criterion of nationality does not fully correlate with that of language. On the one hand, a number of these foreigners may in fact speak the national language of their country of residence. Such a distortion can be corrected to a certain extent when there is a breakdown of the global number of aliens according to their country of

origin; thus, half of the foreigners resident in Switzerland come from Italy, Germany and France and therefore speak one of Switzerland's official languages. The correlation between language and nationality is also inaccurate on the other side: as years go by, more and more immigrants will acquire the nationality of their country of residence, without necessarily shedding their language of origin. Alienage is therefore only a reliable criterion of linguistic diversity in countries of recent immigration, as most West European countries actually still are.

One must take into account these various caveats in reading Table 1, at the end of this section, which gives the number of foreign residents in the major immigration countries of Western Europe.

As for endogenous linguistic diversity, even less reliable indications are available. In this case, no indirect criterion, like alienage, can be used, but only direct investigations of language characteristics can offer valid data. The normal, and easiest mode of investigation is to include a linguistic question in the periodic general population census. This is, however, only rarely done in Western Europe (in contrast to many East European countries).

Official census data on language exist in Switzerland, Finland, Austria and Ireland, as well as for limited parts of the United Kingdom (Wales and Scotland) and Italy (South Tyrol and Triest). In some notoriously plurilingual countries like Spain and France, no data are available at all. And the same even holds for Belgium, where linguistic diversity plays such an overwhelming political role. In this country, linguistic statistics are only available up to 1947, and the language question has been omitted from the census since then for political reasons (33) : the Flemings feared that a number of persons (especially in the area around Brussels) might falsely declare to be French-speakers because of the greater social prestige attached to that language, and thereby provoke a modification of the linguistic status of some localities at the linguistic 'border'.

This example shows that a census, despite its apparent objectivity, is not always a neutral and reliable indicator of the linguistic composition of the population. Because the system is based on self-ascription, persons may be tempted to disclaim their true linguistic status and join the language group to which their aspirations or sympathies go. As was correctly pointed out, "In a bilingual situation the procedure of defining a person's linguistic status on the

basis of self-reported main language renders the minority extremely vulnerable. Answers to such a question will be influenced by social pressures and fashions of various kinds, and sometimes the answers will be given by others than the individuals concerned" (34). This may lead certain minorities to boycott the census : thus, the statistics on the Slovene population of Carinthia (Austria) are disputable, as several Slovene organisations advised not to answer this question in the census (35). The fallacy of census results is not necessarily brought about by the fact that the declaration is gratuitous and has no practical consequences for the person involved. In the recent 1981 census in South Tyrol, concrete benefits did depend on one's language declaration. Access to employment in the public service is organised, in this Italian province, on the basis of a proportional representation of the German, Italian and Ladin language groups. From 1981 onwards, the census declaration decides upon a person's linguistic membership for this -and possibly other- purposes. But this is precisely why the census allegedly gave a false picture : as there are generally less German-speaking candidates for the civil service jobs attributed to their group, bilingual or Italian-speakers might have been tempted to declare themselves as German-speakers in order to stand better chances for public employment (36).

That the results need not necessarily be tilted in favour of the numerically or socially dominant language is documented in the case of Ireland. In the 1971 census, 28.3% of the population (816.000 persons) returned themselves as able to speak Irish. Subsequent officially sponsored research found out that only 1.7% (57.000) were native Irish speakers, with a further 7.4% (220.000) 'at least fairly fluent non-native speakers'. All the others had apparently been moved by their sympathy for the Irish language to overrate their skills (37).

Much confusion also arises because of the type of question asked : where the criterion is, like in Ireland, 'ability to speak', a person may indicate more than one language at the same time. Neat delimitations of language groups can only be obtained through exclusionary questions. But here again, the results may differ whether one asks for the mother tongue, the home language, or the main language. Language groups in the process of assimilation may show widely divergent numbers according to these various criteria. This is documented by studies on the census results in Canada, the only country where both the mother tongue and the habitual home language have to be declared at the census. The percentage of people who habitually speak at home the language they learned as a mother tongue ranges from 98.8%

for English and 93.8% for French, to 5.9% for Indi-Pakistani and 0.3% for Gaelic (38).

As for the countries (or parts of countries) where there exist no census data on linguistic usage, one must rely upon estimates that are usually little more than informed guesses. As such estimates are usually made by minority-friendly authors (the others prefer to ignore the existence of minority languages), they tend to exaggerate the number of speakers of the smaller languages. Moreover, it is not always specified whether one takes linguistic skills as the criterion, or actual linguistic usage. As said above, there can be vast differences between both figures in diglossic situations.

Taking into account all those caveats, one can give a list of the important linguistic minorities in Western Europe with their approximate number of speaker

3.500.000 French and 70.000 German in Belgium - 1.000.000 German-Alsatian, 600.000 Breton, 200.000 Catalan, 180.000 Corsican, 100.000 Dutch-Flemish, 80.000 Basque and an indinite number of Occitan-speakers in France - 1.000.000 Sardinian, 500.000 Friulian, 300.000 German, 95.000 Albanese, 75.000 Slovene, 70.000 French, 55.000 Occitan, 40.000 Lad, 20.000 Greek in Italy - 300.000 Swedish in Finland - 300.000 Irish in Ireland - 500.000 Welsh and 89.000 Scottish Gaelic in the United Kingdom - 50.000 Faroese and 30.000 German in Denmark - 1.050.000 French, 200.000 Italian and 50.000 Romansh in Switzerland, 6.000.000 Catalan, 2.500.000 Galician and 600.000 Basque in Spain. (39).

T A B L E 1

NUMBER OF FOREIGN RESIDENTS IN SELECTED EUROPEAN COUNTRIES
 AND THEIR PERCENTAGE OF THE TOTAL RESIDENT POPULATION

	Total in 1000's	Percentage
Belgium	912	9'
Denmark	102	3
France	3.680	6.8
Germany	4.492	7.3
Italy	287	0.5
Netherlands	539	4
Norway	82	2
Sweden	414	5
Switzerland	945	15
United Kingdom	4.100	7

Sources : Latest Statistical Yearbooks of the various countries. For France, see Population, 1984, p.688. For the United Kingdom, see the calculations in Population Trends, 28, Summer 1982. For Italy, estimates by the Ministry of the Interior in 1981, in Studi Emigrazione, n.71, 1983, p.285.

CHAPTER TWOHISTORICAL OVERVIEW OF LINGUISTIC DIVERSITY

Language diversity is of all times, and of all places. European history, in particular, has always been characterised by the coexistence of several language groups under a common rule. But, until the 18th-19th century, this diversity did not become politically salient. "In most of the closed micro-communities of the agrarian age, the limits of the culture were the limits of the world, and the culture often itself remained unperceived and invisible" (1). Only for a limited number of persons and in specific contexts did language become a meaningful factor of categorisation : to take one example, a supranational organisation like the Catholic Church used to be divided, not along political, but along linguistic lines, into 'nationes' (2). In the formation of states, on the contrary, linguistic considerations did not play any appreciable part, the determining factors being war, marriage and succession. The social and cultural characteristics of the population living in these casually assembled territories were of little importance to the ruler : "a medieval European monarch (...) would have been mystified by the notion that he should rule only, or even

mainly, people of similar cultural origins as himself" (3). There is even a striking statement by the Hungarian king St. Stephen, according to whom "unius linguae uniusque moris regnum imbecille et fragile est" (4).

This generally relaxed attitude towards linguistic diversity was made possible by the fact that the use of different languages did not entail the same practical consequences as today. In this period of limited communication and mass analphabetism, linguistic and literary skills only played a role in the domain of public administration, which only marginally affected the life of most citizens. In this field, significantly, measures restricting the free use of languages have been taken quite early; the most famous is certainly the edict of Villers-Cotterets of 1539 by which king Francois I made French the exclusive language of the administration, a decision which was primarily detrimental, at the time, to Latin but which also prevented the emergence of the country's other native tongues to the status of official language. In Britain, the Act of Union of 1536, imposing English law on Wales, also provided that "from henceforth no person or persons that use the Welsh speech or language shall have or enjoy any manner of office or fees within the realm of England, Wales or other the King's dominions (...) unless he or they use English".

In 1716, a similar decision, the 'decreto de Nova Planta' imposed the exclusive use of Castillian to the Catalan administration.

Section 1

The Emergence of Linguistic Nationalism

Towards the end of the 18th century however, both the ideological climate and the social-economic conditions for linguistic diversity changed for the worse, and cultural homogeneity became now widely seen as a desirable thing for a state.

A. Ideological Origins

The new ideological climate was that of the Enlightenment, which radically reconsidered all the accepted criteria of state legitimacy based on tradition and theology, and harked back to a (variously defined) nature of man as the foundation of society. I will mention here only two of the most influential representatives of this new ideology, whose theories - although widely divergent in other respects - both

had a negative impact on the acceptance of linguistic plurality within a state.

1. In Rousseau's Social Contract, the formation of the general will (itself the basis of political legitimacy) presupposes the free and autonomous expression by every citizen of his own individual will : "il importe donc pour avoir bien l'énoncé de la volonté générale qu'il n'y ait pas de société partielle dans l'Etat et que chaque citoyen n'opine que d'après lui"(5). The existence of intermediate groups within society can only cloud this constitutive process. The linguistic implications of this theory were not spelled out by Rousseau, but were fully articulated some years later during the French Revolution. After a short initial period of relative liberalism, the regional languages became increasingly stigmatised by the revolutionary leaders as tools used by anti-national (and clerical) forces for particular purposes, and as communication obstacles hindering the unity of purpose expressed by the general will (6). Linguistic homogeneity became an essential element of the Jacobin nation-state concept.

2. The other emblematic figure is Johann Gottfried Herder, who has been called "the father of the modern national philosophy of central and eastern Europe" (7). For

him, the basis of civil society is not an abstract general will, but a concrete shared culture, rooted in a common language. Language plays such an important role because, according to Herder, it is not a mere descriptive code, but rather "the living manifestation of historical continuity and the psychological matrix in which man's awareness of his distinctive social heritage is aroused and deepened" (8). Therefore, "for a man to speak a foreign language was to live an artificial life, to be estranged from the spontaneous, instinctive sources of his personality" (9). The language reflects the 'Volksgeist', the deepest essence of the people who speak it.

Again, Herder himself did not draw political consequences from his linguistic philosophy; indeed, he readily accepted the possibility of a pluralist political system, where several cultures could freely develop (10). But soon after him, philosophers like Schlegel and Fichte held that every language group needed a state of its own in order to come to full fruition. In order to achieve this goal, the traditional state constructions had to be overthrown. This radicalisation has partially been brought about as a sequel of the French Revolution which had swept away the old legitimate order throughout Europe and unleashed speculations on new and revolutionary orderings of society; but the very

aggressiveness of the French foreign policy provoked a reaction of defence in the other countries and gave to these speculations a distinctively nationalistic flavour.

B. Social-Economic Origins

Yet, more important perhaps than these ideological evolutions and political events, has been the transformation of society brought about by the industrialisation which progressed through Europe in the 19th century. According to the influential doctrine of Ernest Gellner (11), it is no coincidence that (linguistic) nationalism appeared at the same moment as industrial society. While the identification of culture and polity had been irrelevant or even undesirable to agrarian society, it became of paramount importance for the functioning of the new industrial society (12). Economic rationality and efficiency, the dominant values of the new social-economic model, required continuous innovation and a strong mobility of the labour force, in contrast to the stable conditions of agriculture. To allow for this mobility and for the general availability of workers, traditional culture was to be replaced by a new standardised culture, imposed through 'exo-socialisation', i.e. "the production and reproduction of men outside the local intimate unit" (13). In this view, nationalism is "the fruit neither of ideological

aberration, nor of emotional excess", but rather "the external manifestation of a deep adjustment in the relationship between polity and culture" (14) : "Nationalism is, essentially, the general imposition of a high culture on society, where previously low cultures had taken up the lives of the majority, and in some cases of the totality of the population. It means that generalized diffusion of a school-mediated, academy-supervised idiom, codified for the requirements of reasonably precise bureaucratic and technological communication" (15).

Of course, this linguistic standardisation was not a smooth and painless process, especially with regard to populations whose traditional idiom was very different from the new standard language. Sometimes, such minorities saw the adoption of the national language as a means of social promotion; but very often, either because assimilation was obstructed by the ruling classes themselves, or because it was, on the contrary, too ruthlessly imposed and required a disproportional sacrifice, these minorities refused the official linguistic model. Paradoxically, interest in the minority idioms was often born among intellectuals of the majority group who were "prompted by antiquarian motives or by a general interest in philology and folklore" (16). But soon, the minority groups themselves started making efforts

to develop their idiom into an alternative standard language. The role of 'language strategists' (17), and of popular literary works (18) has often been noticed in this regard.

Section 2

The Decline of Linguistic Diversity

Whatever the exact mix of causal elements, the result is uncontroversial : the spread, all through Europe, of a doctrine of linguistic nationalism, "whose creed consists of a single article : political should coincide with linguistic boundaries"(19). In the historical reality of the nineteenth century, the main trend identified by Gellner (the centre wanting to assimilate minorities) and the counterreaction it provoked (peripheries refusing to surrender their cultural identity) have not annulled each other, but have rather played a complementary role in favouring cultural homogeneity within states. Indeed, such homogeneity, as Charles Tilly points out, has been achieved "along two criss-crossing paths : (1) via the deliberate attempts of state-makers to homogenize the culture of their subject population through linguistic, religious, and, eventually, educational standardization (...); 2) via the

tendency of those states enclosing relatively homogeneous populations to survive and prosper, while those containing wide cultural disparities tended to stagnate or to explode" (20).

We find thus, on the one hand, solid and long-established territorial states (France, Britain, Spain, Denmark...) who tried (and largely succeeded) to assimilate the linguistic minorities living within their boundaries, while on the other hand new states come into existence, either through the conglomeration of small historical states into a larger unit defined by a common language (Italy, Germany), or by the erosion of large multinational empires (Greece in 1830, and much later Bulgaria and Albania, breaking away from Turkey; and, on a much larger scale, the carving up of Austria-Hungary and the western part of the Russian Empire after the First World War).

The theoretical underpinnings of both processes are different. Only the second seems to be based on a coherent doctrine of linguistic nationalism *sensu stricto*, according to which political borders should be adapted to the existing language divides. As to the first process, that of assimilation, it rests on a definition of the nation which is not based on objective criteria such as race, religion or

language, but on a subjective feeling of belonging, transcending linguistic and other cultural markers. According to the famous definition of Ernest Renan, the nation is a "plébiscite de tous les jours" (21). This theoretical dichotomy between the concepts of 'Kulturnation' and 'Staatsnation' as Meinecke called them (22), should not be overstated; most countries shifted their allegiance to one or the other according to the concrete 'besoins de la cause'. Moreover, both theories tended in fact to the same goal : the identification of a state with a particular language (23), and were thus equally detrimental to linguistic plurality.

There were exceptions to this trend, the most conspicuous one being Switzerland, where cultural pluralism has been the official State policy at least since the middle of the nineteenth century (24). The Austrian part of the late Habsburg empire showed an even more sophisticated, but short-lived example of cultural coexistence (25). Yet, the global climate for linguistic diversity was somber. The doctrine of 'cujus regio, ejusque lingua' relegated linguistic minorities to a peripheral status, and treated their members as second-rate citizens. Their position became "anomalous in theory and dismal in practice" (26), and seemed to offer but two alternatives : either create their own state, or, if they did not succeed for reasons of numerical weakness or

political misfortune, try to resist as long as possible to assimilationist policies.

This process has persisted through a large part of the twentieth century, as one can see from the figures given by Krejci and Velimsky (27) on the percentages of ethnic minorities in relation to the total population, for the European states as a whole : 26% in 1910, 7% in 1930, and only 3% in 1950. It is true that the criterion of 'ethnic minorities' gives no exact picture of linguistic diversity : thus, Belgium and Switzerland are not considered, in these figures, to have ethnic minorities, although they are of course linguistically heterogeneous; similarly, ethnic minorities are considered to have ceased to exist in post-revolutionary Russia, because they all have been granted an autonomy status. Still, the global trend is unmistakable; and two main events have played a crucial role in this diminution of intra-state linguistic diversity : the two World Wars.

A. The circumstances of the outbreak of the First World War had clearly shown that the treatment of minorities could play a considerable (destabilising) role in the overall pattern of international relations. The fact that the minority question undermined more particularly the cohesiveness of the Central Powers made it to a favourite

propaganda theme of the Entente. The official Allied war doctrine concerning the post-war resettlement of Europe, which found its most prominent spokesman in president Wilson, was to make a systematic application of the principle of 'national self-determination'; however, the principle, "in practice entailed complexities which Wilson, by his own admission, had never dreamed of" (28), and, by the end of hostilities, it was considerably watered down, not only in the Wilsonian doctrine itself (29), but consequently also in the peace instruments. National self-determination was only one among more principles governing the peace reshuffle; in fact, it was only applied where it could disadvantage the defeated powers (Austria-Hungary, Turkey, but also Russia). Even where the 'principle of nationality' was ostensibly applied, it did not make state and linguistic boundaries coincide exactly; due to the impossibility of drawing exact territorial dividing lines between nations in the population mosaic of Central and Eastern Europe, minorities came into being in most of the new 'national' states. Yet, the overall trend was unmistakably that of a diminution of the degree of linguistic diversity.

B. The negative impact of the Second World War on linguistic diversity was of a different nature; it did not create new states, but rather operated forced transfers of

population, which left many states more homogeneous from the linguistic point of view. This phenomenon was inaugurated by the 1939 German-Italian agreement, providing for the resettlement in the German Reich of those South Tyroleans who would not submit to total italianisation (30). This was only the prelude to a period of compulsory mass-transfers, organised during the war principally by the Nazi regime, and hitting after the war the German minorities in Central and Eastern Europe, on the basis of a 'carte blanche' authorisation by the Allied powers at Potsdam (31). Important changes in the territorial distribution of languages in Europe have resulted from this period; for instance, according to the source quoted above (32), the ethnic minority population sank from 5 to 0.7 million in Czechoslovakia, from 10.4 to 0.8 million in Poland, from 4.6 to 2.1 in Romania.

Section 3

A Re-Emergence ?

In more recent years, there have been some indications of a reversal of this secular trend, and linguistic diversity has become more prominent in Western Europe both in qualitative terms (through its increased

political visibility) and in quantitative terms (essentially through mass immigration). This section will deal with the main factors of this renaissance.

A. Ethnic Mobilisation

From the sixties onwards, there has been a general upsurge of ethnic consciousness in practically all Western countries, including France, Britain, Italy, Spain, Austria, Belgium, Switzerland, as well as Canada and the United States; no linguistic minority has remained unstirred by this movement, although some have been more present in the news headlines than others. This resurgence, which has been extensively analysed in political and social science writings (33), has had a double effect on linguistic diversity : on the one hand, an effective return of some persons to the use of minority languages, or at least a halting of the trend towards assimilation; on the other hand, revendications by ethnic groups concerning the status of their language have made the issue of linguistic diversity politically more visible, and made it, in many instances, into an inescapable object of governmental policies.

But what are the reasons for this ethnic mobilisation ? To explain it as a reaction against

discrimination and denial is inconclusive. Assimilation policies had been going on uninterruptedly for a long period of time, and had met with constant opposition of a more or less consistent group of ethnic activists. But why could they now suddenly draw such mass support and political attention, "at a time when ethnic minorities have become least different from their fellow citizens" (34) ?

Many divergent explanations have been offered in recent literature; it would seem that no single factor, but rather a combination of factors varying according to each case, has been decisive in the emergence of this 'unexpected rebellion' (35).

1. The ethnic movements have mostly arisen "in well established, often ancient states, with clear and recognised national boundaries, and with a relatively prosperous economy" (36), all conditions which, according to classical theories of modernisation, should have led instead to a demise of 'primordial sentiments' such as ethnicity. The new phenomenon "contradicts the expected predominance of functional cleavages in the modern polity" (37), and has led to a painful revision in dominant sociological theory. One has acknowledged the fact that the greater mobilisation and communication characterising the process of modernisation

also lead to an increasing awareness of differences, an increasing ethnic consciousness arising from daily contact with the outer world (38). The counter-process we saw at work already in the period of emergence of nationalism, i.e. a reactive cultural identification by those excluded from integration in the new industrial society, has been rekindled by the increase in social communication. Once again, "a significant number of people perceived that the cumulative impact of the quantitative increases in the intensity of intergroup contacts (...) constituted a threat to their ethnicity" (39).

2. The expansion of the welfare state has led to egalitarian attitudes : "having stimulated expectations, central governments become at the same time the focus of demands and the target of grievances" (40). While becoming more prosperous in absolute terms, peripheral minorities have resented their status of relative economic deprivation, claiming to be the victims of a 'cultural division of labour' organised by the capitalist mode of development and supported by the state (41). While this theory may be valid in a number of cases (e.g. Brittany, Wales, Galicia, Sardinia), there are also counter-examples of relatively affluent peripheries. What they resent is the fact (Catalonia, Basque Country), or the perspective (Scotland) that their "hard-earned prosperity

s being drained by a hostile central government for the benefit either of a parasitical bureaucracy or of preferred but undeserving regions dominated by other ethnic groups" (42).

The equality paradigm has also stimulated expectations outside the economic sphere. Just like social equality was accepted as implying measures of special protection of the weakest, so cultural equality was also increasingly seen as implying the recognition and protection of existing differences (43). As Mc Rae remarks, "to some degree this upsurge of consciousness reflects the success of liberal and socialist elements of the Western tradition in promoting egalitarian values and norms, and the subsequent discovery that in plural societies the realization of these norms is impeded by cultural differences" (44).

. Closely related to this development of the welfare state is the often noted erosion of the classical ideological divisions - class and religion - that had put their mark on the national party systems and silenced the ethnic factor (45). Ethnic demands, on the contrary, have benefitted from the general emergence of the so-called 'post-materialist values' (46); this "need for belonging and for intellectual and aesthetic self-fulfillment" (47) has found different outlets in the various countries, but has quite often taken

the form of a revival of 'ecological' life-styles and the revalorisation of what had been considered as 'low culture', including things like popular music and folklore (reformulated from touristic attractions into sources of group identity), and also obviously the regional languages. At the political level, regionalist movements may be considered as the specific shape taken in culturally segmented countries by the Europe-wide protest movement (48).

4. A further stimulating factor has been the 'demonstration effect' of successful new countries born out of national struggle (Norway, Ireland, Iceland), of victorious ethnic demands (Belgium), of the extra-European decolonisation movement which has revived the principle of national self-determination(49), and of the European integration process, - all instances of the vulnerability of the assimilationist nation-state construct.

In synthesis, one could say that ethnic symbols are a means for expressing a revolt against inequalities, against the loss of power, and against the impersonality and homogeneity of advanced industrial society; these grievances are resented in all parts of the western world, but can be voiced more easily through ethnic symbols (50). Language, in turn, is foremost among these symbols; it has been the object

of so much concern, not only for its own sake, but also as a shorthand for other, less eloquent values.

B. Migrations

The recent decades have also witnessed, in Europe, the emergence of an entirely new dimension of societal heterogeneity, brought about by the operation of the labour market. As a result, "more and more of the world's advanced countries will become secondarily multilingual and multicultural not because they have failed to assimilate their old inhabitants but because they are deliberately importing new ones" (51). In some European countries, mass immigration, and the problem of ethnic coexistence it involves, is partially related to the consequences of decolonisation (Britain, France, the Netherlands). But in other countries (such as Germany, Belgium or Switzerland), it is the pure result of the unequal economic development creating a need for unskilled labourers in the rapidly growing northern economies. The initial intention of both the receiving state and the migrant workers might have been that of a temporary stay, but this proved soon to be unrealistic, and the host societies are now confronted with a new (and largely unintentional) source of cultural and linguistic diversity; the newcomers are too different, too numerous and

too locally concentrated to be as easily assimilated as the sporadic immigrants of earlier times. The figures given in the first chapter (52) show that immigration is now, in quantitative terms, at least as important a source of linguistic diversity as the presence of long-established territorial minorities. Even if the influx of new workers has now been stopped (except for intra-European Community movement), the possibilities of 'family reunion', and the higher birth rate of immigrant communities make sure that the receiving countries are faced with a problem of cultural (and social) integration which cannot be evacuated from the agenda.

C. European Integration

The process of European integration has led, first of all, to the creation of a new political unit, the European Community, with normative powers of its own, which have had a positive, albeit limited, impact on linguistic diversity. On the one hand, the Community has certainly not attempted to reduce the existing diversity among its member states, and follows on the contrary a policy of strict equality between these states' official languages (53). On the other hand, the free movement of workers guaranteed under the EEC Treaty has

facilitated the mass immigration mentioned above; this freedom of movement has even served as the legal basis for positive Community action directed at the protection of the immigrants' language and culture (54).

European integration, in the large sense, has further played an indirect role in the demise of the nation-state model. A favourite argument of many federalist circles, indeed, is that the state is at the same time too big and too small to fulfil the needs of society and therefore should transfer (some of) its powers to the higher (European) and lower (regional) level (55). Such political deconcentration of powers logically implies also more cultural pluralism.

CHAPTER THREE

LINGUISTIC CONFLICTS AND POLICIES

Section 1

Elimination or Protection ?

The historical overview in the foregoing chapter has made clear that "Western political thought in general has shown little understanding or respect for the cultural diversity of mankind and has made scant allowance for it as a possible concern for government" (1). The coexistence of several language groups within a state has, as a rule, not been considered a positive or even a neutral fact, but a nuisance which should preferably be eliminated. On the means of such elimination, there is seldom agreement however. The dominant language group (and the state organs it may control) usually favoured the elimination of linguistic diversity through an assimilation of the speakers of the minority language into the majority group, - but they have found a willing ear only with (some) immigrant communities, and not with 'historical' language communities. The latter have, on

the contrary, often preferred to eliminate the problem not by changing their cultural identity, but by changing state allegiance, joining their fellow nationals across the border, or setting up a new state. The different methods which have been used for eliminating linguistic diversity will now be briefly sketched, and contrasted with the opposed policy of linguistic pluralism.

A. Territorial Change

Linguistic diversity can be eliminated, first of all, by dismembering the existing state, and leaving it with only that part of its territory which is inhabited by the main linguistic group, and transferring the rest of its territory under the sovereignty of another existing state or a newly created independent state (2). Such adaptation of the political to the linguistic boundaries is, as we saw earlier, the ideal solution according to one strand of nationalist doctrine, but was never (except for tiny border corrections) enacted by mutual agreement. Indeed, no state is likely to accept spontaneously the amputation of a portion of its territory. Such territorial changes as have taken place were always the result of conflicts, civil and other, and the 'principle of nationality' was imposed only on the defeated side, and never on the victor.

A major practical difficulty with this 'solution' is that it presupposes the concentration of the linguistic communities in a well-defined territory, which is only rarely the case. In fact, the secession process will, more often than not, leave into existence a language minority within the state of origin, while creating a new minority in the beneficiary state. The initial problem of diversity has not been solved then, and the condition of the minorities involved is often more precarious than before.

Moreover, this solution, in order to be advisable, should correspond to the wishes of the persons concerned. In fact, many language groups are perfectly content with the state in which they happen to live, even when they constitute only a minority. Language is often not a reliable criterion for a person's national identification, and certainly not in the case of immigrants, for whom the possibility of secession does not even come into consideration.

Historical experience has shown territorial annexations and creations of new sovereignties to be rather crude and non-democratic solutions. Apart from some sporadic experiments with plebiscites (3), the opinion of the beneficiaries' of such operations is seldom taken into consideration. This method, although often used throughout

history, seems also to have lost its appeal at a time where the nation-state model gives way to more flexible federative models, be they of a supranational or an infranational character (4).

B. Population Transfer

While the previous solution was based on the, very approximate, assumption that a given territory constitutes a compact linguistic area, this one is more radical as it aims directly and exclusively at the cause of diversity - the alloglot population - and thus avoids the problem of rest-minorities (5).

The other arguments advanced against a territorial transfer apply however also in this case, to which one should add that this is a very brutal solution, uprooting local communities from a place where they often have lived for generations, in the name of the largely abstract ideals of ethnic and linguistic unity, or of more pedestrian state interests. In very specific cases, it can be the best solution for a bitter and everlasting conflict between border groups; the 1919 Greek-Bulgarian treaty is thus favourably valued (6), as it provided for an exchange of populations

which was at the same time reciprocal, optional, in accordance to a precise legal procedure, and under international guarantee. The mass-transfers ordered during and after the Second World War were not so civilised, and practically left the persons concerned only the option to move or to perish; nevertheless, "the statesmen who were in a position to dominate the framing of the postwar settlement were prepared to accept the transfer of populations as a respectable and useful device for the solution of minority problems" (7).

Happily enough, present-day linguistic diversity in Europe is unlikely to be eliminated in this way. I may, a fortiori, forgo the description of the most radical solution of all, the physical elimination of the alloglot population, or genocide. One should not forget however that such 'ethnocides' occurred frequently enough in history and were applied with more grimness in this century than in any other; although it was never for purely linguistic reasons, language has served at times as a badge of candidates for the massacre.

2. Assimilation

This leaves us with only one practically feasible way for eliminating linguistic diversity, namely assimilation. Language assimilation can be defined as the process whereby, within a given political system, a language group disappears through absorption of its members into one (or more) other language group(s). The end-result of this process is also described by the word 'assimilation'. Yet, one must add immediately that this end-result is seldom if ever achieved; native languages rarely disappear (in Europe, during the last century, one could only mention Cornish and Manx), and even immigrants tend to preserve some use of their language over many generations. The reason why assimilation has not got the same 'all-or-nothing' effect as the previously mentioned methods, is of course the fact that it cannot be imposed in globo, but consists of a number of individual language shifts.

Language diversity is never reduced, in practice, through the adoption of a common 'neutral' language - despite Esperantists' wishes - but only through absorption of one language, the weaker, into the other. Therefore, the 'melting-pot' ideal - the merging of separate communities into a new type, different from each of the digested elements - does not apply to language matters : here, to take the

American example, assimilation did not mean the creation of something new, but rather Anglo-conformity.

At the basis of this phenomenon, there is therefore always a power relation; when there is an important difference in language power between two languages in contact, a language pressure (8) is exercised, resulting in assimilation or, in more picturesque terms, 'glottophagy' (9). In this sense, linguistic assimilation is never entirely voluntary. An individual will not switch to another tongue out of sheer ethereal admiration for it, but only under some kind of societal pressure. This societal pressure may be accompanied by a political one, and thus give rise to a policy of assimilation, expressly designed to eliminate linguistic heterogeneity, but this need not be the case : the demand may come primarily from the assimilated individuals themselves, without any conscious purpose from the side of the dominant group. Immigrants especially may sometimes consider the loss of their language as only a small price to pay for the desired social assimilation (10) in the host society, for the promotion out of discrimination and segregation into an equal status in society. This willingness depends on several factors, such as the numerical importance of the group, the existence, or not, of close links with the mother country, the temporary or permanent nature of the

migration. I will not question that, in such cases, assimilation may be the ideal solution to linguistic diversity, provided it takes place at a non-disruptive speed (11) and in an 'organic' way (12).

Most states, however, want to assimilate not only the willing immigrants, but all possible linguistic minorities on their territory. The forced assimilation of endogenous linguistic groups has sometimes taken, in the past, the form of a brutal eradication of the unwanted language, especially at lower implementation levels. One may think here, for instance, of the school boys caught while speaking the banned vernacular in the class-room or even during playtime, and who had, in addition to other punishments, to wear the ill-famed 'signs' as an outward symbol of shame. This device was used with slight variations in such diverse places as Scotland, Wales, Brittany, Flanders, Occitania, Rhetoromanic Graubunden : an early and unexpected example of European harmonisation indeed... General policy norms with such a clearly stated oppressive scope were rarer; but one could mention the forced modification of names and forenames which took place e.g. in Italy during fascism (13).

By far the favourite means of assimilation was (and is) a more civilised and much simpler one : the legal negation of the existence of diversity. No intervention takes place in the private sphere, but only a, sometimes implicit, imposition of the use of one language for all public activities within the state's jurisdiction. Valued against classical democratic standards, this is an impeccable policy : the persons who do not speak the official language are not harrassed or picked out for special discriminatory treatment; they simply are subjected to a general standard, applicable to all, which happens to be the exclusive use of one official language (14).

Such 'moderate' assimilationist devices, the only ones existing on a large scale in present-day Western Europe, are coupled with arguments of an ideological or psychological nature. The relevance of the mother tongue as a community-building factor is bagatellised, while the competing ideological values of state unity and national 'grandeur' are extolled (15). At the same time, a mechanism of 'linguistic culpabilisation' (16) aims at making the minority adherent despise his own 'dialect' (as it will often be called) and aspire to assimilation. Pairs of concepts are used such as : savage-civilised, backward-progressive, idiom of the common people-language of arts and science. If this policy succeeds,

the dominated language will indeed have been reduced to a dialect restricted to inferior uses, as a prelude to its gradual disappearance.

D. Pluralism

The alternative policy to the elimination of linguistic diversity is of course one aimed at preserving existing plurality, i.e. a policy of linguistic pluralism. A pluralistic society is, quite generally, a society recognising the legitimacy of intermediate communities and group loyalties (17). Linguistic pluralism, then, is a system recognising the existence of more than one language group on the state's territory, and which tries to adapt the state to their various and competing demands, without imposing an unwanted uniformity (18). Pluralism, then, implies a double condition (19) : on the one hand, that the state (or the dominant group) abandons the nation-state doctrine (20) and respects the existence of cultural loyalties; on the other hands, that the single language groups are willing to preserve their identity.

Introducing the concept of integration at this stage needs some caution, as this word has been used, with regard to our subject matter, in two divergent meanings. The

most generic description of 'integration' is : "making a whole out of elements", but the ambiguity remains whether the elements disappear within the whole, or are still clearly visible in the unified pattern.

Integration in the cultural field is usually understood as the merging of different cultures into one, and is therefore equated with assimilation (21), or, in a more refined approach, considered to be the peaceful and voluntary variant of (forced) assimilation (22). Language integration, if considered as a specific application of this notion of cultural integration, would then be equated with language assimilation. Yet, as we said earlier on in this chapter, language, in contrast to other cultural characteristics, does not lend itself to the unpreferential 'melting' of two entities into a new one; language assimilation is the victory of one language on the other. This conclusion seems hardly reconcilable with the rather different connotation the word 'integration' has acquired in other contexts, like that of 'European integration'. Here integration stands, roughly spoken, as the synthesis of unity and diversity; it aims at genuine union in large domains of policy, but respecting the identity of the different member states, and notably their cultural identity. If we apply this 'positive' meaning to the present problem, the integration of language groups would not

be the absorption of the one by the other, but the voluntary interaction and mutual enrichment of these groups. This element of contact and impregnation could also serve in distinguishing integration qualitatively from mere pluralism, which implies only the peaceful coexistence of the different groups.

Section 2

The Case for the Protection of Linguistic Diversity

A policy of linguistic pluralism, consciously aiming at the preservation of an existing linguistic diversity, does not seem to have been, to say the least, a 'natural' course to follow in most states. It may therefore be appropriate to have a quick overview, in this section, of the ethical case that can be made for such a policy. Let me add from the outset, however, that this study does not rest upon such an ethical argument. As will be pointed out in the next section, language diversity is often maintained not because of a spontaneous and mutual desire to do so, but as a form of compromise between conflicting objectives. Furthermore, one of the peculiarities of the specific instrument of fundamental rights is that it may operate

either within a policy framework of mild assimilationism, or within a genuinely pluralist system.

The justification for protecting linguistic diversity will be assessed against the two currently prevalent modes of ethical thinking : utility and rights theories (23) (24).

A. Protection for the Sake of the Political System

Within a utilitarian analysis, it must be decided whether linguistic diversity, compared to uniformity, increases the aggregate amount of happiness in society. At first sight, this seems unlikely; on the contrary, there are many reasons why a linguistically unified political system might seem preferable.

First of all, linguistic uniformity is more practical; it facilitates the business of government, the communication between the administration and the citizens, and among the latter. Conserving linguistic diversity, on the contrary, lays a heavy burden on a country's economy. The money and energy that is spent on language teaching, on translations, on double versions of the same documents, could be put to more productive uses.

More fundamentally, the coexistence of various language groups is a source of social stratification within a country, and also, very often, a source of political rivalry and conflicts of interest, which puts a strain on the operation of government. In the classical textbooks, cultural segmentation is a factor which is likely to indicate political instability (25). In a more qualitative version of the same argument, such countries are thought as particularly unfit for democracy; this has been the received wisdom of liberal-democratic thought ever since J.S.Mill's celebrated remark that "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..." (26). Finally, a language divide, it is thought, constitutes a permanent threat to the integrity of the state. In an ideological atmosphere which is still permeated by nationalism, the loyalty of an alloglot minority is never sure.

The argument of political stability may prove to be spurious. On the one hand, many studies have shown that a deeply segmented society may be at least as stable as a society without such deep divides (27), provided that it

treats its various constitutive elements in a fair manner. Switzerland is of course the prime example which comes into mind. On the other hand, monolingual countries may be preferable in the abstract, from a utilitarian point of view, but the analysis here has to start from a concrete situation where linguistic diversity is effectively present. The moral alternative is therefore not : 'uniformity or diversity', but rather : 'assimilation or protection'. Now, an assimilation policy can be very destabilising too. Dominant policy-makers tend to have an over-optimistic opinion about the quick and painless elimination of language diversity and to underestimate the emotional forces evoked by the defence of cultural traditions. Paradoxically, the conflicts and troubles commonly associated with linguistic plurality are often more the result of an attempt at forced assimilation, than of the diversity as such; one gets then into the vicious spiral described by Kloss (28) : "the majority, by dealing unfairly with the minority, create(s) among it the very unrest, dissatisfaction and centrifugal tendency which in turn provide(s) governmental authorities with arguments (...) to bolster their restrictive policies".

.

The practical arguments in favour of uniformity, for their part, are counterbalanced by the advantages a plurilingual state may offer : there is likely to be a vast

amount of language skills and bilingualism, which can be very valuable for international transactions, especially with a neighbour state whose language corresponds to that of one of the national groups. It should be noted in this context that a person who feels protected in his own language will show an open attitude towards other languages : "indeed, the greatest force working for the voluntary acquisition of languages of wider communication in educated circles today is the realization that one's national language is safe-but-inefficient".

Not only must current arguments in favour of assimilation strongly be relativised; but diversity, far from being an unavoidable curse, might well be seen as a positive value for itself. In an age of growing standardisation and uniformisation of life-styles, the need is increasingly felt for positive efforts at maintaining some diversity. If ecology has one thing to teach us, it is that a certain amount of variety and diversification is a prerequisite for the global equilibrium of any natural, or indeed social, system. 'Monoculture' (in both its meanings), even if profitable in the short run, may provoke unforeseen detrimental effects in the long run. Why should this not apply also to the specific issue of linguistic diversity? Alarm has been growing, recently, about the threat exercised

by the network of international communication (and the pattern of cultural dominance it carries) on the future even of official languages of smaller countries. The recognition of the value of linguistic diversity at a transnational level, and the mobilisation for its protection, have led, as a windfall effect, to a growing awareness that such efforts logically imply also the recognition of linguistic diversity at the internal level. If "we are all minoritarians"(30), except for the English-speakers, how can the smaller minority languages then be excluded ?

Total linguistic standardisation is only possible through the transformation of human beings into automatic machines whose behaviour is entirely predictable (31); conversely, as Orwell convincingly showed in his 1984, the introduction of a uniform 'Newspeak' is one of the most efficient means for transforming men into machines. Indeed, a language is not merely a technical code, a collection of phonetic signs which can easily be stripped off from a pre-existing 'pure reality' - in which case a universal language could arguably have been the best solution. On the contrary, language has its own, autonomous role in the production of communication; intuition and expression are in fact inseparable (32). The thesis already advanced by Herder and Humboldt (33) that every language is an idiosyncratic

conceptualisation of the world, is confirmed by the so-called theory of linguistic relativity, which dominates in linguistics since the works of Sapir (34) and Whorf (35). The latter's study of the Hopi Indians' language is the locus classicus in this respect. One typical feature he discovered in the language of this community is the lack of a distinction between the three time dimensions; on the contrary, the Hopi language makes a distinction unknown to us between an objective and physical reality - comprising our past and present - and a subjective reality - including what we call the future as well as things existing in our consciousness. The so-called 'Whorfian hypothesis' deriving from this study has been described in the following terms : "Insofar as languages differ in the ways they encode objective experience, language users tend to sort out and distinguish experiences differently according to the categories provided by their respective languages. These cognitions will tend to have certain effects on behaviour" (36). This phenomenon should not be underestimated even with closely related languages, as e.g. within the Indo-European family, as one can easily appreciate when trying to write in, or translate from, a language which is not one's own...

As George Steiner elegantly put it, "Language is both the container and the shaping spirit of the ways in

which we experience the world. Every single language embodies and gives expression to a particular way of organising, perceiving, understanding reality. Human senses are, broadly speaking, the same throughout the earth. But the mental picture of the world which makes up that complex living framework of social existence which we call a culture varies immensely from community to community. And it is of this variety that language is the preeminent medium and preserver". Therefore, "the seemingly absurd, economically crippling, socially and politically divisive multiplicity of human tongues (...) represents an absolutely essential mechanism of human freedom. Because each language constitutes a different part of the total range of possible consciousness and personal identity men have been free to dream, to invent, to analyse in a multitude of different ways" (37).

In sum, every language preserves some knowledge and reveals, by its own peculiar structure, some truths about life which may not have occurred to, or have disappeared from, another language. The extinction of any particular language is thus a spiritual loss for humanity; and the claim of the superiority of the language one wants to impose on others, though continuously made through the ages, is only the mark of ethnocentrism - one's own language is indeed the best expression of one's own civilisation -if not of

straightforward imperialism. Even within one country, the disappearance of a language (that may still survive elsewhere) will stimulate a provincial outlook and complicate the understanding of foreign cultures and peoples, with which contact cannot be avoided.

B. Protection for the Sake of the Individual

A more straightforward case in favour of the protection of linguistic diversity can be made within an approach in terms of individual moral rights. The maintenance of diversity is then not only a matter of policy or practicality, but one of respect for basic human values, such as liberty - the freedom to speak and cultivate the language one prefers; the freedom simply to be different - and equality, both as equal treatment - when two groups speak a different language, there is no a priori reason why the one should yield to the other - and as equal respect - no language has more inherent dignity than another, they all constitute authentic modes of expression of individual persons.

This short statement of a long-established, and recently reviving strand of moral thinking may do for the

moment. There will be ample opportunity, in the following parts of this study, to discuss these ethical values in the context of the corresponding legal rights. As far as such fundamental legal rights for the protection of linguistic diversity will be shown to exist, they will override all opportunity arguments that can be advanced against linguistic pluralism. But remaining, for a while, within moral discourse, it seems appropriate to consider the following objection.

Assimilation, it is said, needs approximately two generations to achieve its goal. The next generation will then spontaneously adopt the new language, and the problem of diversity is resolved. This may be a reason to favour a "system that, although necessitating certain temporary sufferings and sacrificing a certain number of individual rights, leads to the elimination of the cause of possible future conflicts" (38).

But, apart from the desirability of uniformity as such, one might object that the prospect of a future paradise has been used too much in history, in the name of all sorts of hardly recommendable ideologies, to justify the hardships it entails for the present generation, for the here-and-now existing individual. In fact, as we saw, a reduction of

conflicts through assimilation is but one possible hypothesis, and one can argue the other way round : that preserving the existing pattern is the best way to avoid conflicts. It would be reckless to violate, in exchange for an only hypothetical melioration, the human values served by uninhibited language use.

Not only is the very objective of linguistic assimilation contrary to human freedom and equality, but such a policy also creates as it were 'procedural' hardships in its mode of operation. The decisive tool of assimilation is the education and acculturation of the younger generation. But this entails considerable pedagogic problems. Already under normal circumstances, the passage from the world of free playing to that of the organised learning is difficult. If this passage coincides with a language shift, this has on the child a shock-like effect (39). One of the recommendations of a UNESCO study on The Use of Vernacular Languages in Education (40) sounds as follows : "the mother tongue is a person's natural means of self-expression, and one of his first needs is to develop his power of self-expression to the full". The conclusion of this study was accordingly : "On educational grounds we recommend that the use of the mother tongue be extended to as late a stage in

education as possible. In particular, pupils should begin their schooling through the medium of the mother tongue".

The problem lies not merely in the children's adaptation difficulties, but also in the resulting cultural gap within the family. The children, schooled in the new language, will have communication difficulties with their parents for a whole series of, mainly intellectual, matters or they may develop a feeling of shame for their parents' backwardness : in any case, the socialising and value-transmitting function of the family will greatly suffer, which may contribute decisively to the phenomenon of anomia one frequently encounters with second generation immigrants (41).

But, one might wonder at this point, do the ethical reasons pleading for the respect of linguistic identity apply at all in the case of immigrants, or do they hold only for long-standing territorial language groups ? The argument being that the immigrants' right to equality and freedom cannot discharge them from adapting to the already established cultural pattern of the area in which they move. In this perspective, no distinction should be made between international, i.e. border-crossing, immigrants and speech

immigrants, i.e. people moving from one language area into another within the state's boundaries (42).

By coming voluntarily into a long-established language zone, immigrants may be presumed, it is argued, to have tacitly accepted to abandon their language. In reality, this is a problem most immigrants have not primarily considered in taking the decision to emigrate. More fundamentally, the 'voluntary' character of migration may be questioned, as most people seem to be driven by economic or political necessity. If one uses the criterion of 'uprootedness', i.e. "movement in the absence of meaningful freedom of choice about staying or leaving" (43), one can distinguish between, on the one hand, political refugees and most of the migrant workers, and on the other, the more privileged immigrants, who express a deliberate choice, such as e.g. professors and researchers at the European University Institute.

The 'take-and-give' theory (44) claims that migrants, in return for the economic gain they make through migration, should entirely adapt to the host language and culture. Again, this holds only for part of the people involved. Besides, at the macro-economic level, a comparison is hard to draw between the benefits received by the country

or region of origin and those of the receiving country or region. The latter's economic advantages "stem from having a flexible pool of relatively cheap labour without having to pay for training or for the full cost of social security" (45). An equally valid reasoning would then be that "protection of culture can be regarded as one form of compensation to the country of origin for the social and economic costs to that society attendant upon migration" (46).

Excluding the immigrants' languages from any protection seems thus not justified. At the same time, it would seem to appear reasonable to make some differentiation between indigenous and immigrant languages; in drawing the line between these two categories, one usually considers the second generation still to be immigrants, while the third generation have become permanent settlers (47). If an immigrant group maintains its distinctiveness through two generations, it may be assumed that they are genuinely opposed to assimilation, and they should be granted full protection of their linguistic identity, if they want so.

Temporary immigrants may then have, in ethical terms, less claims than others. Yet, at the same time, the need to preserve their cultural links with the place of

origin, to which they will eventually return, is stronger. Many migrant workers in Europe are in this situation : they have no stable perspectives of establishment but depend heavily on the economic evolution in the host country, as is shown by the present economic crisis. The need to prepare for reintegration is especially vivid for the generation that has grown up in the mean time. One generally accepts the view that the "better way of solving the problem of reintegration in the home countries is the provision of special courses in the immigration countries, so that the children whose parents intend to return home can learn to read and write in their own language and can be instructed in the history, geography and literature of their home countries" (48).

Section 3

Instruments of Protection

In some countries, diversity is preserved as the result of a conscious policy of linguistic pluralism, inspired by considerations of the kind expressed in the preceding section. But this need not be the case. In many other instances, the preservation of linguistic diversity may

well not be desired by all parties concerned, but instead be the unavoidable outcome of clashing priorities. The classical case is that of a state in which the dominant language group would prefer to assimilate the minorities, while the latter would prefer secession, and both have to settle down on intermediate terms, involving some form of recognition and preservation of the existing diversified pattern.

Whatever be the underlying reasons, most political systems nowadays are bound to devise the legal and institutional terms by which to accommodate linguistic diversity, while at the same time maintaining the integrity of the state. In order to keep their promise of offering a stable solution to ethno-linguistic conflict, these instruments may not be open to permanent challenge by the political leaders of the day, and must therefore be of a constitutional or otherwise fundamental nature.

In most political science analyses, there seems to be agreement on the type of structural adjustments that are most likely to be successful in this context; as Milton Esman writes, "the combination of regional autonomy and elite accommodation at the center offers the most likely general formula for maintaining ethnically segmented political systems with a minimum of coercion" (49). Lijphart agrees :

"two constitutional models that have been proposed as solutions for the problems of plural societies are federalism and consociational democracy. The objective of both is to provide political arrangements in which the tensions between the segments of a plural society can be accommodated within a single sovereign state" (50). In view of the notoriety of these two models, I will spend some comments on both, before moving on to a third 'constitutional model' for the protection of linguistic diversity - fundamental rights - that will form the object of the remnant of this study.

A. Federalism and Regionalism

The first model of conflict resolution is that of "a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions" (51). This definition which was coined for federalism, equally applies to regionalism. In fact, the differences between both systems of division of power are not evident; as far as it still possible to find a distinguishing legal feature between both, this is not at the level of autonomy (which is the sole object of the definition above), but rather at the level of participation (in federations, the member-states participate

to some extent in federal decision-making, while this aspect is usually lacking in regional states like Italy, Spain or Belgium. Even this distinction is however rather formalistic).

The important aspect of the definition is that the regions or member-states are 'auto-nomous' in the etymological sense, that is, that they have a final decision-making power for some activities, and are not subordinated, in any way, to the central state (52). That means that conflicts of jurisdiction between the centre and the autonomous institutions, which will inevitably arise in practice, cannot be solved by one of the partners but will normally be entrusted to a neutral third, usually a Constitutional Court. In practice, the neutrality of such a Court may be a bit doubtful, especially in countries, like the United States, Canada, Germany, Italy and Spain, where these courts are general 'guardians of the constitution', and not just of the provisions of the constitution dealing with the federal or regional division of powers. The member states or regions are therefore not represented as such in these courts, a factor which may lead to a certain centralist bias in their case-law (53). Only in a few countries have special courts been set up for settling disputes on the allocation of powers, offering therefore also special guarantees of an

adequate composition : the newly created Arbitral Court in Belgium (54) consists of an equal number of Dutch-speakers and French-speakers, and the special commission created by art.6 of the 1948 Faroe Home Rule Law, consists of two members appointed by the Faroe government, and two appointees of the Danish government; only in case of disagreement are they supplemented by three judges of the Danish Supreme Court.

Apart from the existence and orientation of constitutional adjudication, other factors may influence the effectiveness of federal or regional autonomy, such as the control on the financial instruments of autonomy (55), or the independence and capacities of the regional political elites (56). Notwithstanding these nuancing elements, federalism and regionalism may be considered as rather effective tools for the protection of a language group; its minority status is partially abolished by the fact that a significant number of policy areas are hived off from the central state and attributed to an autonomous community, whose organs may use their powers in the interest of the minority language. Membership of the language group ceases then to be a factor of societal marginalisation, and the incentive for assimilation weakens.

All this implies, of course, that this language group constitutes a majority of the population of the autonomous territory and is able to control its institutions. If, on the contrary, it is outnumbered even at the regional level, then the value of the regime of autonomy becomes much more doubtful (57); admittedly, even in this case, the group will represent a higher proportion of the population at the regional than at the national level, and may accordingly be able, as a rule, to exercise more influence (58). But one may also have the opposite effect: a local majority that, by being directly confronted with the minority, is more hostile to its interests than a distant and indifferent central government (59). Outside the strictly linguistic field, one could mention here the extreme case of Northern Ireland, where the devolution of powers has increased the discrimination against the local minority until the return to direct rule from London in 1972. Less clear-cut examples exist with regard to linguistic minorities. The Slovenes in Austria, for example, expect more from the federal government in Vienna than from the Carinthian Land authorities. In Wales, during the seventies, the prospects for devolution were welcomed with mixed feelings by Welsh language activists, as it was not clear whether the interests of the language would be in better hands with the English-speaking majority of an autonomous assembly than with the Whitehall

government, where the Secretary of State for Wales generally acts as a supporter of Welsh culture (60). But the most typical example was, no doubt, that of South Tyrol, where the Italian government, after the war, manoeuvred to drown out the German-speaking minority. In the so-called De Gasperi-Gruber agreement concluded with Austria in 1946, Italy had taken the international obligation to grant an autonomy status to the German-speaking population (61). But the Region Trentino-Alto Adige which was subsequently enacted by a constitutional law (62) included not only the predominantly German-speaking South Tyrol, but also the almost exclusively Italian Trentino area, the amalgamation of both territories resulting in a global Italian majority at the regional level. The Tyroleans reacted fiercely against what they resented as an abuse, and after years of protracted conflict, a package deal agreement in 1969 distributed the bulk of the powers of the Region to its two component Provinces, Trento and Bolzano. The German minority, by controlling the latter Province, now finally benefitted from a significant degree of autonomy (63).

A second important element is of course the type of policy matters which have been attributed. The role of the autonomous institutions in the protection of linguistic diversity is obviously much more direct and effective when

language policy is among the devolved powers. A preliminary question, in this respect, is whether the regulation of language use is to be considered as a specific 'policy' at all. The answer on this question depends on which view of language tends to prevail. If one looks at language primarily as an instrument of communication, then the regulation of language use will also be considered as ancillary to other, more 'substantive' policies. Thus, the central state will have the power to regulate language usage within the central administration, the region or member state within its own administration, the authority which has the power on education will decide on the language regime of education, etc.

Following the second approach, which sees language primarily as a cultural product in its own right, language is accordingly treated as a substantive policy area, covering the various situations where the use of languages is a significant factor (administration, the courts, education, the media, etc.). This means that a global and homogeneous linguistic policy for a given territory becomes possible; yet, this power need not be attributed to the central state; and even when it is, it may be directed either at the promotion of assimilation and linguistic uniformity, or at

the protection of diversity. The Italian and Belgian cases offer an interesting comparison in this regard.

In Italy, article 6 of the Constitution ("The Republic safeguards linguistic minorities by means of special provisions" (64)) has been an object of controversy in the distribution of powers between the State and the Regions. Most legal writers conclude from the location of this article (among the general principles of the Constitution) and from the use of the word 'Republic' (considered as embracing both the State and the Regions), that the directive to protect linguistic minorities is addressed to all public authorities within their respective sphere of competences (65). The central government, on the other hand, backed until recently by the Constitutional Court, interprets article 6 as constituting the 'protection of linguistic minorities' into a separate policy matter which, in the absence of any explicit attribution to the Regions (66), is reserved for the central state. This monopoly has not been put to a very generous use for the minorities concerned; except for the border zones of South Tyrol and the Aosta Valley, where (international) political pressure has brought about important concessions, the other linguistic minorities are more or less ignored by the central state, and regional initiatives for their protection have been stopped by a governmental veto (67).

Yet, this negative attitude has recently been more selective, and the Constitutional Court, too, seems now to have taken its long-expected about turn (68).

Belgium, on the contrary, provides the example of a central state which had also, for a long time, monopolised the legislative power regarding public language usage, but with the opposite goal of protecting and fostering the country's linguistic diversity. In the thirties already, a series of laws regulating language use in public administration, in education, and at the courts have established a system of 'territorial unilingualism' (69) : Dutch became the official language of Flanders, and French of Wallonia, only Brussels (and, to a certain extent, the small German-speaking area) remaining under a bilingual regime. This system, which proved to be a rather effective tool for the protection of the existing language pattern, was confirmed and strengthened by a new spate of linguistic laws in the years 1962-63 (70). When, in 1970, a constitutional reform established a devolution of legislative powers in cultural matters (71) , language regulation and promotion were included among the powers attributed to the Cultural Communities. Yet, the policy under the previous unitary regime had been so effective, that the scope for new initiatives of the Communities in entrenching even further

their linguistic peculiarity had become rather narrow (72). Moreover, central government remains in control of language policy in the most 'delicate' areas - central administration, Brussels, and the localities along the linguistic border - with the explicit objective of guaranteeing diversity in these mixed settings (73).

In other countries, there is no such global attribution of the power to conduct language policy; the 'instrumental' view prevails, in which the power over single 'substantive' fields is considered to include a subsidiary power to regulate the use of languages in that domain, whenever such regulation appears necessary. This doctrine was explicitly affirmed by the Canadian Supreme Court in its 1974 judgment in Jones v Attorney-General of New Brunswick. It upheld both the federal Official Languages Act and the provincial Official Languages Act of New Brunswick, as each of these legislators had restricted the operation of their act to their own field of competence (74). While both these Acts established an equal status for English and French, several acts of the Quebec province have sought, on the contrary, to establish a maximal degree of French unilingualism (75); but, here again, the general validity of these laws could not be questioned as they mainly regulated the use of language in fields such as the provincial

administration, the schools or labour relations, all within the provincial jurisdiction. Only a minor part of the Charter of the French Language, adopted under the Parti Québécois government in 1977, was struck down (76), insofar as it purported to restrict the use of English in the Quebec courts and parliament, which is guaranteed by section 133 of the British Northern American Act (77).

Similar rules obtain in Switzerland. Article 116.2 of the Constitution, declaring German, French and Italian to be the official languages, only applies to the federal level. The cantons, for their part, are free to choose a linguistic regime of their own in the matters of their competence, such as local administration and tribunals, and the most part of educational institutions. And in fact, the linguistic plurality at the national level is accompanied by quite radical systems of territorial unilingualism (with only limited minority guarantees) at the cantonal level (78).

In Spain, to take a final example, the division of powers in language matters between the central State and the Autonomous Communities is not yet entirely consolidated. The controversy follows familiar lines : the Autonomous Communities tend to consider language regulation as a full cultural policy area - yes even, for some of them, as their

chief cultural concern - and claim it as their exclusive competence on the basis of art.148.17 of the Constitution, while the central government seems to favour an 'instrumental' approach and wants to regulate the use of languages in all societal fields which it has kept under its control (79).

It is not my concern here to analyse in depth the impact of regional or federal autonomy on the protection of (language) minorities (80). I will only try to indicate in the remaining part of this sub-section, why, despite its strong appeal, it is not a panacea and needs to be complemented, or, in certain cases, supplemented by other means if one wants to arrive at an adequate regime of protection for linguistic diversity. More specifically, the territorial dimension of autonomy can be shown to be at the same time its principal strength and the cause of a number of drawbacks.

1. Even when autonomy is granted to a given territory with the explicit aim of protecting the ethnic identity of its population (which is not always the case), this objective can only be perfectly attained when the area of ethnic settlement corresponds perfectly to the regional

territory. Apart from some rare examples, mostly in isolated islands like the Aaland, Faroe or Greenland, this is rarely the case. The general rule is the existence of transition zones, of town-country distinctions, of reciprocal migrations. This absence of neat linguistic divides means that the problems of diversity are reproduced in miniature within the autonomous unit, and leads to the problem of 'minorities within the minority' (81).

The only radical solution to this state of things is to substitute territorial autonomy with a system of personal autonomy, whose beneficiary is not a territorial district, but a part of the State's population, identified on the basis of some personal characteristics, like, in our case, their linguistic membership. Such a conception, which seems so alien to present-day views on state construction, has some historical antecedents (82). Its most authoritative theoretical proponents have been Austrian socialists of the declining Habsburg Empire, Karl Renner and Otto Bauer, who saw in cultural autonomy along personal lines the only viable solution to the Austro-Hungarian nationality question (83). There were to be, in their mind, two types of autonomous powers : the one category (of a more social and economic nature) could be left with the existing historical *Laender* that cutted across ethnic boundaries; but all cultural

matters, on which the conflicts between nationalities were particularly heated, were to be attributed to corporations ('Koerperschaften') grouping all members of a given nationality without regard to their place of residence. The attractiveness of such a scheme is that it allows at the same time for maximal respect of the individual's identity and for the free development of every culture (84), and in addition counteracts spatial oppositions between the various ethnic groups, which could easily lead to a decomposition of the state along territorial lines. Despite these theoretical advantages, personal autonomy was only fragmentarily implemented : during the final years of the Austrian Empire (85), immediately after the war in short-lived independent Ukraine (86), and, most durably and systematically, in the three Baltic countries during the inter-war period (87).

One obvious reason for this failure is the considerable problems of practical organisation caused by the absence of a clear territorial framework. A distinction between the addressees of a legal rule on the basis of personal characteristics is certainly nothing exceptional, and is e.g. widely used in linguistic legislation (88). But entrusting such a population segment with proper legislative powers, that is, making of it a political actor and not just the object of political action, is a rather more difficult

enterprise, either at the level of constituting the governing bodies of such an autonomous community or in its daily administrative operation. It is certainly no coincidence that the territorial framework is so universally adopted as the appropriate instrument for the diffusion of governmental power.

More fundamentally, personal autonomy has proved to have, despite the expectations, a differentiating and fragmenting effect (89). If, in times of crisis, territorial autonomy may lead to secession, personal autonomy can lead to endemic violence (90) and thereby, in the long run, also to partition at an even higher cost; one might think here of Lebanon and Cyprus, where extremely sophisticated regimes based on forms of personal autonomy (in the large sense) (91) have degenerated in precisely this way. At present, the idea is moribund; in Europe, there is not a single linguistic group benefitting from a status of personal autonomy (92). One might therefore agree with Elazar (93) that it is theoretically possible to create a federal system whose constituent units are fixed but not territorially based, but that, for all practical purposes, the territorial element is a necessary part of the definition of federalism or regionalism.

2. If territory is thus an inescapable factor, an autonomy status would seem to be applicable only to fairly large and/or compact linguistic groups. The establishment of an autonomous region or member state of a federation seems to require a certain minimum size. There are, it is true, examples of autonomous units with a very small territory and/or population, but they are often off-lying islands, whose geographical isolation compensates for their lack of size : the Aaland islands, with their Swedish-speaking population of approx. 20.000, and the Faroe islands with their Faroese speaking 35.000 inhabitants both have a special autonomy status with regard to their respective mainland mother countries, Finland and Denmark (94). But mainland language groups of similar, or even much larger dimension, are not likely to benefit from such an elaborate autonomy regime. This is a *fortiori* the case with immigrant populations : they do not usually form compact, territorially identifiable settlements, and moreover, regional autonomy is not the kind of protection they aspire to, nor are they considered to have a legitimate claim to it.

3. This leads us to a third limitation of regional autonomy : unitary states are extremely reluctant to concede it, especially in the case of ethnic or linguistic minorities, and these groups must therefore possess

considerable leverage to obtain such a regime. In contrast to consociational devices or individual rights, autonomy appears as inherently subversive. Territory is indeed a basic element of state formation, and an autonomous territory, it is feared, can easily be transformed in a separate state. Moreover, the deep ideological roots of the typical nation-state are of a cultural nature : such a state might therefore tolerate devolution in the social-economic field, but be much more reluctant in highly symbolic cultural matters. France and Italy appear as good illustrations of this fact. One can say therefore that central elites in unitary systems "are slow to concede regional autonomy, fearing that separatist appetites will not be satisfied with concessions, but instead will grow with eating" (95). And the historical experience confirms that granting autonomy "can serve to exacerbate demands as well to defuse them" (96).

4. By its very definition, finally, regional autonomy leaves into being a central state which is not dominated by the minority language group. It is unavoidable that this central government will at least have some remaining powers with regard to language, be it only the political representation of the language groups, or the use of their languages in central administration. Autonomy can

provide no answer to this problem, except in those fully-fledged federal systems, where the participation of the member states in federal decision-making is constitutionally guaranteed.

B. Consociationalism

In the words of one of its main theorists, "consociational democracy may be defined in terms of four principles, all of which deviate from the Westminster model of majority rule : grand coalition, mutual veto, proportionality and segmental autonomy" (97). A number of authors, faced with the apparent paradox of a number of small European democracies (The Netherlands, Belgium, Switzerland, Austria) who, despite deep divisions along linguistic, religious or social cleavages, showed a high degree of political stability, have sought its secret in the agreement, among the political elites representing the main political cleavages, to set aside full majority rule in favour of a complex mechanism of proportional representation (98). The descriptive validity and explanatory power of the theory have however come under strong attack (99). It is disputable whether it has ever applied to the Swiss (100) or Austrian (101) cases, while it has clearly broken down in recent years

in the Netherlands (102); in Belgium it may still hold valid for the class and religious cleavages (103), but management of the ethno-linguistic conflict has slipped out of the hands of elite accommodation (104).

Due to this descriptive deficiency, the model has also lost its prescriptive appeal as a general tool for the maintenance of political stability, or, in our case, for the regulation of linguistic conflict and protection of diversity. However, the term 'consociational' may still be a useful synthetic way of describing a number of particular devices which tend to secure specific protection of language values at the central state level, thereby complementing or substituting federal or regional autonomy.

A typical category of such rules are those providing for some form of proportional representation of the country's language groups in public positions, both elected and appointed, including the legislature, government, the judiciary and civil service. Rarely however are these rules of a constitutional rank : one might mention article 86bis of the Belgian Constitution, which is the explicit recognition, since 1970, of a previously unwritten rule according to which French- and Dutch-speakers should be equally represented among the cabinet ministers (the so-called rule of parity).

Comparable, but much more flexible rules obtain in Switzerland. They are, for the most part, unwritten, except as far as the Federal Tribunal is concerned (art.107 I of the Constitution); but the rule that at least two out of the seven members of the federal cabinet must belong to the Romance language groups has, arguably, become an unwritten constitutional convention. Detailed rules on the allocation of positions between the Greek and the Turk language groups also exist under the 1960 Cyprus constitution, but are presently not applied because of the Turkish intervention and forced partition of the island (106).

One might also consider as consociational measures those constitutional provisions which recognise an official status to a plurality of languages. This implies an important correction of the minority position of the smaller of these language groups. Indeed, the official status of a language means that it will be widely used within the central bureaucracy, which in turn implies a series of measures concerning the linguistic composition of the public service. But beyond this, an official language clause is also a source of individual rights for the citizens, and it will, as such, be treated more fully at a further stage of the study (107).

C. Fundamental Rights

Most academic and political attention goes to the two aforementioned constitutional tools for the pacification of ethnic conflict and the protection of linguistic diversity. Yet, I have chosen, in this study, to deal with a third type of instrument of minority protection, namely fundamental rights. A full analysis of their nature and role can not be provided in this section, as it forms precisely the object of the study as a whole. Here, I will merely attempt to show why one can meaningfully choose to deal with this instrument. The arguments will be of the negative and the positive sort : fundamental rights are not affected by some of the limitations inherent in the other types of protection, and they are also, by their nature, able to perform the function of preserving linguistic plurality. I do not want to claim that fundamental rights are the only valuable, not even the most valuable, tool for that purpose, but only that they may usefully complement other political and legal mechanisms. If I have selected them for special consideration, it is also for 'practical' reasons ; to the jurist, fundamental rights may appear as the more congenial object of study, the one where the specific contribution of legal analysis is likely to be greater than with the other, more exclusively 'political' means of conflict regulation. It

is moreover a land that, to a large extent, lies fallow (108).

1. While federalism, regionalism and consociationalism are rather ponderous mechanisms of conflict regulation, rights appear as eminently more flexible : they do not alter the structure of political decision-making, nor do they inherently require institutional measures of implementation. They are, on the contrary, ex post interventions in the governmental process, depending, for their implementation, primarily on private individual initiatives. Protecting linguistic diversity through fundamental rights does not even require basic alterations to the existing legal mechanisms that are geared already to this type of rule enforcement. As far as their nature is concerned, rights are therefore applicable to all situations and all language groups, however small or diffuse they may be.

2. Closely linked to the foregoing is the fact that fundamental rights are somehow neutral and open-ended. They do play an important positive role in the protection of language plurality, as this thesis wants to prove; but this role need not be consciously acknowledged by the political system. In contrast to regionalism or consociationalism,

fundamental rights are acceptable and accepted in every democratic system, whether it recognises the value of linguistic diversity or not.

This point can provisionally be argued here by referring to the classical distinction between 'negative' and 'positive' fundamental rights. The former category, also called 'classical rights', basically establishes a sphere of autonomous private societal action, protected against state interference, where the individual may pursue his own objectives even if they contrast with declared state purposes. These 'tolerance-oriented' (109) rights allow him therefore to shelter his language against assimilationist official policies. 'Positive' or 'promotion-oriented' (110) rights, on the contrary, require state activity for their implementation. The guarantee of positive language rights would therefore seem to presuppose a political will to maintain linguistic diversity. In reality, as I will try to show later, even assimilationist states may be compelled, in certain cases, to take some positive measures for the protection of linguistic minorities, in order to respect the internal logic of their system of fundamental rights. These rather cryptic remarks will be substantiated in later parts of the study. At this point, I merely submit that fundamental rights have a certain subversive character, as they can, in

contrast to other instruments, play their protective role even without a preliminary consensus to that effect.

3. More positively, it seems that fundamental rights have a close conceptual link with the value of diversity, and hence also of linguistic diversity. Luhmann describes the general function of fundamental rights as "the protection of societal differentiation against regressive assimilative tendencies of the political system"(111). Fundamental rights play this differentiating role because they act as a 'higher law' check on, otherwise omnipotent, majoritarian decision-making. Certain areas of social life cannot be forced into the majoritarian mould; minority groups cannot be forced to total conformity with a cultural model.

It has been held, however, that diversity can be as efficiently protected through the normal democratic decision-making process, without entrenching constitutional rights. The once prevalent 'pluralist' political theory argued that decisions, in Western democracies, are the result of a pluralist game with a large number of competing interest groups, none of which is dominant, and who make shifting alliances on the various policy issues. Each of these specific interest groups is able, through the give and take of the political market, to make its voice heard in the

global decision-making. A system of fundamental rights, purporting to shield off some minority groups from the reach of majority decisions, disturbs this spontaneous ordering : "in a way, it is of the essence of democracy to allow the various persons and groups that make up our society to decide which others they wish to combine with in shaping legislation"(112), and this choice should not be constrained from the outside.

Yet, this optimistic theory of society has come under strong attack even on its American home ground (113); pluralism, it is said, is only a label which masks an elitist reality. There are several privileged groups in society with a roughly equal share of influence on policy-making; but their interaction does not lead, by some Smithian invisible hand, to decisions in the general public interest, because of the fact that many outsider groups do not participate in the game. There are, in most societies, structural minorities, "that keep finding themselves on the wrong end of the legislature's classification" (114). "This", another author adds, "is the crucial distinction between minorities and interest groups such as farmers, pensioners, higher civil servants or divorced women. All these groups are also minorities from a numerical point of view, but their position is not continuously opposed to that of the majority. They can

trade their interests in the process of bargaining, propaganda, and, most importantly, by forming coalitions. It is precisely in this last respect that a minority does not form part of the political arena" (115).

I have tried to show in the first part of this study that language groups that do not form a numerical majority of their country's population are usually such structural minorities. Effective linguistic pluralism, therefore, is in strong need of a limitation on the majoritarian process through the entrenchment of fundamental rights.

P A R T T W O

F U N D A M E N T A L R I G H T S

CHAPTER ONE

A CONCEPT OF FUNDAMENTAL RIGHTS

In the foregoing chapter, fundamental rights have been presented as one specific instrument for the protection of linguistic diversity. Some descriptive indications were added in order to contrast fundamental rights with other tools for protection. In this chapter, I will try to define the concept of fundamental rights in a more rigorous way. This operation will take place in two steps : first, a definition of legal rights as contrasted with non-legal rights and with legal norms that are not 'rights'; and subsequently, the identification, within this general category of legal rights, of a special category of rights that may be called fundamental.

Section 1

Rights

Rights will be defined here as rules of positive law (A), that can be privately enforced (B).

A. According to one definition, "to have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles" (1); as this definition clearly indicates, the term 'rights' is used either in morals or in law. This study is not one of political philosophy; the short exercise in ethical theory in the foregoing chapter (2) will not be further pursued. I am not primarily concerned with the question which language rights ought to be recognised, but which rights are effectively guaranteed in the various legal systems. It also follows that natural law will not be considered here as an independent source of linguistic rights. Of course, the historical origin of fundamental rights lies in political philosophy and natural law theories, and they may still be considered, somehow, as a historical synthesis between the two competing doctrines of jusnaturalism and positivism (3). While acknowledging this

origin, I will however restrict my analysis to those fundamental rights that are effectively guaranteed in the presently existing legal systems.

Is this narrow positivism ? I certainly do not pretend that the choices made by the various legal orders in admitting certain rights as 'fundamental' and others not, are irreproachable. It is not evident, e.g., that the right to property is any more basic than the right to work. As for the present subject, I would personally share the view that many legal systems give insufficient protection to the value of linguistic identity. Yet, I am also convinced that a scientific study of the lex lata, as separate from ethical considerations de lege ferenda is specially relevant in a context like that of linguistic diversity, where 'is' and 'ought' have often been intermingled.

At the same time, an analysis of positive law is not bound to be a flat recital of constitutional and legislative provisions and case law developments. In fact, much of the 'ought' can, with some interpretative creativity, already be read into the 'is'. As will be more fully argued in the next chapter (4), general fundamental rights sometimes have unexpected linguistic implications, which might not be fully acknowledged in the existing legislation or case-law,

but are nevertheless part of positive constitutional reality. Finally, as pointed out in the Introduction to this study, the comparison of the various constitutional systems, in combination with the international law dimension, shows the relativity of the solutions reached by any single legal system and spontaneously points to improvements de lege ferenda.

B. What, within the whole of the rules of positive law, are rights ? It is not the place here to delve into the important theoretical issue of the ultimate source of 'rights', whether genuine 'subjective rights' whose existence precedes their recognition by the state, or mere 'reflexes' of an objective legal order (5). I will choose a pragmatic criterion, which avoids to take sides in the underlying debate : a right is a norm which can be judicially enforced through private action.

Rights in this 'procedural' sense (6) will quite often correspond to rights in the 'formal' sense, i.e. legal norms expressly indicating an individual (or group of individuals) as their beneficiary. But the procedural criterion also permits to include those institutional or 'objective' norms that do not mention a direct beneficiary,

but can nevertheless be invoked by the individual. Again, whether this individual remedy is called a 'reflex' or a genuine 'subjective right' is unimportant for present purposes; in their effect they are undistinguishable, and it would therefore be unwise and over-formalistic to exclude them from the investigation. As will be shown later on, several such institutional norms can be turned in individual instruments for the protection of linguistic diversity, foremost among them the 'official language clause' (7).

Section 2

Fundamental Rights

'Fundamental rights' is not a term of art with a well-defined and generally accepted meaning. A definition for the purpose of this study must therefore be provided. One could try to formulate a substantive definition, sounding more or less as follows:

"Fundamental rights may be taken to mean rights which are inseparable from the concepts of the freedom and dignity of man, the safeguarding of his existence, health and economic security, as well as from the principles of equality and social justice and from his cultural development."(8)

Such a definition, despite (or because ?) of its uncontroversial nature, can hardly serve as a working definition permitting a clear distinction of 'fundamental' from 'ordinary' rights. Indeed, when one descends from the level of abstraction and tries to apply this definition to concrete instances, value judgments become unavoidable, and the danger of wishful thinking, alluded to above(9), creeps in again.

Rather than a substantive definition, I will use, therefore, a formal definition. The term 'fundamental rights' will serve in this study as a common denominator for 'constitutional rights' (at the national level) and 'human

rights' (at the international level). The following pages attempt to give a formal definition of these two categories.

A. National Fundamental Rights

1. Fundamental Rights as 'Higher Law'

The provisional identification, above, of national fundamental rights as 'constitutional rights' should not be taken literally. The real criterion will be that of 'higher law' : rights will be called fundamental when, within the legal system, they are "accepted as controlling in cases of conflict with ordinary law"(10). Not all constitutional rights are 'fundamental' in this sense; the constitution of the United Kingdom, e.g., is usually described as lacking hierarchical superiority over ordinary legislation. Conversely, other than constitutional rights may have a higher law status within the legal system :

i) In most cases, fundamental rights are listed in the formal constitution, either scattered over the entire text or (more frequently) grouped into a separate chapter of the Constitution (11)

ii) Sometimes, fundamental rights are laid down in a 'Bill of Rights' which exists alongside the original

constitutional text : this is the case of the United States (the Amendments to the Constitution) and now also of Canada (the 1982 Charter on Rights and Liberties is, formally at least, an amending Act to the 1867 British Northern America Act).

iii) In some other countries, fundamental rights, instead of being located in a single type of legal text, can be found in a number of disparate legal instruments forming all together the 'constitutional block' (12). France is a typical case in this respect : the 1958 Constitution, in its Preamble, refers as supplementary sources of constitutional law to the 1789 Declaration of the Rights of Man and to the Preamble of the former Constitution of 1946, which itself refers to the "fundamental principles recognised by the laws of the Republic"; these four different sources all contain a number of individual rights(13). Austrian constitutional law is at least as fragmented; like in the French case, the federal Constitution of 1920 (containing only very few rights itself) forms the legal basis on which several other instruments have been grafted : firstly, the fundamental liberties recognised by the 1867 'Staatsgrundgesetz ueber die allgemeinen Rechten der Staatsbuerger' (the Habsburg Bill of Rights) are explicitly adopted by art.149.1 of the Constitution; secondly, the Peace Treaties concluded after both World Wars (the Treaty of St.Germain of 1920, and the

1955 State Treaty) have been transformed into domestic law with constitutional rank (14). All of these instruments contain provisions dealing with linguistic minorities.

iv) In addition, constitutional law may also contain unwritten or customary rules. Custom and convention play often a very important role with regard to the institutional side of constitutional law, and rather less so as far as individual rights are concerned. Nevertheless, constitutional courts have, in some countries, 'discovered' rights not specified by the Constitution. The French "fundamental principles recognised by the laws of the Republic" may be considered as 'half-written', but they are basically for the Constitutional Council to identify within the enormous mass of "laws of the Republic". The Irish Supreme Court has read a similar mandate for judicial creativity into art.40.3 of the Constitution which guarantees the general category of "personal rights of the citizen", and has enforced, occasionally, unwritten or 'natural' rights on the legislator (15). Without such reference to natural law, the Swiss Federal Tribunal has also been very active in finding unwritten rights, which it defines as necessary complements to the, admittedly rather sparse, individual guarantees of the Constitution (16); one of these unwritten rights is 'linguistic freedom' which plays of course an important role for the purposes of this study.

v) May we also include those rights listed in the Statutes or Constitutions of regions or member states of a federation ? Surely, many of these instruments contain individual rights, but they apply as a 'higher law' standard only to the state or regional legislator - and not to national legislation. Indeed, the national constitutional provisions on the division of powers rank above the member state constitutions; legislation enacted by the central state in respect of its jurisdiction can therefore not be subjected to member state constitutional review. There are, however, some exceptions in which regional Statutes, through a solemn procedure of adoption in national Parliament, have been given a hierarchical rank superior to national legislation. This is the case, first of all, with the five Special Statute Regions in Italy. In contrast with the other fifteen so-called "ordinary" Regions, their Statutes have not been adopted by an ordinary act of the national Parliament, but by a constitutional law (17). Although these "leggi costituzionali" have been ranked by the Constitutional Court under the Constitution itself (18), they are undoubtedly hierarchically superior to ordinary legislation. Relatively similar is also the legal position of the Statutes of the Autonomous Communities in Spain. Although some of these Statutes have been elaborated by an ad-hoc assembly in the region concerned, the legal character of the final text

passed by the Cortes is undoubtedly that of a national act (19). They are not, like in the Italian case, 'constitutional laws', but belong, according to art.81 of the Constitution, to the very wide category of 'organic laws'. Whatever be the exact hierarchical relation of organic laws in general to ordinary legislation (20), the Statutes must certainly be considered to be 'higher law' as they can be enforced in the constitutional process against conflicting national legislation (21).

It may seem somewhat paradoxical that regional Statutes occupy a higher rank in the national hierarchy of sources than the state Constitutions in fully-fledged federal systems. Yet, these Statutes are also more vulnerable than state Constitutions; having been adopted by national Parliament, they cannot be amended without the agreement of this same Parliament; indeed, in the Italian case at least, they can be undone by Parliament, according to the ordinary procedure of constitutional amendment, i.e. without intervention by the Regions.

2. Judicial Review as a Necessary Condition ?

The formal definition of fundamental rights, given in the previous section, runs into the following objection : can rights truly be called 'fundamental' if they are not

effective higher law, if they are unable to set conflicting legislation effectively aside? According to this view, the existence of binding judicial review of the constitutionality of legislation is a precondition for the existence of a 'higher law'.

It is true that judicial review multiplies the efficacy of fundamental guarantees; more than this, judicial review may well appear to be a logical necessity of constitutionalism : "(...) the logic of Chief Justice Marshall's doctrine in *Marbury v Madison* - that, if the Constitution is to be 'higher law', judges must be bound to apply it over conflicting ordinary law - is as forceful as it is simple"(22). The question of enforcement will be discussed in a following chapter; but for present, definitional purposes, one might well argue that the absence of judicial review does not deprive a Constitution of its higher rank. Indeed, "judicial review is but a part of a larger whole. If one defines constitutional justice as that condition in which citizens may trust their government to uphold certain rights considered inviolable, it is clear that judicial review of statutes is only one way of attaining this happy state. In fact, in a given country political factors may perhaps provide a better check than the courts on attempts to establish majoritarian tyranny"(23).

To speak of 'enforcement' in cases of such 'political review' may seem pretentious. Yet, the legal doctrine of several countries takes such political enforcement seriously. The new Swedish Constitution, e.g., while reluctantly introducing some form of judicial review, at the same time stresses the fact that the main responsibility for the control of constitutionality rests with the political organs (24). In legal systems without judicial review, legal writing unanimously adheres to the Kelsenian view of the legal pyramid and affirms the supremacy of the Constitution over ordinary legislation, and 'only' denies to the judge the power to rule on this matter (25). Two factors confirm this view : i) the existence of special amendment procedures for the Constitution, requiring often special majorities, by which the Constitution affirms, implicitly, its higher law status; and ii) the existence of (non-binding) preview of constitutionality by a quasi-judicial body : the Council of State in Belgium or the Netherlands, or the Supreme Court in Finland. In the latter country, the President has, at times, refused his approval to laws passed by Parliament when the Supreme Court considered them as contrary to the Constitution (26).

The United Kingdom shares with the foregoing countries the absence of judicial review, but, in addition,

it does not have a formal constitutional text either. Can one then speak, in Britain, of 'fundamental rights' as higher law norms controlling legislation, or is the constitution just a set of basic rules which are generally followed, but which Parliament may freely disregard if it wishes? The answer lies of course in the vexed issue of parliamentary sovereignty, defined as follows by one author (27):

"The Queen in Parliament is competent, according to United Kingdom law, to make or unmake any law whatsoever on any matter whatsoever; and no United Kingdom court is competent to question the validity of an Act of Parliament."

If these two phrases form, as they appear to (28), two independent statements, then the United Kingdom is different indeed from Belgium, the Netherlands, etc., in having no supra-legislative norms. Even if one holds the unorthodox view that the United Kingdom constitution is higher law (29), there remains the further uncertainty whether any individual rights form part of this Constitution. According to prevailing opinion, civil liberties appear as 'residual' guarantees : "(t)o define the content of liberty one has merely to subtract from its totality the sum of the legal restraints to which it is subject."(30). According, then, to the definition used in this section, United Kingdom law has no fundamental rights for the protection of linguistic

diversity; references to this country's legal system, in this study, will therefore only be cursory (31).

B. International Fundamental Rights

1. Human Rights Conventions as Higher Law ?

Can the criterion of 'higher law', used for the identification of fundamental rights at the national level be applied to international human rights? Those rights could conceivably be viewed as 'higher law' on two different levels : either within the whole of international law, or in relation to national law.

a) Within International Law.

"The international normative system has traditionally been characterised by its unity : whatever their formal origins (custom or Conventions, for example), whatever their object or importance, all norms are placed on the same plane, their interrelations ungoverned by any hierarchy, their breach giving rise to an international responsibility subject to one uniform regime" (32). Yet, the existence of a hierarchy within international treaty rules, often affirmed in legal

writing, is now proclaimed by art.53 of the Vienna Convention on the Law of Treaties :

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

This concept of 'peremptory norms', more often called jus cogens establishes a hitherto unexisting hierarchy among conventional norms, by which some rules of general international law may not be derogated by non-general (i.e. regional, local or bilateral) agreements (33).

In assessing the importance of jus cogens in relation to human rights, one should not forget, as Suy points out (34), that human rights violations will only very rarely occur through international agreements, but rather through unilateral state action. In order to be meaningful in the context of human rights, the concept of 'peremptory norms' as coined by the Vienna Convention must be extended to

a more general, and uncertain, notion of 'imperative norms' controlling unilateral state action as well.

Such imperative norms can be identified e.g. in those rights listed in international human rights conventions from which no derogations are permitted, such as the provisions of the Civil and Political Covenant mentioned in its article 4.2, and the provisions of the European Human Rights Convention mentioned in its article 15.2. But if one considers these articles as embodying *jus cogens* (in the larger sense) (35), what about all the other rights listed in these conventions, from which derogation is permitted? If they are excluded, a definition of 'fundamental rights' based on *jus cogens* would be intolerably restrictive. Some authors, it is true, think that "the great bulk of the contemporary human rights prescriptions" should be regarded "as among the principles clearly identifiable as *jus cogens*" (36). But the prevailing view tends to restrict the attribute of *jus cogens* to only a very limited number of basic human rights (37). There also exists some judicial authority for the latter view. In the Barcelona Traction case, the International Court of Justice drew a distinction "between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection", and exemplified the former category

of erga omnes obligations as follows : "Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." (38). Though, strictly speaking, the erga omnes character of an obligation only deals with its ratione personae field of application, and not with its hierarchical rank, the distinction made by the Court is often seen as an elaboration of the concept of jus cogens (39). But, once again, the basic rights identified by the Court constitute only the top of the iceberg, and cover only a small segment of what is generally viewed as international human rights law. They do not cover, to take only the rights which were directly at stake in Barcelona Traction, the right to property and a fair judicial hearing. We must conclude that the concept of jus cogens, and its ramifications, cannot, because of its uncertainties and limitations, provide us with a satisfactory working definition of 'fundamental rights' for present purposes. If their definitional utility is scarce, jus cogens and other, related, notions may however have an impact at the level of enforcement of human rights (40).

The term 'constitutional rights' is not very helpful either in the international context. The treaties setting up particular international organisations are often called the 'constitutions' of these legal systems (41). Usually however, they perform only part of the functions assumed by national constitutions, namely that of organising the system by creating institutions, attributing powers and establishing procedures - but they do not have 'bills of rights', for the simple reason that these organisations do not enter into direct relationship with private individuals (with the exception of their own administrative personnel). Fundamental rights typically appear, instead, in other kinds of conventional instruments, that do not set up international organisations, but are specifically directed at the States themselves.

b) In Relation to National Law

Even if international law itself does not make a sufficiently helpful distinction between 'higher' and 'ordinary' norms, there might still be found such a distinction in the way the national legal orders 'receive' international norms. In reality, this is not the case either, and every legal order defines the relation of international to domestic law in globo, without any distinction of rank :

i) some legal orders recognise the supremacy of international treaty law as a whole over conflicting national legislation; in this case, all individual rights contained in international agreements have higher law status, and would have to be called 'fundamental'; ii) in other legal orders, all international agreements are transformed into national law before they can operate in the domestic forum. Accordingly, they do not have a higher rank than other national legislation, and in this case no international rights could be called 'fundamental'. The choice between these diverging theories on the domestic status of international law has of course important consequences in the field of enforcement of fundamental rights, and will therefore receive due attention in another chapter(42). But, for our present purposes, both theories equally imply that the criterion of 'higher law' can give no firm guidance as to the identification of 'fundamental rights' within the body of international law.

The criterion used to identify national fundamental rights having been discarded, there remains to be found an autonomous criterion by which to ascertain the existence of international human rights. This criterion will be very pragmatic : human rights are those rights contained in special multilateral instruments similar to national Bills of

Rights. Although there is no 'authentic' enumeration of such instruments, the lists given in the leading compilations and studies on the subject may give an approximate idea; it is striking, by the way, that the authors of these works usually do not even attempt to give an introductory abstract definition of the concept of human rights (43). To this criterion of analogy (with national Bills), we might add a criterion of genealogy : all those instruments (both at the universal and at the regional level) specifically refer, in their Preamble, to the human rights provisions of the United Nations Charter and/or to the Universal Declaration of Human Rights. The latter texts might therefore be considered as the backbone of a, more or less coherent, 'International Bill of Rights'. In the next chapter, I will indicate which, among all those human rights instruments, are relevant to the field of linguistic diversity.

2. Non-Treaty Rights ?

The international conventions just mentioned certainly constitute, at present, the overwhelmingly dominant source of international human rights obligations. But the question arises whether the other main sources of international law listed in art.38 para.1 of the rules of

procedure of the International Court of Justice, namely custom and general principles also include some human rights norms which might have an impact on linguistic diversity.

It is generally accepted that the list of human rights contained in the global multilateral conventions is fairly comprehensive. The problem is therefore not so much whether the unwritten sources may contain any supplementary substantive provisions. Their hypothetical role would be more procedural : treaty rights are only binding for states that have ratified the instruments in which they appear, while the unwritten sources may have a much larger obligatory effect. In this way, a specific right, to which a state has closed the 'front door' by refusing to ratify the treaty wherein it figures, could enter through the 'back door' of custom or general principles. One sees immediately the interest, but also the temptation of discovering human rights guarantees in those other sources of international law (44).

As far as customary law is concerned, there seems to be at least one area of individual rights which constitutes, beyond any doubt, positive international law, namely that of the international minimum standard for the treatment of aliens. The exact content of this minimum standard is controversial (45), and several lists of these

minimum rights have been proposed (46), but it seems clear, at any rate, that the customary protection of aliens has fallen beneath the substantive level of general human rights protection (47). The trend therefore seems to be towards the disappearance of this special status and the recognition to aliens of the benefit of general international instruments (48). Those latter usually describe their beneficiaries with a general formula ("everyone..."), and explicitly specify so when they want to exclude foreigners (49). We may then say, as a rule, that the international language guarantees that will be analysed in this study hold equally for foreigners (above all, immigrant workers) as for nationals. Only exceptions to this rule will be specially emphasised (50). Notwithstanding this evolution, the traditional procedures devised for the protection of aliens (diplomatic protection) will keep a certain value as long as the implementation mechanisms of conventional rights remain inadequate, or impose special difficulties of access to aliens.

The existence of customary human rights protecting the nationals of a state is more problematical. At first sight, one might think that the opinio juris, one of the constituting elements of custom can be easily established by the various multilateral conventions and the reiterated proclamations in international fora expressing the (often

unanimous) opinion of the states as to the obligatory character of human rights standards. Can those proclamations at the same time be considered as evidence of state practice ? A number of authors would agree with Henkin that "(t)he declarations and resolutions of UN organs and other international bodies on human rights may have greater weight in achieving international law here than on other matters, since they purport to express the conscience of mankind on a matter of conscience." (51) It has also been convincingly argued that in many cases state practice does not play any role of its own, or rather takes exclusively the form of the expression of a legal opinion (52). Yet, this may be true e.g. for boundary disputes, but not, it is submitted, in the case of human rights where the danger of confusing lip service paid to human rights with their actual guarantee is specially acute.

Yet, if the internal practice of a state concerning a given rule differs from its expressed legal opinion (as is typically the case with human rights) can the state not be taken to its word and have the rule in question enforced against it as a customary norm (53), before an international court or even before the courts of another state (54)? This construction may be justified in the case of obligations prohibiting a fairly easily identifiable behaviour, such as

the norms prohibiting torture, slavery or genocide (55), or perhaps the right to life (56). But beyond these core rights, there is not only a gap between legal statements and actual practice, but also a lack of common understanding on the interpretation of the legal rules themselves. This is apparent from the preparatory work of human rights conventions; indeed, the compromise between widely conflicting values through the use of very general terms may have been a necessary condition for the conclusion of these conventions. The rights that will be specifically analysed in this study belong to this second, more amorphous category; the role of customary law is therefore negligible in their regard. It would take e.g. a wide spread apartheid-like pattern of linguistic discrimination to bring into operation a clear customary prohibition, an unlikely event in the countries under study. I therefore submit that, for the purposes of this study at least, conventional rights are already so threatened and uncertain, that bringing in other and vaguer norms risks, despite the best intentions, to increase further the gap between expectations and reality.

b) As for the third source of international law mentioned in art. 38.1 of the Statute of the International Court of Justice, the general principles of law recognised by civilised nations, one may safely say that "few things have

in the past given rise to so much diversity of opinion as precisely the nature and function of these principles" (57). This lack of agreement extends also to the question whether any human rights figure among these general principles. On the basis of a (summary) constitutional comparison, one recent study concludes to the existence (or at least to indications of the existence) of "a significant group of human rights which constitute under general principles of law, a substantive part of international law" (58), including e.g. freedom of expression and non-discrimination. Another author, more daringly still, offers a quite detailed list of minority rights all deemed to be general principles (59). Because of the fairly gratuitous way in which general principles are often asserted, e.g. by browsing through national constitutions, it seems preferable to follow the prevailing view, according to which the position of general principles, as the third source of international law, also indicates a logical order : they are only a subsidiary source of international law (60), playing as such a double role : i) a methodological role, as an aid to the interpretation of existing, but vague conventional or customary law; and ii) a limited substantive role of gap-filling, in those instances where conventional or customary rules are not available (61). As there is no dearth of conventional human rights prescriptions, the normative role of general principles must

be considered as very slight in this field (62). Only under European Community law do general principles play an important - indeed, the dominant - role in the protection of fundamental rights. But this does not really constitute an exception to the theory sketched above : as the Community Treaties are, apart from some limited provisions, silent on the subject of human rights, the European Court of Justice was certainly justified in recurring to the category of "general principles of Community law" in order to fill a lacuna in legal protection (63).

CHAPTER TWO

WHICH FUNDAMENTAL RIGHTS ?

Section 1

At the National Level

A. Fundamental Rights v Linguistic Rights

In the last pages of the first part of this study, I tried to indicate the reasons why fundamental rights, as an institution, offer an attractive tool for the protection of minority groups in society, and thus also of linguistic minorities (1). But do the concrete fundamental rights guaranteed in the various legal systems live up to this promise ? Do these rights, or at least some of them, contain a meaningful guarantee for linguistic values ?

On a first glance at the constitutional texts, this does not seem to be the case at all : the rights listed there admittedly protect the members of a linguistic minority as citizens, but only exceptionally, if ever, in their quality

of speakers of their language. These people find themselves protected as adherents to a religious faith, as proprietors, as workers, as members of an association, etc., but their linguistic interests are not directly satisfied. As a consequence, the actual value of constitutional rights for the protection of linguistic diversity seems rather remote and indirect, taking the following two forms (2) :

i) negatively first : apart from the rare cases where express distinctions are made, fundamental rights are generally granted to all citizens (or even to all persons coming within the State's jurisdiction); this means that language minorities may not be singled out for mistreatment or discrimination in regard of those basic rights.

ii) Positively, fundamental rights of the 'classical' type guarantee to everyone a free sphere of activity. Like everyone else, members of a language group can use this liberty for the promotion of the values which they cherish, including their language. Freedom of expression, e.g., means that they may canvass for the cause of their language, like others for their political opinion or religious faith; they may use their property in order to further the position of their language; they may create associations for the same purpose; and so forth.

Yet, if that would exhaust the contribution of fundamental rights to the protection of linguistic diversity, one could readily agree that the value of general rights and liberties for linguistic minorities is rather low; indeed, the primary objective of these minorities' demands, namely a protection against assimilation by the dominant culture is not helped any further. According to one author, bills of rights and their machinery of enforcement "are certainly not designed to enhance or to reduce the relative power position of particular cultural groups. Nonetheless, the cumulative effect of such measures is in the long run to integrate individuals and groups within the greater society, for individuals' group allegiance to fade, and for the relative influence of groups as a whole to be diminished" (3). Not only is such a 'creeping' assimilation facilitated by fundamental rights, but even a conscious policy of assimilation is, according to many, compatible with such rights : "a State may perfectly well respect human rights, and still depreciate the minorities existing on its territory : it only needs to abstain from taking into consideration their special needs" (4).

Fundamental rights might, consequently, be considered as a kind of charade, raising high expectations but offering only a minimal and largely insufficient response

to the real needs of minority language groups, or at least of those among them who refuse assimilation and desire to preserve their cultural identity. Such a remote form of protection would also not justify the idea of embarking on a long-winding analysis, like the present one. However, there exists an additional category of specific rights protecting explicitly linguistic values. They do not belong to the 'standard' list of rights which one can find in most constitutional systems; on the contrary, they are an idiosyncratic feature of only a limited number of countries, those where the multilingual fact is explicitly acknowledged; even there, they take the most variegated forms.

Those rights might be called linguistic rights, a notion which is, however, fraught with ambiguities. There is, in the specialised literature, a tendency to use the term in a rather impressionistic way, without clearly distinguishing it from other means of linguistic protection, such as autonomy or devices of the 'consociational' type (5). I will use the concept of 'rights' as defined in the previous chapter, as rules of positive law that can be privately enforced. Sometimes, linguistic rights are also called 'group rights' or 'collective rights', because they aim at the protection of the group or have been attributed on the basis of a group characteristic (6). In this study, I will use the

term 'group rights' only for those entitlements whose beneficiary is a group or collectivity rather than the individual. This is an entirely different matter: indeed, similar rights are very rare, and ill-suited to the existing enforcement mechanisms. The protection of most collective interests is typically made, not through collective, but through individual rights (7); this applies specially in the case of language : rights guaranteeing the use of language, although attributed to individuals, can only be exercised in community with others (8); in the case of a prohibition of linguistic discrimination, the very criterion which makes a certain treatment unlawful is a group criterion : the fact of belonging to a linguistic community (9).

After these brief terminological remarks, I will now proceed to a quick inventory of linguistic rights of a constitutional nature existing in the countries under review (10), dispensing, at this point, with their detailed analysis.

1. One can mention first of all linguistic freedom, as guaranteed by art.23 of the Belgian Constitution : "The use of the languages spoken in Belgium is optional; it may only be regulated by law and only in the case of acts by the public authorities and of judicial matters". In Switzerland,

a similar freedom, while not listed in the Constitution, has been declared, by the Federal Tribunal, to be an unwritten fundamental right (11).

2. Other constitutional provisions guarantee a right to use certain languages in some fields belonging to the 'public' sphere. A characteristic example is section 133 of the 1867 British Northern America Act, the original Canadian Constitution : "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; (...) and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec (...)".

Usually, similar guarantees of the 'public' use of certain languages do not stand in isolation, but are the (implicit or explicit) consequence of a broader institutional norm : an official language clause, figuring in a number of Constitutions. The official language is, quite in general, the language to be used by official institutions (legislative, administrative, judicial) both in their internal operation and in the outward contact with the public (official forms and publications, documents, information,

street signs, court trials, hearings, etc...). In the previous chapter, such a clause was mentioned as a typical example of an 'objective', institutional norm from which individual 'reflex' rights may flow. Indeed, the fact that public authorities must use a given language implies in principle that the individual citizens are also entitled to use this language in addressing themselves to the public authorities, either orally or in writing (license or tax forms, applications for governmental services, court suits, affidavits, etc.).

Recognising this 'subjective' side of the official language use is, of course, unproblematical when the Constitution mentions only one single official language (12). More interesting is the case of bi- or multilingual settings, i.e. of countries or parts of countries where two (or more) languages have an official rank. Does this imply a free option for the individual to use either of those idioms? Sometimes, the Constitution itself gives the answer. Thus, art.14 of the Finnish Constitution gives a positive answer:

"Finnish and Swedish shall be the national languages of the Republic. The right of Finnish citizens to use their mother tongue, whether Finnish or Swedish, before the courts and the administrative authorities, and to obtain from them

documents in these languages, shall be guaranteed by law; (...)".

This is also the path followed, in painstaking detail, by the new Canadian Charter of Rights and Freedoms, which attempts to spell out all the possible individual rights flowing from the fact that French and English are declared to be the official languages of Canada as a whole, and of the Province of New Brunswick(13). Article 8 of the Irish Constitution, on the other hand, gives a negative answer and explicitly restricts the possibility of derivative individual rights :

"(1) The Irish language as the national language is the first official language

(2) The English language is recognised as a second official language (3) Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof".

Finally, there are those countries where an official language clause is not followed by any specification as to individual entitlements : art.116.2 of the Swiss Constitution, recognising German, French and Italian as the official languages of the Confederation; or art.3 bis of the Belgian Constitution, distinguishing four linguistic areas : a Dutch, French, German area and the bilingual area of Brussels.

whether individual linguistic rights can be implicitly read in those provisions, shall be discussed later (14).

3. A final category of linguistic rights consists of provisions which do not solely relate to the use of the language, but are more generally aiming at the protection of linguistic values. Foremost, here, is the principle of equality, which is not a 'subjective' right in the formal sense, but operates in practice as an individual entitlement to challenge discriminatory treatment. Language is listed as a forbidden ground for discrimination, alongside race, religion and other similar personal characteristics, by art.3 of the German Basic Law, art.3 of the Italian Constitution, and art.5 of the Greek Constitution. More elaborate is art.14 of the Finnish Constitution, already mentioned, which, after declaring Finnish and Swedish to be official, adds that "care shall be taken that the rights of the Finnish speaking population and the rights of the Swedish speaking population of the country shall be promoted by the State upon an identical basis. The State shall provide for the intellectual and economic needs of the Finnish speaking and the Swedish speaking populations upon a similar basis".

Other general clauses, while less obviously linked to the idea of equal treatment (15) also offer some

protection for minority linguistic values. According to art.6 of the Italian Constitution, "the Republic safeguards the linguistic minorities with special measures". The more recent art.3.3 of the Spanish Constitution states, in the same spirit, that "(T)he richness of the linguistic modalities of Spain is a cultural patrimony which will be the object of special respect and protection". Here also belongs the first paragraph of article 116 of the Swiss Federal Constitution, whereby "German, French, Italian and Romanche are the national languages of Switzerland". In this case, the term 'national language' cannot be considered as synonymous with 'official language', which is used by the second paragraph of the same article (and does not apply to Romanche). It merely indicates that those four languages form part of the country's cultural heritage and are therefore made the object of a special protection. The three last-mentioned clauses seem, at first blush, to contain very little by way of enforceable individual rights. But I will show further on how these enigmatic phrases have sometimes been put to a far-reaching use by the courts (16).

To round up this overview, one truly collective right must be mentioned, contained in art.19 of the Austrian 1867 Constitution : "All ethnic groups ("Volksstaemme") within the State have equal rights, and each ethnic group

has an unabridgeable right to the protection and promotion of its nationality and language. (...)"(17). Yet, it is far from sure whether this provision, in its original form, can still be considered as applicable in present-day Austria (18).

All in all, the picture that emerges from the foregoing overview is one of extreme fragmentation. While the general doctrine of fundamental rights, and its main substantive specifications, constitute a common heritage of all the 'liberal democratic' countries considered in this study and have thus a 'universalistic' (or at least a 'regionalistic') appeal, constitutional language rights seem, on the contrary, to be extremely particularistic : they are entirely absent from some important legal systems (such as the United States or France), fragmentarily present elsewhere, massively regulated in still other countries; and their content seems to escape all systematisation and be strictly commanded by the specific context of each country.

This paradigmatic distinction between 'universalist' fundamental rights and 'particularist' linguistic rights (19) has left its mark on scholarly writing. Language rights are considered as an entirely idiosyncratic category, and form the object of a special discipline, variously called language law, or minority law.

Studies covering this domain usually concentrate on single countries; those comparative studies that exist tend to deal with the same recurring group of multilingual countries, including Switzerland, Belgium, Canada, Finland, South Africa (20). If other countries are mentioned, it is usually to deplore the total absence of protection for their linguistic minorities, and to advocate the introduction, de lege ferenda, of norms inspired on the openly multilingual states (21). Moreover, while often contributing valuable data and insights to the analysis of linguistic issues, many of these studies move within the penumbra of law and other social sciences, and fight shy of such 'technicalities' as the distinction between constitutionally entrenched individual rights and other language guarantees. Very rarely, therefore, their findings on language law are linked to a broader theory of fundamental rights.

On the other hand, general studies of constitutional law or fundamental rights either superbly ignore the linguistic rights (when the authors come from a country where this issue is not vividly present) or try to fit it, as best they can, within the main body of doctrine. Thus, one finds "minority rights" as a separate category of fundamental rights (22) or as part of 'collective fundamental rights' (23); alternatively, one finds "linguistic freedom"

as part of a general category of 'freedom rights' (24), or "the use of languages" as part of 'freedom of opinion' (25), the "right to one's language" as an element of a 'very broad category of equality' (26), and "language and education" as 'group rights' (27). Apparently, the existence of linguistic rights of the 'higher law' type poses some problems to constitutional theory. One can discover only one common ground among these views : that linguistic rights are an idiosyncratic, and slightly awkward, offshoot, in a limited number of countries, of the common stem of received fundamental rights and liberties.

In sum, linguistic rights are, within constitutional law, somehow relegated to a specific preserve. This 'ghetto-formation' is unsatisfactory for various reasons. It is unsatisfactory, first of all, from the methodological point of view. The essential motive, admittedly, behind the entrenchment of linguistic rights, is the recognition of the dignity of the individual, and the will to place certain essential attributes of this dignity beyond the reach of the day-to-day political decision-making, - precisely what fundamental rights aim at; one might therefore presume that both categories have a lot in common, and that the building of two separate constructions and two

separate specialisms prevents some interesting cross-fertilisation.

But the dichotomy is above all detrimental on the material level of the protection of linguistic diversity. Linguistic rights tend to appear as supplementary measures, as derogations from a basic pattern needing some special justification. They do not benefit from an aura of "inherent rights of man" which makes of fundamental rights such a strong weapon in political argumentation, but are considered as strictly dependent on the peculiarities of a given country, and the good-will of its authorities. Opponents can easily invoke the argument that "the introduction of special provisions for any group would negate the validity of the universal guarantees for all citizens" and therefore runs counter to liberal democratic theory (28).

B. Beyond the Dichotomy

I take the line, in this study, that the separation between 'fundamental rights' and 'linguistic rights' is largely artificial, and that general fundamental rights can and do protect persons belonging to a linguistic minority as such, and not merely as abstract citizens. There exist a

number of rights, belonging to the classical list of constitutional rights and therefore applicable in every country under consideration, which constitute a guarantee against linguistic assimilation and present therefore the same substantive impact as explicit linguistic rights. The whole remainder of this study must help substantiating this claim. I will only give a first provisional survey, here, of those fundamental rights capable of playing this role.

1. Freedom of Expression

So-called 'classical' fundamental rights - the ones still predominant in most constitutions and bills of rights - are often described as 'negative' : they identify a sphere of action, in which the State should not intervene but instead respect the free choices made by the individual citizen. A number of substantive activities have been entrenched in this way, such as mass communication through the press, the exercise of religion, the conduct of private and family life, the use of one's property, the creation of associations, etc. All those substantive liberties logically include some ancillary formal aspects, and foremost among these is the use of language. Language is the medium through which many, if not most, human actions proceed. If one decides to protect certain of these actions, one must therefore also protect the

freedom to choose the linguistic instrument that serves as their support. Thus, the freedom of the press implies the freedom to choose the linguistic medium of the publication; freedom of association also means freedom to choose the language to be used in the association's life, and the same holds for the freedom of religion; the right to privacy implies the right to choose one's home language...In sum, language is constitutionally entrenched whenever it constitutes the outward, communicative aspect of a substantive constitutional right.

But at the same time, all these particular guarantees of language are only segments of a general freedom of communication or freedom of expression, which is a fundamental right of its own. In contrast to other rights, it does not cover a materially-defined activity, but rather a dimension (the expressive or communicative dimension) of all human activities. It is true that the legal analysis of freedom of expression continues to focus on the material content of the expression (thought, ideas, information as 'protected' content), but the form (the language) is protected along, because both are indissolubly linked, as will be argued later (29). This means that language is not only constitutionally entrenched when related to one of the substantive rights of the constitution, but is protected

'across the board', as a general freedom to use the language of one's choice. This general freedom is contained within freedom of expression, and supersedes all its partial embodiments in the context of privacy, property, the press; the separate analysis of those other rights becomes thereby redundant in the context of this study.

If this construction is correct, then the freedom of language use, as guaranteed in Belgian and Swiss constitutional law, is not an idiosyncratic feature of some plurilingual states, but only the explicitation of a rule which exists, albeit in a latent form, in every legal system which guarantees freedom of expression, whether its declared linguistic policy is assimilative or pluralistic. The freedom of language use only stops where freedom of expression stops. Within the traditional doctrinal framework, this means that the State has no positive obligations in the field of language use, but only the negative duty to respect the private use of languages. It is arguable that such a strong dividing line no longer exists (30); but even if it still does, an important societal domain is shielded from a State's assimilationist policy : many classically used instruments of linguistic regulation or oppression must be viewed as restrictions of freedom of expression, and their validity is therefore questionable (31).

2. Educational Rights

Freedom of education, i.e. the individual's right to set up educational institutions, and organise teaching therein, seems, at first sight, similar to freedom of association, the right of privacy, etc. : the substantive freedom implies the formal freedom to choose the linguistic instrument of teaching. Like those other rights, this one would also be superseded by the encompassing freedom to express oneself in the language of one's choice. This assimilation is legitimate to a certain extent (32), but it presupposes a slight shift : the linguistic implications, in this case, do not relate to the beneficiaries of freedom of education themselves; what these persons primarily want is not to speak the language of their choice, but to have the teachings held in that language, and this implies the regulation of the linguistic behaviour of third persons (teachers and pupils). Apart from this theoretical difficulty, the area of private education has also, historically, been marked by much greater linguistic interference by public authorities. This attitude, undoubtedly inspired by the crucial importance of the educational process in the evolution of linguistic diversity (33), has found legal anchoring points in the recognition of broad public supervisory powers with respect to private

schools (especially when they receive state financial aids), which have no parallel in the domain of other freedom rights.

In sum, freedom of expression may fall short where freedom of education still holds, and vice-versa. For this reason, it seems methodologically advisable not to bring the linguistic issue in private education under the general heading of freedom of expression, but to analyse it as a separate question.

Moreover, the very same linguistic dimension of education may also be covered by an other fundamental right, namely the right to education. This more recent right is of the 'positive' sort, i.e. it imposes on public authorities an obligation to protect certain values by their own action, instead of a mere abstention. The precise contours of the right are difficult to define, but it might conceivably include certain rules as to the linguistic format of the public educational system.

Freedom of education and the right to education thus potentially cover the same domain. Their joint analysis may offer an interesting view of the respective contribution of a 'negative' and a 'positive' fundamental right in the protection of linguistic diversity.

3. Equality

The principle of equality, which is one of the pillars of every constitutional system, presents a slightly different case. As we saw, its specific value for language has been recognised by a number of constitutions, especially in the form of a non-discrimination clause singling out language as a specially protected ground (34). Yet, the obvious and superficial meaning of such a clause - no differentiations on the basis of the language people speak - is precisely the kind of generic protection which treats the speakers of a minority language as abstract citizens, without acknowledging their cultural identity. Indeed, the absence of distinctions, the application of one-and-the-same rule to everyone is precisely the favourite instrument of linguistic assimilation : everyone in the same school classes, for everyone the same radio and television programmes, for everyone the same administrative forms, irrespective of their mother tongue.

If one wants to argue that equality can play an important (indeed, the most important) role in the protection of linguistic diversity, one must show that it implies more than such schematic equal treatment. In fact, the deceptively simple rule of equality has undergone, in jurisprudence and

case-law, an important complexification and even transformation. The prohibition of unlawful differentiations remains an important aspect of it; but it is also increasingly recognised that 'real' equality, in certain circumstances, allows for differentiations, or even requires some distinctive treatment. Indeed, the definition of equality to which most writers, but also most constitutional adjudicators, nowadays adhere is the classical Aristotelian definition of justice : 'treating like things alike, and different things differently'. In linguistic as in other matters, the role of the equality principle is therefore ambiguous : sometimes, linguistic differences between persons may not be taken into account, while in other circumstances, the establishment of a differential treatment, the taking of special measures, is mandatory. The exact extent of such measures cannot be explored here(35). Suffice it to say that they can take two basic forms. Measures of pluralist equality grant to members of linguistic minorities nothing more than what the majority already has on the basis of the generally applicable rules : the right to have their children educated in their language, the right to use one's language at court, or with the administrative authorities, etc. Measures of affirmative equality on the other hand, give some additional benefit to members of linguistic minorities, as minorities,

in the same way as special benefits may be reserved for other powerless groups in society.

The resulting complete picture of the protection of linguistic diversity through fundamental rights is thus potentially richer and more promising than one might have thought at first view. In order to give a complete view of this role, the analysis of specific linguistic rights must be integrated with that of what could be called generic linguistic rights (i.e. contained in constitutional rights not specifically related to language). Those are not two neatly separated bodies to be added to each other : many explicit language rights are but the express affirmation of something already included in a generic right, or constitute a further elaboration of a generic right, in the context of which they should be analysed. This fact dictates the order in which to proceed for the rest of the study. I will deal, first, with each of the three categories of generic rights briefly sketched above : expression, education and equality. To each will be devoted a separate Part (Part Three, Four and Five), analysing the linguistic guarantees that come within their scope, both implicit and explicit. The last Part, then, will cover those specific language rights that cannot be read in one of the three generic categories, but constitute

genuinely specific and supplementary higher law guarantees for certain language groups.

Section 2

At the International Level

The definition of fundamental rights given in the foregoing chapter includes national constitutional rights and international human rights. But the question remains to be answered whether these latter are really relevant for our problem, that of linguistic diversity. Does a constitutional comparison not exhaust the matter, with international law provisions playing the role of mere decoration? Human rights instruments classically contain a "most favourable standard" clause according to which they can never supersede a higher level of protection guaranteed by another text (be it national or international). In these circumstances, it is not enough that international instruments offer yet another formulation of linguistic rights; they become relevant only if they go beyond what is already available on the basis of the national systems.

Whether this is the case can be consistently affirmed only after an investigation of the content and impact of the particular human rights, and is indeed one of the main objects of this thesis. At this preliminary stage, one can however already draw attention to the fact that the question has to be examined from two different angles : international standards may be superior to national standards by their substantive or by their procedural features. The latter will be discussed in the following chapter on 'enforcement'. As far as the substance is concerned, it seems unlikely at first that international guarantees could exceed national guarantees. Indeed, the countries dealt with in this study are all constitutional democracies where fundamental rights are entrenched to a certain extent. It follows that it is difficult to imagine how universal international instruments, approved by many countries that are not constitutional democracies, could go beyond. Even at the regional, European, level, the common standard will, more likely than not, amount to little more than a 'lowest common denominator'.

Yet, these arguments are perhaps not entirely conclusive :

1. At the universal level, many countries may readily agree to a standard which is considerably superior to their actual

practice, because there is no effective sanction. In this way, the very weakness of the implementation machinery paradoxically facilitates agreement on an ambitious substantive level.

2. As for the European protection system (more particularly the European Human Rights Convention), it may globally not go beyond any national system, yet some of its specific provisions may not be met in all national legal orders. Moreover, the European human rights system is not static; even if it started as a lowest common denominator, it has since undergone an autonomous evolution through the case-law of its organs who have adopted a dynamic approach to the interpretation of the European Convention. National rules which have fallen far below the general average in the course of time may come into conflict with the Convention (36).

Yet, the fact remains that international rights by and large correspond, at present, to the rights protected by national constitutions, and really novel or additional guarantees can only be found in the interstices of the international instruments. Like at the national level, linguistic values will be protected above all through generic fundamental rights, and more particularly by freedom of expression, educational rights and the principle of equality.

But this has not always been the case. Historically, the first systematic attempt to bring about international protection of human rights (37) did not attempt to imitate the provisions of national bills of rights : the system of minority protection, between the two world wars, within its territorially and materially limited field of operation, went far beyond the standards which its addressees would have voluntarily set at the national level. During that period, international protection of linguistic diversity certainly had an importance of its own, which even tended to overshadow the national dimension, and operated by the means of specific rights, explicitly aimed at the protection of linguistic and other minorities.

This picture has changed entirely in the wake of the second world war, and the newly created body of international human rights was adjusted on the model of fundamental rights prevailing at the national level (of the Western States). As far as linguistic diversity is concerned, this implied a shift from specific to generic protection, with perhaps a recent (and still timid) revival of the 'minority' approach.

A short analysis of this historical evolution seems warranted, both because of its methodological interest

(showing the two opposed paradigms of language protection), and because of the value the pre-world war system might have preserved for us, despite the fact that it no longer constitutes positive international law (38). The provisions of the minority treaties, and their subsequent refinement in a number of judgments and opinions of the Permanent Court of International Justice, may offer elements for the interpretation of vague norms of contemporary international law (39), and a stimulus for its further elaboration in the field of protection of linguistic diversity.

A. Minority Protection after the First World War (40)

1. Origins and Functions of the Minority Treaties

The establishment of an international regime of minority protection after the first world war can be seen as the consequence of two political facts (41) :

- the incomplete application, during the peace reshuffle, of the principle of self-determination to many nations and the ensuing need to make good for the non-fulfillment of many claims (and promises) to independence (42);
- the existence of 'national minorities' in the newly created States; "peoples who had long suffered as minorities now found large numbers of their former oppressors handed over to

them, and the temptation to act vengefully was strong. The new political entities of Eastern and Central Europe looked upon themselves as national states, and were eager to inaugurate policies of consolidation" (43).

To this must be added an 'internal' reason for the Allied initiative : the pressure exerted by Jewish organisations - often very influential within the victorious countries - for their fellow people in Central & East Europe, and more generally for the setting up of an international minority protection system.

One should not conclude from the foregoing that the Allied Powers handled primarily for humanitarian motives. These might have been part of the picture, but more decisively the Minority Treaties were seen as an essential building-block of the system which was being set up for the maintenance of a stable and peaceful world. Members of minorities were to be protected, not so much for their own sake as for the sake of international stability. This official priority, which pays due regard to the dogma of state sovereignty, can be expressed in the following hierarchy of objectives and means :

"(...) the primary objective is the peace of the world; the means through which this is to be attained, and thus the indirect object of the Treaties, is the internal

stability of the Treaty states; and the means through which this, again, is to be achieved is the well-being of the minorities, which shall make them contented and loyal citizens of the states of which they form part" (44).

Hierarchically relegated to the third place, the well-being of the minorities was nevertheless, in logical order, the prime objective to be attained, as the solidity of the system's foundation conditioned the achievement of its overall goals. The protection of linguistic values, in turn, occupied only the fourth place in the hierarchy of objectives : they were not there for their own sake, as a recognition of the eminent human value of language, but because language happens to be one of the main distinctive features of minorities; if one decides to protect minorities, one of the principal domains must be their language.

The overall target of the maintenance of peace does not give a definite answer to the crucial question of the future of minorities: whether assimilation or preservation; both alternatives could seem compatible with the objective. The first thesis only recognised a temporary validity to the minority system : it had to make the minorities ripe for complete assimilation into the nation-state. The most famous

rendering of this theory was that by the Brazilian delegate de Mello Franco before the League Council in 1926; for him, the protection was intended to "gradually prepare the way for the conditions necessary for the establishment of a complete national unity" (45). It is not entirely clear, though, whether by this he supported full cultural assimilation (46); after all, 'national unity' does not necessarily mean 'assimilation' (47).

On the other hand, the contrasting theory of preservation, which implied the permanent validity of the minority system, was widely proclaimed in the political and legal fora. The basic assumption of the framers was that the internal stability of states will ineluctably be challenged if a forceful assimilation is attempted; on the contrary, the maintenance of the minorities' cultural heritage was the only way to "take away their sting" (48), to have them abandoning any wishes for secession or irredentism and obtain their loyalty to the state. This position was also unambiguously endorsed by the Permanent Court in the Albanian Minorities Schools case :

"The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility

of living peaceably alongside the population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs" (49).

2. Contents of the Minority Regime

The term of 'Minority Treaties' is used as a shorthand for a wide variety of legal instruments : special minority treaties between the Allies and the newly created or radically enlarged countries of Poland, Czechoslovakia, Rumania, Greece and the Serbo-Croat-Slovene state; minority clauses in the (general) Peace Treaties signed between the Allies and the defeated states of Austria, Hungary, Bulgaria and Turkey; unilateral declarations, made on the occasion of their admission to the League of Nations, by Albania, Lithuania, Latvia, Estonia (and Iraq); and bilateral conventions : the German-Polish convention on Upper Silesia, the Poland-Danzig Treaty on the status of the city of Danzig, and the agreement between Finland and Sweden on the Aaland Islands.

The area of minority protection thus represents "a continuous fault-line from the Baltic to the Persian Gulf,

confirming and slightly extending the nineteenth century Central Europe/Balkan locus of the problem" (50). Apart from this geographical continuity, what allows for the amalgamation of all those different instruments under the common heading of 'minority treaties' is a procedural and a substantive fact.

Procedurally, all these minority provisions are guaranteed by the League of Nations. Each of the 'minority treaties' contained an identical guarantee clause whereby the State concerned "agrees that any Member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction or any danger of infraction of any of these obligations, and that the Council may thereupon take such action and give such direction as it may deem proper and effective in the circumstances" (51). This system could well appear, in 1945, as "one of the boldest experiments which has been made in the international limitation of the sovereignty of states" (52). For the first time, a State could seize an international organ with a complaint for breach of international law without needing to show an own interest, or that of one of its nationals. In addition, and more revolutionary still, the League worked out a system allowing also individuals to have access, albeit indirectly, to this international forum (53). Finally,

alongside this political guarantee, all minority instruments also provided for the judicial intervention of the Permanent Court of International Justice, on the initiative of any Member of the Council of the League of Nations (54).

The other common element between all those legal instruments of minority protection was of a substantive nature : their content is largely identical, the provision of the first of these instruments, the Polish Treaty of June 28, 1919, having served as a model for all the subsequent ones. In the following, we will refer to the text of the Peace Treaty with Austria (Treaty of St-G^ermain, 1919), as it is, in contrast with most others, still valid due to its transformation into Austrian constitutional law (55).

In reality, the rights contained in the 'minority treaties' were not exclusively addressed at members of minorities. To all inhabitants of the countries concerned was recognised the right to life and liberty and the free exercise of religion (art.63). To all nationals was guaranteed equality before the law "without distinction as to race, language or religion" (art. 66), and the freedom of language use framed in the following terms:

"No restriction shall be imposed on the free use by any Austrian national of any language in private

intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings" (art.66).

More far-reaching benefits were attributed exclusively to the members of minorities, including :

- the right to use their language in judicial matters (but not, to the irritation of minorities, in other, more important, fields of the public administration (56)) :

"Notwithstanding any establishment by the Austrian Government of an official language, adequate facilities shall be given to Austrian nationals of non-German speech for the use of their language, either orally or in writing, before the courts" (art.66).

- the right to mother tongue education (limited to primary schools) : "Austria will provide in the public educational system in towns and districts in which a considerable proportion of Austrian nationals of other than German speech are resident adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Austrian nationals through the medium of their own language. This provision shall not prevent the Austrian Government from making the teaching of the German language obligatory in the said schools"(art.68).

- a more detailed guarantee of equal treatment, explicitly covering the field of private education : "Austrian nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Austrian nationals. In particular they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein"(art.67) (57).

3. The Failure of the Minority System

The minority system failed because it was a compromise which could not satisfy any of the parties in an age of inflamed nationalism.

On the one hand, the minorities saw it as a poor 'Ersatz' for the right to self-determination which had been refused to them, even in the diluted form of territorial autonomy. In addition, they complained that the vague wording of many provisions allowed the states far too wide a discretion in the legislative implementation and practical application. The international guarantee procedure, finally, was "too slow, too solicitous of the susceptibilities of

states, and too closely dependent upon political considerations; protection and redress were always uncertain and frequently inadequate" (58). The reason of this inadequacy has to be sought also in the attitude of leading League members who were not enthusiastic to infringe upon the doctrine of state sovereignty in a field that was potentially sensitive in their own countries.

On the other hand, the minority states viewed the whole system as a restriction on their sovereignty, an intervention into their basic policy decisions, which was the more intolerable as it was based on particularistic international law, branding them second class-states as compared to those countries who established the system but did not take any obligation themselves (59). If the system was good, it should apply to all; if not, why then should it continue to exist ? Many of the minority states therefore adopted the doctrine of the provisional nature of the minority treaties. Accordingly, Poland unilaterally denounced its obligations in 1934. This was only a more spectacular testimony of the general decay of the system, which was virtually dead before the outbreak of the second world war. All parties concerned - the minority States, the minorities and their 'kin-states' (especially Germany and Hungary) shared a hostile attitude to the treaty system (60). It is a

futile exercise to disentangle the responsibilities in this mutually-feeding spiral, which was moreover linked to the general deterioration of international relations.

The two fundamental innovations of the system - the generalisation of individual rights protection and the creation of procedures of guarantee - were only partially carried through, and this certainly accounts for the failure. But could one realistically expect much more from this first breach in state sovereignty (61), especially in such a touchy matter ? Also, one can only speculate on what would have happened without the protection system. It can be submitted (62) that the League system, by providing an outlet for discontent and irritation, has at least temporarily contributed to international stability (the Treaties' first objective), and to the alleviation of the minorities' fate.

B. The Shift from Minority to Human Rights Protection

1. Reasons for the Shift

The second world war meant the death blow for the ailing minority protection system, and it would not resurge

after the end of hostilities. The immediate post war period was marked by an essential development in the position of the individual under international law : for the first time, the existence was proclaimed of general human rights, equally applicable to all persons in all countries of the world. This new philosophy engulfed the particularistic and outmoded minority approach. Language will henceforth be protected, not as a distinctive element of a minority, but as an attribute of the human being. In this process of generalisation, the language rights have however lost some of their substance. From now on, they are, to a very large extent, only implicitly granted, as a specific element of such generic rights as non-discrimination, freedom of expression or the right to education.

In addition to the inherent defects of the minority system, the post-war shift can be accounted for by a number of complex factors related to the role and fate of minorities before, during and immediately after the war.

i) The minority question, and especially the existence of large groups of 'Volksdeutsche' ('Ethnic Germans') in Central and East European countries had been used by Hitler as a propaganda theme and as a springboard in his first uncertain expansionist moves. Not only did the minority protection system thus seem perverted by power politics, but

the very notion of minority became loaded up with 'fifth column' type connotations. These suspicions were further enhanced by the actual collaboration of minorities, in several parts of Europe, with the German occupier.

ii) Moreover, the Jews had been denied the assimilation they basically preferred and an unwanted minority status was imposed upon them. Their cruel fate, and its prominence, may have brought to the rash generalisation that it is better, even in the minorities' own interest, to have a general fundamental rights protection, rather than a specific minority status which might be turned against them.

iii) After the second world war, one did not try, like after the first, to adapt the state borders to nationalities, but rather the opposite. After the blank-cheque given in the Potsdam Agreement (1945), mass transfers of allogene populations took place in Central and Eastern Europe. What was left of the formerly protected minorities could easily be disposed of as 'quantité négligeable'. Furthermore, the new world community was much less Eurocentric than the League of Nations. The most influential power, the United States, favoured - together with the Latin American countries - the 'melting pot' concept and were unsympathetic to special minority protection even for the non-migrant, 'historical' communities of Europe.

iv) Apart from these 'negative' reasons undermining the possibility for relaunching the minority approach, there was also the positive reason of the new global concept of human rights, which was seen by many as rendering obsolete all former developments.

One can thus discern two prevalent strands in political thought on the minority question, at that time. On the one hand, assimilation of these groups seemed to be in the best interests of the states and of world peace. On the other, it seemed as least as well for the minorities to enjoy the general human rights like anyone else. Like after the first world war, political imperatives and humanitarian motives pointed into the same direction; but this time, towards the abolishing of special minority regimes.

2. Legal Expression of the Shift

The political attitude sketched above had a double legal consequence. First of all, the minority system was considered to have lapsed, in accordance with the 'rebus sic stantibus' clause (63). The substantive rights might continue to exist in certain national legal orders (Austria and Greece, e.g.), but the international protection had ceased to exist, except perhaps in the case of the Aaland islands (64).

Secondly, the defunct system was deliberately not replaced by new initiatives in the United Nations framework. The problem was certainly not overlooked in the many political plans during and immediately after the war (65); the decision to leave aside the minority issue was therefore a deliberate one. Minority protection was not even discussed during the drafting of the United Nations Charter. This absence is in itself no proof; after all the League Covenant did not mention minorities either. But subsequent developments would make it soon clear that this lacuna was not to be filled up. The clearest landmark was the adoption of the Universal Declaration of Human Rights, in 1948; a draft article dealing with the rights of minorities was rejected; instead, the General Assembly decided, in its resolution 217 (c) to refer the whole matter to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, with the mission to make further study on appropriate measures of minority protection : an elegant way of burying the whole idea (66).

C. Development of the Human Rights Program

The protection of linguistic diversity in the frame of the post war human rights system will be amply treated in

the rest of this study. I will only give here the barest of sketches of the historical evolution.

The human rights program was launched by the United Nations Charter, which contains some general provisions on human rights (67), and empowers its organs for further activities in this field. These activities have gone through three phases :

i) First, the phase of the formulation of the human rights, culminating in the adoption of the Universal Declaration on Human Rights, on 10 December 1948. While lacking in binding force, this Declaration has played a considerable political role, as a "common standard of achievement" (68), and an indirect legal role, most obviously on the human rights program within the United Nations, but also at the regional level (the European Human Rights Convention being the most direct and important progeny of the Declaration), and at the level of national Constitutions (69).

ii) Secondly, the phase of preparation and adoption of binding instruments, culminating in 1966 with the adoption, by the General Assembly of the United Nations, of the International Covenant on Economic, Social and Cultural

Rights and the International Covenant on Civil and Political Rights, both entered into force in 1976. As regards our subject matter, the Civil Covenant recognises the freedom of expression in art.19 (70), and contains some language guarantees in criminal proceedings in its art.14 (71). Art.26 lays down a general principle of equality (72), while art.27 adds a specific guarantee for minorities (73). In the Social Covenant, the 'cultural' aspects are covered by arts.13 to 15. Article 13 guarantees the right to education (74); article 14 affirms the need to establish a system of compulsory primary education, and therefore does not concern the countries under study; article 15 guarantees some more unusual rights, whose practical importance is largely speculative (75).

In addition to these two global human rights instruments, a large number of conventions have also been adopted, within the U.N. or the specialised organisations, in relation to specific human rights fields (76). Of all these texts, two are of direct importance for this study : the Convention on the Elimination of all Forms of Racial Discrimination, adopted by the General Assembly of the U.N. in 1965, and entered into force in 1969, which constitutes the explicitation of one single human right, non-discrimination, with regard to one forbidden category of

discriminations, those based on a racial criterion. In fact, the term 'racial' in the title of the Convention only serves as a shorthand for a broader category which might, arguably, include language minorities as well (77). The Convention against Discrimination in Education, adopted by the General Conference of Unesco in 1960, and entered into force in 1962, also deals specifically with non-discrimination, but then limited to a certain material field, that of education. Unavoidably, this implies also some specification as to the right and freedom of education, and their possible linguistic components (78).

iii) The third phase, which is only timidly initiating, ~~is~~ is that of the coming into operation of international implementing mechanisms of those rights. The role of these various procedures, which will be analysed in the next chapter (79), is not only that of making the rights effective; they also play a creative role, by providing for a continuous process of definition of such abstract rights (80).

A parallel, but much more concentrated and successful evolution has taken place in the mean time within the more limited framework of the Council of Europe, a regional intergovernmental organisation whose main

achievements lie precisely in the human rights area. The European Convention on Human Rights, signed in 1950, and entered into force in 1958, was formulated on the model of the Universal Declaration, but is a legally binding instrument. It embodies principally the 'classical' freedoms, among which the freedom of expression of art.10 (81), the non-discrimination rule of art.14 (82), and the linguistic guarantees in criminal procedure (art.5.2 and 6.1 (a) and (e) (83), will be picked out for the purpose of this study. The right to education, a more 'social' right, was added through the First Protocol to the Convention, adopted in 1954 (84). Contrarily to the universal instruments, the meaning and the linguistic implications of these rights have been largely spelled out by a body of case-law of the Commission and the Court of Human Rights. This judicial interpretation, and the very effectiveness of the enforcement mechanism, make up for the apparent timidity of the Convention with regard to language claims, and makes it, at present, the outstanding source of international human rights obligations in the linguistic field for the ratifying States (i.e. all member States of the Council of Europe). In addition to the Convention, marginal obligations for certain States are also contained in the human rights law of the European Community (85) and in the Final Act of Helsinki (86).

D. Survival (and Revival ?) of the Minority Approach (87)

The 'minority approach', which stresses the need for special measures of protection, apart from and beyond the general application of human rights, has never entirely died out in international law.

First of all, one might mention three particular treaties from the post-war period, concerning West European countries, which went clearly against the prevailing trend. First of all the Paris Agreement on South Tyrol, signed in 1946 by Italy and Austria, under the patronage of the Allies. Apart from providing for a regime of territorial autonomy for the German-speaking community within the Italian State, it also contained a number of individual rights protecting linguistic values (88). The border conflict around Trieste was provisionally settled in 1954 by a 'Memorandum of Understanding' initialed in London by Italy and Yugoslavia (the States directly involved), and by the United Kingdom and the United States (the Allied administrators of the zone). Annexed to this Memorandum was a Special Statute, which Italy and Yugoslavia agreed to enforce, listing several measures for the protection of the rights of "the Yugoslav ethnic group in the Italian administered area" and of "the Italian ethnic group in the Yugoslav administered area" (89). The

question was definitively arranged by the bilateral Italo-Yugoslav Treaty of Osimo, signed in 1975, in which the contracting parties undertake to maintain, or enact, minority protection at the level fixed by the Special Statute (90). The third of these minority-friendly instruments is the Vienna State Treaty of 1955, restoring the independence of Austria, which, in its article 7, imposes on this State some particularised obligations of minority protection, to be added to the obligations resulting from the first world war peace treaty which continue to form part of Austrian law (91).

On the global level of international law, we saw how the minority problem was put on a side-track at the moment of adoption of the Universal Declaration. In the following years, it was to be dealt with by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. This agency, created in 1947, depends from the Human Rights Commission, which in turn emanates from the Economic and Social Council : this low status in the structural hierarchy of the United Nations is already symptomatic. Its initial years offer a rather somber picture (92) : its work was often ignored and its existence threatened. In 1955, it stops its work on minority protection, to concentrate henceforth on its other task, the

prevention of discrimination (93). Its study on the possibility of drafting a special minority protection clause would however fructify many years later, with the adoption, in 1966, of the International Covenant on Civil and Political Rights. This text includes, as was mentioned above, a special minority provision (art.27), guaranteeing inter alia to persons belonging to a minority the "right to use their language in community with others" (94).

Article 27, small as its positive achievement may be, has served from then on as a stepping-stone for further actions of minority protection. The Sub-Commission resumed consideration of the question, trying to specify somewhat the meaning of this rather cryptic article. The Resolution 1418 (XLVI) of the Economic and Social Council of 6 June 1969 authorised the Sub-Commission to designate a Special Rapporteur for a "study of the implementation of the principles set out in article 27 of the Covenant on Civil and Political Rights with special reference to analysing the concept of minority taking into account the ethnic, religious and linguistic factors and considering the position of ethnic, religious and linguistic groups in multinational societies". Prof. Capotorti was appointed in 1971 as rapporteur, and submitted his study in 1977; after adoption by the Sub-Commission (95), it became an official publication

of the United Nations (96). Although, as usual, "the opinions expressed in the present study are those of the special rapporteur", this is the most authoritative account to-day of the status of minorities (97). The completion of the Report, together with the entry into force in 1976 of the Covenant, has marked a certain renewal of interest in the matter.

Europe may be seen as a region where one could best elaborate a model of international minority protection, because of its rich experience with ethnic diversity and because of its relatively well developed human rights system and lower barriers of state sovereignty (98). In fact, nothing has been effectively achieved in this field, and linguistic diversity is still quasi exclusively protected, at the European level, through generic fundamental rights. What has been done remained at a parliamentary, i.e. non-binding, level. The Parliamentary Assembly of the Council of Europe has adopted, over the years, a number of resolutions and recommendations based on the following reports :

- the short Rolin-report in 1957;
- the somewhat more ambitious Struye-report of 1959, which gives an overview of existing minority provisions in Germany, Denmark, Austria and Italy, but recommends not to take any international codification initiative, as the general situation of minorities is satisfactory (99);

- the Lannung-report in 1961, recommending the inclusion of a minority provision in the second Protocol to the European Convention (100);
- the Sieglerschmidt-report in 1976, recommending the adoption of a provision inspired upon art.27 of the Civil Covenant (101);
- and the Cirici report in 1981, recommending mother-tongue education and official use of minority languages in multilingual countries (102).

The European Parliament has also manifested itself recently, even in the absence of any substantive^b Community competence in this matter, by the adoption of a resolution on a 'Community Charter of Regional Languages and Cultures and a Charter of Rights of Ethnic Minorities' (103).

CHAPTER THREETHE ENFORCEMENT OF FUNDAMENTAL RIGHTS

While the first chapter in this Second Part dealt with the general identification of fundamental rights, and the second chapter with the specific identification of fundamental rights protecting language diversity, this chapter will deal with general questions of enforcement of these rights. This study is not primarily about the enforcement aspects of fundamental rights. Still, the procedural side may not be entirely left out, if one wants to obtain a correct picture of the law as it stands, especially in fields like comparative and international law, where the danger exists of underrating procedural differences between states and between single international instruments. Apparent similarities, or contrasts, on the substantive level, may be markedly altered by the rules of enforcement.

As the enforcement pattern applies indistinctly to the various single rights of a given constitutional or human rights instrument, it seemed appropriate to examine the main

enforcement variables in a preliminary chapter, before embarking into the substantive analysis of these rights. The characteristic features of enforcement, which will be summarily delineated in this chapter, will then only occasionally be referred to in the rest of the study.

The main distinction in the enforcement of fundamental rights is that between national enforcement and international enforcement. This distinction does not correspond to the one, outlined in an earlier chapter, between national and international rights. Indeed, the main forum of enforcement of international rights lies at the domestic level. In a first section, I will sketch the main variables in the enforcement of national constitutional rights, namely the existence or not of judicial review of the constitutionality of legislation, and the degree of individual access to the courts in fundamental rights disputes. The second section will deal with the variables affecting national enforcement of international rights, more particularly the domestic status of international law, and its hierarchical rank in relation to national law. In the third section, dealing with international enforcement, differences among the various procedures are obviously not due to national factors, but rather to the absence of a single system of human rights enforcement. Every human rights

treaty has set up its own procedures of implementation or enforcement. Their many differences will be indicated as well as those common features that set apart international from national procedures.

Section 1

Enforcement of National Constitutional Rights

Judicial means are not the only ones available for the enforcement of constitutional rights. Yet, I will not deal here with the various forms of political control of constitutionality through representative organs. Short mention might be made, however, of para-judicial modes of enforcement of the 'ombudsman'-type, that are taking an increasing importance throughout the world (1). National ombudsmen with a general competence have also dealt with linguistic matters, in countries where this is a vivid issue (2). But more interesting for our purpose is the existence of bodies with the specific competence of implementing linguistic rights.

Bodies with more generic tasks of an advisory nature in linguistic or minority matters exist in several countries (3). But organs having (or also having) an implementing function are comparatively rare. Interesting recent examples are the British Commission for Racial Equality and the Equal Opportunities Commission (4), but linguistic issues are only very marginally affected by them. Among the purely linguistic organs, the Indian Officer for Linguistic Minorities is perhaps the oldest still existing example. In 1963, Belgium created a Permanent Commission of Linguistic Control, which assumes a variety of functions under the legislation relating to the use of languages in public administration. The Commission is composed of 5 Francophones, 5 Dutch-speakers, 1 German-speaker (only intervening for questions relating to his language group), and a 'neutral' president, who does not participate in voting (6). Apart from its consultative function, the Commission may conduct investigations on the implementation of linguistic legislation in public administration (e.g. on the regularity of 'linguistic tests' for civil servants), and receive individual complaints from civil servants and citizens on the same subject. Although it can not take binding decisions, but only opinions ('avis'), a very complex and detailed para-judicial 'case-law' has emerged throughout the years (7).

Comparable institutions exist in Canada, both at the federal level and in Québec. At the federal level, the 1969 Official Languages Act has established a Commissioner of Official Languages. Apart from his function as an adviser of the Federal government on linguistic matters and as a 'linguistic auditor-general' (controlling the institutional operation of bilingualism in the federal administration), his task is mainly that of a specialised 'linguistic ombudsman'. Standing requirements for filing complaints to the Commissioner are extremely liberal, and he has been described as "by far one of the most accessible ombudsmantype institutions in the world"(8); his jurisdiction is of course restricted by the scope of the Official Languages Act which deals, as was said earlier (9), only with federal (as opposed to provincial or local) governmental bodies, and only grants equal rights to the English and the French language (as opposed to the other smaller languages of the country). In fact, the Commissioner acts foremost as a protector of the Francophones : statistical data show that between 80 and 90% of complaints are submitted in French (10), relating not so much to the federal government itself, but to governmental agencies such as the Post Office, Air Canada, Manpower & Immigration, National Railways, etc. (11). The powers of the Commissioner, on receipt of a complaint, are that of investigation and recommendation. When the institution

concerned does not act upon a recommendation, the Commissioner may send a report to the Governor-in-Council or to Parliament. Besides, he may publicise his findings in his Annual Report.

In Quebec, the 1977 Charter of the French Language has created a variety of institutions. Setting apart the Conseil de la langue française (a general advisory body on the situation of the French language and the application of the Charter), and the Commission de toponymie (assigning place names), there are two organs with explicit implementing functions : the Office de la langue française (called, under the earlier 1974 legislation, 'Régie de la langue française'), administering the 'francization programmes' in private enterprises (12), and its dependent body, the commission de surveillance, specifically entrusted with the task of investigating cases showing a failure to comply with the Charter. One should note that the task of the Québec bodies can hardly be described as that of enforcing fundamental rights, but rather of enforcing restrictions on individual language rights in the interest of the dominant linguistic community of the Province.

A. Judicial Review

Moving now to judicial enforcement *sensu stricto*, the most striking difference between countries, as far as fundamental rights are concerned, is undoubtedly the existence, or not, of a system of judicial review of the constitutionality of legislative action. The existence of such a review has not been considered, earlier on (13), as a prerequisite for the existence of fundamental rights, but is certainly a significant factor in their exercise. It may be true that actual violations of these rights will more often be perpetrated by executive, rather than legislative action. Yet, in many cases, the administrative agency's activity is merely the implementation of a legislative act, and, in order to obtain redress, the victim will have to challenge this statutory enactment. Whether such a remedy is available in the legal system concerned is therefore a matter of considerable importance.

Modern judicial review was born in the famous United States Supreme Court decision in Marbury v Madison (14); yet, the idea of judicially enforcing the primacy of the Constitution "did not spring anew from the head of John Marshall", but must rather be considered as "the logical result of centuries of European thought" (15). Despite these

European antecedents, the institution was slow in re-crossing the Atlantic. The primacy of the written constitution over other sources of law became a generally accepted doctrine, but the further step of entrusting the guarantee of this primacy to the courts was not taken for a long time. Austria adopted, in the wake of the First World War an elaborate system of judicial review (radically different from the American), but remained isolated for a long time. But since the last World War, "the growth of this institution has experienced what could well be called a worldwide explosion" (16). As far as Europe is concerned, this process has coincided - not fortuitously - with the (re)establishment of democracy in formerly authoritarian states, a phenomenon which has taken place in two waves : a first one immediately after the war (Germany, Italy, and re-establishment in Austria), and a second one in the Seventies in Southern Europe (Greece, Portugal, Spain). But other countries have evolved in the same direction through less dramatic constitutional reforms (France, Sweden), or even through hardly noticeable jurisprudential elaborations (Denmark, Norway).

There are, of course, important national variations on the common theme of judicial review. In his classical analysis (17), Cappelletti distinguishes two pure models, the American

and Austrian model, which contrast on various points, and shows that most present-day European systems are a hybrid between both. Some of the distinctions will be referred to in the next sub-section; what must be established at this point is which countries can be said to have a genuine system of judicial review. The division, in this respect, is less clear-cut than one might expect. Among the countries considered in this study, many have a fully-fledged system of review : the United States, Italy, Germany, Austria, Ireland, Spain, Portugal, Greece (18), but there is also an intermediate category of less outspoken regimes.

In France, there is, as one knows, only preview of constitutionality, i.e. constitutional recourse against Bills voted by Parliament but not yet entered into force. This means that statutes prior to the 1958 constitution escape any control, and that new statutes, once published in the Official Journal, are equally untouchable. 'Exceptions of unconstitutionality', raised against existing Acts, have at times been accepted by the Conseil Constitutionnel with regard to organisational norms of the Constitution, but never with regard to fundamental rights (19). Yet, it should be noted that when existing legislative arrangements are restated in a reform bill, they also become open to constitutional legislation. And in periods of intense

legislative reform, like the current one initiated by the 1981 presidential election, the intervention of the constitutional adjudicator may be quite far-reaching even under a system of preview.

Canada is still hesitating between the British tradition of parliamentary sovereignty and the American tradition of judicial review. Ostensibly, the new Canadian Charter of Rights and Freedoms of 1982 has opted for the second alternative by declaring in its Section 52.1 that : "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is, to the extent of the inconsistency, of no force or effect." Yet, what section 52 gives, the so-called 'notwithstanding clause' of section 33 largely takes away by providing that "Parliament or the Legislature of a province may expressly declare in an Act of Parliament or of a Legislature as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter". There are thus two categories of fundamental rights, which show a strange inversion of values (20): those rights one would normally consider as the most basic (including the right to life, freedom of expression, equality) may be overridden, while other, apparently less essential rights are absolutely

protected against legislative encroachments; they include the specific linguistic rights listed in the Charter, a move apparently directed against Québec language policies. Accordingly, the existence of such an unrestricted power of review with regard to certain rights formed one of the main reasons of Québec's opposition against the constitutional patriation and amendment (21).

The recent constitutional reform in Sweden has also been marked by a half-hearted introduction of judicial review. Chapter 11, para.14 of the new Constitution grants to every court the power to refuse the application of a statute, but only in cases of obvious conflict with the Constitution. Judicial review thus exists in principle, but is not meant to be normally used (22). A similar situation prevails, but without an explicit constitutional mandate, in neighbouring Denmark and Norway : the courts feel in principle entitled to control the constitutionality of legislation, but they very rarely, if ever, use this power (23).

Finally, there is the third category of countries where (national) fundamental rights cannot, in any way, be enforced against conflicting acts of the legislator. But the legal tide seems to be against this option. It is striking that none of the countries where judicial review exists,

think of abolishing it, while on the other hand, countries where it is absent face a continuous and growing debate on its desirability. In Switzerland, acts of the federal parliament (as opposed to cantonal acts) are exempt from judicial review, but the present discussions on a global reform of the Swiss Constitution show a tendency to introduce it in the future (24); but the final decision has not yet been taken, and some caution is warranted if one recalls the example of the Netherlands, where initial proposals to introduce judicial review have been defeated in the final version of the new Dutch Constitution (25).

In Belgium, the Constitution remains silent on this subject, but the Belgian courts have traditionally followed a line of self-restraint, and denied themselves the right to question the validity of an Act of Parliament. Some doubts had been cast on the validity of this traditional doctrine by an ambiguous decision of the Court of Cassation in 1974 (26), but since that date no further velleities in this sense have occurred. Moreover, the recent 1980 constitutional reform has created an Arbitral Court, which will have the power to review the constitutionality of national laws and regional and community decrees, but only with regard to jurisdictional conflicts, and not to individual rights. It is arguable that, if the introduction of this limited control of

constitutionality was thought to require a constitutional amendment and the creation of a special body, then a general power of review for all courts can certainly not be read in the Constitution as it presently stands (27). Violations of the fundamental rights provisions of the Constitution are therefore still immune from judicial interference, when committed by the legislator.

In the United Kingdom finally, heated debates on the desirability of a bill of rights and judicial review have been raging for a number of years, but the unwritten British 'Grundnorm' of parliamentary sovereignty is still solidly entrenched (28).

B. Problems of Standing

1. The Availability of Private Remedies.

Every right can, according to the definition given earlier on (29), be enforced through a private remedy. But the concrete forms of these remedies vary widely according to the idiosyncrasies of each country's procedural system. One important distinction, applying in most countries, is that based on the nature of the contested act : whether the

alleged infringement of one's fundamental rights is the result of an act by the administrative authorities (or private persons, for those fundamental rights displaying a 'horizontal effect' (30)), or a legislative act. While judicial review of the constitutionality of legislation either does not exist at all or, when it exists, is usually characterised by a special procedure, constitutional review of non-legislative acts belongs to the 'normal' tasks of the courts and does not offer as many procedural peculiarities.

a) Against Administrative Acts

In this first hypothesis, procedural rules are not significantly different for the enforcement of fundamental rights than for any other individual rights of lower rank. Remedies against such acts may be available before the ordinary courts, or before special administrative courts, or before both, in a varying mix. This classical distinction will not be examined here further (31), the important thing to note for present purposes being that some form of judicial review against most administrative actions exists in every legal system. In some of the countries, a general right of action against the decisions of public authorities is recognised, sometimes even, as in Italy or Germany, constitutionally entrenched (32). In other countries, there

have traditionally been important gaps in legal protection against the executive, but this situation is changing gradually, through internal reforms (33), but also through the emergence of a common international standard in this regard (34).

Many countries (especially those influenced by the French model) do not distinguish between individual and normative acts of the executive (35). Of course, the number of addressees and potential claimants is much larger for the second type of acts, but the available remedy is not different. In other countries, there is no direct remedy against general orders, but only against their subsequent individual implementation. But what with normative acts that are directly applicable and are not followed by implementing acts ? There is a danger, here, of an important lacuna in legal protection. Yet, as far as alleged violations of fundamental rights are concerned, this danger is avoided in most of the countries concerned by the existence of a specific constitutional remedy, the individual recourse before the constitutional court. The German Verfassungsbeschwerde and Swiss Staatsbeschwerde have traditionally had this function of filling the remedial gap. The Austrian Verfassungsbeschwerde, for its part, was, like the administrative action, traditionally restricted to

complaints against individual acts; but a recent reform (1976) has established the procedure of Individualantrag auf Normenkontrolle, expressly designed as a remedy against normative acts (both legislative and executive) that are directly applicable to the individual, thereby closing an important remedial deficit in the Austrian system (36).

Those German, Swiss and Austrian procedures (to which may be added the recent Spanish amparo procedure) do not only play a gap-filling role (37). They also constitute the *ultima ratio* where an ordinary remedy is available but has not offered to the plaintiff the desired result. Describing this as a supplementary appeal procedure is not entirely correct, as the Verfassungsbeschwerde-like action obeys to rather different standing rules than the initial action. Yet, the subsidiary nature of this recourse is emphasised by the requirement, common to all four countries, of a prior exhaustion of ordinary remedies (38), subject to some exceptions (39).

b) Against Legislative Acts

Legislative acts infringing fundamental linguistic rights may be less frequent than administrative acts, but their impact is of course much wider. When an administrative

act correctly implements a statute, it is the enabling law alone, and not the implementing act, which can be challenged on its constitutionality. Now, as regards legislative acts, the existence of an individual remedy against violations of fundamental rights is the exception rather than the rule. First of all, there are the legal systems in which the legislator is entirely immune from judicial review. But even in the countries, listed in the previous section, where judicial review of constitutionality exists, individual remedies are not always available. One must recall in this regard the classical distinction coined by Cappelletti between centralised and decentralised judicial review (40). In the latter model, adopted in the United States, but also - with the reservations made above - in Canada and in the Scandinavian countries, as well as in Greece, every court is entitled to enforce the constitutional provisions against any conflicting act of lower rank in a 'case-and-controversy' context (41). Legislative acts are not treated any differently from administrative acts, and conditions for individual access are therefore also identical.

But in the centralised model, which prevails in Europe (Germany, Austria, Italy, Spain, Ireland (42), France), the power to declare a statute unconstitutional is entrusted to a single court, usually a specially created

constitutional court, that has its own procedural and standing rules which differ from those of the ordinary courts, and are, in most cases, very restrictive as regards individual access.

The prevailing principle is that individual fundamental rights can only be enforced against legislative acts through the mediation of an institutional actor. Typical mediators are the ordinary courts; whenever an issue of constitutionality of a statute arises before them, they have to suspend proceedings and refer the question to the constitutional court. One may consider this as a form of 'indirect access' of the individual : he initiates the case and may raise the issue of constitutionality before the judge; but only the latter can take the final decision whether to seize the constitutional court or not. This system of 'concrete' or 'incidenter' control of constitutionality exists in Italy, Germany, Spain and Austria.

Entirely different is the 'abstract' control of constitutionality, where the case is brought before the constitutional adjudicator in the absence of any concrete case or controversy. The initiating role entirely belongs to political or other institutions, without any formal role for the individual. This does not mean that 'abstract' control is

entirely useless for the protection of individual linguistic rights. This will depend on whether any of the competent institutional actors is willing to launch a constitutional action on behalf of these language rights, whether, in other words, the individual right forms the object of a political interest. This may, first of all, be the case when the declared objective of the organ is the protection of citizens' rights, like with the Spanish Defensor del Pueblo who has been granted direct access to the Constitutional Tribunal (43); one may think also of the legislative branch itself, and more particularly of the opposition to the government-of-the-day, who can bring an action before the constitutional court in Austria, Germany, France and Spain (44); and thirdly, of the governments of autonomous regions or member-states, acting in favour of a language minority living in their area (and perhaps dominating the region's institutions). Yet, their right of action extends to the fundamental rights provisions of the Constitution only in Germany and Austria, but not in Spain and Italy, where it is strictly limited to jurisdictional conflicts with the central state, to the exclusion of all other constitutional provisions (45). One exception has been made in the latter country, directly inspired by the need to protect linguistic diversity : article 98 of the Statute of Trentino-Alto Adige grants to the President of the Region, and to the Presidents

of each of its two constituent Provinces, the right to bring a constitutional recourse against national legislation for violation either of the Regional Statute or of the principle of the protection of the German and Ladin linguistic minorities (46).

Only some of the 'centralised' systems of judicial review have the additional possibility of direct individual access to the constitutional court. Its prototype is the German 'Verfassungsbeschwerde' which performs the same two functions with regard to legislative acts as it does with regard to administrative acts : offering an extra recourse when the ordinary judge failed to refer the case to the Constitutional Court for a 'konkrete Normenkontrolle'; and providing the only possible individual action against legislative acts that constitute a direct violation of fundamental rights, without any intervening implementing act (47). Only the second function is performed by the Austrian 'Individualantrag auf Normenkontrolle', while in Switzerland a direct individual action only exists against cantonal statutes. In Spain, finally, the 'recurso de amparo' does not apply to legislative acts at all.

2. Individual and Group Standing

As we saw earlier, collective linguistic rights, in the strict sense, are rare, but individual linguistic rights have by their very nature, a collective effect (48). Violations of these linguistic rights, in turn, often do not affect one single, or just a few, persons, but a larger number of similarly situated persons. They typically belong to the category of 'mass violations' which characterises modern society and has prompted to a reconsideration of the traditional canons of civil procedure (49). This does not mean that the classical individual action can not cope at all with linguistic interests. In comparison to such typical 'diffuse interests' as those of the consumers or the environment, linguistic (and other minority) rights are rather well defined and personified, so that the role of individual litigation (eventually backed by collective expertise or funding) is still prevalent.

Yet, recognising a right of action to groups for the enforcement of individual rights might still constitute an important additional guarantee. The actual situation in this respect, however, is in constant flux; most legal systems are presently struggling to find an 'appropriate compromise' between the classical individualistic procedural

model, and the need to accommodate for these new group phenomena (50). In the United States, the class action has played a very important role for the protection of diffuse interests, including ethnic and racial minorities (51), but it has not penetrated on the European legal scene, where a collective initiative for the enforcement of linguistic rights takes one of the two following principal forms : enforcement by a governmental institution or action by private organisations.

a) Public Enforcement

The classical mode of governmental law enforcement (the attorney-general, 'ministère public' and similar institutions), is complemented by enforcement through 'specialised attorney-generals' (an administrative agency or ombudsman (52)), and through territorial institutions challenging the acts of other (often higher) institutions (53). These territorial units may act in defense of their own powers (like in the typical example of conflicts of competence between central state and member states or regions), and thereby play an indirect role in the protection of language rights, along the lines indicated above (54). But they may also, more rarely, act as a 'parens patriae' for the defense of the interests of their citizenry. The promising

nature of such actions has been described as follows by Cappelletti and Garth :

"This federalistic model and its variations provide a number of important benefits. Obviously the opportunities for effective law enforcement are multiplied, not least because governments, state and local, tend often to be better equipped to carry the burden of a lawsuit than the actual or asserted representatives of diffuse interests. In addition, not only is the problem of the officious intermeddler minimised because the government - presumably accountable to civil society - supports the action; it may also be that the state or local government, being closer to the people, is more responsive to the interests of a diffuse group that, for various reasons, is neglected at higher political levels. Finally the state or local government may, at least in a society with opposing political parties, also be under control of a party in opposition to the policies of the central government" (55).

All these factors stand out in special relief as regards language rights. More than other diffuse interest groups, language groups are normally strongly concentrated in a given territory, and may constitute a majority in certain localities and control the public institutions at that level,

that will then be extremely responsive to their needs. But, as said earlier, this type of litigation is still at an incipient stage. Concrete applications may be mentioned in the Italian Region Trentino-Alto Adige. First, there is the constitutional recourse, mentioned above, of the President of the Region and of the Provinces of Bolzano and Trento against national legislative acts. A similar constitutional recourse may be exercised against regional acts by one of the two Provinces, and against provincial acts by the Region or the other Province (art.97.3 of the Regional Statute). Finally, a regional or provincial act may also be challenged, under certain conditions, by the majority of one of the linguistic groups represented in either the regional or provincial council, again on the specific ground that the equal rights of the members of the various language groups or their ethnic and cultural characteristics have been violated (56). These are all additional procedural guarantees to the normal means of recourse against administrative acts, which also provide for some 'public' enforcement; thus, in a recent decision, the Italian Council of State has upheld the right of action of the Comprensorio ladino della val di Fassa (a Ladin local community) for the educational rights of Ladin-speakers (57).

b) Private Organisational Enforcement

The right of associations to plead the rights of their members, or, more generally, to bring an action for the protection of the interests for which they were created, has been recently extended in various countries, either through specific legislative enactments or through judicial interpretations relaxing the earlier restrictive standards (58).

Legislative reforms providing for 'Verbandsklagen' are especially numerous in the field of consumer protection, but specific linguistic examples do not exist. As for the judicial attitudes towards group actions, they are difficult to ascertain, as no clear principles have as yet emerged (59); divergences may exist between the administrative and the ordinary courts (60), or between various lower courts belonging to the same system (61). The impact of more liberal standing requirements in linguistic matters can be illustrated by two French examples, one from the ordinary judiciary, the other from the administrative court system :

- the 'Loi sur l'emploi de la langue française' of 1975, mandating, as will be explained later (62), the use of French in certain commercial activities and labour contracts, gives standing to sue for the enforcement of the Act to a

governmental organ, the 'Service des Fraudes'. Yet, a much more important role has been played by a private consumer group, the 'AFGULF', which was specifically created for the purpose of enforcing this linguistic legislation (63).

- an association called 'Défense et promotion des langues de France' wanted to challenge a Decree implementing an Act which had promised an enhanced status for the country's regional languages in the public educational system (64). Now, the striking thing is that the Decree did not deal with these languages at all, this omission being precisely the motive of complaint. Yet, the absence of any direct link between the association's declared interests and the content of the Decree did not prevent the Council of State from recognising the association's standing to sue (but it did constitute a motive for rejecting the applicant's substantive claims) (65).

Section 2National Enforcement of International Human Rights

A. Domestic Status

With the exception of the, not so numerous, purely intergovernmental agreements, international treaties need to be implemented at the national level, and this implies the active collaboration of the municipal legal systems (66). Human rights treaties, more than any other, are in this situation. In this implementation process, the guiding principle, according to a judgment of the Permanent Court of International Justice, is that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken" (67). But the States have, by virtue of what has been called the 'decentralised structure of international law' (68), a wide discretion in the choice of the appropriate means by which to execute this general obligation of conformity. Only when their domestic rules fail, in a given instance, to attain the final objective, then there is a breach of international law, giving rise to the responsibility of the State.

In practice, there exist three general methods of reception, i.e. methods of adapting the domestic legal system to international treaty obligations. No unanimity exists on the denomination of these three methods; I will call them, following a classical study in this domain (69), specific transformation, general transformation and adoption (70).

In countries where the doctrine of specific transformation prevails, an international treaty is considered to be, by its very nature, inapplicable at the internal level; only by becoming the object of a specific domestic enactment can its contents be transformed into national law. When, however, the state authorities estimate that the domestic legal system, as it stands, is already in conformity to international obligations, then no such transformative action is required. Thus, the European Convention on Human Rights has not been given a domestic status in the United Kingdom, Ireland, Denmark, Iceland, Norway, Sweden and Malta, and can, accordingly, not be invoked before the tribunals of those countries (71); and the same situation prevails with regard to other human rights instruments : these countries seem to consider their legal system as entirely consistent with the human rights treaties they have ratified. As described by a close observer, "their basic attitude seems to have been that the duty of

implementation has been observed when human rights are respected in fact. Neither new enactments nor new remedies have been introduced for the sole and separate purpose of affirming or ensuring in law the rights to be implemented" (72).

This, often presumptuous, gap between international obligation and national implementation does not exist under the other two methods, where the act expressing the country's consent to be bound by a treaty is coupled with the incorporation of that treaty in the domestic legal system. The substantive provisions of this treaty can therefore immediately display their effect at the internal level. This outward similarity has led several authors to downplay the opposition between 'general transformation' and 'adoption' (73). The remaining differences are considered to be the fruit of a doctrinal controversy (dualism v. monism) with little practical importance. However, the consequences of choosing one or the other method become evident in the case of a conflict between the norm of international origin and a purely domestic norm.

The method of general transformation (prevailing in countries marked by the dualist tradition such as Italy and Germany) postulates the need for international law to be

transformed into internal law in order to be enforceable at the national level. The difference with specific transformation is that no express legislative act is needed for that purpose, but a simple clause attached to the ratifying act. The consequence, however, is that a conflict between international and national law is simply ruled out: by its transformation, the treaty rule takes the authority and rank of the domestic norm in which it has been transformed.

The method of adoption, on the other hand (based on a monist conception of the relationship between international and municipal law), incorporates the international norm as such within the domestic legal order : even when there is a formal act of 'reception' - as distinct from agreement or ratification - it does nothing more than 'open the gates' of the legal system for the 'incoming tide' of international law. Only with this system is there a possibility of 'conflict' between an international treaty and national law, and must the problem of their relative rank be affronted.

B. Rank of International Treaties in National Law

I have argued elsewhere (74) that, contrary to a widely held view, the choice of whether to recognise the supremacy of international law at the domestic level is not a matter left within the state's discretion. Surely, the mere existence of an abstract conflict norm which gives precedence to national law does not yet amount to a breach of international law; but the application of this norm to a specific case immediately triggers the international responsibility of the state. All national courts must therefore, in all cases, give precedence to an international norm over any conflicting national provisions. This rule has been explicitly proclaimed by the European Court of Justice in the famous Costa v ENEL case (75) and its progeny. But, despite the argumentation used by that Court, which was entirely based on the 'specific nature' of the Community, the same rule applies to norms of 'ordinary' international law as well.

The practice of many states is, however, in contrast with the rule. As we saw in the preceding subsection, the doctrine of transformation does not even contemplate the possibility of a conflict : the relation between a norm of international origin and a purely national norm becomes, through the transformation of the former, a problem of internal cohesion of the domestic legal order, to

be solved according to its ordinary conflict and hierarchy rules. In reality, as treaties are usually transformed (if they are transformed at all) by an act of the legislature, they will take precedence over conflicting administrative regulations and earlier legislative acts, but will be superseded, in turn, by later legislative acts, according to the age old rule 'lex posterior derogat priori'. This is the dominant view in Germany and Italy (76). Austria constitutes a rather particular case : the major international instruments containing human rights (the European Human Rights Convention, the Convention against Racial Discrimination, the Peace Treaties following the two world wars) have been transformed into constitutional law. Despite its adherence to the theory of transformation, Austria can therefore be considered as recognising, by and large, the supremacy of international law over national legislation, in the field covered by this study.

Only in monist systems does the question of a conflict arise as such. But the solution to the conflict is not uniform. If, as Morgenstern remarked some time ago, "the doctrine of 'adoption' leaves room for further development towards the supremacy of international law in the municipal sphere" (77), he had to add that "the 'adoption' of international law is not tantamount to its supremacy within

the State" (78). Here too, problems have arisen mainly in cases where a treaty conflicts with subsequent legislation. Yet, a remarkable evolution has taken place in this respect, during the last decades. In his 1952 course at the Hague Academy of International Law, De Visscher could find only one single country (France) where the full supremacy of international treaties over national legislation was constitutionally recognised, and even there only on paper, without actual judicial enforcement (79). Since that date, two other Constitutions, that of the Netherlands (art.66) and that of Greece in 1975 (art.28.1) have explicitly recognised the primacy of treaty provisions over all conflicting national legislation. In France itself, the 1958 Constitution, in its art.55, has reiterated the choice made by its predecessor, be it under the slightly limiting condition of reciprocity (80); but, moreover, the judicial attitude towards this constitutional rule has markedly changed. The constitutional conflict norm had remained a dead letter, in the case of subsequent legislation, because of the courts' traditional adherence to a "general unwritten principle that no French court is entitled to question the popular will as expressed by the representative assembly" (81). While the Council of State remains true to such a restrictive view of its own role (82), the 'Cour de Cassation' has crossed the Rubicon in the celebrated Cafés

Jacques Vabre decision (83), where it affirmed the power of the ordinary courts to make an international norm prevail, even over subsequent national statutes; though the case arose in the specific context of EEC law, the Court has not made any distinction which would except 'ordinary' international treaties from the benefit of supremacy.

In a number of other countries, where the constitutions are silent on the rank of international treaties within the legal order, the recognition of their supremacy has been the exclusive contribution of case-law. The courts of Belgium have traditionally shared the self-restraint of their French counterparts, until the famous Le Ski decision of the Belgian Court of Cassation (84). Under the impulse of its 'procureur-général' Ganshof van der Meersch, the Court decided to overrule its accepted doctrine and to recognise the supremacy of international treaties, based (in the absence of any relevant constitutional provisions) on their nature of consensual agreements. Since then, this view has been unanimously accepted by the Belgian courts (85). A similar conversion of the courts had already occurred earlier in Luxemburg (86). The Swiss Federal Tribunal, for its part, has also expressed itself in the same sense in a long line of cases; there is some isolated authority to the opposite effect, but it has been heavily

criticised in writing (87) and does not seem to counterbalance the opinions favourable to supremacy of treaties, particularly of those dealing with human rights (88).

The fact that the constitutions of the three aforementioned countries remain silent on the problem of conflict between international and national law is not so surprising; they stem from a period where similar conflicts could still be considered as only a remote possibility. In view of the multitude of international obligations assumed, at present, by the states, the silence of the recent Portuguese (1975) and Spanish (1978) Constitutions on this matter can not be considered as an oversight, but only as a deliberate attempt to avoid this controversial issue (89). The constituent powers have not dared to resolve the doctrinal controversy existing on this point in both countries, and have thus entrusted this responsibility to the courts. The latter seem to be inclined, both in Spain (90) and in Portugal (91) to recognise the supremacy of international treaty law.

Of all the countries under review, which can be classified as 'monist', the United States remains the only one to be firmly attached to the 'lex posterior' doctrine as

expressed in Whitney v Robertson, an old but hardly challenged decision of the Supreme Court : "By the Constitution a treaty is placed on the same footing, and made of like obligation with an Act of legislation. Both are declared by that instrument to be the supreme law of the land and no superior efficacy is given to either over the other (...). The duty of the court is to construe and to give effect to the latest expression of the general will" (92).

C. Caveat and Conclusion

The classifications of countries operated in the previous sub-sections should be handled with some care. While it is possible to make fairly neat dichotomies between monist and dualist legal systems, between countries recognising or not recognising the supremacy of international law, the differences are somewhat blurred in practice, due to a number of factors.

1. The distinctions outlined above are only valid with regard to ordinary international conventions, and not to customary international law and European Community law.

Customary law is usually considered as the 'law of the land' even in dualist countries (despite the contradiction of this attitude to dualist doctrine), either on the basis of explicit constitutional provisions (art.25 of the German Basic Law, art. 9 of the Austrian Constitution, art.10.1 of the Italian Constitution) or of prevailing legal opinion (as in the United Kingdom (93)). Hence the temptation of some judges or authors of those countries to by-pass the domestic obstructions on the road of international treaty law, and to smuggle human rights in by means of customary law (94). But, as the human rights content of custom is rather meagre (95), these attempts have not led very far (96).

The distinction does not hold either in the case of European Community law, which also has, as will be seen, some (limited) relevance in the field of human rights (97). Of the five 'dualist' member states of the Community, Italy and Germany have accepted the supremacy of Community law (both primary and secondary), by separating it sharply from 'classical' international law, and thereby adopting the theory of the 'specific nature' of Community law originally elaborated by the Court of Justice (98). As for the three other countries, the United Kingdom, Denmark and Ireland, they had partly to adapt their doctrine to allow for the 'direct applicability' (automatic reception) of Community

regulations and decisions, but it is still not clear whether they are also prepared to recognise the supremacy of Community law over subsequent national legislation (99).

2. Even within the field of international treaty law, which is by far the main recipient of human rights norms, the distance between the various domestic legal orders is less marked in practice than in theory. First of all, one has to check to what extent ratifications of the various human rights instruments have been made by each country. A country may be extremely receptive to international law in theory, but can nevertheless avoid any adverse consequences upon its domestic legislation by omitting to ratify the more disturbing of these treaties. The United States' failure to ratify human rights treaties it has signed is notorious, but does not constitute an isolated example (100).

More important still is the impact of techniques of judicial interpretation. Here, the theoretical gap between the two categories of countries can be bridged in both senses :

a) The courts of most dualist countries have a rule of construction according to which national legislation is interpreted so as to conform to the international agreements

entered by the State and to avoid the breach of an international obligation. This rule, existing of old (101), is particularly important for human rights treaties, whose provisions are often open to very flexible interpretation. In the United Kingdom, for instance, the European Convention of Human Rights, "although it is not considered as a formal source of internal law (...) is nevertheless used by the judiciary as a persuasive authority when there appears to exist a lacuna in domestic law, the clarification of an ambiguity is needed, or if the courts are faced with a doubtful or controversial point of view" (102). The same seems to hold in Italy and Germany (103).

A similar, but slightly stronger device is that of replacing the 'lex posterior' conflict rule with the rule of 'lex specialis' : the treaty norm is then considered as a 'lex specialis', with which subsequent national legislation is presumed to be in conformity, unless there is an express derogation. This technique has its partisans above all in Italy (104), but opinion in Denmark apparently goes along the same lines (105). Yet, whatever may be its merits in other contexts, the 'lex specialis' rule seems ill-suited to human rights treaties (106), that do not apply to some technical subject matter or to a specific class of persons (which would leave intact more generally formulated national norms), but

acts rather as a global check upon the state's activity, as a 'lex generalis' rather than 'specialis'. As, moreover, the rule cannot cope with clear departures from international obligation, it offers no more guarantees than the classical rule of 'conform interpretation'.

b) Parallel interpretative techniques may mitigate the 'disturbing' impact of international treaties in countries where their supremacy is accepted. More than in dualist countries perhaps, the courts will try to read the national and international provisions in conformity with each other, so as not to be compelled to give a formal precedence to the latter. To take the most 'internationalist' of legal systems, that of the Netherlands, human rights conventions are often taken into consideration by the courts, but national legislation has, up till now, not once been found to conflict with them (107). One very common device in this strategy of conflict avoidance is to declare the international rule to be non-self-executing. The fact that a given norm needs some further legislative or administrative specification before it can be judicially enforced in the particular case, is not - as such - peculiar to international law. National constitutional rights, above all the so-called 'social rights', may also present this characteristic (108). Yet, there is a widespread bias presenting international norms as

inherently less able to be 'justiciable' or 'self-executing' (109); in fact, the denial of the self-executing nature of an international treaty provision is frequently used as an easy and elegant escape from international obligations (110).

Whether the 'direct effect' or 'self-executing character' of a norm is assessed on the basis of the subjective intention of the parties, or instead of the objective nature and content of the provision (111), the final authority resides, almost invariably (112), in the national courts. Many authors conclude from this that direct effect should be considered as a third major variable - besides domestic status and rank - in the national enforcement of international rights (113). I have not followed this course in this section which only intends to highlight the structural variables in this domestic enforcement; in fact, one cannot affirm that 'international treaties' as a whole are self-executing, or not, within a given country, but only that a specific provision of a given treaty is self-executing. There exist, it is true, general criteria by which the self-executing nature of a provision can be assessed. But these criteria do not vary appreciably from one country to another (114), nor do they constitute a decisive limitation of the discretion of the judge, when confronted with a particular case.

T A B L E 2

JUDICIAL ENFORCEMENT OF FUNDAMENTAL RIGHTS AGAINST
LEGISLATIVE ACTS

Judicial Review of Legislation

		YES	±	NO
Supre- macy of	YES	Spain Greece		Belgium Netherland Switzerlan Luxemburg
	±	Austria	France	
Interna- tional Law	NO	Germany Italy United States Ireland	Sweden Norway Denmark Canada	Un. Kingdom

At the end of this section, one can combine the two essential differentiating criteria relating to the judicial enforcement of fundamental rights at the national level, namely judicial review and supremacy of international law. The combination of both variables, both allowing for 'intermediate' cases, gives a simple scheme presented in Table 2, dividing all countries concerned in six groups. Bearing in mind the caveats made above, one thus has an approximation of the relative impact of national and international sources of human rights in the domestic forum.

Section 3

International Enforcement

In assessing the impact of international procedures in securing fundamental rights, one is tempted to adopt more modest standards than with national procedures. The word 'enforcement' hardly corresponds to the reality of supervision on the international level. In the human rights sphere in particular, there is a sharp contrast between the substantive achievements, which are relatively impressive, and the procedural machinery which has accompanied them; the contrast explains the abysmal gap between the official human rights rhetoric and actual practice in the world community.

Measures of enforcement in the strict sense, that is, with an inherent element of 'sanction', are to be found only on the regional level; in Europe, essentially the European Court of Human Rights enforcing the European Convention, and, accessorially, the European Court of Justice, in so far as it deals with fundamental rights binding on the member states (115). On the universal level, one might better use the wider concepts of international control, as a sort of intermediary between judicial enforcement and self-assertion (116), or of international 'implementation', which has been defined as including "a whole cluster of institutions and procedures for the international control and supervision of treaty and other obligations with a view to making them work in practice. They include such means as periodic reporting,

the consideration and public discussion of complaints emanating from states and individuals, the organization and education of public opinion and public exposure" (117).

Leaving aside the last-mentioned, very remote type of implementation, a classical tripartite distinction can be made between the examination of periodic state reports, procedures for dealing with complaints by one state against another, and procedures for the consideration of petitions or communication by individuals (118). Table 3 gives an overview of the availability of these three methods of implementation under the human rights treaties that are of interest to this study. I will add only some general remarks, referring for more detailed examinations to the specialised works on the subject (119).

A. State Reports

A common characteristic of nearly all universal human rights instruments is the provision for a system of state reports, whereby the ratifying states have to submit a periodic account of the measures they have adopted to give effect to the substantive rights contained in the treaty. These reports are received by a special committee, consisting either of independent experts (as is the case with the Human

T A B L E 3

International Procedures for the Implementation of Human Rights

REPORTING PROCEDURES

INSTRUMENT	C O M P L A I N T S P R O C E D U R E S				Individual	
	Interstate		Non-Judicial			
	Non-Judicial	Quasi-Judicial	Judicial	Non-Judicial	Quasi-Judicial	Judicial
(art.57)		art.24	art.44 ff.		art.25	(art.44 ff.)
art.40	art.41				Optional Prot.	
art.16 ff.						
art.9		art.11-13			art.14 (optional)	

- 218 -

INSTRUMENT
Organisms

UNESCO CONV.
UISCR. EDUCATION
Conciliation and
Good Offices
COMMISSION

Rights Committee under the Civil Covenant and the Committee on the Elimination of Racial Discrimination), or of governmental representatives (the ad-hoc Working Group established by the Economic and Social Council for the implementation of the Social Covenant). These committees have the power to discuss the reports, and to issue their comments and recommendations, but without any formal sanctioning power against the reporting States (120).

Although they are, obviously, a far cry from genuine judicial enforcement, these reporting systems should perhaps not be considered as totally ineffective. One member of the Human Rights Committee has pointed to the comparative advantages of the mechanism in the following terms :

"(...) it is worth noting that organs which only deal with complaints about alleged violations in individual cases will not always be faced with the most important questions of principle. Under the reporting system, on the other hand, the international organ, and even its individual members according to the practice now established, have the possibility of taking up matters of this kind by themselves. Whether or not the result of such an inquiry is a binding decision is probably not very important so long as no international means of coercion are applicable in any event" (121).

B. Inter-State Disputes

A number of human rights treaties provide for particular forms of dispute settlement between the contracting states, as regards the implementation of the obligations laid down by these treaties. Yet, State complaints appear as inherently ill-suited to the task of enforcing human rights. Indeed, "there is something almost naive about a system that assumes that a government will gratuitously come to the help of foreigners at the risk of compromising its relations with other governments" (122). This intrinsic limitation is compounded by the ineffectiveness of the mechanisms devised under the universal human rights instruments.

A first negative factor is that, apart from the inter-state communication procedure under arts.12 and 13 of the Race Discrimination convention, the States do not automatically become subject to these procedures upon ratification of the respective conventions. Under the Civil Covenant, the inter-state communications, organised by art.41, are only admissible when both the 'initiating' and the 'receiving' state have made a declaration recognising the competence of the Human Rights Committee to examine such communications. As for the dispute settlement procedure under

the Unesco Convention against Discrimination in Education, it has been instituted by a separate Protocol (needing separate ratification) creating a Conciliation and Good Offices Commission (123).

A second debilitating element, which is common to the three aforementioned procedures, is that they are of the 'friendly settlement' or 'conciliation' type, and do not by any means end in a formal and binding decision on whether the 'receiving' State has violated its international obligations (124). Under the Civil Covenant, for instance, the appointment of an ad-hoc conciliation commission is the final stage of the procedure. In case it fails in its mission, all this commission can do is to publish a report, embodying its findings on all questions of fact relevant to the issues between the parties concerned, and its views on the possibility of an amicable solution of the matter. As further confirmation of the highly symbolic nature of these control mechanisms, one might mention the fact that none of them has to date been used by any of the participating States.

Under the Race Discrimination and Discrimination in Education Conventions, this weakness is compensated by the fact that parties are expressly allowed to have a supplementary recourse to the International Court of Justice

in order to obtain a binding decision (obviously, within the limits of this Court's jurisdiction) (125). In the two International Covenants, however, no such clause exists. It has been argued that the provision by these Covenants of an enforcement system of their own precludes the recourse to any other method of supervision or dispute settlement (126). This view, however, leads to paradoxical results. In the words of one commentator, "(...) were this view to become generally accepted, then international treaty law for the protection of human rights would assume a quality lower than that of other treaties : in the latter case one can rely on diplomatic means of enforcement, on the various procedures of dispute settlement and, in the last instance, on self-help by peaceful means, while with respect to human rights treaties one would have to remain content with pure 'stimulation'" (127).

The picture is different only with the European Human Rights Convention, which expressly excludes recourse to any other method of dispute settlement than those provided by the convention itself (128). But, then, the inter-state action under the Convention does not present any of the flaws characterising the universal treaties mentioned above. Not only can an inter-state application be lodged before the European Commission of Human Rights by and against any State

who has ratified the Convention (129), but this Commission's role is of a quasi-judicial nature, and its final opinion does not leave any doubt on whether it has found a violation of the Convention. Access to the second level of enforcement, before the European Court of Human Rights, depends, it is true, on the recognition of its jurisdiction by the defending State (130), but it leads to a binding judicial pronouncement on the merits.

But even in those 'ideal' circumstances, this procedure may well appear more of a strain to the Convention system, than a helpful device for the enforcement of the rights of the individual (131). It nevertheless retains its practical virtue in the case of States that have not recognised the possibility of individual applications. When, in addition, these countries are suspected of massive and prolonged infringements of the conventional rights, as in the case of Turkey presently (132), the inter-state application may well be the appropriate avenue.

C. Individual Petitions

1. Treaty Procedures

Access of the individual to an international supervision organ, is, on the contrary, somewhat of an anomaly according to the classical canons of international law. Of the **universal** human rights treaties considered here, only the Racial Convention and the Civil Covenant provide for a system of individual communications.

The Racial Discrimination Convention contains, in its article 14, an optional individual complaints procedure, which has only come into operation in 1982, when the tenth ratifying state had declared to recognise the competence of the Committee on Racial Discrimination to receive such communications. The Committee has, since, been discussing the detailed rules of procedure; no complaint seems to have been lodged as yet (133).

The individual communications procedure under the Civil and Political Covenant is not to be found in the text of the treaty itself, but in an Optional Protocol, to be separately signed and ratified by the States parties to the Covenant. The existence of an individual petition mechanism had not been contemplated in the drafts of the Covenant; it emerged during the concluding 1966 session of the General Assembly (134), but could only be adopted if relegated to a separate protocol (135).

This precaution was taken for a control mechanism which is, after all, rather modest and remains far below the standards of a true judicial procedure. This appears already from the use of the term 'communications'; these communications may be submitted by individuals, belonging to states who have ratified the Protocol, to the Human Rights Committee. The Committee considers them in a closed meeting, and, in the end, "forwards its views" to the State and to the individual concerned (136). Yet, in its more than five years practice (137), the Committee has given a fairly wide interpretation to the term "views" (in French : "constatations"), and has moved somewhat in the direction of a quasi-judicial pronouncement : the report published by the Committee does not leave any doubt as to whether it considers the Covenant to be violated or not in the particular case, and often enjoins the State to take steps for reparation, or for the prevention of new breaches (138).

The individual complaint procedure under the European Human Rights Convention is equally optional : its availability depends, again, on a special declaration by the State concerned, recognising the competence of the Convention organs to deal with such cases. The right is attributed to "any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one

of the High Contracting Parties of the rights set forth in this Convention" (139). This basic standing requirement is very liberal as it leaves open the possibility of collective actions, and of complaints by aliens, both very interesting in the context of linguistic diversity (140). The European Commission on Human Rights, to which the complaints are addressed, plays the role, first of a conciliation organ, then that of a quasi-judicial body. The first objective is to reach a friendly settlement between the applicant and the defending State; such an amicable solution, which must be "on the basis of respect for Human Rights as defined in this Convention" (141), can either be found in the official way (on the terms of art.28b of the Convention), or in an informal manner (by withdrawal of the application) (142). In the absence of a settlement, the Commission delivers a report on the facts of the case, accompanied with an opinion as to whether the facts disclose a breach by the State concerned of its Convention obligations.

The Commission does not take a binding decision, but it may refer the case either to the Committee of Ministers or to the European Court of Human Rights, who take final decisions binding on the member states. While the former is a political organ, taking its decisions largely on policy grounds, and without any representation of the

individual concerned, the Court is a judicial organ; the parties represented are the defending State and the Commission acting as 'amicus curiae'; some participation of the individual has also been organised under the Rules of the Court (143).

Despite all their differences, the various individual petition mechanisms have certain common characteristics, which set them clearly apart from the type of individual action existing at the national level. These characteristics act as it were as structural barriers limiting the impact of international supervision systems on the effective guarantee of individual human rights.

A first, well known series of limitations is inherent to the international treaty, as compared to national sources of law, and is therefore present both at the level of domestic and of international enforcement of treaties : the need for ratification (in addition to signature) of a treaty before it can bind the State (144), and the presence of various forms of 'escape clauses' (145), such as reservations (defined by the Vienna Convention on Treaties as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to

modify the legal effect of certain provisions of the treaty in their application to the State" (146)), interpretative declarations (often a disguised form of reservations) (147), or derogations (that may be considered as "reservations *ratione temporis*" (148)).

But other barriers are typical of the process of international adjudication, and can therefore not be found on the national level. Foremost among them is the fact, repeatedly mentioned above, that an international organ's jurisdiction to handle individual cases is never automatic, but depends on a special recognition by the single States (149).

A second barrier is the rule of exhaustion of local remedies. This is a general rule of customary international law (150), which has been transposed to human rights law and figures in all treaties considered here (151). Its justification is to allow States to repair by their own means a breach of international law; "states may be blamed only when their own judicial organs are unwilling to restore the situation" (152), and unless he has tried out all internal possibilities of redress, an individual can have no access to an international forum.

Thirdly, the international enforcement organs have a screening power, in deciding on the admissibility of complaints, which by far exceeds the amount of discretion left to the national courts in this respect. The example of the European Human Rights Commission is fairly typical; only two percent of all applications are admitted for examination on their merits (153). Among the grounds of admissibility under this Convention, some are of a formal nature : the application must be directed against a State party which has recognised the right of individual action, it must come from the victim of the alleged violation, the fact must have occurred on the territory of the State, and at the time the Convention was in force, local remedies must be exhausted and the complaint must be lodged within six months after the final decision, the case may not substantially repeat an issue already decided before, or pending before another international organ. In addition, there are two more substantive grounds which involve an, albeit cursorily, examination of the facts of the case. The first is 'abuse of right' that may result from the content of the application, or from the applicant's behaviour during the procedure. This ground, which was introduced to appease the apprehensions of some States, is in fact much less frequently used than the other test of admissibility, rejecting applications that are 'manifestly ill-founded'. This criterion has developed into a

certiorari-like procedure, allowing for the exclusion of cases that cannot be described as 'manifestly ill-founded' in the ordinary meaning of those words, but still do not raise sufficient interest from the side of the Commission (154).

Finally, there is also an 'a posteriori' barrier to the domestic impact of international adjudication, at the level of its execution. When an international control organ has found a violation of human rights, the concrete translation of this pronouncement into reality will depend on an action of the state concerned. As most of those international organs do not take binding decisions, the application of their findings can only be a matter of voluntary compliance. But the situation is not that different with genuine judicial decisions : judgments of the European Human Rights Court, for instance, are certainly binding on the member states (155), but when the State does not abide by them, compliance can only be secured through the intervention of the national judiciary (156). It is worth noting, however, that once an international decision has been accepted, its practical impact is often not limited to the case at hand. This is especially clear when the decision brings about legislative changes; it will indirectly regulate all future cases. But even otherwise, it may establish an 'autorité jurisprudentielle', to which national judges will tend to

adapt their case-law in order not to expose their State to further breaches of its international obligations (157). The preventive role of an international pronouncement is often more important than its immediate repressive impact on the particular case.

2. Non-Treaty Procedures

Apart from the mechanisms of individual access, which have been provided under the various treaties, special procedures exist, at the universal level, which are not based on a particular normative instrument. Indirectly though, they can be considered as deriving from the United Nations Charter provisions on human rights and the implementing powers attributed to the United Nations organs.

A central role in this general action of human rights protection is played by the Human Rights Commission (to be distinguished from the Human Rights Committee under the Civil Covenant), whose existence, significantly, is provided for by the Charter itself (art.68), as an auxiliary organ of the Economic and Social Council, made up of government representatives (158). While its provisional powers, as defined by its parent body in its Resolution 5(I) of 16-2-1946, were very weak, they were soon extended to "any

other matter concerning human rights" (Resolution 9 (II) of 21-6-1946). Its first twenty years of operation can be called the 'abstentionist' phase (159) : the Commission was mainly involved in the formulation and promotion of human rights (160). Concrete activity for the protection of human rights initiated only in 1967. The main procedure developed within the framework of the Commission is the examination of communications relating to situations revealing a consistent pattern of gross violations of human rights, the so-called 1503-procedure (161).

The examination consists of three stages. A working group within the Sub-Commission on the Prevention of Discrimination and Protection of Minorities operates a first selection among the total number of communications, both on admissibility (162) and on the merits, i.e. whether the communication "appears to reveal" a consistent pattern of gross violations. Secondly, the Sub-Commission itself operates a second screening. Finally, the Commission decides whether there is need either for 'thorough study' or for an 'investigation by an ad hoc committee' with the express consent of the State concerned.

The specific characteristics of this control mechanism (as opposed to, say, that of the Optional Protocol

to the Civil Covenant) are the following (163) : it is universal (covering all countries), in principle confidential (164), does not end in any type of judicial or quasi-judicial pronouncement, and deals only with gross violations showing a consistent pattern, and not with single infringements.

Within Unesco, a similar generic individual petition procedure has been established by a decision of the Executive Board in 1978 (165). It is not directly linked to the implementation of any particular human rights text, yet, it is, presumably, intended above all to further the observance of treaties adopted in the Unesco framework, and may as such acquire some importance for the protection of language rights. The task to handle the complaints has been entrusted to a Committee on Conventions and Recommendations. In contrast to the 1503-Procedure, not only gross collective issues, but also individual cases can be proposed. On the other hand, the confidential character of the hearings seems to be even more pronounced here (166).

The conclusion of this section must undoubtedly be that the primary forum of enforcement lies at the domestic level. The international forum can - and should - only play a complementary role of supervision on the implementation by

national states of their international human rights obligations. This supervision itself is "probably best understood as a great attempt to bring about a harmonization of the national legal systems" (167) in a few basic domains. The rights listed in international instruments can be given, through the international supervision mechanisms, a common interpretation, which will often be based on a comparative assessment of the several national interpretations of the same rights. If international enforcement does not generally impose a higher standard of achievement on the states, the common standard may nevertheless entail supplementary obligations for those countries who, on a given point, are lagging behind.

PART THREE

FREEDOM OF EXPRESSION

CHAPTER ONECOMPARATIVE CONSTITUTIONAL LAWSection 1Freedom of Expression and Language Use

Freedom of expression is one of the most commonly guaranteed fundamental rights; one finds it in Italy (art.21 Const.), France (art.11 of the Declaration of Rights, now part of the 'constitutional block' enforced by the Conseil Constitutionnel), Germany (art.5 of the Basic Law), Austria (art.13 of the 1867 'Staatsgrundgesetz', and now also art.10 of the European Convention of Human Rights, which has been transformed into Austrian constitutional law), Spain (art.20), the Netherlands (art.7), Denmark (art.77), Belgium (art.14 and 18), the United States (First Amendment), Canada (art.5 of the Charter of Rights and Freedoms), etc. In Switzerland, only the freedom of the press is expressly guaranteed, but a more general freedom of expression has been

recognised by the Federal Tribunal as an unwritten constitutional right (1).

This means that the role of freedom of expression as a vehicle for the protection of linguistic values is potentially important. Yet, it must first of all be demonstrated that freedom of expression really implies the freedom of language use, as I claimed in an earlier part of the study (2). Quite a number of authors agree with this point and have noted, often in a rather casual way, that one of the implications of freedom of expression is the freedom to use the language of one's choice as the medium of expression (3). On the other hand, many works dealing with linguistic rights do not deal with freedom of expression at all, and discuss 'linguistic freedom' as an entirely separate and specific right. They find a precedent in a number of national and international law sources where linguistic freedom is also treated separately from freedom of expression : art.23 of the Belgian Constitution, the unwritten 'linguistic freedom' discovered by the Swiss Federal Tribunal, a provision of the inter-war Minority Treaties (still surviving as art.66 of the St.Germain Treaty in Austrian law) (4). Conversely, general analyses of freedom of expression or freedom of speech also, as a rule, fail to make

any reference to the possible linguistic components of this right.

The fact that no link is made, generally, between freedom of expression and free language use could lead to two conclusions : either that free language use is so obviously included in freedom of expression that it goes unnoticed (in homogeneous linguistic settings) or needs no formal explicitation (in plurilingual situations); or, on the contrary, that these two rights have really nothing to do with each other. It would seem, therefore, that the matter needs some further consideration; this section will try to demonstrate that the first view is the correct one.

A. Theoretical discussions on the reasons why freedom of expression deserves a special constitutional protection, tend to focus on two types of justification : a consequentialist view, where freedom of expression is guaranteed because of its societal function, or a non-consequentialist view, whereby expression is protected for its own sake, as the realisation of a certain inherent individual aspiration.

The functional role of freedom of expression is quite universally recognised. It is considered as a

"cornerstone of the democratic order" (5); only through a free flow of opinions and ideas can the political system be protected against corruption and tyranny, and can it be adapted to the changing needs of society. As Archibald Cox forcefully states : "only by uninhibited publication can the flow of information be secured and the people informed concerning men, measures and the conduct of government. Only by freedom of expression can the people voice their grievances and obtain redress. Only by speech and the press can they exercise the power of criticism. Only by freedom of speech, of the press, and of association can people build and assert political power, including the power to change the men who govern them" (6). In this sense, free speech is correctly considered as occupying a 'preferred position'; it is "the matrix, the indispensable condition of nearly every other form of freedom" (7). There is hardly one analysis of freedom of expression where its constitutive role in the democratic system is not brought to the fore (8), and many supreme courts have recognised it as well (9).

So far, so good. But this type of analysis becomes more controversial when pushed to its logical extreme, i.e. when it is argued that freedom of speech only protects political speech, that is, speech directed at the formation of public opinion and governmental decisions; and that all

other forms of expression do not benefit from constitutional protection. One immediately sees the implications for our subject : freedom of expression could not possibly be seen as a general guarantee for the free choice of language, but only, at the very most, as a guarantee of such choice for the purposes of political speech.

This theory has been propounded above all by American authors like Meiklejohn or Bork (10). However laudable their intention of ensuring a bullitt-proof protection of political speech by shedding all superfluties, they have never convinced the majority of legal writing or constitutional adjudication. In Europe, the doctrine has never taken hold, except in the watered down version that the political function is the principal one, but without excluding other, extra-political forms of expression(11).

The doctrine has, in fact, two main flaws :

i) On the one hand, there is no textual basis for such a narrow view in any of the constitutional texts: they guarantee 'freedom of expression', or 'freedom of speech', without specifying as to the political character of such speech. It follows that, by adopting such an approach, one does not so much upholster the position of political speech,

as degrade that of non-political speech, which is much less acceptable.

iii) Upon further consideration, it can even be argued that privileging political speech is in reality, and paradoxically, contrary to the foundations of the liberal democratic state, which is based on the voluntary participation of the citizens in public affairs (12). If one adopts the (creeping totalitarian) view that the fundamental goal of politics is to bring happiness to the people, then there is indeed no higher value in society than political participation. If, on the contrary, one takes the more modest view that the role of political activity is that of providing an organisational framework within which personal life choices can be made, then there is no reason to think that time and energy spent on 'private' matters is less important than that spent on political activity (13). Besides, if one allows some authority to make a distinction between 'political' and 'non-political' speech, then the next step might well be a distinction between 'good' and 'bad' political speech.

B. Another, less drastic but more widespread means of restricting the scope of freedom of expression is by affirming that only the expression of thoughts or opinions or ideas is protected, to the exclusion of other forms of

expression. The use of a given language would, accordingly, not be generally protected but only when it serves as the instrument for the communication of such opinions. In contrast to the theory discussed before, this one finds strong arguments in the wording of many constitutional provisions. Art.5 of the German 'Grundgesetz' protects the "Meinungsauesserungsfreiheit"; art.21 of the Italian Constitution the "libertù di manifestazione del pensiero", art.11 of the French Declaration, the "libre communication des pensées et des opinions"; art.20 of the Spanish Constitution guarantees the right to "expresar y difundir libremente los pensamientos, ideas y opiniones"; art.14 of the Belgian Constitution, the 'liberté de manifester ses opinions'. One might argue that the same limitation is implicitly contained in the more general terms used by the First Amendment of the United States Constitution, and art.5.1 of the Canadian Charter of Rights and Freedoms.

Yet, although the doctrinal controversy is still unabated, there is a trend in most of the countries to include also 'non-intellectual' expression within the bounds of constitutional protection. Even if one starts from the premise that freedom of expression's primary function is that of guaranteeing the formation of public opinion, and that, therefore, messages that do not carry any idea or opinion do

not deserve constitutional protection, it has proved impossible to translate this theoretical premise into a practical criterion. No sharp distinction can be made, as even the purely private communication of a fact or a feeling implies also an opinion, namely that this fact or feeling is worth communicating (14). The notion of 'opinion' or 'thought' is therefore open to varying interpretations. In recent times, the wider view, which refuses to make any qualitative distinction among the contents of expression, prevails in Germany (15), in Switzerland (16), in Italy (17), in Belgium (18) and the Netherlands (19). Only in Austria has an older decision of the Constitutional Tribunal, restricting the scope of art.13 of the 'Staatsgrundgesetz' to the protection of 'value judgments' not yet been overruled (20); but it is rejected in legal writing, and is not in accordance with the text of art.10 of the European Human Rights Convention, which is part of Austrian constitutional law and has therefore superseded the older interpretation (21).

C. Even if one accepts that no distinction can be drawn, for constitutional purposes, between the various contents of expression (ideas v information v emotions), it does not necessarily follow that freedom of language use receives full protection. In fact, another distinction which is often proposed is that between the content of the

expression (of whatever nature) and the form of this expression. While restrictions keyed to the content of expression would be impermissible, a reasonable regulation of the form of expression could be more easily justified. Language is of course the basic form of expression; a total prohibition of the use of any language whatsoever is unthinkable, but a regulation of linguistic choices (i.e. allowing for the use of a given language, or outlawing the use of other languages) would be acceptable as long as the content, the message, can freely be expressed.

While the content distinction has been generally articulated in a number of countries (22), its clearest application to the case of language use can be found in a recent judgment of a Quebec court, Devine and others v. Attorney General of Quebec (23). The plaintiffs in this case, Anglophones living in Quebec, attacked several provisions of the Quebec 'Charter of the French Language' restricting the freedom of language use in private business, and especially section 58 of the Act which imposes the exclusive use of French in public signs and commercial publicity (24). Among other arguments, which were easily dismissed by the court, the plaintiffs argued that this clause violated freedom of expression as guaranteed by art.3 of the 1975 Quebec Charter of Rights and Liberties. In his decision, judge Dugas held,

first of all, that language is nothing but an instrument or medium of expression : "la langue n'est après tout qu'un code de signes oraux ou écrits, qu'emploient ceux qui le connaissent pour communiquer entre eux" (25); and, secondly, that freedom of expression only covers the message and not the medium (26). Starting from these premises, the judge concluded, not surprisingly, that freedom of expression does not include the freedom to choose the language of expression (27), and rejected the complaint on the grounds that the applicants' right to diffuse their advertising message was not affected by the restriction as to the language to be used for that purpose.

Both premises of the Devine judgment are, however, extremely questionable. First of all, the dichotomy between the medium and the message is too summarily argued. Canadian court decisions that are quoted in this respect (28) are not at all convincing; the most one can read in them - and the most partisans of the content-form distinction are prepared to argue - is that limitations on freedom of expression are only acceptable, or more acceptable when they are directed at the form, and not at the content. They do not pretend that the form should not be protected at all. Accordingly, the Devine court should not have excluded language altogether from the domain of freedom of expression, but instead have

examined whether this restriction was justified on the basis of some overriding public interest (29).

It is also arguable, however, that the whole distinction between content and form is an artificial construction, which can only lead to abuses in its practical enforcement (30). Very often, it is impossible to distinguish the instrument of expression from its substance (31), and even when one can, the restriction of the instrument affects the substance of the message. This is particularly true for language. Take, first of all, the example of a person who is less conversant in the permitted language than in the forbidden language (and few people are real bilinguals) : can one deny that the regulation of the form considerably inhibits the content of his message ? In fact, the freedom to express any idea or information becomes entirely illusory when it must be exercised through an unfamiliar idiom (32). But the situation is not so different if the person in question is a quasi-bilingual, who can switch to another language without too many difficulties. The language one chooses to speak or write is not a neutral instrument, an empty vessel (and the context of Devine - commercial advertising - may be misleading in this respect), but very often it is part and parcel of the message one wants to convey. As was discussed in the first Part of this study,

language is not only a communicative instrument, but also an unexchangeable cultural good (33). Linguists generally agree that a proposition (the 'content') can only be understood through language (the 'form'), and needs the background of a whole linguistic system of discourse. One cannot, therefore, simply switch from one language to another without altering the significance of discourse (34).

D. All the 'negative' arguments made up till now, as to why language use cannot be excluded from full protection by freedom of expression, become superfluous when one adopts the alternative view of the function of freedom of expression. Expression is then not seen primarily as the constitutive element of public opinion and hence of democratic decision-making (which leads to privileging the expression of meaning over information, and of the content over the form), but as self-expression, as an instrument of personal communication (35). If one accepts the view that the central element of freedom of expression is the communicative act itself (its content being of secondary importance), then there is of course no motive to grant language only a limited degree of protection.

This, in some way paradigmatic shift in the interpretation of freedom of expression is making headway in

many countries (36). It does not, it should be stressed, deny the societal function of freedom of speech, but absorbs it in a wider perspective. As argued above, free government and open institutions, the basic values underlying the 'classical' theory, are not self-supportive values. We want democratic government not for its own sake, but because it allows citizens to build up their own 'life-world', in which autonomous social communication is possible (37).

The main problem with this wider conception is that it does not indicate where to stop and how to distinguish freedom of expression from an all-encompassing freedom of action, as all action contains a communicative aspect. This problem is real but need not detain us here, as we are not concerned with 'symbolic speech'; speaking a language is 'expressive' in the narrow sense and does not pose any problems of delimitation.

E. One final objection remains to be answered at this point. If the freedom to use the language of one's choice is really included within freedom of expression, why then has it been protected separately from freedom of expression in the constitutional law of Belgium, Switzerland and Austria? The reasons for this redundancy must be traced back to the

particular circumstances in which each of those rights was entrenched.

In Switzerland, linguistic freedom was coined by the Federal Tribunal in the Ecole francaise case (38) as an unwritten constitutional right; now, such rights can only be recognised, according to the Tribunal's doctrine, when they are a "necessary precondition for the exercise of other rights" (39). Linguistic freedom was thus considered as a precondition for the exercise of all "those fundamental rights guaranteeing the freedom of expression through the spoken or written word, such as freedom of expression of opinion, above all in the form of the freedom of the press, the freedom of religion, the freedom of association, the political rights, and, as far as it is recognised, also freedom of education" (40). Thus, the Swiss supreme court clearly adopts the view, outlined earlier on (41), that linguistic freedom is the 'ancillary' of a certain number of rights that can all be subsumed under freedom of expression in the large sense. That the court did not merely refer to freedom of expression but added a number of other rights has its own particular motive : freedom of expression itself is not written in the Swiss Constitution (which only guarantees freedom of the press in art. 55), and its status as an unwritten fundamental right, clearly and repeatedly affirmed

in later decisions, was not yet firmly established at the time of the Ecole française case (42). Therefore, founding the existence of 'linguistic freedom' exclusively on 'freedom of expression' (an implicit right within another implicit right) might have appeared as too temerarious a hermeneutic enterprise to the Federal Tribunal.

The Belgian case can be argued along broadly similar lines. The 1831 Constitution recognised the freedom of "manifestation" of opinion" in a close connection with freedom of the press (43), and this freedom might have been considered, at the time, as protecting only a certain content and not the form of expression, without any connection whatsoever with the use of languages. Therefore, a separate protection of the latter was certainly not superfluous. Only the subsequent doctrinal broadening of 'manifestation of opinion' into a general freedom of expression has caused some overlapping between the articles 14 (freedom of manifestation of opinion) and 23 (free language use). Today, the latter should be considered as a lex specialis to the former. In practical terms, this means that limitations on free language use are only permissible under the conditions of art.23, and may not be subjected to any supplementary limitations that could be read in art.14.

As for the Austrian provision on linguistic freedom, it is not endogenous, but was included in the 1920 St-Germain Peace Treaty imposed by the Allies as one of the series of 'minority treaties' whose content was closely modelled on the Polish Treaty (44). As a multilateral international obligation, it did not take into account the existence of parallel guarantees under the Constitution of single minority states. And when those minority protection provisions of the St-Germain Treaty were then transformed into Austrian constitutional law (45), this was done in globo, without checking whether some of the rights involved were already adequately protected under existing constitutional law (in this case, by art.13 of the 1867 'Staatsgrundgesetz'). Since then, art.66 of the St-Germain Treaty functions also as a lex specialis to art.13 of the 'Staatsgrundgesetz', with its own legal regime (46).

My conclusion is that the explicit recognition of linguistic freedom in a small number of plurilingual countries is not an argument against reading a similar freedom in general guarantees of freedom of expression. A final argument a contrario can be drawn from the recent Spanish Constitution. This text is not only extraordinarily prolix in general, but it also makes numerous specific references to the need of protecting linguistic diversity

(47); yet, it does not find it necessary to have a provision protecting explicitly the free use of languages. The only plausible reason for the absence of this most basic of language guarantees is that the constituent body thought it sufficiently protected by other provisions of the Constitution.

F. The result of the analysis made in this section is therefore the following : in all expressive situations, i.e. all action covered by the guarantee of freedom of expression, the free choice of the linguistic freedom is guaranteed along. Having established this premise, I can now proceed to the concrete delimitation of this 'field covered by freedom of expression'. A basic distinction must be made, in this respect, between 'private' and 'public' language use. The former only requires an abstention from the side of the public authorities, and therefore squarely falls within the scope of freedom of expression. The latter, on the contrary, requires positive state action, which is normally not covered by freedom of expression. Limitations to the free choice of one's language therefore have a different legal status depending on whether they occur in the private or public sphere.

Let us consider private language use first. Here, limitations exist because of the communicative nature of language. Using a language is never a monologue; it may be a dialogue at a distance, as when it is used in a written form, but it is still directed at an audience or readership or public. The dialogue may take place between persons speaking the same language, in which case there is no problem. But when it takes place between persons speaking a different language, they must either understand each other's language or adjust their linguistic behaviour to each other. This process of adjustment takes place on the basis of individual or social factors. Legal problems may arise, e.g. as to whether a contract has been validly concluded where a party alleges linguistic difficulties (48), but this is not a legally imposed restriction on the use of languages.

In this social process of linguistic adjustment, there is an important difference between cases where one freely adapts oneself (e.g. when a person buys a newspaper written in a language other than his own), and those where the adjustment is imposed, in the sense that the person might lose important benefits if he does not accept to use a certain language. Apart from such social pressure, there can also be legal intervention in this process. The law may reduce the number of available options, either by imposing

the use of a given language, or by prohibiting the use of some other language. Such limitations of free expression by the public authorities can -as will be shown before long- either be complementary to social pressure or, instead, reactions against social forces.

Linguistic contacts between a private citizen and the public administration, on the contrary, constitute public language use, whose legal regime is very different. To a certain extent, and especially in oral contacts, the process of spontaneous adjustment may also take place here. But in order to cope with all the more formal and general relations with the administration, it has proved necessary everywhere to regulate the use of languages in the 'public' field, thereby limiting the possibility for everyone to use freely the language of his choice.

In legal terms, the latter type of state intervention should not, in contrast with the one discussed before, be considered as a restriction on freedom of expression. Even if one holds that a person should be free to decide which language to use when dealing with an administrative service as in any other occasion, this does not imply that the public authority should also understand him and act upon his request or declaration. This inherent

limitation corresponds to the nature of freedom of expression as a 'negative' right which normally commands only abstention from the side of the state, but no positive duties.

Both issues will therefore be kept separate in the following sections. Section 2 deals with the constitutional validity of limitations by public authorities on the free use of languages in the private domain; while section 3 discusses the question whether there exist also positive state obligations under constitutional law in relation to language use in the public field.

Section 2

Limitations to Free Language Use

The classical method to analyse a freedom right is "to outline what a person may not do and to assume that all else is permitted" (49). This is not only the typical British (and Canadian) attitude, but also reflects the legal reality of other constitutional systems. The crucial question as regards freedom of expression (and the linguistic freedom) is, accordingly, to what extent restrictions by public authorities are permitted. This issue arises in every

country. Even where, like in the United States, the constitutional text seems to contain an absolute and unrestricted freedom, case law has nevertheless elaborated a fine pattern of inherently permissible limitations (50). In most countries, the possibility of restrictions is expressly provided, either by a general clause applicable to all fundamental rights, or by a specific clause applicable to freedom of expression (51). Only the freedom of language use in art.23 of the Belgian Constitution seems to be absolutely guaranteed; according to this provision, the use of language may "only be regulated by law and only in the case of acts by the public authorities and of judicial matters". The distinction made between private and public use is, as was explained above, an inherent feature of the notion of linguistic freedom and can therefore not be considered as a restriction on this freedom.

I will not attempt to give an exhaustive comparative overview of permissible limitations on freedom of expression; most limitations have no direct bearing on the object of this study, as they are aiming primarily at the content of the message; on the contrary, restrictions on the form of expression are imposed less frequently, and limitations on the specific linguistic form of expression are rarer still. Only one country, among the member States of the

Council of Europe, has a sweeping general restriction on the free use of language; the new Turkish Constitution of 18 October 1982, in its article 26 provides that "in the expression or diffusion of opinion no language prohibited by law may be used", a provision primarily aimed against the Kurdish language, and which is clearly unacceptable under whichever standard of democracy.

For the rest, rather than give a global comparative picture of theoretically permissible limitations, I will concentrate on the few restrictions on private language use existing in the positive law of the various countries, and see whether they can be reconciled with their constitutional principles.

As I said earlier on, public intervention in the field of private language use may either complement the existing societal power relation between various languages, or on the contrary try to reverse this pattern of linguistic pressure (51). The dominant type, historically speaking, has been the former; states have tried to quicken the assimilation of linguistic minorities and to foster national integration - as they understood it - by denying equal rights to those weaker groups in the field of language use. I will not deal here with the crass violations of the basic rights

of linguistic minorities in countries like Spain, Italy, or Germany, in the period of dictatorship. But even constitutional democracies have, in times of war or other national emergency, had recourse to quite drastic restrictions on free use of languages. Thus, in Canada, an 1918 Order-in-Council prohibited "the publication of books, newspapers, magazines or any printed matter in the language of any country or people (...) at war with Great Britain" (52). In the United States, a federal law of 1917 prohibited the non-English press from publishing news and articles about the war and foreign policy without first submitting an English translation to the post office (53). Such restrictions to the free press have been lingering on for some time after the war. Thus, a state law of Oregon of 1920 required all non-English papers to print their content simultaneously in full English translation (54).

Some remnants of this type of intervention still exist under French law. First of all, article 14 of the Law on the Press of 21 July 1881, as amended by a Decree-Law of 6 May 1939, gives the Minister of the Interior the power to prohibit by decree "the circulation, diffusion and sale of newspapers, periodical and other publications, written in a foreign language or of foreign origin written in French, whether published abroad or in France"(55). The notion of

'foreign language' has at times been given a wide extension. Thus, a newspaper published in Italian in Nice (where a number of persons speak that language) was considered to be 'foreign' (56).

Secondly, there is an 'Ordonnance' of 13 September 1945 ordering that all periodicals published in Alsace must have a minimum content of 25% written in French - including all sports and youth features (57). This regime only applies to Alsace, and dailies like the 'International Herald Tribune' (formally published in Paris) or 'Narodowiec' (the Polish paper published at Lens in the northern mining district) can be entirely written in a foreign language.

I would submit that neither of these two restrictions can be held compatible with freedom of expression guaranteed by the Declaration of the Rights of the Citizen, which is part of the French constitutional 'block' (58). The second of those norms, being an administrative regulation, is perfectly reviewable on its constitutionality by the administrative courts. Yet, the fact that no such issue has arisen seems to indicate the low salience, in practice, of these limitations.

In the recent period, the emphasis of state intervention in the linguistic field has changed. Its main (at least purported) objective is the protection of the free language use of some weaker segment of society against the imposition of linguistic values by a stronger group. This trend participates in the general movement away from unbridled contractual freedom, towards a legislative protection of the contractual 'underdog'.

The most elaborate system of public intervention on the use of languages in private affairs is the one established in the province of Quebec, by the language laws of the 1970's. The statute presently in force is the so-called 'Charter of the French Language' (also called 'Bill 101') enacted in 1977 under the impulse of the Parti Québécois government. This statute contains a comprehensive regulation of all aspects of societal language use, which does not remain within the usual bonds of 'official' language use, but penetrates deep into the private sector. In Quebec, the fact that French, the Province's majority language, had been traditionally in use as the main language of official affairs had not prevented the lingering on of patterns of social dominance of the English language in other fields, and most strikingly in that of labour relations. Speakers of the majority language were denied an equality of economic

opportunity unless they wanted (and succeeded) to switch over to the dominant minority language (59). Inquiries showed some striking data : in the province of Quebec, 83% of all communications at the work place were made in English, whereas 80% of the population is Francophone (60). Now, by its importance in the life of most people, the work world exerts a decisive influence on the evolution of linguistic patterns. Efforts at the emancipation of a language in the domain of public affairs are to little avail when, contemporarily, private business is immune to such efforts and continues its practice of diglossic domination.

One of the main purposes of the 1977 Act is to extend the full status of the French language from the public into the private domain. Restrictions on the free use of languages are presented, not as invidious measures directed at the Province's minority language groups, but as a consequence of the right of all Quebeckers to use the French language. This order of priorities is well expressed in the following initial provisions of the Charter :

"(2) Every person has a right to have the civil administration, the health services and social services, the public utility firms, the professional corporations, the associations of employees and all business firms doing business in Quebec communicate with him in French.

(3) In deliberative assembly, every person has a right to speak in French.

(4) Workers have a right to carry on their activities in French.

(5) Consumers of goods and services have a right to be informed and served in French".

Those basic rights to use French are then, in the rest of the Act, transformed into specific obligations to use French to the exclusion of any other language. It is impossible to give here a full catalogue of all those restrictive measures, listed in sections 41 to 71 of the Act. Suffice it to give one characteristic sample of the painstaking detail in which some matters have been regulated :

"(s.51) Every inscription on a product, on its container or on its wrapping or on a leaflet, brochure or card supplied with it, including the directions for use and the warranty certificate, must be drafted in French. This rule applies also to menus and wine lists. The French inscription may be accompanied with a translation or translations, but no inscription in another language may be given greater prominence than that in French".

Constitutional objections against this law have been momentarily discarded by the Devine judgment mentioned above. As I argued earlier on, the position adopted by the court in this case is indefensible : the freedom of expression of all non-Francophones living in Quebec is clearly curtailed; the point where discussion should start is, rather, whether the particular restrictions of the Charter of the French Language can be justified under the general limitation clause of the new Canadian Charter of Rights and Freedoms (61). It must be considered whether the public interest at stake (the protection of the French character of Quebec in order to guarantee the linguistic rights of the Francophones) justifies the limitations. The main problem, in this context, is that the Law privileges the French language against all other languages. Does the understandable desire to counteract the social dominance of the English language justify the extension of the prohibitions to the languages of the immigrant minorities ? On those questions, Devine is not the final word, as higher Quebec Court and the Canadian Supreme Court may reverse its decision. In addition, international human rights standards on this matter should be taken into account. Canada has ratified the U.N.Covenant on Civil and Political Rights, and recognised the competence of the Human Rights Committee to receive individual communications (62).

In Belgium, there exists similar legislation, but more closely limited to the language use of, and within, business enterprises. The factual situation in the work world of the Flemish part of the country bore striking resemblances to that of Quebec. Here too, the language spoken by the large majority of the population (Dutch), was not used in many Flemish enterprises because of the dominant position of French-speaking proprietors or managerial staff (63). A first legislative intervention occurred in 1963; the law of 2 August, regulating the use of languages within public administration, also contained one provision, art.41 (64), which regulates the linguistic behaviour of private enterprises. Those enterprises must adopt the country's general policy of territorial unilingualism and, thus, use the official language of the area where they have their seat for two types of written documents : acts and documents prescribed by laws or regulations and documents for their personnel. In the bilingual area of Brussels, a free choice between French and Dutch is left for the former type of acts, while documents for the personnel must be written either in Dutch or in French, according to the language spoken by each employee.

Justified doubts have been voiced about the constitutionality of this provision. Indeed, art.23 of the

Constitution only allows a regulation of language use for the acts of the public administration; while most of the provisions of the 1963 Law squarely fall within this category, article 41 does not. It is not because they are 'prescribed by law' that certain private acts automatically become 'public'. One should distinguish between acts addressed at the public authorities (tax declarations, customs documents, etc.) and acts merely prescribed by law (obligatory insurances, receipts, etc.). The latter seem to fall outside the scope of public intervention permitted by article 23 (65).

The constitutional reform of 1970 has partially silenced these misgivings. It attributes to the newly created French and Dutch Cultural Councils (66) the power to regulate the use of languages as regards :

- i) administrative affairs;
- ii) education in institutions created, subsidised or recognised by public authorities;
- iii) social relations between employers and their personnel, and acts and documents of enterprises prescribed by laws and regulations (67).

Thereby, the constitutional objection is eliminated but only as far as the jurisdiction of the new Communities is

concerned. In fact, their territorial jurisdiction with regard to language use is narrower than their general territorial jurisdiction, and excludes Brussels, the 'frontier' communes with a special linguistic status, public services operating across the limits of one language area, national and international institutions, and the German-speaking area (68), for all of which the national legislator remained competent (69). But this competence must be exercised, like before, within the bounds of article 23, and the problem of constitutionality remains open as far as those areas are concerned (70).

The explicit mention of 'social relations' as a permissible field of language regulation by the Communities was not only meant to silence retroactive doubts of constitutionality, but also to pave the way for further activities of the now autonomous Dutch Community in this field (71). And indeed, the Dutch Cultural Council voted, in 1973, a Decree which considerably radicalises the existing linguistic requirements applicable to private enterprises, a move for which the agreement of the Francophone parties under the previous unitary regime would have been unthinkable (72). The Decree innovates in imposing the use of Dutch in all labour relations (formal and informal, written and oral, directly and indirectly related to the conditions of work),

and by providing for the sanction of nullity (only to be invoked by the employee) of all acts contravening those rules (73).

After an initial period of vivid political controversy, the actual enforcement of the Decree has been very moderate and has not created major legal difficulties (74), with the one conspicuous exception of its territorial field of application. Indeed, according to its article 1, the Decree applies to "natural and legal persons domiciled in the Dutch language area or employing personnel in the Dutch language area". The first criterion corresponds to the one used by the 1963 Law but the second, additional criterion was bound to create conflicts with the latter Law : indeed, a Walloon enterprise, employing personnel in the Dutch language area must, for certain documents, use the French language on the basis of the 1963 Act, and Dutch by virtue of the 1973 Decree. The question arises whether the second criterion of qualification does not overstep the limits of the Dutch Community's territorial jurisdiction. Several concrete cases of this nature have arisen and received confused and contradictory solutions in judgments by the lower courts and by the Court of Cassation, and in a decision by the Senate, that was called to intervene under the (now defunct) system of jurisdictional conflicts resolution created by the 1970

Constitution. The controversy is compounded by the theoretical discussion whether this should be considered as a real conflict of jurisdiction between the Community and the central State, or rather as a contradiction between two norms that are both in conformity with the constitutional division of powers, and show only the appearance of a conflict (75). A final complicating factor has been the recent adoption, by the Council of the French Community of a sort of 'counter-Decree', imposing the use of French not only in the two hypotheses contemplated by the Flemish Decree (enterprise based in the French linguistic area or employing personnel within this area), but also in a third case, that of enterprises employing French-speaking personnel (76). This third criterion is abusive, as no link, however tenuous, with the territory of the French Community exists in this situation; the Decree is therefore, more clearly than its Flemish counterpart, ultra vires the constitutional division of powers in matters of language regulation. This seems to have been acknowledged by the initiators of the Decree, who saw it more as a sort of provocative move. Altogether, the legal situation has become extremely entangled and can only be solved by the recently established (but not yet operating) Arbitral Court, that has final authority for deciding conflicts between the central State, the Communities and the Regions (77).

A French law of 31 December 1975 'relative à l'emploi de la langue française' apparently participates in the same spirit as the Quebec and Belgian Acts : it purports to protect the rights of two categories who classically benefit from legislative protection, workers and consumers. Yet, it is not directed against a (socially) dominant language group within the French society, but at an out-group : the law must be seen as an "attempt to provide a partial remedy to what has been perceived generally as the syntactical and lexical 'contamination' of the French language resulting from the dominance of English or, more precisely, American English, in international business transactions and technological devopment" (78).

The policy of protecting the language against 'franglais' had been inaugurated by a Decree of 7 January 1972 making obligatory in public administration and education the use of French terms as elaborated by special commissions on terminology. The law of 1975, on the contrary, does not only aim at the purity of French but is also directed against the use of foreign languages (not only English, but all other languages, including France's minority tongues). In addition to strengthening existing requirements for the public sector (articles 6,7 and 8), it also covers two 'private' domains : commercial activity and labour relations.

As far as commercial activity is concerned, the use of French is made compulsory, by article 1, in "the description, the offer, the presentation, the written or oral advertising, the directions for use, the scope and conditions of guarantee of a good or service, as well as in invoices and receipts" (79). As far as the labelling of products is concerned, it is hardly disputable that making the use of the national language obligatory is a true consumer protection device; this is, by the way, one of the most widespread types of regulation of private language use (80). Yet, for current consumer goods, the practice is already largely in the sense of the law. The picture is different for specialised goods, where the practice is different and where intervention can hardly be justified on consumer protection motives (81). Moreover, if one adds up all items which have to be written in French, one comes to the conclusion that every contracts themselves must entirely be drawn up in French (82), even bilateral agreements between partners who commonly use a foreign language without any particular pressure (e.g. in maritime transport), and even agreements on French territory between foreigners who do not know French. By the generality of its terms, this aspect of the Law cannot be accepted on its face-value as an instrument of consumer protection, but rather as a straightforward defence of the French language (83).

In addition to commercial activity, the 'Loi sur l'emploi de la langue française' also covers some aspects of labour relations. Here again, the declared objective of worker protection is incompatible with some of the specific provisions. Offers of employment and labour contracts must, according to art.4, be written in French. But the existing rule that a labour contract can be concluded orally is not modified, so that the French-speaking worker is not protected at all in such cases. And what with job candidates speaking another language than French ? Is the obligation to use French not an infringement of their rights ? The law, it is true, allows foreigners to require a translation of the contract; but one cannot imagine that this will happen very often, especially not in the case of 'fresh arriviers'. And what then with French citizens who are not conversant in French, rare as they may be ? Finally, the law adds nothing on the conditions of employment themselves : only the 'consumer' aspect of the social relationship is covered, not the 'worker' aspect. This is logical, as the danger for French linguistic integrity lies more 'outside' than 'inside' the work relationship, contrary to the Flemish and Quebec case. But then, one should not present this Law as primarily aiming at the protection of the weaker groups in society.

As for the constitutional issue, it can no longer be raised in French law, once the statute has been promulgated (84). The only possible issue is that of the compatibility of some of the provisions with freedom of expression as guaranteed by art.10 of the European Convention : this piece of legislation is to be enforced by the 'ordinary' French courts who, in contrast to their administrative counterpart, recognise the supremacy of international treaty law (85).

One might also mention a Belgian Decree, adopted by the French Cultural Council of that country on 12 July 1978, and which is inspired by the same will to preserve the purity of the French language against English influences. Yet, it merely encourages compliance with its provisions, without penal or administrative sanctions (86).

In Switzerland, restrictions to private language use are almost inexistent. If one excepts the case of private education, to be discussed later (87), there is only one minor publicised example : a 'legislative decree concerning signs and inscriptions for the use of the public' enacted by the canton Ticino on 28 September 1931, and imposing the use of Italian in the shop, hotel and bar signs and inscriptions within the canton. Translations were allowed, but only in

characters half as big as those of the main text. The Swiss Federal tribunal, in the Zaehringer case, quashed the latter provision, but upheld the essentials of the act (88).

The case was decided at a time when neither general freedom of expression nor linguistic freedom had been recognised by the Tribunal, and when this court was perhaps less activist in the creation of unwritten rights. Yet, one should not expect similar restrictions to be struck down today. In the Ecole francaise judgment of 1965, in which it recognised linguistic freedom, the tribunal also adopted, in the same breath, a far-reaching general limitation to this freedom which had previously been formulated by legal writing in the following terms : "in cases of an essential menace to the survival of a national language, or of the linguistic homogeneity of the territory of a language group, the legislator has the power to restrict linguistic freedom. Such a menace arises above all by an insufficient assimilation of immigrants from other language areas" (89).

The constitutional basis of this doctrine is sought in article 116.1 of the Swiss Constitution, declaring German, French, Italian and Romansh to be the country's national languages. It is generally accepted that this is not a mere statement of fact, but also constitutes a normative program

(which is fairly obvious for a legal norm) : those are not only the four languages presently spoken in Switzerland, but they should also be maintained in the future. The underlying concept is that of Switzerland as a political and not as a linguistic or cultural nation (in contrast with most other European states (90)); it is feared that a unilingual Switzerland would no longer possess the same political legitimacy to resist irredentist claims by its big neighbours (91). Therefore, art.116.1 guarantees the establishment of the legal conditions for the effective use and survival of the four national languages (and especially Italian and Romansh). A further step of the reasoning is that the legitimation of the Swiss State would be endangered not only by the extinction of one language, but also by the mixing together of formerly pure language zones, because, in this case, irredentism could again become an attractive alternative (92). This very wide interpretation of art.116.1, as mandating the enforcement of a strict principle of territoriality and the maintenance of the linguistic status quo, even at the cost of linguistic freedom, was accepted by the Court in Ecole française (93). The doctrine has been criticised by some authors because of its sweeping nature (94), and correctly so, in my opinion. An essential distinction should be made between small language groups whose existence might indeed be endangered by private

language pressure (and the Zaehringer judgment can therefore entirely be approved), and a large majority like the German-speakers, whose linguistic integrity can quite effectively be maintained by the regulation of public language use alone, and does not need the drastic elimination of all private initiatives towards plurilingualism.

Section 3

Positive State Action under Freedom of Expression

In constitutional law, the question of the necessity of positive state intervention for the guarantee of fundamental rights may arise in three different hypotheses :

i) The first is that of the so-called 'social rights'. A number of (fairly recent) Constitutions contain rights that

cannot be exercised by the autonomous action of their individual beneficiaries, but inherently need positive state action (e.g. right to health, right to education, right to work, etc.). For these rights, the crucial question is not whether they impose positive obligations - they certainly do - but rather whether they are, in a given country, constitutionally entrenched - many, especially older constitutions do not contain any such right - and, if so, whether they are judicially enforceable. The question will be dealt with in more detail in the next Part of the study, in discussing the right to education, in many ways a typical example of a social right (95).

The second hypothesis is that of what could be called 'derivative positive rights' : whenever the state grants a benefit to certain persons, then there is a claim for all similarly situated persons to have this benefit extended to them as well. Such a claim is based on the equality principle, and exists under all constitutional systems. The important impact of equality on the legislative activity of the State will be analysed, with special reference to linguistic matters, in another Part of the study (96).

The third case, which is the one arising here, is that of positive duties that are read into a 'classical' negative right like freedom of expression : can such a right impose the enactment by public authorities of certain measures ex novo (and not just the extension of existing benefits as under the previous hypothesis) (97)?

Now, the moral justification for such an extensive reading of 'classical' fundamental rights is evident enough; it is based on the often made distinction between 'freedom of' and 'freedom to', between 'negative freedom' and 'positive freedom' (98). Recognising only the 'negative' dimension of rights like freedom of expression (freedom from state interference) is condemning them to growing irrelevance in a society where the state plays an ever-increasing role as the effective guarantor of the individual's well-being. As the famous maxim says, "Entre le fort et le faible, c'est la liberté qui opprime, et la loi qui affranchit" (99).

There is no ideological contradiction between 'negative' and 'positive' freedom; both are generally recognised as essential elements of justice (100). It is also widely accepted, and has been illustrated in the previous section, that the establishment of the conditions for 'positive' freedom justifies some limitations to 'negative'

freedom (101). But the problem we are faced with here is of a different order : not whether such positive state action is allowed, but whether it is constitutionally mandated, and, if so, whether this mandate can also be judicially enforced.

And here, there is a serious separation of powers objection. If constitutional courts could not only check the legislative output on its conformity with constitutional standards but also order the legislator to take positive steps in a certain direction, what limits are there then to judicial omnipotence ? Does the 'watchman' not become a political organ to be watched itself (102)? The argument goes that courts are not equipped with the global vision and democratic legitimacy needed to allocate scarce resources between competing societal goals (103). This separation-of-powers objection appears less convincing where the constituents expressly decided to include social rights. Such constitutional entrenchment logically implies the will to restrict the legislator's discretion in the domain covered by those rights and an authorisation for the constitutional adjudicator to enforce them, be it very cautiously, by enjoining the public authorities to take some positive measures. But the picture is very different with rights like freedom of expression which have as a dominant, and independent, function the guarantee of a private sphere of

autonomy against state interference. Reading, in addition to the 'negative' aspect, also an implicit 'positive' component in such rights can easily be termed as judicial 'activism'.

It is not surprising, therefore, that most constitutional courts are extremely reluctant to enforce positive claims on the basis of classical freedoms like freedom of expression (104). Such positive measures as have been taken in this field are not the result of a constitutional obligation but of the free choice of the legislator.

Only in some countries do classical rights nevertheless form the basis of (limited) positive constitutional claims. Two factors seem to concur to that effect. The first is a general strong conviction, in constitutional theory, of the need for positive state action in order to make freedom rights meaningful, coupled with a strong influence of this theory on the judiciary. The German Federal Republic is the best illustration here : the simple model opposing 'negative' classical rights to 'positive' social rights is discarded by the most influential writers as unsatisfactory (105). Prompted by this scientific backing, the Constitutional Court saw its task facilitated also by a procedural device : individual constitutional recourse

('Verfassungsbeschwerde') is explicitly allowed against legislative omissions (106).

This brings me to the second favourable factor to the judicial recognition of the positive side of freedom rights : the availability of remedial devices for imposing on public authorities a duty to act, together with a general tradition of using such remedies. The example of the United States comes naturally to mind here. Traditionally existent injunctive relief has been instilled new life by its use for imposing affirmative duties on public authorities in the civil rights area (107). As one commentator noted, "even when the suit is premised on constitutional provisions, traditionally regarded as constraining government power, there is an increasing tendency to treat them as embodying affirmative values, to be fostered and encouraged by judicial action" (108). Yet, freedom of expression has only marginally been affected by this evolution. Due perhaps to the absence of a sophisticated theorisation of constitutional rights comparable to that undertaken in Germany, this judicial activism has occurred quasi exclusively in the field of the equality clause of the fourteenth amendment, and not in the form of a reinterpretation of classical rights like free speech (109).

More insight in this complex matter may be gained by breaking down the general issue of the positive dimension of freedom of expression into concrete factual situations. It seems that one could distinguish, in this respect, between cases where positive intervention by the state is a useful contribution to the enhancement of the freedom and cases where such a form of intervention is practically indispensable for its exercise.

As an example of the first, one might consider freedom of the press, a traditionally important sub-category of free expression. Here, except for those countries where the State has a monopoly of the distribution of paper, no governmental measures are strictly indispensable to exercise the freedom. On the other hand, the recent evolution of this sector shows a striking tendency towards concentration in the hands of a few publishing groups, and the gradual disappearance of smaller independent papers. Acknowledging this evolution which is reducing the citizens' freedom of expression by means of the press into a fiction, many governments have sought to intervene, either in a negative way, by anti-trust measures (110), or, more often, in a positive way, by granting direct or indirect financial aids to the press. Yet, in most constitutional systems, these regimes of state aids are not considered as the

implementation of a constitutional obligation, but as a free policy choice of the legislator which cannot be constrained by the judge (111). Only in the case law of the German Constitutional Court does the press benefit from an 'institutional guarantee' implying certain positive state duties (112), but financial subsidies are presumably not among them. Accordingly, there is generally no independent right for a minority language newspaper to be subsidised by public authorities. Any constitutional claim to that effect is of a derivative nature : whenever the legislator decides to establish a system of aids to the press, he may not discriminate against one category of papers, e.g. on the basis of the language they use. But this is an application of the equality principle, to which I will come back later (113).

Yet, there are some other expressive situations which are qualitatively different in the sense that intervention by the State is not only useful, but actually indispensable for their exercise. These are situations where

" (1) the form of the expression implies the use of certain means for its realization;

(2) government facilities exist that would afford such means;

and (3) the government possesses a monopoly or near monopoly of such facilities, that is to say no private facilities are available" (114).

If one accepts that all means of expression are equally protected by the Constitution, then the exclusive control by public authorities of some of those means puts them under a constitutional obligation to make them accessible, in some form, to the public.

The most massive example is perhaps that of radio and television, media which have been monopolised by the public sector in a large number of countries. Even where the constitutionality of such a monopoly is accepted as such, there is a growing recognition that the freedom of expression issue is not made irrelevant by the monopoly, but rather imposes on the public broadcasting corporation certain positive duties in order to allow for the widest possible expression of ideas. Because of their exceptional importance for linguistic diversity, and their peculiar legal regime, these mass-media will be considered in a separate section, below.

Another example, directly related to the linguistic domain, is less important but more illuminating perhaps. It is hardly disputed, nowadays, that the official registration

of first names at the moment of birth is a legitimate object of state policy, and even of state monopoly. But name-giving is also, and first of all, a form of personal expression by the parents. Therefore, one can argue, their free choice should basically be respected by the registering officer, and can only be abridged on weighty grounds. Now, first names are not linguistically neutral, and the choice of a name has therefore, in most cases, a linguistic component. It follows that state officials may not refuse to enter a given name on their register because of its linguistic form. In most countries, this is not a real problem (115). But authoritarian regimes have often denied to members of linguistic minorities the right to wear a 'foreign' family or first name, and Italy and Spain have only recently eliminated the effects of the repressive legislation in this domain (116). Even in France, administrative practice was often hostile to the use of certain non-French first names. In a celebrated case, a Breton woman called her children Adrobaran, Maiwen, Gwendel and Divezha, and the official ('officier de l'état civil') refused to accept them. Subsequently, the woman was denied child allowances, as the only admissible proof of the existence of dependent children is the birth registration. The Court of Cassation upheld this administrative refusal in a 1964 judgment (117). A series of decisions in the following year took the contrary view that

the Law of 11 Germinal An XI, by referring to official name lists, did not leave unlimited discretion with the official to accept or refuse names that do not figure in the lists, but merely intended to protect the children against ridicule; non-French names must therefore be accepted (118). This more liberal interpretation has not been reversed since, and the whole problem seems to belong to the past now. But, in theoretical terms, one can argue that the administrative veto in the Breton case, apart from being an exceedingly narrow-minded interpretation of the law, was also a violation of the constitutionally guaranteed freedom of expression.

The issue of name-giving is only of marginal importance of course. What really matters in terms of language protection is the more general question whether public authorities must use themselves the language preferred by the individual citizen. The difference with the foregoing examples is conspicuous : what is required from public authorities here is not merely a 'neutral' attitude of making available public services or structures without any creative contribution of their own; rather, they should perform a more active role : even where the public administration is not required to use the citizen's language itself (e.g. tax declarations, declarations of succession), it must at least understand the language in order to process the document

submitted. In order to guarantee to every person the right to use the language of his choice in the 'public' domain, administrative, judicial or educational authorities have to organise themselves, and this may cause them considerable additional expenses (interpreting and translation costs, selection of bilingual civil servants, etc.).

It would therefore seem that this situation is rather comparable to that of the press subsidies outlined above : linguistic freedom remains possible without the right to use the language with the administration, but it is seriously jeopardised by the absence of this 'public' dimension. Therefore, efforts at providing services in the various languages spoken by sizeable numbers of citizens are commendable, because they make the exercise of linguistic freedom of expression more effective. But on the other hand, there does not seem to exist constitutional authority for the direct judicial enforcement of this claim.

In fact, judicial pronouncements on this matter are scarce, due to the fact that the link between freedom of expression and the use of languages in official matters is generally not made. One single instance could be mentioned, that of the Derungs case, which will be treated more amply in the context of the right to education (119). There, the Swiss

Federal Tribunal made the following obiter remark : "whether linguistic freedom must be considered as one of the few fundamental rights which include a claim to positive activity may be doubted but can be left undecided here" (120). It could be left undecided for the following reason : the point at issue was whether the linguistic freedom of a Romansh-speaking child (and his parents) was violated by the absence of public education, free of charge, in his mother-tongue. The Tribunal noted that, in the case at hand, the teacher of the local German-language primary school had offered the son of plaintiff an individualised bilingual (German-Romansh) instruction, until the time he could fully participate in the German curriculum (121).

The case 'left undecided' could therefore be articulated as follows : it is that of a child having to start his school education in a language which he does not speak or understand, without any help for adaptation. If no account is taken at all of the child's mother tongue in the educational set-up, then the school language must already be introduced at home, in order to prepare the child. This means, in turn, that the family's free choice of their home language is restrained by the absence of recognition of that language at the public level. Linguistic freedom thus imposes some positive state initiatives in the field of language use.

This, it should be stressed, is only my personal explanation of the court's dictum, and 'is somehow weakened by the otherwise restrictive holdings in this case (122). Besides, this reasoning only fully applies to the educational sector, while the impact of administrative and judicial language regimes on the language of the home is much more indirect.

All this does not mean that individual constitutional claims with regard to the public use of language are non-existent altogether. But, more often than on freedom of expression, they will be based on other provisions, such as the right to education, the right to equality, or specific language rights (123).

Section 4

Freedom of Expression in the Broadcasting Media

Of all the secondary instruments of expression, radio and above all television play a peculiarly important role in the socio-cultural evolution in general, and in the evolution of linguistic diversity in particular. "Television's impact is different in kind from that of other media because it brings the majority culture (often in its

least attractive form) right into the living room. It is different because it captures the imagination and sympathies of children to a much greater extent than the printed material or radio" (124). And the same author adds, as an example, that a Welsh child, watching English TV, is "apt to develop a preference for the English language. Such a transfer of allegiance may not be reversed by the introduction of compulsory Welsh lessons at school; in this situation, it may be Welsh, instead of English, that is perceived as the language the child is forced to learn" (125). By being less alien to the child, and more part of the daily home environment, television is therefore a more direct threat to linguistic maintenance than the school system.

On the other hand, the mass media are also very effective instruments for protecting language values, especially through the recent technical evolution, which has made them more easily accessible. It has been argued that "in terms of the speed with which it can be inaugurated, the numbers upon whom it will impinge and the cost of provision, investment in media services would seem to have first priority given a policy of short-term action to halt the decline in a language" (126). Stimulating a language minority by action in the media sector seems thus more promising than in education (where returns are only in the long-term), or in

the administrative sector (which has a less profound impact on linguistic diversity).

However, the principles one can generally derive from freedom of expression in terms of language use cannot simply be applied to the domain of broadcasting. Freedom of expression through these media is, in all countries, different from the general regime, and subject to supplementary restrictions. The extent of those limitations varies however widely from country to country.

A. The Role of Freedom of Expression

In fact, two widely divergent 'ideal-typical models' (127) have governed the broadcasting media from their inception. There is, first of all, the American 'marketplace-of-ideas' model which sought to extend, as far as possible, the pattern of free competition characterising the press to those new media of public speech and information. In the second, 'public service' model which overwhelmingly dominates in Europe, radio and television were considered, from the beginning, as radically distinct from the press, for two reasons : on the technical level, they appeared rather as the continuation of existing media of long-distance communication (post, telegraph, telephone) that had, in most countries,

been brought under state control (128); functionally, they seemed more akin to cultural institutions like the school or libraries or museums. Radio, and later television, were primarily seen, not as a medium for the individual expression of opinion or for private economic initiative, but as a service to be delivered by the state to its citizens and a factor of national integration, buttressing the country's social and cultural fabric (129).

While the two models can very clearly be distinguished for analytical purposes, they have nevertheless grown in each other's direction. In the American model, restrictions have been imposed on the free use of the media which have moved them away from the legal regime of the press. On the other hand, none of the European broadcasting systems has proved to be totally immune from requirements concerning the free expression of the individual, and can still be considered as a 'pure' public service governed by a 'natural' state monopoly.

Within the American model, the constitutionally guaranteed freedom of speech is, and remains, the central value buttressing the whole broadcasting system, as was expressed by Justice White for the Supreme Court in the landmark Red Lion case : "It is the purpose of the First

Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail; rather than to countenance monopolisation of that market, whether it be by the Government itself or a private licensee" (130). Yet, the legal regime of broadcasting in the United States has been marked by a constant tension between the constitutional imperative of the fullest possible diversity of expression and the objective need of state intervention for purposes of distribution of the scarce resources. Indeed, the first regulatory body, the Federal Radio Commission (later to become the Federal Communications Commission) had been set up in 1927 in order to put an end to the anarchy which had rapidly developed in the ether. The Federal Communications Commission has the task of regulating this conflict of values by ensuring that the existing occupation of the waves affords the best possible reflection of societal diversity. The instrument of this policy is the licensing of private broadcasters, to be periodically renewed on the basis of various "public interest" considerations. The Supreme Court has endorsed this system by stressing the free speech rights of the viewers instead of those of the broadcasters :

"Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain

their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters which is paramount" (131).

Therefore, the Federal Communications Commission is entitled to require from the licensed broadcaster "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views which are representative of his community and which would otherwise, by necessity, be barred from the airwaves" (132).

In the European broadcasting systems there has been a parallel evolution, modifying the strict state monopoly, and opening up the media for the expression of individual opinions. Denying all relevance to the constitutional guarantee of freedom of expression in broadcasting matters became increasingly difficult, due to the important role those media gradually began to play in the formation of public opinion and in the flow of societal communication, and to the totalitarian abuse to which they had been put in certain states.

In some countries, a compromise solution between the public service conception and the freedom of expression imperative had been found quite early. The United Kingdom has created a system of broadcasting oligopoly, associating a public corporation (the BBC) with a number of private stations, grouped in nation-wide private networks. Content requirements are imposed on those private stations both by law and by guidelines issued by the Independent Broadcasting Authority, who can refuse to renew their licenses (133). The Dutch compromise is different, as it combines a public monopoly of diffusion, with a system of predominantly private programming. As one of the most striking features of the consociational system of 'pillarisation' for which the Netherlands have gained a certain reputation, radio and television have quite early been carved up between various broadcasters representing the main ideological currents of the country (134). The present legal regime, established by the 1967 'Omroepwet' (135) does not, however, establish any bias in favour of ideological groups. Conditions for being admitted to the broadcasting pool are entirely quantitative, based on the number of paying members of the applicant organisation. There has, thus, been a recent growth of purely commercial broadcasters without any ideological program (136).

In the other countries, the public monopolies were maintained but could no longer entirely avoid the challenge of freedom of expression. France kept to the 'public service' model in its original form until recently, but the last reforms clearly acknowledge the role of freedom of expression (137). Only Greece has, in its 1975 Constitution, explicitly excepted the broadcasting media from the constitutional guarantee of freedom of expression (138). All other European countries now acknowledge, in principle, that the constitutional freedom extends to broadcasting as well (139) and sought to conciliate this finding with the existing public monopolies. The earlier arguments in favour of maintaining the monopoly were of a negative nature : one agreed that an individual right to broadcast would be an ideal situation, but it was declared unattainable because of inherent technical and financial limitations of the medium. Technically, the airwaves were considered (like in the case law of the United States Supreme Court) as a scarce resource, for which the demand necessarily exceeds the offer, so that intervention by the state (representing the interests of the whole collectivity) was the only available alternative. Financially, operating a broadcasting station needs a large investment of capital, which can be made only by strong financial groups. In order to guarantee the access of the common citizen to the media, the government had to intervene.

The argument of the 'special circumstances' has long been popular in legal writing and constitutional adjudication (140). Yet, it appears somewhat dubious in view of the existence of the American model, where the same scarcity problem has led to a very different solution (private licensing instead of public monopoly). With technical progress in broadcasting equipment and in new means of diffusion such as cable distribution or satellite diffusion (141), the argument became increasingly vulnerable. Financially, it has been said, starting a private radio station now costs 100 times less than launching a daily newspaper (142). Yet, the 'special circumstances' theory has been maintained up till now by several constitutional courts, such as the French 'Conseil Constitutionnel' (143) or the Spanish 'Tribunal Constitucional' (144). Indeed, the system generates a self-supporting legitimation : as long as technical alternatives to the existing broadcasting system are outlawed, they remain a mere potential which cannot be put to an immediate use.

The Italian Constitutional Court, on the contrary, has, in a clamorous 1976 judgment (145), overruled its previous opinions. Considering that the scarcity rationale only held at the national level, it outlawed the public monopoly on the local level. It mandated the legislator to

establish a licensing system for private local broadcasters and provided some guidelines for that purpose (146). Eight years later, and despite a reminder by the Constitutional Court (147), nothing has happened, and instead of a system of public regulation, a savage competition has developed of the various private broadcasters among each other and with the public broadcasting corporation. This legal limbo is variously analysed. According to some lower tribunals, there is, at least since the 1976 judgment of the Constitutional Court, and even in the absence of a licensing system, a genuine individual right to operate a local radio or television station based on freedom of expression. This right implies for existing stations a constitutional protection against later intruders upon their frequency, even if the latter are run by the public service corporation. But the highest courts of both judicial orders, the Court of Cassation and the Council of State, have adopted the arguably more sensible view that the 1976 judgment has not recognised a 'right to broadcast' but only a non directly applicable obligation for the public authorities to distribute licenses to private radio and television stations fulfilling certain conditions (148). The legal situation of existing local broadcasters is therefore precarious; they are merely tolerated but cannot be judicially protected against private competitors, and certainly not against state-run programs

which, because of their public service nature, are of an altogether different quality (149).

It seems that, in general, the 'negative' argument of the 'special circumstances' affecting broadcasting has run its course. In recent pronouncements of the German and Italian Constitutional Courts, it is tuned down, without the need for public regulation of the airwaves being repudiated. But the arguments now are of a more positive nature : public broadcasting is not an unsatisfactory solution, imposed by technical and financial circumstances, but a way to ensure freedom of expression which, as such, is as valid, or even more valid, than private initiative. As argued by Bollinger (150) the true concern "is with undue power in the marketplace of ideas and that springs not just from the number of channels but from the number of sources of control over those channels". The "fictional and ambiguous reference to 'physical scarcity' as the rationale for broadcasts regulation has tended to obscure that fundamental point and to so cloud our thinking that the most troublesome of all new media can now pretend to be the inheritor of the traditional principles applicable to the traditional pamphleteer".

The German Constitutional Court, in its judgment of 16 June 1981 argues that "the necessity for a legislative

regulation continues to exist even when the special situation of broadcasting, caused by the scarcity of frequencies and high financial cost of broadcasting, falls short in the wake of modern evolution" (151). In this case, the Court was not asked to rule on the constitutionality of the public monopolies existing in most Laender, but on that of a Saarland Law establishing the conditions for private broadcasting. And the Court imposed rather stringent conditions on the legislative regulation of private stations; a simple withdrawal of public authorities from the field of broadcasting, abandoning it to the free play of market forces, would not be justified (152); indeed, the Court added that, in the case of a medium like broadcasting, the danger of a concentration of media power and its misuse in the form of a unilateral linking of public opinion is particularly acute (153). Although it is not explicitly said, the Court's arguments seem to imply that a public broadcasting monopoly is still one of the legitimate regulatory options to which the authorities may resort (154).

A similar evolution can be witnessed in the opinions of the Italian Constitutional Court. In its 1976 decision outlawing the public monopoly at the local level, it expressly accepted the legitimacy of the national monopoly, but the argument used by the Court was no longer the

existence of technical scarcity but rather that national broadcasting "represents an essential public service of preeminent general interest" (155). This updated version of the old 'public service' conception was more fully articulated in a subsequent judgment of 1981, where the Court held that "not only the element of availability of frequencies for transmission is decisive for the preservation of the monopoly, but also the existence of conditions which might lead to a private monopoly in such a delicate sector of social life" (156).

In general, one can say that the constitutional courts have been unwilling to strike down the entire public monopoly, and have used various ways in which to accommodate it with the constitutional freedom of expression clauses. The legislative evolution in many countries, whether prompted by constitutional case law or not, has also gone towards such an accommodation.

On the one hand, there has been a strengthening of the guarantees of 'internal pluralism' within the public broadcasting system, in order to allow for the widest possible expression; among those guarantees, there is the participation of the main political parties or interest groups in the leading organs of the corporation, the

independence of the informations service from governmental directives, and access of various social groups to the programming schedule (157).

On the other hand, there has been in many countries, a partial liberalisation of the monopoly, allowing for some private initiatives alongside it. While the television has been firmly kept within public hands, local radios have been recently recognised in France (158), Belgium (159) and Switzerland (160). In Germany, various 'Laender' - those governed by the Christian-Democrats - have recently been launching privatisation schemes within the guidelines provided by the 1981 judgment of the Constitutional Court (161).

As a conclusion, one can say that freedom of expression is now everywhere a strong constitutional factor influencing the legal regime of the broadcasting media. Its practical effects are however still divergent, ranging from the cases where freedom of expression has (partially or wholly) eliminated the public monopoly, to those where one has tried to incorporate freedom of expression within the existing monopoly, by guaranteeing the reflection of the various opinions within the public service. The consequences flowing from these various models as regards the use of

languages in radio and television will be analysed in the following pages.

B. Linguistic Diversity in the Broadcasting Media

1. Private Radio and Television

In none of the countries where private television and/or radio stations are allowed to operate is there a genuine individual right to broadcast, based on freedom of expression. Access to the broadcasting waves rather depends on an administrative licensing, which is not just a formal acknowledgement of someone's decision to start a broadcasting station (as is the case, in many countries, with a decision to open a private school (162)); the role of public authorities is further reaching and implies a policy choice : often, they have to operate a selection among candidates more numerous than the available frequencies in a given area; and even when such a competition does not exist, they still tend to impose on the potential broadcasters certain minimal substantive standards as regards programming, access of social groups, commercial advertisements, etc.

In the United States, the Federal Communications Commission requires from potential broadcasters that they offer a 'balanced programming' reflecting the general interests of the community in which they want to diffuse their broadcasts. The FCC has elaborated a catalogue of such interests, which includes also 'service to minority groups'.

(163). Furthermore, the FCC is itself bound by certain standards in attributing licenses, among which there is the constitutional equal protection clause, prohibiting a discrimination against non-English broadcasters (164). In practice, minority languages are very reasonably served by radio : in 1960, 547 of the 4000 radio stations had regular broadcasts in languages other than English (165); in 1970, 234 stations had Spanish broadcasts (of which 11 exclusively), 116 had Polish broadcasts, 87 Italian, 80 German, 64 French, 25 Greek, 21 Portuguese, some in Indian languages like Navajo, etc. (166). The situation at the level of television is slightly less satisfactory for the smaller language groups. But the Hispanics, the largest linguistic minority within the United States, are still adequately covered, especially through the 'Spanish International Network', itself controlled by the Mexican television conglomerate 'Televisa'. Through its various stations (owned and affiliated) in cities like Miami, New York, San Antonio, Los Angeles, Fresno, San Francisco, Sacramento, Phoenix,

Chicago, Albuquerque, Houston, Corpus Christi, added to the stations beaming from across the Mexican border, and various cable diffusion services, this network is able to reach 90% of the Hispanics in the United States (167).

In France, the licensing, by the 'Haute Autorité' of a private radio station is made subject to fairly detailed 'cahiers de charges', licensing conditions related to the content of the programme. One of the basic aims is that every local radio should have a distinct programming profile (a 'principal object', according to art.83 of the 1982 Law), directed at a given public, so that the combination of the various channels in a given area offers an adequate reflection of the community's general communicative needs. On the basis of this philosophy, candidates for broadcasting with a common interest were ordered to merge, in those (metropolitan) areas where the number of candidates exceeded that of available channels. There are, thus, a number of local radios catering for a plurality of minority groups living within an area : one could mention as typical examples 'Radio Gazelle', the immigrant radio in Marseille using a number of foreign languages, or 'Radio Pays' in Paris, broadcasting in various regional minority languages. In less densely populated areas, there exist local stations using only one minority language (either exclusively, or in

addition to French). In general, one can say that the licensing practice does not show any bias against non-French languages.

In Italy, on the contrary, there is not (yet) a licensing system. Nor is there, as has been argued before, an individual right to broadcast, but merely a toleration of existing initiatives. The value of the liberalised media system for minority languages is comparable to the French case. Admittedly, private television is available in Italy, and not in France, but this remains a rather expensive medium, heavily depending on commercial inserts, and no minority language private television channel has been set up - even the Italian language offer has been severely restricted by the emergence of a few national networks who tend to incorporate most of the local stations, despite the fact that the Constitutional Court's opening was strictly limited to local broadcasts. Radio stations being far less expensive, several of them have been established in the minority areas and currently use minority languages (often alongside Italian). As the situation is in constant flux, due to the absence of a legal disciplining regime, it is impossible to give here an accurate list of such stations.

2. Public Radio and Television

Monopoly may easily mean monolingualism, and it would seem that minority languages will be less adequately served by a broadcasting regime with only a few channels run by the public sector than by a free market model allowing in principle every language group to have its own station. But a public monopoly need not be exercised by a single institution. It may be split up between several competing networks, entirely independent from each other, but controlled, in last instance, by a common authority : this is the situation existing in the French public service. In other countries, diversity results not from the existence of parallel nation-wide stations, but from a federal division of powers. Cultural affairs are very often attributed to the regional or member-state level; and the political control of the communication media is sometimes among them. The Federal Republic of Germany offers the typical case where the 'Bund' (central State) has only very sparse powers in this field (the technical aspects, and programming for abroad), while the main power is in the hands of the 'Laender' (member States). As mentioned above, all those Laender (with the theoretical exception of Saarland) maintained until very recently a public monopoly; while most of them run their own radio stations, public television takes the form of three nation-wide channels, operated along two different models of horizontal cooperation between the Laender. The existence of

this legislative autonomy in media matters has not had any appreciable consequences in the linguistic field, as Germany has only tiny territorially-based linguistic minorities. But its importance is much more marked in countries like Belgium and Spain, where plurilingualism in broadcasting has become indirectly entrenched in the Constitution, through the guarantee of regional autonomy.

In Belgium, broadcasting forms part of the broad notion of 'cultural affairs', for which the Communities have been granted, since the constitutional reform of 1970, full legislative competence (168). Yet, this did not significantly alter the existing situation as regards language use in the media : since 1960, French- and Dutch-language radio and television channels had been run on an entirely separate basis in operational terms, be it within a common legal framework. This state of affairs has simply been entrenched by the constitutional reform; subsequent Decrees adopted by both the French and Dutch Cultural Council have now also subjected the two broadcasting networks to formally different legal regimes (169). There also exists a public radio station in the German language. It has been granted a separate legal status by the national Law of 18 February 1977 (art.7), and immediately put under the administrative control of the German-speaking Community. A recent constitutional reform has

extended full legislative powers to this small Community, on the same lines as the two bigger Communities, including therefore the broadcasting sector (170). Not only do the Germanophones now fully control their radio station, but they could also, if they wanted, set up their own television channel.

In Spain, the 'Statute of Radio and Television' (a national Law) (171) reserves the legal responsibility to operate three television channels to the central State; yet, the newly created third channel was not, unlike the other two, directly operated by the centrally run public corporation RTVE, but programming responsibility was rather to be attributed to the various Autonomous Communities, under the merely 'technical' supervision of the State. The Catalan 'Generalitat' has been the first to start its programs on this third channel (172), and has decided to use the Catalan language for that purpose, as the need for Castillian broadcasts is already sufficiently covered by the two nationwide channels. The Basque Government moved in a slightly different direction. The Basque Statute of Autonomy, indeed, expressly authorises the regional government to launch its own channel, in addition to the three channels contemplated by the Statute on Radio and Television (173). Without awaiting the licensing by the central State, the Basque

government decided to start, entirely on its own responsibility, a fully autonomous radio and TV service on a fourth channel ('Euskal Irrati Telebista')(174). They operate exclusively in the Basque language, and their principal aim is precisely that of providing a platform for the Basque language (175).

In Switzerland, the media are not run by the cantons, but by the Confederation, but this centralisation cannot be said to have adversary consequences for the minority language groups of the country. The Federal Government has granted an exclusive license to the Swiss Radio and Television Society (SRG-SSR), itself made up of three regional societies established along linguistic lines : a French- and an Italian-language corporation, and a third one comprising six sub-regional member societies, five of which from the German area, the sixth being the 'Cumunanza Rumantscha Radio e Televisiun'(176). While the French and Italian language groups have a radio and TV station of their own (receiving public funding which is more than proportional to their numerical strength)(177), the Romansh must be content with a few programs on the German channel (178). Yet, a fourth Romansh channel has been promised for some time (179).

That centralisation of the media does not necessarily mean unilingualism is further borne out in a number of other countries. In Italy, the law of 1975 on the public broadcasting service imposes the transmission of radio and television programs in German and Ladin (South Tyrol), French (Val d'Aosta) and Slovene (Friuli-Venezia Giulia) (180). Yet, if a full German-language radio and TV station is now functioning in Bolzano, the other minorities' rights have not adequately been implemented up till now. In Finland, Swedish is used as the exclusive language of one of the three national radio stations, and for about 10% of the programming schedule on television; the Swedish minority is currently claiming the creation of a television station of their own. In Ireland, the national broadcasting services offer a number of weekly programs through Irish, and in addition a separate Irish language Gaeltacht Radio was set up in 1971, with studios in the three principal Gaeltacht areas (Kerry, Connemara, Donegal), but covering also the rest of the country (181). The Welsh-speakers in the United Kingdom have no radio station of their own, but have instead concentrated all their efforts on obtaining the much more effective television channel. Claims to that effect had been voiced for years and have finally been implemented in 1982, under the menace of a hunger strike by the leader of the Welsh nationalists' party. The new channel, 'Sianel Pedwar Cymru'

(Channel Four Wales) was launched together with 'Channel Four' in the rest of Britain, but under a different legal regime. While the latter is a private network, the Welsh language channel constitutes an idiosyncratic combination of contributions by the BBC, by the commercial station ITV, and by independent programs. The first viewing data seem to bely the skeptical comments that the all-Welsh channel was only a waste of public money in order to fulfill a wish of only a tiny minority of the Welsh public (182).

Still, if one takes a global view, the minority language groups benefitting from a public broadcasting channel of their own are fortunate exceptions. Most groups must be content with some limited programs on a majority-language channel. This is the case with the smaller endogenous minorities (whose broadcasting time is very variable from case to case (183)), and for all immigrant language groups (that do not obtain more, in any country, than a weekly information program). From our point of view, that of constitutional law, the crucial question is whether language programming on the public network is an entirely discretionary policy matter, or whether it is constrained by the guarantee of freedom of expression.

... As was argued in Section 3 above (184), if the broadcasting media are monopolised by the public authorities, the latter may have a constitutional duty to make all necessary arrangements for the widest possible expression of all societal groups on the airwaves, and those groups may have a corresponding right to that effect. Such a right could conceivably take one (or both) of the two following forms :

a) an adequate participation of the group in the governing bodies of the broadcasting corporation, as an institutional guarantee of the interests of the language;

b) an adequate representation of the language on the programming schedule, either in the form of programmes made by the public service itself, or in the form of 'access' from an outside group, representing the interests of the language minority.

Such claims are increasingly recognised in legislative practice. In addition to the examples given above, the French broadcasting reform offers a rather striking illustration of this trend. Art.5 of the 1982 Law imposes on the public service the task of serving the general interest in a number of ways, including by "defending and illustrating the French language and guaranteeing the expression of the regional languages". Recognising that the protection of the minority languages is part of the general

interest is a rather revolutionary breakthrough in French political thought, which is confirmed in art.14 of the same Law (the High Authority has to ensure, through its recommendations, not only the "defense and illustration of the French language", but also the "promotion of regional languages and cultures"), and art.30 (setting up 'regional committees of audiovisual communication' whose role is defined in similar terms). In practice, there has indeed been a gradual (but still rather modest) increase in the time schedule attributed to minority language programs on the, regionally decentralised, third channel. There is also one experimental public radio channel at the local level which is bilingual (French-Breton), the 'Radio Ouest Bretagne' in Quimper.

This increased legislative recognition does not imply, however, that similar linguistic claims are directly enforceable before the courts, as is well brought out by the Italian case. Here, the Constitutional Court had, in a 1974 judgment, ordered that "access to radio-television be granted, to the maximum possible extent, and in an impartial way, to political, religious, and cultural groups expressing the various ideologies present in society"(185). The, still valid, Law of 1975 has implemented this judgment and lists, in its article 6, a number of potential beneficiaries of

access, among them the "ethnic and linguistic groups" (186). Yet, this possibility does not seem to have been used by the Italian language minorities. The first reason is that the right of access is not directly enforceable but depends on a largely discretionary decision of the parliamentary control committee on radio and TV (187); secondly, the stronger language groups have their broadcasting needs served in other ways, while the smaller groups simply have not the power to impose their language to a nation-wide program.

In conclusion, it can be said that, despite the recent increase of linguistic pluralism on the publicly controlled airwaves, private broadcasting seems to be the more promising field for the promotion of minority linguistic values. The rapidly expanding scope of this alternative media regime in many European countries offers an attractive opportunity for those minorities willing to protect their cultural identity by their own efforts. Much depends, however, on the question whether private radio and television will be entirely left to the 'market forces', or whether the public authorities are able to devise an adequate regulatory regime, guaranteeing the true expression of all community interests, including those of the minorities.

CHAPTER TWOINTERNATIONAL LAW

Article 10 of the European Convention on Human Rights guarantees freedom of expression in the following terms :

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

The formulation of article 19 of the Covenant on Civil and Political Rights is very similar. The following analysis, which will concentrate on art.10 of the European Convention, is generally applicable to the Covenant as well, and only important differences will expressly be indicated (1).

Section 1

Does Freedom of Expression Include the Freedom of Language Use ?

My theoretical premise - that the freedom to speak the language of one's choice is included in freedom of expression - must first be put to the test of the case-law of the Convention organs. The question of the significance of article 10 in language matters has indeed come up several times before the European Commission of Human Rights (but never, up till now, before the Court of Human Rights). Most of these cases stemmed from Belgian applicants, Francophones

living in the Dutch language area of the country, who asserted that the exclusive use of Dutch as the language of public administration in the area where they lived, constituted a violation of the right to use their own language (French) guaranteed by art.10 (2).

The Commission declared the applications inadmissible, as far as article 10 was concerned. Yet, it did not use the seemingly obvious argument that freedom of expression is a 'negative' right which guarantees a right to use one's language in private affairs, but does not impose any 'positive' duties on the public authorities (3). It argued instead that "there is no article in the Convention or First Protocol that expressly guarantees 'linguistic freedom' as such" (4). Now, this is clearly no answer to the applicants' arguments : they submitted that art.10, while not expressly guaranteeing linguistic freedom, might nevertheless protect it implicitly . The Commission further argued that "the only clauses of the Convention that deal with the use of language, namely article 5.2 and 6.3(a) and (e) are limited in scope and irrelevant to the case in point" (5). It is correct to say that those articles were irrelevant in this case because of their limited scope (they only deal with the use of languages in criminal proceedings). But their existence does not mean that the Convention does not contain

any other language guarantees. Articles 5 and 6 are exceptional only by the fact that they entail a positive obligation for the State to guarantee the use of languages (6); but they do not preempt the existence of implicit duties of state abstention.

The distinction between 'private' and 'public' was not acknowledged either in a later case before the Commission. Here, an Irish applicant (a civil servant) had refused to fill in a form in Irish in order to claim the benefit of child allowance, on the ground that he did not speak that language. Again, his case was declared inadmissible by the Commission, but again without fully spelling out any convincing arguments :

"Whereas, insofar as the applicant complains that he has been denied freedom of expression, contrary to Art.10 of the Convention, the Commission observes that the inly allegation made by the applicant in support of this complaint is that he was required to complete in the Irish language the form for claiming child allowances; whereas the Commission finds that such a requirement could not in any way be considered as an interference with the applicant's freedom of expression" (7).

Thus, the Commission has not come openly to grips with the issue of the implicit language components of freedom of expression. But it has also never denied their existence, as may be shown from an incidental phrase in one of the Belgian decisions :

"Whereas freedom of religion is not in question; whereas this is also true of the freedom of thought, conscience and expression of the applicants themselves, since nothing prevents them from expressing their thoughts freely in the language of their choice" (8).

This 'obiter dictum' may serve as a sufficient confirmation that the hypothesis developed earlier on - that linguistic freedom is automatically protected along with freedom of expression - applies to the European Convention as well. This allows us to embark on the further issues of the limitations on this freedom (section 2) and its possible positive components (section 3). Like in most national systems, the broadcasting media are subject to a special regime in art.10 of the Convention (section 4).

Section 2

The Limits of Freedom of Expression

Both the "freedom to impart information and ideas" (the 'active' side) and the "freedom to receive information and ideas" (the 'passive' side) are to be guaranteed "without interference by public authority". Or more exactly, interferences are accepted only when they constitute "restrictions to the exercise of the freedom" authorised by paragraph 2 of article 10. The exact scope of freedom of expression (and linguistic freedom) can therefore only be assessed 'negatively', through an analysis of the conditions under which the restrictions to linguistic freedom, described in the foregoing chapter (9), are compatible with the European Convention (or the Civil Covenant).

In order to be lawful, interferences by the public authorities must comply with three cumulative conditions : they should be prescribed by law, for the sake of a limited number of public interests, and be necessary in a democratic society.

A) Prescribed by law

The content of this first requirement was specified by the European Court of Human Rights in the Sunday Times case (10), where the restraint on the publishing freedom of the Sunday Times newspaper was imposed on the basis of the unwritten Common Law notion of 'contempt of court'. The Court found, quite sensibly, that the concept of 'law' as used in article 10.2 is not of a formal but a substantive nature :

"It would clearly be contrary to the intentions of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation : this would deprive a common-law State which is Party to the Convention of the protection of Article 10 para.2 and strike at the very heart of that State's legal system" (11).

A Common law restriction can therefore also fulfil the requirement, as long as it complies with the 'substantive' definition offered by the Court :

"Firstly, the law must be adequately accessible : the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with

sufficient precision to enable the citizen to regulate his conduct (...)" (12).

Arguably, limitations like those affecting foreign language press in Alsace, although not based on formal legislation (13), could be covered by this wide definition.

B) Public Interests

The limitation should further be imposed "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Contrarily to what could appear at first glance, this is not the most important of the three barriers. There is no doubt that the list of public interests is limitative and not open-ended; nevertheless, the restraint they impose on the action of the public authorities is little more than symbolic. By their number and their vagueness, these notions cover almost every conceivable motive for restriction (14). The same holds for art.19 of the Civil Covenant; the grounds listed there are less numerous, but they include the

"protection of the public order" which is considerably larger than the "prevention of disorder" mentioned by the European Convention (15).

This does not mean of course that a State can pick at random among the different interests. In classical 'Jacobin' nation-state ideology, every usage of a minority language might appear as a threat to 'territorial integrity', but it seems very doubtful whether the Strasbourg organs would accept this latter motive in the context of language legislation. But other grounds, and especially the 'right of others' are wide enough to cover such restrictions.

C) Necessary in a Democratic Society

The limitations imposed on the basis of one of the aforementioned grounds must be 'necessary in a democratic society'. Due to the open-endedness of the two first requirements, the interpretation given to the third condition of 'necessity' is crucial. The European Court of Human Rights has repeatedly been faced with this issue. Although the various case applications do not seem to be entirely consistent, the 'basic tenets of its doctrine are well-established : the appreciation of the necessity of a restrictive measure is based on the two complementary

principles of domestic power of appreciation and European supervision.

The doctrine of power of appreciation, or 'margin of appreciation' was first applied, within the Convention system, in the context of the derogations in time of war or other public emergency, allowed in article 15 of the Convention. The Commission, in the Cyprus case extended to the derogatory state (the United Kingdom) "a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation" (16). Subsequently, the Court adopted the theory in similar derogation cases (17), and later extended it systematically to all clauses of exception or limitation within the Convention (18).

In the first years, neither the Commission nor the Court probed very hard at the existence of a state of necessity, and made no efforts at systematisation (19). Gradually however, they put forward the notion of 'European supervision' as an analytical counterbalance to the margin of appreciation. Characteristic is the following passage in the Handyside judgment :

"(...) nevertheless article 10.2 does not give the Contracting States an unlimited power of appreciation. The court, which, with the Commission, is responsible

for ensuring the observance of those States' engagements (...) is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by article 10. The domestic margin of appreciation goes hand in hand with a European supervision" (20).

That those two principles should constitute the terms of the debate is, in fact, contested by no one, but all depends where, in the given case, the Convention organs will strike the balance between them. Two opposed interpretative doctrines can, and have, been used in this regard :

i) the strict construction of exceptions. According to this theory, the rights of the Convention should not be balanced on an equal basis against the public interest advanced by the State; as the Court said in Sunday Times, "(T)he Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted" (21). This appears as a sound principle, especially in the case of a 'negative' right like freedom of expression; otherwise, the restriction could hollow out the whole guarantee.

ii) the subsidiary nature of the international procedure (22). The Court intends this principle not only in the chronological sense (the rule of exhaustion of local remedies), but also in the more qualitative sense (23), classically expressed in the ritual, but rather hollow, phrase : "it is in no way the Court's task to take the place of the competent national Courts but rather to review under article 10 the decision they delivered in the exercise of their power of appreciation" (24), or, more concretely, "by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a restriction or penalty intended to meet them" (25).

Both maxims of interpretation thus practically annul each other. The Court is hovering between both, bringing them alternatively to the foreground, depending on the cases. It admitted e.g. the existence of a necessity to limit the freedom of the press on the basis of morals in Handyside, but not on the basis of judicial authority in Sunday Times. How can one account for those variations ? Are they simply based on a different assessment of the facts of each case, in which hypothesis the real (and unrestricted)

margin of appreciation would be the Court's (26) ? Or is Sunday Times a flat overruling of the Handyside doctrine (27) ? The Court itself, in defending its stricter control in the Sunday Times case, attributed it to a difference between the public interests involved, the vague notion of 'morals' contrasting with the "far more objective notion of the authority of the judiciary" (28). And it is more objective because "(T)he domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including article 6, which have no equivalent as far as 'morals' are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation" (29).

It would thus seem from this paragraph (30) that the European standard can either consist of a provision of the Convention itself (31), or of a "fairly substantial measure of common ground" among the Member States. The latter criterion is particularly interesting. It implies that the Convention cannot simply be considered as the lowest common denominator of the laws of the ratifying states. A country that, on a particular point, lags behind a 'substantial' group of other States, has to adapt itself to this higher standard. A fine illustration of this mechanism was provided

by the Dudgeon case dealing with the criminal punishment of homosexual relations between adults (32).

Firmer or more particularised guidelines on the acceptability of limitations cannot be found in the case law as it presently stands. In attempting to find further, more elaborate, criteria, the function of the qualifier "in a democratic society" deserves perhaps some more attention. Material definitions of 'democracy' are useless, as they are always too vague to provide useful guidelines for delicate balancing problems (33). But the concept of 'democracy' may be given a 'procedural' function, through the following syllogism :

- i) All member States are democracies (34);
- ii) One of the member States does not have a particular type of restriction;
- iii) (conclusion) This restriction is not necessary in a democratic society (35).

In a such a way, one arrives of course at a maximum standard of review, giving decisive pre-eminence to the principle of strict construction of exceptions over that of subsidiarity. Apparently, this hypothesis has been rejected in Sunday Times, where it is stated that "the Court cannot hold that the injunction was not 'necessary' simply because

it could or would not have been granted under a different legal system" (36). In the Dudgeon case, the Court similarly held that "the fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member states of the Council of Europe does not mean that they cannot be necessary in Northern Ireland" (37). But the maximal standard just described does not necessarily lead to absolute uniformity. Uniformity would only be required for comparable forms of expression in comparable situations.

The Handyside case offers precisely a good example of comparability. While 'morals' in general may indeed be an exceedingly vague concept, it was applied in this case to a concrete object, a publication called 'The Little Red Schoolbook'. While being prohibited under English law because of offense against morals, it circulated without problems in the majority of other member states, and even in parts of the United Kingdom (38). Nor is there any indication that the situation of morality in England would be affected in any special way by the book. Accordingly, the prohibition should, against the opinion of the majority of the Court, not have been considered as necessary in a democratic society. But there are many other instances where no cross-national comparison can be made, either because the form of the expression is idiosyncratic, or because the public interest

is more pressing in one country than in another (i.e. a country confronted with epidemic disease may impose broader restrictions for the sake of public health) (39).

Where does all this lead us with regard to limitations on language use ? A general indication was given in the 'travaux préparatoires' : "no restriction should be introduced which would interfere with the right of national minorities to give expression to their aspirations by democratic means" (40). It would seem that the ground of limitation which is more likely to be accepted is that of the "rights of others" (41). The restrictions on freedom of the press existing in France do not fall within this category; moreover, they are fairly unique, and one may therefore submit that France has fallen considerably below the common European standard in this respect (42). The other principal Acts limiting the freedom of language use (the Quebec, Belgian and French Acts) tend arguably to establish greater equality in private relations by limiting the freedom of the stronger party. The Convention organs (and, in the case of Quebec, the Human Rights Committee under the Civil Covenant) might consider those statutes as prima facie justified by the "rights of others". A strong argument in this sense may be found in another international treaty, the Convention against Racial Discrimination, that expressly imposes on the States

parties a duty to guarantee non-discrimination in various private domains, in the exercise of the right to work etc. (43). There remains to be seen, however, whether those Acts are really inspired by the aim of protecting the rights of others (considerable doubts exist above all in the case of the French 'loi sur l'emploi de la langue française' which, as we saw, seems rather inspired by the will to protect the national language and culture against foreign influences (44)), and whether all their provisions are equally necessary for attaining this objective (the fact that all three Acts apply to the languages of immigrant minorities is questionable in this respect). Finally, an additional limit to state discretion is contained in the non-discrimination principle of art.14 of the Convention and art.26 of the Civil Covenant (45).

Section 3

Freedom of Expression and Positive State Duties

The question whether article 10 contains any positive obligations for the public authorities has only been explicitly discussed, till now, at the Commission level. In the case of X v Germany, concerning the refusal of German

authorities to grant subsidies to a puppet theatre, the Commission found that article 10 guarantees no right to subsidies or to the performance of a particular play in schools (46). Whether this finding only applies to subsidies or precludes also any other positive component in art.10, has not been spelled out in case law.

Like at the national level, the question of positive state duties under freedom of expression must be situated within the general problem of the existence of 'positive social rights' in the Convention. There is only one typical social right in the Convention system, the right to education guaranteed by art.2 of the First Protocol to the Convention. As the European Court indicated, in the Belgian Linguistics case that will be analysed in later chapters (47), such a right would be meaningless if it did not entail at least some positive state duties. The case of the 'classical' liberties like article 10 is very different. They do have a meaningful role to play even in the absence of state involvement, by guaranteeing a private sphere of activity against encroachments by public authorities or others. Discovering positive obligations in those rights, without any textual authority to that effect, is a perilous enterprise, and even more so for an international than for a national enforcement organ (48).

Yet, on the other hand, the Convention organs cannot isolate themselves from the social and legal evolution which Judge Evrigenis describes as follows : "This change in the legal content and function of basic rights reflects a change in social realities. The growing complexity of the social fabric is obliging the State to take positive action to protect rights and freedoms which, in the traditional view, only required protection against interference by the public authorities" (49).

With regard to two other classical rights, which can very well be compared to art.10, the European Court has ventured into the field of positive obligations, using two different approaches. In the Marckx case, it found that article 8 (right to privacy and respect for family life), by itself, may contain positive obligations and it added : "As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence, in domestic law, of legal safeguards that render possible as from the moment of birth the child's integration in the family" (50). In the somewhat earlier Belgian Police case, the Court used a somewhat weaker theory: art.11 (right to association) was not found to contain any directly applicable positive components, but if the State decided to take active measures, then it was

bound to respect the rule of non-discrimination contained in art.14 of the Convention (51).

The rationale behind these cases seems convincing. On the one hand, state intervention appears as absolutely indispensable for the effective exercise of the right (there must be a legal regulation permitting the recognition of the relation between mother and child, otherwise there can be no family life); on the other hand, and in contrast with the case of the subsidies for the puppet theatre, no particular financial expenses are involved by those measures. Those are precisely the conditions under which a positive right to use one's language can be argued to exist in national law (52). Thus, the right to name one's children in the language of one's choice, to take this straightforward example again, must be considered as covered by article 10 of the Convention. At the other extreme, there is certainly no general right to use one's language in the public sphere (administration, courts, public education), as is confirmed by the Belgian language cases discussed above (53). The fact that a limited right to use one's language in criminal proceedings is explicitly recognised in the articles 5 and 6 of the Convention could be seen as an a contrario argument excluding a similar right in other contexts (54).

Section 4The Special Regime of the Mass Communication Media

Radio, television and cinema are excepted from the general regime of freedom of expression in the European Convention, and subjected to a special arrangement. According to the second sentence of the first paragraph of art.10, "(T)his article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises". In other words, limitations on the individual freedom to broadcast need not be justified under the criteria of the second paragraph (prescribed by law, for a number of public interests, necessary in a democratic society). They can be general and preventive in the form of a licensing system. The reasons for this special treatment have been outlined earlier on in the context of the national broadcasting regime (55). The question, under the European Convention, is what "licensing" means. What measures of public intervention are covered by this term ?

It would seem, at first sight, that a licensing system ("régime d'autorisation" in the French version) cannot be the same thing as an outright prohibition in the form of a public monopoly. Licensing implies at least the possibility

that some private broadcasters are allowed into existence (56). Hence, when faced with applications against public broadcasting monopolies, the European Human Rights Commission had the delicate task of reconciling such public monopolies, existing in most of the member States, with the wording of art.10. In declaring inadmissible because manifestly ill-founded those recourses, the Commission followed what has aptly been called a "rather original method of interpretation of a text which is gramatically clear" (57). Its reasoning was as follows :

"whereas, when interpreting the term 'licensing' in the provision in question, the Commission finds it necessary to take into consideration the practice in different countries which are member States of the Council of Europe; whereas in this respect it appears that, both at the time of the drafting of the Convention and at the present time, a great number of such Member States had established a system of public monopoly enterprises for radio and television; whereas therefore, the Commission finds that the term 'licensing' mentioned in the Convention cannot be understood as excluding in any way a public television monopoly as such" (58).

The Commission took the same view in a later application (59), where it held that "art.10(1) should be

interpreted as permitting the United Kingdom Government authorities to ban private broadcasting within the United Kingdom". The Commission's uneasiness with the conformity of this solution with the letter of the Convention was expressed some years later, in the decision on an application against the Italian broadcasting monopoly. While declaring the declaration inadmissible for non-exhaustion of the local remedies, the Commission added 'obiter' that "notwithstanding this precedent" (i.e. appl. 3071/67 quoted above) "the Commission would not now be prepared purely and simply to maintain this point of view without further consideration" (60). The question has remained open ever since (61). In a recent case of 1982, the Commission managed once again to avoid a clear pronouncement, because the applicant could not be considered as an actual victim of a violation : "the Commission is accordingly not called upon to pronounce whether a public television monopoly is as such in conformity with the Convention" (62). The current evolution in the various countries, involving a partial liberalisation of the media, may make the issue less controversial in future. While the strict monopolies are presumably going to disappear, there is no doubt that the continued existence of a public broadcasting company, as well as strict controls on private broadcasters, come within the notion of a 'licensing system'

and can therefore not be challenged on the basis of article 10.

As for art.19 of the Civil Covenant, it does not except radio and television from the general norm. Does this mean that no preventive governmental control system is allowed under this text ? One could also argue, on the contrary, that the Civil Covenant allows for limitations on grounds of public policy that can go beyond the mere 'licensing'.

Whatever be the present state of the law under article 10, both public monopolies and partially liberalised regimes are bound by the non-discrimination rule of article 14. Within their programming, e.g., public monopolies have to allow for the expression of different ideas and thoughts. This was confirmed by the Commission :

"On the other hand, the Commission considers that the denial of broadcasting time to one or more specific groups of persons may, in particular circumstances, raise an issue under Article 10 or in conjunction with Art.14 of the Convention. Such an issue would, in principle, arise for instance if one political party was excluded from broadcasting facilities at election time while other parties were given broadcasting time" (63).

what applies to political parties also applies to language groups. They, too, should have a non-discriminatory access to public broadcasting. And the same issue of equal treatment arises in the regime of authorisations of private stations. For both issues, I refer to the discussion of the right to equality, below (64).

Section 5

The Free Circulation of Information

Both art.10 of the European Convention and art.19 of the Civil Covenant stipulate that freedom of expression is guaranteed "regardless of frontiers"(65). This specification has obviously little meaning for oral speech, but rather for the more indirect instruments of expression : the printed word and broadcasting. Guaranteeing the 'free flow of information' -as the expression goes - as an inherent part of freedom of expression is essential for those language groups whose survival depends on their access to the larger cultural network of another country : typically, for immigrants (in relation to their home country) and for border minorities (in relation to the neighbouring homoglot State).

While globally favourable to language minorities, the uninhibited free flow of information may at the same time be detrimental to 'cultural diversity' taken in a wider sense. Misgivings are currently voiced about the dangers incurred by the (majority) cultures of many countries due to their exposure to stronger foreign cultures. This phenomenon is not absent from the relations between developed states (see e.g. those between Canada and the United States), but is more conspicuous in the north-south relation between industrialised and third world countries; here, the 'flow of information' is a one-way flow carrying what many consider to be a 'cultural imperialism' or 'cultural neo-colonialism' (66).

Without entering into this debate, I will only consider here whether international human rights instruments (especially at the European level) condition the availability of linguistic transborder flows of information. Such inflows may sometimes be protected under national constitutional law (67), but this is an area which, by its very nature, lends itself to international regulation and protection. Here again, the important differences existing between the press and publishing, on the one hand, and radio and television, on the other, call for a separate treatment of those media.

A. Press and Publishing

The message delivered by these media goes under the form of a material object. Books and newspapers are therefore, when crossing the border, covered by trade regulations applicable to commercial products in general (68). The question arises whether customs duties and import quotas (and, a fortiori, import prohibitions) on such products are compatible with the international guarantee of a free circulation. The term "regardless of frontiers" would seem to mean that national frontiers may not play any inhibiting role in the enjoyment of freedom of expression; it lays down, in other terms, a rule of national treatment (69).

Special limitations or conditions applicable only to foreign printed material are then only justified, under the European Convention, when "necessary in a democratic society" for one of the interests listed in paragraph 2 of art.10. Among the interests most likely to be invoked are the "rights of others" (as a justification of national intellectual property rights limiting the importation of foreign material (70)), or "national security" (against foreign propaganda). For the interpretation of this public policy limit, I can generally refer to what has been said above; additional inspiration, for this specific issue, could

be found in the rich case law on free movement of goods developed by the European Court of Justice (71).

Can one extend the principle of equal treatment of foreign press and publications from the 'negative' field of the prohibition of state intervention to the 'positive' field of state aids (indirectly, in transportation or distribution costs, or directly, through financial subsidies) (72) ? This depends, of course, on whether freedom of expression extends to positive measures at all. It seems difficult to hold, anyway, that direct aids to the press should be attributed to foreign papers, circulating in the country, on the same footing as to national papers.

B. Radio and Television

In the case of the broadcasting media, on the contrary, the message is not carried by a material object. Here, the free circulation is really a 'free flow'. Broadcasting frequencies, once emitted, cannot be stopped, unless one consciously wants to prevent their reception by an audience. As art.10 of the European Convention and art.19 of the Covenant guarantee both the right to impart and the right to seek information regardless of frontiers, the transmitter

as well as the receiver benefit from the right; and both the transmitter state and the receiving state are under the obligation to abstain from interference.

Of those two hypotheses, interventions by the receiving state are likely to be more frequent. But they are also less efficient. First of all, the authorities cannot strike at the source of the diffusion : the licensing power granted by art.10 of the European Convention obviously applies only to those 'enterprises' within each State's jurisdiction, and not to broadcasters operating from another State's territory (73). The remaining possibility is to try to prevent the broadcasting from reaching an audience across the border, through 'jamming', i.e. "the deliberate interference of broadcasts with a view to making their reception impossible" (74), or through other means (criminal prohibitions of listening to foreign stations, limitation of the frequency scale of the receivers). Whether jamming is a lawful exercise of state sovereignty under general international law is disputed. Much depends, it would seem, on the question whether the information can be considered as hostile propaganda (75). Among member States of the Council of Europe, this is to be excluded : they must advance other reasons why jamming should be "necessary in a democratic society". The simple wish to protect one's national monopoly

against foreign-based competition does not comply with this standard (76).

The other case, of interventions by the transmitting state seems less likely on first view. It is difficult to imagine a State unilaterally trying to stop its 'own' public broadcasting programmes from crossing the border. The picture is slightly different when private stations exist, as some recent Italian cases show (77). More importantly, the control exercised by the originating country is not limited to existing broadcasts. A much more important field of intervention is situated higher up : by controlling the power of diffusion and the location of transmitters, a State can seriously curtail the possibility of transborder flows. Nearly all States have done so, on the basis of multilateral agreements concluded within the International Telecommunications Union (ITU).

This specialised international organisation has, among its general tasks, the prevention of "harmful interference between radio stations" (78). As the spectrum of available broadcasting frequencies is a naturally limited resource, an agreement on their allocation between states appeared justified and even necessary (79). While the regulations pertaining to radio have not gone beyond this

technical objective (leaving entirely free the diffusion along the more widely available short wave frequencies), the television regulations are much more restrictive and basically limit the diffusion power of television stations to the coverage of their national territory, including only the technically unavoidable spill-over. Because of their conventional nature, these restrictions to free circulation cannot be challenged on their compatibility with arts. 10 or 19, except if one were to consider that freedom of expression has the status of a jus cogens rule from which particular international agreements may not derogate; but, as argued earlier (80), this seems unlikely.

The effect of those agreements on the two media is thus very different. As far as radio is concerned, one may consider that the "principle of freedom of broadcasting" - without the agreement or prior consent of other States - has developed into a rule of customary international law (81); indeed, a number of radio stations have been specifically set up for transmitting broadcasts to foreign countries, in the languages of those countries, for cultural or propaganda purposes. Television is more narrowly confined to the national territory. For language minorities this difference between both regimes has negative consequences for a double reason : television has nowadays a much more profound

cultural impact and it is also much less available to minority groups under the existing national systems.

Yet, spill-over, which is the only accepted form of transborder television, is not a negligible phenomenon. Some smaller countries, as for instance Belgium or Switzerland are quasi entirely covered by spill-overs of neighbouring countries. As for the Luxemburg Radio and Television company, the bulk of its audience lives outside the territory of the Grand-Duchy (82).

One can say that, as a rule, border minorities have access to the radio and television programmes transmitted in their language by their neighbouring kin-state : for groups such as the Germans in Belgium, the German and Danish groups at the Schleswig border, the Alsatians, the Slovenes in N.E.Italy, access to foreign programmes constitutes an important and widely used cultural resource. Only when the frontier lies in a mountain area is there a natural obstacle to cross-border spill-over. In the Val d'Aosta and South Tyrol, this impediment has been removed by the construction of transmitters on the mountain ridge that allow for the reception of French and German language programs in the minority areas (83).

For immigrant minorities, on the contrary, coverage by television programmes from their home country is scarce or non-existent. As, in addition, their language is only poorly represented on their guest-country's television system, the radio and the press play a dominant role in the maintenance of their linguistic identity. The picture is different, of course, for short-range migrants like the Italian guest-workers in Switzerland : in many parts of the country, they can tune in either on the Italian language Swiss channel or on Italy-based programmes.

Technical progress, however, now permits to extend the 'natural' reach of television. Two means must be mentioned in this respect : cable diffusion and direct satellite broadcasting.

1. Cable Diffusion

A cable diffusion service essentially "consists in picking up by means of an aerial television signals that have been broadcast over the air and distributing the signals by cable to the television sets of subscribers to the service" (84). Television programmes can thus be received beyond their zone of natural reception, through the intervention of the cable diffusion service. At the same time, both this

intermediary and the medium of diffusion (the cable) are more palpable objects than the airwaves, and can therefore more easily be regulated. A country can thus entirely ban cable distribution, or reserve it to a public monopoly company, or exclude foreign programmes, or impose various other conditions. Thus, the Dutch legislator had plans to restrict the distribution of those foreign commercial broadcasts that used the Dutch language (85).

The legitimacy of such far-reaching measures of intervention under European Convention law largely depends on whether cable distributors can be considered as "television enterprises" within the meaning of article 10. It has been suggested (86) to make a distinction in this respect between 'passive distribution' (the transmission of foreign programs without any additional intervention) and distribution services in which foreign programs form part of a larger package offered to the subscribers. Only the latter should be considered as "enterprises" subject to a licensing regime, while the former should benefit from the general regime of free movement, with the sole restriction of the public policy clause of art.10.2.

The question is currently discussed whether a still more liberal regime should obtain between the member States

of the European Community, by virtue of article 59 of the EEC Treaty, guaranteeing the freedom to provide services within the common market. Yet, the case law of the European Court of Justice, as it presently stands, suggests that the obligations contained in this article do not exceed those of art.10 of the Convention : States only have a duty of non-discrimination, and restrictions which bear equally on national programs (e.g. the prohibition of commercial advertisements) are lawful (87). There is, therefore, no sign of any immediate Community-based liberalisation of the market conditions in the transnational media sector (88).

2. Direct Satellite Broadcasting

A still more radical extension of the reach of broadcasting programmes over surrounding countries could potentially come about by means of direct broadcasting by satellite (DBS). While ordinary point-to-point telecommunication satellites need a re-diffusion by terrestrial transmitters before their signals can be individually received (which leaves intact the communication sovereignty of the States), direct broadcasting satellites pose entirely novel legal questions because their signals can be directly received by the general public at very large distances. This 'global reach' of DBS has made it into a

central issue in the 'cultural imperialism' debate (89). Its potential importance for linguistic matters is also evident : DBS would irremediably eliminate the 'national' logic of television, and allow for the direct reception of programmes in the most diverse languages. The impact could be particularly meaningful for immigrant groups.

In view of those potentialities, it should not surprise that many states have pushed for an international regulation of this new technique in order to take the sting out of it. Like with 'ordinary' radio and television, limiting inter-state agreements cannot be challenged on the basis of human rights law, as the 'free flow of information' cannot be considered as a jus cogens rule (90). Protracted discussions have been held in various international fora : a special Working Group on Direct Broadcast Satellites within the framework of COPUOS (the United Nations Committee on the Peaceful Use of Outer Space), the UNESCO and the ITU (89).

Until now, the only binding norms have been passed within the framework of the International Telecommunications Union. First of all, at the 1971 World Administrative Radio Conference, the principle of 'national coverage' was extended to broadcasting satellites : according to Art.7 No.428 A of the ITU Radio Regulations, "in devising the characteristics

of a space station in the broadcasting-satellite service, all technical means available shall be used to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries". Thus, apart again from the inevitable spill-over, transnational radiation is permitted only with the previous agreement of the State concerned (92). In 1977 then, this principle was complemented by an allocation of frequencies on the geostationary orbit (the ideal position for a satellite which, under present technical conditions, constitutes a scarce resource (93)) to every individual country. The 'first-come first-served' principle has been expressly abandoned, in order to preserve the future possibilities of developing countries (94).

Despite their seemingly technical character, the decisions adopted within the World Administrative Radio Conferences of the ITU clearly express the political will to maintain a maximal national control over broadcasting services, and have probably preempted the outcome of discussions in the U.N. and UNESCO. It would seem that with the future DBS-system, like with the present land-based system, the inhabitants of each State will only have access to national programs, unless their government agrees to the inflow of foreign programmes (95). Yet, because of the

difficulty in precisely positioning a satellite, spill-over is potentially larger with the new technique. Thus, the satellite planned by the Luxemburg broadcasting company will necessarily considerably exceed the national territory, even without the prior consent and even despite the misgivings of the neighbouring states (96).

THE PROTECTION
OF LINGUISTIC DIVERSITY
THROUGH
FUNDAMENTAL RIGHTS

by

Bruno De Witte

VOLUME TWO : TEXT

January 1985

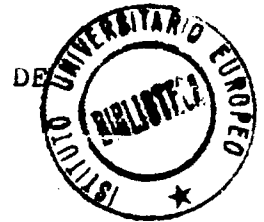


TABLE OF CONTENTS

Introduction	I
 <u>PART ONE : LINGUISTIC DIVERSITY</u>	 1
 <u>Chapter One : The Concept of Linguistic Diversity</u>	 2
Sect. 1 : A Definition	2
Sect. 2 : A Description	13
 <u>Chapter Two : Historical Overview of Linguistic Diversity</u>	 24
Sect. 1 : The Emergence of Linguistic Nationalism	26
A. Ideological Origins	26
B. Social-Economic Origins	29
Sect. 2 : The Decline of Linguistic Diversity	31
Sect. 3 : A Re-Emergence ?	36
A. Ethnic Mobilisation	37
B. Migrations	42
C. European Integration	43

Fhm 9

<u>Chapter Three : Linguistic Conflicts and Policies</u>	45
Sect.1 : Elimination or Protection ?	45
A. Territorial Change	46
B. Population Transfer	48
C. Assimilation	49
D. Pluralism	54
Sect. 2 : The Case for the Protection of Linguistic Diversity	56
A. Protect. for the Sake of the Political System	57
B. Protection for the Sake of the Individual	64
Section 3 : Instruments of Protection	70
A. Federalism and Regionalism	72
B. Consociationalism	88
C. Fundamental rights	91
<u>PART TWO : FUNDAMENTAL RIGHTS</u>	97
<u>Chapter One : A Concept of Fundamental Rights</u>	98
Sect. 1 : Rights	99
Sect. 2 : Fundamental Rights	102
A. National Fundamental Rights	104
B. International Fundamental Rights	112

<u>Chapter Two : Which Fundamental Rights ?</u>	125
Sect. 1 : At the National Level	125
A. Fundamental Rights v Linguistic Rights	125
B. Beyond the Dichotomy	138
Sect. 2 : At the International Level	147
A. Minority Protection after the 1. World War	151
B. The Shift from Minority to Human Rights Protection	161
C. Development of the Human Rights Program	165
D. Survival (and Revival ?) of the Minority Approach	170
<u>Chapter Three : The Enforcement of Fundamental Rights</u>	175
Sect. 1 : Enforcement of National Constitutional Rights	177
A. Judicial Review	181
B. Problems of Standing	187
Sect. 2 : National Enforcement of International Human Rights	201
A. Domestic Status	201
B. Rank of the International Treaties	204
C. Caveat and Conclusion	210
Sect. 3 : International Enforcement	216

A. State Reports	218
B. Inter-State Disputes	220
C. Individual Petitions	223
<u>PART THREE : FREEDOM OF EXPRESSION</u>	235
<u>Chapter One : Comparative Constitutional Law</u>	236
Sect. 1 : Freedom of Expression and Language Use	236
Sect. 2 : Limitations to Free Language Use	255
Sect. 3 : Positive State Action under Freedom of Expression	275
Sect. 4 : Free Expression in the Broadcasting Media	288
A. The Role of Freedom of Expression	290
B. Linguistic Diversity in the Broadcast Media	309
<u>Chapter Two : International Law</u>	315
Sect. 1 : Does Freedom of Expression Include the Freedom of Language Use ?	316
Sect. 2 : The Limits of Freedom of Expression	320
Sect. 3 : Freedom of Expression and Positive State Duties	331
Sect. 4 : The Special Regime of the Communication Media	335

Sect. 5 : The Free Circulation of Information	339
<u>PART FOUR : EDUCATIONAL RIGHTS</u>	353
<u>Chapter One : Comparative Constitutional Law</u>	353
Sect. 1 : Language and Education	354
Sect. 2 : Freedom of Education	363
A. The Constitutional Recognition of Private Education	364
B. Claims to State Subventions and their Consequences for Language Use	375
Sect. 3 : The Right to Education	385
A. General Guarantees of Educational Rights	386
B. Other Guarantees of Language Use in Public Education	396
C. Conclusion	413
<u>Chapter Two : International Law</u>	416
Sect. 1 : The European Convention	416
A. The Right to Education	418
B. Freedom of Education	430
Sect. 2 : Universal Human Rights Conventions	436
A. The Right to Education	436

B. Freedom of Education	439
<u>PART FIVE : EQUALITY</u>	444
<u>Chapter One ; Comparative Constitutional Law</u>	445
Sect. 1 : The Scope of Equality	451
A. Equality before the Law or Equal Protection of the Laws ?	451
B. Control on Differentiations and Equiparations?	460
Sect. 2 : The Meaning of Equality	480
A. General Remarks	480
B. Non-Discrimination	496
C. Pluralistic Equality	510
D. Affirmative Equality	543
<u>Chapter Two : International Law</u>	569
Sect. 1 : The European Human Rights Convention	569
A. Scope of the Principle of Non-Discrimination	569
B. Meaning of the Non-Discrimination Principle	582
Sect. 2 : European Community Law	601
A. The General Principle of Equality	606
B. Specific Non-Discrimination Provisions	609
Sect. 3 : Universal Human Rights Instruments	619

<u>PART SIX : THE RIGHT TO USE ONE'S LANGUAGE</u>	634
<u>Chapter One ; Comparative Constitutional Law</u>	635
<u>Chapter Two : International Law</u>	651
Sect. 1 : Beneficiaries	652
Sect. 2 : Contents	664
Conclusion	675

P A R T F O U R

E D U C A T I O N A L R I G H T S

CHAPTER ONECOMPARATIVE CONSTITUTIONAL LAWSection 1Language and Education.

The educational system can act as an instrument either for the conservation and transmission of established cultural values, or for mutation and the creation of new values. As far as language is concerned, this means that the school will be one of the privileged tools either for the preservation of existing diversity or for the assimilation to the dominant language, or also for the revival of a dormant language. This role of education can hardly be overrated; it is commonly agreed that "in multiethnic and multilingual countries, the use of the languages of the various population groups in the educational system is a crucial test for determining the ability of these groups to maintain and develop their own characteristics, their own culture and their own traditions" (1).

This linguistic impact of education is inescapable because the transmission of the educational message necessarily proceeds through a linguistic medium : "it is possible to administer an educational program without regard to race, religion or sex, but it is not possible to do so without regard to language" (2). As long as the education took place primarily in the parental home, this did not create particular problems. But when the educational function is taken over by a specialised institution (as is now the case for the vast majority of children in the countries under review), where many pupils, possibly of a different linguistic background, are brought together, a linguistic choice must be operated. The choice basically refers to two questions : which language(s) to include among the subjects of teaching, and which language(s) to use as the medium for teaching the other, non-linguistic courses.

Accordingly, the status of a language within a given class is not an all-or-nothing question; it can rather be differentiated along the following scale : a given language may be :

- 1) entirely excluded from the program;
- 2) used as a pedagogical tool in order to facilitate the teaching of, or in, another language;

3) taught as a subject in its own right, but outside the normal program (as an optional course, during extra hours);

4) taught as a subject in the normal curriculum, during a varying number of hours;

5) used as one of the media of instruction, alongside another language;

6) used as the exclusive medium of instruction (except, eventually, for the teaching of other languages).

Moreover, the decision among these options need not be made once and for all, and a pupil may go through various stages during his school career. A characteristic example is that of the schools in the Romansh-speaking part of the Swiss canton Graubunden. Great emphasis has been put, by the Romansh movement itself, on the creation of an outstanding network of 'scolettas' (Romansh-language kindergarten) (3). At the primary level, Romansh remains the exclusive language of instruction during the initial years, then German is gradually introduced from the fourth grade onwards, and becomes the exclusive medium of instruction already in the seventh grade; throughout the rest of the curriculum, Romansh is, at most, a mere subject among others (4). The case of Luxemburg is equally striking : nursery schools exclusively use the local Luxemburgian, on the basis of which High German is then introduced as the medium of instruction of the

primary school; French, taught as a subject at the end of the primary level, becomes an ancillary medium of instruction in the first years of secondary education, and the principal medium of instruction during the final years (5).

As a general rule, one may say that the position of smaller, or minority languages becomes increasingly marginal as one proceeds through the various types of education, for a number of reasons. Firstly, because the often recognised pedagogical need to have children start their formal education in their mother tongue, disappears at later stages when they have been introduced to the second, dominant, language. Secondly, because of the difficulties in providing a skilled teacher staff and specialised teaching materials in the less current languages, for the more advanced programs. Furthermore, the basic education, which prepares mainly for manual jobs, does not need to develop very advanced linguistic skills, while the further stages of education prepare for the more clerical jobs in society, that are often only available in the majority language and thus require a thorough knowledge of the latter. A final reason is that of sheer numbers (6). As one proceeds through the stages of education, the absolute number of pupils diminishes, and the critical mass of minority language speakers, needed for the establishment of a separate set of classes, can often no

longer be met. As a rule, therefore, one can say that secondary education is only rarely provided in minority languages (7), and universities or other higher educational institutions teaching in such languages are rarer still (8). However, members of minorities sometimes continue their education in a neighbouring kin-state, on the basis of special arrangements regarding the recognition of degrees : thus, many German speakers of East Belgium attend German universities, South Tyroleans go to Austria, the Ticinesi to Italy. Luxemburgians can either choose German (in the Federal Republic) or, more often, French (in Belgium or France).

Leaving aside those variations in the course of the educational curriculum, four global solutions can be adopted, in multilingual countries or areas, as regards the language regime of their schools. These options result, as the accompanying Table shows, from the combination of two different factors : whether there is only one medium of instruction, or more, within a given class (structural criterion), and whether the policy aim is linguistic assimilation or the maintenance of existing plurality (functional criterion).

TABLE 4

S T R U C T U R E			
		Unilingual	Bilingual
F U N C T I O N	Assimi- lation	Uniformity	Transitional Bilingualism
	Pluralism	Separation	Maintenance Bilingualism

The structural distinction is the easiest to make. Although some controversy exists on the definition of bilingual as opposed to unilingual education, it would seem that the mere teaching of a second language does not make a class bilingual, but that, rather, two (or more) languages should be used as an instrument for teaching courses other than language per se (9). On the scale presented earlier on, only situation 5) corresponds to a bilingual education, all others are unilingual systems, with or without the teaching of a second language.

Organising unilingual classes in a multilingual setting may have a double function : when parallel unilingual classes exist for each of the groups, it constitutes the most effective way of preserving diversity; the existence of a single set of classes, on the contrary, implies a policy aiming at the streamlining of the children of various linguistic backgrounds into one dominant mould.

Although it is not so readily apparent, bilingual education is similarly ambivalent as regards linguistic diversity. Indeed, the presence of several languages as instruction tools is not necessarily inspired by a political will to maintain pluralism. As several writers have noted, "bilingual education is a concept which might be interpreted

as either a pedagogical method designed to establish more effectively a unified society by preparing children through special programs to learn the ways and language of the dominant social order, or as a means of insuring the existence of diverse groups within society each capable of contributing to a pluralistic polity" (10). The first variety is often called transitional bilingualism, under which "a child receives early instruction in his maternal language, until such time as he is able to participate without academic loss in the regular curriculum. Hence, transitional bilingual education is of a temporary, or bridging, nature; its success is measured by the ease and timing of its phasing out" (11). Maintenance bilingualism, on the other hand, "is seen as a more permanent educational fixture. The desire here is not to move the pupils into some national-language-only mainstream, but rather to retain bilingual education throughout the school career (...)" (12).

The choice between both is not dictated so much by the desire to develop language skills; the necessity of learning the majority language is beyond discussion in both cases and it is not proven that transition to the mainstream is a better way of developing this skill (13). The decisive factor is of a cultural, rather than a pedagogic, nature. The maintenance of a minority cultural identity is often

perceived as a danger for national integration, especially with regard to recent immigrants, while the counter-argument runs that maintenance of ethnic identity may make the insertion less problematical (14).

When surveying the various countries, one finds a global trend to the recognition of a larger place to the children's mother tongue, either as the medium of teaching (partially or exclusively) or merely as a subject. This chapter will examine what role fundamental educational rights have played (and continue to play) in entrenching such linguistic claims. In this respect, a distinction needs to be made which is secondary from the sociolinguistic point of view, but crucial from a legal perspective : that between public and private education. The constitutional technique by which language claims can be enforced is very different according to which of both networks is concerned.

In the private sector, the claim is one of state abstention. State authorities are enjoined to recognise freedom of education by leaving every individual or group of individuals free to set up an educational institution and decide on the content of the curriculum, including its linguistic regime. In public education, on the other hand, the possible claim is that public authorities must guarantee

to all persons an adequate education in the state supported systems taking account of such legitimate differences as may exist between those persons, and respecting the opinions and convictions of the children's parents. In terms of language, this implies an educational program which is possibly delivered to each child in his own language (or the language his parents prefer), or, at least, is sensitive to the diverse linguistic backgrounds of the pupils.

Freedom of education and the right to education are thus very different in legal nature. In the first case, the right invoked is a 'classical' freedom of the same nature as freedom of expression, implying in principle no action from the side of the state; while the second right is of the so-called 'social' variety, which can only be guaranteed through a positive intervention by public authorities, and posing therefore quite different legal problems. In a comparative constitutional analysis like the present one, the two educational systems should therefore be treated separately.

Section 2

Freedom of Education

Setting up private educational institutions may be the preferable option for many minorities. Indeed, the public educational system is usually (15) subject to rigidly determined programs, that may, or may not, attribute the desired place to the minority language. When the freedom of private education is recognised, the language group does not exclusively depend on the goodwill of the public educational authority or on the impact of the right to education, which, as will be seen in the next section, is rather uncertain. It can instead pursue an alternative linguistic policy in a network of private schools using the minority language.

This requires, however, that the freedom of private education is recognised as including the freedom to choose the language regime to be used in the school. But, as will be shown before long, this is not always evident. More often than the freedom to express oneself in the language of one's choice, the freedom to run schools in the language of one's choice has been severely restricted. A state aiming at the gradual resorption of linguistic diversity may admit the free

use of a minority language by the adult generations, if it has the prospective that the language will die out with the next generation. But it will be much more reluctant to allow for its teaching to the young, which implies the perpetuation of the problem of diversity (16). The freedom of private education is therefore a revealing test case for the willingness of a "moderate assimilationist" system (17) to respect fundamental rights even when they thwart its cultural objectives.

A. The Constitutional Recognition of Private Education

The freedom to create and run private educational establishments is among the 'classical' liberties and is, accordingly, to be found in a large number of constitutional texts, much more frequently anyway than the right to education to be discussed in the next section : art.7.4 of the German Basic Law, art.42 of the Irish Constitution, art.17 of the Belgian, art.33.3 of the Italian, art.82 of the Finnish, art.208 of the Dutch, art.27.6 of the Spanish, and art.76 of the Danish Constitutions, art.17 of the Austrian 1867 'Staatsgrundgesetz'.

In some other countries, freedom of education, while not explicitly mentioned in the constitutional

instruments, has been judicially entrenched. The French Conseil Constitutionnel declared, in a judgment of 23 November 1977 (18) freedom of instruction ('liberté d'enseignement') to be one of those "fundamental principles recognised by the laws of the Republic" that have a constitutional value in the French legal system (19). There is some irony in this consecration, as the explicit guarantee of freedom of education was rejected by the very same Constituent Assembly of 1946 that created the category of fundamental rights (20). Be that as it may, the category of 'fundamental principles' has also been used by the Conseil Constitutionnel at other occasions, for the protection of rights like freedom of conscience (in this very same judgment), and freedom of association (in the clamorous 1971 decision by which the Conseil had taken the, by no means obvious, step of enforcing the whole 'Bill of Rights' part of the 1958 Constitution (21)).

In the United States, private education is not constitutionally protected in its own way, but covered by a general, and rather open-ended, 'liberty' read by the Supreme Court in the due process clauses of the Constitution (Fifth and Fourteenth Amendments). This implicit protection of freedom of education was first established in 1923, in a case dealing precisely with the use of languages in private

schools : Meyer v Nebraska (22), and its companion case (23). The plaintiff questioned the validity of a state statute imposing to all schools the exclusive use of the English language until the eighth grade (24). Similar statutes had been passed, in 1919, by fourteen other states (25). While aiming specifically at the flourishing German-language private school system, this legislation also intended to foster a larger program of 'Americanization' of the schools (26).

It is perhaps only a coincidence that it was a linguistic dispute that prompted the Supreme Court to find a constitutional protection for private education. Indeed, the Court, in its judgment, did not express peculiar sympathy for the value of linguistic diversity. In the words of Justice Mc Reynolds who wrote the majority opinion : "The desire of the legislative to foster a homogeneous people with American ideals prepared readily to understand current decisions of civic matters is easy to appreciate. Unfortunate experiences during the last war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration" (27). Yet, he added, "a desirable end cannot be promoted by prohibited means" (28). And the means were, in the presented case, prohibited, because they conflicted with the parents' right to direct the upbringing of their children,

itself guaranteed by the due process clause. This general principle was confirmed in the subsequent case Pierce v Society of Sisters (29), where the Court invalidated an Oregon statute requiring all children between eight and sixteen to go to public schools.

This is, therefore, a clear example of implicit protection of linguistic diversity, as described earlier (30). What is protected is not some special linguistic right, but the general freedom of education, which happens to include the right to decide on the linguistic aspects of the school curriculum. Private education is guaranteed by the Constitution, and "the protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue" (31). As Heinz Kloss accurately points out, "the language rights of the immigrants were, therefore, indirectly protected not because the justices were particularly understanding or even sympathetic toward these rights but because, out of their commitment to a liberal constitution and social order, they were compelled to protect even activities of the citizens which they deemed insignificant, odd, or even perhaps undesirable" (32).

Despite the clear pronouncement in Meyer, repeated by later cases during the 1920's (33), many states continued

to have a ban on foreign language teaching in private schools on their statute books for a long time (34). There is, however, no doubt that Meyer is still a valid precedent which has not been overruled. It is true that the so-called 'Lochner era', during which the Supreme Court used the due process clause in a substantive sense, in order to curb legislative innovations in the social and economic field, has been terminated in 1937. But this does not entail the demise of all prior decisions based on substantive due process, including Meyer. In fact, substantive due process has been revived in a number of clamorous cases involving the protection of personal life-styles (Griswold v Connecticut - birth control (35) - and Roe v Wade - abortion (36)), that are, at the same time, very different from the economic preferences guaranteed under the Lochner doctrine, and very similar to Meyer and Pierce (cases which were cited with approval by the Griswold and Roe courts). One may therefore rank the parents' rights, along with those more recently protected due process rights, within a general category of constitutionally guaranteed 'rights of privacy and personhood' (37).

But what is the exact scope of the protection of language values offered by this doctrine? It certainly protects the right to teach a given language within the

private schools, but also the right to use a foreign language as the general medium of instruction in that school? Some controversy exists on the latter point(38). Meyer is no authority either for the status of minority languages in public education (39). A later opinion of the Supreme Court, which read Meyer as having protected "children's rights to receive teaching in languages other than the nation's common tongue" (40) is therefore inaccurate. The recognition of such a general children's right, extending into the public educational system, is certainly an important issue, even more so today when the country's linguistic minorities do not have the same means to fund a network of private schools, as the German communities at the beginning of the century. But the constitutional basis of a similar right has to be sought elsewhere, above all in the equal protection clause (41).

Neighbouring Canada presents the opposite case of a legal system where freedom of education is not fully entrenched, and where the power of the educational legislator (in the Canadian case, the Provinces) to establish the linguistic regime for all the schools - whether public or private - has been upheld by the courts.

While the British North America Act (the original Canadian Constitution) does not contain any fundamental

rights as such, it contains nevertheless a partial guarantee of private education. Its art.93 prohibits the provincial legislatures from prejudicially affecting "any Right or Privilege with respect to Denominational Schools which any class of Persons have by Law in the Province at the Union". In the Mackell case (42), decided in 1917, the Judicial Committee of the Privy Council (then the highest judicial authority for the country), upheld the validity of an Ontarian statute requiring Roman catholic schools to change their language of instruction from French to English. It appears to have used a double line of argument : on the one hand, that art.93 protects only religious, and not also linguistic, preferences; on the other hand, even on an extensive reading which would consider the linguistic regime as part of the religious choice, the use of the French language by those schools was not a "Right...at the time of Union" (i.e. in 1867), but a mere privilege.

If one takes this second line of argument, one cannot exclude the continuing existence of certain linguistic guarantees for private education in other Provinces than Ontario, where these would have been guaranteed as a right in 1867 (43). Yet, as far as the most likely candidate, Quebec, is concerned, this was denied by a more recent judgment of the Superior Court of that Province (44). Yet, even if not

constitutionally protected, English language private schools in Quebec are tolerated by the legislator. But they do not receive any state subsidies for those children that are uneligible for English instruction in the public educational system.

Switzerland seems similar on first view : the exclusive jurisdiction of the cantons with regard to education is not restricted by any federal guarantee of private education. Indeed, it is generally accepted that the constituents deliberately intended to leave the cantons free to establish a public school monopoly or not (46). In reality, only the canton Solothurn operated such a monopoly until 1969. Since that date, all cantons admit the existence of private schools. Freedom of education is even entrenched in the Constitution of seven cantons, all of them, significantly, predominantly catholic (47), while it is provided on a mere legislative basis in the other cantons. Among them is Zuerich, where the important Association de l'Ecole francaise case has arisen. The canton of Zuerich prescribed that, at a certain point of the curriculum, all pupils must be educated in the official language of the canton (German) and must therefore leave a school where French is the language of instruction, even if this school is privately run; in fact, the regulation could only apply to

private schools, as all public schools already functioned in the language of the region. The constitutional recourse of the 'Association de l'Ecole française' against this regulation could be based neither on a federal nor on a cantonal freedom of education clause. Yet, the plaintiff's case was not as easily disposed of by the Federal Tribunal, as the case of Mackell by the Privy Council.

Indeed, in its judgment in the Association de l'école française case, the Tribunal took considerable pains in refuting the plaintiff's arguments (48). The absence of a freedom of education clause in the cantonal constitution was not a decisive factor, according to the court. Even cantons where such a guarantee existed would have the power of imposing similar linguistic restrictions on their schools (49). The reason of this is not that freedom of education would fail to include the linguistic choices of the school regime; indeed, it is precisely in this judgment that the Federal Tribunal for the first time articulated its doctrine of the freedom of language use ('Sprachenfreiheit') as an inherent part of other fundamental rights (50). But, as we saw earlier on, this freedom to choose the language of one's choice finds its limits, according to the Tribunal and Swiss constitutional doctrine in general, in art.116.1 of the federal Constitution, the 'national languages' clause (51).

This article, says the Court, does not only contain a guarantee of the survival of all four national languages ("Gewährleistung des Fortbestandes der vier Nationalsprachen") (52), but also of the traditional linguistic structure of the area ("die ueberkommene sprachliche Zusammensetzung des Landes") (53), in other words, of the linguistic status quo. Such a broad interpretation of art. 116.1 was necessary in order to justify the measure at hand : one can hardly see how the existence of one French private school in the heartland of the country's dominant language group might endanger the latter's survival. But this is, submittedly, the point where the court may be criticised : can such a negligible deviation from the territorial language pattern justify an encroachments on the fundamental rights of the individual ? (54).

As for those countries where freedom of education is constitutionally entrenched, the freedom to use the language of one's choice follows without any particular difficulties. This implicit consequence, which was drawn both by the United States Supreme Court in Meyer v Nebraska, and by the Swiss Federal Tribunal in Association de l'école française (although both judgments differ, of course, in their ultimate effect), is taken for granted by most other

countries. An apparent exception is Austria, where the freedom to operate private schools in minority languages is explicitly guaranteed by art.67 of the St-Germain Treaty (55), in addition to the general freedom of education. The Treaty, however, is not an autochthonous legal text, but one of the series of nearly identical post-war Minority Treaties. Like the corresponding freedom of language use (56), this minority provision must therefore be considered as redundant within the Austrian legal order.

As for the other countries, we can be brief. Running a private educational institution is, as such, subject to only very few conditions; more stringent requirements are made only in connection with positive state benefits granted to those schools, but this is a very different story to which I will return in the next subsection. The rules relating to the mere authorisation to open a private school usually concern the personal (moral or professional) qualities of the initiators, and the material standards of the school premises; they do not impinge on the methods or contents of the education. The German Basic Law, e.g., spells out those conditions in its article 7.4, and none of them could properly justify the imposition of linguistic criteria (57). In Italy, the only admissible grounds for refusing to grant an authorisation are said to be

those that can be derived from the Constitution itself, such as morality or public health (58). As art.6 of the Constitution proclaims the duty to protect linguistic minorities, language requirements would be entirely excluded. Similar minimal rules also obtain in France (59) and Belgium (60).

B. Claims to State Subventions and their Consequences for Language Use

In the foregoing sub-section, we saw to what extent the existence of private schools is constitutionally protected, and more specifically to what extent the linguistic choices of those private schools are entrenched. The guarantee of this private activity against state interference might seem to be a powerful tool for language groups wanting to preserve their linguistic character. Yet, it is at the same time a very costly tool. The survival of the private schools has become, in most countries, dependent on the financial support of the public authorities. Equally important as the theoretical power to establish a private educational institution is therefore the existence of a claim to state aids in order to meet the considerable expenses of such an educational enterprise. This need is specially felt

by small language minorities who, in order to preserve their culture, cannot rely on the existence of a large nationwide network of denominational schools (with often considerable financial means), but are entirely self-supporting.

In legal terms, the issue is comparable to the one discussed earlier in the context of freedom of expression : can a classical, 'negative', right like freedom of education form the basis for a claim to positive state activity (61)? The argument would have to run that freedom of education can no longer be meaningfully exercised without the help of state subsidies (62). It is true that legal regimes granting state aids to private schools are, in practice, extremely frequent, and that, therefore, the need for positive state action is, at the political level, widely recognised. But the fact that such regimes exist does not automatically imply, of course, that they are also constitutionally protected for the future. The present crisis of many state budgets quite understandably prompts public authorities to concentrate their efforts on the maintenance of the public educational system, sacrificing some of the benefits they used to grant to the private sector.

Practically all Constitutions are silent on this question, and the constitutional position of subsidies to

private schools is therefore more the result of judicial and doctrinal elaboration. The various constitutional systems may be grossly classified in three categories in this respect : they are either favourable, neutral or restrictive with regard to the recognition of a positive duty to grant state subsidies to private schools (63). Germany is one of the few examples of the first category. The constitutional ground is well prepared, in this country, by the widespread doctrinal recognition of the fact that classical rights might entail positive duties for government. Particularly the idea, adopted by the Constitutional Court, that the press benefits from a special 'institutional guarantee' (64), might allegedly be extended to private education as well. The most authoritative confirmation of this view is a 1967 judgment of the Federal Administrative Court recognising to private schools, under certain conditions, a judicially enforceable right to subsidies (65). The Federal Constitutional Court has, however, never confirmed this view, which is also heavily contested by large sectors of legal writing (66). It would therefore be safer to say that the German Constitution is neutral towards state aids : they are neither mandatory, nor prohibited, but depend primarily on a policy choice which is left to the legislative branch. The same holds for France : the 1977 decision of the Conseil Constitutionnel recognising freedom of education also declared subventions to

private schools to be constitutionally acceptable, but not mandatory(67). In Belgium and the Netherlands, the subvention system is particularly generous (up to 100 percent coverage of financial costs in the latter case), but there is no clear constitutional mandate either; indeed, the new Dutch Constitution was unable to amend the old educational clause, largely because of the controversy on including or not an explicit guarantee of the present position of the private schools. The Spanish Constitution is similarly open-ended (68).

In Italy, on the contrary, there is a constitutional indication which makes the picture much simpler, at first sight at least: art.33 expressly declares that the right to establish private schools is recognised "without burden for the state" ("senza oneri per lo Stato"). There has nevertheless been considerable controversy on the exact interpretation of this clause (69). While many authors hold to the literal reading according to which the State is not allowed to spend any money whatsoever on private schools, others read this prohibition as applying narrowly only to the 'establishment' of private schools, but not to their subsequent functioning; or only to 'pure' private schools, but not to those that have been 'parified', i.e. partially integrated in the public system; while still others hold that

subsidies do not constitute a 'burden for the state' at all, because private institutions take over part of the State's educational tasks - subsidies being a financial compensation rather than an additional cost for the budget. The discussion is so open-ended because a general code regulating this matter is still lacking; a wide variety of disparate legal provisions apply (often dating from pre-constitution times), attributing financial aids to a number of private institutions, particularly at the level of elementary schools (70).

The constitutional law of the United States is more restrictive than its European counterparts. The so-called 'Establishment clause' contained in the First Amendment, according to which Congress and the states "shall make no laws respecting the establishment of religion", has led to a rather strict doctrine of separation between the state and religion. In educational terms, this has meant a virtually unlimited private autonomy, but also a distrust for state aids. The fact that private schools are predominantly (in the United States as elsewhere) of a denominational character, has adversely affected the constitutionality of financial schemes benefitting private education in general. In Levitt v Committee and companion cases (71), the Supreme Court in 1973 invalidated Pennsylvania and New York state laws providing

for tuition reimbursement to parents whose children attended non-public schools. The slightly earlier Lemon v Kurtzman (72), which inaugurated the Supreme Court's restrictive line, shows more clearly the potential negative impact of the Establishment clause on minority languages : a Pennsylvania statute was struck down which permitted the state to reimburse all nonpublic schools for nearly all expenses (teachers' salaries, textbooks, teaching aids) incurred by the teaching of four specified subjects, among which modern foreign languages. The Supreme Court has become more lenient again in its recent decision in the case Mueller v Allen (73), where a Minnesota statute allowing tax-payers to deduct tuition, transportation, instructional material, and textbooks expenses incurred in having their dependents educated at primary and secondary schools, was upheld by a deeply divided Court. Direct financial aids may still be prohibited under the new doctrine (74), at least those benefitting parochial schools. But one might wonder whether a scheme of state aids in favour of non-denominational private schools using a minority language would equally be covered by this constitutional ban.

As a conclusion, one can say that the overwhelming majority of countries do not recognise a constitutional claim to state subsidies for private schools. But then there is no

constitutional objection either against making the attribution of subsidies dependent on certain requirements. One of those requirements could then be the alignment of the linguistic curriculum of the private schools on that of the official school system.

This issue is particularly vivid in Belgium. The Act of 29 May 1959, dealing with the relation between public authorities and private schools, provides for considerable financial aids to the latter. Yet, among the conditions for entitlement, the schools must adopt the existing linguistic regime of public education (75). This regime, expressed by the Law of 14 July 1932 (since modified by the Law of 30 July 1963), is inspired by a stringent policy of territorial unilingualism in conformity with Belgium's overall linguistic policy : Dutch is the exclusive medium of instruction in the Dutch linguistic area (Flanders), French in the French linguistic area (Wallonia), only Brussels having two parallel networks in each of the languages (76). In its effects, this provision is quite comparable to an outright prohibition of minority language schools (77). The number of private institutions using an other than the regional language as the medium of instruction (essentially French schools in Flanders) has rapidly dwindled, and the few remaining ones are moribund. While private education in general, and

catholic denominational schools in particular, has been reinforced by the subsidy rules of the 1959 law, and outnumbers by far the public education network (78), it has ceased to provide a meaningful alternative to official policy as far as its linguistic regime is concerned. As for the constitutional justification of this restriction, it is generally found in art.17 of the Constitution, which declares that "education paid by the public authorities shall be regulated by law", without adding any limitations on the form or content of this regulation.

Quite comparable is the legal situation prevailing on the Aaland islands. The (Finnish) Act of 28 December 1951, concerning the Autonomy of the Aaland islands, provides, in its art.35.3 that : "In elementary schools maintained by or receiving support from the State or a commune, instruction may not be given in a language other than Swedish, without the consent of the commune having jurisdiction". The constitutional issue of the protection of freedom of education does not arise here : the Finnish act is only an implementation of the country's international obligation to respect the Swedish cultural character of the islands; permitting subsidies by the central State to Finnish private schools would in fact be a way of circumventing this obligation (79).

In France, too, the existing regime of subsidies excludes the possibility of linguistic alternatives or experimentations. The 'Loi Debré' of 1959 is, pending a major reform bill introduced by the present government, still the basic regulation of the relations between the State and the private schools (80). This act makes a distinction between two categories; on the one hand, those schools who sign one of two types of contract ('contrat simple' or 'contrat d'association') with the State, have a right to financial subsidies in return for a far-reaching alignment of their curricular provisions on the model of the public schools. Schools using another than the French language as their general medium of instruction can certainly not benefit from such a contract. On the other hand, those schools who prefer to avoid this partial integration in the public schools system receive no state aid whatsoever but keep at the same time full control on the content of the instruction (81). For understandable reasons, the latter option has become very minoritarian (82); but among them we find the little schools using Basque (the 'Ikastolak') and Breton (the 'Diwan' schools) as the language of education.

Rather more exceptional is the opposite case of general subsidy conditions being relaxed in favour of minority language schools. One example can be found at both

sides of the German-Danish border. In Denmark, the minimum size for private schools to be eligible for State subsidies, has been lowered for the German language schools in the border zone (83); while the German authorities at the other side of the border have equally expressed their good-will, be it in a different manner : the general subsidy rate of 70%, granted by the Schleswig Holstein Land government to recognised private schools, has recently been raised to a full 100% for the Danish language schools (84). This very favourable treatment of private education explains and justifies the fact that neither of the two countries has taken account of the minority languages at the level of the official educational system.

Such a situation has increasingly become exceptional; the crucial importance that private education formerly had for the maintenance of linguistic pluralism has faded away in recent decades. Nowadays, the existence of a private school network plays an essential role only for a few language groups in Europe : to the Danish and German minority mentioned above, one can add the Swedes in Finland (85), the Frisians in the Netherlands (86), and some immigrant groups with strong cultural traditions (87). Most others depend on the public educational system for their cultural needs. Whether they can advance any claims of a constitutional

nature in this respect, shall be examined in the next section.

Section 3

The Right to Education

The child's right to be educated in his mother tongue has repeatedly been proclaimed, above all in international fora. But these programmatic commitments have seldom been transformed in constitutional reality. Two reasons concur in creating this gap between ideological proclamation and legal entrenchment. First of all, there is a general difficulty in dealing with a fundamental right to education. As a 'social' right requiring state action, it is traditionally seen as less amenable to judicial enforcement and therefore also less suitable for inclusion in a binding text like the Constitution. In addition, even where a core content of this right to education is recognised as a directly enforceable individual right, it rarely includes any linguistic component; the idea that education, in order to be meaningful for the child, supposes some respect for his linguistic background is only slowly trickling down from the

world of sociolinguists and pedagogues to political and judicial circles. Anticipating here on the conclusion of this section, it will appear that constitutional guarantees of a general children's right to mother tongue education and/or a right of the parents to have their children educated in their language, are rare and uncertain. Such rights, where they exist, are generally restricted to specific language groups in specific areas of the country. Having (public) education in one's mother tongue is, therefore, more a specific minority right than an ancillary claim contained within a general fundamental right.

A. General Guarantees of Educational Rights

1. As all social rights, the right to education is of a fairly recent origin and is still far from universally included in the Constitutions and Bills of Rights. It can be found more often in post-war Constitutions, as well as in international human rights instruments dating from the same period, but is entirely absent from the older Constitutions. These latter are not silent altogether on the subject of education; as we saw, they were generally concerned with guaranteeing the freedom of private education against state encroachments. But they did not impose ambitious targets on the educational activity of the state itself. Yet, a number

of these older Constitutions give some limited guidance to the public school system, in providing that primary education shall be offered by the public authorities free of charge. This guarantee is sometimes couched in terms of an individual right (ex: art.76 of the Danish Constitution), but more often in terms of an institutional guarantee, from which however individual entitlements may flow as a 'reflex' (88) : art.42 of the Irish Constitution, art.80.2 of the Finnish Constitution, art.27.2 of the Swiss Constitution (89). The new Greek Constitution stands alone in guaranteeing free tuition at all levels of instruction (art.16.4). Obviously, the requirement of providing education free of charge does not bear on the content of this education, and has therefore no implications with regard to the language of instruction.

2. Some Constitutions from the period immediately following the second world war, being generally more responsive to the newly recognised social dimension of justice, are also more explicit on the subject of education, stopping short however of proclaiming a general right to education. The typical guarantee is one of a right of access : the Preamble of the 1946 French Constitution guarantees "l'égal accès de l'enfant et de l'adulte à l'instruction, à la formation professionnelle et la culture"; article 12.1 of the German Basic Law guarantees the "freie Wahl der

Ausbildungsstaette" (the "free choice of educational institutions"); the art.33 and 34 of the Italian Constitution are more detailed, but the most ambitious and open-ended clause, here again, is that "la scuola à aperta a tutti" ("the school is open to all").

The 'right to access' is not an easy concept to define. In a first, and most uncontroversial sense, which is also the one most widely accepted in France and Italy (90), it simply means that enrollment in the schools which happen to exist in the country cannot be denied in a discriminatory manner, i.e. for reasons which have nothing to do with academic achievement. Thus, no person could, in principle, be turned down because of the language he speaks. One example of an enrollment condition based on language is the Italian legislation requiring from foreign students an 'attestato di buona conoscenza della lingua italiana' before they can be admitted to Italian educational institutions. The preliminary question whether the right to education of the Italian Constitution also applies to foreigners, is not clearly made out (91); but if it does, this distinction might constitute an unlawful denial of access.

Access to education can also be interpreted, without forcing the bounds of the concept too much, in a

larger sense. It then means that every school offering any type of instruction must accept all candidates for enrollment. If not enough places are available to grant access to everyone, then the public authorities have the positive duty of creating additional facilities of the same type. This is how the German Constitutional Court, in its famous 'numerus clausus' judgment of 1972 (92), has interpreted art.12 of the 'Grundgesetz'. While the "free choice" promised by this article apparently only entails a negative freedom from state intervention, the Court, by reading it in conjunction with the equality clause (art.3) and the social state principle (art.20.1), found in it a 'participatory right' ('Teilhaberecht', in German constitutional parlance) : whenever the state has chosen to establish a given type of educational curriculum, then all persons have the right to avail themselves of it and the state has a corresponding duty to expand existing facilities; a system of 'numerus clausus' at the universities must therefore be considered as in principle unconstitutional. Yet, in the same breath the Court adds that this positive right against government is limited by a "Vorbehalt des Moeglichen" (a "condition of feasibility")(93), and recognises that, under present conditions, restrictions to access, if correctly administered, are the only available way to ensure a maximum of 'free choice'. The contorted

motivations of the Court, heavily criticised by a number of writers (94), have left the practical consequences of this case unclear. In the short term, the 'numerus clausus' system was conditionally upheld; but does this mean that the newly discovered social right is immediately devalorised to a mere programmatic norm or could it, when the conditions justifying the 'numerus clausus' no longer obtain, become a directly enforceable right ? The question was not resolved by the Court and seems still to be open (95).

For language diversity, the consequence of a similar 'dynamic' interpretation of the access guarantee would be that, whenever the public authorities have established a particular linguistic regime of education (e.g. by creating minority language primary schools), they must make sure that a sufficient number of such schools effectively exist to meet the demand (96). Even if, for reasons of financial feasibility, one should consider this claim not to be judicially enforceable, the educational administration does not receive a blank check. Like in the German case, the distribution of available places should follow certain rules (97), and more particularly the constitutional equality rule. Members of (linguistic) minorities should not be discriminated against in this process (98).

3. To find a full guarantee of the right to education, one must look at one of the most recent Constitutions, that of Spain. Art.27 contains at the same time the general proclamation that "all persons have the right to education", and a first, but still fairly abstract definition of what such a right might imply : "the aim of the education shall be the full development of the human personality, respecting the democratic principles of coexistence and the fundamental rights and liberties" (99). No direct reference is made to the language of education, but one might read an indirect indication in the expressed aim of "full development of the personality". It is arguable, on the grounds advanced earlier on (100), that a child's education must at least partially take place in his mother tongue in order to attain this objective (101). This issue is not academic, as the right to education of art.27, contrary to the other 'social rights' of the Spanish Constitution, is listed among the "fundamental rights and liberties", to which the fullest judicial guarantees apply, including the action of amparo (102). But on the other hand, the educational status of the main minority languages in Spain is also protected, in a more straightforward manner, by other 'higher law' provisions, to which I will turn later in this section.

4. Due perhaps to the repeated inclusion of a right to education in international instruments to which they are parties, many countries have felt the absence of a general right to education as a gap in their system of constitutional guarantees. Efforts to remedy for this absence have taken two forms : amending the constitution, and finding an indirect protection of the right to education in other, existing, constitutional provisions.

The first method, aiming at the inclusion of a right to education in those constitutions where it was lacking, has been unsuccessful until now. In Switzerland, a governmental proposal to introduce the right to education in the federal constitution was defeated by popular referendum in 1973; it obtained a majority of the total votes, but was not approved in a majority of the cantons (103). In Belgium, similarly, there was a governmental initiative to include a number of social rights, among which a fairly detailed right to education (104), at the time of the global constitutional reform of 1970. But the political agenda was entirely dominated by the regional devolution aspects of this reform, the urgency of which made the fundamental rights part sink into oblivion. The brand-new Chapter I of the Constitution of the Netherlands has reformulated all fundamental rights provisions, except in the field of education where no

consensus could be reached. The old art.208, which is a guarantee of private schooling and does not refer to a social right to education, has finally been kept in force (105). The inclusion of a corpus of social rights in the Constitution is also an endemic subject of debate in German political and legal circles. But the various initiatives and drafts have not been transformed into reality until now (106).

A second method for finding a protection of the right to education is through a 'creative' interpretation of the existing constitutional text. A likely candidate for such an approach is France. The case-law of the 'Conseil Constitutionnel' has transformed the constitutional higher law in a vast and rather open-ended collection of provisions; a general right to education might, like the freedom of private education, be construed by the Council as a 'fundamental principle recognised by the laws of the Republic' (107). Until the day that such hypothetical judicial entrenchment takes place, it is useless to speculate on the question whether such a right to education might include some linguistic features. It is safer to say, for present purposes, that the timid moves towards the incorporation of minority languages in the public school system (limited to the primary level (108)) remain at a

legislative and even infra-legislative level, without constitutional backing.

5. The guarantee, in a number of Constitutions, of parental rights in the domain of education could conceivably be used as a vehicle for claims against the public school system. The parental right is primarily the right to educate one's children according to one's own beliefs, within the home. More controversial is the question whether it also extends beyond the home, to the educational institutions. It may, for instance, imply the right to establish one's own schools, in order to secure an education in full conformity to one's convictions : this question of the freedom of education has been dealt with in the preceding section. But should the public educational system, too, respect this parental right? In most countries, this is acknowledged in relation to religious issues : either the parents have the right to have their children exempted from the religion course on the normal curriculum (Italy, Norway, Sweden, Austria (109)), or, alternatively, members of a recognised religion are granted the right to receive religious instruction during the school hours; this latter seems to be entrenched by art.6.2 of the German, and art.27.3 of the Spanish Constitution (110). Exceptionally, those claims play an indirect role in the protection of language values. Thus,

the teaching of Islamic religion , organised in German schools, requires the use of the Arabic language (111).

But normally speaking, linguistic values will only be protected if the parental right entails substantive claims on the curricular content, which go beyond the religious domain. In Germany, this hypothesis was rejected by the Constitutional Court in 1980 (112). But the same legislation which was upheld by the Constitutional Court (a global reform of the higher classes of the secondary school, enacted on the basis of an all-Laender agreement), was subsequently struck down by the Hesse State Court (113) as infringing a provision of the Hesse Constitution (art.55.1) which, according to the court, embodies a broader guarantee of parents'rights than art.6.2 of the Federal Constitution. This court found a constitutional violation e.g. in the devalorisation of the teaching of history and the German language (which, after 12 years as a compulsory subject, could become optional in the final 13th year...). Claims as to other than the national languages do not seem envisageable, however, on this basis. Moreover, the court decision has only a partial validity, limited to the Land of Hesse, and has met with the unanimous criticism of legal writing, depicting this judgment as a crass example of illegitimate judicial activism (114).

B. Other Guarantees of Language Use in Public Education

1. When general constitutional rights in the educational field are to no avail, recourse can be had to other constitutional provisions. The United States offer an interesting example of this possibility. The United States Constitution and Bill of Rights do not comprise any social rights, nor have subsequent attempts at the indirect entrenchment of some basic welfare rights been very successful (115). In the specific case of the right to education, this was spelled out by the Supreme Court in San Antonio v Rodriguez : "education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected" (116). There is a specific supplementary motive for the absence of the right to education from the Federal Constitution, namely the fact that education is essentially a competence of the States - and, in fact, all States have constitutional education clauses (117).

Yet, the equality clause of the Fourteenth Amendment seemed a promising alternative avenue. Within the framework of its equal protection case-law, the Court had developed the concept of 'fundamental rights', i.e. rights, that, though not explicitly listed in the Constitution, are

nevertheless "deemed fundamental in the sense that departures from equality in their availability are suspect" (118). Among the rights which have been made the subject of this heightened protection are the right to vote and the right to travel (119). But, in San Antonio v Rodriguez, the Supreme Court refused to add the right to education to the list. Notwithstanding this setback, equal protection "has become the standard bearer for attempts to secure second-culture opportunities within schools" (120), not through a special guarantee of education as such, but through a general concern with minority interests, including the field of education. The role of equality in this respect shall be analysed in another part of the study (121).

2. Another constitutional provision which might come into play as an indirect guarantee of the right to education in a given language, is an official language clause. However, it is worth remembering, from the outset, that a language can be official only in part of a country, so that no right to be educated in that language exists (in constitutional terms at least) in the other part of the country. Art.3 bis of the Belgian Constitution divides the country in' four linguistic areas; three of them are unilingual, and the educational system enforces this general principle to a very large extent, by not providing any

instruction conducted in a language other than the language of the region (122). This principle, which dominated already the law of 1932, has been reinforced by the Law of 30 July 1963, which has eliminated a number of remaining exceptions. Only in Brussels, where both French and Dutch are official, two parallel school networks are organised in each of those languages among which the parents may freely choose (123).

The principle of territoriality is applied more stringently still in Switzerland. Not only do the officially unilingual cantons organise the education only in one language, but even within the officially bilingual cantons (Berne, Fribourg, Valais, Graubunden), there is a further territorial split-up according to language zones. Basically, every locality only offers instruction conducted in the language spoken by the majority of the inhabitants; exceptions are limited to the level of secondary schools, whose recruitment is often canton-wide (124).

The constitutionality of these arrangements was recently challenged in the Derungs case before the Federal Tribunal (125). The case originated in the canton of Graubunden, where the German- and Romansh-speaking language groups form a chequered pattern of settlement. Mr. Derungs was a Romansh-speaker living in the small commune of St. Martin,

with a German majority. As no Romansh classes were organised by his commune, he sent his children to the neighbouring (Romansh-majority) villages of Uors and Tersnaus. Thereby, he lost the benefit of primary education free of charge, which only accrues to parents sending their children to the school of their home community. A demand for reimbursal of the school costs was rejected by the cantonal authorities, and this refusal was challenged by a constitutional complaint ('Staatsbeschwerde' (126)) before the Federal Tribunal. The Tribunal upheld the general power of the cantons to decide on the language regime of their schools, and to impose a strict observance of the territoriality regime in this respect. Like in the earlier Ecole francaise case, the holding was based on a reading of art.116.1 of the Constitution, which sees in it a guarantee of the territorial status-quo in matters of language distribution (127). But here again, the usage made of this article seems disputable, in view of its paradoxical effect. Indeed, the article was included in the Constitution with the special purpose of protecting the small Romansh language minority (128); yet, in its practical application in Derungs, it operates to the detriment of this group. The uneasiness about this fact accounts perhaps for some distinctions which the Tribunal this time added to its doctrine. First of all, it explicitly raised the question whether there might be an obligation to provide for public

education in another than the local majority language in larger localities with strong minorities (which was not the case in St-Martin)(129). Secondly, the fact that a child of Romansh mother tongue must follow a purely German programme from the first years onwards might be unlawful (but again, this did not need to be decided in the present case, as the teacher of St-Martin was able to follow the children in Romansh, until the point where they could follow the ordinary German classes) (130).

When, however, a language is official in a given area, then a right to education in that language would seem to follow quite logically. Indeed, learning a language seems to be the precondition for the exercise of the right to use the language in official matters (131). But does this mean that that language must be available as the sole or dominant medium of education, or is its mere teaching sufficient ? The Spanish Tribunal Supremo favoured the first alternative in a controversial decision of 1980 (132). As Castillian is proclaimed by art.3 of the Constitution to be official throughout the country, it follows, according to the Court, that every child must have the right to be educated entirely in Castillian throughout his school curriculum. Yet, I would rather submit that, in an area where two languages are official, a bilingual educational system, where all pupils

are taught through the medium of the two languages, is a true implementation of the official language clause, despite the fact that, strictly speaking, none of the pupils is educated "in his language" (133).

If this is the correct view, then a choice is offered to educational authorities in the case of a plurality of official languages : either setting up two separate schools systems, with the exclusive use of each of the official languages (except, of course, for the teaching of the other language as a subject), or the creation of an integrated system, with a common bilingual curriculum for all, or any combination of both systems (e.g. two unilingual and one bilingual network at the same time). Each option is compatible with a constitutional 'official language' clause.

Brussels offers an example of the first option; in Italy as in Spain, both the option of 'linguistic separatism' and that of 'linguistic conjunction' (134) have been tried out. In the Basque Country, there is a right to be educated in either of the two official languages of the Community (135), and the same applies in South Tyrol, where there is a right to "mother-tongue education" in German or Italian (136). On the other hand, Catalonia (137) and the Aosta Valley (138) have opted for a bilingual school system, using

Castillian and Catalan, Italian and French, as roughly equivalent media. One reason for this different solution might be the fact that the two languages, here, are much closer to each other and also more widely known throughout the population (139).

3. In addition to, or instead of, an official language clause, the teaching of a language can also be constitutionally guaranteed by the recognition of regional or member state autonomy in the field of education, provided, of course, that the control over educational policy includes the linguistic regime of the school curriculum (140). A full analysis of this role of autonomy goes beyond the scope of this study, which is restricted to individuals rights guarantees (141). Suffice it to say that education is one of the most commonly devolved policy areas, and that regional autonomy in education plays a crucial role for such language groups as the Swedish in the Aaland islands, the Faroese and Greenlanders, the Italian and, to a certain extent, Romansh groups in Switzerland.

In Spain, too, autonomy is proving to be an effective implementing tool of the official language clauses discussed above. Education is a shared power in this country : the central state enacts the basic norms for the

implementation of art.27 of the Constitution (142), while further implementation is left to the Autonomous Communities. Among the latter's explicit constitutional powers is the organisation of teaching of their language (143). A national statute, the 'LOECE' ('Ley Organica de Estatuto de Centros Docentes') has defined some of the basic norms, including 'minimum requirements for the teaching curriculum' (144), to be applied throughout the national territory. The teaching of the Castillian language figures among them (145). The constitutional picture is therefore the following : the Autonomous Communities may organise the teaching of their language on the basis of an explicit attribution by the Constitution; the State has rendered the teaching of Caatillian mandatory, on the basis of its jurisdiction regarding the basic norms; the remaining question is who has the competence for deciding on the linguistic medium for the instruction of the other, non-linguistic courses. It would seem that this falls within the implementing power of the Communities (146).

The role of autonomy in deciding the language policy in education has been most conspicuous, perhaps, in Canada. Exclusive provincial control in this matter has indeed led to a wide disparity in the availability of minority language education. On the one hand, there has been

a gradual increase of such education in the English-language provinces, who used to be very restrictive on this point. Nowadays, public education through French is available, in various proportions, in Alberta, Manitoba, New Brunswick, Ontario, Nova Scotia, Prince Edward Island and Saskatchewan. In addition, the local boards may decide to use other minority languages as the medium of instruction in Alberta, Manitoba and Saskatchewan (147). Only in British Columbia is English imposed as the exclusive medium. In Quebec, on the other hand, English-language education, which used to be very widely organised, has recently been restricted by the 1977 'Charter of the French Language'. French is, in principle, the sole language of instruction (s.72 of the Charter); derogations, allowing for English language instruction, are permitted under s.73 for four categories of children :

"(a) a child whose father or mother received his or her elementary instruction in English, in Quebec.

(b) a child whose father or mother domiciled in Quebec on 26 August, 1977, received his or her elementary instruction in English, outside Quebec;

(c) a child who, in the last year of school in Quebec before 26 August, 1977, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;

(d) the younger brothers and sisters of a child described in paragraph c."

In other words, while the rights of the existing English-speaking minority in Quebec are to a large extent preserved, the Charter's provisions are keyed towards the assimilation of all newcomers, whether from English-speaking Canadian provinces, or from abroad. The statute thus aims at the immediate freezing, and eventual absorption, of the non-Francophone groups living in Quebec (148).

4. However, regional autonomy is often restricted by the existence of national constitutional rights. In the Canadian case, the formerly unrestricted jurisdiction of the provinces in matters of educational language, has been recently curtailed by section 23 of the new Canadian Charter of Rights and Freedoms. This provision guarantees a right to education in English or French in the following terms :

"(1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which

they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes where the number of children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds."

The provision has been quoted in full, because it provides an almost preposterous example of how painstakingly detailed linguistic rights may sometimes be, especially if one compares this provision to the other, very laconic, fundamental rights contained in the Charter. The intricate formulation might be explained by the difficult task to find a middle ground between the desire (very strongly held by the then Prime Minister Trudeau) to guarantee the rights of the two 'founding nations' throughout the country, and the traditional power of the provinces (championed by the Quebec government) to shape their cultural identity (149).

Section 23 does not contain a general right to have one's children educated through the medium of English or French :

i) The right is reserved to parents belonging to the linguistic minority in the province where they reside, i.e. English-speakers in Quebec, and French-speakers in all other provinces. Members of the French majority (in Quebec) or the English majority (elsewhere) have no constitutional right to send their children to minority schools that may be established in their province. As for the persons speaking languages other than English or French, they do not have the right to have their children educated in their mother tongue, nor do they have a right to choose among the English and

French networks that may exist in their province. This limitation clearly takes into account the Quebec government's views. Indeed, until recently, members of immigrant minorities in Quebec chose at a rate of three to one to have their children educated in English rather than in French (150). The will to assimilate those minorities in the French majority, expressed by the Charter of the French language, is respected by section 23. All in all, section 23 only covers "five percent of the English-speaking population, seventeen percent of the French-speaking population, and none of the non-English and non-French-speaking population" (151).

ii) In addition, the right only exists where the number of minority language children so warrants; despite all its detail, section 23 remains therefore extremely open-ended. It will presumably be for the provincial governments themselves to decide, under judicial supervision, when the numerical conditions are fulfilled.

Despite its limitations, section 23 certainly affects provincial sovereignty in matters of education. In practical terms, the Quebec government is certainly justified in thinking that it is principally directed against its own policy of French unilingualism. This fear was immediately confirmed by a judgment of a Quebec district court, which found that the derogations permitted under the Charter of the

French Language were too limitative in regard of section 23. In particular, the exclusion from English-language education of those children whose parents were not educated in Quebec, and arrived after 1977, was held unconstitutional (152). While the immediate locus of conflict is Quebec, the other provinces will presumably also be affected by section 23; above all British Columbia with its English-only policy, but the other provinces might have to relax existing standards as well (depending on the interpretation of the numerical condition of s.23.3.

A constitutional right to education in a given minority language, within a given area does not only exist in Canada. It also exists, be it on a smaller scale, in Austria and Italy.

In Austria, there is no general right to education, except for the First Protocol to the European Convention, which has been transformed into Austrian constitutional law, but will be examined in the next chapter. But art.7.2 of the 1955 Vienna State Treaty extends a specific right to mother tongue education to the members of the Slovene and Croat minorities living in Carinthia, Burgenland and Styria. According to this article, they "are entitled to elementary instruction in the Slovene or Croat language and to a

proportional number of their own secondary schools; in this connection school curricula shall be reviewed and a section of the Inspectorate of Education shall be established for Slovene and Croat schools"(153).

This obligation has been partially executed by the 1959 Minority School Law for Carinthia. The generic 'right to mother tongue education' guaranteed by the State Treaty was supplemented, in this statute, by a numerical criterion : minority schools are to be organised only in those localities where a 'sufficient number' of Croats or Slovenes exist. The delicate problems of concrete implementation were provisionally avoided by organising bilingual instruction in those places where it already existed in 1958/59, at the time when the law came into force. But this provisional solution is still in force today... (154). As for the two other 'Laender', no new legislation has been enacted (155). Even the more recent 'Volksgruppengesetz' of 1976, which was meant as an encompassing minority protection statute, does not deal with education at all (156).

In addition to art.7 of the 1955 State Treaty, art.68 of the first world war peace treaty, the Treaty of St Germain, is also still applicable. Its first alinea guarantees to members of minorities a right to public

education in their mother tongue, limited to the primary school level. Some authors consider this provision to be superseded by the more detailed art.7 (157). This may be true as far as Slovenes and Croats are concerned; but art.68 continues to apply to the other, tiny minorities that are not contemplated by art.7. As for art.68's second alinea, imposing on the State a duty to attribute an appropriate part of its financial expenditure to minority institutions (educational and others), is applicable to all minorities; but its direct applicability is doubtful, in view of its extremely vague terms (158).

A comparable bilateral treaty obligation to provide for minority language schools has been imposed on Italy by the Special Statute on Trieste and confirmed by the Treaty of Osimo (159). An Italian statute of 1961 established schools in which Slovene is the exclusive medium of instruction at all grades; it codified the existing situation which had been established after the war by the Allied Military Government, and applies not only to Trieste, but also to the neighbouring province of Gorizia (160). As for the Slovenes living in a third province, that of Udine, no educational guarantees exist at all but they can of course send their children to the Slovene schools in Gorizia and Trieste that lie, however, beyond commuting distance.

One must note that, in contrast to the Austrian case, the international obligation is not of a 'higher law' nature; the Treaty of Osimo has been given, through transformation, the rank of ordinary national legislation. But art.6, the minority clause of the Italian Constitution, might indirectly entrench the existing regime (161).

Of a purely internal nature, finally, is the right, granted to the small Ladin minority of the Bolzano province, to the teaching of their language. Article 19.2 of the Special Staute of Trentino-Alto-Adige provides that : "La lingua ladina è usata nelle scuole materne ed è insegnata nelle scuole elementari delle scuole ladine. Tale lingua è altresì usata quale strumento d'insegnamento nelle scuole di ogni ordine e grado delle localita stesse. In tali scuolà, l'insegnamento è impartito, su base paritetica di ore e di esito finale, in italiano e in tedesco".

While the first sentence, guaranteeing the use of Ladin in nursery schools and its teaching in primary schools, is perfectly clear, the second and third sentence seem to conflict with each other : the second sentence provides for the use of Ladin as a medium of instruction in all schools of the Ladin valleys, while the third sentence adds that teaching shall take place, half in Italian, half in German (162). Two halves make a whole, it would seem. When can Ladin

then be used as an instrument of teaching (outside the Ladin language course itself) ? On a constitutional recourse by the Bolzano province, the Italian Constitutional Court solved the dilemma by deciding that Ladin is not to be used as a real medium of instruction, but in an auxiliary function, as "an instrument to facilitate contacts between teachers and pupils and the acquaintance by the latter with Ladin traditions and culture" (163). The Court has thereby struck the balance against the interests of the weaker party. In practice, the level of protection of the Ladins living in the Bolzano province, does not therefore exceed, as far as education is concerned, that of their fellows in the province of Trento, to which another article of the regional Statute (art.102.2) guarantees the teaching of their language and culture.

C. Conclusion

The constitutional protection of language values in public education offers an extremely complex picture. It consists of two broad categories : educational rights in the strict sense and educational implications of other higher law provisions. In both categories, a further distinction can be made between **generic** and **specific** provisions. In the first

category, the generic provisions include the general right to education of the Spanish Constitution, the right of equal access in Germany, France and Italy, and the parental rights; specific language guarantees are section 23 of the Canadian Charter and art.7.2 of the Vienna State Treaty. In the category of implicit guarantees, a similar distinction can be made between generic rights (such as equal protection in the U.S.) and specific language rights, based principally on official language clauses (Belgium, Switzerland, and certain Italian and Spanish regions).

The fact that a general right to be educated in one's mother tongue is quasi inexistent is thus compensated by the existence of several other constitutional provisions imposing some linguistic obligations on the state educational system. Yet, this substitution is not equally beneficial for all linguistic minorities. Migrant workers in the European countries, in particular, have little or nothing by way of constitutional protection of their language within public education. Such promotional measures as have been taken remain purely at a legislative or infra-legislative level (164). For the member states of the European Community, there is, however, a clear higher law obligation of international origin to provide a mother tongue education to children of

immigrant workers from other Community states (165).

CHAPTER TWOINTERNATIONAL LAWSection 1The European Convention

The most effective source of international obligation in this field is, again, the European Convention on Human Rights. The Convention itself did not contain any educational rights, but this lacuna was filled a few years later by the First Protocol to the European Convention (1), entered into force in 1954, whose article 2 is formulated as follows :

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education, and to teaching, the State shall respect the right of parents to ensure such education and teaching in

conformity with their own religious and philosophical convictions."

Like in most national constitutions, no explicit reference is thus made to the linguistic dimension of education. Yet, the article's possible implications in this domain have been thoroughly explored by the European Court of Human Rights in the Belgian Linguistics case, which has already been discussed earlier on in relation to freedom of expression (2).

The complaint, in this case, involved a frontal attack, by Francophones living in Flanders, on Belgian educational policy and its basic premise of territorial unilingualism. The applicant's claims concerned language issues both in public and private education. In a nutshell, they were as follows : as for public education, the parents complained that instruction through the medium of French was not, or not adequately, provided in the areas where they lived; and that access to those French classes as did exist in some Flemish localities near the linguistic border was unduly restricted. As for private education, the parents complained that the Government withheld grants from those private schools which did not conform to official language policy (i.e. French-medium schools in the Dutch language

area), and did not endorse school-leaving certificates issued by those schools.

The status of these arguments under Belgian constitutional law has been dealt with in the preceding Chapter. In the context of the Convention, the very complexity of these issues has provided an excellent testing ground for the existence of linguistic claims in relation to education. As Article 2 of the First Protocol is, above all, a guarantee of the 'social' right to education, and only accessorially and hypothetically of freedom of education, the order followed in the Chapter on national constitutional law will be reversed, and the right to education will be tackled first.

A. The Right to Education

1. First Sentence

The striking thing about the article's first sentence "No person shall be denied the right to education" is its negative formulation, which contrasts with the formulation of all other rights in the Convention, typically starting with the words : "Everyone shall have the right...".

This negative terminology results from an explicit amendment made during the 'Travaux Préparatoires' of the Protocol (3), and expresses the misgivings of some Contracting Parties about the implications of positively guaranteeing this 'social' right in the context of a Convention which mainly deals with directly applicable 'classical' liberties. They did not mean, it seems, to avoid any positive state obligations in regard to education. Indeed, as the European Court had occasion to say in the Belgian Linguistics case, the right "by its very nature calls for regulation by the State" (4); it would be absurd to recognise, on the one hand, that there is a 'right' to education, and on the other, to dispense the states from any obligation, when it is quite clear that public authorities alone can, in present circumstances, secure this right (5). The negative formulation can therefore better be interpreted as an attempt to emphasize the fact that this particular right is of a 'programmatic' nature, and is not a proper object for judicial enforcement, in contrast to the other conventional rights.

The European Court was of a different opinion, however. In the Belgian Linguistics case, it started by admitting from the 'preparatory work' that the Parties did not intend to "recognise such a right to education as would

require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level" (6). But, it added, this does not mean that other individual claims to positive state action should equally be rejected. More particularly, the Court highlighted the existence of two such obligations (7) : one is of a general nature, the second specifically concerns the language regime of education, which was after all the matter at hand.

The first requirement is that "the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed" (8). By the words "that is to say", the potentially promising notion of "drawing profit from education" is immediately restricted to the mere bureaucratic act of recognition of the studies; no room is thus left for an interpretation according to which especially young children in the earliest stages can not draw 'benefit' (in the larger sense) from their education, if it is not conducted, at least partially, in their mother tongue (9).

If no language implications are to be drawn from this general requirement, the Court has added however an

obligation which specifically concerns language. It starts by saying, not very promisingly, that "the first sentence of Article 2 does not specify the language in which education must be conducted in order that the right to education should be respected. It does not contain precise provisions similar to those which appear in Articles 5(2) and 6(3) (a) and (e)" (10). Despite what sounds like a negative presumption, the Court immediately adds that there is nevertheless an implicit language component : "the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be" (11).

The Court accordingly overstates its own position when saying, at a later point of the judgment, that "the first sentence of Article 2 contains in itself no linguistic requirement" (12). Surely, it does not contain a "right to the establishment or subsidising of schools in which education is provided in a given language" (13), but there is a right to education in the national languages or one of the national languages. That this does not amount to a far-reaching guarantee becomes clear from the context : i) 'national' should not be understood in its sociological meaning (14), according to which e.g. Welsh or Basque could

be viewed as national languages. This is certainly not what the Court intended to impose on the member states. To avoid any confusion, it might have been preferable to use the legally more accurate term of 'official language';

ii) the clause "or one of the national languages" does not mean that the individual is entitled to an education in his language, whenever that language is official in some part of the country. This was precisely what the applicants in this case claimed, and what the Court clearly rejected : that they, as Francophones living in the Dutch language area of Belgium, could be educated in French, which is the official language in another part of the country. In fact, the word "or", used in the judgment, does not leave the option to the individual, but to the public authorities : they may choose, either to organise classes in the various official languages throughout the country, or to have only one medium used in each particular locality (15). Thereby, the principle of territorial unilingualism in the field of education is declared to be in conformity with article 2 (16). Its compatibility with the non-discrimination clause of the Convention will be discussed further on (17).

But, the applicants had also another, more modest claim. In derogation of the main regime, a limited number of French schools were run, or subsidised, by the state in the

Dutch language area, viz. in Louvain (in order to cater for the personnel of the French section of the University), and in six localities in the vicinity of Brussels (the so-called 'communes à facilités'), where French-speaking immigrants constituted a particularly important percentage of the population and had therefore been accorded special 'facilities' as regards language use in education and public affairs. However, as these schools were an exception to the general rule of territorial unilingualism, admission was strictly limited to those French-speaking children whose parents, respectively, worked at the University of Louvain, or lived in one of the 'six communes'. Consequently, the majority of French-speaking inhabitants of Flanders, who do not belong to one of these categories, were not allowed to send their children to those schools (18).

And here comes the point raised by the applicants : why, if French schools have been organised in a given place, should they be reserved to a limited group, and not be open to all ? The response of the Court seems very promising at first. If art.2 does not contemplate a right to the establishment of any school of a given type (19), it does guarantee "a right to access to educational institutions existing at a given time" (20). Now, such a right of access, which apparently refers to similar concepts in various

national systems (21), would seem to imply that everyone can freely choose which of the "educational institutions existing at a given time" he wants to attend (22). Consequently, French-speaking children living in Flanders should not be barred from the French schools existing at Louvain and in the six communes.

In fact, this particular residence requirement has only been examined by the Court under Art.2 in combination with Art.14 of the Convention (i.e. under education cum non-discrimination), with the ruling that a State which has set up a particular educational establishment may not "in laying down entrance requirements, take discriminatory measures within the meaning of Article 14" (23). In other words, the 'right to access' does not entail an unlimited free choice; the available options may be restricted, only not in a discriminatory manner. The only function of Art.2, in this respect, is that of forming the background against which the non-discrimination principle may operate (24). Consequently, the compatibility of this aspect of Belgian language legislation with Convention obligations will also be examined in the Part of this study dealing with the principle of equality (25).

2. Second Sentence

There is a close link between the first and the second sentence of article 2. Both concern state activity with regard to education : the first sentence deals with the relation between the state and the child (or the 'educandus' in general), the second with the relation between the state and the children's parents (26) : not only should public authorities guarantee the right to education (first sentence), but they should also do this in respect of "the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions" (second sentence).

A reading of article 2 which would certainly not be correct is to see the first sentence as the embodiment of the right to education and the second of the freedom of education. As the Court said in the Kjeldsen case, "(...) the first sentence does not distinguish any more than the second, between state and private teaching" (27). Whether or not the second sentence also guarantees the freedom of education (28), the fact of allowing and even subsidising such private education does not exhaust, as was claimed by the Danish government in this case, the state's obligation to respect the parents' preferences. This interpretation derives from

the words "in the exercise of any functions it assumes (...)", and is confirmed by a recourse to the Preparatory Work (29). The respect for the parents' preferences therefore applies, first of all, to public educational activity. Nor does it suffice e.g. to provide for optional religious instruction of a denominational character; the respect should apply "throughout the entire State education program" (30).

To examine the content of these claims any further may seem utterly irrelevant for our purposes, since the Court, in the Belgian Linguistics case, expressly excluded 'linguistic preferences' from the notion of 'religious and philosophical convictions' protected by the second sentence. It did so in the following strong terms :

"To interpret the terms 'religious and philosophical' as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there. Moreover the "preparatory work" confirms that the object of the second sentence of Article 2 was in no way to secure respect by the State of a right for parents to have education conducted in a language other than that of the country in question; indeed in June 1951 the Committee of Experts which had the task of drafting the

Protocol set aside a proposal put forward in this sense. Several members of the Committee believed that it concerned an aspect of the problem of ethnic minorities and that it consequently fell outside the scope of the Convention (see Doc.CM (51) 33 final, page 3). The second sentence of Article 2 is therefore irrelevant to the problems raised in the present case" (31).

The combination of the text argument with the argument of drafting history seems to lend solid support to the Court's opinion. Still, one may doubt whether the Court has fully met the applicants' arguments (32). They did not pretend that 'linguistic' can automatically be read into 'philosophical', but rather that the desire to have their children educated in French corresponded to their 'personalistic' philosophical convictions (33). This, at first sight rather obscure, argument can be explicitated in two separate ways : one is to say that the fact, as such, to want one's children educated in the language of one's choice, constitutes a philosophical conviction, or at least that it forms part of a certain vision of life (34); the other possibility is to pretend that a certain language embodies or represents a certain philosophy (35) : one cannot make a clearcut distinction between the content of the education and the linguistic medium which is used (36). In certain

situations, they can be inextricably linked, the imposition of a certain language paving the way for a certain philosophy or religion.

These arguments may seem to be overdrawn if one takes 'philosophical convictions' in the narrow sense, as it was by the Court in 1968. Yet, in later judgments, a much wider scope was given to this concept. In the Kjeldsen case, the Court affirmed that "the second sentence of Article 2 aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the 'democratic society' as conceived by the Convention" (37). This emphasis on the notion of 'pluralism' (without a specific qualifier) makes the need for a sharp distinction between purely religious or philosophical convictions, and convictions or preferences of another nature less pressing. Why should some measure of linguistic diversity not be considered to be part of democratic pluralism? (38).

In the later case of Campbell and Cosans (39), the concept is more loosely drawn still. 'Convictions', here, stand for "views that attain a certain level of cogency, seriousness, cohesion and importance" (40); while the adjective 'philosophical' does not necessarily refer to a

"fully-fledged system of thought", but also to "such convictions as are worthy of respect in a 'democratic society' (...) and are not incompatible with human dignity" (41).

If the category of 'philosophical convictions' has now become so open-ended, one sees no reason to exclude 'linguistic preferences' from it. Accordingly, it is submitted, Article 2 prohibits the public school system of putting an inferiority badge on any particular language. It remains to be seen whether this implies only a negative duty to abstain from interference with language values, or also a positive duty to recognise the contribution that various languages can make within the educational curriculum, which is of course the principal claim of the French speaking parents in Flanders, or any similarly situated group. In Campbell and Cosans, the Court affirmed that the word "respect", in addition to a primarily negative undertaking, also "implies some positive obligation on the part of the State" (42). In the case at hand, the State had to adapt itself to the convictions of those parents who are opposed to corporal punishments at school; yet, the Court accepted that the solution of establishing separate schools without corporal punishment would be an unreasonable requirement and indicated its full satisfaction with the alternative remedy

of exempting individual pupils from this type of sanction (43). In other words, the 'positive duty' in this case merely consists in taking steps to eliminate an existing interference with the parents' convictions. The Court does not seem willing, at present, to put the educational authorities to the expense of providing any special type of school, or any special curriculum, be it of a linguistic or other nature.

In sum, the dismissal of 'linguistic preferences' in the Belgian Linguistics judgment has probably been too cursory. In view of subsequent developments, the legal position should be restated as follows : the claims of the Francophone parents must be rejected, not because the linguistic values they cherish are not truly philosophical convictions, but because they would entail positive state action of a kind which the Court is presently not prepared to guarantee. Yet, the last word may not be said in this matter.

B. Freedom of Education

The question whether the European Human Rights Convention system contains a guarantee of the freedom of private education is one of its main moot points. Such a

freedom is, in any case, not clearly spelled out in the words of Article 2; this is not an accidental omission but seems due to fundamental disagreement between the signatories on this matter, a disagreement which one finds also reflected in the declarations and reservations submitted by a number of them (44). The question remains whether this freedom can be implicitly derived from article 2.

Exceptionally, it has been suggested that freedom of education might be included in the words of the first sentence (45). The "right to education" which may not be "denied" would then encompass, not only the ordinary, 'passive' meaning (the right to be educated), but also the opposite, 'active' meaning of the term (the right to educate, i.e. to set up an educational institution). The suggestion seems rather adventurous. At any rate, the Convention organs have never faced the problem from this angle.

Usually, the analysis concentrates on the second sentence of Article 2. Can one read a guarantee of private education in the State's obligation to "respect the right of parents to ensure such education in conformity with their own religious and philosophical convictions" ? We saw that the second sentence, according to the Court, aims at "safeguarding the possibility of pluralism in education"

(46). But what type of pluralism is meant thereby : is only internal pluralism required, that is, the simultaneous presence of different religious and philosophical views within the common educational system, or is there an obligation of institutional pluralism, entailing the right to set up private schools alongside the public system ?

In the Belgian Linguistics case, the Court was able to avoid the issue, which was not essential to a decision in the case at hand. Indeed, the right to set up private schools, and choose their linguistic regime, was not directly challenged by the Belgian legislation. The issue was of a different nature : whether the government could make the granting of benefits to those schools dependent upon the observance of the official language policy. As for the Kjeldsen case, it concerned public education. Yet, even if it did not have to address the question frontally, the Court gave vent to its favourable appreciation of 'institutional pluralism', in an 'obiter dictum' :

"Besides, the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily

subsidised by the State (paragraphs 15, 18 and 34 above), or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions" (47).

From the Court's words, one can only gather that allowing for private schools is one (important) means to fulfil the State's duty under the second sentence, but certainly not that it is a necessary means. The Court is equally vague when it dwells for some moments on the preparatory work :

"Whilst they indisputably demonstrate the importance attached by many members of the Consultative Assembly and a number of governments to freedom of teaching, that is to say, freedom to establish private schools, the "travaux préparatoires" do not for all that reveal the intention to go no further than a guarantee of that freedom. Unlike some earlier versions, the text finally adopted does not expressly enounce that freedom" (48).

But does it perhaps implicitly contain such freedom; the Court still does not want to pronounce itself on this issue, nor has the Commission taken an unambiguous stand (49), and the controversy which started during the 'travaux

préparatoires' and was continued in legal writing (50), may
rage on.

Yet, this dispute is rather theoretical at present, as all members of the Council of Europe recognise the existence of private schools, only the Maltese government planning to wind them up, amidst serious political controversy. What is more important for our purposes is whether a hypothetical freedom of education also includes the right to decide on the language regime of these schools, an issue which arises above all, as we saw, in Switzerland. An indication can be gleaned from a decision of the Commission in the Church of Scientology case ; while not pronouncing itself on the general issue of freedom of education, the Commission expressed the view that the British government was "not obliged to recognise or to continue to recognise any particular institution, including that of the applicant, as an educational establishment" (51). Such recognition may be subject to certain 'minimum educational standards', a notion which the Commission expressly borrowed from the Unesco Convention on Discrimination in Education, and whose linguistic implications will be discussed in the next section (52).

Whether or not there is freedom of education, it does not include a right to be subsidised by public authorities, as the Court clearly decided in the Belgian Linguistics case (53). Yet, if the State chooses to subsidise a given type of school, it must extend this benefit to all similarly situated schools, on the basis of the non-discrimination principle set forth by Article 14 of the Convention (54).

As for the other claim to state action expressed by the applicants in Belgian Linguistics, namely to have studies in private schools recognised by the State, the legal position is slightly different. Indeed, the Court has recognised that the first sentence of Article 2 contains a right to have one's studies recognised. But this right was not utterly denied to pupils from private schools with an alternative language regime, but only limited; their studies were not automatically recognised as with 'regular' private schools, but they had to pass a supplementary examination administered by a state board (55). This amounts to a restriction on the exercise of their right which, again, does not raise a direct issue under Article 2, but forms the object of scrutiny under Article 14 (56).

As a conclusion, Article 2 of the First Protocol contains little or no direct guarantees for the use of languages in education; the European Convention, in this matter, sets its standards predominantly in Article 14.

Section 2

Universal Human Rights Conventions

A. The Right to Education

Article 13, paragraph 1 of the Economic, Social and Cultural Covenant holds that :

"The states parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or

religious groups, and further the activities of the United Nations for the maintenance of peace".

This long winding discourse stands in striking contrast with the laconic formulation of the European Convention : "No person shall be denied the right to education". Still, it is equally difficult to derive from it firm indications concerning the linguistic dimensions of the right. Two passages could be constructed as indications of a right to education in one's mother tongue : "shall be directed to the full development of the human personality" (57); and "shall (...) promote understanding, tolerance and friendship among all nations and all racial, ethnic and religious groups". The legal value of such an exegesis is very slight however. Not only could these words also be interpreted, to the contrary, as backing policies of linguistic assimilation in education, but implementation of this Social Covenant is quasi exclusively delegated to the contracting states (58), and substantive standards must therefore be considered as inherently flexible. The most one can read in Article 13 as regards language values in education is probably the doctrine which the European Human Rights Court has so cautiously elaborated. It has been argued that art.23 of the Canadian Charter of Rights would not meet the test proposed by the European Court in Belgian

Linguistics (59), and that therefore Canada, that has ratified the Covenant, is in breach of its international obligations. But the crucial issue, here again, is one of equal access to the schools for all language groups, involving non-discrimination rather than the right to education as such (60).

The UNESCO Convention against Discrimination in Education does not help us any further. Its articles 4 and 5 (1)(a) contain a general guarantee of the right to education, couched in terms almost identical to those of art. 13 of the Covenant. Its article 2(b) says that the "establishment or maintenance for religious or linguistic reasons, of separate educational systems" does not constitute a discrimination under the Convention - and "separation for linguistic reasons" logically implies also a different language regime in these schools - but this is only a negative pronouncement from which one cannot conclude that certain language values are positively entrenched as part of the right to education. Yet, one should also note that mother tongue education has been recommended in various instruments sponsored by UNESCO (61). Although legally not binding, such declarations might nevertheless be used as an interpretive aid for construing vague concepts such as the right to education.

Finally, article 27, the 'minority clause' of the Civil and Political Covenant, could come into play. As will be argued later on, the right, for persons belonging to a minority, to use their language and to enjoy their culture in community with others, might entail some uncertain claims to be educated in that language (62).

B. Freedom of Education

More can be said, at the universal level, about the freedom of education, and the measure in which it comprises also the free use or teaching of any language.

Article 13 of the Social Covenant, first, unambiguously guarantees private education in general; its paragraphs 3 and 4 view this freedom respectively from the side of the parents and that of the educational operators :

"3. The states parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the state and to ensure the religious and moral

education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the state".

The UNESCO Convention, in contrast, does not guarantee freedom of education in general. But it gives a precious clue as to what the 'minimum educational standards', the real limitation on freedom of education in the text of article 13 of the Covenant, may mean in relation to the status of language; the relevant passage is article 5 (c) :

"It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each state, the use or the teaching of their own language, provided however :

- i) That this right is not exercised in a manner which prevents the members of these minorities

from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;

ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and

iii) That attendance at such schools is optional".

The first limitation of this provision is that it applies only to members of national minorities, other language groups being presumably denied the benefit of the guarantee. The thorny problem of the definition of a minority in international law will be discussed in relation to art.27 of the Civil Covenant (63). One should note, however, that the latter provision is considerably larger; it deals with "ethnic, religious or linguistic minorities", while the UNESCO Convention only contemplates national minorities. The potentially restrictive effect of this specification became already apparent in the first series of state reports on the implementation of the Convention; several countries, among them the Netherlands, Switzerland and Spain denied the existence of 'real' or 'national' minorities on their territory (64). As for aliens, to which the UNESCO Convention otherwise applies (65), they could also be excluded on a restrictive definition of 'national minority'.

The substantive limitation of article 5 (c) is that the use or teaching of the minority language is made "dependent on the educational policy of each state". This can of course not be interpreted as leaving to the states full discretion to allow for the minority language (whether in use or in teaching) at all (66). This would annihilate the meaning of adding the words "and the use or the teaching of the language". The correct interpretation is therefore that the state should as a minimum recognise the teaching of the minority language in the private schools run by members of minorities; but that the use of this language as the medium of instruction depends on the state's educational policy.

The impact of the guarantee of private education on the protection of linguistic diversity is thereby seriously jeopardised. The instrumental use of language is implicitly ranged within the domain of the 'minimum educational standards' justifying state intervention with this freedom. As for the freedom to teach the minority language as one subject among others, the states "agree that (...) it is essential to recognize it". This vague terminology would cast some doubts on the binding nature of this obligation, were it not for paragraph 2 of article 2 which specifies that "the states parties to this convention undertake to take all

necessary measures to ensure the application of the principles enunciated in paragraph 1 of this article".

This paragraph clearly shows the existence of a binding obligation; at the same time, it would seem to exclude direct applicability. But this is not necessarily so; the need to take implementing measures may only refer to those "principles enunciated in paragraph 1" that are inherently unenforceable (like e.g. para.1 (a) : "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights..."), but not to the provisions, like the one on language that can perfectly well be directly applied (67).

The conclusion must nevertheless be that existing national standards as to the language of education, in the countries under review, are not seriously questioned by the universal human rights instruments that, on this point at least, fall clearly behind the pre-war Minority Treaties (68).

P A R T F I V E

E Q U A L I T Y

CHAPTER ONECOMPARATIVE CONSTITUTIONAL LAW

Saying 'five is equal to five' has exactly the same meaning as saying 'five is identical with five' : the two terms of the comparison have only one characteristic, namely their numerical characteristic, the identity of which makes for the identity of the objects as a whole. But this notion of equality-as-identity cannot be transferred from the world of pure mathematics into the more complex world of concrete objects. All existing objects possess many characteristics, some of which they may share with other objects, but never all of them. At the very least, every object has its own, specific position in time and space (1). Declaring that two objects are equal, therefore, does not constitute a statement of general identity, but one of specific identity with regard to one specific point of view, the tertium comparationis or criterion of comparison between both. This can be illustrated by the following example, borrowed from P.Westen (2) :

"(...) assume two bottles of wine - one a rich red burgundy, the other a sweet white sauterne. Each bottle contains one

liter of wine weighing twenty-five ounces. Are the two bottles equal or unequal ? Obviously, the answer depends upon the standards by which one measures them. Measured by ordinary standards of volume, weight, and grape content, the bottles are identical and, thus, equal, in those respects. Measured by ordinary standards of color, taste and acidity, they are non-identical and, thus, unequal in such respects. To say they are equal or unequal merely spells out the identity or nonidentity that obtains among them by reference to given standards of measure."

What applies to objects also applies, a fortiori, to persons. All persons are alike in some respect (e.g. the fact that they are born and have to die), but no two persons are alike in every respect. What does the legal principle of equality, entrenched in all Constitutions or Bills of Rights, then mean ? Does it impose to make abstraction of all differences existing between persons, and to treat them alike in all circumstances ? Of course not; it is unanimously accepted that such 'mechanical equality' would lead to absurd results. Every legal system is bound to make some distinctions between rich and poor, old and young, men and women, healthy and ill, vicious and virtuous... The definition of equality to which most writers and, as we will

see, many constitutional courts adhere, takes account of this complexity; it is the classical Aristotelian definition in which the principle of equality breaks down into two sub-principles : treat like cases alike and different cases differently, to the extent of their difference" (3).

Equality judgments can therefore not be made in the abstract, but become meaningful only by considering a particular situation : one can then decide whether, within this specific context, the similarities between persons outweigh the differences, or vice versa, and whether accordingly they should receive a like treatment, or rather a different treatment; or, as Hart says, "a consideration of the objects which the law in question is admittedly designed to realise may make clear the resemblances and differences which a just law should recognise" (4). Whether one should make distinctions on the ground of age, of gender or of language becomes more arguable if one considers the specific contexts of, say, the right to vote, military service, access to the civil service, pregnancy leave, etc.

If the Aristotelian definition of justice thus makes equality into a realistic and meaningful concept, it also renders it very complex and pervasive. Equality becomes a fundamental right which outstrips all other rights by its

all-encompassing field of application and by its open-ended meaning :

1) Equality is ubiquitous : "any case, any challenge can be put in an equal protection framework by competent counsel" (5); if the rule operates a distinction between two classes of persons, it can be criticised on the ground that they should have received a like treatment; if the rule makes no differentiations at all, it can be argued on the contrary that it has failed to recognise differences existing in reality. While the rights analysed above, like freedom of expression and the educational rights, are linked to a relatively well-defined substantive domain, the scope of equality has no such intrinsic limits; it requires a justification why any rule is as it is.

2) Moreover, the meaning of equality is also exceedingly vague. Even when one applies the Aristotelian formula to a specific context, one merely sets the terms of the debate into sharper relief, but without beginning to give an answer. The answer is provided by a substantive value judgment, laying outside the equality formula. As Kelsen notes, "any desired difference can thus be ranked as essential in the treatment of its subjects by an actual legal order, and hence be the basis of differential treatment, without the régime thereby coming into conflict with the principle of equality.

This principle is too empty to be able to determine the content of a legal system" (6).

Most authors agree in qualifying the Aristotelian formula as an "empty form" (7), an "empty idea" (8), or a "simple tautology" (9). But there is disagreement on the status of the substantive values which are incorporated in the formal framework. According to one view, recently restated in an article by Peter Westen which has sparked off a heated debate in the United States (10), those substantive values do not themselves belong to the equality complex, but are autonomous notions of right and entitlement. Clothing these values in terms of equality is not only useless, but also misleading, because it impedes a straightforward discussion of the moral values involved. As Alf Ross forcefully affirmed : "to present them as a demand of justice founded in an evident idea of equality is sharp practice aimed at bestowing on certain practical postulates determined by interest the apparent evidence which belongs to the idea of equality"(11). Therefore, "equality as an idea should be banished from moral and legal discourse as an explanatory norm" (12).

Others have argued, on the contrary, that the formal framework of equality, far from confusing the debate,

might be an enlightening instrument of analysis, which helps making explicit the implicit criteria or value judgments which underlie the distribution of rights (13). The more basic counter-argument is that the material side forms an integral part of the right to equality, and indicates a conscious societal choice to constitutionalise certain values that are not already covered by other fundamental rights. This content can be found in the historical and social context in which the right to equality was adopted or is still operating; as Kenneth Karst tersely wrote : "Equality, as an abstraction, may be value-neutral, but the fourteenth amendment is not" (14). It is true that many clearcut cases can be solved in this way : red hair is not an admissible differentiating criterion for tax purposes; the colour of one's skin should not be considered for matters of access to public transportation; social security allowances should not reserved for one language group, etc. Yet, a considerable uncertainty continues to exist on the appropriate interpretation of the equality dictate in a large number of situations.

Because of those two characteristics - the ubiquity of its scope, and the open-endedness of its meaning - equality has a potentially disruptive effect on the legal system. As it is enshrined in most constitutions, it raises

delicate problems as to the respective roles of political and judicial bodies. The remainder of this Chapter will consider the various strategies that exist in order to mitigate this disruptive effect. They can be grouped in two categories : first, the (largely unsuccessful) effort to restrict the scope of the equality principle, by excluding certain domains and norms from its reach (Section 1); and secondly, the groping efforts to establish some 'objective' guiding principles as to the substantive meaning of equality (Section 2). Both analyses will of course be conducted in relation to the specific context of linguistic equality.

Section 1

The Scope of Equality

A. Equality before the Law or Equal Protection of the Laws ?

The first, and very radical, possibility to minimise the scope of the equality principle is to 'formalise' the substantive element within the equality formula, and deprive it of its value content. The substantive element is provided by a preexisting, and unchallengeable,

general rule determining in which cases an equal or a differential treatment is due. Taken in this sense, the principle of equality merely lays down "that we should treat each case in accordance to an antecedently promulgated rule, which we should apply to all cases falling under it, and which thus specifies what features are to count as relevant" (15). The general rule defines certain characteristics with regard to which a certain treatment should take place (e.g. 'speakers of different languages should receive a like treatment in field A, and a different treatment in field B), and the application of the equality principle is then nothing but the purely deductive operation of assessing whether the characteristics of the particular case at hand coincide with those set forth in the general rule (16), the latter being beyond any challenge.

The 'emptiness' of the equality formula is thereby filled in a very modest way : "the grounds for deciding between two persons should be only those laid down by the law, and not legally extraneous ones, whether reasonable grounds of moral sentiment or Natural Law, or unreasonable ones of private caprice" (17). This conception of equality, which is often called equality-before-the-law, has had its historical importance, as it implies the equal subjection of all to common rules, and the abolition of extra-legal

privileges (18). But nowadays, this function is superfluous, and equality-before-the-law, as Kelsen remarks, "has scarcely anything to do with equality any longer. It merely states that the law should be applied as it is meant to be applied. It is the principle of legality or legitimacy which is by nature inherent in every legal order, regardless of whether this order is just or unjust" (19).

The effect of this conception on the role of equality is quite remarkable. Political controversies about the nature of true equality are deliberately kept outside the legal forum. The judge or interpreter cannot, by the use of a substantive value conception, upset the democratic decision of the political organs, embodied in the general rule. All he has to do is to correctly translate the political decision into practice. The consistent set of values served by this restricted vision of equality is well rendered by Marshall's restatement of the prevailing Diceyan doctrine of his country : "Let the Queen-in-Parliament clearly place unequal burdens on one class of subjects compared with another and the subject knows where he stands. If where he stands is uncomfortable or unjust, that is no concern of jurisprudence or judge. It is a part of politics and a task for moral judgment with which legal tribunals should have as little as possible to do" (20). In addition, "the proper response if

one feels that the rule the judge is applying is unjust cannot be to disobey them; it must rather be to go to the legitimate legislative body and pursue one's interest in a different rule" (21).

However, the "traditional model of administrative law that conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases" (22) simply does not correspond to reality. The fiction that all discretionary choices can be made by a democratic legislator has long been abandoned. Due to the 'open texture' of law (23), a general rule is often not clear and self-evident enough to make simple syllogistic deductions from it, to lie the case side by side with the rule in order to see whether the former 'squares' with the latter. This indetermination exists first of all in the reality of administrative activity : in every country now, a fundamental distinction is made between rule-bound and discretionary administrative activity, between 'compétence liée et pouvoir discrétionnaire' (24), between 'attività amministrativa vincolata e discrezionale' (25), between 'gebundene Verwaltung und Ermessensverwaltung' (26). This discretion does not only take the form of some lee-way in the individual application of general rules; it also, very often, means the power, for the administration, to create its own, more

particularised, rule as an intermediate layer between the legislative norm and the individual application. There are even, in some countries, areas of autonomous administrative activity, where no formal legislative guidelines exist (27).

Some activities are entirely rule-bound, such as promotion by seniority, or the delivery of certain welfare benefits; but are there also entirely discretionary areas, in the sense of excluding any judicial review on their operation? This has long been an important issue in the developing administrative systems, all along the 19th century. The prevailing answer nowadays, with some minor exceptions (28), is that no such unfettered discretion exists, and that the judiciary is called to control the use made of executive discretion. On the other hand, one is generally reluctant to go into the merits of the public authorities' policy, and one prefers to adopt a neutral, 'objective' approach. The typical feature of such a 'marginal' control is whether the discretion has been exercised in an impartial manner, without disadvantaging some persons with respect to others; that is, whether the administration, in the absence of a clearcut legislative norm, has established a kind of 'internal' norm which it evenly applies to all individual cases. In indeterminate cases, the rule-applier should consider whether the present case resembles the plain, paradigmatic case

'sufficiently' in 'relevant' aspects (29). But such reasoning by analogy is typically the way in which substantive equality is applied !

This type of review exists in practically every administrative law system. Only in some systems does it explicitly go under the name of equality (30), while it is known elsewhere as the reasonableness doctrine (31), or the (extended) principle of legality (32). I do not need to go into the detail of the various existing doctrines here. What is important for present purposes is that there exists, in every country, a substantive evaluation of the discretionary activity of the executive, based upon some concept of 'impartiality' or 'equal treatment'. Therefore, the concept of 'equality-before-the-law' as a purely formal concept, whose content is predetermined by a general rule, does not correspond to any living reality in contemporary legal systems. The most 'equality before the law' can mean is 'equality below the level of formal legislation': there is still an important restriction in the scope of equality as the legislator himself is entirely free to create the categories he wants without any judicial check; but activities beneath the level of legislation, whether discretionary or not, do not escape a substantive review. The

distinction, in other words, is that between countries with or without judicial review (33).

The introduction of judicial review in an increasing number of countries, has meant a further devastating blow to the formal notion of equality. It implied that not only administrative, but also legislative activity was henceforth bound by the observance of the equality principle. Instead of 'equality before the law', one has to speak of 'equality in the law' or 'equal protection of the laws' (34). True, the introduction of judicial review did not automatically trigger a full-blown substantive scrutiny of legislative choices on the basis of the equality principle. In some places, as in France (35), older traditions of judicial deference have been lingering on for some time. Elsewhere, there have been doctrinal rearward actions to restrict the scope of equality and prevent the imposition of substantive value judgments upon the legislator :

i) Equality has been described, in legal writing, as a 'programmatic' norm, which binds the legislator, but cannot be directly enforced by the constitutional judge. Yet, none of the constitutional courts has accepted such a drastic self-limitation.

ii) Other authors proposed to restrict equality to a formal concept, by merely reading into it a requirement of 'generality' and a prohibition of 'personal laws', singling out their addressees. Apart from the fact that the concept of 'personal law' is difficult to define, this theory has been rejected on its merits in most countries. In Germany, the question of personal laws is dealt with in a different article of the 'Grundgesetz' (art.19.1), and can therefore not serve as a guideline for the interpretation of the principle of equality in art.3 : a law may be in conformity with the principle of equality, but not with that of generality, and vice versa (36). In Italy, the doctrine used to have some influential proponents (37), but has been flatly rejected by the Constitutional Court (38). Similarly, the French Conseil Constitutionnel has upheld a tax law with a differential treatment for 'electricity producers', of which there is in fact only one, the nationalised 'Electricité de France' (39). Personal laws have also been upheld by the United States Supreme Court, despite a constitutional ban on 'bills of attainder' (art.1 para.9) (40). The most one can say is that 'personal' or 'specific' laws are more likely to violate the principle of equality, but certainly not automatically : there are many excellent reasons why the legislator may single out certain persons for specific treatment (41).

iii) Another restrictive interpretation consists in extending the formal concept of equality to the level of the legislator : not only should there be "equal subjection of all classes to a common rule" (42), but there should also be guarantees for the impartiality of the enforcement, such as the principles of natural justice, equal access to the courts, independence of the judiciary (43). Legislation which would fail to ensure those procedural guarantees, and only such legislation, could be struck down by the judiciary. The rule of law, in its contemporary understanding (44), includes in fact such substantive components, but Britain has of course no system of judicial review in order to enforce these obligations on the legislator. On the continent, a similar tradition of distinguishing procedural from substantive requirements does not exist and has therefore never been used as a means to restrict the scope of constitutional equality review, some recent attempts in legal writing notwithstanding (45).

As a conclusion of this sub-section, one can say that the various limitative interpretations of the equality principle have been unable, in the long run, to contain the irruption of a full-blown substantive review. Not only has the will to limitate administrative discretion led everywhere to the imposition of an equality-like standard in the

judicial review of administrative action, but attempts to immunise legislative action from such a substantive reading of equality have similarly failed. The only clear practical limit to the scope of equality is that deriving from the absence of judicial review of the constitutionality of legislation (46). But this is a general limit to the enforcement of all fundamental rights which does not derive from a specific conception of equality itself.

B. Control on Differentiations and Equiparations ?

The Aristotelian definition of distributive justice, by itself, does not establish any priority among its two elements, the like treatment of alike, and the different treatment of unalikes; both are necessary components of the overall principle. Yet, there is no general agreement, in moral and legal theory, to recognise the equivalence of both elements. An alternative vision of the equality principle holds that "all men must be treated alike except when there are relevant differences between them, and the relevance of the supposed differences must be proved by the person or authority responsible for the distinctions under investigation" (47). In other words, there exists a presumption of like treatment, which shifts the burden of

proof to those who want to establish a differentiation. On the judicial level, the presumption could also be used in order to radically narrow down the scope of the equality principle : equiparations (like treatments) would be presumed to be lawful, and escape all judicial review, and only differentiations would be the object of scrutiny as to whether there really exist objective differences justifying the distinction in the case at hand.

I. Before discussing the existence of such a presumption in the various positive constitutional systems, I will first consider, and try to reject, the arguments buttressing this theory.

A first argument in favour of a priority for like treatment is of a moral nature : equal treatment corresponds to a basic moral principle, which is "deeply embedded in modern man" (48), that human beings, notwithstanding all factual differences, are equal at least to one fundamental aspect, their common humanity. This moral principle, it is worth stressing, only characterises 'modern' man, and was quite unknown to former historical periods that frankly established qualitative differences between men, within the 'great chain of beings' (49). The idea of the fundamental equality of all human beings, as introduced by Christian

doctrine (the human 'soul'), was vigorously affirmed, in its secular version, by the Enlightenment (Rousseau's "men are born equal", and Kant's equality of men as rational agents); it is still absolutely dominant in contemporary thought (50), and even the grossest discriminators pay lip-service to it.

The problem, though, is not with the moral validity of the doctrine, but with the possibility of drawing any meaningful legal consequences from it. Can one really derive from this fundamental belief the consequence that "prima facie human beings should be treated alike" (51) ? I would submit, on the contrary, that 'equal concern and respect' has nothing to do with uniform treatment ; "the more anxiously a society tries to secure equal opportunity, the greater will be the differentiation of treatment and the more pronounced certain positive forms of discrimination" (52). A paradox which lies at the heart of all contemporary social policies is that one must take positive actions of differentiations, in order to move closer to the objective of equal respect for all human beings. There is, thus, no clear progression, in moral theory, from the assumption of the equal worth of all men, to a presumption of like treatment in concrete cases.

Another, at first sight more convincing, argument can be found in the logical nature of legal activity. All

rule-making is based on a principle of rationalisation, through which the entropic reality is brought under manageable categories; equalities are actively discovered in a world which, on first view, is nothing but an atomised chaos. This rationalisation is even inherent in the Aristotelian principle itself : "even if we repeat, with Aristotle, that equal things should be treated equally, but unequal things differently, even so we are asserting that justice demands the same treatment for the same difference" (53). The consequences of this view are well expressed by Is.Berlin :

"The assumption is that equality needs no reasons, only inequality does so; that uniformity, regularity, similarity, symmetry (...) need not be specially accounted for, whereas differences, unsystematic behaviour, change in conduct, need explanation, and, as a rule, justification. If I have a cake and there are ten persons among whom I wish to divide it, then if I give exactly one tenth to each, this will not (...) call for justification; whereas if I depart from this principle of equal division I am expected to produce a special reason" (54).

Yet, if one takes the analysis further, one discovers that the precondition for such legal generalisation

is precisely a strongly diversified reality. Indeed, in a uniformised 'primitive' society, there is no need for an equality rule (55). Equality must be seen as a principle disciplining the necessarily existing diversity and division of labour. The question then is : when is the generalisation of the diversified 'life-world' justified, and when is it, on the contrary, an intolerable streamlining of societal plurality ? Within legal activity, generalisation may be the dominant principle, but legal intervention, itself, is but a subsidiary instrument of societal ordering. Equal treatment, when seen in this broader perspective, becomes the exception rather than the rule.

In fact, the principle of generalisation constitutes an interference of the formal aspect of equality with its substantive content. My criticism, then, will be along two lines :

- i) if one treats it as a purely formal concept, it is easily manipulable;
- ii) the formal nature of the rule hides a substantive value judgment which is open to criticism.

That the 'like treatment' formula can be used in rules which could equally well be rendered through the opposed 'different treatment' formula, can be shown by the

following example, mentioned by the Swiss Federal Tribunal (56) : all civil servants are due for retirement at the end of the calendar year in which they have celebrated their 65th birthday. This may, at first sight, seem a rule of equal treatment. But it implies that A, who was born on a January, 1st, works one year longer than B, who was born on a December, 31st. In fact, the Federal Tribunal had no difficulty in calling this rule a differentiation, while strict equality would have commanded the retirement of every civil servant on his 65th birthday. But such 'equal treatment' entails more administrative complication (and less generality !) than the alleged differentiation.

To demonstrate further that the equiparation and differentiation formula are often interchangeable renderings of an identical legal rule, one might consider the hypothetical case of an educational authority having to decide the language of education to be used in a school catering for English- and French-speaking students.

Formulation a) : "All pupils shall be educated in their mother tongue"

Formulation b) : "English-speaking pupils shall be educated in English, and French-speaking pupils in French".

Both rules are identical as to their content; still, on a presumption in favour of equal treatment, the first rule would escape review, and the second not. The conclusion must be that, in order to be meaningful, the priority of the first term of Aristotle's definition cannot be purely formal or semantic, linked to the outward appearance of a rule. It would take only a minimal drafting skill of the rule-maker to escape all equality review on his decisions. Generality, therefore, cannot be used as a purely formal category, but only, in the final outcome, as a substantive value which one could describe as 'uniformity'.

This might be illustrated by the last example. The school authority could enact one of the following two rules :

- a) All children shall be educated in English.
- b) All children shall be educated in their mother tongue.

Both rules are couched in formal terms of like treatment; both are therefore equally general. Yet, their substantive content is obviously different : in the first hypothesis, all pupils will follow a common program; in the second hypothesis, a double set of classes must be established (57). The first can truly be described as uniform treatment, while the second is a differential treatment without formal categorisation.

If uniformity is no longer a formal, but a substantive value, then it must also be justified in substantive terms. The presumption that uniformity should be given precedence over diversity can no longer be based on 'neutral' principles of logic or metaphysics, - it must "derive from particular experience that distinctions between persons are either usually unjustified or sufficiently grave to outweigh the harm of usually doing the opposite" (58). Claims to that effect have a long tradition in political thought; they are very present in the work of Rousseau (59) and his contemporaries, for instance, which is quite understandable in a context marked by the absence of the principle of legality and equal subjection of all to the laws. But the same claims are still frequently made today. In the words of an American author, "human experience strongly suggests that the danger of erroneous discrimination incomparably exceeds the danger of erroneous uniformity. A presumption of equality provides an analytical counterweight to the prejudices of dominant groups, thereby serving a critical political function no other concept can perform as well" (60). The same theme rings in an oft-quoted passage by Justice Jackson in Railway Express Agency v New York (61) :

"(T)here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose

upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that the laws be equal in operation".

In other words, the plight of a minority in society can never be very harsh, if it can live by rules that are common to all.

These arguments are questionable for two reasons. First of all, stressing unilaterally the notion of erroneous discrimination is sometimes self-defeating; and at other times, it constitutes an inadequate response to social reality.

There is, first of all, an amount of ingenuity in the equal treatment presumption. When such a presumption is recognised and enforced by the legal system, would-be discriminators are warned in advance that open distinctions are likely to be struck down, and might therefore try to mask their unaltered discriminatory intention behind facially

neutral norms, which make no classifications at all and seem perfectly uniform. American case-law offers many examples of such 'indirect' discrimination and the way it has puzzled classical equal treatment theorists. An outstanding example is Palmer v Thompson where the decision of the city of Jackson, Mississippi, to close all public swimming pools rather than desegregate them was upheld by the Supreme Court (62); and the problem of 'vote dilution', adressed for the first time in the 1960 Gomillion v Lightfoot judgment (63), and which has remained controversial up to the present (64). In such cases, the presumption of equal treatment undermines the position of the weaker group. It means, at the very least, that they have to carry the burden of proof that the rule, despite its neutral appearance, was motivated by an invidious motive. Sophisticated discriminators are therefore comforted by the very principle which was intended as a weapon against them.

The second objection is of a more fundamental nature. Contrary to the view of Justice Jackson, dominated groups in society do not crave for an uniform treatment in every respect; nor do the dominant groups always prefer to subject the weak or the minority to a different standard; if the rich were sufficiently powerful, one might imagine them having a tax law enacted whereby every person would pay an

equal amount of taxes (uniformity), instead of the present system of progressive taxation (diversity). Or, to quote once more the famous phrase of Anatole France, "the law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread" (65).

As for the speakers of a minority language, their main problem is certainly not excessive differentiation, but rather excessive uniformity. They do not want, admittedly, any distinction in access to parks or swimming pools, or in the entitlement to welfare benefits, but the immediate dangers facing those persons are elsewhere : a uniform school system where all teaching is held in the majority language, a single official language of the courts and administration, one broadcasting network from which their language is excluded.

There are, in fact, two situations in which differential treatment is justified, according to Marshall : "In the one a departure from sameness of treatment is undertaken out of respect for equality, and to restore individuals to some position of comparability with others, which is regarded as having been lost or disturbed. In the other a difference of treatment reflects a deliberate and

justifiable rejection of the claims of equality out of respect for the claims of some other value such as liberty or security" (66). I do not pretend that both forms are easily distinguishable; but that considering any differential treatment a priori as a limitation of equality and therefore in need of special justification, is a one-sided view. It is also true that maximal differentiation (mother-tongue education for all children, television programmes in all languages...) is often utopical and that a uniform norm may in some cases be preferred for reasons of finance or convenience. The only point I want to make here is that, from a moral point of view, the presumption of equal treatment is unjustified. This is particularly clear in matters of linguistic equality but also holds in other fields. There has been in recent years a kind of paradigmatic shift whereby minorities of all kinds tend to stress their need for identity rather than their aspiration to assimilation (67). Thus, the dominant issue in racial policy nowadays is whether 'affirmative action', that is, preferential treatment of the racial minorities, is justified (68). And even in the case of sexual equality, the dominant assimilation model is currently under attack (69).

A final argument in favour of the presumption of equal treatment is that control on differentiations better

fits the judicial role than the opposed operation; there would be inherent institutional limits for judicial bodies to engage in review of equiparations. In fact, as I will try to show, the judicial approach in both cases is not that different at all.

When a court finds that a rule makes an undue differentiation (that it is, in other words, 'under-inclusive' (70)), it can either act in a negative way, by invalidating the regulation partially or entirely, or act positively and order the restoration of equal treatment by extending the benefit or burden to the classes which were wrongly excluded. Conversely, when a court is faced with an unlawful equal treatment (or over-inclusive classification (71)), it can again either strike down the rule (or exempt the wrongly included group from it), or indicate itself the proper alternative way in which this group should be treated. In both cases, the first, negative, alternative is most respectful of the legislator's prerogatives : the court merely declares that the law, as it stands, is not in conformity with the equality principle, but does not preempt the options offered to the legislator for remedying to this situation. Most European courts have adopted this view (72), which is not so negative after all : indeed, "giving precise reasons for invalidating a statutory provision is essentially

no different from suggesting an appropriate form of replacement" (73). Anyway, there is strictly no distinction between reviewing equiparations or differentiations in this respect.

Strong reasons push the courts towards more 'activist' stances, however. The interest of a plaintiff often does not lie in obtaining the withdrawal of rights from others (which would only be a pyrrhic victory), but rather the amendment of the rule in a sense which is more consonant with his interests. Also for other reasons, the mere annulment of a norm may render the legal situation even more objectionable than before. American court decisions, in particular, have not been wary of ordering the extension of underinclusive legislative classifications (74), even if this entailed increased governmental spending, and even beyond what was authorised by the budget. The dominant attitude in legal writing seems to be that "the courts act legitimately (...) when they employ common sense and sound judgment to preserve a law by moderate extension where tearing it down would be far more destructive of the legislature's will" (75). In Italy too, there have been examples of the Constitutional Court pronouncing a so-called 'accoglimento additivo', i.e. ordering the extension of an existing measure to persons originally not covered by it (76).

Again however, the argument that courts should not positively 'legislate', especially if their decision entails financial consequences, holds either in the case of an extension of rule A to a new category of persons, or in the case of the formulation of a new rule B for persons wrongly included under rule A. The difference existing between two cases does not lie in the 'positive' or 'activist' nature of the court's decision, but in the specific content of the remedy : in the first case, the remedy is pre-determined by the existing rule (which is merely extended on the same terms to other persons), while in the second rule, no such model exists, and the court itself has to fashion the proper remedy by constructing the alternative rule B. But even this difference is not so absolute. The typical 'positive' remedy claimed in linguistic litigation is that the linguistic minority be granted what the majority already has : the teaching of courses in language B like in language A, having the public administration address itself to the speakers of language B in their own language, as it already does with the speakers of A, etc.. In other words, one claims the establishment of a differentiation, whose content is nevertheless closely based on an existing norm.

The delicate issue of the proper balance between the legislator and the judiciary in the implementation of the

equality principle will be taken up again in the next section, in the concrete context of the various constitutional systems. For present purposes, however, one can conclude that judicial control on equiparations requires an only marginally higher measure of judicial creativity than control on differentiations, and that the separation of powers argument is therefore not prohibitive against the former type of judicial action.

2. After this theoretical rejection of the presumption of equal treatment, there remains to be seen how this doctrine has been treated in the constitutional practice of the various states. As far as I can see, there is only one country, France, where equiparations escape all judicial review, at least according to the case law of the 'Conseil d'Etat'. This body holds that the existence of differences in fact does not require a differential treatment by the administration; the decision to establish or not a differential regime in such cases is a discretionary matter (78). Some authors have taken the view that the 'Conseil Constitutionnel' follows the same lines, as far as legislation is concerned (79). Its standard formula, indeed, is that "the principle of equality only imposes to treat equally similar situations but does not prohibit a different

treatment for dissimilar situations" (80). Yet, the use of this unilateral formula does not exclude the possibility that differential treatment might also be imposed under certain circumstances; it can be explained by the fact that the equality case law of the Council is not yet very rich - compared to other constitutional courts - and that issues of wrongful equiparations have not yet been raised. In view of its general activism, it seems doubtful whether the Constitutional Council would, if such a case arose, adopt the same deferential views as the Council of State.

In the other countries, there is generally a long line of pronouncements of the supreme courts interpreting the general equality clause according to the Aristotelian formula (81), and specific examples will be quoted in the next section (82). The only delicate issue, in some of those countries, is whether this general interpretation of equality also applies to the specific case of linguistic equality. Indeed, many constitutional provisions on equality specifically mention certain criteria of classification, among which one often finds race, sex and religion. Language is also among those specially protected grounds in a few Constitutions (art.3 of the Italian Constitution, art.3.III of the German Basic Law, and also art.5.2 of the Greek Constitution)(83).

What is now the role of those enumerations ? They, first of all, constitute a recognition of the fact that these characteristics, more than any others, have been extensively used throughout history in order to subject certain groups to an inferior status; they remind the legislator and all other authorities of this historical fact and warn him for any new attempt in this direction. But usually, one also tends to find in those enumerations a distinctive legal meaning, implying a reduction of the scope of judicial discretion in the application of the equality clause. The most radical theory is that the use of any of those enumerated grounds as criteria for classification is prohibited, and brings about an automatic violation of the equality principle. Conversely, of course, the like treatment of persons belonging to the enumerated groups can never be unlawful. The theory is based on the, extremely bold, assumption that a valid or justifiable reason to make a distinction between persons on those grounds can never be found, and those distinctions always have the intention or effect of harming the groups thus defined.

As has been argued before (84), this argument is untenable. Even the most 'colour-blind' person might accept the selection of a person with black skin for the role of Othello. It should therefore not come as a surprise that

doctrinal constructions of unconditionally prohibited grounds have quickly been shattered by case-law, and the reality of life situations revealed by it. This has brought about, among some German and Italian authors, a certain doctrinal schizophrenia : they still refer to the list of grounds as 'Differenzierungsverbote' (85), or 'divieti di differenziazione' (86), while acknowledging, afterwards, that constitutional case-law has shown the not so absolute character of those prohibitions.

Moreover, this attenuation of outright prohibitions into mere 'presumptions of unconstitutionality' has occurred in cases which can hardly be called extreme. The criterion of 'sex' has posed particular problems to the constitutional judges : while alleging its general irrelevance, the Italian Constitutional Court felt nevertheless able to uphold legislation providing that a criminal jury should not be composed of a majority of women (87), as well as a statute making only female adultery a criminal offence (88). The German Constitutional Court has similarly been skating on thin ice when upholding a statute criminalising male, but not female, homosexuality, because in this case, "the biological differences between the sexes so decisively shape the subject matter that similarities between them entirely recede" (89).

With these precedents in mind, the claim of the 'Bundesverfassungsgericht' that the enumerated grounds can "concretise the general equality rule and put firm limits to the discretion of the legislator" (90), sounds as little more than deceptive rhetoric. In theory, there is, in German constitutional law, a presumption in favour of the equal treatment of persons speaking different languages and against their differential treatment, but one wonders whether it makes a difference in concrete cases (91). In Italy, the whole theory is on the verge of being abandoned. A recent, authoritative account of the Court's case law argues that art.3 should be read as prohibiting only arbitrary distinctions on the basis of sex, language, etc (92), and this means nothing else than the application of the ordinary equality test (93). Besides, the existence of article 6 of the Constitution, imposing special measures for the protection of linguistic minorities, neutralises the possible inhibiting effect of art.3 as far as language is concerned (94).

Section 2

The Meaning of Equality

A. General Remarks

The conclusion of the foregoing section is that the scope of equality is practically all-encompassing. In countries with judicial review, the constitutional adjudicator has the power to control an unlimited number of legislative rules on their conformity with the principle of equality; more than a 'law-maker', which he undoubtedly is, he could become a sort of 'appeal legislator', not just in a limited number of domains specifically protected by substantive fundamental rights, such as freedom of expression or the right to education, but across the board. And indeed, in all systems of constitutional review, equality has effectively proved to be the provision most frequently invoked and applied by the courts (1). This raises in all its acuteness the 'mighty problem of judicial review' and its alleged counter-majoritarian nature (2).

Now, it is generally agreed that "in its role of institutional guarantor of fundamental rights, a court cannot

allow itself to become a forum for resolving the grievances of factions that have lost out in the ordinary political process. Such a role would duplicate the legislative function, would drastically affect the court's work load, and most importantly, would be anti-democratic" (3). The only way out, if one cannot restrict the scope of equality, is to develop some principled standards as regards the substantive meaning of equality. In fact, the standards used by the courts in the various countries are strikingly similar : they all refer to a notion of legislative rationality (4) or - its negative counterpart - non-arbitrariness (5). This means that the judge will only control the reasonableness and not the inherent justness of a legislative choice, leaving thereby to the political bodies a considerable margin of discretion. Taken in the abstract, the concept of 'rationality' is nothing more than this statement of judicial self-restraint, but has no substantive meaning. Yet, as mentioned above (6), the consideration of the particular context of the given case may make rationality judgments more feasible : the usual standard of review becomes whether the classification (or absence of classification) in a particular rule is rationally related to the legislative object.

To assess this relationship, two different interpretative methods are currently used. The first method

is purpose-oriented, and analyses the 'legislative object' as the purpose which the legislator sought to achieve; the second is situation-oriented, and analyses the object as the life-situation which is to be regulated. In fact, the terminology may be misleading; in many cases, what goes under the name of 'purpose' does not indicate the real purpose which the rule-maker sought to achieve, but the objective purpose as reconstructed by the judge without referring to the actual state of mind of those who enacted the rule. A good example of such a semantic shift is provided by a decision of the French 'Conseil Constitutionnel' (7). The object of scrutiny was a Bill reforming the labour courts in France, which gave to the employers, in the designation of their representatives in the courts, weighted votes according to the number of personnel employed. The Constitutional Council held that

"In relation to the designation of members of a court, the fact that some electors employ a greater number of workers than others is no reason why the former should be given weighted votes; because this differentiation is incompatible with the objectives of an election which is intended solely to designate the members of a court and which has no connection with circumstances that may have preceded such designation."

The Council, although using 'purpose' language, does not inquire which was the real motive inspiring the legislator, but authoritatively decides that the proper purpose of enacting a law of this kind should be to constitute an impartial bench for adjudicating labour disputes; accordingly, a distinction on the basis of the dimension of the enterprises was not rationally related to the law's 'constructed' purpose, and was struck down. This method of interpretation is even more clearly illustrated by the use of the notion of 'intéret général' as the overall principle of equality review (8) : here, the 'objective' or 'reconstructed' nature of the 'purpose' is very obvious.

The real distinction in methods of equality review is therefore between subjective rationality (rational as 'purposeful and sensible action') and objective rationality (rational as 'conformable to a certain context or order of things'). The European courts all tend to use the second method, whether they cloth it in the language of purposes, as do the French, but also the Italian, Spanish or Belgian courts (9), or use the situation-oriented language of intrinsic comparability and 'nature of things' as do the German, Swiss or Austrian courts (10). In both cases, the process is the same : the court first defines what is, in its eyes, the object or life situation which the law regulates

(e.g. voting, taxation, constitution of a jury....) and then considers whether the classification (or absence of classification) in issue is rationally related to this object (11). Thus, to give just one example, the Italian Constitutional Court found that gender differences are rationally related to selection in a jury (12), but not to teaching in a nursery school (13).

In the United States on the contrary, the purpose-oriented inquiry is predominantly used in its original, subjective sense : the courts try to discover what the legislature or administration had in mind in making a certain classification. When this classification is not related to the purpose discovered, or when the purpose is illegitimate by itself (e.g. there is ample evidence of the intent to discriminate against a racial minority), then there is a violation of the principle of equality. On first view, this might appear as a more principled approach to equality review as the courts leave the determination of public policy and social goals to the elected representatives. However, as has often been noted by American commentators, assessing the true aims of the legislator can be an extremely difficult hermeneutic enterprise (14). The clearest and uncontroversial goal of a given distinction is precisely that of distinguishing between the persons involved : a rule

excluding persons speaking language A from a certain benefit has the aim of excluding those persons. Of course, such tautological reasoning makes purpose inquiry utterly meaningless. One must therefore look for some more encompassing goal. Here, however, one enters into the domain of speculation. Seldom, if ever, is such a general purpose clearly articulated in the text of the norm, or even in the minds of the rule-makers. Therefore, American courts often reconstruct the purpose from the context of the law (15), moving thereby a long way towards European-style 'objective rationality' review.

But if the courts autonomously construe the context in which the equal or unequal treatment is made, then they can also easily manipulate it in order to fit an underlying value judgment or desired outcome. An American comment even said that "in every case in which the Court has construed a statutory goal in such a way that the statutory classification could be found to be not rationally related to the legislative purpose, it would have been equally possible to define the purpose so that the statute could have been found rational" (16). Of course, one can construct hypothetical examples in which the classification cannot correspond to any intelligible purpose (e.g. a law taxing bald butchers (17)), but those are rare occurrences in case

practice. In the great majority of equality litigation cases, "the decisive question is how courts formulate the legislative purpose against which the rationality of the statutory classification is to be tested" (18). One important variable here is the level of abstraction at which the purpose is set; the narrower one defines the overall purpose of a regulation, the more chances a distinction has to survive scrutiny (19).

If the American 'subjective' test leaves so much discretion to the law enforcing bodies, the same holds a fortiori for the European 'objective' test which does not even constrain the judge in seeking the effective aim pursued by the rule-maker. Examples of this 'flexibility' of objective rationality control will be given further on, in the specific context of linguistic equality. Here, I will consider the theoretical remedies one has tried to elaborate in order to restrict this margin of judicial discretion. A principle which has strongly been emphasized, especially by the German and, more recently, the Italian Constitutional Court is that of system rationality. As the latter Court said in a recent judgment :

"In the name of equality, this Court (...) is not entitled to make choices that are of the exclusive competence of the legislator, but may only reconduct the

unjustified derogations and arbitrary exceptions to the rules established by the law or to the general principles that can unequivocally derived from the legal order as a whole" (20).

The discretion inherent in the assessment whether a given classification (or absence of classification) is adequate with regard to the legislative object, is reduced by considering whether the legislator has established comparable differentiations in comparable situations (21). Thus, in order to assess whether the criterion has been validly used in a given case, the judge must determine first of all within which system or 'life sphere' the comparison should take place (22). Indeed, one should not extrapolate from one system to another; as argued earlier on, there is not a single criterion of classification which may not be justified for some purposes. A typical example of such 'system rationality' analysis is provided by an early decision of the German Constitutional Court holding that the profession of midwife belonged to a different life sphere ('Lebensbereich') than that of doctor, and that differentiated age limits for the exercise of those professions are therefore justified (23).

The German and Italian Constitutional Court have often recurred to such an approach and several commentators

have analysed it as the dominant mode of equality review (24). Yet, this attractive (and modish) systematic approach conceals a number of dangers. First of all, it is often falsely objective. Discovering an autonomous system within the overall legal or societal order (or, if one prefers, a sub-system within the global system) is an a posteriori interpretative exercise which usually does not correspond to a clearly manifested intention of those who built the system. There are, of course, cases in which the legislator has set some general guidelines in a framework law, to be implemented in particular laws. But apart from this hypothesis, a 'system' is often not clearly visible, and the court can be tempted to smuggle in its own value judgments under the cover of a 'neutral' construction (25). Secondly, the method can be undemocratic. Even if one accepts that the courts are equipped to make the artificial reconstruction of a systematic design in the legislator's initiatives, why should the legislator not be allowed to derogate from it? As a control on administrative acts, such a systemic analysis (in the form, e.g., of the rule 'patere legem quem ipse fecisti') is justified and widely used. But, when applied to legislative norms, it is bound to lead to a "bureaucratisation of politics" (26); existing legislation becomes a constitutional parameter for future legislation, and political change is thereby inhibited.

The courts acknowledge these facts, and allow for exceptions to systematic rationality. The Austrian Constitutional Court characteristically said :

"The legislator is not prevented, within a legal ordering system he has created, to regulate certain points in a non-systematic way, when this is justified by objective grounds. One cannot read in the equality clause, and the Constitutional Court can therefore not impose, a duty for the legislator to refrain from making an exception which appears necessary for the only reason that it does not correspond to the legal ordering system" (27).

This appears very reasonable, and is accepted by the German and Italian courts as well (28). Yet, the promise of a 'neutral' standard of review through the use of systems analysis is likely to get lost, if exceptions are permitted. Instead of a formal reasoning of analogy -promised by the systems approach- one is referred back to some substantive value judgment.

This value judgment, however, needs not be an act of pure judicial discretion, with self-restraint as only limiting device. Indeed, the courts can recur to a different, hierarchical (or Kelsenian) system rationality by checking

whether the classification adopted is in conformity with the highest principles of the legal order, expressed above all in the Constitution. The argument that earlier legislation blocks future legislation does not hold here; the constitutional norm is hierarchically binding on all legislators.

Three categories of constitutional norms can conceivably play this role of providing values which facilitate the interpretative task of the courts in equality litigation. First of all, there are the (other) fundamental rights contained in the Constitution. On first blush, they cannot easily be combined with the equality principle; a measure may violate equality or an other fundamental right, but not both at the same time. For instance, a governmental measure encroaching upon some fundamental right of person A, but not of person B will be quashed for violation of that particular fundamental right, and not of the equality principle. If every infringement of constitutional rights which disproportionately affects some persons would be covered by the equality principle, then the other fundamental rights provisions of the Constitution would hardly have a role to play. To take only one example which has been discussed earlier (29) : the prohibition, in Alsace, to publish a newspaper written entirely in another than the

French language, implies a discrimination (German-speakers being treated less favourably than French-speakers, and than members of linguistic minorities elsewhere in France), but in constitutional terms, there is (or can be) a direct violation of freedom of expression which does not involve the equality principle.

Nevertheless, as mentioned earlier, a number of governmental measures regulate the exercise of fundamental rights, without violating the right itself; they are either justifiable restrictions on the right, or contributions to its effective exercise. Yet, if this regulation disproportionately affects or favours some persons, an issue of equality arises, which commands special attention of the courts because of the importance of the interests at stake (30).

Secondly, recourse may be had to objective or institutional norms of the Constitution. Many norms that do not protect an individual entitlement contain nevertheless a substantive value judgment which can help deciding an equality case. If, for instance, the Constitution contains the rule "no taxation without representation", then a statute exempting a particular category of public authorities from having its taxes adopted by a representative body, could be

struck down as a violation of equality. In this manner, equality acts as a procedural instrument through which the Constitution in its entirety can be made a parameter of judicial review. The so-called 'fundamental rights' strand in the equality doctrine of the United States Supreme Court is a variation of this hypothesis : certain rights, that are not explicitly entrenched as constitutional rights, are nevertheless so basic for the functioning of the entire constitutional fabric that distinctions in their enjoyment are inherently suspect. An equal vote, an equal treatment of citizens of other states, have thus been made the object of heightened judicial scrutiny (31).

The third type of constitutional value-judgment is that offered by the existence of specifications of the general equality clause. As we saw in the preceding section, several European constitutions list a number of 'suspect' grounds specifying the general principle of equality such as sex, race, and -in some cases- language (32). They do not help, as has been shown, to restrict the scope of equality clause, but they might perhaps impose a special standard of judicial review. Yet, in several countries, like Italy and Austria, this is not the case, and classifications based on the enumerated grounds do not trigger a special mode of equality review (33). Among the countries where language is

among the listed grounds, only Germany seems to attach special consequences to this fact : differential treatments based on those grounds are prima facie unconstitutional, but this presumption is rebuttable (34).

Particular embodiments of the general equality rule can not only be found in one and the same article of the Constitution, but also in other provisions. In our case, those other provisions are even more important : as will be argued further on, the Italian, Spanish, Austrian, and Finnish Constitutions give clear guidelines that linguistic equality should be interpreted in a 'pluralistic' sense (35).

The Fourteenth Amendment to the United States Constitution, on the other hand, guarantees equal treatment in the most abstract terms. Yet, the Supreme Court and legal writing have also developed a theory of suspect classifications, which call for a stricter judicial scrutiny. The genesis of this doctrine lies in the famous footnote n.4 of Justice Stone in the Carolene Products case of 1938 :

"prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call

for a correspondingly more searching judicial inquiry" (36).

The Supreme Court, as a whole, adopted the test in Korematsu v the United States in 1944. During the World War, more than 100.000 persons of Japanese origin living on the West Coast where subjected to a certain number of measures ranging from relocation to prolonged confinement in camps. The Supreme Court held, that while the regulation affected a distinctive racial group, it should be considered as inherently suspect and commanding a special judicial scrutiny (37). Later on, the reasoning was extended from race to other criteria which have been described by the Supreme court as follows :

"an immutable characteristic determined solely by accident of birth, or a class saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a political powerlessness as to command extraordinary protection from the majoritarian political process" (38).

Language groups, in se, do not seem to be covered, but some of them, and above all the large Hispanic group, certainly conform to this picture of a 'discrete and insular minority' (39).

When such powerless minorities are involved, the

standard of equality review becomes the following : the end must not merely be legitimate, but must present a 'compelling state interest'; the means must not merely be rationally related to the end, but must be necessary for achieving it. Yet, it has been argued that the 'suspect classification' test has lost much of the bite it might have had. Indeed, the greatest danger for 'powerless minorities' nowadays stem from indirect discrimination, that is, facially 'neutral' regulations which have a discriminatory effect on those minorities. Now, the insistence, in recent Supreme Court decisions, on the necessity to prove a discriminatory purpose of the legislator makes such indirect discriminations vary difficult to challenge (40).

In the rest of this section, I will try to apply the general principles of interpretation presented above, to the specific issue dealt with in this study, and see how the various constitutional systems have handled linguistic equality. I will separately consider the three categories of linguistic equality outlined earlier on : non-discrimination, pluralistic equality, and affirmative equality (41).

B. Non-Discrimination

The basic principle, as stated above, is that the use or knowledge of a certain language is a legitimate criterion for distinguishing among persons only when the specific context or object of regulation so warrants. Some cases can easily be solved in this way : the language criterion is obviously rational when it comes to selecting the personnel of an administrative service which has to use a given language : in unilingual settings, civil servants must of course be able to use the official language. And the same holds for jobs in the private sector where a certain linguistic skill forms an inherent part of the job description (most obviously, in the case of an interpreter or translator).

In other cases, a linguistic differentiation is clearly arbitrary, as in the Austrian Law on the Assistance to Victims ('Opferfuersorgegesetz') which reserved its benefits to German-speakers; the Court had no difficulty in finding that there is no objective relationship between the language one speaks and the entitlement to war damages (42).

Often, it is not so easy to tell whether language is a relevant factor to take into account. A very

controversial domain is that of plurilingual administrative services, i.e. services using more than one language in their normal operation. Is the knowledge of one of those languages a legitimate requirement or condition for employment or promotion ?

In two very recent cases, the Spanish 'Tribunal Supremo' (the highest 'non-constitutional' court) annulled decisions of the Guipuzcoa and Alava provincial governments regulating the regime of examinations for access to the provincial services and attributing extra points to candidates showing a knowledge of Euskera (the Basque language) (43). The Court considered the litigious measures as linguistic discriminations, "restricting the right of access to public functions for those Spanish citizens who do not speak Euskera" (44). In interpreting the equality principle, the court recurred to 'higher' constitutional principles, along the lines described above. The 'super-norm' to which the Court refers is article 3, first sentence, of the Constitution, declaring Castillian to be the country's official language and recognising to every citizen the right to use it. A norm which has a negative impact on Castillian speakers is therefore contrary to the equality principle, as interpreted in connection with art.3.

The arbitrariness in choosing, and construing a constitutional principle for the purposes of equality review is very clear here. Indeed, the Court could as well have referred to the second sentence of the same art.3, stating that the "other Spanish languages will also be official in accordance with the Statutes of the respective Autonomous Communities". On the basis of this constitutional norm, the Basque Statute has provided, in its art.6.1, for the co-officiality of Castillian and Euskera within the Basque Community, including the right for the citizens to use any of these two languages in dealing with the public administration (45). But, if, as the 'Tribunal Supremo' has ordered, no weight may be attributed, in the selection of civil servants, to knowledge of Euskera, then the right of all citizens to address themselves to the public administration either in Castillian or in Euskera is in jeopardy. In fact, the right to use a certain language (be it Castillian in art.3 of the Constitution or Euskera in art.6 of the Statute) is only a right of the citizen and implies a duty of the civil servant (46). Only outside his professional duty is the latter also a citizen with the right to speak Castillian (or Basque); in the exercise of his function, he must adapt himself to the wishes of the users of the service. Therefore, I would argue that the advantage given, in the examination rules, to persons speaking Euskera, is rationally justified by the

objective needs of a bilingual administration, and is not in contrast with any constitutional norm. The Spanish Constitutional Tribunal (which has final authority on the interpretation of the Constitution) also held, in a 1983 judgment, that a linguistic bonus is a perfectly legitimate consequence of the citizen's right to use the official language of his choice. Yet, the Tribunal added in the same breath that making the knowledge of both official languages of the Autonomous Community an absolute requirement (instead of a mere bonus) would be unconstitutional. Only the administration as a whole should be bilingual, and not every single member of it (47).

Yet, this more radical alternative for ensuring an adequate linguistic performance of the administration, is used in other places. In the local administration of the bilingual language area of Brussels, every civil servant must be able to address himself to the users in each of the area's two official languages, French or Dutch (48). In the Val d'Aosta region, article 38 of the Statute prescribes that the State administration may only consist of "civil servants originating from the Region or knowing the French language". As all Valdostans (due, in part, to the educational system (49)) are supposed to be bilingual, this clause implies in fact a general requirement of knowledge of both official

languages. This statutory provision has however been satisfactory implemented only in 1978 (50). The same condition of bilingualism is imposed to the civil servants working in the province of Bolzano (South Tyrol) (51). In a recent judgment, the Italian Constitutional Court has taken the opposite view from its Spanish counterpart and explicitly held that a regime of official bilingualism imposes on every single civil servant the duty to speak both languages (52). The Court held found that the measure does not discriminate between Italian- and German-speakers (both are concerned by the condition of bilingualism) and aims on the contrary at guaranteeing an effective equal treatment (53).

Ireland has been moving from the 'strong' to the 'weak' regime. Irish is no longer, what it used to be, a compulsory requirement for entrance or promotion in the civil service. Knowledge of Irish is only imposed when it is essential for the performance of the duties of a specific post. But proficiency in both languages remains of course a special credit in selection matters (54). The system was considered as perfectly legitimate in a recent dictum of a Supreme Court judge :

"It is incontestable that under a Constitution which recognises Irish as the first official language (Article 8) and which empowers the State in its enactments to

have due regard to differences of capacity, physical and moral, and of social function (Article 40.1), a law may provide that proficiency in Irish is relevant to the discharge of the duties of that office" (55).

In contrast with such requirements of linguistic competence, there is also an entirely different criterion of linguistic differentiation in the access to civil service, namely membership of a language group. The prime objective of such a system of 'linguistic proportionality' is not so much that of enabling the administration to perform its linguistic tasks, but that of ensuring an adequate representation of the language groups in public administration. Thus, every department of the Belgian central administration is made up of a number of unilingual services, for which knowledge of French and Dutch is not required (except for the higher hierarchical levels); instead, one selects roughly equal numbers of members of the Dutch and French language group to staff those services (56). Similarly, the posts of civil servants in the province of Bolzano (South Tyrol), are attributed to members of the Italian, German and Ladin language groups in proportion to the numerical importance of those groups within the province (57).

In Belgium, the group equality is only approximate; the proportion attributed to French- and Dutch-speakers is based on a political compromise, and does not correspond to the effective number of members of the two linguistic groups, which, by the way, can no longer be assessed because of the absence of a linguistic census (58). In Bolzano, the distribution is far more objective, as the consistency of each of the three linguistic groups is reassessed in every decennial official census (59). Yet, several problematical aspects are involved here. At the time the proportional system was adopted, the Italian group was grossly overrepresented in the civil service : 20% of the Italian population was employed by the government, against only 6.2% of the German-speakers (60). Therefore, the adjustment of the existing situation to the new rule required a temporary over-recruitment of German-speakers, which was resented by the Italian group. As for the Ladin minority, its small dimension makes the application of the proportionality rule problematic. As they constitute only 4% of the provincial population, a given public service must be formed of at least 25 persons before a Ladin has the right to be selected; they tend also, and for the same reason, to be excluded from the highest level of the administrative hierarchy (61). A Presidential Decree of 1981 has offered a partial remedy by

allowing for the pooling of various public services in order to attain the 1/25 quota (62).

The justification of such regimes of linguistic proportionality in terms of equal treatment is less evident than in the cases discussed before : if one considers the specific object of regulation to be : 'ensuring a functionally adequate civil service capable of dealing with the citizens in each of the official languages', then the system of proportional representation may appear discriminatory : in the particular case, the better candidate (who, among other qualities, speaks both official languages) may be passed over because he belongs to the 'wrong' language group.

The justification generally offered is that group equality takes precedence over individual equality. This is generally the line taken by Belgian legal writing and the Council of State, who has consistently upheld appointments in which there was a linguistic balancing (63). Now, the concept of group equality, as such, is not constitutionally entrenched. Therefore, it cannot simply be used to overrule individual equality, which is the only form provided by the Constitution. The ultimate justification, therefore, has to be that effective individual equality requires such a

recourse to group considerations. Two arguments could be advanced in support of this thesis.

The first argument is that the proportional system makes the representation of the language groups independent of the existence of bilingual skills within the group. Indeed, where language competence is the only requirement, the administration could be flooded with members of one of the language groups, who happens to count more bilinguals. Thus, in the Belgian case, requiring only proficiency in both official languages would almost certainly lead to a disproportionate selection of Dutch-speakers. The criterion of linguistic membership achieves the same purpose as that of linguistic skills; the means employed are not more discriminatory, and perhaps less, as nobody is forced to be bilingual (64). Note however that this argument may hold for the Belgian central administration, but not in the case of Brussels and South Tyrol, where language competence and linguistic membership are cumulative conditions.

In these cases, one can only use the second argument : that the equal treatment of the members of the various linguistic groups implies not only a right to address themselves to the administration in their language, but also a guarantee that their interests will be impartially considered through a fair representation of members of their group within the

administration (65). This presupposes a situation of ethno-linguistic animosity, in which one can fear an invidious treatment, by the officials, of members of the other language group. The same argument that an adequate representation of minority groups in public bodies may be necessary for guaranteeing an equal treatment of their individual members, has been used in a number of jury selection cases in the United States (66).

The use of language qualifications in the sector of private employment does not automatically raise the constitutional issue of equality. Indeed, the leading constitutional doctrine in most countries holds that fundamental rights have no direct 'horizontal' effect : they only constrain acts of the public authorities, but not also private relations (67). Equal treatment standards can only be made to bear on the private sector in an indirect way, through the intermediary of a legislative act. Equal treatment can thus be statutorily imposed in two different ways : through a general clause of 'public order' or 'good faith' governing contractual relationships, or through acts specifically aimed at combatting discrimination. There have, recently, been a spate of such legislative acts imposing respect of non-discrimination principles by private persons, and particularly private employers. However, they do not

contain a general principle of equality, but restrict themselves to certain selected grounds of discrimination, such as race or sex. A random sample of such laws includes : Title VII of the Civil Rights Act of 1964 in the United States, which is a comprehensive prohibition of private acts of employment discrimination (68), the Race and Sex Discrimination Acts in the United Kingdom (69), arts. 15 and 16 of the Statuto dei Lavoratori in Italy (70), art.611a of the German Civil Code imposing the equal treatment of men and women in labour relations (71), the Dutch Acts making racial discrimination a criminal offence (72), art.416.3 of the French Code Pénal punishing discrimination in job recruitment and in labour relations, if based on gender, family situation, ethnic, national, racial or religious characteristics (73).

Language, as such, is nowhere among the protected grounds. Yet, language use correlates rather closely to other characteristics such as race, ethnic or national origin, and may therefore be employed as a substitute for one of the forbidden grounds. This concept of indirect discrimination is widely used in equality litigation in the United States (74), but only slowly penetrates in Europe (75).

In addition, a ban on linguistic discrimination in private relations is contained in international instruments, which have, in certain countries, the status of 'higher law'. Provisions to that effect in the Convention against Racial Discrimination will be examined in the next Chapter (76).

If employment (whether public or private) is certainly the main field in which language discriminations may occur, there are also other domains where the relevance of linguistic differentiations has been challenged. In the United States, the right to vote has been (and still is) made dependent in many States on English literacy tests. Such tests were "originally formulated as an indirect but effective means of achieving discrimination on the basis of race, creed or color" (77), but had nevertheless been upheld by the Supreme Court in the Lassiter case of 1959 (78). The underlying rationale seems to be that language competence is rationally related to voting, because voting requires an adequate information of issues and standpoints of the candidates, which persons not conversant in the national language cannot possess. Some doubts have been cast on this reasoning in a dictum of a later Supreme Court case, Katzenbach v. Morgan (79), and it was completely rejected by the California Supreme Court decision of 1970, Castro v State of California; here, the court held that conditioning the

right to vote upon an ability to read the English language was, as applied to persons literate in Spanish but non in English, unconstitutional as violative of the equal protection clause; the Court argued that "because of the availability of sources for translation, the Spanish speaker is in a position to be aware of political issues, and thus capable of exercising the franchise in as competent a manner as any citizen" (80).

A similar link between language skills and the granting of a certain franchise or benefit is made in some countries, who make the knowledge of the national language a prerequisite for naturalisation. Such conditions exist in many Third World, but also in some Western countries. In the United States, section 304 of the Nationality Act holds that

"No person (...) shall be naturalized as a citizen of the United States upon his own petition who cannot demonstrate

(1) an understanding of the English language, including an ability to read, write and speak words in ordinary usage in the English language (...)".

Article 69 of the Code de la Nationalité française also holds that "no one can be naturalised if he does not justify his assimilation to the French community, notably by a sufficient

knowledge, depending on his condition, of the French language" (81).

It is true that language skills are generally a fair indication of a person's integration in his country of residence. But as naturalisation decisions normally leave already a considerable margin of discretion to the legislator or administration (depending on the countries), one does not see the need for expressly enacting such linguistic requirements.

A final domain that could be mentioned is that of positive state interventions in the field of fundamental rights. 'Negative' rights like freedom of expression or freedom of education, as we have seen, do not impose generally a positive contribution from the side of the public authorities. If, however, the state chooses to intervene in order to make those rights more meaningful, it must do so in a non-discriminatory manner. Otherwise, as has correctly been said, the government "could buy unanimous support for orthodox opinions" (82); by stimulating, financially or otherwise, one language group, it could jeopardise the rights of other groups. One example of a discrimination in this field is the Dutch system of direct aids to the press. Temporary financial aids can be granted by the Government to

press organs in difficulty, but only to those written in the Dutch language (83). In Belgium, aids to the press are divided along linguistic lines, and such a proportional system raises the same issues as in access to public administration (84).

C. Pluralistic Equality

According to many authors, the principle of equality is not very useful for language minorities. What such groups need are specific, 'positive' rights, which go beyond the non-discriminatory application of rights attributed to all (85). This, however, is a reductionist view of equality. As Koopmans notes, equality is "the freedom to be different without being disfavoured by the law for that reason" (86). Now, in the case of linguistic diversity, the right to be different is not guaranteed by systematic identical treatment, but by a treatment by analogy (87). If, for instance, only one medium of instruction is used in a country's educational system, then pupils with a different mother tongue are clearly disadvantaged; and the same holds in all other domains of public life, ranging from broadcasting to public administration. What linguistic

minorities claim are special measures, whose purpose is not to grant them a preferential treatment, but to grant them what the majority group already has, the normal use of its language throughout public life. Therefore, special measures are not equivalent, as is so often said, with 'favouritism' or 'affirmative action', which must be considered as still another type of equality. On the other hand, it is also clear that ensuring a perfect 'pluralistic' equality along those lines would lay an intolerable financial burden on the state. Yet, this does not mean that measures providing for the 'public' use of minority languages are entirely within the discretion of the legislator or the executive. In several countries, the constitutional right to equality has been read to imply some duty of linguistic pluralism.

Admittedly, the task of a constitutional court to impose differentiations (as regards the regime of language use) where the legislator has not already provided them, is not simple. Like in their review of legislative discriminations, the courts will want to recur to some principled method of review, and above all try to find a guideline elsewhere in the Constitution, ordering such linguistic differentiations. And indeed, a fairly neat dichotomy can be made between those countries (Italy, Spain, Austria, Finland) where the Constitution itself specifies the

need for pluralistic equality in linguistic matters, and the other countries where equality is stated in general terms without reference to linguistic diversity. In the latter case, judges have been very reluctant to impose, on their own initiative, any obligation to take special measures for linguistic minorities.

1. Italy

In Italy, the fact that the public authorities are under a constitutional duty to take positive action in favour of the country's linguistic minorities is not open to doubt. Article 6 of the Constitution provides that "the Republic safeguards the linguistic minorities with special measures". What might appear doubtful, on the theoretical level, is whether this article can be considered as a specification of the general equality principle, or rather as a specific language right of an idiosyncratic nature (88). After all, equality is guaranteed by a separate provision, article 3, of the Italian Constitution. Therefore, a number of authors used to be of the opinion that art.6 is a derogation to article 3 : while the latter generally prohibits the making of differentiations (and expressly adds 'language' as a 'forbidden' ground), article 6 allows for derogations in the special case of linguistic minorities (89). This thesis is

illogic. If language is specially mentioned in article 3, it is presumably with the intention to protect linguistic minorities (the country's dominant language group does not need such a special guarantee); but then, the Constitution would at one place (art.3) prohibit differentiations in order to protect linguistic minorities, and elsewhere (art.6) impose differentiations with the same purpose.

In fact, this doctrine has long been overruled by constitutional case law. As we saw earlier on (90), the Italian Constitutional Court has analysed article 3.1 as an obligation to treat equal things equally and different things differently, and this holds for the specially listed grounds (language, sex, race, etc.) as well as for 'ordinary' grounds. This interpretation is further confirmed by the second sentence of article 3 which imposes on all public authorities the duty "to remove obstacles of a social and economic nature, which, by limiting in fact the freedom and equality of the citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the Country" (91), and this can only be done by making differentiations (92). Now, not being able to use one's language in public life is certainly an 'obstacle' limiting one's full development and effective participation. Article

6, therefore, does nothing else than applying the general rule of equality of art.3.1, and especially the rule of 'substantive equality' of art.3.2, to the case of language diversity. The fact that this is done through a separate article of the Constitution is not exceptional : the Constitution contains several other specifications of substantive equality (93). In sum, article 6 is not a 'specific' right derogating from the equality principle, but a particularisation and implementation of this general principle (94).

What, now, is the precise content of article 6 ? As to its scope ratione personae, the preparatory work of the Constitution clearly shows that it was specifically meant to cover only the minority language groups at the State border : in the mind of its proponents, the article was to make clear that Italy had spontaneously decided to undertake the protection of its frontier minorities, and not just to comply with any international pressure (Val d'Aosta, Trieste) or legal obligation (the de Gasperi-Gruber Agreement on South Tyrol) (95). Of course, it was precisely the international pressure, and not so much the fate of the minorities themselves, that put the matter on the constitutional agenda. It is quite plausible anyway, that none of the framers of the Constitution ever thought of the country's other minorities

in enacting article 6. Whatever the by-thoughts or objectives of the Constituent Assembly in 1947, the fact remains that article 6 protects linguistic minorities in general terms, without enumerating single groups. And as all linguistic minorities face the same handicap of speaking another than the country's official language, art.6 must be considered to be applicable to all groups on Italian territory characterised by the use of a language that is not that of the Italian State, whatever their dimension or location (96).

The first hurdle, then, in the application of art.6, is the existence of a separate language. While the protection of local idioms and cultures may be commendable cultural policy, it cannot be considered to be constitutionally imposed, as this would stretch article 6 too far (97). While no definitional problems arise in the case of minority idioms that are at the same time the official language of a foreign state (German, French, Slovene, Albanian, Greek), or have explicitly been called a language in legislative acts (Ladin), more controversy surrounds the nature of two idioms of relatively wide currency, Friulian and Sardinian. Both were considered until recently in Italian nationalist circles and by some linguists as mere dialects belonging to the Italian language cluster. At present, linguists tend to agree that Friulian is a separate language,

or a separate branch of the Rhetoromanic language of which another branch (Ladin) is legally recognised, but certainly not an Italian dialect (98). Even less doubt is possible with Sardinian, that has very distinctive features. The problem, here, is whether a common standard 'Sardinian' can be discerned amongst the various regional varieties (99).

Once the linguistic minorities have been defined, there remains a second, and more difficult hurdle : what are those "special measures" to be taken on their behalf? The abstract formulation of the article makes it difficult to draw any well-defined entitlements from it. For a long time, the uncontested view has been that the legislator is granted a large measure of discretion in implementing the constitutional mandate, the court's role being only that of preventing the application of a given, minority-hostile regulation, but not that of imposing a specific course of action. Thus, legislative implementation could take the form either of general protective norms applying to all minorities, or of specific treatment of the single groups.

The national parliament and government have taken the latter direction, but without following it to its last consequences; only four minorities (German, French, Ladin and Slovene) currently enjoy (a widely varying degree of)

official protection, and the others have been 'forgotten' by the central authorities. More even, initiatives taken at the regional level for the protection of some of those groups have, until recently, been systematically thwarted by the national government (100). For instance, a Law enacted by the southern region of Molise in favour of its ethno-linguistic minorities (Albanians and Croats) (101) was immediately blocked by the central government who argued that Molise had intruded upon the State's jurisdiction on the following three points : language legislation, education (the Act provided for courses in minority language and culture), and external relations (the Act adumbrated the possibility of cultural contacts between the minorities and their cultural kin-state) (102). On the other hand, two northern Regions (Piedmont and Veneto) managed to carry through their minority enactments, but at the price of setting themselves more modest targets. No substantive action by the regional authorities is contemplated in these Laws, but only the provision of a (modest) annual subvention for private activities promoting minority culture (103). Sardinia has been more cautious even. Its regional council did not adopt any measure itself, but voted a short (but ambitious) text of two articles "recognising the legal equality of the Sardinian and the Italian language and introducing bilingualism in Sardinia", which it submitted to the national Parliament as a 'Bill on

regional initiative' (104); no further action has followed since (105). Finally, a Sicilian law of 1981 for the protection of the region's linguistic minorities (106) has been referred by the Government to the Constitutional Court for annulment. Yet, in view of the changing attitude of the Court on the question of legislative jurisdiction to implement art.6 (107), the verdict could now well be favourable to the Sicilian region, which would at the same time enable all other regions to enter the field of minority protection.

As was said above, initiatives by the central authorities have been limited hitherto to only four minorities. Even those groups have not been made the object of a global treatment but rather of territorially differentiated regimes, leaving out certain segments of each minority. While the bulk of the French and German groups are protected through the special regimes applying to Val d'Aosta and South Tyrol (108), the same is not true for the other two. The Ladins are compactly settled in a relatively small area of the Dolomites, the valleys surrounding the Sella mountain. Unfortunately, this traditional area is administratively split up over three provinces. Those living in the province of Belluno are not protected at all, with the exception of the rudimentary Veneto regional law mentioned

above; those living in Trento have been granted some rights, e.g. in the field of education, but less than their kin-group living in the Val Gardena and Val Badia, in the province of Bolzano, who participate in the benefits of the elaborate protection regime established for the German majority of that province (109).

As for the Slovene group at the north-eastern border, it has also been split up in three differently treated segments. Those of the Udine province have been entirely neglected, those of Gorizia have been granted the right to mother tongue education (110), and only the Slovenes living in the province of Trieste have more encompassing rights granted by the London Memorandum of 1954 and confirmed by the Treaty of Osimo in 1975 (111), including full equality in law and in fact (art.2 of the Memorandum), and the right to use their language in official matters (art.5). Yet, international treaties are not automatically adopted in Italian law, and legislative implementing measures have been limited to the field of public education (112). Other, more fragmentary measures, exist only on an administrative, and therefore rather precarious, level (113). Both the existence of an international obligation and a recent judgment of the Constitutional Court - to be discussed below

- seem to imply a need for rapid legislative action on behalf of the Slovenes (114).

In contrast, the French language group in Val d'Aosta and German language group in South Tyrol (province of Bolzano) have been granted roughly speaking equal rights to those of the Italian group. The basic implementing measure of art.6 is, in both cases, the Regional Statute, which is an Act adopted by the national Parliament but with the status of 'higher law' (115). For all practical purposes, the more detailed rights laid down in those Statutes have superseded the generic provision of art.6.

In Val d'Aosta, an equal status is recognised to the French and Italian language by art.38 of the Statute. As a consequence, the citizens have a right to use either of those languages in the public sector (116). As all civil servants must be bilingual (117), and all (autochthonous) citizens are bilingual as well (thanks to the bilingual educational system), no significant problems exist in this Region as to the practical implementation of this right.

In South Tyrol, the picture is more complex, as the German, Italian and Ladin language groups are three neatly separated communities. The need for special measures

protecting the German group was already indicated in the 'de Gasperi-Gruber Agreement' signed on 5 September 1946 between Austria and Italy. Its art.1 states that :

"German speaking inhabitants of the Bolzano Province and of the neighbouring bilingual townships of the Trento Province will be assured a complete equality of rights with the Italian-speaking inhabitants within the framework of special provisions to safe-guard the ethnical character and the cultural and economic development of the German-speaking element (...)".

Yet, this international agreement could not have a decisive impact on the Italian legal order as it was incorporated by means of an ordinary legislative act (118). The Regional Statute of 1948, which implemented the Agreement, did have higher law rank, but was considered as totally unsatisfactory by the German minority and its foreign protector. After years of protracted conflict, a new Statute was enacted in the early seventies (119). It recognises the full equality of the German and Italian language : according to article 2, "within the region is recognised the equality of rights to the citizens, whichever language group they belong to, and their respective ethnic and cultural characteristics are protected" (120). This general statement, echoing the 1946 Agreement and specifying article 6 of the Constitution, applies to all language groups of the Region; but while the

German inhabitants of the province of Bolzano have indeed been granted a full right to use their language in all areas of public life (121), the Ladins have only been granted limited rights, above all in the field of education (122).

So far the overview of the variety of linguistic regimes applying to Italy's minorities. One cannot escape the impression that, by leaving the legislator free to pick and choose among the various minorities, one tends to make the constitutional mandate of article 6 subservient to pedestrian policy considerations. Many authors have argued that this has been the case in Italy. Not only, it is said, have only those minorities been protected on whose behalf there was some international pressure, but even among those, a clear gradation was made according to the degree of their centripetal attraction (in political, economical or cultural terms) to foreign states (123). Several proposals for a global framework law on the protection of all linguistic minorities have been submitted to Parliament but, as yet, to no avail (124).

If the legislative implementation of art.6 shows an extremely chequered pattern, constitutional case law has nevertheless added some unifying interpretative guidelines. The fact that art.6 is framed as an 'objective',

institutional norm has not been an obstacle for it being invoked for the protection of individual claims; in this sense too, art.6 runs strictly parallel to the general equality clause of art.3.

In relation to both problems indicated above, that of the identification of linguistic minorities, and that of the definition of the special measures to be taken, the formerly prevalent course was to consider them as political questions ill-suited for judicial decision-making. In particular, the type of action involved in the implementation of art.6 ('positive' state action) seemed to exclude its direct enforceability. Yet, as was indicated above (125), the courts can perfectly well scrutinise the omission, by the legislator, of necessary differentiations without overstepping the bounds of their function. They can invalidate legislative acts failing to take the necessary special measures, while leaving it to the legislator to decide on the exact terms of the remedy.

The Italian Constitutional Court has followed this course in a 1970 South Tyrolean case (126), in which it partially invalidated a law which failed to make a necessary linguistic differentiation. The law in question organised job placement for agricultural workers, including an obligation for private employers to hire such workers according to their

numerical order on the waiting list (127). Small farmholders in the Trentino-Alto-Adige could thus be forced to recruit workers belonging to another linguistic group than their own. This, the court held, was in contrast with art.2 of the Regional Statute of Trentino-Alto-Adige, because it affected the linguistic homogeneity of the local communities : indeed, art.2, "by prescribing the safeguarding of the ethnic and cultural characteristics of the language groups living within the Region, forbids measures that aim at forced assimilations between them or that may compromise their free development according to their own traditions and customs" (128). Therefore, the territory of the Region should be exempted from the application of the act. In all truth, it must be admitted that the Court did not create this duty to differentiate ex nihilo. The fact that 'mixed language zones' had been excluded from the field of application of the formerly existing legislation in this field (129), has probably prompted the Court to strike down the new legislation which failed to repeat this distinction. Yet, the rule developed by the Court, that equiparations leading to forced assimilation are in contrast with art.2 of the Regional Statute, is generally valid. In addition, as was argued above (and as the Court explicitly acknowledged in this case (130)), art.2 of the Statute is but a more particularised reformulation of art.6 of the Constitution.

Therefore, this judgment has paved the way for the application of article 6 to similar cases of legislative equiparation which affect the integrity of linguistic minorities.

Another landmark is the recent Constitutional court judgment of 11 February 1982 (131), dealing with article 137.1 of the Italian Code of Criminal Procedure which imposes the use of Italian in all procedural acts, and article 137.3 which makes it a criminal offense for a person to refuse to speak Italian when he knows that language. Mr Pahor, a Slovene speaker from Trieste, was prosecuted on the latter basis, and raised the issue of the compatibility of both provisions with article 6 of the Constitution. Some twenty years earlier, a similar recourse to article 6 in order to challenge the constitutionality of art.122 of the Code of Civil Procedure, similarly prescribing the use of the Italian language, had been flatly rejected by the Appeals Court of Trieste (132). The 1982 case, however, was not as quickly dismissed by the Constitutional Court.

First of all, the Court continues to accept that the basic decision which minorities to protect with what type of norms is within the discretion of the legislator. More particularly, there is no constitutional duty, as the

applicant pretended, to align the treatment of all linguistic minorities on that meted out to the South-Tyroleans; nor, apparently, is there any need to emanate a uniform legal regime for all Slovenes : the Court, indeed, expressly restricts its holding to the province of Trieste (133). In this sense, article 6 remains a programmatic, non-directly applicable norm.

But once the legislator has decided to act, he must do so in a systematic manner. Applying its favourite method of equality review to this case, the Court finds that the legislator has enacted various norms for the protection of the Slovene group, including measures in the field of education, of radio and television, of the European elections, etc. (134). As a consequence, the Trieste Slovenes must be considered as a recognised minority, a fact which triggers supplementary rights on their behalf, directly imposed by article 6. The Court, apparently, argues that, if the legislator chose to say B,C and D, he must also say A : if he decided to enact those other protective measures in favour of the Slovenes, then he can no longer consider the use of Slovene in judicial proceedings as a criminal offense. The exact scope of the Court's findings in this case is however ambiguous; the crucial passage of the judgment holds as follows : "If we are here in the presence, without any

doubt, of a 'recognised minority', then this situation is incompatible, logically even more than legally, with any type of sanction ("qualsiasi sanzione") affecting the use of their mother tongue by the members of this minority" (135).

But what does "any type of sanction" mean? Does it only refer to the penal sanction provided by art.137.3 of the Code of Criminal Procedure? Or is the term 'sanction' used in the wider meaning of 'negative impact'? If interpreted in this larger sense, the Pahor case could be read as imposing a positive duty on the (national or regional) legislator to reorganise the judicial system or even the whole public administration in such a way that Slovenes can use their language without obstacles or hindrances (136). This 'generous' interpretation seems contradicted by the fact that the Court, through a rather voluntaristic 'constructive' interpretation did not hold art.137.3 of the Criminal Procedure Code unconstitutional, but merely declared it inapplicable to Slovenes appearing before the courts of Trieste (137). Yet, on the other hand, if article 6 only embodies a negative obligation of state abstention, what need is there then to distinguish between recognised and non-recognised minorities? It would seem that the rationale of the 1970 judgment, prohibiting all kinds of 'measures aiming

at the forced assimilation of minorities', applies to all minorities, whether recognised or not (138).

2. Spain

Article 3.3 of the Spanish Constitution, holding that "the richness of the linguistic modalities of Spain is a cultural patrimony which will be the object of special respect and protection", seems to be quite comparable to article 6 of the Italian Constitution (139). Its scope is somewhat wider as it does not only apply to minorities, and therefore also includes Castillian among the objects of protection (140), and does not only protect languages but the somewhat looser category of linguistic modalities. Yet, like art.6, this clause can also be read as a specification of the principle of equality of art.14 of the Constitution, and more particularly of the principle of 'substantive equality' of art.9.2, despite the fact that it is mentioned in a separate article of the Constitution (141).

Yet, the effective role of art.3.3 is unlikely to be of the same nature as that of art.6 in Italy, because other 'higher law' sources for the protection of linguistic diversity are more widely available in Spain than in Italy. Indeed, the Statutes of a number of Autonomous Communities

spell out in all clarity the rule of equal treatment, in law and in fact, of persons speaking the national language (Castillian) and those speaking the other official language of the Community (142). Moreover, and contrary to Italy, there is no doubt that the Autonomous Communities are empowered to act in the field of language law and to further implement this 'pluralistic' equality (143). Therefore, even the issues that are not directly regulated by the Statutes can be dealt with by further legislative action from the side of the Communities. And, in fact, four plurilingual Communities (Catalonia, Euzkadi, Galicia, Valencia) have adopted what are called in Spanish legal parlance normalisation laws, containing more detailed measures to ensure a full equal status to the formerly oppressed regional languages (144).

Yet, article 3.3 of the Constitution can still display a direct (though perhaps not individually enforceable (145)) impact in the following domains :

- i) within the jurisdiction of the central State (where the autonomous Communities cannot intervene), article 3.3 can be read as a generic duty to act in accordance with the principle of linguistic pluralism;
- ii) for those, smaller, linguistic varieties, that are not fully supported by regional institutions. It is difficult to

identify any such groups at this point, because all regional Statutes made it a point of honour to 'discover' and protect such minority language groups (146).

3. Austria

Austria belongs to the same category of countries where special measures for (linguistic) minorities are mandated by constitutional law. The principle of the equal rights of all linguistic groups, and its consequences for the purposes of language use, are clearly spelled out in art.19.1 of the Basic Law of 1867 ('Staatsgrundgesetz') :

"All ethnic groups ('Volksstaemme') within the State have equal rights, and each ethnic group has an unabridgeable right to the protection and promotion of its nationality and language.

The equal rights of all customary languages of the country ('landesuebliche Sprachen') in the schools, the administration and public life are recognised by the State.

In those countries ('Laender') inhabited by a plurality of ethnic groups, the public educational institutions shall be organised in such a way that each of those ethnic groups is given the necessary means to have

education in its language, without an obligation to learn a second language." (147).

This 'Basic Law', which dates from the Austro-Hungarian Empire (but was only valid for its Austrian part) has been incorporated as a whole in the Constitution of the Austrian Republic in 1920 (art.149). Yet, the continued validity of this specific article 19 has been questioned. The argument goes that Austria is no longer a multinational State with globally equivalent 'Volksstaemme' (ethnic groups), but a nation-state with some rest-minorities, whose languages cannot be considered as 'landesueblich' and who cannot therefore advance the same right to full equal treatment. Earlier decisions of the Constitutional Court have thus denied that art.19 forms part of present Austrian constitutional law (148) but a recent judgment has explicitly considered this issue as unsettled and seems thereby to move closer to the opinion of those legal writers who affirm the continued validity of art.19, be it in a diluted form (149).

Yet, this question is largely preempted by the existence of other constitutional norms that are undoubtedly valid and repeat this principle of equal treatment, be it in reference to the individual members of linguistic minorities, rather than the groups as a whole. Art.67 of the St-Germain Treaty imposes "the equal treatment in law and in fact" of

the minority members, a phrase which implies a duty, where need should be, to take special 'pluralistic' measures in favour of their languages (150). Other constitutional norms specify in more detail the appropriate measure of linguistic pluralism in certain fields of public language use : art.66.4 of the St-Germain Treaty, and art.7.3 of the Vienna State Treaty of 1955 (151).

The Austrian Constitutional Court declared, in a 1981 judgment that all the aforementioned provisions have in common that "they contain a value judgment of the constituent power in favour of minority protection" (152), and this value judgment must be taken into account for the interpretation of the general principle of equality in art.7 of the Austrian Constitution. This means in turn that the general principle of equality can impose the enactment of special protective measures in favour of the minorities (153), even beyond the existing explicit norms (one might think here of a field like public broadcasting, which is not covered by any of the norms listed above). The Court thus established a potentially fruitful dialectical relationship between the specific constitutional language rights and the general principle of equality.

4. Finland

An even closer link between the principle of equality and a specific guarantee of language use exists in Finland. As Modeen points out (154), article 14 of the Finnish Constitution, declaring Finnish and Swedish to be the official languages of the country, appears in the section of the Constitution dealing with fundamental rights. The correct interpretative sequence is therefore not that the equal rights of Finnish- and Swedish-speakers derive from the fact that their language is official, but that the co-officiality itself is a specification of the general equality principle of art.5 of the Constitution (155).

Can one extend this reasoning to the other countries whose constitution contains a clause recognising a plurality of official languages, such as Canada, Ireland and Switzerland ? Are all those provisions to be seen as specific embodiments, in the linguistic domain, of the principle of equality ? One should be cautious in the absence of any clear textual, judicial or doctrinal authority in this sense. On the one hand, co-officiality is certainly an embodiment of the idea of equality taken in the wide sense; indeed, the highest measure of equality a minority language group can hope to obtain is the recognition of a full official status to its language. On the other hand, and precisely because of its far-reaching consequences, an official status cannot be

considered as inherent in equality, taken in its legal-technical sense. The official status needs therefore to be explicitly proclaimed by the Constitution, and cannot be read by the constitutional adjudicator in a generic guarantee of equal treatment.

5. Other European Countries

This can be demonstrated by looking at the countries where no constitutional guidelines exist as to the need of special protection measures of linguistic minorities. The courts of those countries have been extremely reluctant to derive any such measures from the general principle of equality. Sometimes, like in Belgium, the negligible role of equality in matters of language use is due to the absence of judicial review of the constitutionality of legislation. The conformity of Belgian linguistic legislation to standards of equality could more easily be challenged by reference to international law but the European Human Rights Court in the Belgian Linguistics case considered the basic principles of territorial unilingualism, as applied in this country, to be compatible with the Convention (156), an attitude which Belgian courts are unlikely to challenge.

Yet, the same holds true also for countries which have judicial review. In a recent case, dealing with the use of languages in judicial proceedings, the German Constitutional Court flatly held that "the prohibition of discrimination of art.3.3 of the Basic Law does not impose the compensation of linguistic handicaps" (157). This negative attitude may derive from the presumption of like treatment which German doctrine reads in art.3.3 (158), but the picture is not essentially different in other countries. While one acknowledges the desirability of special facilities for minority language use, this is considered as a matter of governmental policy and not of constitutional obligation. One area should be excepted, that of judicial proceedings, and more particularly the criminal process. Here, practically all countries provide for the assistance of an interpreter to the persons who do not have a sufficient knowledge of the language used by the court; such aid is usually provided without cost for the accused, except, in some cases, for a reimbursement which can be claimed if the person is found guilty (159). Yet, this guarantee is only indirectly linked to the general principle of equality, and more closely to the more specific constitutional principles of 'fair trial', 'equality of arms', or, in the United States, 'due process' (160). Furthermore, recent improvements in this sector have been influenced, in many European countries, not

so much by their own constitutional provisions as by the fair trial guarantees of the European Human Rights Convention; indeed, this is one of the areas in which this Convention most clearly went beyond the existing 'minimum standard' of its contracting states (161).

6. United States

One court which showed a greater degree of activism is the United States Supreme Court in Lau v Nichols (162). In this case, non-English-speaking students in San Francisco had brought a class action suit against the local school authority, alleging that it had failed to provide special language instruction to a large majority of the Chinese children in the district. Justice Douglas, speaking for the majority of the Supreme Court, held that the exclusive use of the English language amounted to an unlawful equiparation :

"Under these state-imposed standards there is no equality treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education".(...) "It seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority from respondents' schools system which denies

them a meaningful opportunity to participate in the educational program - all earmarks of the discrimination banned by the regulations" (163).

Note the reference to the 'regulations'; indeed, the Supreme Court, in Lau, did not reach the equal protection clause of the Constitution, but based itself on federal law of lower rank, Title VI (section 601) of the 1964 Civil Rights Act as implemented by regulations promulgated by the Department of Health, Education and Welfare, which expressly indicate the need for special educational programs :

"Where inability to speak and understand the English language excludes national origin - minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students" (164).

In other words, the Supreme Court does not take the lead in ordering measures of linguistic pluralism in education, but rather defers to the policy followed by the administration. The Court considers it as a reasonable governmental choice, but would not have imposed it on its own behalf. More importantly, the exact scope of the remedy ordered by the Lau decision is left uncertain; indeed, the

linguistic deficiencies of the minority children can be remedied by two different types of "affirmative steps" : special transitional courses in English (according to the so-called English-as-a-Second-Language (ESL) method), or the establishment of bilingual education (165). The Supreme Court itself did not express a preference, but the administrative guidelines issued in 1975 - known as the 'Lau Guidelines' or 'Lau Remedies' - interpreted the court decision as requiring some form of bilingual education; this interpretation was also adopted by a number of lower court decisions who granted a right to bilingual education to minority plaintiffs (166).

As appears clearly from the opinion of Douglas J. quoted above, the Supreme Court used an effects test in Lau : the practice of the school district was declared unlawful because the minority children did not get a meaningful education out of it, not because the district was motivated by an intention to discriminate. But in the subsequent famous Bakke case which was also decided on the authority of Title VI of the Civil Rights Act, the Supreme Court decided to use the same test as in the cases based on the constitutional equality cases, i.e. a test of discriminatory intent (167), and added that it now had "serious doubts concerning the correctness of what appears to be the premise of the decision in Lau" (168).

Reverting to a purpose-oriented test has indeed serious consequences. Proving that, by adopting an ESL-program, rather than a bilingual education program, the state or school district had the intention of harming the minority students is an extremely arduous enterprise, especially in an ideological climate which is still pervaded by the conviction that the 'melting-pot' policy is in the good interest of the country's minority language groups. Yet, more recently again, in Guardians Association v Civil Service Commission, the majority of a deeply divided Supreme Court returned to its earlier view that Title VI, not in itself but together with its implementing regulations, prohibits actions having a disparate impact on minorities (169). The trouble, however, is that administrative regulations have been changing under the Reagan administration and do no longer require bilingual education, it seems (170).

In fact, claims to a bilingual educational program are now more likely to succeed under another legislative act, the Equal Educational Opportunities Act (EEOA) of 1974, which has become the central focus of litigation. It provides that :

"no state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by

"(...) (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program" (171).

On its face, the duty to take 'appropriate action' is equally vague as that imposed by section 601 of the Civil Rights Act. Yet, this provision was never construed by the courts as requiring intentional failure to act, but rather as prohibiting "non-intentional, inadvertent actions which have the effect of failing to take appropriate action, even if there is no design or purpose to discriminate (172). Bilingual education is, again, not imposed per se. Yet, the tripartite standard by which every educational program is assessed, a standard formulated by the Appeals Court in Castaneda v Pickard (173), and more or less applied by the other courts, can arguably only be met by bilingual programs (174).

Bilingual Education Acts have now been enacted, at state-wide level, by twelve states (175), a policy which was encouraged by the availability of federal funds for that purpose under the federal Bilingual Education Act of 1968 (as amended in 1978) (176). But even where bilingual education is thus widely provided, its avowed purpose seems to be to favour the assimilation of the country's linguistic

minorities, rather than to ensure a permanent protection of linguistic diversity. The preamble of the Californian Act, e.g., states that "the Legislature finds and declares that the primary goal of all programs (...) is, as effectively and efficiently as possible, to develop in each child fluency in English" (177).

The judicial moves to impose some measure of linguistic pluralism in education have been entirely based on statutory provisions. In other fields of public language use, like that of the administrative services, there are no similar federal legislative initiatives. Efforts to extend linguistic pluralism to those domains have therefore to be based directly on the constitutional principle of equality, a step which courts have been extremely reluctant to take. In Carmona v Sheffield, a federal district court rejected a claim that civil servants should be made available to help all citizens with difficulties in English. The court argued :

"The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt

(...) The extent to which special consideration should be given to persons who have difficulty with the English language is a matter of public policy for consideration by the appropriate legislative bodies and not by the Courts". (178).

In appeal, the Ninth Circuit of the U.S. Court of Appeals affirmed that equality was not violated in this case : "even if we assume that this case involves some classification by the state, the choice of California to deal only in English has a reasonable basis" (179). The California Supreme Court, in Guerrero v Carlson also used the argument of practical impossibility to affirm that using Spanish in public administration would be desirable in terms of public policy, but that no directly enforceable constitutional imperative existed in this sense (180).

These decisions are open to criticism. In particular, the practical difficulties should not be exaggerated. A court need not grant a universal right to every person to use whichever language in all fields of public life, but can easily modulate its remedy in order to take account of numbers and available possibilities. It might well appear, then, that the bilingual staffing of a public service is not such a costly and complicated endeavour to preclude any judicial intervention (181). Yet, the American

decisions clearly confirm the general picture that has emerged from other countries : that the courts are reluctant to create a plurilingual system ex nihilo, and are prepared to play an active role only when they can find some constitutional or legislative authority as to the need of such language measures.

D. Affirmative Equality

Like pluralistic equality, which was examined in the previous sub-section, affirmative equality also involves a differential treatment, but of another kind. The term of 'affirmative action' is commonly associated with the efforts, in the United States, to eliminate racial, and to a certain extent also sexual, discrimination, by means of special preferences for the minorities involved; it can be defined as "a public or private program designed to equalize (...) opportunities for historically disadvantaged groups by taking into consideration those very characteristics which have been used to deny them equal treatment" (182). Another country where affirmative action is an important feature of the legal landscape, for a longer time even than in the United States, is India, where art.15.4 of the Constitution mandates special promotional measures "for the advancement of any socially and

educationally backward classes of citizens or for the scheduled castes and scheduled tribes". Indeed, comparative studies of affirmative action tend to focus on these two countries (183).

Yet, even if the concept was - until recently at least (184) - relatively unknown to Europe, the underlying phenomenon is certainly not. Every legal system has created policies designed at the promotion of certain target groups of very diverse nature, such as war veterans, the disabled, pregnant women, etc.

In a certain sense, affirmative action is the mirror image of discrimination. Whereas 'pluralistic equality' only consists, as was explained above (185), in giving to the minority what the majority population already has, affirmative equality goes further : in order to boost the rights of some individuals or groups, it imposes a corresponding disadvantage to another individual or group. This has led opponents of such a regime to the use of disparaging terms like 'affirmative discrimination' or 'reverse discrimination' (186), implying therewith that such action is only a new form of invidious treatment, equally perverse as the old discrimination it is intended to combat.

One should note however that the advantage for one group is not always symmetrical with the burden on the other. Two hypotheses should in fact be distinguished. In the first case, the advantage granted to a member of the favoured group exactly corresponds to the disadvantage of a member of the other group. The typical example here is the quota system, which is often used in the United States : in the access to a school or enterprise, a person of the minority group is directly preferred over a person belonging to another class.

In the second case, on the contrary, the advantage accruing to the favoured group is financed by general (budgetary) means, and its impact is thereby more evenly spread. The disfavoured class, as a group, still undergoes a loss, but the negative effect on each of its members individually may be negligible (especially when they are a large numerical majority of the population) and will be of a quantitative rather than a qualitative nature. In addition, the burden is evenly divided among all members of the 'dominant' group. Indeed, one of the more justified criticisms against affirmative action in the American fashion (characterised by its use of quota) is that it tends to penalise the weaker members of the white majority and to advantage the stronger members of the Black or Hispanic

majority, thereby operating a social redistribution in reverse (187).

Supporters of affirmative action, on the other hand, hold that one can easily distinguish legitimate affirmative action from unjustified discrimination, by considering which groups benefit. In the case of affirmative action, the beneficiaries are persons belonging to a group which has either been a traditional victim of disadvantageous treatment, or is still in an inferior social position (these two possibilities being not mutually exclusive). In other words, affirmative measures do not destroy equality, but aim precisely at establishing a more perfect equality of opportunities. By imposing a 'handicap' to certain participants, one wants to make the 'race of life' more fair, which is entirely consonant with the best traditions of liberal reformism.

The troublesome question, at this point, is how to define the groups that are worthy of such special protection. For our purpose, the question is whether linguistic minorities qualify for such benefits, under which circumstances and to what extent. In constitutional terms, one has to examine whether preferential treatment of certain language groups, which goes beyond 'pluralistic equality' as

described in the previous sub-section, can be reconciled with the constitutional principle of equality, and whether it may even be mandated by it.

Two arguments can be advanced to justify affirmative action in favour of linguistic groups : the fact that they are cultural minorities and the fact that they are political-economic minorities. The first argument is the more widely applicable, as its only condition is that the group should be in a numerical minority within the country. The second rationale, on the contrary, does not apply to those language minorities whose social-economic situation is relatively good; while very important in the United States, this argument appears less acceptable, and is less widely used in Europe.

1. Language Groups as Cultural-Linguistic Minorities

Even when pluralistic equality fully applies, and the use of a minority language is permitted in all possible settings of public life, its speakers may still be at a disadvantage in cultural terms. Despite the formally impeccable status of his language, a person speaking a minority idiom may still face more difficulties than someone speaking the majority language. Although legally equal, the

languages may continue to have a different social status, due either to past oppression or to present numerical imbalance.

a) · Enduring oppression in the past may have seriously weakened the cultural position of a language, even if its present legal status is satisfactory. The example of Spain is very enlightening in this context. In a few years time, the peripheral languages, which were not recognised at all and even actively persecuted under the Franco regime, have been elevated to the status of fully official language of their Community. But, of course, those languages are not equipped for their new tasks. While Castillian has always and without interruption been the language of the administration and of the educational system, Catalan, Basque and Galician must start from scratch : a specialised administrative language must be created, civil servants, educators and journalists must be trained in the language, text books and teaching aids must be printed, etc. In other words, the co-official status proclaimed by the Statutes of those Communities remains largely formal, and the citizens cannot effectively exercise their right to use the regional languages, without the enactment of some accompanying measures. In the United States, these would be called 'compensatory measures'; in Spain, one tends to use the term of 'normalisation' measures which is more accurate : the purpose is not to exercise a

revenge for past injuries, but to eliminate the effects of this injustice for the future. Several Statutes of Autonomy accompany the provision of the formal equal status of Castillian and their respective regional language with a further provision authorising the Autonomous Community's political organs to enhance the status of the minority language, so that it can effectively overcome its legacy of oppression. Typical in this respect is the Catalan Statute; its art.3.2 having declared Catalan and Castillian to be the official languages of the Community, art.3.3 adds :

"The Generality shall guarantee the normal and official use of both languages, shall take the necessary measures to ensure knowledge of them and shall create the conditions in order to arrive at their full equality in the exercise of the rights and duties of Catalan citizens" (188).

More strongly still, art.5.3 of the Galician Statute :

"The Galician public authorities shall guarantee the normal and official use of the two languages and shall promote the use of Galician in all spheres of public life, of culture and information, and shall take the necessary measures to facilitate its knowledge" (189).

Four Autonomous Communities (Catalonia, Euskadi, Galicia, and the Valencian Community) have used those

enabling provisions and have enacted 'normalisation laws' providing, in addition for the formal equalisation of the two official languages, also for a number of affirmative measures (190). The Catalan normalisation law has put special emphasis on the field of culture and the communication media : its articles 22 and 23 allow and even impose financial and other actions to stimulate the use of Catalan in the press, the broadcasting media, theater, cinema, and book publishing (191). In the field of education, the Basque Community has been particularly active; the relevant provisions of the normalisation law have been further implemented by a series of decrees favouring Basque-language education :

- special financial aids are attributed to private educational institutions teaching through the medium of Euskera (the so-called 'Ikastolas' that had sprung up in the last years of the Franco regime) (192);
- subsidies for the drafting of school books and teaching aids in Euskera (193);
- reimbursement of the cost of transportation and lunch meals of those pupils of the Ikastolas whose home is more than 3 km away of a Basque language school (194).

All those measures, it is submitted, are not in contrast with the non-discrimination rule of art.14 of the Spanish Constitution, which, significantly, is repeated in

the Statutes and the normalisation laws themselves (195). Indeed, their objective is only to help the regional languages attain an effective equal status; this also implies that they should be reconsidered at the time (if ever it will come) when the regional languages will have obtained an equal social status.

In addition to the typical Spanish cases, one can mention other, rather isolated examples, of measures of affirmative equality inspired by the will to compensate for historical injustice. In Belgium, affirmative action does not exist, as a rule, in the relations between the Dutch and French language groups whose numerical and political strength is quite comparable. Yet, the former discrimination of Dutch-speakers has for a long time left its mark on the way certain governmental services were staffed. A proportional recruitment of Dutch- and French-speakers of the type outlined above (196) would have taken a very long time to restore the balance; it was therefore decided to recruit a more than proportional number of Dutch-speakers until one reached the point of equilibrium. This 'temporary preference' was applied, not without some polemics, in the Foreign Affairs Ministry and the diplomatic service (197), and among higher army officials (198), to quote the most conspicuous examples. Exactly the same remedy has been used in the

Italian state administration located in the province of Bolzano : according to article 89.4 of the Special Statute of Trentino-Alto-Adige, the number of German- and Ladin-speakers in administration shall be gradually brought to the level of their proportion in the total provincial population (199).

b) Even without any historical legacy of oppression, two equally official languages are not in a fair competition with each other if the first is a language spoken by a large number of persons, or even a world language, and the second is a language spoken by a small group. The dimension is a crucial element in the development and survival of a language which needs to be supported by a communicative network covering a certain range of societal uses for each of which there is a critical quantitative mass (200); below this threshold, a language is no longer self-supporting. The comparative disadvantage suffered by the smaller of two official languages can further be specified as follows :

i) the per capita cost of all language-related services and investments is comparatively higher, because their users or beneficiaries are fewer in number; at a certain point, this cost will become prohibitive and the service will no longer be delivered;

ii) due to this restricted diffusion, social mobility within the language area will be limited; for certain activities, such as university studies, or employment in neighbouring areas, a person will be forced to use the majority language; the prospect of social mobility has always played a major role in processes of linguistic assimilation.

Maintaining their language loyalty thus requires special dedication and financial sacrifices from the side of members of a linguistic minority. A compensation of those sacrifices by the public authorities is therefore only a restoration of the balance of equality.

This form of affirmative equality is widely used in Switzerland in favour of the minor national languages, French and above all Italian and Romansh. This action is considered as mandated, to a certain extent, by art.116.1 of the Constitution : the proclamation of the existence of four national languages is read to imply a duty to provide the means for their effective use in daily life (201). See, for instance, the following illustrations :

- within the general federal aids to cantonal primary education, a special 'linguistic supplement' is attributed to the cantons Ticino and Graubunden for each Italian-speaking pupil; a considerably larger sum (in view of the extremely costly provision of primary school texts in each of the four

larger dialect groups of Romansh) is granted to the latter canton for each Romansh-speaking pupil. As an observer notes, "this kind of financial supplementation from federal sources has permitted the canton of Graubunden to provide Romansh children with primary texts of high quality, thus keeping them current and consonant with those available to German-speaking pupils" (202).

- Relatively more money is spent on public broadcasting through French and Italian than through German (203).

- The smaller linguistic groups tend to be over-represented within the public administration; according to one source, "while only 4% of the entire population are Swiss Italian, as opposed to Italian-speakers, 7.6% of all federal administrative employees, 6.0% of railway employees, are Swiss Italians. Only at the upper levels of the administration of the civil service is the proportion of Ticinese and Swiss Italians from Graubunden precisely equivalent to their share of population" (204).

- special federal subsidies are granted for the general promotion of cultural activities of the Italian and Romansh groups (205).

In a certain sense, Switzerland is more generous for its minorities in terms of affirmative equality than in terms of pluralistic equality, as the legal status of the

Romansh language, in particular, is still rather unsatisfactory (206). A similar pattern can be discovered in Canada. There, a modest sum of about 5 million \$ is yearly made available to subsidise the cultural institutions and events of the ethnic minorities. Yet, this can only be called a poor substitute for the failed recognition of an official status to those languages : "the political purpose, of course, has been to protect the flanks of the official languages policy at relatively low financial cost from groups that have little reason to favor it and might be in a position to do it harm" (207).

In Finland, on the contrary, both aspects of equality go hand in hand; article 14 of its Constitution proclaims the official status of Finnish and Swedish, and then adds that "The cultural and economic needs of the Finnish-speaking and the Swedish-speaking populations shall be met by the State on equal principles". The exact nature of those 'equal principles' is controversial, but it is commonly accepted that this should include some affirmative policies. That such compensatory measures must be finely balanced against competing policy interests is well brought out in the following statement of the leading Finnish author in this field :

"The correct interpretation (of art.14) should be that, in those cases where the community supports cultural and economic (as well as social) aspirations within one population group, then the other should also receive support. The size of this support should be such that a similar degree of activity is possible for both in accordance with similar principles. For example, the level of education in Swedish institutions should be the same as that in Finnish institutions. On the other hand, account should of course be taken of the size of both population groups so that the minority cannot demand as many institutions as the majority. In certain areas where the minority is too small to warrant its own institution it should be possible to incorporate the minority into a predominantly Finnish institution" (208).

One characteristic illustration is that of the entrance requirements to the University of Helsinki (209). In a certain number of academic disciplines, the number of Swedish-speaking students had sunk to such a low level that one might anticipate a lack of competent Swedish-speaking personnel in certain civil services. The University was therefore empowered to modify the existing 'numerus clausus' system and to set aside a quota for Swedish-speakers. While apparently violating the principle of non-discrimination, this measure may well be considered as a true implementation of the principle of equal treatment (210).

This need to make the right to use a language effective by an adequate staffing of the public administration is more directly apparent in those measures which provide for special training courses for civil servants in only one of the official languages. In Ireland, e.g., a special language teaching institute, the 'Gaeleagras na Seirbhise Poible' has been set up in order to help civil servants improve their knowledge of Irish; scholarships are also available to spent some time in the 'Gaeltacht' areas, for immersion in Irish-only surroundings (211). In Catalonia, the Generalitat (Catalan government) established an 'Escola d'Administracio Publica' whose primary purpose also is the training of the administrative personnel in specialised uses of the Catalan language (212).

The affirmative aspects of linguistic equality have also been acknowledged in a recent Austrian law, the Act on Ethnic Groups ('Volksgruppengesetz') of 7 July 1976. Its article 1.1 states the general principle that "the Austrian ethnic groups and their members are protected by the law; the maintenance of the ethnic groups and the protection of their existence are guaranteed. Their language and culture must be respected" (213). The third paragraph of the same article adds the important principle that "no member of an ethnic group may be disadvantaged by the exercise or non-exercise of

the rights he holds as such" (214). This negative statement finds its positive counterpart in articles 8 and following, providing for the procedure and conditions of the promotion of ethnic groups ('Volksgruppenfoerderung'). Those measures are certainly conform to (and may have been conducive to) the recent reinterpretation of equality by the Constitutional Court (215). Yet, one author finds the use of the word 'promotion' presumptuous, as those means are grossly insufficient to reverse the secular trend towards assimilation (216).

A final case in which the constitutionality of affirmative measures for the compensation of a cultural handicap has been upheld, is the Association de parents d'élèves decision of the Belgian Council of State (217). At issue was a Royal Decree of 5 May 1971 amending the rules on financial subsidies to kindergartens and primary schools; the minimum number of pupils which a school must have in order to qualify for subsidy was lowered in the case of the Dutch language schools of the bilingual district of Brussels (art.3 of the Decree). The parents' association of a French language school of the Brussels district complained of discriminatory treatment. : the Decree permitted the creation of very small schools in the Dutch language network, with accordingly

closer contacts between teachers and pupils, and therefore a more efficient education. This could, the parents claimed, provide an incentive for certain, especially bilingual, parents to send their children to Dutch rather than to French schools.

The administrative court upheld the legitimacy of the differentiation on the basis of its usual purpose-means test (218). The purpose of the act was easily found, by the court, in the enabling legislation, the Law on the Use of Languages in Education of 30 July 1963 (219), whose article 5 provides that the conditions for subsidy should be enacted by the 'King' in such a way that all parents can send their children to schools using their language (whether French or Dutch) within a reasonable distance from home. As for the means, the Council of State found that relaxing the numerical criterion was necessary, due to the fact that Dutch-speakers are a relatively small minority in Brussels, and that their right to have schools within reasonable distance could not be implemented if one used the ordinary standards (220). Nor are those means in disproportion to the purpose : there is no sign, according to the Council, that the preferential treatment of the Dutch schools has a detrimental effect on French language education.

Note however that the Belgian court only had to decide whether affirmative differentiation was legitimate, and not also whether it was mandatory; it merely stated that "Article 6 does not prohibit the application of different legal rules to different situations" (221).

2. Language Groups as Economic-Political Minorities

The first rationale for affirmative action, in the case of linguistic minorities, applies to all of them : they all bear a cultural handicap, even those groups among them who are relatively well off in social-economic terms, like the Catalans, the South Tyroleans or the Swedish Finns. For a number of minorities, however, the language is only part of a larger 'stigma' bearing upon them, and excluding them from access to a wide range of societal benefits. They could be called 'economic minorities' (222), or, in United States constitutional parlance, 'discrete and insular minorities'. Indeed, a number of ethnic minorities, in the U.S., and above all the large Hispanic minority, are generally considered to be such powerless groups, comparable to the traditional victims of societal discrimination, the blacks.

As was indicated before, a special, more severe standard has often been used by the Supreme Court as regards differentiations relating to such groups (223). Yet, as has been shown in a number of cases, this very theory of 'suspect classifications', which was devised for the protection of the weaker groups, was turned against them in cases of affirmative action. Classifications based on race or national origin, as many argue, are always inherently suspect, and no difference should be made according to the avowed statutory purpose, whether this is to burden or to favour the insular minorities. The credibility of neutral standards of equality review would be jeopardised if the theory of 'suspect classification' was used against whites, but not against blacks. As Justice Powell said in the Bakke case, "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color" (224). Others have strongly attacked this 'color-blind' theory, and point to the substantive reality underlying the emergence of the theory of suspect classifications. Race has become suspect, not on the basis of some logical or neutral argument, but because of the historical experience of the United States. In another, racially homogeneous country, race might not be suspect as a criterion, while others like religion, or language, or political opinion, might be. In other words, the (justified)

search for principled standards in equality adjudication should not deteriorate into a blind formalism, but should continue to reflect substantive values. Therefore, affirmative action in favour of powerless minorities is entirely legitimate (225).

Despite the clamorous Bakke judgment, the second view has on the whole prevailed in the case law of the Supreme Court. In Bakke itself, while the use of fixed racial quota in entrance examinations to state medical schools was declared unlawful, the use of more flexible methods for favouring minority members was explicitly upheld in the decisive vote of Justice Powell (226). In addition, the Court accepted the use of set-aside quotas in other fields, such as in a private sector hiring regulation adopted by collective bargaining (Steelworkers v Weber) (227), or in public contracting under the Public Works Employment Act of 1977 (Fullilove v Klutznick) (228).

It can therefore safely be said that affirmative action has - in principle, if not in all its concrete forms - been considered as compatible with the equal protection clause of the Fourteenth Amendment. Yet, these judicial decisions only constitute deference to preexisting legislative choices. There is no question that the American

courts would, at present, not dream of imposing such positive remedial measures on a reluctant legislator. This limitation is increasingly important at a time that the government does no longer take any new affirmative initiatives, and even attempts to scale down existing schemes.

European courts are also very reluctant to order affirmative measures for (linguistic) minorities in fields that are not directly connected to language use. Immigrant linguistic minorities appear as typical economic minorities, to be compared with the Hispanics in the U.S. Yet, despite some isolated arguments in the literature (229), they are seldom or ever made the object of preferential treatment, and the first dimension of equality, non-discrimination, still remains the most practically meaningful for them. As for the endogenous minorities, they have occasionally benefitted from preferential treatment in areas that are not directly linked to their linguistic handicap, but those were, according to the constitutional courts, discretionary decisions of the legislator which were not judicially constrained.

In the Austrian case of 1981, already mentioned before (230), the Constitutional Court stated the general principle that positive measures might be needed in favour of minorities, but did not accept the specific claim of a

Slovene political party that the electoral districting for the Land elections in Carinthia should be adapted so as to allow for the election of at least one representative of the Slovene minority. Although the Court did not fully articulate the reasons for its rejection, it might have been that a political issue like electoral procedure was considered as too tenuously linked to the ethno-linguistic distinctiveness of the minorities. In addition, the Court explicitly argued that nothing indicated that the electoral districting in Carinthia had been adopted with the intention of discriminating against the Slovenes; it rather corresponded to a long-established internal administrative division of Carinthia (231).

In fact, the idea that ethnic minorities should benefit from some special political representation, which echoes John Ely's theory of the process-oriented protection of powerless minorities (232), is a recurring theme. In similar cases dealing with the electoral law of the Land Schleswig-Holstein, the German Constitutional Court held, in the 1950's, that a preferential treatment of the party representing the Danish minority was constitutionally legitimate, though not imposed (233). Many examples of such special representation exist in the history of minority

protection (234). Some modest political 'privileges' for minorities have also been adopted in Italy :

- the 'guaranteed' representation of the small Ladin minority in the Trentino Regional Council and in the Bolzano Provincial Council (235), as well as the automatic representation of all linguistic groups who have obtained two municipal councillors in the local board ('giunta comunale')(236).

- the national law on the public funding to political parties, in which the general numerical criteria are slightly relaxed in favour of parties that, though marginal in national terms, are strongly represented within a "special statute region providing for the protection of linguistic minorities" (237);

- the 1979 Law on the Elections to the European Parliament which, in order to compensate for the fact that its electoral districting is less favourable to small parties than the one used for national elections, allows parties representing the French, German or Slovene minorities to pool their votes with those of a national list (238).

The question whether affirmative measures are necessary for the effective exercise of formal language rights, the central issue of this sub-section, is clearly posed under Italian constitutional law. As mentioned earlier, the

Constitutional Court holds that the central objective of article 6 of the Constitution is to protect the integrity of linguistic minorities against forced assimilations (239). Now, it might be argued that the failure to make special allowance for their minority status, even in areas not directly dealing with the use of languages, is an indirect way to provoke the assimilation of those groups. The 1970 judgment on the recruitment of agricultural workers, mentioned above, goes some way in this direction. Yet, it merely consisted in exempting the minority from a general norm; the Constitutional Court has been much more reluctant as far as special positive measures are concerned. A 1975 case concerned the constitutionality of national legislation which recognised a given benefit only to social institutions run by the national trade unions, excluding thereby the South Tyrolean trade union which is dominant in its own province. The Court held that the legislator was not bound to include the German union because language or ethnic differences were not legally relevant in the case at hand, which was of a social nature (240). It reiterated its position in a similar case one year later : a national decree, regulating a new local tax, exempted cultural, recreational and sports associations adhering to national organisations, excluding thereby the German and Ladin associations which lead a separate existence (241). The Court expressly argued that

this measure was not a covert means of forced assimilation, because the minority associations were entirely free to join the national organisations and thus benefit from the tax exemption (242). The picture would be different only if membership of those national organisations implied a threat to their linguistic identity (243), which, according to the Court, it did not. Thus, the 'institutional autonomy' of the minorities in matters not directly linked with language or culture is not particularly protected under article 6 of the Constitution (or by the Regional Statute) (244).

As a final conclusion of this Chapter, I may point to the existence of two different levels of analysis at which a constitutional comparison of the issue of linguistic equality is meaningful. At a first, wider level, of general constitutional theory, one may compare the various constitutional systems as to their attitude towards the issue of equiparation/differentiation in linguistic matters. Wide differences can be observed, as appears from the analysis, in the recognition of the desirability, or the need, of special positive measures of the 'pluralistic' or 'affirmative' type, in addition to the non-discrimination rule. At the second, more specific level of constitutional adjudication, every study of equality unavoidably raises the

issue of the appropriate balance between the legislator and the courts. Here, national differences are less conspicuous; as far as the classical 'non-discrimination' cases are concerned, courts actively check the use of language as a classifying ground. As far as special measures of 'pluralistic' or 'affirmative' equality are concerned, the courts' attitude is much more restrained. Existing 'positive' measures are checked on their compatibility with the principle of equality, but where the legislator remains inactive, the courts are unlikely to impose positive measures by their own initiative. Yet, where existing legislative measures are only fragmentary, the judiciary sometimes entrenches the general principles of a more coherent and comprehensive policy of 'positive' linguistic equality.

CHAPTER TWO

INTERNATIONAL LAW

Section 1

The European Human Rights Convention

A. Scope of the Principle of Non-Discrimination

Article 14 of the European Convention reads as follows :

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Many of the problems regarding the scope of the equality principle in national law do not arise under the

non-discrimination rule of the European Convention. In particular, there is no question that it applies to legislative as to any other domestic legal norms. The municipal system as a whole must be in conformity with international law obligations, without any distinctions as to the hierarchical status of the various norms. It is also clear that all possible grounds of discrimination are covered. There is a list of such grounds, but this list is only enumerative, and not limitative, as is proved by the words "such as" and "other status" (1).

On the other hand, there is an important limitation to the scope of article 14, which cannot be found in any national constitutional text, namely the fact that discrimination is prohibited only for certain subject matters, namely "in the enjoyment of the rights and freedoms set forth in the Convention." Yet, the case law of the Convention organs has been able, against this restrictive wording, to secure a fairly large field of application to the non-discrimination rule, through the elaboration of the doctrine of the "autonomous application" of art.14.

Considering its unambiguous wording, it was impossible to read in article 14 a general provision for 'equality in the law'. The Consultative Assembly of the

Council of Europe has attempted to remedy this fact by recommending the inclusion of 'equality' in the Fourth Protocol to the European Convention (2). The rejection of this proposal by the Committee of Experts, first, and then by the Committee of Ministers (3), is an indirect confirmation of the restricted scope of article 14.

But how restricted is it really ? According to a first, but superficial, interpretation, there would only be two alternatives :

- either an alleged discriminatory treatment does not entail a concomitant violation of one of the substantive rights listed in the other articles of the Convention ; in this case, article 14 is unapplicable, as it covers "the enjoyment of the rights set forth in the Convention", and nothing else.
- or, the alleged discrimination is at the same time a violation of one of the Convention rights; article 14 applies, but only as a duplication, or at the most as an aggravating circumstance, "to establish the particularly odious aspect, the discrimination, of an action on the part of the State which already constitutes a violation of the Convention" (4). It therefore has a symbolic, but not a legally significant role, as there is only one single regime of State responsibility under the European Convention (5).

Such literal interpretation of article 14 thus threatens to make it entirely irrelevant in the Convention protection system. A violation of art.14 without the simultaneous violation of another article being impossible, the non-discrimination does not exert any additional protection for the individual. But, after some initial years of hesitation, and under the encouragement of legal writing, the Human Rights Commission, soon followed by the Court (in the Belgian Linguistics case) were able to find a way out, allowing for article 14, if not an 'independent' application which only a real equality clause could provide for, at least an 'autonomous' application, giving to the article a wider scope, which remains, at the same time, more or less compatible with the restrictive wording of the text.

During its first years of operation, the Commission usually stuck to the restrictive version outlined above. One of the most linear formulations of this orthodox view was given in a case relating directly to the subject of this study, the Isop case of 1962 (6). Franz Isop, an Austrian citizen, had brought a suit written in the Slovene language before an Austrian tribunal, which was rejected by the latter; the 'Minderheiten-Gerichtssprachengesetz' of 1959 allowed for the use of Slovene only in a limited number of judicial districts, to which the tribunal of this case did

not belong (7). The European Commission did not find that this directly violated Isop's right to a fair hearing under article 6 of the Convention (8), and it refused to examine, in addition, whether there was a discrimination against Slovenes in the exercise of the right to a fair hearing :

"Whereas, as regard to the complaint that the said refusal constituted a violation of art.14 of the Convention, it is to be observed that that Article, by its express terms, forbids discrimination only with regard to the rights and freedoms guaranteed in the Convention; and whereas the Commission has already held above that such right is not violated in the present case; whereas it follows that Article 14 of the Convention has no application in the circumstances of the present case" (9).

The Isop case provided perhaps the most orthodox statement of the literal interpretation of art.14. In many other cases, the Commission was floating around, trying, deliberately or not, to escape the issue, or offering contradictory solutions (10). Finally, it outlined, in the Belgian Linguistics and the Grandrath cases, its theory of the 'autonomous application' of art.14, soon adopted by the Court in the Belgian Linguistics case, and since become the 'jurisprudence constante' of both organs.

Let us take the Grandrath case first. Grandrath was a Jehova Witness who was denied the privilege of exemption from compulsory military service which German law grants to certain ministers of religion. The Commission, in its report, affirmed that "the application of Article 14 does not only depend upon a previous finding of the Commission that a violation of another Article of the Convention already exists. In certain cases Article 14 may be violated in a field dealt with by another Article of the Convention, although there is otherwise no violation of that Article" (11). In this sense, art.14 has an autonomous role : it has a function of its own, which is not independent from the other provisions, but operates 'in the field dealt with' by those provisions.

What is now this mysterious 'field' ? Without giving an exhaustive answer, the Commission argues that the specific treatment of Grandrath, at least, 'lies within the field' of art.4 of the Convention. Indeed, military service is presented, in article 4.3 (a) of the Convention as one of the exceptions to the prohibition of compulsory labour (12). Such an exception, now, must be considered as lying within the field of the Article they are attached to. Therefore, "when using this power to restrict a right guaranteed by the Convention the Contracting Parties are bound by the

provisions of Article 14. Consequently, if a restriction which is in itself permissible (...) is imposed in a discriminatory manner, there would be a violation of article 14 in conjunction with the other Article concerned" (13).

In the Belgian Linguistics case, the Court endorsed the Commission's position, but justified it in an even more elliptical manner, by stating only the maxim, followed by two examples, but without any theoretical elaboration :

"(...) a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature.

Thus, persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.

To recall a further example, cited in the course of the proceedings, Article 6 of the Convention does not compel States to institute a system of appeal courts. A

State which does set up such courts consequently goes beyond its obligations under Article 6. However, it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions." (14).

According to this view, equality appears, not as a supplementary right to those guaranteed by other provisions of the Convention, but as a supplementary dimension added to them. One can certainly applaud this evolution, and agree that the organs' interpretation is "par-delà les arguments exprimés à son appui, conforme à la finalité profonde de la Convention" (15). Yet, such a teleological interpretation is legitimate only as long as it does not fly into the face of the "ordinary meaning to be given to the terms" (16). On this point, the Belgian Linguistics case has left some lingering doubts, which were to be forcefully expressed, some years later, by Judge Fitzmaurice in the Belgian Police case. To show the inconsistency of the Court's doctrine of autonomous application, Judge Fitzmaurice reconsidered the second example of the Belgian Linguistics judgment, that of the appellate courts :

"(...) in one and the same breath the Court says that there is no obligation for States under Article 6 of the Convention to establish such a system - which means that the individual has no right to require it to be established, which in turn means that such a right is not, within the terms of Article 14, a right "set forth in this Convention" which again means that it is not a right in respect of the enjoyment of which non-discrimination is prescribed by article 14 : there is no right to be enjoyed (as of right) and hence no prohibition of discrimination if it is voluntarily accorded by the State" (17).

And Fitzmaurice concludes :

"What the Court is really doing here (and the same is true for the 'Linguistics' case) is to interpret and apply Article 14 as if the words "set forth in the Convention" did not figure in it at all.

Such a process may have its attractions, and it may be tempting to follow it. Yet a natural and creditable distaste for discrimination in any form cannot justify a conclusion for which no sufficient legal warrant exists, or can exist" (18).

The Court by-passed the challenge of Judge Fitzmaurice's iron logic, in the Belgian Police case, but

also in all other subsequent art.14 cases, where it simply restated the doctrine of 'autonomous application' as formulated in the Belgian Linguistics, with hardly any elaboration (19). The Commission, which had elaborated the theory in the first place, also continued to use a very loose language, and accepted allegations of discriminations which were "related to" one of the substantive rights (20), when the matter at issue was "covered by" (21), or fell "within the scope of" (22) one of those rights.

Yet, it seems necessary to provide a more coherent theoretical foundation of the 'autonomy' of art.14, which would save the essentials of the Court's and the Commission's views, while making it more compatible with the canons of legal interpretation. What is needed is a tighter definition of the link between article 14 and the "rights set forth in the Convention". In the absence of a comprehensive justification, the Convention organs have provided some bits and pieces, which legal writing, almost unanimously favourable to the 'autonomy' of art.14, has employed itself to put into order (23). One can, according to some authors (24), distinguish two types of situations where the principle of non-discrimination can play a proper role in the Convention system :

- the first situation is that of a substantive right which allows for a restriction or exception under certain circumstances. The limitation clause of art. 10.2, which I examined earlier on in the context of freedom of expression (25), is a typical example of the former, but is repeated in several other articles of the Convention (26). The Grandrath case, on the other hand, offers an example of an **exception** clause. Finally, **derogations** as permitted under art.15 also belong to this category (27).

- The second situation is that of Convention rights that are not (entirely) self-executing, but need some further implementation by the ratifying States. The two examples mentioned by the Court in Belgian Linguistics (access to educational establishments and appellate courts) belong to this category.

What those two situations have in common is the existence of a certain measure of discretion, a 'margin of appreciation' (28) in favour of the States. Now, and here is the fundamental justification for the 'autonomous application', "such a margin is constituted by the Convention itself, it is limited by it and therefore fully covered by it" (29). In other words, in such situations there is a right for the individual, but its exercise is subject to a measure of state discretion. The Convention organs can exert a

legitimate control over this discretion; their task is to prevent the States from overstepping the margin and violating the right itself under the cover of a regulation of its exercise (30). The weak link in Judge Fitzmaurice's logical chain was his strict dichotomy between State obligation and mere voluntary practice. In reality, there seems to be, in between, a sort of 'grey area', where the State is free to act, as long as it acts in an abstract and general manner, without operating discriminations among its citizens. Thus, public authorities can impose certain limitations to freedoms guaranteed in the Convention, but these measures must be imposed on all persons similarly situated (31). And, in the second hypothesis, they can implement certain 'vague' positive rights on an incremental basis, but they should do this in a non-discriminatory manner (32).

I now come, finally, to the consequences this more widely defined scope of article 14 may entail in the context of language. Restrictions on private language, which by themselves might pass the muster of article 10.2, are still subject to the requirements of equal treatment : a state may not restrict the free use of languages of one group and not of the other groups, if they are similarly situated (an issue arising e.g. under the 'ordonnance' on the Alsatian press (33)) ; conversely, it may not restrict the rights of a

number of language groups, if among them there are essential differences (this issue of 'overbreadth' arises in the Quebec Charter of the French Language, the French Law on the use of languages, and the Decree of the Flemish Community (34)).

Moving on to the second 'branch' of application of art.14, the following situations come within its scope :

- there is no direct right to state subsidies for private schools, but if a state decides to fund private schools using a given language, then it must show convincing reasons to exclude schools teaching through other languages (35);
- the right to education contains a 'right to access' which is not directly enforceable under article 2 of the First Protocol; yet, discriminatory rules of access would fall within the scope of article 14 (36);
- there is no enforceable right to broadcast; yet, in distributing licenses, or in organising the public broadcasting regime, the state must take due account of the non-discrimination rule (37).

If, in all these cases, article 14 may be considered as applicable, the essential question must still be answered : what is the meaning of article 14 in relation to language, and which of the national legal rules mentioned above are unlawful under the European Convention ?

B. The Meaning of the Non-Discrimination Principle

In the Belgian Linguistics case, in which it adopted the theory of 'autonomy', the Court also squarely had to face the meaning, in linguistic matters, of this enlarged concept of equality. Yet, some of the promises raised by the theory of 'autonomy' have been belied by the extremely cautious approach of the Convention organs on the substantive level of this case.

The applicants' complaints all concerned the language regime of education established by the Belgian Law of 30 July 1963 (38), and may be reassumed as follows : as far as public education is concerned, they complain that the public authorities organise only Dutch-language education in the area where they live, and not also education through French, which is the other national language (and the applicants' mother tongue); in addition, access to those few French classes that were organised in the Dutch linguistic area was unduly restricted. As far as private education is concerned, the contested provisions were those withholding subsidies from private schools whose linguistic regime is not in conformity with that of public education, and denying

official recognition of the school-leaving certificates issued by those schools (39).

The issues raised by this case are above all of the classical 'non-discrimination' type : the treatment of French-speakers is different, and allegedly less favourable than that of Dutch-speakers living in the same area. Yet, before embarking on the examination of the particular issue, the European Court of Human Rights started by presenting its general conception of equality, a conception which will be reiterated in all subsequent cases on article 14 :

"It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equal treatment is violated if the distinction has no objective and reasonable justification".

This general principle is further specified as follows :

"The existence of such a justification must be assessed in relation to the aim and effects of the measure under

consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim : Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised"(40).

At this preliminary, abstract level, three comments can be made :

- As the Court says, it has adopted an interpretation of equality which is closely inspired on the principles of the various national States, which, as we saw before (41) show also a striking resemblance to each other. The language adopted by the Court is that of 'purpose' (as used e.g. in Italy, France, Spain, Belgium), rather than that of 'nature of things' (as used in the German-speaking world); but, as argued earlier on, there is no real substantive difference between both terminologies (42).

- The standard adopted by the European Court applies to all equality cases, including those concerning the grounds that are expressly listed in article 14 (sex, race, colour,

language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status). This option in favour of a single-tier test has been consistently maintained by the Court in later cases; only in a recent decision of the Human Rights Commission is there evidence of closer scrutiny in the case of an alleged sexual discrimination (43), but it is too early to speak of a new trend.

- Finally, the Court adds to this ends-means test an additional statement, recognising a certain 'margin of discretion' to the States :

"In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention." (44)

This leads, however, to a paradox ; the role of article 14, as delineated above, is that of subjecting the state's margin of appreciation in the fields covered by the Convention

rights to a specific review in terms of equality; yet, the substantive standard used in this equality review is, in its turn, made subject to another form of the margin of appreciation doctrine : the Court leaves some lee-way to the states in deciding which measures are legitimate and which not. This self-restraint is perhaps unavoidable; yet, it means that the principled approach, which the non-discrimination rule promised to bring to the interpretation of the other Convention rights, is only apparent : reviewing a state's margin of appreciation under a substantive right, or doing so under article 14 does not appear to make any difference in terms of legal certainty. In the Belgian Linguistics, at any rate, the Court has exercised a considerable self-restraint; whether this is the effect of the 'margin of discretion' or not, the fact remains that the ends-means test is used in a rather unconvincing manner in this case.

The first issue tackled by the Court is the refusal by the State to establish or subsidise any French schools in the Dutch language area. As the Court correctly notes, this legislation "tends to prevent, in the Dutch-unilingual region, the establishment or maintenance of schools which teach only in French." The question whether this constitutes

discrimination against French-speakers is however given short shrift :

"Such a measure cannot be considered arbitrary. To begin with, it is based on the objective element which the region constitutes. Furthermore, it is based on a public interest, namely, to ensure that all schools dependent on the State and existing in a unilingual region conduct their teaching in the language which is essentially that of the region" (45).

In fact, all possible distinctions and discriminations are based on an "objective element" and on an alleged "public interest"; purely capricious and arbitrary distinctions do not exist, at least not at the legislative level. Equality review logically implies not only an examination of whether a public interest exists, but rather whether the public interest is legitimate (46); in the given case, not only whether the aim of unilingual education existed, but also whether it is legitimate. Perhaps the Court feared that, by delving too deep, it would ineluctably have to strike down the entire Belgian linguistic legislation, which for reasons of judicial policy it preferred not to do. Yet, it seems that it could very well have found a convincing legitimation for the aim of establishing unilingual education, or, more broadly, of ensuring the "protection of the linguistic homogeneity of the region" (47).

Indeed, the unilingualism within the Dutch language zone has its exact counterpart at the other side of the 'linguistic border', in the French language zone. As argued by the Belgian government in this case, "the legislation which has been criticised ensures a strict parallelism between the regulations for the Dutch-speaking and French-speaking areas. Furthermore, it was passed by very large majorities of chambers elected by universal suffrage. In spite of some inevitable imperfections, it represents a democratic compromise between values of liberty and social values" (48).

Indeed, as indicated in an earlier Chapter (49), when the Flemings had acquired the political strength to claim equal rights for their language in Belgium, in the 1930's, two options offered themselves to the legislator : either total bilingualism all over the country, or a double system of territorial bilingualism, with Dutch as the sole official language in the north, and French in the south. Both ethnic communities (and especially the Francophones) preferred the latter option, which was passed by a large majority in Parliament, and subsequently confirmed in the language laws of the 1960's. While it is more convenient and less expensive than its alternative, it is also less respectful for the minorities at both sides. The basic

feature of the Belgian legislation is one of group equality between the French and Dutch linguistic community, entailing however individual sacrifices for French-speakers in Flanders and Dutch-speakers in Wallonia.

It is the failure to recognise that the basic groups of reference of the Belgian legislation are the French- and Dutch-speakers in Belgium as a whole, and to bring out the underlying aim of ensuring some group equality between those language groups, which makes the arguments of the Court so weak. Consider e.g. the hypothesis that the legislator would have made the whole of Belgium into a unilingual Dutch region; the distinctions would still be justified against the criteria of the 'objective element which the region constitutes' and of the 'public interest of unilingualism'. Yet, what a blatant discrimination of Belgium's French-speaking citizens would this be ! (50)

Once adopted its basic interpretation on the first question, it comes as no surprise that the Court also rejected the second and the third question of the applicants, on the same basis of the 'objective element' and the 'public interest' (51). The fourth, dealing with the regime of the Brussels schools, was left open as none of the applicants (all living in the Dutch language region) showed a direct

legal interests in it (52). But in the fifth question, we find a sudden and unexpected resurrection of the aims test; suddenly, the Court starts distinguishing between 'good' and 'bad' public interests. The facts were the following : in six communes, in the vicinity of Brussels, Dutch was established as the main language for administrative and educational purposes, yet the legislator decided not to impose a strict unilingualism, but to grant certain 'facilities' to the important French-speaking minority living in those localities, including the creation of French public schools. However, access to those schools was strictly reserved to children having their residence within those communes, excluding therefore Francophone children living elsewhere in Flanders. This residence condition, which only applied to the French, and not to the Dutch schools of the 6 communes, was, according to the Court, "not imposed in the interest of schools, for administrative or financial reasons : it proceeds solely, in the case of applicants, from considerations relating to language" (53). Therefore, the Court decided, this point of the education laws was in conflict with the principle of non-discrimination. This sudden move to a more 'substantive' type of scrutiny seems to be inspired by the fact that, in the opinion of the majority of the Court, those six communes do not really form part of

the Dutch language region (54), so that the rationale of 'territorial homogeneity' does not hold in their case.

In fact, as the collective Dissenting Opinion of five judges correctly points out (55), the communes do belong to the Dutch linguistic area; they only benefit from a special derogatory regime, according to which the dominant position of Dutch is somewhat tempered by granting special 'facilities' to the French minority (56). It is a strange paradox that the Court accepts the regime of territorial unilingualism in its purest form, and strikes down instead what is only a milder version of it.

Yet, the distinction between 'unilingual' and 'mixed' zones, tentatively made by the Court, but wrongly applied in the case of the six communes, is meaningful, as can be illustrated by the case of Brussels. The capital is treated, in the linguistic legislation, as a truly bilingual zone. In administrative matters, there is a right to use either French or Dutch. In education, there are complete networks of French and Dutch schools. Yet, access to those schools was restricted on the basis of a language requirement: children had to attend French or Dutch schools according to the language used at home.

This system does not violate group equality, as the conditions for access apply to French and Dutch schools alike. Yet, in my opinion, it was nevertheless extremely questionable in terms of individual equality, if one uses the test of 'systematic rationality' described earlier on (57). Indeed, the general system of 'public' language use in the area of Brussels was one of free choice among the two official languages, and only in the educational sector was such a free choice denied. Yet, the regime was upheld in a decision of the European Commission, which inspired itself on the doctrine of the Court in Belgian linguistics (58). The issue has become theoretical however by a 1971 amendment which allows a free choice for the inhabitants of Brussels among the two linguistic networks (59).

What now are the implications of those Belgian cases for the linguistic legislation of the other countries? If one applies the main test of Belgian Linguistics, there is little danger for any of the national measures falling within the scope of art.14. But in subsequent art.14 cases, the Court, while formally using the same ends-means test, has applied it in a more resolute manner and was no longer so reluctant to invalidate national legislation as incompatible with the principle of non-discrimination (60). Making

predictions about what could happen to the particular laws of other countries remains however rather hazardous, in view of the inherent open-endedness of equality review. One advantage the European Convention organs have over their national counterparts is that they can use the comparative method, so that discriminatory measures which are unique to one country, and are not to be found elsewhere, can more easily be held incompatible with article 14. Moreover, the criterion used by the European Court that there should be a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" can apply to linguistic policies whose basic rationale is acceptable but some features of which are excessive (61).

Up till now, I only considered whether formal differentiations on the basis of language are compatible with art.14. Yet, the question also arises whether this article, despite the use of the terms 'non discrimination', might also contain a ban on unwarranted equiparations, and impose the enactment of special 'positive' measures, be they of the 'pluralistic' or the 'affirmative' type. No definite answer on this point can be found in the Belgian Linguistics case. At one point of the judgment, the Court affirms that "the competent national authorities are frequently confronted with situations and problems which, on account of differences

inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities" (62). To read in the words "call for" a clear obligation to enact differentiations is perhaps a bit overbold. Further on in the same judgment, the Court says that to interpret the right to education and the principle of non-discrimination of the Convention "as conferring on everyone within the jurisdiction of a State the right to obtain education in the language of his own choice would lead to absurd results, for it would be open to anyone to claim any language of instruction in any of the territories of the Contracting Parties"(63). Yet, this passage, it is submitted, is only the rejection of differentiation pushed to its extreme; it does not exclude a duty of reasonable differentiation.

In the absence of any clear authority in the Convention case law on this subject, one can only refer to the comparative practice of national equality doctrines. On this basis, one can argue for the existence of a general duty to differentiate under the European Convention (within the limited scope of article 14) (64), but the Convention organs will certainly be extremely prudent in deriving any concrete consequences from it in the linguistic domain (65).

Yet, there is at least one duty to make linguistic differentiations which is clearly spelled out in the Convention. It is not contained in article 14, but in the articles 5 and 6 dealing with the fundamental guarantees of parties during judicial proceedings. Formally speaking, the analysis of those provisions does not belong in a chapter on equality, yet the right to a fair trial might well be considered, partially at least, as a specification of the general principle of equality ('equality of arms') (66).

Among the variety of procedural rights guaranteed by the articles 5 and 6, one finds three specific references to the use of languages in criminal proceedings.

Article 5.2 deals with the time of arrest : "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". The language specification in this provision seems superfluous : the person arrested cannot be adequately informed, if he does not understand the language in which this information is conveyed (67). The guarantee is of a substantive nature : the purpose of correct information ' can be attained by any means, whether oral or written; through an interpreter or through the judge himself; there are no formal prescriptions.

Article 6, for its part, deals with criminal proceedings in the strict sense. According to 6.3,

"Everyone charged with a criminal offence has the following minimum rights :

(a) to be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him;

(...)

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in the court."

These guarantees do not confer a general right to use one's language, nor a right to have the acts translated in the language of one's choice. There is only a conditional right for those persons who are actually unable to understand the language of proceedings. Indeed, in two of its decisions, the European Human Rights Commission denied the existence of a violation of art.6.3 because the applicant had shown, in the procedure before the Commission, that he could very well handle the language used in the domestic proceedings, and was only unwilling to use it ! (68) It would seem that language skills can also be presumed : a person who received his education in a given language could not pretend he did not

understand that language when used during criminal proceedings.

The modalities of the right to an interpreter have been partially clarified by a judgment of the European Court of Human Rights in the case of Luedicke, Belkacem and Koc (69). Each of those persons had been tried for a criminal offence in Germany and had received the assistance of an interpreter, as their knowledge of German was insufficient. Upon conviction however they were asked to reimburse the expenses for interpretation. The German Government argued before the Commission and the Court that only "persons charged with a criminal offence" were entitled by the text of art.6.3 to an interpreter, and that persons who were convicted could therefore be claimed back the costs. This rather sophistic construction was rejected by the Court on the basis both of the ordinary meaning and the object and purpose of art.6.3 (e) (70).

The ordinary meaning of 'free' (in the French version 'gratuitement'), "denotes neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration" (71). When there is a free entrance advertisement for a performance, one does not expect to pay at the exit... (72).

As for the purpose of the provision, it is to secure the right to a fair trial without being handicapped by language difficulties, and, the Court argues, "it cannot be excluded that the obligation for a convicted person to pay interpretation costs may have repercussions on the exercise of his right to a fair trial" (73).

Some difficulties remained in the construction of the terms of art.6.3 (e) even after Luedicke. The first relates to the words "language used in the court". Does this only cover the oral proceedings, or also the written documents; does it only cover the relations between the accused and the court, or also those between the accused and his counsel? On this last point, a narrow interpretation was given in an earlier decision of the Commission (74), but this could now be revised in the light of the Luedicke judgment (75).

The second problem related to the notion of "criminal proceedings" : is the loose category of 'administrative' (i.e. non-penal) fines included as well? In the recent Ozturk judgment, decided against Germany, the Court held that road traffic offences qualify as a 'criminal' proceeding for the purposes of art.6.3 (e), and that

therefore the language guarantees should apply there as well (76).

Some interesting problems concerning the relation between the European Convention and national law were raised in the aftermath of Luedicke. In Germany, difficulties of implementing the judgment were caused by the doctrine of dualism and the ensuing 'lex posterior' rule in the case of conflict between international treaties and national legislation (77). There have been judicial efforts to conciliate article 6.3, as interpreted by the Court, with the contrasting, and subsequent, domestic legislation, but a clear-cut solution was only found through a legislative amendment (78).

Switzerland caused problems of a different order. When it ratified the European Convention on 28 November 1974, i.e. before the Luedicke judgment, it made the following 'interpretative declaration': "The Swiss Federal Council declares that it interprets the guarantee of (...) the free assistance of an interpreter, in Article 6, paragraph 3 (e) of the Convention, as not permanently absolving the beneficiary from payment of the resulting costs"; indeed, the existing criminal procedure laws of the various cantons differed on this question. After the decision

in Luedicke, the European Commission was seized by an applicant from Switzerland, who based himself on the Luedicke doctrine to claim a permanent exoneration of costs (79). The Commission, in its report on the merits, started by examining the nature of the interpretative declaration and found that it had, in reality, the effect of a reservation (80). And although the Swiss declaration did not comply with the formal requirements for a reservation listed in art.64 of the Convention (it did not contain "a brief statement of the law concerned"), it nevertheless produced, according to the Commission, the legal effects of a validly made reservation. Therefore, the application of Mr. Temeltasch was rejected. This extremely generous construction of the Convention's escape clauses has met with justified criticism in legal writing (81).

Finally, one may note that, in addition to the explicit guarantees of art. 6.3, the general right to a fair trial of article 6.1, which applies to civil proceedings as well, might, under certain circumstances be violated by the absence of special provision for a party who does not speak the language of the court. Yet, this depends, as the Commission pointed out in several decisions (82), on the factual situation of the case; there is certainly no general right to use one's language for any person or group.

Section 2

European Community Law

Making reference to European Community Law, in the context of international protection of linguistic equality, needs some preliminary justification. Indeed, there is not, in European Community law, a complete catalogue of fundamental rights, comparable to international instruments like the European Human Rights Convention or the U.N.Covenants. Yet, one can identify, within the EEC Treaty, "a number of special provisions which (...) come very close in substance" to fundamental rights (83). They are not grouped together, nor can they formally or hierarchically be distinguished from other provisions of the same Treaty. They are nevertheless called 'fundamental rights' by some authors (84). Others prefer to use different terms such as

'fundamental freedoms' (85) or 'freedoms of the Common Market' (86). The latter expression has the advantage of indicating that those rights are closely determined by the specific legal context in which they operate : they are of a predominantly economic character, and are granted to citizens of the Community Member states coming under the jurisdiction of another Member state, i.e. to use general international law terms, to (a category of) aliens.

Among these rights, the prohibition of discrimination occupies a prominent position. The prohibition of discrimination on grounds of nationality, contained in art.7 of the Treaty, ranks among the basic principles of Community law. It is further specified in a number of separate articles, for particular contexts : art.48.2 (free movement of persons), art.36 and 37 (free circulation of goods), art.67 (free movement of capital), etc. Apart from this principle of non-discrimination on grounds of nationality, there is also a ban on gender discrimination in labour relations (art.119 : equal pay and equal conditions of work). In certain sectoral fields, finally, there exist general prohibitions of discriminations on all grounds : agriculture (art.40.3), competition (art.86), coal and steel (arts.3b and 4b of the ECSC Treaty).

A common characteristic of all those embodiments of the equality principle is their limited scope : they deal with specific grounds of discrimination and/or specific fields of activity. On the other hand, however, the European Court of Justice has repeatedly recognised the existence of a general principle of equality as one of the unwritten 'general principles of Community law'. Can one then argue, as some authors do, that the specific guarantees against discrimination listed in the Treaty are but manifestations of this general principle, and must be read within this larger context (87) ?

I would submit, on the contrary, that the unwritten principle of equality and the express prohibitions of discrimination should carefully be distinguished as to their legal regime. The reasons for this can be found by looking at the circumstances in which the Court of Justice developed its much acclaimed 'general principles' case law. The absence of a coherent set of fundamental rights in the Community Treaties gradually elicited the fear that a serious gap might be created in the legal protection of the individual. Indeed, the transfer, by the Community treaties, of important policy fields from the national to the Community level, coupled with the principle of supremacy of Community law, implied that national fundamental rights in those fields lapsed without

being replaced by corresponding guarantees of Community law. The drafters of the Treaties had not contemplated this problem, or had considered the possibility of human rights violation by Community institutions as purely theoretical, but with the continuous expansion of Community activity in an increasing number of areas, and especially in the field of economic regulation, the absence of fundamental rights became a potentially acute issue.

Spurred by the existence of this deficiency in the protection of the individual, and perhaps even more by the fear that national courts might use it as an argument to deny full supremacy to Community law over national law (88), the European Court of Justice developed, in a well-known line of cases, the theory according to which fundamental rights form part of the unwritten 'general principles of Community law', the respect of which is guaranteed by the Court (89). Later on, the Community's political organs equally expressed, in a Joint Declaration, their will to respect fundamental rights (90).

Seen in this historical context, the function of the general principles doctrine is to ensure that the Community institutions will not use their powers in a manner contrary to certain basic rights; it is not that of

entrenching supplementary standards which the national authorities should respect. There is, therefore, a crucial difference in scope between the 'Community freedoms' (including the partial prohibitions of discrimination listed above), and the 'general principles' (including equality) : while the former are directed either at the Member states (e.g. art.48), often including also private individuals within their jurisdiction (art.119), or at the Community institutions (art.40.3), or at both at the same time (art.7), the general principles, it is submitted, are only directed at the Community institutions (91). As the function of their judicial 'discovery' was the closing of a gap in the legal protection of the individual, it does not seem appropriate to extend their operation also against the Member states, in respect of which no such gap existed. The supplementary individual rights which the process of integration has brought along are expressly listed in the Treaty. They may, as will be shown, be given an extensive or 'teleological' reading which leads them beyond the purely economic sphere (92), but it is not the object of the European Community to entrench a fully-fledged bill of rights - other international instruments cater for this need - and even if it were, these rights should at least have been fully spelled out and consciously accepted by the Member states, and not stealthily brought in through case-law.

The protection of equality in Community law must therefore be analysed under two separate headings : first, the general equality principle, applicable to Community institutions (and also to Member states, but only when they implement Community measures); and secondly, the specific non-discrimination clauses, with their wider range of addressees.

A. The General Principle of Equality

Fundamental rights having been developed on a piecemeal case-by-case basis by the European Court, one can only affirm that they are generally protected under Community law, but one cannot give an exhaustive list of the single rights figuring in this 'unwritten catalogue'. The Court, however, has given some indications as to its sources of inspiration in discovering those rights. In Nold, the Court found itself "required to base itself on the constitutional traditions common to the Member States and therefore could not allow measures which are incompatible with the fundamental rights recognized and guaranteed by the constitutions of such States" (93). Furthermore, "the international treaties on the protection of human rights in which the Member States have co-operated or to which they

have adhered can also supply indications which may be taken into account within the framework of Community law" (94).

While there is thus no rigorous certainty as to whether any single right belongs to the general principles of Community law, there is little risk in affirming that freedom of expression and educational rights, including their main linguistic components as outlined in previous Chapters, form part of them and thus act as a limit on the legislative and administrative activity of the Community institutions. At the same time, however, the chances that those rights will be violated are very slight indeed, as the Community's field of activity only very marginally touches on the domains covered by them. These rights might play a slightly more important role at the 'internal' administrative level (relations between Community institutions and their staff), than at the external level (relations with Member States and Community citizens) (95).

As for equality, no doubt is possible, as it has repeatedly been considered by the Court as belonging to the general principles (96). This principle of equality is general in scope, extending to all possible grounds of discrimination, including language. An issue of linguistic discrimination is most likely to arise in the area of access

to, and promotion within the Community civil service. The main rule is, not surprisingly, very similar to the one existing at the national level : linguistic requirements are lawful when they are closely linked to the nature of the post to be filled. Thus, according to art.28 f of the Commission's Staff Regulations, the 'interests of the service' may justify the requirement that a candidate should produce evidence of a thorough knowledge of one of the languages of the Communities and satisfactory knowledge of another (97).

In addition, those linguistic requirements may not be used as an indirect way to operate discriminations on the ground of nationality, which, though not unlawful per se (98), are nevertheless the object of special attention in the framework of the Community. Thus, in Lassalle, a requirement of "perfect knowledge of Italian" was struck down by the Court as indirectly discriminatory on the grounds of language (99), while in Kuster, a requirement of "thorough knowledge of English" was upheld, especially in view of the context of the accession of the United Kingdom and Ireland to the Community (100).

At the level of language use, equality is guaranteed by the fact that the Community has adopted all nation-wide official languages of the Member-States as its

own official languages. This means that every citizen of the countries concerned, in dealing with the Community institutions, is free to use any of those languages. Restrictions to their free use are only permitted within the Community institutions, either in order to adapt to the external demands, or as a pragmatic solution to facilitate the operation of a multinational staff, which would be paralysed by a rigorous application of linguistic equality (101). As for minority languages, they have no status at all at the Community level, despite a recent Resolution of the European Parliament calling on the Commission "to review all Community legislation or practices which discriminate against minority languages" (102).

B. Specific Non-Discrimination Provisions

The scope of the specific prohibitions listed in the Treaty is larger in the sense that most of them are also binding on the Member States (and even on private individuals) like the 'normal' human rights instruments considered in this study. To this wide range of addressees corresponds however a more restricted field of application, which makes the value of those clauses questionable as far as linguistic diversity is concerned. The few provisions that cover all grounds of discrimination apply to substantive

areas where linguistic discrimination is unlikely (agriculture, competition), while the provisions covering more relevant fields only contemplate specific grounds of discrimination, - and 'language' is not among them.

However, as in its case-law on the general principle of equality, the Court of Justice has repeatedly extended its control also to indirect discrimination (103). Linguistic discriminations by the Member States are therefore banned whenever they are used as a covert way to establish one of the discriminations that are forbidden by the Treaty. While language can obviously not serve as a substitute for gender, the main prohibited ground of discrimination in the Treaty, nationality, is much more akin to language. As differences in nationality often correspond to differences in mother tongue, language may serve as one of the favourite devices to circumvent the ban on discrimination on grounds of nationality.

The free movement of persons, which entails, according to art.48.2 EEC Treaty, "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment", is the main field in which Community equality has proved to have meaningful

linguistic implications. This is due to the process of extension of the concept of free movement both in Community legislation and in the case-law of the Court.

The concept of free movement has, first of all, be extended by Community legislation. The main source for the implementation of the principle of non-discrimination in work and employment is Regulation 1612/68. This text, it is true, expressly permits, in its article 3, the retention of conditions relating to "linguistic knowledge required by reason of the nature of the post to be filled". Yet, this express provision implies a contrario that linguistic requirements which are not directly linked to the work conditions must be considered as unlawful. The clause is far from limpid however, and has given rise to a number of legal disputes, particularly in France. Under an Act of 1972, a candidate for election to an enterprise committee or a personnel delegate had to be able to read and write French. This condition was clearly not "required by reason of the nature of the post to be filled", and was relaxed, in a subsequent law of 11 July 1975, to the mere ability to "express oneself" in French. Similar requirements, it should be noted, do not exist in other countries (104).

The Court of Justice has also played an important role in the extension of the concept of free movement. Intended perhaps by the drafters of the Treaty as a purely functional device to foster market integration, free movement has proved to be, in the words of a close observer, "one area in which the recognition of individual rights, based on Community law, has enabled the Court to escape the narrow confines of that form of economism which regards a person who is in an activity simply as a factor of production; the Court can thus take into account the living and working conditions in which the person carries on his activity" (105).

This process of judicial extension need not be described here in all details (106). Suffice it to note that it affected the scope of free movement both ratione materiae, by the inclusion of domains which only show a tenuous link with the 'conditions of work and employment' (107), and ratione personae, by the inclusion of the workers' families in addition to the workers themselves (108). In the whole of this expanded field, all linguistic conditions which serve as a covert way of establishing discriminations on grounds of nationality (and are not justified by the particular context) have become unlawful. Thus, in the Choquet case, dealing with the recognition of driving licenses issued in another Member State, the Court expressly indicated that "linguistic

difficulties arising out of the procedure laid down for the conduct of any checks" would be disproportional obstacles under article 48 (109).

Linguistic equality in the framework of free movement even implies, beyond the prohibition of discriminations, a duty to take special measures of 'pluralistic equality', as defined above (110). One of the earliest Regulations implementing free movement held, in its article 84(4) that "the authorities, institutions and tribunals of one Member State may not reject claims or other documents submitted to them on the grounds that they are written in an official language of another Member State" (111). As was aptly stated by Advocate General Capotorti in the Maris case, "the main purpose of Article 84 (4) is to help migrant workers by removing the handicap of language differences, which is liable in practice to make it more expensive and difficult to safeguard their rights as against the authorities of the State to which they have emigrated" (112). Another provision, art.48.1 of Regulation 574/72, relating to the 'passive side' of communication with the administration (the right to have certain decisions notified in one's language) serves obviously the same needs (113).

The recognition of this, albeit limited, right to use their language means that 'Community citizens' can have more rights than the nationals of the country in which they live. Yet, it should be noted that the linguistic rights granted by Community law are not attributed, strictly speaking, on the basis of nationality. Nationals of the Member State itself can also take advantage of them, if only they qualify as 'Community workers' coming within the field of application of free movement. The Maris case offers thus an ironical, but rare, example of a person covered by the Community provisions who could claim a right to use her language in dealing with the public administration of her own country, a right which she did not have under national legislation (114).

As regards positive measures too, the workers are no longer the exclusive beneficiaries of Community rights, but their family has been included as well. The most spectacular move in this field is undoubtedly the 1977 Directive on the education of children of migrant workers (115). This directive may be seen as a compromise between two basic principle of the Community system : the political principle of respect for the Member States' cultural and linguistic identity and the legal principle of free movement of workers within the Common Market. On the one hand,

existing linguistic variety may not be an obstacle for free movement; therefore, article 2 of the Directive states that Member States should take "appropriate measures" to facilitate the integration of the children of Community migrants by teaching the official language or one of the official languages of the host State. On the other hand, free movement may not threaten the cultural identity of the persons concerned; therefore, article 3 holds that "Member States shall, in accordance with their national circumstances and legal systems, and in cooperation with States of origin, take appropriate measures to promote, in coordination with normal education, teaching of the mother tongue and culture of the country of origin" for the children of Community migrants.

The fact that migrant children are not only granted a formal equal treatment in education, but also special measures, raises the problem of a possible 'reverse discrimination' against the nationals of the Member State (116). But, as argued extensively before, measures of 'pluralistic equality' such as those relating to mother tongue education, are complementary, and not contradictory, to the formal non-discrimination rule (117). Whether the provision for mother tongue education can truly be considered as a measure of pluralistic equality can even be doubted. As

argued earlier on (118), bilingual education may serve different objectives; it may be a device to facilitate assimilation or to foster the maintenance of linguistic diversity. Even if one holds that the objective is one of maintenance (119), this does not necessarily mean that the directive has been enacted to achieve the full equality of the migrant children, but rather, as its Preamble admits, "with a view principally to facilitating their possible reintegration into the Member State of origin" (120).

Whatever the underlying philosophy, and despite the directive's limitations (it only applies to children of migrant workers who are Community citizens, and not to all alien children), its implementation required a large-scale reorientation of the educational system of those Member States with large migrant populations. On 16 February 1984, the Commission transmitted to the Council of Ministers its first report on the implementation of the directive, in which it noted, be it in cautious terms, the almost general lack of adequate implementing measures (121). A Council of the Ministers of Education on 4 June 1984 'recommended' the promotion of mother tongue education, but did not mention in its conclusions that a binding legal text already existed in this domain (122).

Yet, very little can be done while the Member States remain inactive. The legal status of provisions of a directive which have not been timely implemented by the Member States is very controversial; the Court of Justice has recognised that they may display some direct effects, and be judicially enforced by their individual beneficiaries; yet, the terms of this directive ("take appropriate measures to promote..."), and its far-reaching content do not seem to correspond to the criteria for direct effect as elaborated by the Court (123).

In the same direction of granting positive language rights under Community law, one must also mention two initiatives de lege ferenda, embodied in two resolutions of the European Parliament. As such, those resolutions lack any binding force on Member-States, but they are nevertheless indicative of a certain sensibilisation to the issue of linguistic diversity at the political level.

The first is the resolution on 'Special Rights for Community Citizens' adopted on 16 November 1977 (124), and containing a catalogue of rights to be granted by each State to the citizens of the other Member States (125). While building on the rights granted by the Treaty, this text goes much further. Directly relevant for our purposes is the

'special right' mentioned at littera k) : "the right of Community citizens to use their mother tongue and to choose freely lawyers from any Member State for their defence in court actions". It has been doubted whether the legislative institutions of the Community, if they would decide to translate some of those provisions into binding law, would have the power to do so under the present Treaty (126). Could a protection of linguistic rights, beyond the sphere of free movement, be enacted on the basis of the 'implied powers' clause of art.235 EEC Treaty, or would it need an outright amendment of the Treaty according to the cumbersome procedure of art.236 ?

The same legal caveat applies, a fortiori, to a second Parliamentary initiative, the 'Resolution on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities' adopted on 16 October 1981 (127), and calling directly on the Member States to take a number of initiatives in favour of the 'regional languages', notably in the field of education, mass communications, but also in that of 'public life' and 'social affairs'.

Section 3

Universal Human Rights Instruments

The principle of non-discrimination (as it is usually called, rather than 'principle of equality') is certainly prominent among all the human rights with which the international community has been concerned :

- It is explicitly mentioned in the United Nations Charter (arts.1 and 55).

- It is repeated in all subsequent global human rights instruments : Universal Declaration, Social Covenant and Civil Covenant; in the latter text, it is even mentioned at three different places (arts. 2.1, 3 and 26).

- It has, in addition, formed the exclusive object of a number of multilateral human rights conventions, which have either focused on limited fields of public life (UNESCO Convention against Discrimination in Education of 1960, ILO Convention concerning Discrimination in Respect of Employment and Occupation of 1958), or on limited grounds of discrimination (Convention against all Forms of Racial

Discrimination of 1965, Convention on the Elimination of all Forms of Discrimination against Women of 1979).

- It had also been the subject of special Declarations, Resolutions by the General Assembly, and formed the main concern of a special body created within the United Nations, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (128) which, in its turn, has sponsored a number of influential studies (129), and seminars.

- Finally, and partially as a result of the foregoing, it is one of the few human rights which may be considered to form part of customary law (130), be it only with respect to specific grounds like race. The guarantee of non-discrimination on the grounds of language, for its part, is probably still exclusively a matter of treaty law (131).

The significance of all those texts in terms of the concrete rights of the individual is difficult to assess in the almost total absence of any judicial or quasi-judicial pronouncements on the matter, in contrast with the European Human Rights Convention and European Community Law. For solid interpretations of the principle of non-discrimination at the universal level, one has mainly to rely on the texts of the

Conventions themselves, which, fortunately, are often more explicit than the corresponding provisions in the national Constitutions. The nature of those sources explains that more indications exist as to the scope of the principle, while nothing much can be said about the concrete meaning and the type of review to be used (132).

A. The first question to be answered is whether language is protected at all by those various instruments. Indeed, international non-discrimination provisions characteristically enumerate a number of prohibited grounds or motives of discrimination. Yet, such an enumeration can play two different roles :

- in most cases (Charter, Universal Declaration, Covenants), the grounds are merely indicative : their mention does not exclude that discriminations on other grounds are equally prohibited. The fact that language is explicitly mentioned (as it is in all those instruments) can mean, at most, that it forms the object of special scrutiny; yet, if one sees the number and variety of the enumerated grounds, covering almost any conceivable criterion of classification (133), one can hardly consider them as very meaningful for concrete purposes of enforcement (134).

- In a few cases, however, the enumeration is limitative : only discriminations based on the specifically mentioned

grounds are covered by the instrument. A typical example is the Convention against Racial Discrimination, which, according to its article 1, applies to "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin". Language is not mentioned in this list of forbidden grounds, and is thus not directly protected under this Convention. Yet, language is indirectly protected in so far as it serves as an indicator of ethnic origin, when e.g. discrimination against an ethnic group takes the form of repression of its language. Indeed, while 'ethnic groups' and 'language groups' are theoretically not coterminous, they tend to cover, in Europe at least, the same realities. Yet, the precise legal meaning of 'ethnic group' in the context of this Convention remains puzzling; the notion cannot be traced back to other international instruments, and the Convention's own preparatory work was marked by a lot of confusion in the delimitation of the various grounds of article 1 (135).

B. The scope of some of the universal non-discrimination provisions is limited in the same way as that of art.14 of the European Convention, i.e. they apply only to the 'substantive' rights protected by the Convention, to the exclusion of all other societal domains. Such restrictions are to be found in art.2 of the Universal Declaration,

art.2.1 of the Civil Covenant, and art.2.2 of the Social Covenant. Yet, in the two former instruments, the provision is completed, in another article, by a general prohibition of discrimination, applying 'across the board' (136). As a result, non-discrimination is only limited to 'fundamental matters' in the Social Covenant. The theory of 'autonomy' as applied by the European Human Rights Convention with regard to art.14, should be transposed to art.2.2 of the Social Covenant, and for the same reasons : it is the only way to give an 'effet utile' to this article (137). Of course, in States who have ratified both Covenants, the Civil Covenant (with its unrestricted scope) is much more likely to be invoked than the Social Covenant, as far as the protection of equality is concerned.

Similar limitations to the field of application of non-discrimination are as it were 'inbuilt' in the instruments dealing with specific sectors like education (the UNESCO Convention), or labour conditions (the various ILO Conventions). Yet, it should be noted that the UNESCO Convention, e.g., is not limited to the 'fundamental rights' aspects of education (like the Social Covenant), but applies to the whole educational sector.

C. A question which used to be very controversial in various national legal orders has recently been the object of debate at the international level as well : should 'equality' be considered as 'equality before the law', or does it also include an obligation of 'equality in the law' (138). The more detailed conventions, like the ones on racial discrimination and on discrimination in education specifically refer to the obligation to adapt the national legislations, and not simply the administrative practice (139). The Convention against Racial Discrimination goes even further and prohibits discrimination by private individuals as well (140). But art.26 of the Civil Covenant is a much more laconic provision, which is open to divergent interpretation. According to Tomuschat, art.26 only entrenches the concept of 'equality before the law' and not some sweeping general prohibition of discrimination (141), The underlying rationale of his position is rather convincing. As we saw, a general principle of equality is not materially limited like other fundamental rights, but rather subjects all possible legislative acts to a universal 'reasonableness' review by the enforcement organs. Now, if such a broad notion already raises considerable difficulties under domestic notions of 'separation of powers'(142), then it becomes entirely untenable at the international level. The function of international human rights protection is of a

subsidiary nature; it is to ensure to all persons the enjoyment of a few very basic rights, and not to allow for the scrutiny of every possible legislative enactment on the basis of a vague 'reasonableness' standard (143).

If the rationale of this opinion is convincing, the arguments listed in its favour are rather weak.

- First of all, the 'travaux préparatoires' of the Covenant do not show a general understanding to limit the scope of art.26 to 'equality before the law'. Other authors have convincingly argued that the preparatory work is extremely ambiguous, with many drafters having only a vague idea of the meaning of the concepts that were used; the drafting history can, in fact, point either way (144).

- Another argument is that of the 'object and purpose' of art.26 : if one adopts the broad view of art.26, article 2 of the same Covenant (with its limited guarantee of equality "in the rights recognised in the present Covenant") becomes entirely pointless and redundant; furthermore, the broad reading would encroach upon the domain of the Social Covenant : as art.26 applies 'across the board' (thus also in social, economic and cultural fields), the restrictive wording of art.2.2 of the Social Covenant would be entirely swept aside (145).

- On the other hand, the text itself of art.26 produces a powerful counterargument against Tomuschat's thesis, as it includes both the terms of "equal before the law" and "equal protection of the law".

- There is a more profound reason pleading against Tomuschat's view. As the analysis of national practice in the previous Chapter showed (146), the criterion of 'equality before the law' inevitably boils down, in operational terms, to a distinction between countries with or without judicial review : in the latter, equality review stops short of formal legislation, while in the former it covers this legislation; but in both categories, the review is necessarily of a substantive, not a formal nature. However, the distinction based on the existence of judicial review is meaningful at the national level (the 'mighty problem' of the alleged counter-democratic nature of constitutional review), but it is alien to the traditions of international law. Indeed, in the eyes of international law, state activity appears as an indivisible whole, without distinguishing between acts of the legislature, the administration or the judiciary, and state responsibility can be incurred under international law under any of those acts (147).

For those reasons, I tend to share the views of the majority of legal writing who consider art.26 as embodying a general prohibition against discrimination (148).

D. Whether one adopts the wider or the narrower interpretation in the foregoing controversy, one final question remains to be answered as to the scope of non-discrimination in international law : does it only contain a ban on unreasonable differentiations, or does it prohibit unreasonable equiparations as well. As was profusely shown in the analysis of national law, this is a question of the utmost importance in the case of linguistic equality, linguistic minorities needing, more than others, the enactment of 'special measures' of differentiation.

The definition of 'non-discrimination' given by the opening articles of the UNESCO and Racial Discrimination Convention is unambiguous in this respect : it corresponds to what I called 'non-discrimination' in the analysis of national constitutional law (149), as it only prohibits "any distinction, exclusion, restriction or preference" (150) which is not reasonably justified. Equiparations are not covered by this definition, and special measures are therefore neither prohibited nor imposed.

Yet, article 1 of those Conventions only intends to define the concept of 'discrimination', and does not exclude the existence of supplementary obligations for the States Parties, which go beyond 'non-discrimination' in the strict sense. And indeed, art.2.2 of the Convention against Racial Discrimination adds the following :

"States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. (...)"

This obligation is, admittedly, not formulated in very strong terms, and seems to exclude any directly enforceable individual claim. Yet, the fact remains that equiparation, the denial by the States Parties of 'special measures when the circumstances so warrant', while not falling under the definition of discrimination of art.1, nevertheless constitutes a breach of the Convention (151).

What, then, is the correct interpretation of art.26 of the Covenant which is, because of its general nature, the most important embodiment of equality at the international level. Even if one wanted to transpose to art.26 the

definition of discrimination given in the Conventions mentioned before (which one should not, as both Conventions specify that their definitions only applies "in the Convention" (152)), the fact remains that art.26 uses both the concepts of 'non-discrimination' and of 'equal treatment'

:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour,....".

Many authors think that the use of 'equal protection' does not add anything to the concept of 'non-discrimination', and that therefore special measures are not mandated by art.26, but are simply allowed (if they are not discriminatory) (153).

I tend to be of the contrary opinion and to agree with those authors (154) who read in article 26 a general 'Aristotelian' obligation to 'treat equals equally and unequals unequally', according to which both equiparations and differentiations can be illegitimate under the international equality standard. While the 'travaux

préparatoires' of the Covenant are, here again, contradictory and inconclusive (155), the following arguments may be adduced in support of this view :

a) If article 26 mentions both 'equal protection' and 'non-discrimination' then one must presume that those different terms also stand for different meanings, according to the principle of effectiveness ('effet utile') (156).

b) To discover the additional meaning of 'equal protection', one might have a comparative look at the meaning this term has at the national level; as indicated earlier on, the Aristotelian formula is adopted as the definition of equality by practically all Constitutional Courts (157).

c) In international law itself, there is some authority for this view, foremost among which is the interpretation of the concept of 'equality' given by the Permanent Court of International Justice in the Albanian Minority Schools case. The Court distinguishes two aspects in the notion of equality as used in the context of the minority treaties :

"The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority" (158)

d) A more recent judicial authority is the Dissenting Opinion of Judge Tanaka of the I.C.J. in the South West Africa case (159); according to a leading commentator, "his exposition is undoubtedly the locus classicus on the subject and has had a profound influence on later thinking" (160). After a long analysis, Judge Tanaka concludes that "to treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently" (161), and, further on, "to treat unequal matters differently according to their inequality is not only permitted but required" (162).

e) Finally, the idea that 'equality' is more encompassing than the notion of 'non-discrimination' is also expressed in the following statement in the Memorandum of the Secretariat

of the United Nations on 'The Main Types and Causes of Discrimination', which relates directly to our subject :

"The protection of minorities (...) although similarly inspired by the principle of equality of treatment for all peoples, requires positive action : concrete service is rendered to the minority group, such as the establishment of schools in which education is given in the mother tongue of the members of the group. Such measures are of course also inspired by the principle of equality : for example, if a child receives its education in a language which is not its mother tongue, this might imply that the child is not treated on an equal basis with those children who do receive their education in their mother tongue"(163).

The interpretation one chooses to give to art.26 has some influence on the relationship between this article and the immediately following article 27 of the Covenant, which provides for the right of persons belonging to ethnic, religious or linguistic minorities, "to enjoy their own culture, to profess and practise their own religion, or to use their own language". If one adopts the prevalent 'negative' view of art.26 (a ban on unlawful distinctions, but no obligation of special measures), then art.27 can either be considered as a specification (declaring in which cases 'positive' differentiations are compatible with art.26)

or as a derogation on the general principle of equality, imposing 'positive' measures in the specific case of ethnic, religious and national minorities. If, on the contrary, one adopts the 'positive' view of equality defended here, art.27 is a specification of the general principle of equality, indicating what type of positive differentiations must be enacted in the case of linguistic and other minorities, and thereby somewhat limiting the open-endedness of art.26. Either way, article 27 is certainly the most promising provision as far as 'positive' measures in the field of language use are concerned. Because of the absence of unanimity on the question whether art.27 forms part of 'equality' in the wide sense, this article, and the intricate issues of interpretation which it raises, shall be discussed in a separate chapter below (164).

PART SIX

THE RIGHT TO USE ONE'S

LANGUAGE

CHAPTER ONECOMPARATIVE CONSTITUTIONAL LAW

As has become clear from previous Chapters, a rather sharp distinction can be made between the constitutional protection of language use in the 'private' sector, and that in the 'public' sector. While the former is entirely covered by freedom of expression (with the additional guarantee of freedom of education as far as the educational domain is concerned) (1), the public use of languages is only very fragmentarily protected by 'generic' fundamental rights like freedom of expression or the right to education (2). As for the role of equality in respect of public language use, it depends very much on how broadly this principle is defined. In particular, the question whether an official language clause should be considered as an embodiment of the right to equality is rather controversial; in Finnish constitutional law, it seems to be answered in a positive sense, but the link between both concepts is much more tenuous in other countries (3). Because of the difficulties in drawing the borderline, it seems preferable

to consider such officiality clauses, together with the individual entitlements which may flow from it, as specific language rights to be treated separately from the generic fundamental rights discussed in the foregoing Parts of this study (4).

. A constitutional provision giving an official status to one (or more) languages is, first of all, an objective institutional norm. It indicates which is "the language to be used by official institutions (legislative, administrative, judicial) both in their internal operation and in the outward contact with the public (official forms and publications, documents, information, street signs, court trials, hearings etc.)" (5). This first meaning of officiality has particularly been stressed in a whole line of Belgian cases. The Belgian Constitution has no 'official language clause' in the strict sense. Yet, its art.3 bis holds that "Belgium is composed of four linguistic regions : the Dutch linguistic region, the French linguistic region, the bilingual region of Brussels-Capital, and the German linguistic region". Like in the case of art.116.1 of the Swiss Constitution (6), this clause must not be considered as a mere statement of sociolinguistic facts, but as a normative provision : the term of 'linguistic region' indirectly indicates the regime of official language use : thus, Dutch

is the exclusive official language in its 'region', and the same holds for French and German in their 'regions'; only Brussels (and the central administration) are officially bilingual. This implies, in turn, a duty to use the official language in the unilingual regions. Derogations to this regime of territorial unilingualism should, according to the Council of State, be restrictively interpreted; thus, the fact that the citizens of certain localities at the 'linguistic border' have been granted the right to use, in certain circumstances, another language, does not imply a similar right for the administrative service in the absence of a specific request of the citizen (7). This principle applies to political organs (like local councillors or members of the executive board) as well; they must be considered as 'administrative services' whose duty it is to use the official language of the region, to the exclusion of any other. In a further crescendo along this line, accompanied by a serious political row, the Council of State held that this also implied that a person unable to express himself in the official language of the region could not hold a local mandate in that region (8).

As observed by prof. Capotorti in his Study for the United Nations, "the selection of a language as a national official language is primarily a political decision based on

a number of factors, such as the numerical importance of the respective linguistic communities, their political and economic position within the country concerned, the existence at the frontiers of the country concerned of a powerful State in which the main language is one which is spoken by a minority group of that country and also, particularly in the developing countries, the stage of the development of the minority language as an effective means of wide communication in all fields"(9). As such, it is a fundamental decision regarding the self-identification of the State, which, as such, is not amenable to individual rights arguments, and should therefore, as a rule, not be considered as the consequence of a 'fundamental right', except if the constitutional text itself holds otherwise (10).

Yet, once established, the decision to grant a constitutionally entrenched official status to a language may have consequences in terms of individual rights for the speakers of that language. When the Constitution recognises only one official language, either explicitly as in art.8 of the Austrian Constitution, or implicitly (11), the fact that the public administration is only allowed to use that language has of course the correlative effect that the citizens are entitled to use that language in addressing themselves to the authorities. But, in the absence of any

alternative, this right is at the same time an obligation. This aspect was stressed, in Belgium again, by a recent Decree of the Flemish Community imposing a duty to all citizens, living in the Dutch linguistic region, to use that language in their relation with the public services operating within the region (12). But this is only the explicitation of an obligation which was already implicitly contained in art.3 bis of the Constitution.

More interesting is the case of a plurality of official languages, be it at the central level, or at the regional level, or in the State as a whole. Does this co-officiality (which is relatively frequent) imply a free personal choice for every individual to use either one of those languages ('criterion of personality'), or is the availability of the two official languages regulated, e.g. on a territorial basis ('criterion of territoriality') ? Formally, countries can be divided in three categories : those where the unrestricted right to use either official language is expressly denied by the Constitution, those where it is expressly affirmed, and those where the text of the constitutional provision remains silent on the matter. In reality, as we shall see, some regulation and limitation of the right to use one's language exists in all cases.

Art.8 of the Irish Constitution explicitly allows for restrictions to the right to use the official language of one's choice; while Irish and English are declared to be the country's official languages, paragraph 3 of the Article adds that : "Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof". Yet, as long as no such limitation has been enacted by law, i.e. by an Act of Parliament, the main rule applies which, according to the courts, is that "every person shall be entitled at his option to use either language in transacting legal business, and that he shall not suffer any impediment or incur any liability or disability by reason of the language he uses" (13).

In Finland, on the contrary, no limitation is contained in the text of art.14 of the Constitution which merely provides that "the right of Finnish citizens to use their mother tongue, whether Finnish or Swedish, before the courts and the administrative authorities, and to obtain from them documents in these languages, shall be guaranteed by law". Yet, the implementing law promised by those last words, the Language Act of 1 June 1922 (with subsequent amendments), only recognised a full right to use either Finnish or Swedish in judicial proceedings, but limited the extent to which the

administration must be bilingual. The main principles of the linguistic regime of public administration are the following : "each commune or municipality in Finland is classified linguistically according to the proportion of its inhabitants speaking each of the official languages. Those having a minority of 10 per cent or more speaking either Finnish or Swedish are classified as bilingual communes; those with smaller minorities are unilingual Finnish or unilingual Swedish communes, as the case may be. The classification is reviewed and adjusted after each decennial census. The classification then becomes the basis for the language practice of government departments and agencies; any administrative district containing bilingual communes or communes of different languages is obliged to provide service in these communes in the language or languages prescribed"(14). Whether the creation of these bilingual districts is in conformity with the unrestricted right granted by art.14 of the Constitution is somewhat doubtful, but cannot be authoritatively assessed in the absence of judicial review of legislation; yet, it should be noted that the restriction applies to Finnish and Swedish alike, and that there are (a few) local districts in which Swedish is the sole official language.

In Canada, the new Charter of Rights and Freedoms is much more explicit on the individual consequences of official language use. On the one hand, its sections 17 and 19 grant an absolute right to use either English or French in the legislature and before the courts, both at the federal level and in the province of New Brunswick :

"17 (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

19 (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick."

At the level of public administration, on the other hand, the right to use either language, while equally unrestricted in New Brunswick, is limited in the following terms as far as federal administration is concerned :

"20 (1) Any member of the public in Canada has the right to communicate with, and to receive available services

from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

- a) there is a significant demand for communications with and services from that office in such language; or
- b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French."

Thus, a modulation of the official use of languages on a territorial basis is expressly allowed for federal field services. This is in accordance with the existing legislative regime under the Official Languages Act (Canada) of 1969. Wherever official language minorities equalled or exceeded 10 percent, bilingual districts were to be established, in which administrative services would be provided in both languages. However, the bilingual districts idea met with difficulties in its practical implementation and was finally dropped altogether (15); the principal reason of this failure, it is said, has been the opposition of the Provinces, who feared that the existence of federal bilingual districts on their territory might pressure them to establish the same bilingualism in the matters of their competence (16). The federal government has, instead, adopted a more pragmatic

approach. Without drawing clear territorial lines, it seeks to make both languages available wherever a strong demand for bilingualism is voiced; in general, progress in the availability of French in federal agencies operating in the English-language zones has been noticeable (17). Yet, it will be interesting to observe whether the vague wording of section 20.1 of the recently adopted Charter will be interpreted by the courts as to constrain the existing policies of the federal government.

In Switzerland, on the contrary, art.116.2 declares German, French and Italian to be the official languages of the Confederation, without adding anything as to the consequences in terms of individual rights. One accepts as the basic premise that this article implies an individual right to use either of those languages in official business. Yet, this right is made subject to the important reservation of the 'territoriality principle' as embodied, according to prevalent Swiss doctrine (18), in the first paragraph of art.116, the one dealing with the national languages of the country. If this provision is considered as restricting the freedom of private language use (19), then it should also, a fortiori, apply to the regulation of public language use (20). The legal situation is therefore the following : in dealing with decentralised organs of the Confederation, there

is only a right to use the language of the area; in dealing with the central administration, the legal situation is unclear : some hold that there is an unrestricted use to choose either of the three official language (21); others take the restrictive view that, even in this situation, citizens are only entitled to use the traditional language of the area where they live (22). In practice, however, this problem is not acute : the central departments are equipped to handle all three languages, and do not check too closely the geographical origin of every particular request.

The same doctrine holds at the level of the four officially plurilingual cantons : Berne, Valais, Fribourg and Graubunden. Without describing their practice in all details (23), one may mention the recent constitutional cases concerning the canton Graubunden. Its Constitution recognises German, Romansh and Italian as official languages (24). Yet, there is, like at the federal level, no absolute right to use either of those languages but, rather, a territorial modulation on a small scale, according to the effective distribution of languages. This fragmentation is particularly noticeable in the educational sector, where each locality only organises primary education in the locally dominant idiom, a regime which was accepted by the Federal Tribunal in the Derungs case discussed earlier on (25). But

it also applies to the courts and the civil service; an abusive application of the territoriality principle in this domain was recently condemned by the Federal Tribunal in the Giovanoli case (26). While rejecting the recourse for procedural reasons, the Tribunal nevertheless went out of its way to comment on the facts of the case that were the following: the local tribunal of the Albula district used either German or Italian, but not Romansh, although this language is spoken by 50% of the population of the district, and constitutes the traditional language of the area (27). This territorial regulation of public language use is no longer covered, the Tribunal correctly observes, by art.116.1 of the Constitution; it even flies into the face of this provision, which was meant above all to guarantee the survival of the weaker national languages, such as Romansh (28).

Several Statutes of Autonomous Communities in Spain (Catalonia, Euskadi, Galicia, Valencian Community, Balearic Islands, Navarra) (29) proclaim the co-officiality of their respective regional language with Castellian, which is the only official language at the national level. In several instances, this provision is accompanied by the guarantee of the right of the Community's citizens to use either of those languages (30); but, as the Constitutional Tribunal observed,

such a right flows already from the status of officiality itself (31). Here again, the right does not go unrestricted in all cases : the Statutes of Navarra and the Valencian Community expressly allow for the restriction of the official currency of the regional language to only part of the Community's territory (32).

Whether, finally, art.3 bis of the Belgian Constitution, by establishing Brussels as a bilingual district, grants an absolute constitutional right to use either French or Dutch in that area's local administration is uncertain. At any rate, the present legislative regime recognises such a right (33). Every civil servant must be able to address himself to the citizens either in French or in Dutch, and the creation, by the commune of Schaarbeek, of separate counters for French- and Dutch-speakers was declared unlawful by a 1974 decision of the Council of State (34). It might be stressed in this context, although it may seem obvious, that the right to use either of two official languages is a right of the citizen dealing with the public administration, and not also a right for the civil servants, who, in the exercise of their official functions, are restricted by the options expressed by the users of the service, and the ensuing internal organisational arrangements (35).

So far the legal consequences of an official language clause. Yet, a right to use one's language in public life need not necessarily be derived from such an encompassing provision. There also exist, in some countries, more specific constitutional rights which do not grant a full equal status to the minority language, but guarantee its use in limited domains of public life. The right to education in minority languages, guaranteed by section 23 of the Canadian Charter of Rights and Freedoms and by art.7.2 of the Austrian Peace Treaty of 1955, has been discussed earlier on (36). But, in the Austrian case, similar guarantees also exist in other fields.

Article 7.3 of the same Vienna State Treaty holds that "In the administrative and judicial districts of Carinthia, Burgenland and Styria, where there are Slovene, Croat or mixed populations, the Slovene or Croat language shall be accepted as an official language in addition to German". A first, limited, implementation of this provision took place in 1959, by a federal Act designating three districts in Carinthia, in which the Slovenian language could be used by any person in court proceedings (37). This Act was replaced by the more ambitious Law on Ethnic Groups of 1976 and its implementing regulations (38), which apply to public administration as well. In an important recent judgment, the

Constitutional Court held that art.7.3 contains a directly enforceable right, and is not a purely programmatic norm to be discretionally implemented by the legislator and the government (39). In the present case, the Court used an interpretation 'in conformity with the Constitution' and read in the somewhat ambiguous and reluctant terms of the Law on Ethnic Groups a general right to use Slovene in all administrative proceedings within the 'mixed' districts listed in the implementing regulation. It would seem from this case that art.7.3 has not always been directly enforceable, but only since the delimitation (which took place in 1977) of the bilingual districts. In the case of the Burgenland Croats (where no territorial delimitation has been made as yet), art.7.3 might therefore still be of a 'programmatic' nature.

Of course, many minority languages are used in public life without any constitutional authority to that effect. Typical cases of such linguistic regulation on a purely legislative (or infra-legislative) basis are Luxemburg, with its very complex, but unproblematical, functional division of tasks between French, German and Luxemburgian (40); and Wales, where the Welsh Language Act of 1967 granted an unabridged right to speak Welsh in the courts (41), but where the linguistic regime of other domains is

still "piecemeal, unplanned, unco-ordinated, and lacking in any firm base in principle" (42). The use of immigrants' languages in public administration is similarly lacking firm principles in legislation, and is largely based on informal administrative guidelines. That this practice is not necessarily negligible in substantive terms is shown by the following account of the Swedish case : "In Sweden, although there are no laws on the question, a government programme has been in operation since 1965 under which information from government and local authorities is translated to an increasing extent into a large number of languages spoken by immigrants and linguistic minorities. In certain spheres of activity, the labour market in particular, extensive documentation is provided to minority members in their own language. Though the language of the administration is Swedish, letters written to authorities in a minority language must not be rejected by the authorities, according to administrative instructions in force. In this connexion, a central translation service has been established by the national immigration and naturalization board, among others, and in about 40 places local immigration centres provide the service of interpreters. The law also provides that in their dealings with administrative authorities, persons belonging to linguistic minorities are entitled to be assisted by an interpreter free of charge" (43).

CHAPTER TWOINTERNATIONAL LAW

We have seen the originality of article 27 of the Civil and Political Covenant within the general scheme of international human rights protection. It is a first and isolated explicit recognition that special provisions for minorities are not only allowed, but constitute a legal obligation in their own right. It is also a provision of universal international law which does not find its equivalent at the European level. Whether one considers it as a specification of the general equality provision of art.26 of the Covenant, or rather as a derogation from it (1), it appears as a potentially significant provision, but it also raises hosts of interpretative problems, both because of its idiosyncratic nature and because of its elliptical formulation :

"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 own culture, to profess and practise their own religion, or to use their own language."

The main problems arising from this formulation can be classified in two categories : those pertaining to the **beneficiaries** and those concerning the **contents** of the right.

Section 1

Beneficiaries

The "right to use their own language" (as well as the two other rights which do not concern us here) is attributed to "persons belonging to a minority". Article 27 is sometimes superficially characterised as creating 'collective minority rights' (2), but it is perfectly clear from the text that it does not institutionalise a collectivity as the beneficiary of rights. The article remains in line with previous experiments (the interwar Minority Treaties) as well as with the overall pattern of the Civil and Political Covenant which only guarantees the rights of the individual (with the one exception of the peoples'

right to self-determination of article 1, which has however a very specific function as a 'precondition' for the enjoyment of all other rights). Beyond the logic of the system, this choice for individual rights was dictated by political reasons (3): i) protection of the freedom of the individual members of the minority to choose between assimilation and preservation of their distinctiveness, which could be jeopardised by entrenching the rights of the group; and ii) protection of state interests, the attribution of rights to the minority as such being seen as increasing the danger of conflict and disintegration.

Yet, in a certain sense, the rights of art. 27 are situated somewhere "half-way" (4) between the individual and the collective pole. A group element determines the mode of exercise of the right to use the language ("in community with others"), and another group element serves as a criterion for the identification of individual beneficiaries of the right : not all persons - contrarily to what is provided in most other articles of the Covenant - can claim the application of art.27, but only those belonging to minorities. This restriction raises two traditionally vexed questions : what is a minority? and how does one decide who is a member of that minority ?

A. The notion of 'minority' has no official or commonly accepted definition in present day international law. During the interwar period, the Permanent Court of International Justice has however dealt with the term 'communities' in the context of the Greco-Bulgarian Convention on the Exchange of Population, emphasising the "close relationship existing between the Convention and the general body of the measures designed to secure peace by means of the protection of minorities" (5). It defined the notion as follows : "The criterion to be applied to determine what is a community within the meaning of the articles of the Convention (...) is the existence of a group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another."(6)

Although 'community' is a larger concept than 'minority', we find in this definition many of the themes that will recur in post-war discussions leading up to article 27. The most acceptable definition today is perhaps the one

provided by rapporteur Capotorti in his U.N. Study on the Rights of Persons belonging to Minorities (7). On the basis of his own "provisional interpretation" (para.28), and after a careful examination of international documents and opinions of individual states (paras. 26 to 51), he offers the following tentative definition (para.568) :

"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."

A long-winding definition which, on analysis, rests on a double pair of criteria : a minority, basically, is a group within a country, which differentiates itself according to an objective and a subjective criterion, and stands in a certain objective and subjective relation to the rest of the population.

1. The differentiation is objective : the minority distinguishes itself by its "ethnic, religious or linguistic characteristic". This is an undisputed element of any

definition of minority, although its practical application may give rise to delicate interpretative problems. "Language" may be less imprecise than "ethnicity", still it is not a scientifically fixed notion. By calling a certain idiom a 'dialect' rather than a 'language', states may be tempted to avoid the obligations of article 27 (8). Needless to say, a group must not cumulate cultural, religious and language characteristics; a person belonging to a simple language minority, which is not at the same time an ethnic group (9), may claim the benefit of the right to use this language under art.27.

The differentiation is also subjective ; the group must show a "sense of solidarity, directed towards preserving" its differential characteristics. This criterion was absent from the Rapporteur's "provisional interpretation", and its inclusion seems to be a concession to the views expressed by several governments (10). That the concession is made only half-heartedly can be seen from the words "if only implicitly", which refer to a remark made further on in the Study : "(...) the will in question generally emerges from the fact that a given group has kept its distinctive characteristics over a period of time (...). Bearing these observations in mind, it can be said that the subjective factor is implicit in the basic objective element

(...)" (11). These mental reservations against the subjective criterion of distinctiveness seem perfectly warranted : the criterion does not serve a practical purpose in the context of art.27 which lays down rights, and not obligations; the application of this provision will therefore, by definition, only be claimed by persons who are willing to preserve their characteristics. The criterion is not only useless, but it may be harmful : requiring the proof of a subjective identification may serve, for the State, as a device to prevent the recognition of a minority.

2. The relation with the rest of the population should be minoritarian, first of all in an objective, numerical sense. Groups forming a numerical majority but being oppressed or discriminated against by a dominant minority, raise the different issue of the application of basic principles of democracy and equality, guaranteed elsewhere in the Covenant and lying outside the limited scope of art.27 (12). Similarly, groups forming a minority at the level of an autonomous region, but not at global state level, are beyond the field of art.27, it would seem (13). Finally, "in countries in which ethnic, religious or linguistic groups of roughly equal numerical size coexist, article 27 is applicable to them all", according to Capotorti (14).

The relation must also be minoritarian in a more subjective sense. Dominant minorities are clearly not in need of protection. However, sociological definitions of dominance have to be handled with care : an alleged dominance should only result in the exclusion of the group from the ambit of art.27, when it is unambiguously expressed in legal terms, like e.g. in the paradigmatic South African legal system.

There is a further, fifth qualifying element in the Rapporteur's definition : the minority must consist of nationals of the State. This would have rather important consequences in many of the countries under study, excluding e.g. the millions of "guest workers" from the benefit of international minority protection. But the reason adduced for excluding foreign minorities do not convince entirely. At one point of his Study, Capotorti affirms that "the very concept of minority, which takes for granted a corresponding majority which is predominant, in fact restricts the subject of the protection of minority groups to individuals who have settled down as members of the country's population" (15). This argument is not conclusive : the reference on the basis of which one can assess the existence of a minority and a corresponding majority can be the total number of citizens, but can as well be the total resident population of a country. The latter figure is perhaps even more frequently

used in the elaboration of policy decisions. The Rapporteur further justifies the exclusion of foreigners by the fact that they have their own, special rights : "as long as a person retains his status as a foreigner, he has the right to benefit from the protection granted by customary international law to persons who are in countries other than their own, as well as from any other special rights which may be conferred upon him by treaties or other special agreements" (16). But precisely some of the most important of these treaties are the multilateral human rights instruments, and if the Civil and Political Covenant, by virtue of its article 2.1, extends the state's obligations to "all individuals within its territory and subject to its jurisdiction", why should article 27 make an exception, when this is not clearly spelled out ? (17). Experience shows that immigrant minorities may be as badly in need of protective measures as long-time territorial minorities. Some measure of differentiation between both categories seems warranted, in view of the 'voluntary' nature of immigrant minorities (18), but the outright exclusion of foreigners seems to be justified neither by the terms nor by the context of art.27, and the possibly contrary indications in the 'travaux préparatoires' should therefore not come into play (19).

Finally, Capotorti rightly refuses a restrictive interpretation which would make the existence of a minority dependent on official recognition by the state in which it lives. This might have been, admittedly, one of the purposes of the Chilean amendment introducing the opening words of the article ("In those states in which they exist"), but accepting such an interpretation would deprive the article of all meaning (20). In this context, one may mention the reservation to article 27 that France thought proper to express when ratifying the Covenant (21) : "Le Gouvernement francais déclare, compte tenu de l'article 2 de la Constitution de la République française, que l'article 27 n'a pas lieu de s'appliquer en ce qui concerne la République." The implicit rationale of this reservation seems to be that, as article 2 of the constitution guarantees the "indivisibility" of the Republic, the existence of minorities can not be recognised in France. Leaving aside the logic of this argument, which escapes me entirely I must confess, the fact that France felt impelled to make a reservation seems to indicate an awareness that the text of article 27, by itself, does not extend entire discretion to the states whether to recognise a group as a minority or not. As to the admissibility of the reservation, one might well wonder if such a blunt exclusionary statement is not "incompatible with the object and purpose of the treaty" (22). A human rights

obligation cannot be made dependent on the absolute discretion of its addressees; the national systems must be brought into line with international law and not vice versa (23). Therefore, the final word on the identification of a minority belongs to the international implementing organs, both in the case of France and a fortiori in that of all countries who have ratified without expressing reservations concerning article 27.

B. The definition of the minority does not exhaust all problems of identification. The further step of deciding whether a given claimant belongs to a minority may equally be difficult. This question of membership can be decided either by a subjective or by an objective criterion: should a person be free to determine personally his status, or should this be decided on the basis of an external objective assessment? This question frequently arose under the interwar minority protection system. One very characteristic case, that came up before the Permanent Court of International Justice involved a conflict on the interpretation of the Upper Silesian Convention (24). The Polish authorities had, in their part of Upper Silesia, refused admission to minority schools to a number of children, because the linguistic declaration by their parents was deemed to be false and in apert contrast with the children's real mother tongue; indeed, "thousands of

parents (so the Swiss expert verified) stated that their children's mother tongue was German, when in fact they did not know a single word of that language" (25). The more general provision governing this question was article 74 of the Convention, which stated that the "question of whether a person does or does not belong to a racial, linguistic or religious minority may not be verified or disputed by the authorities." The same rule is specified in article 131 with regard to the special domain of minority schools : "in order to determine the language of a pupil or child, account shall be taken only of the verbal or written statement of the person legally responsible for his education. This statement may not be questioned or disputed by the educational authorities." The articles seem to establish unambiguously the priority to be given to the "free and spontaneous statement from the interested party" (26). The Court could but acknowledge this priority; yet, it added that the provision did not leave unlimited discretion to the parents, but only a freedom of choice in the presence of reasonable doubt. The parents could not, in their declaration, express their desires or aspirations, but only the reality. The subjective principle merely grants them a 'margin of discretion', and additionally wants to prevent the inconvenients related to large-scale investigations (and manipulations) by the public authorities. All by all, the

Court's holdings in this case are certainly not among its happiest. Not only did they leave the Silesian tribunal confronted with this case in somewhat of a quandary, but they also left a large measure of uncertainty as regards their application to the less explicit general minority treaties (27).

The dilemma is still with us. On the one hand, it seems reasonable to say that "no person can (...) become a member of an ethnic minority just by declaring his sympathy or personal liking for that group" (28). But it is equally plausible to make the subjective principle prevail in doubtful cases; it should at least "play an important role in supplementing the pattern derived from objective criteria"(29). In any case, as far as article 27 is concerned, the Human Rights Committee has made it clear already, in its first decision on art.27, that full discretion should not be left to the state concerned (30). The applicant Sandra Lovelace ceased to qualify, after her marriage to a non-Indian, as an Indian under the Canadian Indian act of 1869. Nevertheless, the Committee granted admissibility to her complaint on the basis of an autonomous international assessment : "Persons who are born and brought up on a reserve, who have kept ties with their communities and wish to maintain these ties must normally be considered

as belonging to that minority within the meaning of the Covenant" (31). This provisional autonomous definition of membership seems to imply a mix (or cumulation) of both the objective and subjective criterion.

Section 2

Contents

What precisely is guaranteed by the laconical statement that the persons belonging to a minority have the right "to use their language in community with others" ? Many authors have taken a skeptical or even a defeatist view on this question, such as : "(...) the article in question does not do more than express the truism that national minorities must not be prevented from enjoying their culture and using their own language" (32). Now, every person's freedom to use the language of his choice in private dealings is not quite a truism, as we saw in the chapters on freedom of expression. But it is, at any rate, already guaranteed by article 19 of the same Covenant (33). I submit that it cannot be the function of article 27 to be merely the explicit recognition, restricted to persons belonging to a minority, of a right

that is already recognised in the same instrument to all persons. Such redundancy would not be absurd in political terms : it is certainly not evident everywhere in the world that minorities should have the same basic rights as 'ordinary' people. But in legal terms, this would not make sense. According to the rule by which every provision should be given as far as possible an effective interpretation, one must try to find a richer content for article 27.

One clue for this richer content might lie in the words "in community with others". The Lovelace case discussed by the Human Rights Committee (34) offers precisely a fine example of how the "freedom to use one's language in community with others" can, in certain circumstances, mean more than freedom of expression. Sandra Lovelace, by marrying a non-Indian, had lost her membership of the Indian reserve where she had lived until then. After her divorce, she wanted to return to the reservation, but was denied this right by the Canadian authorities. This denial of access was considered by the Committee as amounting to a breach of her right to use her language "in community with others", as the reservation was, in reality, the only place where a community of persons' speaking this language existed. Denying access, which on its face does not raise any problems under the general freedom of expression of article 19 (no one prevented

Lovelace from speaking her language), nevertheless constitutes an infringement of article 27 (she could not exercise this freedom in community with others).

The case of Sandra Lovelace is in many ways exceptional. In most countries, and especially in the European countries dealt with in this study, it is difficult to imagine similar obstacles to personal communication; one can not see, therefore, how the terms "in community with others" can imply a supplementary obligation of state abstention to what already exists under the freedom of expression. The conclusion is that article 27 goes beyond state abstention, and implies, in one way or another, a **positive** obligation for public authorities in relation to language use. Only in this sense can article 27 (as to its language component, at any rate) provide its own contribution to the system of the International Covenant, and not be a simple gloss to article 18. While Rapporteur Capotorti comes to this same conclusion in his study, many other authors disagree, and read only a negative obligation into article 27 (35).

The different arguments on this crucial question can be examined in the light of the rules on treaty interpretation contained in articles 31 and 32 of the Vienna

Convention. I will consider subsequently the terms of the provision, the context, the object and purpose and the preparatory work.

1. According to many authors, the use of the words "shall not be denied" clearly indicates the will to exclude any positive obligation for the Contracting Parties(36). This intention of the Parties will be considered under point (4) below, but the words by themselves are certainly not decisive. We saw how the European Court on Human Rights has interpreted exactly the same words ("shall not be denied"), used in article 2 of the First Protocol to the Convention, as implying - against the defendant government's arguments to the contrary - at least some measure of positive state action for the guarantee of the right to education (37). The negative phrasing of article 27 could rather denote the will to stress the individual character of the right and the free choice left to every person to prefer linguistic (and, similarly, religious and cultural) assimilation : the right "shall not be denied", if the person wants to avail himself of it.

2'. Another argument advanced against the existence of positive state duties under art.27, is based on the context of the article : such obligations would run counter

to the 'économie' of the Civil Covenant, whose specificity precisely consists in the fact that it imposes only duties of abstention. It is simply not true, however, that the Civil Covenant only imposes state abstention, and the Social Covenant only state intervention. The Covenants do not contain any general clause in this sense, and the analysis of the single provisions provides some counter-examples. In the Civil Covenant, art. 10.3 (social rehabilitation of prisoners), art.23 (protection of the family, measures to ensure equality of spouses), art.24 (child protection), and art.25 (guarantee of periodic elections), can only be realised through positive state measures. Why could the same not apply to the equality provision of art.26 (38), and indeed to article 27 ? It has also been noted, with some surprise, that art.27 does not contain a limitation clause, like so many other provisions of the Covenant (39). Could this not be explained by the positive nature of the article, which makes restrictions pointless ?

3. Controversy also exists on the object and purpose of the minority protection clause. A good articulation of the limitative view is provided by Tomuschat :

"Above all, one has to bear in mind that, as one of the components of the CCPR, Art.27 is designed to find

world-wide application. Thus, account has to be taken of the specific problems of Third World countries. As far as Africa is concerned, it has been reported, for instance, that in Nigeria not less than 250 native languages exist. It is simply unrealistic to assume that the competent public authorities could take affirmative action for the benefit of all of those linguistic communities. On the other hand, there is no obstacle of any kind which would prevent authorities from tolerating the use of those languages and their manifold dialects. the same is true of the cultural life of the different communities. Stretching the scope of Art.27 to encompass positive obligations could lead in the last analysis to an outright breakdown of its guiding value and hence to a total loss of credibility." (40).

But what is minority protection really about? As was indicated supra (41), the specific minority provision of article 27 stems from an awareness that the undifferentiated application of general norms can often deny to minorities a genuine, 'factual' equality. Now, if one wants to grant them extra guarantees, beyond the general freedom of language use available to all, this can only consist, within the context of the Covenant, in positive state duties. This hypothesis is backed by considering the Economic, Social and Cultural Covenant : article 15.2 of this instrument holds that the

states should take "steps (...) to achieve the full realization" of the right to take part in cultural life guaranteed in the first paragraph of article 15. This right applies to all persons; "it would be inconceivable that the State should have fewer cultural obligations vis-a-vis minorities than towards its people in general" (42). If minorities are not to lag behind other people, article 27 also needs positive measures of implementation. This does not mean however a universal and self-executing standard, as Tomuschat fears. Recognising the positive nature of a provision does not automatically imply a specific level of these measures; this latter problem will be dealt with below.

4. The preparatory work seems to indicate, indeed, a widespread reluctance of the states to concede positive rights (43). But, according to the Vienna Convention, this is only a supplementary means of interpretation, that comes into play only when the other means do not dispose of the problem. For the reasons that I have indicated, the other means, and especially the object and purpose of article 27 appear sufficiently clear to disregard conflicting evidence in the 'travaux préparatoires'. I may therefore conclude, with Capotorti (44), that article 27 requires "active and sustained measures" from the part of the states.

A further, and still more difficult step is to try to delineate what these positive measures could be in relation to language use. The special linguistic situation prevailing in many less-developed countries, mentioned by both Tomuschat and Capotorti (45) makes it exceedingly difficult to draw from article 27 universally applicable requirements. Even if one limits the analysis to the relatively homogeneous group of countries under study, it will be hard to distinguish a self-executing core content, a minimum claim that might be judicially enforced by all minorities in all countries. Article 27 appears to be, to a large extent, non self-executing, and depending on the general measure of state involvement in every sector. As to these sectors, a supplementary hint could again be read in the words "in community with others". Rather than the relation between the minority members and public administration in the strict sense, the field of operation of the article might be the interaction between the persons belonging to minorities, in so far as this interaction requires implementation by the public authorities : one may think of the domains of education, cultural institutions, and the media (46). These fields, which are usually to a large extent governmentally regulated, act quite naturally as a potent integrative factor for the majority population. In order that these institutions could play a similar role for

minorities, specific measures are needed adapting them to this linguistic diversity. This interpretation is reinforced, in relation to education at least, by the other right of article 27, the "enjoyment of their culture (...) in community with others". "Language being an essential element of culture, the capacity of a minority group to survive as a cultural group is in jeopardy if no instruction is given in its language" (47).

Section 3

Towards a Declaration ?

Because of its pioneering character in post war international law and of its laconical formulation, article 27 is thus subject to extreme controversy as regards its beneficiaries and contents. Recognising this fact, the Rapporteur wrote, in the conclusions of his study, that "it would be useful to draw up certain principles to which the Governments of all States could turn for guidance"(48), and suggested the elaboration of a declaration on the rights of persons belonging to minorities, in order to "throw light on the various implications of article 27 and to specify the measures needed for the observance of the rights recognized by the article" (49). The Sub-commission on Prevention of

Discrimination and Protection of Minorities, which had commissioned the study, took up this suggestion and recommended to its parent body, the Human Rights Commission, the drafting of such a Declaration (50). The Commission approved, and work has started on the basis of a Draft Declaration submitted in 1978 by Yugoslavia, a traditional minorities champion (51). Slow as it may be, the current drafting process stands nevertheless in positive contrast with earlier years when the minority issue was entirely neglected. One may rightfully hope that article 27 is not the end of the story, but only a stepping stone in the long-term elaboration of a coherent body of international minority protection (52).

Unfortunately, the Yugoslav Draft does not seem to be a very promising basis for further progress (53), as it contains too much and too little at the same time :

i) Instead of remaining within the framework of art.27, as the Capotorti Study recommended, the Draft, first of all, adds 'national minorities' to the three existing categories of article 27 (54), and secondly, purports to grant rights to the minorities as such instead of to the individual members of such minorities. Apart from the inherent dangers in such a collective form of protection (55), this also means a quick

disposal of the laborious compromise reached on article 27, and starting over the whole debate.

ii) As to the contents of the right, on the other hand, the Draft is hardly helpful in dissipating existing uncertainties. It takes a clear stance in favour of a general state obligation to take positive measures of minority protection, but stops short of expressing a binding legal obligation in this sense (56); above all, it does not specify, in any of its five articles, the concrete obligations with regard to language use (or religious and cultural protection) that this general obligation could entail (57).

Instead of setting itself the modest, but crucial, task of developing practical guidelines for the interpretation of article 27, the Yugoslav Draft shows the ambition of proposing a general philosophy of minority protection as an alternative to the one embodied in article 27 (58). One severe commentator notes that "(i)n its present version, the draft declaration seems more an exercise in legal activism than a contribution to enhancing real enjoyment of human rights" (59). The chances for the quick adoption of a declaration seem accordingly rather slight (60).

CONCLUSION

At the end of this study, one might object that there has been relatively little talk of language law as such, and very much of such diverse and seemingly unconnected topics as direct broadcasting satellites, subsidies to private schools, the emptiness of equality, the domestic status of international law, etc. This, however, is the inevitable result of the methodological approach which was adopted at the outset. I did not want to walk along traditional roads and give a systematic presentation of linguistic legislations, but rather to explore the various, often unexpected, consequences which the analysis of some general fundamental rights might have for language use and linguistic values in general. Not all of these explorations have been equally illuminating, but the global result seems nevertheless quite rich. It is, above all, incomparably richer than a similar study would have been only twenty years ago.

Indeed, an impressive part of the constitutional amendments, legislative acts and judicial pronouncements mentioned in this study stem from these last twenty years. This evolution has caused the classical dichotomy between 'general human rights' and 'specific minority rights' to lose much of its former validity. Not only has there been an explicit incorporation of minority provisions in national and international bills of rights, but above all an internal evolution of fundamental rights conceptions, both in legal writing and in adjudication. Two of these new interpretative trends have proved particularly meaningful for our subject : the renewed attention to the role that traditional individual liberties, like freedom of expression and freedom of education, play even in the present 'post-industrial', 'semi-welfare' states of Western Europe and Northern America; and the doctrinal refinement of the concept of equality from a rather formal rule prohibiting discriminations into a central element of every constitutional order with complex substantive ramifications, implying a duty to differentiate among societal groups according to their specific needs. Both trends have in common that they reflect a growing recognition of societal pluralism, whereby both individual life-choices and group identities are considered worthy of special protection from the majoritarian political process.

Beyond the attempt at giving a global, comparative and transnational, assessment of this evolution in the context of linguistic diversity, this study also wants to point further in the same direction. The potential of fundamental rights in the field of language has not yet sufficiently be acknowledged, in my opinion, in the following domains : the 'pluralistic' and 'affirmative' dimensions of equality, while clearly established in some countries, must still be formulated and affirmed in other countries, as well as on the international level; the right to education is only very timidly enforced by the courts, and the fact that education is not meaningful without respect for some basic linguistic values has not yet penetrated from the world of academic discourse into that of legal norm-making; there is a striking difference in the treatment of endogenous and immigrant linguistic minorities; the latter's cultural identity is not entirely unprotected, but it usually lacks any guarantee at a constitutional level.

In sum, there is a growing, but still insufficient, awareness that democracy, in the cultural as in other domains, means the recognition of the right to be different.

THE PROTECTION
OF LINGUISTIC DIVERSITY
THROUGH
FUNDAMENTAL RIGHTS

by

Bruno De Witte

VOLUME THREE : NOTES

January 1985



THE PROTECTION

OF LINGUISTIC DIVERSITY

THROUGH

FUNDAMENTAL RIGHTS

by

Bruno De Witte

VOLUME THREE : NOTES

January 1985

F hm a
D. 16. a

PART ONE : LINGUISTIC DIVERSITY

Chapter One

The Concept of Linguistic Diversity

1. See, for instance, infra, p.515.
2. Cf.infra, p.53.
3. G.DECSY, Die linguistische Struktur Europas. Vergangenheit-Gegenwart-Zukunft, Wiesbaden, Otto Harassowitz, 1973, at 156.
4. E.HAUGEN, "Dialect, Language and Nation", in The Ecology of Language, Stanford, Stanford University Press 1972, 237-254, at 243.
5. G.DECSY, loc.cit.; G.HERAUD, "Notion de minorité linguistique" in Minorités linguistiques et interventions. Essai de typologie, Québec, Presses de l'Université Laval 1978, 15-38, at 18-19.
6. See e.g. S.SALVI, "Intervention", in Minorités linguistiques..., op.cit., at 69.
7. J.A.FISHMAN, Language and Nationalism - Two Integrative Essays, Rowley (Mass), Newbury House, 1972, at 128, note 13. Kloss makes this same distinction in his classical categories of 'Abstandsprache' and 'Ausbausprache' : H.KLOSS, Grundfragen der Ethnopolitik im 20.Jahrhundert, Wien/Stuttgart, Wilh.Braumüller, 1969, at 74-77.
8. A language has been described as a 'dialect with an army'. See e.g. the analysis by L.J.CALVET, Linguistique et colonialisme. Petit traité de glottologie, Paris, Payot, 1974, pp.40-54.
9. G.DECSY, op.cit., at 260 ff.; H.HAARMANN, Soziologie und Politik der Sprachen Europas, Muenchen, DTV, 1975, at 42 ff.; R.PETRELLA, La renaissance des cultures régionales en Europe, Paris, Ed.Entente, 1978, at 204-205.
10. G.BRAGA, "La compétition entre systèmes linguistiques : essai d'un modèle", in Recherches Sociologiques, 1983, 19-28.
11. E.HAUGEN, op.cit., at 252, presents a more elaborate but not basically different four-step model : selection of norm,

codification of form, elaboration of function, acceptance by the community.

12. A term used by B.WEINSTEIN, "Language Strategists : Redefining Political Frontiers on the Basis of Linguistic Choices", in World Politics, 1979, 345-364.

For particular historical accounts of this process, see e.g. H.KLOSS, Die Entwicklung neuer germanischer Kultursprachen von 1800 bis 1950, Muenchen, Pohl, 1952; and E.HAUGEN, "The Scandinavian Languages as Cultural Artefacts" in The Ecology of Language, op.cit., 265-286.

13. Examples of such 'experts' are Pompeu Fabra (for Catalan), Ivar Aasen (for Nynorsk, New Norwegian), Ben Yehuda (for Hebrew).

14. Such as religious leaders (Luther for German) or famous writers.

15. Cf. infra, p.525-526.

16. On the notion of 'official language', see infra, p.636. The legal status of the languages mentioned here will also be discussed in more detail in later chapters of the study.

17. Scots is a controversial case; see A.J.AITKEN, "The Good Old Scots Tongue : Does Scots Have an Identity ?", in Haugen-McClure-Thomson (eds), Minority Languages Today, Edinburgh University Press, 1980, 72-90.

18. E.ALLARDT, "Le minoranze etniche nell'Europa occidentale : una ricerca comparata", in Rivista Italiana di Scienza Politica, 1981, 91-136, at 108.

19. U.WEINREICH, Languages in Contact, The Hague, Mouton, led. 1953, 4th ed. 1966.

20. U.WEINREICH, op.cit., at 1; W.B.MACKEY, "The Description of Bilingualism", in J.A.Fishman (ed), Readings in the Sociology of Language, The Hague, Mouton, 1968, 554-584, at 555. Bilingualism is often defined, instead, in terms of language knowledge, but this criterion is difficult to handle : should there be a perfect knowledge, or an equal mastering of both languages - and according to which basic skills : listening, reading, speaking, writing ? It seems reasonable to say that "the point at which a speaker of a second language becomes bilingual is either arbitrary or impossible to determine" (W.B. MACKEY, ibidem).

An overview of the principal sociological questions relating to bilingualism is given in the last mentioned article.

21. G.FRANCESCATO, "Un problema sociolinguistico internazionale : il problema del 'bilingue isolato'", in Statut et gestion des langues (Actes du 2e colloque international "Langues et coopération européenne", Urbino 1981), Paris, Cireel, 1982, 381-389.
22. E.HAUGEN, "The Stigmata of Bilingualism", in The Ecology of Language, op.cit., 307-324, at 309.
23. C.A.FERGUSON, "Diglossia", in Word, 1959, 325-340.
24. A typical example of triglossia is Luxemburg, where French, German and Luxemburgian have each their own neatly defined functional field of currency. See the description by F.HARTWEG, "La situation linguistique au Grand-Duché de Luxembourg", in Carleton Germanic Papers, 1976, 37-63; H.HOSTERT, "La situation multilingue au Grand-Duché de Luxembourg", in Recherches Sociologiques, 1983, 29-44.
25. On the various existing combinations, see J.A.FISHMAN, "Bilingualism with and without Diglossia; Diglossia with and without Bilingualism" in Journal of Social Issues, 1967, 29-38.
26. See e.g., applied to the Breton case, F.ELEGOET, "Bilinguisme ou domination linguistique", in Les Temps Modernes, 1973, nrs.324-325-326, p.213-222.
27. On those contrasting principles, see H.KLOSS, "Objektive und subjektive Kriterien zur Bestimmung der Volkszugehoerigkeit", in System eines internationalen Volksgruppenrechts, Wien/Stuttgart, Wilh.Braumueller, Vol.1, 1970, 155-180; and A.PIZZORUSSO, Le Minoranze nel diritto pubblico interno, Milano, Giuffrè, 1967, vol.1, at 236-243; see also infra, p.661 ff.
28. See e.g. the discussion of the principle of territoriality in the context of education, infra, p.397 ff., and in the context of language use in public administration, infra, p.639 ff.
29. H.KLOSS, Grundfragen der Ethnopolitik, op.cit., at 230-232.
30. This is the, heavily contested, case in South Tyrol since the 1981 census; cf.infra, p.18.
31. This system prevailed in Brussels between 1963 and 1970, for matters of education. Cf. infra, the Chapter on Educational Rights, p.398 (note 123).

32. R.PETRELLA, op.cit., at 202-203.

33. M.G.LEVY, "Le recensement linguistique du 1 janvier 1960 ou naissance, vie et mort d'un recensement", in Res Publica, 1959, 58 ff.

34. E.ALLARDT & K.J.MIEMOIS, "A Minority in Both Centre and Periphery : An Account of the Swedish-Speaking Finns", in European Journal of Political Research, 1982, 265-292, at 287.

35. Th.VEITER, Das oesterreichische Volksgruppenrecht seit dem Volksgruppengesetz von 1976, Wien, Braumueller, 1979, at 61 ff. The census of the Slovenes in the Italian province of Trieste has been contested for similar reasons : see J.JERI, "Verità, mezze verità e statistiche", in Passato e presente degli Sloveni in Italia, Trieste, 1974, 89 ff.

36. See e.g. P.CARROZZA, "La dichiarazione di appartenenza ai gruppi linguistici nella provincia di Bolzano", in Le Nuove Leggi Civili Commentate, 1983, 1137-1157, at 1150-1151. On the system of ethnic proportionality, see infra, p.501 ff.

37. Committee on Irish Language Attitudes Research, Main Report, Dublin, Stationery Office, 1975.

38. J.A.LAPONCE, "The French Language in Canada : Tensions between Geography and Politics", in Political Geography Quarterly, 1984, 91-104, at 93; see also the study by R.P.BEAUJOT, "The Decline of Official Language Minorities in Quebec and English Canada", in Canadian Journal of Sociology, 1982, 367-389.

39. In addition to the official census data, I used the following sources : H.HAARMANN, Soziologie und Politik der Sprachen Europas, op.cit. (passim); G.DECSY, Die linguistische Struktur..., op.cit., (statistical annex, p.259 ff.); M.STEPHENS, Linguistic Minorities in Western Europe, Llandysul, Gomer Press, 1976 (passim); R.PETRELLA, La renaissance des cultures régionales en Europe, op.cit. (at 204-205 and 212-213); J.KREJCI & V.VELIMSKY, Ethnic and Political Nations in Europe, London, Croom Helm, 1981; Fundacion FOESSA, Informe sociológico sobre el cambio politico en España 1975-1981, Madrid, Editorial Euramerica, 1981, vol.1, at 23; T.DE MAURO, "Note sulle minoranze linguistiche e nazionali in Italia", in Il Mulino, 1979, n.3, 349-367; "Le minoranze linguistiche della Repubblica italiana", in Città e regione, 1980, n.3, 13-33.

Chapter Two

Historical Overview

1. E.GELLNER, Nations and Nationalism, Oxford, Basil Blackwell, 1983, at 111.
2. J.A.FISHMAN, Language and Nationalism - Two Integrative Essays, Rowley, Newbury House, 1972, at 125.
3. A.W.ORRIDGE, "Varieties of Nationalism", in L.Tivey (ed), The Nation-State. The Formation of Modern Politics, Oxford, Martin Robertson, 1981, 39-58, at 40.
4. Quoted by C.A.MACARTNEY, National States and National Minorities, New York, Russell & Russell, 1968 (1934, 1st ed.) as the motto of his book.
5. J.J.ROUSSEAU, Du Contrat Social, Paris, Garnier-Flammarion, 1966, at 67
6. "Les lumières portées à grands frais aux extrémités de la France s'éteignent en y arrivant, puisque les lois n'y sont pas entendues" (BARERE, Rapport du Comité de Salut public sur les idiomes, of 1794, quoted in full by M.DE CERTEAU, D.JULIA & J.REVEL, Une politique de la langue. La Révolution française et les patois, Paris, Gallimard, 1975, at 291-299. The same Barère is the author of the famous 'politicisation' of languages : "Le fédéralisme et la superstition parlent bas-breton; l'émigration et la haine de la République parlent allemand; la contre-révolution parle l'italien, et le fanatisme parle le basque. Cassons ces instruments de dommage et d'erreur". See also the frightening Rapport sur la nécessité et les moyens d'anéantir les patois et d'universaliser l'usage de la langue française by the Abbé Grégoire. For general descriptions of the Revolution's linguistic policy, see M.DE CERTEAU et al., op.cit., and J.Y.LARTICHAUX, "Politique linguistique de la Révolution française", in Diogenes, 1977, no.97, 80-96.
7. C.A.MACARTNEY, op.cit., at 96.
8. F.BARNARD, "Culture and Political Development : Herder's Suggestive Insights", in American Political Science Review, 1969, 379-397, at 392.

9. E.KEDOURIE, Nationalism, London, Hutchinson University Library, 1966, at 64.
10. F.BARNARD, op.cit., at 395; I.BERLIN, Vico and Herder - Two Studies in the History of Ideas, London, The Hogarth Press, 1976, at 180 ff.
11. Several earlier contributions have now been synthesised in E.GELLNER, Nations and Nationalism, op.cit.
12. E.GELLNER, op.cit., at pp.8-38.
13. E.GELLNER, op.cit., at 38.
14. E.GELLNER, op.cit., at 35.
15. E.GELLNER, op.cit., at 57.
16. J.COAKLEY, "Independence Movements and National Minorities : Some Parallels in the European Experience", in European Journal of Political Research, 1980, 215-247, at 228.
17. B.WEINSTEIN, "Language Strategists - Redefining Political Frontiers on the Basis of Linguistic Choices", in World Politics, April 1979, 345-364.
18. R.PETRELLA, "L'impératif être : réflexions sur la renaissance des cultures 'régionales' en Europe occidentale" in Y.Mény & B.De Witte (eds), Dix ans de régionalisation en Europe, Paris, Cujas, 1982, 265-289, at 274. One could mention in this regard works like the Oda a la Patria for Catalan, the Leeuw van Vlaanderen for Flemish Dutch, Kalevala for Finnish.
19. D.A.RUSTOW, "Language, Nations and Democracy", in Savard & Vigneault (eds), Les Etats multilingues - Problèmes et solutions, Québec, Presses de l'Université Laval, 1975, 43-60, at 43.
20. C.TILLY, "Reflections on the History of European State-Making", in C.Tilly (ed), The Formation of National States in Western Europe, Princeton, University Press, 1975, 3-33, at 78.
21. E.RENAN, Qu'est-ce qu'une nation ?, Lecture delivered at the Sorbonne in 1882 : "Ce qui constitue une nation, ce n'est ni le fait de parler la même langue, ni le fait d'appartenir au même groupe ethnique, mais c'est d'avoir accompli de grandes choses ensemble dans le passé et d'avoir le désir d'en accomplir encore dans l'avenir".

22. F.MEINECKE, Weltbuergerum und Nationalstaat, Muenchen, R.Oldenbourg, 1962, at pp.9-26.

23. D.A.RUSTOW, op.cit., at 47; E.S.GLENN, "The Two Faces of Nationalism", in Comparative Political Studies, 1970, 347-366, at 352.

24. This idiosyncratic policy largely accounts for the myth of a peaceful and democratic Switzerland, stimulated by such influential books as H.WEILENMANN, Die vielsprachige Schweiz. Eine Loesung des Nationalitaetenproblems, Basel, Am Rhein Verlag, 1925; A.SIEGFRIED, La Suisse, démocratie témoin, Neuchatel, La Baconnière, 1956; H.KOHN, Nationalism and Liberty : The Swiss Example, London, Allen & Unwin, 1956; D.DE ROUGEMONT, La Suisse ou l'histoire d'un peuple heureux, Lausanne, Librairie Hachette, 1956; K.D.MC RAE, Switzerland, Example of Cultural Coexistence, Toronto, Canadian Institute of International Affairs, 1964. The ethnic aspects of this myth have however recently be questioned; see e.g. T.VEITER, "Der interethnische Friede in der Schweiz - Ideal mit Maengeln", in Europa Ethnica, 1980, 58-62; R.BEGUELIN, Un faux témoin, la Suisse, Lausanne, Edition du Monde, 1973 (more particularly on the Jura problem); R.H.BILLIGMEIER, A Crisis in Swiss Pluralism - The Romansh and their relations with the German- and Italian-Swiss in the Perspective of a Millennium, The Hague, Mouton, 1979.

25. See R.A.KANN, The Multinational Empire. Nationalism and National Reform in the Habsburg Monarchy 1848-1918, New York, Octagon Books, 1977 (2 Vol.); and, from a more specifically legal point of view, K.G.HUGELMANN (Hrsg.), Das Nationalitaetenrecht des alten Oesterreich, Wien, Braumuehler, 1934.

26. C.A.MACARTNEY, op.cit., at 104.

27. J.KREJCI & V.VELIMSKY, Ethnic and Political Nations in Europe, London, Croom Helm, 1981, at 66-67.

28. M.POMERANCE, "The United States and Self-Determination : Perspectives on the Wilsonian Conception", in The American Journal of International Law, 1976, 1-27, at 1.

29. M.POMERANCE, op.cit., at 4-5.

30. See D.I.RUSINOW, Italy's Austrian Heritage, Oxford, Clarendon Press, 1964, at pp.239-265; W.SCHMITZ-ESSER, "Die Genesis des Hitler-Mussolini-Abkommens von 1939", in F.Huter (Hrsg.), Suedtirol. Eine Frage des europaeischen Gewissens,

Wien, Verlag fuer Geschichte und Politik, 1965, 321-339; and F.HUTER, "Option und Umsiedlung", in op.cit., 340-361.

31. See A.M. DE ZAYAS, Nemesis at Potsdam : The Anglo-Americans and the Expulsion of the Germans : Background, Execution, Consequences, London, Routledge & Kegan Paul, 1977; from the legal point of view, see the report by BALLADORE PALLIERI and discussion in the Annuaire de l'Institut de Droit International, 1952, part 2, and J.W.BRUEGEL, "A Neglected Field : The Protection of Minorities", in Human Rights Journal, 1971, 413-442, at pp.417-424.

On this whole period, see also : E.M.KULISCHER, Europe on the Move, New York, Columbia University Press, 1948; and J.SCHECHTMAN, European Population Transfers, 1939-1945, New York, Oxford U.P., 1946.

32. J.KREJCI & V.VELIMSKY, op.cit., at 66-67; see also the global survey by A.BOHMANN, "Die Veraenderung der Sprachraeume in Europa als Folge des Zweiten Weltkriegs", in Sprachen und Staaten. Festschrift fuer Heinz Kloss, Hamburg, Stiftung Europa-Kolleg, 1976, 339-359.

33. Leaving aside the specific case studies, the comparative and theoretical works on the subject include the following : M.J.ESMAN (ed), Ethnic Conflict in the Western World, Ithaca-London, Cornell U.P., 1977; G.HERAUD, L'Europe des ethnies, Nice, Presses d'Europe, 2nd ed., 1974; N.GLAZER & D.MOYNIHAN (eds), Ethnicity : Theory and Experience, Cambridge (Ma.), Harvard U.P., 1975; R.PETRELLA, La renaissance des cultures régionales en Europe, Paris, Editions Entente, 1978; J.ROTHSCHILD, Ethnopolitics - A Conceptual Framework, New York, Columbia U.P., 1981; A.D.SMITH, The Ethnic Revival, Cambridge, Cambridge U.P., 1981; E.ALLARDT, "Le minoranze etniche nell'Europa occidentale : una ricerca comparata", in Rivista Italiana di Scienza Politica 1981, 91-136; A.N.BIRCH, "Minority Nationalist Movements and Theories of Political Integration", in World Politics, 1978, 325-344; W.CONNOR, "Nation-Building or Nation-Destroying?", in World Politics 1972, 319-355.

34. S.BERGER, "Bretons and Jacobins : Reflections on French Regional Ethnicity", in M.J.Esman (ed), op.cit., 159-178, at 175.

35. W.R.BEER, The Unexpected Rebellion : Ethnic Activism in Contemporary France, New York U.P., 1980.

36. A.D.SMITH, Nationalism in the Twentieth Century, Oxford, Martin Robertson, at 153.

37. C.C.RAGIN, "Ethnic Political Mobilization : The Welsh Case", in American Sociological Review, 1979, 619-635, at 619.

38. S.BERGER, op.cit., at 176; in the same sense, A.LIJPHART, Democracy in Plural Societies - A Comparative Exploration, New Haven & London, Yale U.P., 1977, at 56 : "if modernisation leads to rapidly increasing social transactions and contacts among diverse groups, strain and conflict are more likely to ensue than greater mutual understanding".

39. W.CONNOR, op.cit., at 330.

40. M.J.ESMAN, "Perspectives on Ethnic Conflict in Industrialized Societies", in M.J.Esman (ed), op.cit., 371-390, at 373. Social welfare increasingly includes what could be called 'territorial welfare' (see Y.MENY, "Crises, régions et modernisation de l'Etat", in Pouvoirs 1981, no.19, 5-18, at 16).

41. See e.g. the views of M.HECHTER, Internal Colonialism, The Celtic Fringe in British National Development, 1536-1966, Berkeley, Univ. of California Press, 1975, and T.NAIRM, The Break-Up of Britain, London, New Left Books, 1977; and the criticism by A.W.ORRIDGE, "Uneven Development and Nationalism", in Political Studies 1981, 1-15 and 181-190.

42. M.J.ESMAN, op.cit., at 373.

43. This crucial point will be examined in due detail later in this study, in the chapters on Equality.

44. K.D.MC RAE, "The Plural Society and the Western Political Tradition", in Canadian Journal of Political Science, 1979, 675-688, at 686.

45. A.LIJPHART, op.cit., at 60; S.BERGER, op.cit., at 175.

46. R.INGLEHART, The Silent Revolution : Changing Values and Political Styles among Western Publics, Princeton University Press, 1977.

47. A.LIJPHART, op.cit., at 63.

48. This point is made, for Belgium, by R.INGLEHART, "The Silent Revolution in Europe", in American Political Science Review, 1971, 991-1017, at 1011.

49. One of the more influential theories of ethnic protect has been that of 'internal colonialism', which tries to

adapt, *mutatis mutandis*, the model of overseas colonialism to the centre-periphery relations within European states; see e.g. the works by M.HECHTER, op.cit.; R.LAFONT, La révolution régionaliste, Paris, Gallimard, 1967; S.SALVI, Le nazioni proibite - Guida a dieci colonie interne dell'Europa occidentale, Firenze, Vallecchi, 1973.

50. S.BERGER, op.cit., at 177-178.

51. K.W.DEUTSCH, "The Political Significance of Linguistic Conflicts", in Savard & Vigneault (eds), op.cit., 7-28, at 21.

52. Cf. supra, p.21-22.

53. For a general view, and some practical implications of this equality, see L.STEVENS, "The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments : The Regime Linguistique in the Court of Justice of the European Communities", in Northwestern University Law Review, 1967, 701-734.

54. Cf. infra, p.613 ff.

55. S.CASSESE, "Etats, régions, Europe", in Pouvoirs, 1981, no.19, 19-26.

Chapter Three

Linguistic Conflicts and Policies

1. K.D.MC RAE, "The Plural Society and the Western Political Tradition", in Canadian Journal of Political Science, 1979, 675-688, at 685.
2. For a general overview, see A.PIZZORUSSO, Le Minoranze nel diritto pubblico interno, Milano, Giuffrè, 1967, Vol.1, 267-276.
3. Plebiscites have been held on a relatively wide scale only in the post-World War I-period; see S.WAMBAUGH, "La pratique des plébiscites internationaux", in Recueil des Cours A.D.I., 1927 III, 149-258.
4. It could also be argued, however, that this very same growing interdependence has made secession a less dramatic, and therefore more acceptable event; see A.H.BIRCH, "Minority Nationalist Movements and Theories of Political Integration", in World Politics, 1978, 325-344, at pp.340-344, who refers to the example of Ireland.
5. See generally, A.PIZZORUSSO, op.cit., 276-289; P.DE AZCARATE, League of Nations and National Minorities. An Experiment, Washington, Carnegie Endowment for International Peace, 1945, 16-20; I.L.CLAUDE, Nationalities and National Minorities, Cambridge (Mass), Harvard University Press, 1955, 93-106.
6. See S.SEFERIADES, "L'Echange des populations", in Recueil des Cours A.D.I., 1928 IV, 307-439.
7. I.L.CLAUDE, op.cit., at 116.
8. The notions of language power and language pressure are analysed by W.B.MACKEY, "Three Concepts for Geolinguistics", in Sprachen und Staaten. Festschrift Heinz Kloss, Hamburg, Stiftung Europa-Kolleg, 1976, 167-239.
9. L.J.CALVET, Linguistique et colonialisme. Petit traité de glottophagie, Paris, Payot, 1974.
10. The social assimilation of an ethnic group is different from its linguistic assimilation; see E.K.FRANCIS,

Interethnic Relations. An Essay in Sociological Theory, New York-Oxford-Amsterdam, Elsevier, 1976, pp.254-262. One may be socially assimilated while maintaining a linguistic distance. One may also, more frequently, be linguistically assimilated, and still be considered as belonging to a separate social class because of one's origins.

11. K.W.DEUTSCH, "The Political Significance of Linguistic Conflicts", in Savard & Vigneault (eds.), Multilingual Political Systems - Problems and Solutions, Quebec, Presses de l'Université Laval, 1975, 7-28, at 23.

12. The concept of 'organic assimilation' is used and described by H.KLOSS, Grundfragen der Ethnopolitik im 20.Jahrhundert, Wien, Wilh. Braumueller, 1969, 282 ff.

13. A.PIZZORUSSO, op.cit., at 295 and 436.

14. But see the discussion of the concept of equality and its 'pluralistic' and 'affirmative' dimensions, infra, p.510 ff.

15. A.PIZZORUSSO, op.cit., at 290.

16. L.J.CALVET, op.cit., at 48 ff.

17. See B.TOURET, L'aménagement constitutionnel des Etats de peuplement composite, Québec, Presses de l'Université Laval, 1972, at 30 : "Le pluralisme repose sur une certaine conception qui tient dans l'opinion que les sociétés politiques ne sont pas seulement composées d'individus, mais qu'elles sont également constituées de groupes dont l'existence doit être reconnue".

18. See the definition given by A.PIZZORUSSO, op.cit., at 315-316 : "Comprendendo gli ordinamenti giuridici statali che presentano questo carattere nella categoria dei 'sistemi pluralistici' intendiamo mettere in luce il fatto che in questi casi il diritto positivo viene formato nella consapevolezza della presenza sul territorio dello stato di piu gruppi sociali, cercando di adattarlo alle loro diverse e spesso opposte esigenze e rinunciando ad imporre una forzata uniformità". See also F.CAPOTORTI, Study on the Rights of Persons Belonging to Linguistic, Ethnic and Religious Minorities....., U.N.Doc.E/CN.4/Sub.2/384/Rev.1, p.50 : "A policy of pluralism has the fundamental goal of preserving the identity of minority groups".

19. B.TOURET, op.cit., at 30.

20. See I.L.CLAUDE, op.cit., at 86 : cultural pluralism "involves the rejection of the view that a national minority constitutes the state-forming and state-possessing core of a body politic, while members of national minorities are quasi-aliens, in but not of the state".

21. K.W.DEUTSCH, op.cit., at 22-23; also B.TOURET, op.cit., at 28 : "l'intégration ou l'assimilation, ou encore la fusion, sont des termes auxquels il sera accordé ici la meme signification".

22. F.ERMACORA, "Innerstaatliche, regionale und universelle Struktur eines Volksgruppenrechts", in System eines internationalen Volksgruppenrechts, Vol.II, Wien/Stuttgart, Wilh.Braumuellner, 1972, 3-23, at 18.

23. H.L. HART, "Between Utility and Rights", in Columbia Law Review, 1979, 828-846.

24. H.KLOSS, op.cit., pp.269-308, gives a more elaborate argument for the protection of language diversity, based on partially different grounds.

25. See e.g. G.A. ALMOND, (ed), Comparative Politics Today - A World View, Boston, Little Brown, 1974, at 23.

26. J.S.MILL, Utilitarianism, Liberty, Representative Government, London, J.M.Dent & Sons Ltd., 1972, at 361. Note however that, in Mill's view, the existence of various languages does not necessarily lead to this absence of 'fellow feeling' which makes democratic institutions 'next to impossible'.

27. See the discussion of consociationalism, infra, Section 3.

28. H.KLOSS, "Language Rights of Immigrant Groups", in International Migration Review, 1971, 250-268, at 257.

29. J.A.FISHMAN, Language and Nationalism - Two Integrative Essays, Rowley (Mass), Newbury House, 1972, at 84.

30. J.VAN DETH in his conclusion to the international colloque "Langues et coopération européenne", in Statut et gestion des langues, at 418.

31. T.DE MAURO, "Note sulle minoranze linguistiche e nazionali in Italia", in Il Mulino, 1979, 349-367, at 353.

32. See e.g. the following remarks by P.WINCH, The Idea of a Social Science and its Relation to Philosophy, London, Routledge & Kegan Paul, 1958, at 15 : "Our idea of what belongs to the realm of reality is given for us in the language that we use. The concepts we have settle for us the form of the experience we have of the world. It may be worth reminding ourselves of the truism that when we speak of the world we are speaking of what we in fact mean by the expression 'the world' : there is no way of getting outside the concepts in terms of which we think of the world (...).

33. Humboldt's theory of the language as 'Weltbild' or 'Weltanschauung' is outlined in several of his works, especially in Ueber die Verscheidenheit des menschlichen Sprachbaues und ihren Einfluss auf die geistige Entwicklung des Menschengeschlechts, in W.VON HUMBOLDT, Werke, Vol.III, Stuttgart, J.G.Cotta'sche Buchhandlung, 1963. These relativist views have remained a constant of German thought; see, in particular, E.CASSIRER, Philosophie der symbolischen Formen, erster Teil : Die Sprache, Darmstadt, Wissenschaftliche Buchgesellschaft, 1977 (originally published 1923).

34. E.SAPIR, Language, New York, Harcourt Brace, 1921.

35. B.L.WHORF, Language, Thought and Reality. Selected Writings of Benjamin Lee Whorf, New York, Wiley and Sons, 1956. For an outline of his findings, see e.g. G.MOUNIN, Linguistique et philosophie, Paris, P.U.F., 1975, at 171-190.

36. J.B.CARROLL, "Linguistic Relativity, Contrastive Linguistics, and Language Learning", in International Review of Applied Linguistics, 1963, 1-20, at 12; see also the characteristic and oft quoted remark by Whorf, op.cit., at 212 : "The categories and types that we isolate from the world of phenomena, we do not find these because they stare every observer in the face. On the contrary, the world is presented in a kaleidoscopic flux of impressions which have to be organized in our minds. This means, largely, by the linguistic system in our minds".

37. G.STEINER, "The Tongues of Men", in The Listener, 28 April 1977, as quoted in T.O'BRIEN, "Economic Support for Minority Languages", in A.E.Alcock, B.K.Taylor & J.M.Welton (eds), The Future of Cultural Minorities, London, Macmillan Press, 1979, 82-101, at 82 and 84.

38. Translated from A.PIZZORUSSO, op.cit., at 200.

39. H.KLOSS, Grundfragen..., op.cit., at 273.

40. The Use of Vernacular Languages in Education, Paris, UNESCO, 1953.

41. H.KLOSS, Grundfragen..., op.cit., at 286.

42. From a legal point of view, the distinction is of course essential, as the latter will be state citizens, and the former aliens - unless they are naturalised - with a generally speaking lower level of protection.

43. J.CLAYDON, "Internationally Uprooted People and the Transnational Protection of Minority Culture", in New York Law School Law Review, 1978, 125-151, at 129.

44. H.KLOSS, "Language Rights...", op.cit., at 254.

45. J.CLAYDON, op.cit., at 136, note 39.

46. Ibid., at 137.

47. H.KLOSS, "Language Rights...", op.cit., at 253.

48. S.CASTLES & G.KOSACK, Immigrant Workers and Class Structure in Western Europe, London, Oxford U.P., 1973, at 228. See further on this problem of the education of migrant workers, the introduction to Part Four,

49. M.J. ESMAN, "Perspectives on Ethnic Conflict in Industrialized Societies", in Esman (ed.), Ethnic Conflict in the Western World, Ithaca/London, Cornell U.P., 1977, 371-390, at 384.

50. A.LIJPHART, "Consociation and Federation : Conceptual and Empirical Links", in Canadian Journal of Political Science, 1979, 499-515, at 499.

51. W.H.RIKER, "Federalism", in Greenstein & Polsby (eds.), Handbook of Political Science, Vol.5, 93-172, at 101.

52. Taken in a broader sense, the concept of autonomy could also include forms of decentralisation that are not constitutionally entrenched, ranging from the regions in France to the various types of local communities existing everywhere. They too can play a certain role in the protection of the linguistic identity of their population, but in a much more precarious way, with the constant possibility of a veto by the central legislator or government.

53. For Canada, see D.GUIFFAULT, "L'arbitrage de la Cour Supreme du Canada", in Revue de Droit Public, 1979, 1383-1424. In the United States, the Supreme Court has traditionally favoured the expansion of federal power and practically abandoned its role as an umpire in the federal system; see e.g. the analysis by P.HAY & R.D.ROTUNDA, The United States Federal System, Milan, Giuffrè, 1982, at 28-184, or T.SANDALOW, "The Expansion of Federal Legislative Authority", in Courts and Free Markets : Perspectives from the United States and Europe (T.Sandalow & E.Stein eds.), Oxford, Clarendon Press, 1982, Vol.I, 49-91; the case National League of Cities v Usery (426 US 833 - 1976) does not seem to have altered this picture fundamentally, as is shown by an analysis of the most recent case-law : "although National League of Cities may still stalk the night in prey of federal statutes to invalidate, its claws are dulled and its size has much diminished" (R.D.ROTUNDA, "The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions", in University of Pennsylvania Law Review, 1984, 289 ff., at 291). As far as Italy is concerned, a certain reorientation of the traditionally anti-regionalist doctrine of the Constitutional Court is documented in L.PALADIN, "Corte costituzionale e autonomie locali : gli orientamenti giurisprudenziali dell'ultimo quinquennio", in Le Regioni, 1981, 1229-1266. In Germany, the Constitutional Court does not seem to have shown this centralist bias; see e.g. the balanced view by P.BLAIR, Federalism and Judicial Review in West Germany, Oxford, Clarendon Press, 1981, at 246-259. The Swiss Federal Tribunal, finally, can only review the constitutionality of cantonal, not of confederal acts, and its centralising role is therefore inevitable.

54. Law of 28 June 1983; the Court has only been operating since October, 2, 1984, and has not laid down any judgments yet.

55. For comparative views, see J.ANASTOPOULOS, Les aspects financiers du fédéralisme, Paris, L.G.D.J., 1979; M.BERTOLISSI, Lineamenti costituzionali del "Federalismo Fiscale", prospettive comparate, Padova, CEDAM, 1982.

56. See, in general, B.DE WITTE, T.GRUNERT & M.SATRUSTEGUI, "Les élites politiques régionales", in Pouvoirs, 1981, No. 19, 27-37.

57. T. VEITER, "Territoriale nationale Autonomie", in System eines internationalen Volksgruppenrechts, Wien/Stuttgart, Wilh.Braumueller, Vol.2, 1972, 238-252, at 241.

58. A.PIZZORUSSO, "Minoranze etnico-linguistiche", in Enciclopedia del Diritto, Vol.XXVI, Milano, Giuffrè, 1976, 527-558, at 537.
59. H.KLÖSS, Grundfragen..., op.cit., at 149.
60. D.G.T. WILLIAMS, "Wales and Legislative Devolution", in H.Calvert (ed.), Devolution - Essays, London, Professional Books, 1974, 63-88, at 77.
61. Art.2 of the Agreement
62. Constitutional law n.5 of 26 February 1948.
63. For a more detailed historical account, see e.g. A.PIZZORUSSO, Il Pluralismo linguistico tra Stato nazionale e autonomie regionali, Pisa, Pacini, 1975, at 108 ff.
64. A.J.PEASLEE, The Constitutions of Nations, Vol.III Europe, The Hague, Martinus Nijhoff, 1974 (reprint).
65. This view is articulated e.g. by A.PIZZORUSSO, "Tutela delle minoranze linguistiche e competenza legislativa regionale", in Rivista Trimestrale di Diritto Pubblico, 1974, 1093-1102.
66. The Regions have only those powers which are expressly attributed by art.117 of the Constitution (for the 'ordinary regions'), or by their Statute of autonomy (for the 'special regions').
67. See R.INGICCO, "Minoranze linguistiche : due iniziative regionali rinviate dal governo" in Le Regioni 1977, 971-976; and R.INGICCO, "La legge regionale piemontese sulla tutela del patrimonio linguistico e culturale" in Le Regioni, 1980, 7-10.
68. Judgment of 18 October 1983, in Le Regioni, 1984, 238-257 (with a note by A.PIZZORUSSO).
69. For a general description of this regime, see P.MAROY, "L'évolution de la législation linguistique belge", in Revue de Droit Public, 1966, 449-501, at 460-474. On the circumstances of the adoption of the laws, see RYCX D'HUISNACHT, "L'opinion parlementaire et la réforme du régime linguistique de l'enseignement en 1932", in Res Publica, 1970, 543-589, showing the consensus of a vast majority of both Flemings and Walloons in this territorial solution.
70. P.MAROY, op.cit., at 478-489.

71. On the devolution process in Belgium, and the role played in it by the linguistic conflict, see generally B.DE WITTE, "Regioni e regionalismo in Belgio", in Le Regioni, 1984, 294-331.

72. See however the decrees by the two Communities on the use of languages in private enterprise, infra, p.266 ff.

73. Article 59 bis (3) of the Constitution. As for the German Community, its powers have recently been raised to the level of the two other Communities, with the notable exception of the regulation of language use which remains, as far as the German language area is concerned, with the central government (Law of 31 December 1983, art.4, implementing art.59 ter of the Constitution). In this latter case, the purpose of maintaining central control is presumably not the maintenance of the region's German identity.

74. 2 Supreme Court Reports 182 (1975). See the analysis by P.W.HOGG, "Constitutional Power over Language", in The Constitution and the Future of Canada, Toronto, Richard De Boo Ltd, 1978, 229-249.

75. See further, p.260 and 404.

76. The Quebec court decisions in this sense were upheld, in final instance, by the Supreme Court in Blaikie v Attorney-General of Quebec, in 101 Dominion Law Reports 3rd 394 (1980).

77. Section 133 is now confirmed and extended by Sections 17 and 19 of the Canadian Charter of Rights and Freedoms; see p.642.

78. See infra, p.371 and 645.

79. See the discussion by A.MILIAN MASSANA, "Aproximacion al regimen jurídico previsto para la lengua catalana en el Estatuto de autonomia de Cataluña", in Revista de Administracion Publica, n.94, 1981, 321-337, at 323 ff. This author, in a later work, favours the latter view (language use as an ancillary matter), which is also consonant with existing practice : A.MILIAN MASSANA, "La regulacion constitucional del multilinguismo", in Revista Espanola de Derecho Constitucional, 1984, n.10, 123-154, at note 58.

80. See B.DE WITTE, "La pluralité ethnique et l'autonomie culturelle - étude comparative", in Y.Mény & B.De Witte (eds), Centres et périphéries : le partage du pouvoir, Paris, Economica, 1983, 97-126.

81. On this issue, see G.HERAUD, "Problématique de la minorité dans la minorité", in System eines internationalen Volksgruppenrechts, Vol.2, Wien, Braumueller, 1972, 265-276.

82. For general accounts, see A.PIZZORUSSO, Le minoranze..., op.cit., at 380-391; and C.J.FRIEDRICH, "The Politics of Language and Corporate Federalism", in Savard & Vigneault (eds), Les Etats multilingues - problèmes et solutions, Québec, Presses de l'Université Laval, 1975, 227-242.

83. R.SPRINGER (alias K.RENNER), Der Kampf der oesterreichischen Nationen um den Staat, 1902; O.BAUER, Die Nationalitaetenfrage und die Sozialdemokratie, 1907; now in Otto Bauer - Werkausgabe, Wien, Europaverlag, 1975, Vol.1, 49-622. On their ideas, see R.A.KANN, The Multinational Empire. Nationality and National Reform in the Habsburg Monarchy 1848-1918, New York, Octagon Books, 3rd reprint, 1977, Vol.II, at 157 ff.; and A.AGNELLI, Questione nazionale e socialismo - Contributo allo studio del pensiero di K.Renner e O.Bauer, Bologna, Il Mulino, 1969.

84. See e.g. H.KLOSS, Grundfragen..., op.cit., at 150 : "(Die personale Autonomie...) appelliert am meisten an die Reife und Muendigkeit aller Individuen, zwingt niemandem in eine Gemeinschaft und ein sprachliches Regime hinein, die er nicht innerlich bejaht, aber erspart auch, falls sie in richtiger Weise durchgefuehrt wird, niemandem, sich fuer die eine oder fuer die andere Nationalitaet ausdruecklich zu entscheiden".

85. See the indications by J.LUKAS, "Territorialitaets- und Personalitaetsprinzip im oesterreichischen Nationalitaetenrechts", in Jahrbuch des oeffentlichen Rechts der Gegenwart, 1908, 333-405, at 363 ff.

86. A.MANDELSTAM, "La protection des minorités", in Recueil des Cours A.D.I., 1923, 367-517, at 393.

87. See, for a general overview, M.LASERSON, "Das Minoritaetenrecht der baltischen Staaten", in Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht, 1931, II/1, 401-429. Estonia especially has offered a rather remarkable example of cultural coexistence along such lines; see K.AUN, Der voelkerrechtliche Schutz nationaler Miniderheiten in Estland 1917-1940, Hamburg, Gildenverlag, 1951.

88. E.g. all provisions guaranteeing the use of a particular minority language in official or educational matters.

89. C.J.FRIEDRICH, op.cit., at 237.

90. K.D.MC RAE, "The Principle of Territoriality and the Principle of Personality in Multilingual States", in International Journal of the Sociology of Language, 1975, 33-54, at 51.

91. On the (formally still valid) system of personal autonomy under the 1960 Cypriot constitution, see G.VLACHOS, "L'organisation constitutionnelle de la République de Chypre", in Revue Internationale de Droit Comparé, 1961, 525-559.

92. Note however the case of Brussels, where the criterion of personality plays a complementary role in the system of autonomy. Both the Flemish and the French Community have a limited competence on the territory of Brussels, each for their own cultural institutions and activities, while bilingual and 'national' institutions remain under the control of the central State.

93. D.ELAZAR, "Federalism", in D.L.Sills (ed), International Encyclopedia of the Social Sciences, Vol.5, New York, Macmillan and Free Press, 353-367, at 357.

94. On these regimes, see C.JANSSON, "The Autonomy of Aaland : A Reflexion of International and Constitutional law", in Nordisk Tidsskrift for International Ret, 1982, 15-22; and T.VEITER, "Die Autonomie der Faeroer", in Zeitschrift fuer Auslaendisches Oeffentliches recht und Voelkerrecht, 1959/60, 243-270.

95. M.J.ESMAN, op.cit., at 382.

96. V.BOGDANOR, "Ethnic Nationalism in Western Europe", in Political Studies, 1982, 284-291, at 291.

97. A.LIJPHART, Democracy in Plural Societies - A Comparative Exploration, New Haven/London, Yale U.P., 1977, at 25.

98. The main works of the 'consociational school' include : A.LIJPHART, op.cit., as well as A.LIJPHART, The Politics of Accommodation : Pluralism and Democracy in the Netherlands, Berkeley, Univ. of California Press, 1968 (1st ed), and 1975 (2nd ed); K.D.MC RAE (ed), Consociational Democracy : Political Accommodation in Segmented Societies, Toronto, McClelland & Stewart, 1974; G.LEHMBRUCH, Proporzdemokratie : Politisches System und Politische Kultur in der Schweiz und in Oesterreich, Tuebingen, Mohr, 1967; L.HUYSE, Passiviteit, pacificatie en verzuiling in de Belgische politiek, Antwerpen/Utrecht, Standaard, 1970; E.A.NORDLINGER, Conflict

Regulation in Divided Societies, Cambridge (Mass.), Harvard U.P., 1972.

99. See, above all, B.BARRY, "Political Accommodation and Consociational Democracy", in British Journal of Political Science, 1975, 477-505; and A.PAPPALARDO, "Le condizioni della democrazia consociativa. Una critica logica ed empirica", in Rivista Italiana di Scienza Politica, 1979, 367-445.

100. See B.BARRY, op.cit., at 481-490; with some reservations, J.STEINER & J.OBLER, "Does the Consociational Theory Really Hold for Switzerland?", in M.J.Esman (ed), Ethnic Conflict in the Western World, Ithaca/London, Cornell U.P., 1977, 324-342.

101. B.BARRY, op.cit., at 490-500.

102. Significantly, a chapter called 'Dutch Politics in Transition' in the first edition of Lijphart's The Politics of Accommodation, op.cit., becomes 'The Breakdown of the Politics of Accommodation' in the second edition.

103. See the analysis by L.HUYSE, "Pillarization Reconsidered", in Acta Politica, 1984, 145-158.

104. B.DE WITTE, "Regioni e regionalismo in Belgio", op.cit., at 303 ff.

105. This global category of rules corresponds to what Pizzorusso has called 'Influenza dei problemi minoritari sull'organizzazione dello Stato e degli enti pubblici', in Le Minoranze..., op.cit., at 397 ff. For an overview of such arrangements, in addition to Pizzorusso, see C.PALLEY, "The Role of Law in Relation to Minority Groups", in A.E.Alcock, B.K.Taylor, J.M.Welton (eds), The Future of Cultural Minorities, op.cit., at 146 ff.

106. See G.VLACHOS, op.cit.

107. Cf.infra, p.638 ff.

108. Cf.infra, p.135 ff.

109. H.KLOSS, Grundfragen..., op.cit., at 122-123 and 135-140 (using the term 'Duldungsrechte').

110. Ibid. ('Foerderungsrechte').

111. N.LUHMANN, Grundrechte als Institution, Berlin, Duncker & Humblot, 1974, at 162 ("Schutz der gesellschaftlichen Differenzierung gegen regredierende Verschmelzungstendenzen des politischen Systems").

112. J.H.ELY, Democracy and Distrust, Cambridge (Mass.), Harvard U.P., 1980, at 152.

113. Classical pluralist works include : D.TRUMAN, The Governmental Process, New York, Knopf, 1951; and R.DAHL, A Preface to Democratic Theory, Chicago, University Press, 1956. Among the most prominent critics : G.MC CONNELL, Private Power and American Democracy, New York, Random House, 1970; and T.LOWI, The Decline of American Pluralism, New York, W.W.Norton&Cie, 1969.

114. J.H.ELY, op.cit., at 152.

115. H.VAN AMERSFOORT, "Minority as a Sociological Concept", in Ethnic and Racial Studies, 1978, 218-234, at 222.

PART TWO : FUNDAMENTAL RIGHTS

Chapter One

A Concept of Fundamental Rights

1. J.FEINBERG, "The Nature and Value of Rights", in Rights, Justice and the Bounds of Liberty, Princeton, University Press, 1980, 143-158, at 155.
2. See p.56 ff.
3. On this point, see M.CAPPELLETTI, "Appunti per una fenomenologia della giustizia nel XX.Secolo", in Rivista Trimestrale di Diritto e Procedura Civile, 1978, 1381-1433, at 1400 ff.; and E.DENNINGER, "Ueber das Verhaeltnis von Menschenrechten zum positiven Recht", in Juristenzeitung, 1982, 225-231.
4. See p.138 ff.
5. For a recent overview of the debate, see P.NERHOT, "Contribution au débat sur le droit subjectif et le droit objectif comme sources du droit", European University Institute Working Paper No. 84/101.
6. In Kelsen's terms, "the right as legal possibility to put into motion the sanction" (H.KELSEN, General Theory of Law and State, New York, Russell & Russell, 1961, at 81).
7. Cf.infra, p.638 ff. See also the 'minority clauses' of the Italian and Spanish Constitution, at p.512 and 528.
8. A.BERENSTEIN, "Economic and Social Rights : their Inclusion in the European Convention on Human Rights. Problems of Formulation and Interpretation", in Human Rights Law Journal, 1981, 257-280, at 266.
9. Supra, p.100.
10. T.C.GREY, "Constitutionalism : an Analytic Framework", in J.R.Pennock and J.W.Chapman (eds.), Constitutionalism (Nomos XX), New York, New York University Press, 1979, 139-209, at 194.

11. See e.g. the following Constitutions : Federal Republic of Germany (arts. 1-19), Italy (Part I), Belgium (Title II), Ireland (arts.40-44), Denmark (arts.71-79 and Chapter VIII), Spain (Title I), Switzerland (scattered).

12. Expression used by French constitutional lawyers; see e.g. L.FAVOREU & L.PHILIP, Les grandes décisions du Conseil constitutionnel, Paris, Sirey, 1979 (2nd ed), at 43, and 248.

13. See e.g. the overview by F.LUCHAIRE, "Procédures et techniques de protection des droits fondamentaux - Conseil Constitutionnel français", in Revue Internationale de Droit Comparé 1981, 285-333, pp.295-303.

14. More global international law instruments, the European Convention of Human Rights and the Convention against Racial Discrimination, have also been given constitutional rank. They will however be considered under the heading of 'international law', as their transformation into an internal constitutional norm is very peculiar to Austria, and cannot be found elsewhere.

15. On the ebbs and flows of positivism and jusnaturalism in Irish constitutional interpretation, see J.KELLY, The Irish Constitution, Dublin, 1980, pp.328-336. See also the critical discussion by D.M.CLARKE, "The Role of Natural Law in Irish Constitutional Law", in The Irish Jurist, 1982, 187-220.

16. See e.g. Y.HANGARTNER, Grundzuege des schweizerischen Staatsrechts, Zurich, Schulthess, 1982, Vol.II, pp.65-67.

17. The constitutional laws n.2, 3, 4 and 5, all adopted on 26 February 1948, holding respectively the Special Statute for Sicily, Sardinia, Val d'Aosta and Trentino-Alto Adige; and the constitutional law n.1 of 31-11-1963, enacting the Special Statute for Friuli-Venezia Giulia.

18. Corte Costituzionale, decision n.6 of 1970.

19. L.VANDELLI, El ordenamiento español de las Comunidades autonomas, Madrid, Instituto de Estudios de Administración Local, 1982, at 227; J.TORNOS MAS, "Los Estatutos de las Comunidades autonomas en el ordenamiento juridico español", in Revista de Administración Publica, n.91, 1980, 125-169, at 150 : "Estamos ante una norma paccionada que se perfecciona unicamente si existe el acuerdo de dos voluntades, si bien ello no impide que por sus requisitos formales de sancion y promulgacion, y por el propio mandato del articulo 147 de la Constitución, tal ley pueda considerarse como norma estatal."

20. See F.GARRIDO FALLA, "Articulo 81" in Comentarios a la Constitucion, Madrid, Ed.Civitas, 1980, at 857; and F.SOSA WAGNER, "Aproximacion al tema de las leyes organicas", in La Constitucion espanola y las fuentes del derecho, 1979, Vol.III, 1975-1987, at 1984.
21. See J.TORNOS MAS, op.cit., at 160-167.
22. M.CAPPELETTI, "The Mighty Problem of Judicial Review", in Legal Issues of European Integration, 1979, 1-29, at 1.
23. M.CAPPELETTI, Judicial Review in the Contemporary World, Indianapolis, Bobbs-Merrill, 1971, at 1.
24. See e.g. the elaborate legislative procedure prescribed for limitations to constitutional rights; G.HAHN, "Verstaerkter Grundrechtsschutz und andere Neuerungen im schwedischen Verfassungsrecht", in Archiv des oeffentlichen Rechts, 1980, 400-422, at 402 ff.
25. For the Netherlands, see C.W.VAN DER POT & A.M.DONNER, Handboek van het Nederlandse staatsrecht, Zwolle, Tjeenk Willink, 1983 (11th ed), at 208; for Belgium, A.MAST & J.DUJARDIN, Overzicht van het Belgisch grondwettelijk recht, Gent, Story-Scientia, 1983 (7th ed), at 432, and Ch.HUBERLANT & Ph.MAYSTADT, "Exemples de lois taxées d'inconstitutionnalité", in Actualité du contrôle juridictionnel des lois, Bruxelles, Larcier, 1973, 443-515; for Switzerland, where only federal (as opposed to cantonal) legislation is immune from review, see A.AUER, "Réflexions sur l'art.113 al.3 Cst.", in Revue de Droit Suisse, 1980, I, 110-140, at 124 ff.
26. J.NOUSIAINEN, "The Role of the Finnish Supreme Court in the Legislative Process", in Scandinavian Studies in Law, 1979, 131-148, at 143. See also M.HIDEN, "Die praeventive Kontrolle der Verfassungsmaessigkeit der Gesetze", in Oesterreichische Zeitschrift fuer Oeffentliches Recht und Voelkerrecht, 1979, 91-104.
27. S.A.de SMITH, Constitutional and Administrative Law, Harmondsworth, Penguin, 1977 (3rd ed), at 63.
28. See e.g. the opinion of Ungeod-Thomas J. in Cheney v Conn (1968) 1 Weekly Law Reports 242, at 243 : "What the statute itself enacts cannot be unlawful, because (it) is the highest form of law that is known to this country." Other references in de SMITH, op.cit., at 71.

29. See e.g. N.MAC CORMICK, "Does the United Kingdom Have a Constitution? Reflections on Mac Cormick v Lord Advocate", in Northern Ireland Legal Quarterly, 1979, 1-20, who argues that the Acts of Union of 1707 and 1800 are 'higher law' and concludes as follows (at 19-20): "it would seem that a plausible case exists for holding that the original constituent provisions of the state ought to be recognised as continuing in force within the current constitution and as placing certain limits on Parliament's legislative power. There are no good reasons of legal theory or of political morality for insisting on the proposition that Parliament has in principle power to sweep away the Scots courts or Scots law or the Church of Scotland."

30. de SMITH, op.cit., at 439.

31. This lack of fundamental rights as a structuring principle may account for the peculiar shape taken in the United Kingdom by language policy, described as follows by commentators on the Welsh situation: "Arrangements for the development and application of language policy in Wales are comparatively unsystematic and diffuse. the 'arrangements' are, like much else in British government, mainly the result of reactions to particular problems, and are marked by uncertainty of objectives, and unpredictability in operation" (P.MADGWICK & Ph.RAWKINS, "The Welsh Language in the Policy Process", in Madgwick & Rose (eds), The Territorial Dimension in United Kingdom Politics, London, Macmillan, 1982, 67-99, at 71).

32. P.WEIL, "Towards Relative Normativity in International Law", in American Journal of International Law, 1983, 413-442, at 423.

33. M.VIRALLY, "Réflexions sur le 'jus cogens'", in Annuaire Francais de Droit International, 1966, 5-29, at 18.

34. E.SUY, "Droit des traités et droits de l'homme" in Volkerrecht als Rechtsordnung-Internationale Gerichtsbarkeit-Menschenrechte. Festschrift fuer Hermann Mosler, Berlin-Heidelberg-New York, Springer, 1983, 935-947, at 937.

35. See e.g. A.GOMEZ ROBLEDO, "Le Ius Cogens international : sa genèse, sa nature, ses fonctions", in Recueil des Cours, 1981 III, 9-217, at 182.

36. M.S. MC DOUGAL, H.D.LASSWELL & L.C.CHEN, Human Rights and World Public Order, New Haven/London, Yale University Press, 1980, at 345. This view is however not convincingly borne out by

the opinions of the authorities cited in its support, pp.345-350.

37. M.VIRALLY, op.cit., at 28; H.MOSLER, "Ius Cogens im Voelkerrecht", in Schweizerisches Jahrbuch fuer Internationales Recht, 1968, 9-40, at 35; U.SCHEUNER, "Conflict of Treaty Provisions with a Peremptory Norm of General International Law", in Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht, 1969, 28-38, at 33-34; F.DOMB, "Jus Cogens and Human Rights", in Israel Yearbook on Human Rights, 1976, 104-121, at 115 ff.; R.HIGGINS, "Derogations under Human Rights Treaties", in British Year Book of International Law, 1976-77, 281-320, at 282.

38. Barcelona Traction, judgment of February 5, 1970, in I.C.J.Rep. 1970, 3, at 32.

39. F.A.MANN, "The Doctrine of Jus Cogens in International Law", in Festschrift fuer Ulrich Scheuner, Berlin, Duncker&Humblot, 1973, 399-418, at 405; I.BROWNLIE, Principles of Public International Law, Oxford, Clarendon, 1979 (3rd ed), at 513.

40. They can form part of customary law, and thus be more effectively enforceable at the domestic level; see below, p.211. They can more easily form the object of non-treaty implementation mechanisms at the international level; see p.231.

41. C.W.JENKS, "Some Constitutional Problems of International Organisations", in British Year Book of International Law, 145, 11 ff.; T.OPSAHL, "An 'International Constitutional Law'", in International and Comparative Law Quarterly, 1961, 760-784, pp.776-781; R.MONACO, "Le caractère constitutionnel des actes institutifs d'Organisations internationales", in Mélanges offerts à Charles Rousseau - La communauté internationale, Paris, Pedone, 1974, 153-172; M.SOERENSEN, "Eigene Rechtsordnungen" in Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit - Festschrift fuer Hans Kutscher, Baden Baden, Nomos, 1981, 415-436, at 419; H.J.HAHN, "Constitutional Limitations in the Law of the European Organisations", in Recueil des Cours, 1963 I, 189-306, at 195-196.

42. Cf.infra, p.201 ff.

43. See e.g. International Human Rights Instruments of the United Nations, 1948-1982, London, Mansell Publishing, 1984; K.VASAK (gen.ed.), The International Dimensions of Human

Rights, Paris, Unesco & Westport, Greenwood Press, 1982, Vol.2, Annex I; more selective lists in E.VITTA & V.GREMENTIERI (eds), Codice degli atti internazionali sui diritti dell'uomo, Milano, Giuffrè, 1981; and I.BROWNLIE (ed), Basic Documents on Human Rights, Oxford, Clarendon Press, 1981 (2nd ed).

In order to avoid the terminological anarchy, an author recently proposed to establish some procedural requirements for the creation of new human rights : Ph.ALSTON, "Conjuring Up New Human Rights : A Proposal for Quality Control", in American Journal of International Law, 1984, 607-621.

44. See e.g. the lucid criticism by P.WEIL, op.cit., at 433-440.

45. See the classical doctrinal controversy opposing the standard of national treatment to the international minimum standard; cf. I.BROWNLIE, Principles of Public International Law, cit., pp.523-528.

46. See e.g. J.P.MUELLER and L.WILDHABER, Praxis des Voelkerrechts, Bern, Staempfli, 1977, at 326; or A.C.KISS, "La condition des étrangers en droit international et les droits de l'homme", in Miscellanea Ganshof van der Meersch, Bruxelles, Bruylant, T.I, 499-511, at 504-505.

47. A.C.KISS, op.cit., at 507-508 : "Alors que dans le passé les règles générales concernant la condition des étrangers étaient la pointe avancée de la reconnaissance internationale de droits fondamentaux à des individus, la situation s'est renversée (...)"

48. M.S.MC DOUGAL, H.D.LASSWELL, L.C.CHEN, op.cit., at 767-773.

49. For instance, Universal Declaration, art.21; Civil and Political Covenant, arts. 25 and 12.4; Economic and Social Covenant, art.2.3; European Convention on Human Rights art.16.

50. The Convention against Racial Discrimination constitutes a global exception; as to art.27, the 'minority provision' of the Civil and Political Covenant, its application to alien groups is controversial; see the discussion infra, p.658-659.

51. L.HENKIN, "Introduction", in L.Henkin (ed.), The International Bill of Rights - The Covenant on Civil and Political Rights, New York, Columbia University Press, 1981, 1-31, at 8.

52. A.BLECKMANN, "Die Praxis des Voelkergewohnheitsrechts als konsekuative Rechtsetzung", in Voelkerrecht als Rechtsordnung - Internationale Gerichtsbarkeit - Menschenrechte. Festschrift fuer Hermann Mosler, Berlin-Heidelberg-New York, Springer, 1983, 89-110, at 90 ff.

53. See A.BLECKMANN, op.cit., at 98, basing this theory on the principle of "Vertrauensschutz".

54. See the recent application of customary human rights law by an American court to a Paraguayan official : Filartiga v Pena-Irala, 630 F 2d 876 (2d Cir. 1980).

55. The specific content of these rights is analysed by J.M.BLUM and R.G.STEINHARDT, "Federal Jurisdiction over International Human Rights Claims : The Alien Tort Claims Act after Filartiga v Pena-Irala", in Harvard International Law Journal, Vol.22, Winter 1981, 53-113, pp.90-97. Freedom from torture was the right dealt with in Filartiga.

56. B.G.RAMCHARAN, "The Right to Life", in Netherlands International Law Review 1983, 297-329.

57. J.G.LAMMERS, "General Principles of Law Recognised by Civilized Nations", in Essays on the Development of the International Legal Order - In Memory of Haro F.Van Panhuys, Alphen, Sijthoff & Noordhoff, 1980, 53-75, at 53.

58. N.KAUFMAN HEVENER and S.A.MOSHER, "General Principles of Law and the U.N. Covenant on Civil and Political Rights", in International and Comparative Law Quarterly, 1978, 596-613, at 613.

59. B.VUKAS, "General International Law and the Protection of Minorities", in Human Rights Journal, 1975, 41-49.

60. J.G.LAMMERS, op.cit., at 75; M.AKEHURST, A Modern Introduction to International Law, 4th ed., London, George Allen & Unwin, 1982, at 40; Ch.ROUSSEAU, Droit international public, Paris, Sirey, T.I, 1970, at 395; M.VIRALLY, "The Sources of International Law", in M.Soerensen (ed), Manual of Public International Law, London, macmillan & New York, St Martin's Press, 1968, 116-174, at 147.

61. "(D)e nouveaux appels aux principes généraux de droit sont constatés dans tous les domaines nouveaux du droit international dans lesquels les problèmes doivent être résolus sans que l'on puisse invoquer de précédents" (N.QUOC DINH, P.DAILLIER, A.PELLET, Droit international public, 2e éd., Paris, L.G.D.J., 1980, at 318). One such new field might

be that of state contracts (if they are part of public international law at all); see P.WEIL, "Principes généraux du droit et contrats d'Etat", in Le droit des relations économiques internationales. Etudes offertes à Berthold Goldman, Paris, Litec, 1982, 387-414.

62. This is also the position adopted by L.C.GREEN, "Human Rights and the General Principles of Law", in Green, Law and Society- Collected Essays, Leiden, Sijthoff and Dobbs Ferry, Oceana, 1977 (2nd. print), 283-320.

63. Cf.infra, p.603 ff.

Chapter Two

Which Fundamental Rights ?

1. Cf. supra, p.91 ff.
2. See A.PIZZORUSSO, Le minoranze nel diritto pubblico interno, Milano, Giuffrè, 1967, I, at 325-326.
3. C.PALLEY, "The Role of Law in Relation to Minority Groups", in Alcock, Taylor & Welton (eds), The Future of Cultural Minorities, London, Macmillan Press, 1979, 120-160, at 126. Similarly sceptical views are widespread; see T.KOOPMANS, Vergelijkend publiekrecht, Deventer, Kluwer, 1978, at 226; A.PIZZORUSSO, op.cit., at 328; F.MUENCH, "Volksgruppenrecht und Menschenrechte", in System eines internationalen Volksgruppenrechts, I, Wien, Wilh.BraumueLLer, 1970, 55-104, at 101.
4. A.DEMICHEL, "L'évolution de la protection des minorités depuis 1945", in Revue générale de droit international public, 1960, 22-51, at 34-35.
5. Special language rights are sometimes presented under the term 'autonomy' : F.ERMACORA, Handbuch der Grundfreiheiten und der Menschenrechte. Ein Kommentar zu den oesterreichischen Grundrechtsbestimmungen, Wien, Manz, 1963, at 535 and 553-564, calls 'Schulautonomie' and 'Sprachautonomie' what are, in my definition, individual rights; in the same vein, P.PERNTHALER & F.ESTERBAUER, "Moeglichkeiten des rechtlichen Volksgruppenschutzes", in System eines internationalen Volksgruppenrechts, Wien-Stuttgart, Wilh.BraumueLLer, 1972, Vol.2, 175-188, at 183. Conversely, autonomy and other institutional forms of group accommodation are sometimes brought under the general heading of 'linguistic rights'.
6. A.PIZZORUSSO, Le minoranze..., at 329 (using, however, inverted commas : 'situazioni giuridiche collettive'); T.OEHLINGER, "Objet et portée de la protection des droits fondamentaux - Cour constitutionnelle autrichienne", in Revue internationale de droit comparé, 1981, 543-579, at 565 ff.; Y.DE MONTIGNY, "L'O.N.U. et la protection internationale des minorités depuis 1945", in Revue juridique Thémis, 1978, 389-447, at 395-397; A.DEMICHEL, op.cit., at 29.

7. For the theoretical distinction between individual and collective rights, on the one hand, and individual and collective protection, on the other, see P.PERNTHALER, "Der Schutz der Gemeinschaften durch individuelle Rechte", in Europa Ethnica, 1962, 50-86, esp. at 75 ff.

8. "Wer also Sprachenschutz, d.h. die Sicherung des Gebrauches der Muttersprache im privaten und oeffentlichen Leben, proklamiert, bekennt sich gleichzeitig zum Gruppenschutz. Denn die Sprache setzt eine Gemeinschaft voraus" (T.VEITER, "Einzel- und Gruppenrechte in ihrer Wechselbeziehung. Der menschenrechtliche Mindeststandard im internationalen Volksgruppenrecht", in Europa Ethnica, 1971, 2-14, at 6).

9. Cf. infra, Part Five, passim.

10. Linguistic guarantees also exist in the Constitutions of many other countries; they are especially numerous in East European countries,

11. Judgment of 31 March 1965, Association de l'Ecole française, in Arrets du Tribunal Fédéral, 91 I, 480.

12. Art.8 of the Austrian, and art.3 of the Spanish Constitution mention only one official language (German and Castillian respectively). But art.3 of the Spanish Constitution adds that "the other languages of Spain will also be official in the respective Autonomous Communities, in accordance with their Statutes". As for Austria, the (limited) use of minority languages in some public domains is guaranteed by two post-war Peace Treaties (the 1919 Treaty of St-Germain and the 1955 State Treaty of Vienna). Those instruments belong to Austrian constitutional law (see above, p.105), but, because of their international law origin, they will be treated in Section 2 of this Chapter, at p.157 ff. and 171.

13. Arts. 16 to 22 of the Charter. For the text of the relevant provisions and a discussion of their significance, see below, p.642.

14. Cf. infra, p.644 and 647.

15. But see the analysis of these provisions, infra, p.512 ff.

16. Cf. infra, p.273; 372; 512 ff.; 528 ff.

17. "Alle Volksstaemme des Staates sind gleichberechtigt, und jeder Volksstamm hat ein unverletzliches Recht auf Wahrung und Pflege seiner Nationalitaet und Sprache". The article further specifies : "Die Gleichberechtigung aller landesueblichen Sprachen in Schule, Amt und oeffentlichem Leben wird vom Staat anerkannt. In den Laendern, in welchen mehrere Volksstaemme wohnen, sollen die oeffentlichen Unterrichtsanstalten derart eingerichtet sein, dass ohne Anwendung eines Zwanges zur Erlernung einer zweiten Landessprache jeder dieser Volksstaemme die erfoerderlichen Mittel zur Ausbildung in seiner Sprache erhaelt."

18. Cf.infra, p.531.

19. K.D.MC RAE, "The Constitutional Protection of Linguistic Rights in Bilingual and Multilingual States", in A.Gotlieb (ed), Human Rights, Federalism and Minorities, Toronto, Canadian Institute of International Affairs, 1970, 211-227, at 213.

20. In an important theoretical essay, Guy Héraud explicitly makes this restrictive premise : "Le droit linguistique comparé apparait ainsi comme la prospection et la présentation systématiques des solutions juridiques positives apportées par les différents ordres étatiques ouvertement plurilingues aux divers problèmes que pose cette pluralité" (G.HERAUD, "Pour un droit linguistique comparé", in Revue internationale de droit comparé, 1971, 309-330, at 310) (my emphasis).

21. Examples of such comparative studies include, besides G.HERAUD, op.cit., and K.D.MC RAE, op.cit. : J.FALCH, Contribution à l'étude du statut des langues en Europe, Québec, Presses de l'Université Laval, 1973; J.COCQUEREAUX, Volken en talen in beweging - recht en onrecht aan de volken van Europa, Leuven, Davidsfonds, 1981; H. KLOSS, Grundfragen der Ethnopolitik im 20.Jahrhundert, Wien-Stuttgart, Wilh.Braumueller, 1969; J.G.SAVARD & R.VIGNEAULT (eds), Multilingual Political Systems. Problems and Solutions, Québec, Presses de l'Université Laval, 1975; Linguistic Minorities and Interventions. Towards a Typology, Québec, Presses de l'Université Laval, 1978; T.VEITER (ed), System eines internationalen Volksgruppenrechts. 3.Teil : Sonderprobleme des Schutzes von Volksgruppen und Sprachminderheiten, Wien, Wilh.Braumueller, 1978; J.A.SIGLER, Minority Rights - a Comparative Perspective, Westport/London, Greenwood Press, 1983; J.B.PARADIS, "Language Rights in Multicultural States : A Comparative Study", in Canadian Bar Review, 1970, 651-697; G.HERAUD, "Le Statut des langues dans les différents Etats, et en particulier en Europe", in

Language Problems and Language Planning, 1980, 195-223; D.B.WALTERS, "The Legal Recognition and Protection of Language Pluralism (a Comparative Study with Special Reference to Belgium, Quebec and Wales)", in Acta Juridica, 1978, 305-326; M.W.WENNER, "The Politics of Equality among European Linguistic Minorities", in R.P.Claude (ed), Comparative Human Rights, Baltimore and London, Johns Hopkins University, 1976, 184-213.

22. F.ERMACORA, Handbuch... op.cit., at 525 ff.

23. T.OEHLINGER, "Objet et portée...", op.cit., at 565.

24. F.FLEINER & Z.GIACOMETTI, Schweizerisches Bundesstaatsrecht, Zuerich, Schulthess, 1976 (orig.ed. 1949), at 390 ff.

25. A.MAST & J.DUJARDIN, Overzicht van het Belgisch grondwettelijk recht, Gent, Story-Scientia, 1983 (7th ed), at 580.

26. I.D.DUCHACEK, Rights & Liberties in the World Today : Constitutional Promise & Reality, Santa Barbara, ABC-Clio Press, 1973, at 48 and 83.

27. J.D.WHYTE & W.R.LEDERMAN, Canadian Constitutional Law. Cases, Notes and Materials, 2nd ed, Toronto, Butterworths, 1977, Chapter 21.

28. M.W.WENNER, op.cit., at 185.

29. Cf. infra, p.246.

30. Cf. infra, p.277 ff.

31. cf. infra, p.255 ff.

32. For an example from case law, see infra, p.372.

33. See above, p.66.

34. Above, p.133.

35. Cf. infra, pp.510-568.

36. On this evolution through time, see generally Sir H.WALDOCK, "The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights", in Mélanges offerts à Paul Reuter. Le droit international : unité et diversité, Paris, Pedone, 1981, 535-547.

37. If one excepts the so-called 'humanitarian interventions' in the nineteenth century; see e.g. the classical study by ROUGIER, "La théorie d'intervention d'humanité", in Revue générale de droit international public, 1910, 468-526.

38. See below, sub-section B, p.164.

39. See e.g. the analysis of the equality principle, infra, p.630 and of the minority clause of art.27 of the Civil Covenant, infra, p.654 and 661.

40. A full bibliography on the minority system would be endless; see the bibliographical selections made by C.ROUSSEAU, Droit international public, T.I, Paris, Sirey, 1970, at 739-740. Among the most recent analyses, see W.MC KEAN, Equality and Discrimination under International Law, Oxford, Clarendon Press, 1983, at 27-45; L.C.GREEN, "Protection of Minorities in the League of Nations and the United Nations", in A.Gotlieb (ed), Human Rights, Federalism and Minorities, op.cit., 180-210; F.CAPOTORTI, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, United Nations, Doc.E/Cn.4/Sub.2/384/Rev.1, at 16-26..

41. Cf.supra, p.35.

42. I.L.CLAUDE, Nationalities and National Minorities, Cambridge (Mass), Harvard University Press, 1955, at 13.

43. Ibid.

44. C.A.MACARTNEY, National States and National Minorities, London, Oxford University Press, 1934, at 275.

45. Minutes of the 37th Council, February 1926, p.142.

46. C.A.MACARTNEY, op.cit., at 277.

47. Cf.supra, p.54 ff.

48. R.DE NOVA, "The International Protection of National Minorities and Human Rights", in Howard Law Journal, 1965, 275-290, at 278.

49. Minority Schools in Albania, Advisory Opinion, P.C.I.J. (1935), Series A/b, No.64, at 17.

50. P.THORNBERRY, "Is there a Phoenix in the Ashes ? International Law and Minority Rights", in Texas International Law Journal, 1980, 421-458, at 430.

51. See e.g. art.12.2 of the Treaty with Poland of 28 June 1919.

52. P.DE AZCARATE, League of Nations and National Minorities. An Experiment, Washington, Carnegie Endowment for International Peace, 1945 (New York, Kraus Reprint Co., 1972), at 98.

53. The legal framework for the provision of individual petitions, beyond the explicit wording of the minority treaties, was laid down in the Tittoni-report, adopted by resolution of the League Council on 22-10-1920. For a description of the procedure, which was used more intensively than the normal inter-state mechanism, see F.CAPOTORTI, op.cit., at 21-24; J.STONE, "The Legal Nature of the Minorities Petition", in British Year Book of International Law, 1931, 76 ff.; C.GUTERMANN, Der Minderheitenschutzverfahren des Voelkerbundes, Berlin, Duncker & Humblot, 1979.

54. Art.12.3 of the Treaty with Poland. The political and judicial procedures were entirely independent; on their delimitation, see N.FEINBERG, "La juridiction et la jurisprudence de la Cour permanente de Justice internationale en matière de mandats et de minorités", in Recueil des Cours, 1937, I, 591-705, at 673-679. The Court could also be directly asked by the League Council for an Advisory Opinion, and these opinions in fact offered the most distinctive contribution to the development of international minority law: Settlers of German Origin in Territory Ceded by Germany to Poland, P.C.I.J. (1923), Ser.B, No.6; Acquisition of Polish Nationality, P.C.I.J. (1933), Ser.B, No.7; Access to German Minority Schools in Polish Upper Silesia, P.C.I.J. (1931), Ser.A/B, No.40; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig, P.C.I.J. (1932), Ser.A/B, No.44; Minority Schools in Albania, cit.

55. Cf.supra, p.105.

56. Some countries, though, went well beyond the strict treaty obligations; see A.MANDELSTAM, "La protection des minorités", in Recueil des Cours, 1923, I, 367-517, at 422-423 (Hungary), 420-421 (Czechoslovakia), and 424-427 (Poland).

57. The interpretation of this equality principle has perhaps been the most outstanding contribution of the Permanent Court to the progress of human rights law. Beyond the light it sheds on the Minority Treaties, it is also of considerable

importance today, in the discussion on the notion of equality in international law; cf.infra, p.630.

58. I.L.CLAUDE, op.cit., at 31-32

59. Several Allied powers had also acquired new territory inhabited by minorities, but did not enact any corresponding protection system (Italy with South Tyrol, Istria and Dalmatia; France with Alsace-Lorraine; Belgium with Eupen-Malmédy). By a resolution of 21-9-1922, the League of Nations Assembly recommended to all States to adopt similar protection systems, but no further concrete action was taken. See W.MC KEAN, op.cit., at 33 ff.

60. I.L.CLAUDE, op.cit., at 39-48.

61. Together with the creation of the International Labour Organisation.

62. P.DE AZCARATE, op.cit., at 66-67.

63. The dissolution of the League of Nations -which was an essential part of the minority edifice-, the new theory of general human rights, and the disappearance of many minorities from their former territories, these factors taken all together were thought to constitute such a fundamental change of circumstances, that the minority system could no longer exist, even without formal act of death; see the United Nations Study of the Legal Validity of the Undertakings Concerning Minorities, United Nations Doc.E/CN.4/367. But see also the critical comments by N.FEINBERG, "The Legal Validity of the Undertakings Concerning Minorities and the 'clausula rebus sic stantibus'", in Studies in International Law, Jerusalem, The Magnes Press-The Hebrew University, 1979, 17-54 (first published in 1958); and K.DOEHRING, "Das Gutachten des Generalsekretärs der Vereinten Nationen ueber die Fortgeltung der nach dem Ersten Weltkrieg eingegangenen Minderheitenschutzverpflichtungen", in Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht, 1953/54, 521-540.

64. See T.MODEEN, "The International Protection of the National Identity of the Aaland Islands", in Scandinavian Studies in Law, 1973, 175-210.

65. See I.L.CLAUDE, op.cit., at 51-109.

66. See A.VERDOODT, "Influence des structures ethniques et linguistiques des pays membres des Nations Unies sur la

rédaction de la Déclaration Universelle des Droits de l'Homme", in René Cassin Amicorum Discipulorumque Liber, I, Paris, Pédone, 1969, 404-416.

67. On the Charter provisions concerning human rights, see H.LAUTERPACHT, "International Protection of Human Rights", in Recueil des Cours, 1947 I, 1-108; M.GANJI, International Protection of Human Rights, Genève, Droz & Paris, Ménard, 1962; E.SCHWELB, "The International Court of Justice and the Human Rights Clauses of the Charter", in American Journal of International Law, 1972, 337-351; B.SCHLÜTER, "The Domestic Status of the Human Rights Clauses of the United Nations Charter", in California Law Review, 1973, 110-164.

68. First phrase of the Declaration.

69. M.S.MC DOUGAL & G.BEBR, "Human Rights in the United Nations", in American Journal of International Law, 1964, 603-641, at 639; E.SCHWELB, "The Influence of the Universal Declaration of Human Rights on International and National Law", in Proceedings of the American Society of International Law, 1959, 217-229.

70. Cf.infra, p.316.

71. They are similar to those of the European Convention discussed infra, p.595.

72. Cf.infra, p.624 and 628.

73. Cf.infra, p.651.

74. Cf.infra, p.439.

75. But see infra, p.669-670.

76. For a full list of universal human rights instruments, see e.g. International Human Rights Instruments of the United Nations, 1948-1982, London, Mansell Publishing, 1984.

77. Cf.infra, p.622.

78. For its impact on non-discrimination, cf.infra, p.627; on educational rights, infra, p.438.

79. Infra, p.216 ff.

80. T.OPSAHL, "Human Rights Today : International Obligations and National Implementation", in Scandinavian Studies in Law, 1979, 149-176, at 174-175.

81. Cf.infra, p.315.

82. Cf.infra, p.569.

83. Cf.infra, p.595.

84. Cf.infra, p.416.

85. Cf.infra, p.601.

86. Cf.infra, note 65 at p.339.

87. See the following surveys of post-war developments in the field of minority protection : A.DEMICHEL, op.cit.; Y.DE MONTIGNY, op.cit.; F.CAPOTORTI, op.cit., at 26ff.; P.THORNBERRY, op.cit.; F.ERMACORA, Nationalitaetenkonflikt und Volksgruppenrecht. Band II : Ansaetze und Hindernisse fuer Konfliktverstaendnis und Konfliktloesung in den Vereinten Nationen und in Europa, Muenchen, Bayerische Landeszentrale fuer politische Bildungsarbeit, 1978; H.KLOSS, Grundfragen der Ethnopolitik im 20.Jahrhundert, Wien/Stuttgart, Wilh.Braumueller, 1969, at 351 ff.; M.TABORY, "Language Rights as Human Rights", in Israel Yearbook on Human Rights, 1980, 167-223.

88. On the Paris Agreement, its historical context, and subsequent developments, see, among many others, the following : A.PIZZORUSSO, Il pluralismo linguistico tra stato nazionale e autonomie regionali, Pisa, Pacini editore, 1975, at 108-127; A.FENET, La question du Tyrol du sud. Un problème de droit international, Paris, L.G.D.J., 1968, at 96 ff.; A.E.ALCOCK, The History of the South Tyrol Question, London, Michael Joseph (for the Graduate Institute of International Studies, Geneva), 1970, at 110 ff.; a full bibliography of the South Tyrol question is presented by T.VEITER, Bibliographie zur Suedtirolfrage 1945-1983, Wien, Wilh.Braumueller, 1984.

See also the discussion, infra, p.501 and 520.

89. See E.SCHWELB, "The Trieste Settlement and Human Rights", in American Journal of International Law, 1955, 240-248.

90. See the analysis by S.BARTOLE, "Tutela della minoranza linguistica slovena ed esecuzione del Trattato di Osimo", in Rivista di Diritto Internazionale, 1977, 507-525; and T.VEITER, "Der neue jugoslawisch-italienische Triest-Vertrag", in Europa Ethnica, 1976, 108-116. Those international treaty provisions have only partially trickled through to the domestic Italian level; see below, p.411, 519, 525.

91. E.SCHWELB, "The Austrian State Treaty and Human Rights", in International and Comparative Law Quarterly, 1956, 265-276; and see below, p.409 and 648.

92. I.L.CLAUDE, op.cit., at 145-152.

93. For a general overview of the agency's activities, see J.P.HUMPHREY, "The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities", in American Journal of International Law, 1968, 869-888.

94. On art.27, see below, p.651 ff. In addition, both the Civil and the Social Covenant recognise, in their article 1, the right to self-determination of all peoples. This right will however not further be considered in this study, for a double reason. First of all, its applicability to minority groups within states is extremely doubtful. Prevailing United Nations practice, at any rate, tends to restrict the benefit of the right to the colonial peoples only or, if it is extended to other contexts as well, to the whole citizenry of a state, and not to a particular section of it. And even if one would recognise such a positive right to self-determination to intra-state ethnic groups, its impact on language use would only be secondary. For a concise survey of prevailing theories of self-determination, see A.CASSESE, "Political Self-Determination. Old Concepts and New Developments", in UN Law / Fundamental Rights. Two Topics in International Law, Alphen a/d Rijn, Sijthoff & Noordhoff, 1979, 137-165. Among the discussions of its applicability to Western countries, see J.BROSSARD, "Le droit du peuple québécois de disposer de lui-même au regard du droit international", in Canadian Yearbook of International Law, 1977, 84-145; D.THUERER, Das Selbstbestimmungsrecht der Voelker, mit einem Exkurs zur Jurafrage, Bern, Staempfli, 1976; T.VEITER, "Das Selbstbestimmungsrecht als Menschenrecht", in Festschrift fuer Hans Klecatsky, Wien, Wilh.Braumueller, 1980, 967-991; H.GROS ESPIELL, "El caso de las Islas Canarias y el derecho a la libre determinacion de los pueblos", in Revista Espanola de Derecho Internacional, 1978-79, 13-24.

95. On the discussion within the Sub-Commission, see the Summary Records, U.N.Doc. E/Cn.4/Sub.2/SR 795 ff.

96. F.CAPOTORTI, op.cit.

97. I will use it profusely in the analysis of art.27, infra, p.651.

98. F.ERMACORA, "Die Stellung des Volksgruppen- und Minderheitenschutzes in der Arbeit europäischer Organisationen", in Europa Ethnica, 1980, 178-184, at 178.

99. On the Struye-report, see H.GOLSONG, "Minderheitenrecht im Rahmen des Europarates", in Europa-Archiv, 1960, 85-92; and B.SCHLOH, "Ein Bericht des Europarates ueber die nationalen Minderheiten", in Jahrbuch fuer Internationales Recht, 1959/60, 77-83.

100. See the comments by the author, H.LANNUNG, "The Rights of Minorities", in Mélanges offerts à Polys Modinos, Paris, Pédone, 1968, 181-195, at 187 ff.

101. For a global survey of all foregoing documents, see F.ERMACORA, Nationalitaetenkonflikt..., op.cit., at 109-116.

102. Parliamentary Assembly, Doc.4745, adopted by Recommendation 928/1981 "on the educational and cultural problems of minority languages and dialects in Europe".

103. Resolution of the European Parliament of 16 October 1981, Official Journal of the European Communities, 1981, C 287, adopted on the basis of the Arfe-report, synthesising a number of propositions from various political groups. See the comment by the author of the report, G.ARFE, "La carta di Strasburgo e le culture minoritarie", in Città e regione, 1982, n.1, 59 ff. See also infra, p.618.

Chapter Three

The Enforcement of Fundamental Rights

1. For a recent survey, see G.E.CAIDEN (ed), International Handbook of the Ombudsman, Westport, Greenwood Press, 1983, 2 Volumes.
2. For instance, the New Zealand ombudsman has dealt repeatedly with Maori rights, and the Danish ombudsman with the German minority in North Slesvig.
3. See the examples given by F.CAPOTORTI, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, United Nations Doc.E/CN.4/Sub.2/384/Rev 1, at 90-92; they include, as far as Europe is concerned, the Austrian 'Volksgruppenbeiraeete', advisory committees within the Austrian Federal Chancellery representing the Slovene and Croatian minority, which were created by the 1976 'Volksgruppengesetz' (See more details in T.VEITER, Das Oesterreichische Volksgruppenrecht seit dem Volksgruppengesetz von 1976, Wien, Wilh.Braumuellner, 1979, at 59 ff.); on similar lines, the advisory committee, within the German Federal Ministry of the Interior, for questions concerning the Danish minority, and the governmental Commissions on Lappish Affairs, existing in each of the three countries (Finland, Norway, Sweden) in which this latter minority lives.
4. See the analysis by G.APPLEBEY & E.ELLIS, "Formal Investigations : The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies", in Public Law 1984, 236-276.
5. Laws on the use of languages in administrative affairs, coordinated by Royal Decree of 18 July 1966, arts.60-62. The Committee has received a further implementing role under the 1973 Decree of the Flemish Community on the use of languages in private enterprises, on which see further, p.266; as for the use of languages in the army, a specific Commission d'inspection linguistique has been created; the laws on the use of languages at court and in education, for their part, are enforced through the ordinary procedures.

6. The statutory rules of the Commission are discussed in more detail by M.P.HERREMANS, "La Commission Permanente de Controle Linguistique", in Courrier Hebdomadaire du CRISP, no.374, 15 Sept. 1967. For a more general analysis, including a survey of the Committee's activities, see B.RUYS, De vaste commissie voor taaltoezicht, Brugge, Die Keure, 1980.
7. The digest of the Committee's case-law covers more than 3000 pages in the Code Linguistique, Heule-Bruxelles-Namur, U.G.A. (looseleaf).
8. X, "Office of the Federal Commissioner of Official Languages of Canada : The Idea, Image and Reality", in International Review of Administrative Science, 1980, 251-265.
9. Cf.supra, p.80.
10. See the statistics provided by R.SKUCE, "The Commissioner of Official Languages", in G.E.Caiden (ed), op.cit., Vol.1, 35-40, at 38.
11. See the tables in annex to X, "Office of the Federal Commissioner...", op.cit..
12. Forming part of the Charter provisions dealing with the private sector; see infra, p.260 ff.
13. Cf.supra, p.108 ff.
14. Marbury v Madison, 5 U.S. (1 Crunch) 137 (1803).
15. M.CAPPELLETTI & W.COHEN, Comparative Constitutional Law, Indianapolis, Bobbs-Merrill, 1979, at 3. On those European antecedents, see M.CAPPELLETTI, "Quelques précédents historiques du contrôle judiciaire de la constitutionnalité des lois", in Studi in memoria di Tullio Ascarelli, Milano, Giuffrè, 1969, Vol.V, 2779-2797.
16. M.CAPPELLETTI & W.COHEN, op.cit., at 12.
17. M.CAPPELLETTI, Judicial Review in the Contemporary World, Indianapolis, Bobbs-Merrill, 1971.
18. The first four systems are now long-established and have been the object of considerable academic attention; see among many others, the following comparative studies : M.CAPPELLETTI, op.ult.cit.; and L.FAVOREU, Cours constitutionnelles et droits fondamentaux, Paris, Economica. For Ireland, see J.KELLY, The Irish Constitution, Dublin,

1980, at 219 ff.; on Greece, J.ILIOPOULOS-STRANGAS, "Grundrechtsschutz in Griechenland", in Jahrbuch des Oeffentlichen Rechts, 1983, 396-442, at 433-437; on Spain, see the wide comparative perspective of E.GARCIA DE ENTERRIA, La Constitucion como norma y el tribunal constitucional, Madrid, Ed.Civitas, 1981, and the more technical overviews by J.GONZALEZ PEREZ, Derecho procesal constitucional, Madrid, Ed.Civitas, 1980, and F.RUBIO LLORENTE & M.ARAGON REYES, "La jurisdiccion constitucional", in A.Predieri & E.Garcia de Enterria (eds), La Constitucion espanola de 1978, Madrid, Ed.Civitas, 1981, 831-886.

19. J.Y.CHEROT, "L'exception d'inconstitutionnalité devant le Conseil constitutionnel", in Actualité juridique - Droit administratif, 1982, 59-71, at 66.

20. J.B.D'ONORIO, "Le rapatriement de la Constitution canadienne", in Revue internationale de droit comparé, 1983, 69-108, at 100-101.

21. As a reaction, Quebec has decided to exploit section 33 to the fullest: "The Province of Quebec has already announced it intends to make use of the provision to the greatest possible extent, placing it in every Quebec statute passed before or after patriation and applying it to all fundamental, legal and equality rights" (A.BAYEFSKY, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms", in Political Studies, 1983, 239-263, at 259). But against the linguistic rights of the Charter, the Quebec government is impotent, and an article of the 'Charte de la Langue Francaise' was already struck down, in September 1982, as contrasting with art.1 and 23 of the Charter of Rights (cf.infra, p.408-409)

22. G.HAHN, "Verstaerkter Grundrechtsschutz und andere Neuerungen im Schwedischen Verfassungsrecht", in Archiv des oeffentlichen Rechts, 1980, 400-422, at 412. This restrictive interpretation is confirmed by the simultaneous provision for an elaborate system of political control of the constitutionality of legislation.

23. See F.CASTBERG, "Verfassungsgerichtsbarkeit in Norwegen und Daenemark", in Verfassungsgerichtsbarkeit in der Gegenwart, Koeln/Berlin, Carl Heymanns Verlag, 1962, 417-438.

24. See Commission d'experts pour la préparation d'une révision totale de la Constitution fédérale, Rapport, 1977, at 173-179. And W.HALLER, "Ausbau der

Verfassungsgerichtsbarkeit", in Zeitschrift fuer Schweizerisches Recht 1978, I, 501-528.

25. For a short overview of the discussions over the years, see A.K.KOEKKOEK & W.KONIJNENBELT, "Het raam van Hoofdstuk 1 van de herziene Grondwet", in Grondrechten - Commentaar op hoofdstuk 1 van de herziene Grondwet, Nijmegen, Ars Aequi Libri, 1982, 1-39, at 11-16.

26. Judgment of 3 May 1974, Pasicrisie 1974 I, 910.

27. A.ALEN, "De raadsels van artikel 107 van de Belgische Grondwet", in Rechtskundig Weekblad, 1983-84, 1729-1756, at 1756.

28. See, among many others, LLOYD OF HAMPSTEAD, "Do we need a Bill of Rights ?", in Modern Law Review, 1976, 121-129; G.WINTERTORN, "The British Grundnorm: Parliamentary Supremacy Re-examined", in Law Quarterly Review, 1976, 591-617; J.JACONELLI, Enacting a Bill of Rights, Oxford, Clarendon Press, 1980; E.H.RIEDEL, "The Bill of Rights Fallacy ?", in In Memoriam J.D.B.Mitchell, London, Sweet & Maxwell, 1983, 38-62.

29. Cf. supra, p.99.

30. The question of the horizontal effect will not be treated here in globo, but will be considered in the particular context of the substantive parts of this study, see p.505 and 624 (and accompanying note 140). For a short statement of comparative constitutional practice in this regard, see M.J.HORAN, "Contemporary Constitutionalism and Legal Relationships between Individuals", in International and Comparative Law Quarterly, 1976, 848-867.

31. See the comparative overview by H.WALTER, "The Judicial Protection of the Individual against the Executive in the Legal and Constitutional System", in Judicial Protection against the Executive, Koeln, Carl Heymanns & Dobbs Ferry, Oceana, 1971, Vol.3, 7-18.

32. Art.113 of the Italian Constitution, art.19.4 of the German Basic Law. In France, the Council of State declared it to be an unwritten general principle of law, in the Dame Lamotte case, decision of 17 Febr.1950, in Revue de Droit Public 1951, 487.] 2

33. In the Netherlands, a law of 1 May 1975 (Wet Administratieve Rechtspraak Overheidsbeschikkingen) has vested a general competence to deal with all administrative

acts for which no specific procedure already exists in the newly created judicial section of the Council of State. But art.5 of the law still excepts a long list of non-reviewable acts.

34. In a recent judgment, the European Court of Human Rights has found that the absence of legal remedies against expropriation permits in Sweden constitutes a violation of art.6.1 of the European Convention (Sporrong and Lonnroth v Sweden, judgment of 23 September 1982, Series A, Vol.52). This does not mean however that the Convention guarantees a general right to the judicial review of administrative action; see on this point : A.BOYLE, "Administrative Justice, Judicial Review and the Right to a Fair Hearing under the European Convention on Human Rights", in Public Law 1984, 89-111.

35. More details on the different national solutions in A.WERBKE, "Judicial Protection of the Individual against Normative Acts of the Executive", in Judicial Protection against the Executive, op.cit., 89-106.

36. For a first evaluation of this reform, see B.C.FUNK, "Der Individualantrag auf Normenkontrolle", in Festschrift fuer Hans Klecatsky, Wien, Braumueller, 1980, Vol.1, 287-311.

37. The Verfassungsbeschwerde not only fills a gap in legal protection with regard to normative acts, but also with regard to the highest decisions of the ordinary judiciary.

38. For the three 'Germanic' countries, see A.H.SCHULER, "Die Verfassungsbeschwerde nach schweizerischem, deutschem und oesterreichischem Recht", in Jahrbuch des oeffentlichen Rechts, 1970, 129-199, at 171-175. In Germany, this has recently been confirmed by the Constitutional Court judgment of 10 October 1978, Bundesverfassungsgerichtsentscheidungen, 49, 252, at 258. As for Spain, see V.GIMENO SENDRA, "Naturaleza juridica y objeto del recurso de amparo", in Revista Española de Derecho Constitucional, 1982, n.6, 43-60.

39. In Germany, recourses of general importance or where delay would cause important prejudice to the party concerned (art.90.2 of the Law on the Federal Constitutional Court); in Spain, non-statutory acts of the legislative (art.42 of the Organic Law on the Constitutional Tribunal); for the various exceptions in Switzerland, see H.MARTI, Die staatsrechtliche Beschwerde, Basel/Stuttgart, Helbing & Lichtenhahn, 1977, at III-112.

40. M.CAPPELLETTI, Judicial Review..., op.cit., at 46 ff.

41. This does not prevent the highest courts from exercising a certain control on decisions of the lower courts, especially under the 'stare decisis' principle.

42. The Irish system is not entirely centralised : both the High Court and the Supreme Court can review the constitutionality of statutes.

43. For general views on the role of this 'Defensor del Pueblo', see Y.RODRIGUEZ, "Le défenseur du peuple ou l'ombudsman espagnol", in Revue Internationale de Droit Comparé, 1982, 1225-1239; V.PERIFANAKI ROTOLO, "La legge organica spagnola sul 'defensor del 'pueblo'", in Rivista Trimestrale di Diritto Pubblico, 1984, 518-537; J.VARELA SUANZES CARPEGNA, "La naturaleza jurídica del defensor del pueblo", in Revista Española de Derecho Constitucional, 1983, n.8, 63-80.

44. In Austria, the Constitutional Court can be seized by 1/3 of the members of the Nationalrat, in Germany by 1/3 of the members of the Bundestag, in France by 60 M.P.'s (deputies or senators), in Spain by 50 deputies or 50 senators.

45. In Spain, art.32.2 of the Organic Law on the Constitutional Tribunal of 3 October 1979; on the question whether this limitation on the right of action of the Autonomous Communities is constitutional itself, see M.SANCHEZ MORON, "La legitimación activa en los procesos constitucionales", in Revista Española de Derecho Constitucional, 1983, n.9, 9-49, at 11-30. In Italy, see art.32 and 33 of the Law of 11 March 1953, n.87, organising the Constitutional Court, and the judgment of the Corte costituzionale of 18 May 1960, n.32, in Foro Italiano 1960, I, 1446.

46. Special Statute of Trentino-Alto-Adige, art.98 : "La legge e gli atti aventi forza di legge della Repubblica possono essere impugnati dal presidente della giunta regionale o da quello della giunta provinciale previa deliberazione del rispettivo consiglio, per violazione del presente statuto o del principio di tutela delle minoranze linguistiche tedesca e ladina".

47. For case-law examples of such direct infringements of fundamental rights, see K.SCHLAICH, "Procédures et techniques de protection des droits fondamentaux - tribunal constitutionnel fédéral allemand", in L.Favoreu (ed), Cours constitutionnelles européennes..., op.cit., 105-164, at 130-131.

48. See above, p.128-129.

49. M.CAPPELLETTI, "La protection d'intérêts collectifs et de groupe dans le procès civil (métamorphoses de la procédure civile)", in Revue internationale de droit comparé, 1975, 571-597, at 572.

50. See the recent status questionis provided by the Second International Congress on the Law of Civil Procedure, Wuerzburg 1983, and especially the general report by M.CAPPELLETTI & B.GARTH, "Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure", published in Civil Justice Quarterly, 1983, 111-147.

51. On the role of the class actions generally, see "Developments in the Law - Class Actions", in Harvard Law Review, 1976, 1318-1644; on their role in non-discrimination litigation particularly, see NOTE, "Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23 (b)(2)", in Yale Law Journal, 1979, 868-891; and G.AUTHERGLEN, "Title VII Class Actions", in University of Chicago Law Review, 1980, 688-741.

52. In linguistic matters, see e.g the Belgian Permanent Committee of Linguistic Control, which has the power to bring an action before the Council of State against infringements of the Law on language use in public administration (art.61.4 of that Law).

53. See M.CAPPELLETTI & B.GARTH, op.cit., at 120-122.

54. See above, p.74 ff.

55. M.CAPPELLETTI & B.GARTH, op.cit., at 122.

56. Art.56 of the Regional Statute. On this original legal construction, see A.PIZZORUSSO, "Verso il riconoscimento della soggettività delle comunità etnico-linguistiche", in Studi in memoria di Carlo Furno, Milano, Giuffrè, 1973, 741-763.

57. Council of State, Section VI, decision of 10 November 1982, in Rassegna Consiglio di Stato, 1982, I, 1409.

58. M.CAPPELLETTI & B.GARTH, op.cit., at 126 ff.

59. For the present situation in the various countries, see the national reports presented at the Wuerzburg congress (see note 50 above).

60. In Italy, the Council of State is generally more liberal in its standing requirements than the Court of Cassation, see V.DENTI, "Interessi diffusi", in Novissimo Digesto Italiano - Appendice IV, Torino, UTET, 1983, at 308-310; the same applies to Belgium, see P.LEMMENS, "Het optreden van verenigingen in rechte ter verdediging van collectieve belangen", in Rechtskundig Weekblad, 1984, 2001-2026, at 2003-2004.

61. Compare, in the Netherlands, the judgement of the District Court of Zutphen, 26 June 1980, in Nederlandse Jurisprudentie, 1981, 29 (standing granted to an anti-discrimination association for suing a discotheque that had refused admission to persons belonging to a racial minority), with District Court of 's Hertogenbosch, 20 February 1981, in Netherlands Yearbook of International Law, 1983, 397 (standing denied to an association for the protection of immigrant workers against a discriminating housing distribution plan).

62. Cf.infra, p.269 ff.

63. On the enforcement activities of this AFGULF, see T.CARBONNEAU, "Linguistic Legislation and Transnational Commercial Activity : France & Belgium", in American Journal of Comparative Law, 1981, 393-412, at 408 ff.

64. Law of 11 July 1975 ('Loi Haby') and Decrees n.76.1301, 76.1303, and 76.1304 of 28 December 1976.

65. Decision of the Council of State of 1 June 1979, in Recueil Lebon 1979, 252 (with conclusions by the 'commissaire' Mme Hagelsteens).

66. "Le droit international a besoin pour son exécution du droit interne. Il ne peut se réaliser ni sans lui ni en dehors de lui" (K.MAREK, "Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour internationale de Justice", in Revue générale de droit international public, 1962, 260-298, at 263).

67. Exchange of Greek and Turkish Populations, Advisory Opinion of 1925, P.C.I.J., Series B, n.10.

68. A.VERDROSS & B.SIMMA, Universelles Voelkerrecht, Berlin, Duncker & Humblot, 1976, at 68.

69. I.SEIDL-HOHENVELDERN, "Transformation or Adoption of International Law into Municipal Law", in International and Comparative Law Quarterly, 1963, 88-124.

70. For an example of a different nomenclature, see V.LEARY, International Labour Conventions and National Law : The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems, The Hague, Nijhoff, 1982, distinguishing between, respectively, legislative incorporation, quasi-automatic incorporation and automatic incorporation.

71. A.DRZEMCZEWSKI, European Human Rights Convention in Domestic Law, Oxford, Clarendon, 1983, at 190.

72. T.OPSAHL, "Human Rights Today : International Obligations and National Implementation", in Scandinavian Studies in Law, 1979, 149-176, at 166.

73. V.LEARY, op.cit., at 37; C.DOMINICE, "La Convention européenne des droits de l'homme devant le juge national", in Annuaire suisse de droit international, 1972, 9-40, at 15.

74. B.DE WITTE, "Retour à Costa. La primauté du droit communautaire à la lumière du droit international", in Revue Trimestrielle de Droit Européen, 1984, 425-454, at 428-433.

75. Case 6/64, Costa v ENEL, 1964 European Court Reports 585.

76. Italy and Germany, however, recognise the supremacy of European Community law, by making a qualitative distinction between this body of law and 'classical' international law; see B.DE WITTE, op.cit., at 450 ff. For a recent opinion, breaking away with this half-hearted approach and advocating a radical conversion towards monism with supremacy of international law; for Italy, see G.SPARDUTI, "Trattati internazionali e leggi dello stato", in Rivista di Diritto Internazionale, 1982, 5-13.

77. F.MORGENSTERN, "Judicial Practice and the Supremacy of International Law", in British Year Book of International Law, 1950, 42-92, at 60.

78. Id., at 66.

79. P.DE VISSCHER, "Les tendances internationales des constitutions modernes", in Recueil des Cours, 1952 I, 511-578, at 568.

80. On the limited importance of the reciprocity clause in judicial practice, see the analysis by S.REGOURD, "L'article

55 de la Constitution et les juges. De la vanité de la clause de réciprocité", in Revue générale de droit international public, 1983, 780-816.

81. G.BERMANN, "French Treaties and French Courts : Two Problems in Supremacy", in International and Comparative Law Quarterly, 1979, 458-490, at 461.

82. See its decision in Syndicat général des fabricants de semoules of 1 March 1968, in Recueil Lebon 1968, 149, concerning EEC law, repeatedly confirmed, recently, with regard to the European Convention : see the cases L..., of 31 October 1980, in Recueil Lebon 1980, 407; and Conseil national du patronat français, of 10 July 1981, in Droit Social 1981, 725. See also the survey by J.F.FLAUSS, "Le juge administratif français et la Convention européenne des Droits de l'Homme", in Actualité Juridique - Droit Administratif, 1983, 387-401.

83. Judgment of 24 May 1975, in Dalloz-Sirey, 1975, Jur. 497.

84. Judgment of 27 May 1971, in Cahiers de Droit Européen, 1971, 561.

85. See J.V.LOUIS, "La primauté du droit international et du droit communautaire après l'arrêt 'Le Ski'", in Mélanges Fernand Dehousse, Paris, F.Nathan & Bruxelles, Ed.Labor, 1979, T.II, 235-242.

86. Cour Supreme de Justice, Judgment of 14 July 1954, in Pasicrisie Luxembourgeoise, XVI, 150.

87. The Schubert case, in Arrets du tribunal fédéral, 99 Ib, at 43, and the criticism of L.WILDHABER, "Bemerkungen zum Fall Schubert betreffend das Verhaeltnis von Voelkerrecht und Landesrecht", in Annuaire suisse de droit international, 1974, 195-201.

88. L.WILDHABER, "Erfahrungen mit der Europaeischen Menschenrechtskonvention", in Zeitschrift fuer Schweizerisches Recht, 1979, II, 229-379, at 331 (and note 23 with further references).

89. In Spain, this is not doubtful : the first draft of the Constitution provided for the supremacy of international conventions, but this was deleted in the final version of art.96.1 which merely affirms the doctrine of 'adoption' : "Los tratados internacionales validamente celebrados, una vez publicados oficialmente en Espana, formaran parte del ordenamiento interno". See J.PUENTE EGIDO, "La celebracion de

tratados internacionales en el derecho español y su valor normativo : derecho vigente y aspectos históricos", in Mélanges offerts à Paul Reuter. Le droit international : unité et diversité, Paris, Pédone, 1981, 415-439, at 432.

90. For a view of the case law in Spain, see J.PUENTE EGIDO, op.cit., at 436 ff.; in Portugal, I.JALLES, "O primado do direito internacional na jurisprudencia do STJ - o caso Martelli", in Assuntos Europeus, 1982, 475-498.

91. Whitney v Robertson, 124 US 190 (1887), confirmed in Reid v Covert, 354 U.S. 18.

92. See the classical formulation by Blackstone in his Commentaries on the Laws of England : "The law of nations wherever any question arises which is properly the object of its jurisdiction is here adopted, in its full extent, by the common law, and is held to be a part of the law of the land". Despite some conflicting authority, the state of the law does not seem to have changed since; see I.BROWNLIE, Principles of Public International Law, 3rd ed, Oxford, Clarendon, 1979, at 45-49; J.DUTHEIL DE LA ROCHERE, "Le droit international fait-il partie du droit anglais ?", in Mélanges offerts à Paul Reuter, op.cit., 243-268; J.WILLIAMS, "Stare Decisis and the Doctrine of the Incorporation of Customary International Law", in Northern Ireland Legal Quarterly, 1983, 166-173. The same applies to Canada as well : R.St.J.MACDONALD, "The Relationship between International Law and Domestic Law in Canada", in Macdonald, Morris and Johnston (eds), Canadian Perspectives on International Law and Organization, Toronto, Univ. of Toronto Press, 1974, 88-136, at 109-111.

94. For the U.K., see the views of A.DRZEMCZEWSKI, "The Applicability of Customary International Human Rights Law in the English Legal System", in Human Rights Journal, 1975, 71-83; in Germany, similarly, see H.GURADZE, Die Europaeische Menschenrechtskonvention, Berlin/Frankfurt, Verlag Franz Vahlen, 1968, at 14 ff.; in Italy, some lower court decisions in this sense are discussed and rejected by P.MORI, "Convenzione europea dei diritti dell'uomo, Patto delle Nazioni Unite e Costituzione italiana", in Rivista di Diritto Internazionale, 1983, 306-351, at 334-346.

95. See above, p.119 ff.

96. See however, in the United States, the recent clamorous Filartiga judgment of the Court of Appeals (second circuit), in Buerghenthal, Norris & Shelton (eds), Protecting Human Rights in the Americas, Strasbourg, N.P.Engel, 1982, at 243 and the comments by F.HASSAN, "A Conflict of Philosophies :

The Filartiga Jurisprudence", in International and Comparative Law Quarterly, 1983, 250-258; K.BURKE, S.COLIVER, C.DE LA VEGA, S.ROSENBAUM, "Application of International Human Rights Law in State and Federal Courts", in Texas International Law Journal, 1983, 291-328, at 315-322.

97. See below, p.601 ff.

98. And perhaps even elaborated by the European Court in order to circumvent dualistic barriers. For an assessment and critique of this theory of specificity, see B.DE WITTE, op.cit., at 436 ff.

99. For a short survey, see R.KOVAR, "The Relationship Between Community Law and National Law", in Thirty Years of Community Law, Luxembourg, 1982, 109-149, at 125-126.

100. See the intervention by E.A.ALKEMA in I.Maier (ed), Protection of Human Rights in Europe. Limits and Effects, Heidelberg, C.F.Mueller, 1982, at 313 : he ranges Netherlands, Belgium, France, and perhaps Switzerland among the slow ratifiers, "whereas the Scandinavian countries and the Federal Republic, while being 'dualistic' vis-à-vis international law, are examples of speedily ratifying states".

101. See e.g the comparative overview by F.MORGENSTERN, op.cit., at 83 ff.

102. A.DRZEMCZEWSKI, European Human Rights Convention in Domestic Law, op.cit., at 179, with references to the rich case-law at 177-187.

103. In Germany, see the Constitutional Court judgment of 4 May 1955, in Bundesverfassungsgerichtsentscheidungen, 4, 157, at 168; for Italy, see the analysis of case law by L.CONDORELLI, Il giudice italiano e i trattati internazionali. Gli accordi self-executing e non self-executing nell'ottica della giurisprudenza, Padova, CEDAM, 1974, at 105 ff.

104. B.CONFORTI, "La 'specialità' dei trattati internazionali eseguiti nell'ordine interno", in Studi in onore di Ballardore Pallieri, Milano, Vita e Pensiero, 1978, II, 187 ff.; L.FERRARI BRAVO & A.GIARDINA, "Les procédés nationaux de mise en vigueur des obligations souscrites et des accords conclus par les gouvernements", in Italian National Reports to the IXth International Congress of Comparative Law, Milano, Giuffrè, 1974, 475-490, at 481; and, with specific reference to the European Convention, E.VITTA, "Processo civile e

diritti dell'uomo", in Rivista trimestrale di diritto e procedura civile, 1977, 568-614, at 602.

105. A.DRZEMCZEWSKI, European Human Rights Convention in Domestic Law, op.cit., at 127-128.

106. C.DOMINICE, op.cit., at 34.

107. See the analysis by E.A.ALKEMA, "The Application of Internationally Guaranteed Human Rights in the Municipal Order", in Essays on the development of the International Legal Order - in Memory of Haro F. van Panhuys, Alphen, Sijthoff & Noordhoff, 1980, 181-198. More generally on the shadow-side of Dutch internationalism, see T.KOOPMANS, "Receptivity and its Limits : The Dutch Case", in In Memoriam J.D.B.Mitchell, London, Sweet & Maxwell, 1983, 91-104.

108. See e.g. the analysis of the right to education, infra, p.386 ff.

109. A typical illustration of this bias is provided by Austrian case-law. In the early sixties, the Constitutional Court refused to apply directly the articles 6.1 and 5.1.c of the European Convention because of their alleged vagueness; but once the Convention had been transformed into Austrian constitutional law, the Court started enforcing these articles like all other, equally vague, constitutional rights; see L.WILDHABER, "Erfahrungen...", op.cit., at 339, with references.

110. M.MARCOFF, "Les règles d'application indirecte en droit international", in Revue générale de droit international public, 1976, 385-424, at 412 : "Ainsi chaque Etat dispose-t-il de la faculté de se départir "en douceur" de l'obligation conventionnelle d'exécuter certains devoirs internationaux, non pas en la dénonçant formellement, ou en formulant, dans les conditions et selon la forme prescrite par le droit international, des réserves expresses à cet égard, mais simplement en les qualifiant de non directement applicables".

111. For a discussion of this issue, see A.KOLLER, Die unmittelbare Anwendbarkeit voelkerrechtlicher Vertraege, Bern, Staempfli, 1971, at 94 ff.; J.VERHOEVEN, "La notion d'applicabilité directe du droit international", in Revue Belge de Droit International, 1980, 243-264; V.LEARY, op.cit., at 57 ff.

112. The European Court of Justice decides on the direct effect of provisions of Community law with binding authority for the national courts, through the procedure of art.177 EEC

Treaty. Traditional international courts, on the other hand, have seldom or never been faced with the question whether a given treaty provision had to be considered as self-executing within the municipal legal order. This issue simply "is invariably side-stepped by international machinery calculated to establish State responsibility" (D.WYATT, "New Legal Order, or Old?", in European Law Review, 1982, 147-166, at 154 ff. One famous exception is the Jurisdiction of the Courts of Dantzig case, Advisory Opinion, 1928, P.C.I.J. Series B, No.15.

113. See e.g. the following : C.DOMINICE, op.cit., at 10-11; A.VERDROSS & B.SIMMA, op.cit., at 429 ff.; D.EVRIGENIS, "L'interaction entre la dimension internationale et la dimension nationale de la Convention européenne des droits de l'Homme - Notions autonomes et effet direct", in Voelkerrecht als Rechtsordnung - Internationale Gerichtsbarkeit - Menschenrechte. Festschrift fuer Hermann Mosler, Berlin-Heidelberg-New York, Springer, 1983, 193-202, at 198.

114. Even in dualist countries, judges take into account the international law origin of a norm in order to decide on its justiciability (thereby provoking another internal contradiction within dualist theory); see the demonstration, for the Italian case, of L.CONDORELLI, op.cit., at 22-27.

115. On this question, see below, p.601 ff.

116. A.CASSESE, Il controllo internazionale, Milano, Giuffrè, 1971, at 310.

117. J.P.HUMPHREY, "The Implementation of International Human Rights Law", in New York Law School Law Review, 1978, 31-61, at 34.

118. This tripartite distinction is made e.g. in : L.SOHN, "Human Rights : Their Implementation and Supervision by the United Nations", in Th.Meron (ed), Human Rights in International Law : Legal and Policy Issues, Oxford, Clarendon Press, 1984, Vol.2, 369-401, at 373; F.CAPOTORTI, "Human Rights : The Hard Road Towards Universality", in Macdonald & Johnston (eds), The Structure and Process of International Law : Essays in Legal Philosophy, Doctrine and Theory, The Hague/Boston/Lancaster, Mart.Nijhoff, 1983, 977-1000, at 997; J.P.HUMPHREY, op.cit.; J.DE MEYER, "International Control Machinery", in Proceedings of the Colloquy about the European Convention on Human Rights in Relation to other International Instruments for the Protection of Human Rights, Strasbourg, Council of Europe, 1979, 241-296, at 264 ff.

119. For synthetic general overviews of the various procedures : J.DE MEYER, op.cit.; J.P.HUMPHREY, op.cit.; J.J.A.SALMON, "Essai de typologie des systèmes de protection des droits de l'homme", in La Protection Internationale des Droits de l'Homme, Bruxelles, Ed.de l'Université de Bruxelles, 1977, 173-206. See also, on the problems created by the coexistence of these mechanisms : J.DE MEYER, op.cit., at 285 ff.; M.TARDU, "Quelques questions relatives à la coexistence des procédures universelles et régionales de plainte individuelle dans le domaine des droits de l'homme", in Revue des Droits de l'Homme, 1971, 589-625.

120. For more detailed accounts of the various reporting systems, see :

a) for the Civil Covenant, the basic presentation by E.SCHWELB, "The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol", in Texas International Law Journal, 1977, 141-186, at 154 ff.; and the accounts of evolving practice by B.G.RAMCHARAN, "The Emerging Jurisprudence of the Human Rights Committee", in Dalhousie Law Journal, 1980, 7-40; A.H.ROBERTSON, "The Implementation System : International Measures", in L.Henkin (ed), The International Bill of Rights. The Covenant on Civil and Political Rights, New York, Columbia University Press, 1981, at 322-369, at 341 ff.; F.JHABVALA, "The Practice of the Covenant's Human Rights Committee, 1976-82 : Review of State Party Reports", in Human Rights Quarterly, 1984, 81-106.

b) for the Social Covenant, E.SCHWELB, "Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights", in Human Rights Journal, 1968, 363-377; and more recent works dealing with the modifications to the original mechanism : P.ALSTON, "The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social & Cultural Rights", in Columbia Journal of Transnational Law, 1979, 79-118; and B.G.RAMCHARAN, "Implementation of the International Covenant on Economic, Social and Cultural Rights", in Netherlands International Law Review, 1976, 151-162.

c) for the Convention against Racial Discrimination, "Implementing the U.N.Racial Convention", in Texas International Law Journal, 1977, 187-221; K.DAS, "United Nations Institutions and Procedures Founded on Conventions on Human Rights and Fundamental Freedoms", in K.Vasak (ed), The International Dimensions of Human Rights, Paris, Unesco & Westport, Greenwood Press, 1982, 303-362, at 311 ff.; N.LERNER, The U.N.Convention on the Elimination of All Forms

of Racial Discrimination, Alphen/Rockville, Sijthoff & Noordhoff, 1980, at 114 ff.

d) As for the Unesco Convention against Discrimination in Education, an account of the first round of reports is given by P.MERTENS, "L'application de la convention et de la recommandation de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement - un bilan provisoire", in Revue des Droits de l'Homme, 1968, 91-108. Two other consultation rounds have been held since, in 1971-72 and 1975-1980; see H.SABA, "Unesco and Human Rights", in K.Vasak (ed), The International Dimensions..., op.cit., 401-426.

e) An embryonic provision for state reports also exists in art.57 of the European Human Rights Convention; see the discussion by P.VAN DIJK & G.J.H.VAN HOOF, Theory and Practice of the European Convention on Human Rights, Deventer, Kluwer, 1984, at 177 ff.

121. T.OPSAHL, "Human Rights Today : International Obligations and National Implementation", in Scandinavian Studies in Law, 1979, 149-176, at 171.

122. J.P.HUMPHREY, op.cit., at 43.

123. "Protocol instituting a Conciliation and Good Offices Commission to be Responsible for Seeking the Settlement of Disputes which May Arise between State Parties to the Convention", adopted in 1962 and entered into force in 1968.

124. See the following analyses :

a) for the Civil Covenant : E.SCHWELB, "The International Measures of Implementation of the International Covenant on Civil...", op.cit., at 163 ff.; A.H.ROBERTSON, op.cit., at 351 ff.; K.DAS, op.cit., at 338 ff.

b) for the Convention against Racial Discrimination: K.DAS, op.cit., at 318 ff.

c) for the Unesco Convention : H.SABA, op.cit.; and S.BASTID, "Une nouvelle commission de conciliation ?", in Mélanges Henri Rolin, Paris, Pédone, 1964, 1-12.

125. Art.8 of the Unesco Convention; art.16 of the Convention against Racial Discrimination.

126. See the discussion by B.SIMMA, "Fragen der zwischenstaatliche Durchsetzung vertraglich vereinbarter Menschenrechte", in Staatsrecht - Voelkerrecht - Europarecht. Festschrift fuer H.J.Schlochauer, Berlin/New York, de Gruyter, 1981, 635-648, at 636 ff.

127. B.SIMMA, "Consent : Strains in the Treaty System", in The Structure and Process of International Law, op.cit., 485-511, at 501. Along the same lines, J.DE MEYER, op.cit., at 283; L.HENKIN, "Introduction", in The International Bill of Rights, op.cit., 1-31, at 29.

128. Article 62 : "The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention". See also the similar role of art.219 of the EEC Treaty.

129. Art.24.

130. Art.46.

131. See e.g. E.A.ALKEMA, Studies over Europese grondrechten. De invloed van de Europese conventie op het Nederlandse recht, Deventer, Kluwer, 1978, at 6.

132. Appl. No.9940/82, France, Norway, Denmark, Sweden and the Netherlands v Turkey, in European Human Rights Reports, 1984, 241.

133. On the last developments, see "Individual Petitions under the Convention on the Elimination of Racial Discrimination", in The Review - I.C.J., 1984, 40-43; for an earlier description of the system, see A.CASSESE, "Il sistema di garanzia della Convenzione dell'ONU sull'eliminazione di ogni forma di discriminazione razziale", in Rivista di Diritto Internazionale, 1967, 270-336, at 311 ff.

134. E.SCHWELB, "The International Measures...", op.cit., at 177.

135. Even then, it was adopted by the General Assembly only by 66 votes to 2, with 38 abstentions. The Soviet Union and its allies, in particular, were opposed to any form of individual access to the international forum.

136. Art.5 para.4 of the Protocol. For general presentations of the procedure, see E.SCHWELB, op.ult.cit., at 180 ff.; F.MEISSNER, Die Menschenrechtsbeschwerde vor den Vereinten Nationen, Baden Baden, 1976.

137. The first "views" on an individual communication were handed down in 1979.

138. For an account of this evolving practice, see M.NOWAK, "UN Human Rights Committee - Survey of Decisions given up till July 1981", in Human Rights Law Journal, 1981, 168-172.

139. Article 25.

140. For a discussion of this standing requirement, cf. J.DE MEYER, "La situation des 'personnes physiques', 'organisations non gouvernementales' et 'groupes de particuliers' dans la procédure devant la Cour européenne des droits de l'Homme", in Annales de Droit, 1974, 65-74.

141. Art.28 b.

142. See the discussion by C.DAUBIE, "Conciliation et protection européenne des droits de l'homme", in Revue belge de droit international, 1973, 503-546.

143. For general presentations of the successive stages of the Convention enforcement mechanism, see P.VAN DIJK & G.J.H.VAN HOOF, Theory and Practice, op.cit., pp.1-180; and K.VASAK, "The Council of Europe", in K.Vasak (ed), The International Dimensions..., op.cit., 457-542.

144. For an overview of the state of ratifications, see the Chart of Ratifications of Major International Human Rights Instruments as of 1 January 1982, Annex I of K.Vasak (ed), The International Dimensions..., op.cit., covering all States and 60 different universal and regional human rights instruments.

145. The term 'escape clauses' is used as an encompassing term in Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme, Bruxelles, Bruylant, 1982.

146. Art.2 (1)(d) of the Vienna Convention. The legal regime of reservations is outlined in arts. 19-21 of the same Convention. For general studies on the subject, see P.H.IMBERT, Les réserves aux traités multilatéraux, Paris, Pédone, 1979; BOWETT, "Reservations to Non-Restricted Multilateral Treaties", in British Year Book of International Law, 1976-77, 67-92; J.K.GAMBLE Jr., "Reservations to Multilateral Treaties : A Macroscopic View of State Practice", in American Journal of International Law, 1980, 372-394. With particular reference to human rights treaties : P.H.IMBERT, "Reservations and Human Rights Conventions", in I.Maier (ed), Protection of Human Rights in Europe, op.cit., 87-121; H.GOLSONG, "Les réserves aux instruments

internationaux pour la protection des droits de l'homme", in Les clauses échappatoires..., op.cit., 23-42.

147. D.M.MC RAE, "The Legal Effect of Interpretative Declarations", in British Year Book of International Law, 1978, 155-173, distinguishes between mere interpretative declarations (where "the declarant seeks only to offer an interpretation of the treaty that may be found subsequently to be incorrect" (at 172)), and qualified interpretative declarations, which must be assimilated to reservations. For an example of the latter in the case-law of the European Commission, in the context of the linguistic guarantees in criminal procedure, cf.infra, p.599.

148. E.SUY, "Droit des traités et droits de l'homme", in Voelkerrecht als Rechtsordnung..., op.cit., 935-947, at 943. See, generally, R.HIGGINS, "Derogations under Human Rights Treaties", in British Year Book of International Law, 1976-77, 281-320; more particularly on the Civil Covenant, T.BUERGENTHAL, "To Respect and to Ensure : State Obligations and Permissible Derogations", in L.Henkin (ed), The International Bill of Rights..., op.cit., 72-91, at 78 ff.; on the law and practice of the European Convention, J.VELU, "Le droit pour les Etats de déroger à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales en cas de guerre ou d'autre danger public menaçant la vie de la nation", in Les clauses échappatoires..., op.cit., 71-147.

149. Race Discrimination Convention, art.14; European Human Rights Convention, art.25; the Optional Protocol constitutes, as a whole, a 'recognition clause' to the Civil Covenant.

150. Cf. the judgment of the International Court of Justice in the Interhandel case, I.C.J.Reports, 1959, 6.

151. For a thorough global account, see A.A.CANCADO TRINDADE, The Application of the Rule of Exhaustion of Local Remedies in International Law, Cambridge, Cambridge University Press, 1983. More specifically on the function of the rule in the European Convention system, P.COUVREUR, "L'épuisement des voies de recours internes et la Cour européenne des Droits de l'Homme : l'arrêt Van Oosterwijck du 6 novembre 1980", in Revue belge de droit international, 1981, 130-171.

152. H.SCHERMERS, International Institutional Law, Alphen & Rockville, Sijthoff, 1980, at 711.

153. For an analysis of the admissibility stage, see L.MIKAELSEN, European Protection of Human Rights : The

Practice and Procedure of the European Commission on Human Rights on the Admissibility of Applications from Individuals and States, The Hague, Martinus Nijhoff, 1980.

154. For a characteristic example, cf.infra, p.336.

155. Art.53 of the Convention.

156. On the question of the execution of decisions of international jurisdictions, see generally C.SCHREUER, Decisions of International Institutions before Domestic Courts, London/Rome/New York, Oceana Publications, 1981; A.GIARDINA, "La mise en oeuvre au niveau national des arrêts et des décisions internationaux", in Recueil des Cours, 1979, II, 233-352. More particularly on the judgments of the European Human Rights Court, A.DRZEMCZEWSKI, European Human Rights Convention in Domestic Law, op.cit., at 260-325; and G.RESS, "The European Convention on Human Rights and States Parties : The Legal Effect of the Judgments of the European Court of Human Rights on the Internal Law and Before Domestic Courts of the Contracting States", in I.Maier (ed), Protection of Human Rights in Europe, op.cit., 209-269.

157. A recent, very characteristic example is provided by the judgment of the Belgian Court of Cassation, overruling its established doctrine on publicity in disciplinary proceedings because of the repeated condemnations of Belgian practice by the European Court of Human Rights (judgment of 14 April 1983 (with conclusions by advocate-general Velu), in Journal des Tribunaux, 1983, 607).

158. For a general description, see the monograph by J.B.MARIE, La Commission des droits de l'homme de l'ONU, Paris, Pédone, 1975.

159. See J.B.MARIE, "La pratique de la Commission des Droits de l'Homme de l'ONU en matière de violation des droits de l'homme", in Revue belge de droit international, 1980, 355-380.

160. Worth mentioning, in this period, is the Periodic Reporting System established under ECOSOC Resolution 1074c in 1956. It is a staggered 6-year system requiring at two-year intervals state reports on respectively civil and political rights, economic social and cultural rights, and freedom of information.

161. ECOSOC Resolution 1503 (XLVIII) of 27 May 1970. For general discussions of the mechanism, see D.RUZIE, "Du droit de pétition individuelle en matière de droits de l'homme. A

propos de la résolution 1503 (XLVIII) du Conseil Economique et Social des Nations Unies", in Revue des Droits de l'Homme, 1971, 89-101; A.CASSESE, "The new United Nations Procedure for Handling Gross Violations of Human Rights", in La Comunità Internazionale, 1975, 49-61; M.TARDU, "UN Response to Gross Violations of Human Rights : the 1503 Procedure", in Santa Clara Law Review, 1980, 559-602.

162. A.CASSESE, "The Admissibility of Communications to the United Nations on Human Rights Violations", in Revue des Droits de l'Homme - Human Rights Journal, 1972, 375-389.

163. See A.CASSESE, "The new United Nations Procedure...", op.cit., at 52-54.

164. However, in 1979 the Commission decided to treat publicly the situation of Equitorial Guinea, as a sanction for the country's total lack of collaboration.

165. On the emergence of this decision, see S.BASTID, "La mise en oeuvre d'un recours concernant les droits de l'homme dans le domaine relevant de la compétence de l'UNESCO", in Voelkerrecht als Rechtsordnung..., op.cit., 45-57.

166. For further details, see H.SABA, "Unesco and Human Rights", op.cit., at 280-281; P.ROLLAND, "La nouvelle procédure d'examen des communications concernant la violation des droits de l'homme à l'UNESCO", in International Review of Administrative Science, 1980, 266-274.

167. T.OPSAHL, "Human Rights Today...", op.cit. (note 121), at 175.

PART THREE : FREEDOM OF EXPRESSION

Chapter One

Comparative Constitutional Law

1. Several judgments of the Federal Tribunal, in Arrêts du tribunal fédéral, 96 I 224; 96 I 592; 97 I 896; 100 Ia 399; 101 Ia 150; 101 Ia 174.
2. Cf. supra, p.139 ff.
3. The most elaborate discussion of the link between freedom of expression and free language use is A.PIZZORUSSO, "Libertà di lingua e diritto all'uso della lingua materna nel sistema costituzionale italiano", in Rassegna di diritto pubblico, 1963 I, 298-322, at 302 ff., and later works by the same author. For more laconical statements to the same effect, see P.CARROZZA, "Lingue (uso delle)", in Novissimo Digesto Italiano - Appendice IV, Torino, UTET, 1983, 976-988, at 981; M.UDINA, "Sull'attuazione dell'art.6 della Costituzione per la tutela delle minoranze linguistiche", in Giurisprudenza Costituzionale, 1974, 3602-3613, at 3605-3606; F.FLEINER & Z.GIACOMETTI, Schweizerisches Bundesstaatsrecht, Zuerich, Schulthess, 1976 (orig.ed. 1949), at 394; M.TABORY, "Language Rights as Human Rights", in Israel Yearbook on Human Rights, 1980, 167-223, at 167 ; P.WIGNY, La troisième révision de la Constitution, Bruxelles, Bruylant, 1972, at 384 ("La liberté de manifester sa pensée garantie par l'article 14 de la Constitution implique logiquement celle de choisir la langue dans laquelle on s'exprime") ; F.DELPEREE, Droit constitutionnel. T.I : Les données constitutionnelles, Bruxelles, Larcier, 1980, at 217; A.LAGASSE, "Le droit de parler sa langue", in Journal des Tribunaux, 1968, 708-712, at 708.
4. On those provisions, see also above, p.129-130 and 157-158.
5. Italian Constitutional Court, judgment of 2 April 1969, n.84, in Giurisprudenza Costituzionale, 1969, 1175, at 1192 ("pietra angolare della democrazia").

6. A.COX, "The Supreme Court - 1979 Term. Foreword : Freedom of Expression in the Burger Court", in Harvard Law Review, 1980-81, 1-73, at 3.

7. Justice Cardozo in Palko v Connecticut, 302 U.S. 319 (1937), at 327.

8. Just to mention some of these writings : A.FROWEIN, "Reform durch Meinungsfreiheit", in Archiv des oeffentlichen Rechts, 1980, 169-188; A.MEIKLEJOHN, Free Speech and its Relation to Self-Government, 1948; U.SCHEUNER, "Pressefreiheit", in Veroeffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Vol.22, Berlin, W.de Gruyter, 1965, 1-91, at 18 ff.; A.PIZZORUSSO, Lezioni di diritto costituzionale, Roma, Edizioni de 'Il Foro Italiano', 1981 (2nd ed), at 109; C.A.COLLIARD, Libertés publiques, Paris, Dalloz, 5th ed., 1975, at 444.

9. In addition to the judgments mentioned in notes 5 and 7, see also : German Constitutional Court : "Fuer eine freiheitlich-demokratische Staatsordnung ist es schlechthin konstituierend; denn es ermoeoglicht erst die staendige geistige Auseinandersetzung, den Kampf der Meinungen, der ihr Lebenselement ist...Es ist in gewissen Sinn die Grundlage jeder Freiheit ueberhaupt" (in Bundesverfassungsgerichtsentscheidungen, 7, 198, at 208; the United States Supreme Court in Cohen v California, 403 U.S. 15 (1971), at 24 (Harlan J.), and in Garrison v Louisiana, 379 U.S. 64 (1964), at 74 (Brennan J.); Spanish Constitutional Tribunal, judgment of 16 March 1981, in Boletin de Jurisprudencia Constitucional, n.2, June 1981, 128, at 132; the Swiss Federal Tribunal, judgment of 24 June 1970, in Arrêts du tribunal fédéral, 96 I 586, at 592; the European Court of Human Rights in the Handyside case, in Publications of the European Court of Human Rights, Series A, Vol.24, at para.49.

10. A.MEIKLEJOHN, op.cit.; BORK, "Neutral Principles and Some First Amendment Problems", in Indiana Law Journal, 1971, 1 ff.

11. A characteristic example is H.RIDDER, "Meinungsfreiheit", in Neumann-Nipperdey-Scheuner (eds), Die Grundrechte, Vol.2, Berlin, Duncker & Humblot, 1954, 243-290. But even in Germany, the primacy of the societal function is disputed by most authors; see the discussion in W.SCHMITT GLAESER, "Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts", in Archiv des oeffentlichen rechts, 1972, 60-123 and 276-298, at 80 ff.; and H.H.KLEIN, "Oeffentliche und private Freiheit - Zur Auslegung des

Grundrechts der Meinungsfreiheit", in Der Staat, 1971, 145-172, at 161-162.

12. H.H.KLEIN, op.cit., at 167-168 : "Die Moeglichkeit aktiver politischer Betaetigung zu schaffen ist deshalb unzweifelhaft auch ein wesentliches Motiv der Grundrechtsgewaehrung. Dieses Motiv zum Inhalt des Grundrechts zu machen und seine Grenzen von ihm her zu bestimmen, beteuet jedoch nichts anderes, als an die Stelle freiwilligen politischen Handelns der (direkten oder indirekten) Rechtszwang zur Teilnahme an der Bildung der oeffentlichen Meinung in politicis zu setzen".

13. W.LEISNER, Die Pressegleichheit, Berlin, Duncker & Humblot, 1976 : "Es ist ja gerade das gute -auch politische - Recht des Buergers, sich an all dem zu desinteressieren, was den Maechtigen als 'ihre Politik' gar so wichtig erscheint - oder die politische Intensitaet ganz anderswo aufzubauen, als dort, wo sich die Herrschenden gelagert haben".

14. H.RIDDER, op.cit., at 264 : "auch die spontane private Mitteilung einer nackten Tatsache laesst mindestens die gleitende Meinungsaeusserung des Mitteilenden erkennen, dass er die Tatsache eben fuer mitteilenswert haelt und insoweit bewertet".

15. Besides H.RIDDER, op.ult.cit., see also I. VON MUENCH, "Art.5 (Meinungsfreiheit, Pressefreiheit, Rundfunk, Freiheit der Kunst, Wissenschaft, Forschung und Lehre)", in von Muench (ed), Grundgesetzkommentar, Muenchen, C.H.Beck, 1975, 195-247, at 198; K.HESSE, Grundzuege des Verfassungsrechts der Bundesrepublik Deutschland, Heidelberg, C.F.Mueller, 1982 (13th ed), at 152; for an overview of the discussion, see W.SCHMITT GLAESER, op.cit., at 68-75. In case law, see e.g. the judgment of the Constitutional Court of 4 April 1967, in Bundesverfassungsgerichtsentscheidungen 21, 271, at 278-279 (freedom of the press also covers the purely informative parts of a newspaper).

16. P.SALADIN, Grundrechte im Wandel, Bern, Staempfli, 1975, at 78-79; Y.HANGARTNER, Grundzuege des schweizerischen Staatsrechts, Zuerich, Schulthess, 1982, vol.2, at 109-110.

17. P.BARILE, Libertà di manifestazione del pensiero, Milano, Giuffrè, 1975, at 16 ff.; R.CARBONI, "Note sull'interpretazione dell'art.21, primo comma, della Costituzione", in Studi in onore di Giorgio Balladore Pallieri, Milano, Vita e Pensiero, 1978, Vol.1, 37-69, at 50 ff.

18. In Belgium, the larger meaning has been breaking through under the influence of art.10 of the European Human Rights Convention. See e.g. F.DELPEREE, "Libres propos sur la liberté d'expression", in Administration publique, T., 1977-78, 103-112, at 106; K.RIMANQUE & J.DE JONGHE, "De vrijheid van expressie op straten en pleinen", in Tijdschrift voor Bestuurswetenschappen en Publiekrecht, 1978, 7-24, at 8.

19. The new art.7 of the Dutch Constitution explicitly protects the expression of "thoughts or feelings".

20. Judgment n.2060 of 1950, confirmed by several later decisions; see W.BERKA, "Die Kommunikationsfreiheit in Oesterreich. Informationsfreiheit, Freiheit der Meinungsäusserung und Zensurverbot im Ueberblick", in Europäische Grundrechte Zeitschrift, 1982, 413-427, at 415, note 16.

21. Cf. W.BERKA, op.cit., at 416. On article 10 of the European Convention, see below, Chapter Two.

22. The distinction was accepted by the United States Supreme Court in Cox v.Louisiana, 379 U.S. 536 (1965), at 554, and Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), at 209 (the 'time, place and manner' of expression may be restricted for the protection of important interests that cannot be secured by less restrictive means). See also the Italian Constitutional Court in its judgment of 2 February 1972, n.12, in Giurisprudenza Costituzionale, 1972, 45, at 67 (one of the means of expression may be restricted, if others remain available).

23. Judgment of 26 March 1982, in Recueils de Jurisprudence - Cour Supérieure, 1982, 355.

24. For more details on this part of the Charter of the French language, see Section 2, below, p.260 ff.

25. Devine, cit., at 375.

26. Ibid. : "On ne m'a cité aucune décision et je n'en connais aucune où la liberté d'expression a pris assez d'étendue pour englober plus que le message lui-même".

27. Id., at 379.

28. Ibid.

29. See the discussion of the limitations on the freedom of language use in Section 2, below.

30. For refutations of the content-form distinction, see M.H.REDISH, "The Content Distinction in First Amendment Analysis", in Stanford Law Review, 1981, 113-151; P.BARILE, op.cit., at 7 ff. and 45-46; W.BERKA, op.cit., at 423.

31. P.BARILE, op.cit., at 8 : "in via più generale, gli aspetti 'sostanziali' di ogni libertà non differiscono da quelli 'strumentali', quando il mezzo appare necessario a conferire effettività alla libertà sostanziale a cui è collegata".

32. C.HEGNAUER, Das Sprachenrecht der Schweiz, Zuerich, 1947 (Buchdruckerei Jak.Villiger & Cie, Waedenswil), at 27-28.

33. Cf.supra, p.61 ff.

34. See e.g. P.G.CHEVIGNY, "Philosophy of Language and Free Expression", in New York University Law Review, 1980, 157-194, with further references to the literature.

35. 'Communication' could be defined in the words of Luhmann : "Kommunikation ist der elementare soziale Prozess der Konstitution von Sinn in zwischenmenschlichem Kontakt, ohne welchen weder Personen noch Sozialsysteme denkbar sind" (N.LUHMANN, Grundrechte als Institution. Ein Beitrag zur politischen Soziologie, Berlin, Duncker & Humblot, 1974, 2nd ed, at 25).

36. See e.g. the following authors : M.H.REDISH, "The Value of Free Speech", in University of Pennsylvania Law Review, 1982, 591-645, at 593 : "the constitutional guarantee of free speech ultimately serves only one true value, which I have labeled 'individual self-realization'; W.BERKA, op.cit., at 416 : "Daher ist etwa nicht nur der anspruchsvolle Ausdruck einer intellektuellen oder moralischen Individualitaet, sondern ist jeder Kommunikationsakt als eine individuelle Leistung der Person und persoenlichkeitsgebundener Ausdruck verfassungsrechtlich geschützt"; K.RIMANQUE & J.DE JONGHE, op.cit., at 7 : "Onder expressie moet men alle uitingen van de mens begrijpen, die een communicatieve betekenis hebben en die ongeacht inhoud, vorm of plaats van aard zijn enige 'boodschap' over te brengen"; H.VAN MAARSEVEEN, "Vrijheid van zelfexpressie", in Nederlands Juristenblad, 1980, 617-628, at 628 : "De creatieve, zich individueel en authentiek uitende mens staat erbij op de voorgrond, niet de mens als politiek wezen"; R.HERZOG, "Art.5", in Maunz-Duerig-Herzog, Grundgesetz, 4th ed, Muenchen, C.H.Beck, (loose-leaf), nr 54: "dass Art.5 I nicht nur das schon relativ sublime Beduerfnis des Menschen zur Weitergabe der Ergebnisse eigener Gedankenarbeit privilegiert, sondern dass er daneben und

darueber hinaus auch der sehr viel vitaleren und urspruenglicheren Mitteilungsbeduerfnis des Menschen ueberhaupt Rechnung traegt".

37. M.H.REDISH, "The Value of Free Speech", op.cit., at 601 : "political democracy is merely a means to (...) the much broader value of self-realization".

38. Association de l'Ecole française, judgment of 31 March 1965, in Arrets du tribunal fédéral, 91 I 480. See also infra, p.273 ff.; 371 ff.

39. Id., at 486.

40. Ibid.

41. Cf.supra, p.77.

42. A first decision, favourable to the recognition of this right (in Arrêts du tribunal fédéral 87 I 114 (1961)), had been qualified shortly afterwards. Only after the Ecole française case has there been a consistent line of cases recognising freedom of expression (see the cases listed in note 1, above).

43. Art.14 guarantees the freedom of manifestation of opinions generally; art.18 singles out the freedom of the press, which is made the object of some more specific guarantees.

44. See above, p.155.

45. By art.149.1 of the Federal Constitution of 1920.

46. In Austria, freedom of expression can be limited by 'general laws', a rather widely drawn escape clause (on which, see W.BERKA, op.cit., at 422 ff.) which has no parallel in the linguistic freedom provision.

47. See the Preamble and the Articles 3, 20.3 and 148.1.17, and the Final Provision. Of those, art.3 is by far the most important; for a synthetic overview, see A.MILIAN MASSANA, "La regulacion constitucional del multilinguismo", in Revista Espanola de Derecho Constitucional, 1984, 123-154; and see infra, p.497 ff. and 528 ff.

48. This is a question which is seldom treated but has some practical importance; see, for an analysis under German contract law, G.REINHART, "Verwendung fremder Sprachen als

Hindernis beim Zustandekommen von Kaufvertraegen ?", in Recht der Internationale Wirtschaft, 1977, 16-20.

49. W.S.TARNOPOLSKY, The Canadian Bill of Rights, Toronto, Mc Clelland & Stewart (2nd ed), 1975, at 168.

50. On the limitations inherent in the free speech clause of the First Amendment, see e.g. L.H.TRIBE, American Constitutional Law, Mineola (N.Y.), The Foundation Press Inc., 1978, at 580 ff.; A.COX, "The Supreme Court - 1979 Term...", op.cit.. The same theory of implicit limitations applied in Canada under the former regime of the 'Bill of Rights'; see W.J.TARNOPOLSKY, op.cit., at 180-201.

51. A general limitation clause, applicable to all rights, is section 1 of the Canadian Charter of Rights and Freedoms: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (a formula which is clearly inspired on that used by the European Human Rights Convention and the Civil Covenant, on which see Chapter Two, below).

Limitation clauses with specific reference to freedom of expression are contained e.g. in art.5.2 of the German Basic Law ("Diese Rechte finden ihre Schranken in den Vorschriften der allgemeinen Gesetze, den gesetzlichen Bestimmungen zum Schutze der Jugend und in dem Recht der persoenlichen Ehre"), art.13 of the Austrian 'Staatsgrundgesetz' ("Jedermann hat das Recht, durch Wort, Schrift, Druck oder durch bildliche Darstellung seine Meinung innerhalb der gesetzlichen Schranken frei zu aeussern"), art.11 of the French Declaration of Rights ("tout citoyen peut donc parler, écrire, imprimer librement sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi").

52. H.KLOSS, The American Bilingual Tradition, Rowley (Mass.), Newbury House, 1977, at 60-61..

53. Ibid.

54. Ibid.

55. See J.M.AUBY & R.DUCOS ADER, Droit de l'information, Paris, Dalloz, 1976, at 266-272.

56. Id., at 268.

57. At present, two dailies, the Dernières Nouvelles d'Alsace and L'Alsace publish a principal French edition, and an additional bilingual French-German edition.

58. Art.11 of the Declaration states that "la libre communication des pensées et des opinions est un des droits les plus précieux de l'homme". That the Declaration forms part of the present Constitution was recognised by the Constitutional Court in its decision of 27 December 1973. See on this point, F.LUCHAIRE, "Procédures et techniques de protection des droits fondamentaux - Conseil constitutionnel français", in Revue internationale de droit comparé, 1981, 285-309, at 295-297.

59. The best account of the situation which existed in Quebec is provided by two official reports : the Report of the Royal Commission on Bilingualism and Biculturalism, Book III : The Work World, Ottawa, Queen's Printer, 1967; and the Rapport de la Commission d'enquete sur la situation de la langue française et sur les droits linguistiques au Québec, Livre I : La Langue du travail, Québec, Gouvernement du Québec, 1972.

60. Data quoted in R.A.MC CARNEY, "Language Politics : Doing Business in Quebec", in International Lawyer, 1983, 553-579, at 559. See also D.M.RAYSIDE, "Les relations entre groupes linguistiques au Canada et en Belgique", in Recherches Sociologiques, 1977, 95-128, at 114-115.

61. On the overriding legal value of the Charter of Rights and Freedoms, see above, p.184. This review of a provision of the Charter of the French Language against the obligations of the Charter of Rights was done by an other Quebec court in the Protestant Schools case, on which infra, p.408-409.

62. Canada ratified the Covenant in 1976. For a general study of its possible impact, see H.FISCHER, "The Human Rights Covenants and Canadian Law", in Canadian Yearbook of International Law, 1977, 42-83.

63. The situation is documented in H.DELEECK, De taaltoestanden in het Vlaams bedrijfsleven. Een onderzoek in de grote ondernemingen van Oost-Vlaanderen en een geheel van voorstellen, Brussel, Arbeiderspers, 1959; see also R.VANDEZANDE, "De wordingsgeschiedenis van het decreet", in Y.J.D.Peeters (ed), Taalbelang is stoffelijk belang. Het taalgebruik in de arbeidsverhoudingen in Vlaanderen, Antwerpen, Uitgeverij De Nederlanden, 1984, 16-28.

64. Now art.52.1 of the Royal Decree of 18 July 1966 coordinating the laws on the use of languages in administrative matters (in Moniteur belge of 2 August 1966)

65. Legal writing is practically unanimous in considering this provision unconstitutional (but, due to the absence of judicial review of the constitutionality of legislation, such allegations are merely platonical) : see Ch.HUBERLANT & Ph.MAYSTADT, "Exemples de lois taxées d'inconstitutionnalité", in Actualité du contrôle juridictionnel des lois, Bruxelles, Larcier, 1973, 443-516, at 492 ff. ; A.MAST & J.DUJARDIN, Overzicht van het Belgisch Grondwettelijk Recht, Gent, Story-Scientia, 1983 (7th ed), at 587; J.DE MEYER, Staatsrecht, Leuven, Boekhandel L.Wouters, 1972 (8th ed), at 509-510; P.MAROY, "L'évolution de la législation linguistique belge", in Revue de Droit Public 1966, 449-501, at 489-491; J.EECKHOUT, "La langue de l'entreprise", in Journal des Tribunaux 1964, 4-5.

66. On regional devolution in Belgium, see the general comments supra, p.79.

67. Art.59 bis para.3 of the Constitution.

68. See art.59 bis para.4.

69. Since the recent constitutional reform of 1 June 1983, modifying art.59 ter, the German-speaking Community has also been granted legislative autonomy in the field of language regulation.

70. But see J.VELU, Notes de Droit Public, Bruxelles, Presses Universitaires de Bruxelles, 2nd ed, 1977-78, Vol.III, at 963, arguing that the preparatory work of the 1970 Constitution shows that the constituent was well aware of the problem, and that its inaction means that it considered the existing regime to be in conformity with art.23.

71. As is borne out e.g by the article of I.DE WEERDT, "De bevoegdheid van de kultuurraden i.v.m. de taalregeling in het bedrijfsleven. Enkele suggesties voor nieuwe dekretten", in Rechtskundig Weekblad, 1971-72, 1873-1878.

72. Decree of the Dutch Cultural Council (called, since 1980, 'Flemish Council') of 19 July 1973.

73. See the following commentaries on the Decree : R.BLANPAIN, "Het taalgebruik voor de arbeidsverhoudingen. Het decreet van juli 1973", in Rechtskundig Weekblad, 1973-74, 1457-1490; J.COCQUEREAUX, De vernederlandsing van het bedrijfsleven, Antwerpen/Amsterdam, Kluwer, 1977; M.TAQUET & C.WANTIEZ, "Le décret du 19 juillet 1973 ('Décret de septembre')", in Journal des Tribunaux du Travail, 1973, 273-283; P.MAROY, "Des lois et décrets sur l'emploi des langues

dans les entreprises", in Journal des Tribunaux, 1978, 269-278 and 289-293; I.DE WEERDT, Taalgebruik in het bedrijfsleven, Antwerpen, Kluwer, 1980 (3rd ed); Y.J.D.PEETERS (ed), Taalbelang is stoffelijk belang, op.cit.

74. See the recent overview by S.GOVAERT, "Dix ans de 'décret de septembre'", in Courrier Hedomadaire du CRISP, no.1035-1036, 20 avril 1984.

75. See the following judgments and decisions : Court of Cassation, judgment of 11 June 1979, in Journal des Tribunaux, 1979, 642 ('decree applicable'); Court of Cassation, judgment of 30 March 1981, in Journal des Tribunaux, 1981, 411 ('decree applicable'); Senate, decision of 1 April 1981, in Journal des Tribunaux, 1981, 309 ('decree inapplicable'). In the literature see M.FALLON & Y.LEJEUNE, "Contradiction entre loi et décret : le décret du 19 juillet 1973 devant les Chambres législatives", in Journal des Tribunaux, 1979, 637-641; ID., "La pratique belge des conflits interterritoriaux à l'épreuve du droit comparé", in Annales de Droit, 1983, 281-375, at 339 ff.; J.GIJSSELS & J.VELAERS, "Een conflict tussen wet en decreet van de Senaat naar de Kamer", in Rechtskundig Weekblad, 1981-82, 1249-1266; S.GOVAERT, op.cit.; M.MAHIEU, "Le décret de septembre, la Cour de cassation et le Sénat", in Journal des Tribunaux, 1981, 414-415; P.VAN ORSHOVEN, "Het conflict tussen taaldecreeet en bestuurstaalwet. Bedenkingen bij een cassatiearrest van 11 juni 1979", in Rechtskundig Weekblad, 1979-1980, 1523-1531.

76. Decree of the Council of the French Community of 29 June 1982.

77. See above, p.186.

78. Th.E.CARBONNEAU, "Linguistic Legislation and Transnational Commercial Activity : France and Belgium", in American Journal of Comparative Law, 1981, 393-412, at 393.

79. As translated by Th.E.CARBONNEAU, op.cit., at 400.

80. See e.g. in Germany, the 'Lebensmittelkennzeichnungsordnung' of 25 January 1972 (in Bundesgesetzblatt, 1972, I, 85), art.2; in Catalonia, the Decree of the Catalan Government of 15 September 1983 (in Diario Oficial de la Generalitat, 30 September 1983) imposing the use either of Catalan or Castillian or both languages, in product labelling.

81. As Th.E.CARBONNEAU, op.cit., says (at 402) : "The real onus will fall upon the importers and manufacturers of highly specialized, technical merchandise (e.g. computers, machine parts, airplane components and the like). Although their clientele is limited, constituting an infinitely small segment of the French public, the literature which accompanies this merchandise is extensive and ill-suited for translations. Moreover, translations (if they are possible at all) would be astronomically expensive, time-consuming and in fact unnecessary since users of such goods usually receive most of their professional training in English".

82. See, on this point, V.DELAPORTE, "La loi relative à l'emploi de la langue française", in Revue Critique de Droit International Privé, 1976, 447-476, at 458-459.

83. V.DELAPORTE, op.cit., at 457 : "la défense de la langue française reste alors le seul fondement de la solution et il est douteux qu'elle suffise à justifier une pareille entrave aux relations des parties".

84. Cf.supra, p.183.

85. Cf.supra, p.207.

86. On this Decree, see Th.E.CARBONNEAU, op.cit., at 405 ff.; and "Un décret sur la défense de la langue française", in Bulletin de la Fédération des Entreprises Belges, 1978, 3211-3217.

87. Cf.infra, p.371.

88. Judgments of 3 June 1932 and 8 April 1938 (unreported).

89. F.FLEINER & Z.GIACOMETTI, Schweizerisches Bundesstaatsrecht, Zuerich, Schulthess, 1976 (orig.ed. 1949), at 395 : "Der Gesetzgeber besitzt mit anderen Worten bei wesentlicher Gefaehrdung des Bestandes einer Nationalsprache oder der sprachlichen Homogenitaet des Gebietes einer Sprachgruppe die Befugnis zur Beschraenkung der Sprachenfreiheit. Eine solche Gefaehrdung kann vorab bei ungenuegender Assimilation der aus anderen Sprachgebieten Zugewanderten in Frage kommen".

90. See the historical overview, supra, p.33.

91. See the analysis by C.HEGNAUER, Das Sprachenrecht der Schweiz, Zuerich (Buchdruckerei Jak.Villiger & Cie, Waedenswil), 1947, at 42 ff. Esp. at 47 : "Die ueberlieferte sprachliche Zusammensetzung als Wesenszug der

Eidgenossenschaft, als Bestandteil ihres nationalen Gedankens ausdruecklich anzuerkennen, ist der politische Sinn des Art.116 Abs.1. Die Bundesverfassung bringt in den Anerkennung der Nationalsprachen zum Ausdruck, dass die Vielsprachigkeit nicht ein schamhaft zu verhuellender Makel der nationalen Einheit ist, sondern eine notwendige und wesentliche Grundlage der staatlichen Gemeinschaft bildet".

92. See C.HEGNAUER, op.cit., at 58-59.

93. On this judgment, see also further, p.371 ff.

94. L.WILDHABER, "Der Belgische Sprachenstreit vor dem europaeischen Gerichtshof fuer Menschenrechte", in Schweizerisches Jahrbuch fuer internationales Recht, 1969-70, 15-38, at 37; P.SALADIN, "Bemerkungen zur schweizerischen Rechtsprechung des Jahres 1965", in Zeitschrift fuer Schweizerisches Recht, 1966, 419-464, at 459.

95. Cf.infra, p.385 ff.

96. Cf.infra, p.445 ff.

97. See e.g. K.HESSE, "Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland", in Europaeische Grundrechte Zeitung, 1978, 427-438, at 433 : "Die eigentliche Problematik von Grundrechten als Teilhaberechten stellt sich erst bei der Frage, ob Grundrechte unter den veraenderten Bedingungen menschlicher Freiheit (...) als 'originaere' Teilhaberechte verstanden werden koennen oder sogar muessen, ob sie also ueber die gleiche Zuteilung in bestehenden Leistungssystemen hinaus Teilhabeansprueche auch dann begruenden, wenn die Voraussetzungen der Erfuellung dieser Ansprueche erst neu geschaffen werden muessten".

98. For a classical presentation of this distinction, see I.BERLIN, "Two Concepts of Liberty", in Four Essays on Liberty, Oxford, Oxford University Press, 1969.

99. Lacordaire.

100. For the argument that they are complementary rather than contradictory, see e.g. G.PECES BARBA, "Reflections on Economic, Social and Cultural Rights", in Human Rights Law Journal, 1981, 281-294.

101. For a characteristic presentation of this evolution, see G.BURDEAU, Les libertés publiques, Paris, L.G.D.J., 1972, at 12 : "le role de l'Etat n'est plus, en principe, l'abstention, mais, au contraire, une intervention

systematique pour aménager la mise en oeuvre des droits individuels au profit du bien commun, à la fois en réglementant l'exercice du droit de manière à l'adapter à sa fonction sociale et en mettant à la charge des gouvernants des obligations qui sont le corollaire des droits de l'individu à l'égard de la société (...) Cette transformation de la notion de droit individuel se solde pour chacun de nous par une limitation de l'étendue des droits compensée par une augmentation de leur nombre puisque aux droits qui correspondent aux obligations négatives de l'Etat, viennent s'ajouter ceux qui sont la contrepartie d'obligations positives".

102. The expressions are borrowed from M.CAPPELLETTI, "Who Watches the Watchmen? A Comparative Study on Judicial Responsibility", in American Journal of Comparative Law, 1983, 1-62.

103. In this sense, see, among many other authors, K.HESSE, op.cit., at 434 : "Im besonderen muss die regelung materieller Ansprueche auf Leistungen und der mit diesen verbundenen Fragen nach der Aufgabenverteilung des Grundgesetzes als Aufgabe des Gesetzgebers angesehen werden; denn sie laesst sich namentlich unter Prioritaets- und Koordinierungsgesichtspunkten nicht aus der Einfuegung in umfassendere Planungen und deren Durchfuehrung loesen, und sie darf nicht ohne ihre Rueckwirkungen auf diese beurteilt werden. Die unmittelbare Herleitung konkreter oder einklagbarer Verpflichtungen des Staates aus Grundrechten wuerde wie sonst so auch hier an die Stelle von Politik - gerichtlich kontrollierten - Verfassungsvollzug treten lassen und damit den Bereich parlamentarischer Willensbildung als Grundbestandteil einer offenen demokratischen Ordnung entscheidend einengen".

104. For France, see the discussion by J.F.FLAUSS, "Les droits sociaux dans la jurisprudence du Conseil constitutionnel", in Droit Social, 1982, 645-656, at 655-656; for Austria, see Th.OEHLINGER, "Objet et portée de la protection des droits fondamentaux. Cour constitutionnelle autrichienne", in Revue Internationale de Droit Comparé, 1981, 543-579, at 549-550.

105. In addition to K.HESSE, op.cit., see also E.W.BOECKENFOERDE, "Grundrechtstheorie und Grundrechtsinterpretation", in Neue Juristische Wochenschrift, 1974, 1529-1538; H.H.RUPP, "Vom Wandel der Grundrechte", in Archiv des oeffentlichen Rechts, 1976, 161-201; A.BLECKMANN, Allgemeine Grundrechtslehren, Koeln, Heymann, 1979, at 170-199.

106. Art.92 of the Law on the Federal Constitutional Court ('Gesetz ueber das Bundesverfassungsgericht') of 12 March 1951.
107. See e.g. the overview in "Developments in the Law : Injunctions", in Harvard Law Review, 1965, 994-1093.
108. A.CHAYES, "The Role of the Judge in Public Law Litigation", in Harvard Law Review, 1976, 1281-1316, at 1295.
109. An excellent synthetic account of this trend is provided by A.COX, The Role of the Supreme Court in American Government, Oxford, Clarendon Press, 1976, at 76-98.
110. See the recent French Law of 23 October 1984 (the original bill adopted by Parliament has however considerably been watered down by the decision of the 'Conseil Constitutionnel' of 10-11 October; see also, in Italy, the Law n.416 of 1981, arts.4 and 45.
111. See e.g. for Austria, W.BERKA, at 418; for Switzerland, J.F.AUBERT, "La liberté d'opinion", in Revue de droit suisse, 1973, I, 429-450, at 447; in a recent judgment, the Spanish Constitutional Tribunal held that, while freedom of expression may entail some positive obligations, it does not give a right to any particular medium of communication to claim state subsidies (judgment of 16 March 1981, in Boletín de Jurisprudencia Constitucional, 2, June 1981, 128, at 133).
112. The Spiegel case, judgment of 5 August 1966, in Bundesverfassungsgerichtsentscheidungen 20, 162, at 175 : " (...) so hat die Bestimmung zugleich auch eine objektiv-rechtliche Seite. Sie garantiert das Institut 'Freie Presse'. Der Staat ist - unabhaengig von subjektiver Berechtigungen einzelnen - verpflichtet, in seiner Rechtsordnung ueberall, wo der Geltungsbereich einer Norm die Presse beruehrt, dem Postulat ihrer Freiheit Rechnung zu tragen. Freie Gruendung von Presseberufen, Auskunftspflichten der oeffentlichen Behoerden sind prinzipielle Folgerungen daraus; doch liesse sich etwa auch an eine Pflicht des Staates denken, Gefahren abzuwehren, die einem Pressewesen aus der Bildung von Meinungsmonopolen erwachsen koennten". The Court does not mention subsidies, for which the picture seems to be similar to that of other countries; see W.LEISNER, Die Pressegleichheit, cit., at 156 ff.
113. Cf. infra, p.509.
114. T.I.EMERSON, The System of Freedom of Expression, New York, Vintage Books, 1971, at 647.

115. See e.g. on the legal regime of name-giving in Germany, marked by total freedom in choosing foreign names, U.DIEDERICHSEN, "Das Recht der Vornamensgebung", in Neue Juristische Wochenschrift, 1981, 705-713, at 709.

116. In Italy, see the Decree of 10 January 1926, banning the German form of family and first names in South Tyrol; its consequences have only been wiped out by the Law of 11 March 1972, n.118, arts.32 ff.: "particolare procedura per il ripristino di nomi e cognomi nella forma tedesca".

In Spain, under the former art.54 of the 'Ley de Registro Civil', names had to be registered in a Castillian form. Article 1 of the Law of 4 January 1977 now provides that "the names of Spaniards must be transcribed in one of the Spanish languages"; while not leaving entire liberty, this regulation appears rather reasonable. Article 2 of the same Law permits the modification of existing names that had been registered under the old discriminatory regime.

117. Cassation civile 2e sect., judgment of 12 November 1964, in Gazette du Palais, 1965, 1191.

118. Cour d'Appel Colmar, 17 February 1965, in Dalloz-Sirey 1965, Somm.101; Tribunal de grande instance Caen, 20 December 1965, in Juris-Classeur Périodique, 1966, II, 14626 (with a note by Ph.MALAUERIE giving an overview of practice); Cour d'Appel Grenoble, judgment of 15 December 1965, in Juris-Classeur Périodique 1966, II, 14627.

119. See below, p.398.

120. Derungs gegen Gemeinde St.Martin und Regierung des Kantons Graubünden, judgment of 30 October 1974, in Arrets du Tribunal Fédéral, 100 Ia, 465, at 469.

121. Id., at 470.

122. Cf.infra, p.399.

123. On the right to education, see below, p.396 ff.; on equality, p.510 ff.; on specific rights, p.635 ff.

124. A.H.BIRCH, "Minority Nationalist Movements and Theories of Political Integration", in World Politics, 1978, 325-344, at 336. See also the Italian Constitutional Court in its recent judgment of 1981 (in Foro Italiano 1981, I, 2094) emphasizing the "notoria capacità di immediata e capillare penetrazione nell'ambito sociale attraverso la diffusione nell'interno delle abitazioni" characterising television, a medium which "per la forma suggestiva dell'immagine unita

alla parola, dispiega una peculiare capacità di persuasione e di incidenza sulla formazione dell'opinione pubblica nonchè sugli indirizzi socio-culturali, di natura ben diversa da quella attribuibile alla stampa".

125. A.H.BIRCH, ibid.

126. T.O'BRIEN, "Economic Support for Minority Languages", in A.E.Alcock, B.K.Taylor & J.M.Welton (eds), The Future of Cultural Minorities, London, Macmillan Press, 1979, 82-101, at 96.

127. F.KUEBLER, "Rechtsvergleichender Generalbericht", in M.Bullinger & F.Kuebler (eds), Rundfunkorganisation und Kommunikationsfreiheit, Baden Baden, Nomos, 1979, 273-301, at 277. The analysis in the next paragraph is largely inspired on this author.

128. Some examples of the legal features of this assimilation : in Switzerland, art.36.1 of the 1874 Constitution attributes jurisdiction in the field of post and telegraph to the Confederation; this power was extended by the federal authorities to radio. This article still constitutes the constitutional basis of the broadcasting regime, as propositions to include an explicit 'broadcasting' article were twice rejected by popular referendum, in 1957 and 1976 (see J.P.MUELLER, "Landesbericht Schweiz", in Rundfunkorganisation und Kommunikationsfreiheit, op.cit., 229-271, at 231 ff. The same happened in Canada: section 91 of the British Northern America Act, dealing with post and telecommunications, was also extended to include radio, in a judgment of the Judicial Committee of the Privy Council (Re Regulation and Control of Radio Communication, (1932) Appeal Cases (Law Reports), 304). In Italy, the broadcasting monopoly used to be contained in the 'Codice Postale' (Law of 27 February 1936), whose article 1 provides for a state monopoly for all means of telecommunication. Parallel evolutions have also taken place in France (see J.MORAND & G.VALTER, "Efficacité de gestion et liberté d'expression à la radiodiffusion-télévision française", in Revue de Droit Public, 1976, 5-109, at 53 ff.) and in Spain (see F.SAINZ MORENO, "La regulacion legal de la television privada en la jurisprudencia constitucional", in Revista Española de Derecho Constitucional, n.2, 1981, 159-214, at 192 ff).

129. D.GRIMM, "Kulturauftrag im staatlichen Gemeinwesen", in Veroeffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol.42, 1984, 46-82, at 71.

130. Red Lion Broadcasting Co. v Federal Communications Commission, 395 U.S. 367 (1969), at 390 (in this case, the Court sustained a regulation by the Federal Communications Commission compelling a private radio to furnish cost-free reply time to an individual mentioned in one of its programs).

131. Ibid.

132. Id., at 389. The constitutionality of the regulatory regime of broadcasting had already been upheld in a much earlier Supreme Court judgment, National Broadcasting Co. v United States, 319 U.S. 190 (1943).

A number of critics have argued that there is in fact no technical or other reason to subject broadcasting to a stricter regime than the press, and that no governmental content regulation through the licensing system is permitted by the First Amendment; for a representative account of this view, see H.KALVEN Jr., "Broadcasting, Public Policy and the First Amendment", in Journal of Law and Economics, 1967, 15-49; others agree that broadcasting and the press are intrinsically similar, but argue that precisely because of the existence of uninhibited freedom of the press, state intervention in the other media is justified, in order to prevent the concentration of all channels of communication in the hands of a few large private interest groups: L.C.BOLLINGER, "Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media", in Michigan Law Review, 1976, 1-42; ID., "On the Legal Relationship between Old and New Technologies of Communication", in German Yearbook of International Law, 1983, 269-298.

133. See, for a presentation of the system, the contribution by A.LINCOLN in Rundfunkorganisation und Kommunikationsfreiheit, op.cit., 125-142.

134. On the origins of the broadcasting system, see H.COHEN JEHORAM, "The unique Dutch broadcasting system on the eve of the revolution in teletechnics and the freedom of information", in Netherlands Reports to the Eleventh International Congress of Comparative Law, Caracas 1982, Deventer, Kluwer, 1982, 327-343; and K.A.M.DUYVELAAR, "De bewogen geschiedenis van het Nederlandse omroepbestel", in Ars Aequi, 1983, 43-50.

135. Law of 1 March 1967.

136. For an overview of current issues raised by the broadcasting regime, see H.COHEN JEHORAM, op.cit.;

E.J.DOMMERING, "Het verplicht vrije omroepbestel in Nederland", in Nederlands Juristenblad 1982, 149-161.

137. Only with the 1972 Reform Law was the public monopoly no longer justified for its own sake, but in terms of individual rights. Primacy is given, however, to the 'right to information' and the 'right to culture' rather than to 'freedom of expression' (see M.BOUISSOU, "La réforme de la radio-télévision et la notion de service public (loi du 3 juillet 1972)", in Revue de Droit Public, 1973, 5-99, at 49 : "le service public fera prévaloir le droit à l'information et à la culture sur la liberté d'expression").

The 1982 Reform Law, while maintaining the essentials of the monopoly, clearly spells out the primacy of freedom of expression in its opening articles :

"Art.1. Audiovisual communication is free (...).

Art.2. The citizens are entitled to a free and pluralistic audiovisual communication".

138. Art.15.1 of the 1975 Greek constitution excepts radio and television from the application of art.14 (freedom of opinion and the press), and 15.2 adds that the broadcasting media are under the direct control of the State, which has a duty of ensuring objectivity, quality and the cultural development of the country.

139. In Germany, art.5.1, second sentence, explicitly extends freedom of expression to the media : "Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet". In Austria, art.10 of the European Convention which deals expressly with radio and television (though submitting them to a special regime) is part of Austrian constitutional law. In other countries, like Belgium, France or Switzerland, the Constitutions do not mention radio or television, but legal writing generally accepts that they are covered by the guarantee of freedom of expression.

140. The German Constitutional Court used the argument of the 'Sondersituation' of broadcasting in its judgments of 28 February 1961, in Bundesverfassungsgerichtsentscheidungen, 12, 205, at 261, and of 27 July 1971, in Id., 31, 314, at 326 ff. The Italian Constitutional Court used it in the judgments of 6 July 1960, in Giurisprudenza Costituzionale, 1960, 759 and 9 July 1974, in Id., 1974, 1775..

141. The impact of the new technologies on legal conceptions of broadcasting is discussed in all recent contributions on media law; see e.g. L.BOLLINGER, "On the Legal Relationship...", op.cit.; M.BULLINGER, "Elektronische Medien

als Marktplatz der Meinungen", in Archiv des oeffentlichen Rechts, 1983, 161-215; ID., "Télécommunication et liberté d'information", in Revue Internationale de Droit Comparé, 1979, 5-20; H.BISMARCK, Neue Medientechnologien und grundgesetzliche Kommunikationsverfassung, 1982; K.STERN, "Neue Medien - neue Aufgaben des Rechts ? Verfassungsrechtliche Grundfragen", in Deutsches Verwaltungsblatt, 1982, 1109-1118; D.ROUSSEAU, "Le statut de la radio-télévision. Maintien du monopole ou régime de liberté ?", in Actualité juridique - Droit administratif, 1981, 59-79, at 67 ff.

For the impact of those technical developments on international law, see the next Chapter, at p.347 ff.

142. D.ROUSSEAU, op.cit., at 75, note 157.

143. Decision of 27 July 1982, in Journal Officiel of 29 July 1982.

144. Judgment of 31 March 1982, in Boletín de Jurisprudencia Constitucional, n.12, 1982, 272, at 279.

145. Judgment of 28 July 1976, in Giurisprudenza Costituzionale, 1976, 1267, and the case notes by C.CHIOLA, "Il pluralismo spontaneo per la radiotelevisione locale", in Id., 1418-1424; and F.D'ONOFRO, "Groviglio nell'etere : la Corte 'apre' ai privati 'locali'", in Id., 1424-1430.

146. Ibid., at 1283-1284.

147. See judgment quoted in note 156, below.

148. Court of Cassation, judgment n.1051 of 19 February 1982, in Giurisprudenza Costituzionale 1983, I, 540; Council of State, decision n.361 of 14 July 1982, in Giurisprudenza Costituzionale 1983, I, 546. In legal writing, see e.g. A.PACE, "Liceità 'condizionata' delle emittenti locali e disciplina pubblica dell'impresa radiotelevisiva privata", in Diritto delle radiodiffusioni e delle telecomunicazioni, 1979, 25-36.

149. For a general analysis of the case-law, see R.BORRELLO, "Giudici e governo dell'etere : la difficile gestione dell'anarchia delle antenne", in Giurisprudenza Costituzionale, 1983, I, 540-572.

150. L.C.BOLLINGER, "On the Legal Relationship...", op.cit., at 297.

151. In Bundesverfassungsgerichtsentscheidungen, 57, 295.

152. Id., at 323.

153. Ibid.

154. While everyone agrees that the Constitutional Court did not, in its last judgment, take the plunge to outlaw the public monopoly, there are two sharply opposed schools of thought on the underlying issue of the correct interpretation of freedom of expression. Arguing that organisation of radio and television as a public service is not an emergency solution, but a fully legitimate (indeed, the most legitimate) means for ensuring effective freedom of expression to every individual : W.HOFFMANN-RIEM, "Massenmedien", in E.Benda, W.Maihofer & H.J.Vogel (eds), Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, Berlin/New York, de Gruyter, 1983, 389-469, at 406 ff.; F.KUEBLER, "Rechtsvergleichender Generalbericht...", op.cit., at 297 ; K.H.LADEUR, "Die Rundfunkfreiheit und der Wegfall der "besonderen Umstaende" ihrer Ausuebung", in Neue Juristische Wochenschrift, 1982, 359-362; J.WIELAND, "Markt oder Staat als Garanten der Freiheit. Ein Bericht ueber neuere rundfunkrechtliche Literatur", in Der Staat 1984, 245-272, at 271.

For the contrary view that freedom of expression implies an individual freedom to broadcast, see e.g. C.PESTALOZZA, "Der Schutz vor der Rundfunkfreiheit in der Bundesrepublik Deutschland", in Neue Juristische Wochenschrift, 1981, 2158-2166; H.H.KLEIN, "Rundfunkrecht und Rundfunkfreiheit", in Der Staat, 1981, 177-200; R.SCHOLZ, "Das dritte Fernsehurteil des Bundesverfassungsgerichts", in Juristenzeitung, 1981, 561 ff.

155. Judgment of 28 July 1976, cit., at 1282 : "Il che, pero, non richiede né tanto meno comporta che debba escludersi la legittimità costituzionale delle norme che riservano allo Stato le trasmissioni radiofoniche e televisive su scala nazionale. Giacché - e cio giova ribadirlo in modo espresso - la radiodiffusione sonora e televisiva su scala nazionale rappresenta un servizio pubblico essenziale e di preminente interesse generale".

156. Judgment n.148 of 1981, in Il Foro Italiano, 1981, I, 2094 : "che non solo l'elemento della disponibilità delle frequenze di trasmissione (sia) decisivo ai fini del mantenimento del monopolio statale in materia, ma anche l'esistenza di condizioni tali da rendere possibile l'insorgenza di un monopolio privato in un settore tanto delicato della vita sociale".

In Italy too, some authors take the opposed view that technical progress imposes the dismantling of the monopoly also at the national level; see e.g. S.FOIS, "La natura

dell'attività radiotelevisiva alla luce della giurisprudenza costituzionale", in Giurisprudenza Costituzionale, 1977, 429 ff.

157. For a full description of this 'integration model' (integrating the main social actors within the public structure) as it functions in Germany, see P.LERCHE, "Landesbericht Bundesrepublik Deutschland", in Rundfunkorganisation und Kommunikationsfreiheit, op.cit., 15-105, at 48-84; for a short comparison of the German, Swiss and Austrian regimes in this respect, see F.KUEBLER, "Generalbericht", in Id., at 287-290. The 1975 Reform Law of the Italian public broadcasting corporation was also inspired by the need to increase internal pluralism; see the description in R.ZACCARIA, Radiotelevisione e Costituzione, Milano, Giuffrè, 1977, at 327 ff. The recent 1982 law in France also attempts to 'open up' the public service, and to curb excessive governmental control by the creation of an independent 'Haute Autorité de la Communication Audiovisuelle' whose members are appointed along similar lines as the members of the Constitutional Council; see J.CHEVALLIER, "Le statut de la communication audiovisuelle", in Actualité juridique - Droit administratif, 1982, 554-576, at 563 ff.

158. Local radio stations (operating within a 30 km radius) are licensed by the 'Haute Autorité'; see Law of 29 July 1982, art.81.

159. The conditions for the recognition of local radios have been fixed by the Decree of 8 September 1981 of the Council of the French Community and the parallel Decree of 6 May 1982 of the Flemish Council.

160. The recognition, on an experimental basis, of a number of private radio stations, is the provisional result of a general discussion on the future of the media. See the report of the committee of experts, Bericht der Expertenkommission fuer eine Medien-Gesamtkonzeption, Bern, Eidgenoessisches Justiz- und Polizeidepartment, 1982; and the comments by H.W.KOPP, "Die Schweiz auf dem Weg zu einer Medien-Gesamtkonzeption", in Presserecht und Pressefreiheit. Festschrift fuer Martin Loeffler, Muenchen, C.H.Beck, 1980, 151-167.

161. On those new developments (the most important of which is the 'Landesrundfunkgesetz' of Lower Saxony, adopted on 28 May 1984), see R.GROSS, "Verfassungsrechtlich bedeutsame Schwerpunkte der Mediengesetzgebung", in Media Perspektiven, 1984, 681-696.

162. On which, see infra, p.374.

163. See D.M.GILLMOR & J.A.BARRON, Mass Communication Law - Cases and Comments, St Paul (Minn.), West Publishing Co., 1979, at 777-778.

164. On the meaning of this non-discrimination rule, see below, p.484; 493 ff.

165. H.KLOSS, The American Bilingual Tradition, op.cit. (note 53), at 55-56.

166. Id., at 57.

167. See F.F.GUTIERREZ & J.REINA SCHEMENS, "Spanish International Network. The Flow of Television from Mexico to the United States", in Communication Research, 1984, 241-258, at 251.

168. Art.59 bis para.2.1 of the Constitution contains the general devolution of legislative power in cultural affairs. The detailed list of those cultural affairs is now contained in art.4 of the Law of 8 August 1980 (broadcasting being mentioned as point 6).

169. Decree of the French Cultural Council of 12 December 1977; Decree of the Dutch Cultural Council of 28 December 1979.

170. Article 59 ter of the Constitution, adopted on 1 June 1983.

171. Law of 10 January 1980.

172. Law of 30 May 1983

173. Art.19.3 of the Basque Statute (Organic Law of 18 December 1979).

174. Law of 20 May 1982.

175. J.HOWKINS, "Basques use TV to speak their own language", in Inter Media, May 1983, 20-25, at 24. This article gives a non-legal, account of the first steps of this television channel.

176. For a description of this complex legal structure, see J.P.MUELLER, "Landesbericht Schweiz", op.cit., (note 128), at 242 ff.

177. See below, p.554.

178. Three hours daily on the radio program, from 1 January 1984 onwards (see Europa Ethnica, 1983, 164).

179. Ibid.

180. Law of 14 April 1975, art.19.c.

181. D.FENNELL, "Can a Shrinking Linguistic Minority be Saved ? Lessons from the Irish Experience", in Haugen, McClure & Thomson (eds), Minority Languages Today, Edinburgh University Press, 1980, 32-39, at 34.

182. See The Economist of 25 December 1982, p.26.

183. See the table of broadcasting schedules of minority languages provided by R.PETRELLA, "L'impératif être. Réflexions sur la renaissance des cultures 'régionales' en Europe", in Y.Mény & B.De Witte (eds), Dix Ans de Régionalisation en Europe. Bilan et Perspectives 1970-1980, Paris, Cujas, 1982, 265-289, at 275. The table is however no longer up to date.

184. See above, p.282 ff.

185. Judgment of 9 July 1974, in Giurisprudenza Costituzionale, 1974, 1775, at 1789-1790 : "che (...) l'accesso alla radiotelevisione sia aperto, nei limiti massimi consentiti, imparzialmente ai gruppi politici, religiosi, culturali nei quali si esprimono le varie ideologie presenti nella società".

186. Law of 14 April 1975.

187. See the analysis, on this point, by A.PACE, "L'accesso al mezzo radiotelevisivo pubblico", in ID., Stampa, giornalismo, radiotelevisione, Padova, CEDAM, 1983, 311-376, at 314-328.

Chapter Two
International Law

1. For a systematic comparison of both articles, see C.ZANGHI, "La libertà di espressione nella Convenzione europea dei diritti dell'uomo e nel Patto delle Nazioni Unite sui diritti civili e politici", in Rivista di Diritto Internazionale, 1969, 295-308. For an in-depth analysis of art.19 of the Covenant, including an analysis of the first years of State reporting to the Human Rights Committee, K.J.PARTSCH, "Freedom of Conscience and Expression, and Political Freedoms", in L.Henkin (ed), The International Bill of Rights - The Covenant on Civil and Political Rights, New York, Columbia University Press, 1981, 209-245.
2. Applications no. 1474/62, 1769/62, 2145/64, 2333/64. All those cases arose in the context of Belgian linguistic legislation, and would lead up to the famous Belgian Linguistics judgment of the European Court, on which see infra, p.417 ff. and 569 ff. As the applicability of art.10 to their cases was only a minor issue in these cases, and was quickly dismissed by the European Commission (and was not considered by the Court) it can be treated separately here.
3. Supra, p.252 ff. and 275 ff.
4. Appl. no.1474/62, in Yearbook of the European Convention on Human Rights, 6, 332, at 340-342.
5. Ibid.
6. See the discussion of those provisions, infra, p.595 ff.
7. X. v.Ireland, appl.no.4137/69, in Collection of Decisions, 35, 137, at 139.
8. Appl.1474/62, cit., at 342 (my emphasis).
9. Supra, p.255 ff.
10. Sunday Times case, Judgment of 26 April 1979, in Publications of the European Court of Human Rights, Series A, vol.30.
11. Sunday Times, cit., para.47.

12. Id., para.49. While not contesting the Court's interpretation on this principle of 'legality' itself, two separate concurring opinions (by Judges Zekia and Evrigenis) contested its application to the present case, denying 'sufficient precision' to the concept of 'contempt of court' as it stood under common law.

For a general criticism of the Court's analysis of the words 'prescribed by law', see R.SAPIENZA, "La libertà d'espressione nella Convenzione europea dei diritti dell'uomo - il caso Sunday Times", in Rivista di Diritto Internazionale, 1981, 43-66, at 48-54.

13. Cf.supra, p.259.

14. "Sous le couvert d'une nomenclature sélective, ce sont bien les notions les plus larges et les plus extensibles du droit public qui sont mises de bout en bout" (Ph.VEGLERIS, "Valeur et signification de la clause 'dans une société démocratique' dans la Convention Européenne des Droits de l'Homme", in Revue des Droits de l'Homme, 1968, 211-242, at 226.

15. See A.Ch.KISS, "Permissible Limitations on Rights", in L.Henkin (ed), The International Bill of Rights, op.cit., 290-310, at 299-302.

16. Appl. no.176/56, in Yearbook of the European Convention of Human Rights, 2, 174.

17. Case of Ireland v the United Kingdom, judgment of 18 January 1978, in Publications of the European Court of Human Rights, Vol.25, at p.79.

18. Limitation clauses exist, in almost identical terms, under the articles 8 (privacy), 9 (freedom of thought), 10 (freedom of expression), 11 (freedom of assembly and association).

19. See the cases cited by C.C.MORRISSON, The Dynamics of Development in the European Human Rights Convention System, The Hague/Boston/London, Nijhoff, 1981, at 78-86.

20. Handyside case, Judgment of 7 December 1976, in Publications of the European Court of Human Rights, Series A, Vol.24, at para.49.

21. Sunday Times case, cit., at para.65; see also the Klass case, judgment of 6 September 1978, Publications..., Series A, Vol.28, at para.42.

22. See C.C.MORRISSON, "Restrictive Interpretation of Sovereignty-Limiting Treaties : The Practice of the European Human Rights Convention System", in International and Comparative Law Quarterly, 1970, 361-375.

23. The Court passes "de l'ordre de priorité des systèmes à la comparaison de la pleine aptitude du juge international à apprécier les conditions de fond dans lesquelles le droit peut être exercé et violé" (W.J.GANSHOF VAN DER MEERSCH, "La référence au droit interne des Etats contractants dans la jurisprudence de la Cour Européenne des Droits de l'Homme", in Revue Internationale de Droit Comparé, 1980, 317-335.

24. Handyside case, cit., at para.50.

25. Id., at para.48; for a different use of the 'margin of appreciation' doctrine, see the Belgian Linguistics case, infra, p.585-586.

26. R.SAPIENZA, op.cit., at 61. As the same author argues (at 59) :

"Crediamo di poter dire, avuto riguardo al copioso catalogo delle occasioni nelle quali gli organi della Convenzione hanno fatto ricorso a tale dottrina, che questo schema non sia altro che una fictio per coprire gli spazi di mediazione che gli organi chiamati a controllare l'attività degli Stati alla luce della Convenzione hanno a loro disposizione".

The author, however, approves of the use of such a 'fiction' as an instrument of judicial policy. In the same sense, see H.WALDOCK, "The Effectiveness of the System Set Up by the European Convention on Human Rights", in Human Rights Law Journal, 1980, 1 ff., at 9, for whom the doctrine of the margin of appreciation is "one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy".

27. See e.g. C.C.MORRISSON, The Dynamics of Development..., op.cit., at 109, who, in the American fashion, finds a reason for the difference between Handyside and Sunday Times in the Court's composition : "Of the twenty judges who decided the latter affair. seven were new on the bench. And quite a difference that made ! Of the seven new judges, five voted for the position of the applicant newspaper. Of the eleven judges who had participated in both cases, six voted for the government".

28. Sunday Times case, cit., at para.59.

29. Ibid.. But see the strong criticism on this assertion by the Minority Opinion in the same case, as well as by F.A.MANN, "Contempt of Court in the House of Lords and the European Court of Human Rights", in The Law Quarterly Review, 1974, 348-354.

According to C.C.MORRISSON, The Dynamics of Development..., op.cit., at 111, the Court did not want to undermine the authority of its own decisions by rejecting openly Handyside. But through the distinction, Handyside "would not embarrass the Court as precedent for any other area save public morals and 'obscenity'". Even in the field of morals, the Court would show itself more severe in the later Dudgeon case, Judgment of 22 October 1981, in Publications of the European Court of Human Rights, Series A, Vol.45.

30. See also the interesting analysis by P.J.DUFFY, "The Sunday Times Case : Freedom of Expression, Contempt of Court and the European Convention on Human Rights", in Human Rights Review, 1980, 17-53, at 38-39.

31. For another example of this in a different context, see the Golder case, judgment of 21 February 1975, in Publications ..., Series A, Vol.18, at para.45.

32. Dudgeon, cit., at para.60 ; "There is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States". But see the strong dissent of Judge Walsh (at para.16 and ff.) : "It would be unfortunate if this should lead to the erroneous inference that a Euro-norm in the law concerning homosexual practices has been or can be evolved".

33. See e.g. the definition of 'democracy' by A.Ch.KISS, op.cit., at 309 : "It recognizes the principle that government is limited by the concept of human rights, and that even the good of the majority or the common good of all does not permit certain invasions of individual autonomy and freedom". But this merely restates the question of permissible limitations in other terms, without even beginning to answer it ! For a more complex, but, I submit, equally vain definition, see K.HAILBRONNER, "Die Einschränkungen von Grundrechten in einer demokratischen Gesellschaft. Zu den Schrankenvorbehalten der Europäischen Menschenrechtskonvention", in Voelkerrecht als Rechtsordnung

- Internationale Gerichtsbarkeit - Menschenrechte.
Festschrift fuer Hermann Mosler, Berlin/Heidelberg/New York,
Springer, 1983, 359-385, at 369-373.

34. See art.3 of the Statute of the Council of Europe.

35. See also F.JACOBS, The European Convention of Human Rights, Oxford, Clarendon, 1975, at 197 : "if other systems manage without such a restriction, it can hardly be said to be 'necessary in a democratic society'".

36. Sunday Times, cit., at para.61.

37. Dudgeon, cit., at para.56.

38. See, respectively, para. 57 and 54 of the Handyside judgment, cit.

39. Some dangers are involved in this maximal approach : what e.g. with new dangers for the public interest; shall one prevent one country from taking the lead in the enactment of measures of data protection (see K.HAILBRONNER, op.cit., at 378) ? On the other hand, many measures that appear as limitations are at the same time the embodiment of the rights of others, who find themselves sacrificed by a too stringent review on limitations.

40. Collected Edition of Travaux Préparatoires, III, 1961, at 653 (quoted by Y.TAJIMA, "Protection of Freedom of Expression by the European Convention on Human Rights", in Revue des droits de l'homme - Human Rights Journal. 1969, 658-695, at 668-669.

41. On this notion, see the general analysis of A.M.CONNELLY, "The Protection of the Rights of Others", in Human Rights Review, 1980, 117-140.

42. Yet, because those regulations are hardly enforced any longer, cases challenging them are unlikely to arise before the Strasbourg organs.

43. On those provisions of the Racial Discrimination Convention see infra, p.624 and note 140. The Court has referred to an international convention for the interpretation of a Convention right in the Marckx case, judgment of 13 June 1979, in Publications of the European Court of Human Rights, Series A, vol.31, at para.41.

44. Cf.supra, p.270-271.

45. On which, see Part Five, Chapter Two.

46. Appl. nos. 2834/66 and 4038/69, Commission decision of 13 July 1970, in Collection of Decisions, 35, 29, at 34.

47. Cf.infra, p.417 ff. and p.575 ff.

48. M.BOSSUYT, "L'arret Marckx de la Cour européenne des droits de l'homme", in Revue Belge de Droit International, 1980, 53-81, at 68 ff.

49. D.EVRIGENIS, "Recent Case-Law of the European Court of Human Rights on Articles 8 and 10 of the European Convention on Human Rights", in Human Rights Law Journal. 1982, 121-139, at 136.

50. Marckx case, cit., at para.31.

51. According to the doctrine of the 'autonomous application' of art.14, on which see infra, p.569 ff.

52. Supra, p.282 ff.

53. Supra, p.316 ff.

54. On those provisions, see infra, p.595 ff.

55. Supra, p.290 ff.

56. Most authors agree that this is the ordinary interpretation to be given to the term 'licensing'. See B.BINDER, "Rundfunkfreiheit und Menschenrechtskonvention", in Die Verwaltung, 1982, 33-43, at 37; Ch.DEBBASCH, "La Convention européenne des Droits de l'Homme et le régime de l'O.R.T.F.", in Revue des Droits de l'Homme - Human Rights Journal, 1970, 638-647, at 640; D.ROUSSEAU, "Le statut de la radio-télévision. maintien du monopole ou régime de liberté?", in Actualité juridique - Droit administratif, 1981, 59-79; A.KHOL, "The International Aspects of the Freedom of Expression in Radio and Television", in Revue des Droits de l'Homme - Human Rights Journal, 1975, 127-138, at 135.

57. A.KHOL, op.cit., at 135.

58. Appl. no.3071/67, X v Sweden, decision of 7 February 1968, in Collection of Decisions, 26, 75.

59. Appl. no.4750/71, X v United Kingdom, decision of 20 March 1972, in Collection of Decisions, 40, 30.

60. Appl. no.6452/74, Sacchi v Italy, decision of 12 March 1976, in Decisions and Reports, 5, 50.

61. A confirmation of the existing uncertainty was the fact that France, upon ratification of the Convention, submitted an 'interpretative declaration', declaring its broadcasting regime to be compatible with art.10.

62. Appl. no.9297/81, X.Association v Sweden, decision of 1 March 1982, in Decisions and Reports, 28, 204.

63. Appl. no.4515/70, decision of 12 July 1971, in Collection of Decisions, 38, 88.

64. Infra, p.582 ff.

65. See also the provisions contained in the second part of the 'third basket' of the Helsinki Final Act dealing with the free circulation of information. Although the Final Act is not a binding instrument by itself, it may be considered, at least on this point, as an authoritative restatement of the Civil Covenant. For an analysis of those provisions, see J.M.CROUZATIER, "D'Helsinki à Madrid. La circulation des personnes et des informations en Europe", in Revue Générale de Droit International Public, 1980, 752-793.

66. On this question, see e.g. a special issue of Annuaire du Tiers-Monde, V, 1978-79, largely devoted to the theme of 'information and the third world'; further H.I.SCHILLER, Communication and Cultural Domination, White Plains (N.Y.), International Arts & Sciences, 1976; A.SMITH, The Geopolitics of Information - How Western Culture Dominates the World, London, 1980; as well as many UNESCO publications, among which the report of the McBride Commission, Many Voices, One World, London/New York/Paris, Unesco, 1980.

67. See e.g., on the protection of transborder expression under art.5 of the German Basic Law, C.DEGENHART, "Grenzueberschreitender Informationsfluss und grundgesetzliche Rundfunkordnung", in Europaeische Grundrechte Zeitschrift, 1983, 205-213, at 209 ff.

68. G.COHEN JONATHAN, "Liberté de circulation des informations et souveraineté des Etats", in La circulation des informations et le droit international (Colloque de Strasbourg de la Société française pour le droit international), Paris, A.Pédone, 1978, 3-54, at 5.

69. Note that this principle of 'non discrimination' is contained in the very definition of 'freedom of expression

regardless of frontiers', and should be distinguished from the general principle of equality contained, as far as the Convention is concerned, in art.14.

70. On this question, see e.g. M.Cl.DOCK, "Circulation des informations et propriété intellectuelle", in La circulation des informations et le droit international, op.cit., 194-213.

71. See e.g. P.OLIVER, Free Movement of Goods in the EEC under Articles 30 to 36 of the Rome Treaty, London, European Law Centre Limited, 1982, at 126-172.

Note that the influence can be mutual : in the Rutili judgment (case 36/75, judgment of 28 October 1975, in European Court Reports 1975, 1219) the European Court of Justice referred to the public policy doctrine developed under the European Convention, in the slightly different context of the free movement of persons.

72. An affirmative answer is given by H.P.FURRER, "La pratique des Etats membres du Conseil de l'Europe", in La circulation des informations et le droit international, op.cit., 65-85, at 78.

73. W.RUDOLF & K.ABMEIER, "Satellitendirektfunk und Informationsfreiheit", in Archiv des Voelkerrechts, 1983, 1-36, at 16.

74. J.O.H.NASON, "International Broadcasting as an Instrument of Foreign Policy", in Millennium - Journal of International Studies, 1977, 128-145, at 131.

75. See the discussion in M.EPPENSTEIN & E.J.AISENBERG, "Radio Propaganda in the Contexts of International Regulation and the Free Flow of Information as a Human Right", in Brooklyn Journal of International Law, 1979, 154-177; on the foreign policy uses of broadcasting, see generally J.O.H.NASON, op.cit.

76. C.DEGENHART, op.cit., at 212.

77. A recent case is that of 'Radio 24', formally a local Italian radio station, but operating in the German language, and directing its considerable power of diffusion towards the near-by Swiss border, and thus clearly aiming at a foreign public. A prohibitory measure by the Italian authorities was challenged before the administrative court and the Council of State, who referred the case to the Constitutional Court (Consiglio di Stato, judgments n.508 and 509 of 26 October 1982, in Foro Italiano, 1982, II, 501). Indeed, while the state monopoly within the Italian territory has been outlawed

by the 1976 judgment of the Constitutional Court, the same monopoly as regards transmissions for abroad (Law n.103 of 14 April 1975, art.2) has never been squarely challenged and still exists. In addition, the Council of State raised the issue of the compatibility of this regime with art.10 of the European Convention.

78. Art.4 of the ITU Convention.

79. See generally, D.LEIVE, International Telecommunications and International Law : The Regulation of the Radio Spectrum, Leyden, A.W.Sijthoff, 1970.

80. Cf.supra, p.114-115.

81. N.M.MATTE, "Aerospace Law : Telecommunications Satellites", in Recueil des Cours, 1980, I, 119-250, at 140-41.

82. In the member states of the European Community, the following percentage of the population can watch foreign TV : 97% in Luxemburg, 84% in Belgium, 84% in the Netherlands, 69% in Denmark, 41% in Eire, 35% in Italy, 25% in Germany, 16% in Greece, 14% in France, 3% in the U.K. (Source : Europaeische Zeitung, September 1984, p.11).

83. For South Tyrol, see the Presidential Decree of 1 November 1973, art.10; for Val d'Aosta, see the agreement of 20 November 1974 between the Region and the public broadcasting corporation, by which the former undertook to finance the construction of transmitters (cf. R.ZACCARIA, Radiotelevisione e Costituzione, Milano, Giuffrè, 1977, at 119 (notes 76 and 77)).

84. Definition by Adv.Gen. Warner in his Opinion under the judgment of the European Court of Justice of 18 March 1980, case 52/79, Procureur du Roi v Marc J.V.C.Debaue and Others, in E.C.Reports, 1980, 833, at 860-61.
For an overview of present regulations on cable television, see e.g. Cable Television in Western Europe - A Licence to Print Money ?, The Economist Intelligence Unit Special report No.150, London, 1983.

85. See H.COHEN JEHORAM, "The Unique Dutch Broadcasting System on the Eve of the Revolution in Teletechnics and the Freedom of Information", in Netherlands Reports to the Eleventh International Congress of Comparative Law, Deventer, Kluwer, 1982, 327-343, at 338.

86. C.DEGENHART, op.cit., at 212.

87. Debauve case, cit.

88. For more thorough discussions of the various media issues in European Community law, see M.SEIDEL, "Rundfunk, insbesondere Werbefunk und innergemeinschaftliche Dienstleistungsfreiheit", in Das Europa der zweiten Generation. Gedächtnisschrift fuer Christoph Sasse, Kehl/Strassburg, Engel, 1981, vol.1, 351-376; I.E.SCHWARTZ, "La libéralisation des systèmes nationaux de radiodiffusion et de télévision sur la base du droit communautaire", in Revue du Marché Commun, 1983, 26-34.

89. See, among many others, Y.LITTUNEN, "Cultural Problems of Direct Satellite Broadcasting", in International Social Science Journal, 1980, 283-303; for the liberal view, minimising the importance of this issue, see I.de SOLA POOL, "Direct Broadcast Satellites and the Integrity of National Cultures", in K.Nordenstreng & H.I.Schiller (eds), National Sovereignty and International Communication, Norwood (N.J.), Ablex Publishing Corporation, 1979, 120-153.

90. See however W.RUDOLF & K.ABMEIER, op.cit., at 12 ff., who check the compatibility of DBS regulation with freedom of information.

91. There are many accounts of those discussions. See e.g. N.M.MATTE, op.cit.; W.RUDOLF & K.ABMEIER, op.cit.; S.COURTEIX, "La Conférence Administrative Mondiale des Radiocommunications de 1979 et le Nouvel Ordre International de l'Ether", in Annuaire Français de Droit International, 1980, 625-647; J.FREEMAN, "Toward the Free Flow of Information : Direct Television Broadcasting via Satellite", in Journal of International Law and Economics, 1979, 329-366; S.MAGIERA, "Direct Broadcasting by Satellite and a New International Information Order", in German Yearbook of International Law, 1981, 288-305; L.CONDORELLI, "Principi di diritto internazionale in tema di radiodiffusione diretta via satellite", in Il Diritto delle Radiodiffusioni e delle Telecomunicazioni, 1980, 1-40; C.A.COLLIARD, "La télévision directe par satellites", in La circulation des informations et le droit international, op.cit., 143-170; S.A.LEVY, "Institutional Perspectives on the Allocation of Space Orbital Resources : the ITU, Common User Satellite Systems and Beyond", in Case Western Reserve Journal of International Law, 1984, 171-202.

92. There have, thus, been plans for a common Scandinavian satellite 'Nordsat' (see C.SANDEN, "Nordsat und seine Alternativen", in Media Perspektiven, 1981, 184 ff.). A plan for a common zone between the German Federal Republic,

Austria and Switzerland was opposed by the German Democratic Republic and Czechoslovakia (see W.RUDOLF & K.ABMEIER, op.cit., at 5), presumably because the eccentric position of Austria would cause a large spill-over.

93. For a description of the geostationary orbit and the various legal issues connected with it, see C.Q.CHRISTOL, "The Geostationary Orbital Position as a Natural Resource of the Space Environment", in Netherlands International Law Review, 1979, 5-23; S.GOROVE, "The Geostationary Orbit : Issues of Law and Policy", in American Journal of International Law, 1979, 444-461.

94. See S.MAGIERA, op.cit., at 298 ff.

95. L.CONDORELLI, op.cit., at 32. This author even thinks that the regulation of DBS might have a restrictive effect on existing practice in the field of radio regulations (id., at 35, note 53).

96. The debate in Germany on this question is illustrated by the contrasting legal analyses of U.LANG & E.SCHWARZ, "Fernsehen - kuenftig ein 'Spiel ohne Grenzen'", in Zeitschrift fuer Rechtspolitik, 1981, 287-290; and W.LOEWER, "Auslaendisches Werbefernsehen und deutsches Verfassungsrecht", in Juristenzeitung, 1981, 730-737.

PART FOUR : EDUCATIONAL RIGHTS

Chapter One
Comparative Constitutional Law

1. F.CAPOTORTI, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, U.N.Doc.E/CN.4/Sub.2/384/Rev 1, 1979, at 84.
2. V.VAN DYKE, "Human Rights without Distinction as to Language", in International Studies Quarterly, 1976, 3-38, at 22.
3. R.H.BILLIGMEIER, A Crisis in Swiss Pluralism. The Romansh and their Relations with the German- and Italian-Swiss in the Perspective of a Millennium, The Hague, Mouton, 1979, at 347 ff.
4. See P.SCHAEPPPI, Der Schutz sprachlicher und konfessioneller Minderheiten im Recht von Bund und Kantonen, Zuerich, Schulthess Polygraphischer Verlag, 1971, at 111-113.
5. See H.HOSTERT, "La situation multilingue au Grand-Duché de Luxembourg", in Recherches Sociologiques, 1983, 29-44, at 37-39; and F.HARTWEG, "La situation linguistique au Grand-Duché de Luxembourg", in Carleton Germanic Papers, 1976, 37-63, at 53-56.
6. H.KLOSS, "Volksgruppenrecht und Schule", in System eines internationalen Volksgruppenrecht, Vol.III, Wien, Braumueller, 1978, 1-44, at 28.
7. This is also the conclusion arrived at by F.CAPOTORTI, op.cit., at 88.
8. Outstanding, here, is the Swedish minority in Finland, disposing of an entirely Swedish institution of higher education, the Abo Akademi at Abo/Turku, and of the bilingual university of Helsinki. A number of Welsh courses are offered by the University College of Wales at Aberystwyth and, to a lesser extent, by the University College at Bangor (J.L.WILLIAMS, "The Welsh Language in Education", in M.Stephens (ed), The Welsh Language Today, Llandysul, Gomer

Press, 1979, 93-111, at 105 ff.). Irish is in a similar position in the Irish Republic.

9. J.A.FISHMAN, "Bilingual Education : What and Why ?", in Sprachen und Staaten. Festschrift Heinz Kloss, Hamburg, Stiftung Europa-Kolleg, 1976, 125-165, at 126; H.KLOSS, op.cit., at 123. For full presentations of bilingual education, from a sociolinguistic point of view, see J.A.FISHMAN, op.cit., and W.B.MACKEY, "A Typology of Bilingual Education", in J.A.Fishman (ed), Advances in the Sociology of Language, II, The Hague, Mouton, 1972, 413-432.

10. W.F.FOSTER, "Bilingual Education : An Educational and Legal Survey", in Journal of Law and Education, 1976, 149-171, at 171. In the same sense : J.R.EDWARDS, "The Context of Bilingual Education", in Journal of Multilingual and Multicultural Development, 1981, 25-44, at 29 ff.; S.ROSENBAUM, "Educating Children of Immigrant Workers : Language Policies in France & the U.S.A", in American Journal of Comparative Law, 1981, 424-465, at 454 ff.

11. J.R.EDWARDS, op.cit., at 29.

12. Ibid.

13. Id., at 31, with further reference to the literature.

14. For some discussions of the objectives of the education of migrant children, see A.LEBON, "Maintien des liens culturels ou insertion des migrants : quelles relations ?", in Revue française des affaires sociales, 1983, 89-114; A.VERDOODT, "Problèmes sociolinguistiques des enfants étrangers", in Recherches Sociologiques, 1979, 305-316; A.VAZQUEZ, "Children of Exiles and Immigrants", in G.Mialaret (ed), The Child's Right to Education, Paris, Unesco, 1979, 129-138. See also supra, p.67 ff.

15. Among the exceptions, one could mention the United Kingdom, where the freedom of the local school boards in determining the subjects to be included in the curriculum, is considerable. Indeed, describing a general policy as to the use of languages in education is nearly impossible in the British case. The analysis, to be useful, must go down to the level of counties and individual schools. See e.g. P.M.RAWKINS, "The Implementation of Language Policy in the Schools of Wales", in Studies in Public Policy, n.40, 1979.

16. H.KLOSS, Grundfragen der Ethnopolitik im 20.Jahrhundert, Wien, Wilh.Braumüller, 1969, at 136.

17. See above p.93.
18. In Actualité juridique - droit administratif, 1978, 565, with note by J.RIVERO.
19. See above p.106.
20. See L.FAVOREU & L.PHILIP, Les grandes décisions du Conseil Constitutionnel, 2nd ed, Paris, sirey, 1979, at 414.
21. Judgment of 16 July 1971, in L.FAVOREU & L.PHILIP, op.cit., at 236.
22. 262 U.S. 390 (1923).
23. Bartels v Iowa, 262 U.S. 404 (1923).
24. The statute ran as follows :
"Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.
Section 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade (...)"
25. See the list in A.H.LEIBOWITZ, "English Literacy : Legal Sanction for Discrimination", in Notre Dame Lawyer, 1969, 7-67, at 22 (note 138).
26. See, for a general treatment of this historical context, H.KLOSS, The American Bilingual Tradition, Rowley (Mass.), Newbury House, 1977, at 71 ff.
27. Meyer v Nebraska, cit., at 403.
28. Ibid.
29. 268 U.S. 510 (1925).
30. See above, p.138 ff.
31. Meyer v Nebraska, cit., at 401.
32. H.KLOSS, The American Bilingual Tradition, cit., at 73. But one cannot agree with this author when he adds : "Entirely un-European is the justification given by the court for this cornerstone of American nationality law"; in Europe, assertedly, one would have needed specific minority rights. The whole of my study wants to show, on the contrary, that

the implicit protection of language values through fundamental rights is pervasive in Europe as well.

33. The Fourteenth Amendment, the legal basis of Meyer, only applies to the states and not to the federation. For the latter, the issue was decided in the same sense in Farrington v Tokushige (273 U.S. 284), striking down a restrictive regulation on the use of languages applying in the schools of Hawaii (then still a federal territory).

34. See A.H.LEIBOWITZ, op.cit., at 46.

35. 381 U.S. 479 (1965).

36. 410 U.S. 113 (1973).

37. L.TRIBE, American Constitutional Law, Mineola N.Y., The Foundation Press, 1978, Ch.15, 886 ff. See also G.GUNTHER, Cases and Materials on Constitutional Law, Mineola N.Y., The Foundation Press, 1975, 616 ff. And also Comment, "Private School Desegregation under Section 1981", in University of Pennsylvania Law Review, 1975-76, 714-754, at 740 : "Meyer and Pierce are of course completely compatible with the new cases proclaiming associational and privacy rights. They have been absorbed into the new jurisprudence of the Bill of Rights, and one suspects if they were decided today their language would closely resemble that of the privacy and association cases".

38. For the narrow reading, see S.R.GOLDSTEIN, "The Asserted Constitutional Right of Public School Teachers to Determine what they Teach", in University of Pennsylvania Law Review, 1975-76, 1293-1357, at 1306 (note 38); for a large interpretation of curricular discretion, see e.g. "Developments in the Law - Academic Discretion", in Harvard Law Review, 1968, 1045-1159, at 1054 ff.

39. Meyer v Nebraska, cit., at 402 : "(...) the power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports".

40. Prince v Massachusetts 321 U.S. 158 (1943).

41. See further, p.536 ff.

42. Trustees of the Roman Catholic Schools for the City of Ottawa v Mackell, 32 Dominion Law Reports 1 (1917).

43. See P.W.HOGG, "Constitutional Power over Language", in The Constitution and the Future of Canada, Toronto, Richard De Boo Ltd, (no date), 229-249, at 243-245.

44. Protestant School Board of Greater Montreal v Minister of Education of the Province of Quebec et al., Superior Court, Montreal, judgment of April 6, 1976, in Dominion Law Reports (3 rd) 645 (1978).

45. W.TETLEY, "Language and Education Rights in Quebec and Canada (A Legislative History and Personal Political Diary)", in Law and Contemporary Problems, 1982, 177-219, at 213-215, who notes that "the total effect on the entire grant to a school at which an unqualified student attends is far from clear" (at 215). On the regime of Quebec public education, and on the changes that might be imposed under the new Canadian Charter of Rights and Liberties, see further, p.404 ff.

46. W.KAEMPFER, "Bestand und Bedeutung der Grundrechte im Bildungsbereich in der Schweiz", in Europaeische Grundrechte Zeitschrift, 1981, 687-702, at 694.

47. The cantons of Luzern, Uri, Obwald, Nidwald, Zug, Sankt Gallen, and Ticino (see H.PLOTKE, Schweizerisches Schulrecht, Bern/Stuutgart, Haupt, 1979, at 331).

48. Judgment of the Federal Tribunal of 31 March 1965, Association de l'Ecole francaise, in Arrets du tribunal fédéral, 91 I, 480. See above, p.249 and 273 ff.

49. Idem, at 487.

50. Idem, at 486. See the discussion of this point, supra, p.249.

51. Cf.supra, p.273.

52. Judgment of the Federal Tribunal, cit., at 486.

53. Ibid.

54. See the criticism by P.SALADIN, "Bemerkungen zur schweizerischen Rechtsprechung des Jahres 1965", in Zeitschrift fuer Schweizerisches Recht, 1966, 419-464, at 459, who rightly contrasts the case of the hotel and shop signs in Ticino, where the survival of the Italian language

justified the restrictions on linguistic freedom (cf. supra, p.272), with the entirely different circumstances of the Ecole française case. Along the same lines, see H.PLOTKE, op.cit., at 168-169.

55. Article 67 reads as follows : "Austrian nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Austrian nationals. In particular they shall have an equal right to establish, manage, and control at their own expense charitable, religious, and other educational establishments, with the right to use their own language and to exercise their religion freely therein".

56. See above, p.251.

57. What those conditions aim at is the equivalence ('Gleichwertigkeit'), and not the similarity ('Gleichartigkeit') of private to public schools, and any requirement as to the pedagogical aims, contents and methods would conflict with this premise (T.MAUNZ, "Kommentar zu Art.7", in Maunz-Duerig-Herzog, Grundgesetz, 4th ed., (loose-leaf), at n.74-76 ; for the use of those same terms, see already H.HECKEL, "Entwicklungslinien im Privatschulrecht", in Die Oeffentliche Verwaltung, 1964, 595-601, at 596.

58. This, at least, is the position taken by V.CRISAFULLI, "Libertà di scuola e libertà di insegnamento", in Giurisprudenza Costituzionale, 1958, at 486.

59. See e.g. J.ROBERT, Libertés publiques, Paris, Ed.Montchrestien, 3rd ed., 1982, at 504.

60. See e.g. A.MAST & J.DUJARDIN, Overzicht van het Belgisch Grondwettelijk Recht, Gent, Story-Scientia, 7th ed, 1983, at 545; G.CRAENEN, "Vrijheid van onderwijs", in Liber Amicorum Josse Mertens de Wilmars, Antwerpen, Kluwer & Zwolle, Tjeenk Willink, 1982, 25-46, at 33 ff.

61. See above, p.275 ff.

62. See e.g. A.MAST & J.DUJARDIN, op.cit., at 548. And H.HECKEL, op.cit., at 596.

63. Switzerland belongs to all three categories, due to the absence of rules at the federal level on this subject : most cantonal constitutions authorise but do not require subsidies; some prohibit them expressly; only the most recent constitution (canton Jura) grants a right to financial

support by public authorities. See W.KAEMPFER, op.cit., at 694.

64. See above, p.282.

65. In Bundesverwaltungsgerichtsentscheidungen 27, 360 (but see the critical note by H.WEBER, "Noch einmal : grundgesetzlicher Anspruch auf Privatschulsubvention", in Juristenzeitung, 1968, 779-783). In favour of recognising such a right, see also H.J.FALLER, "Bestand und Bedeutung der Grundrechte im Bildungsbereich in der Bundesrepublik Deutschland", in Europäische Grundrechte Zeitschrift, 1981, 611-628, at 618.

66. For a recent overview of the debate, see M.KLOEPFER & K.MESSERSCHMIDT, "Privatschulfreiheit und Subventionsabbau", in Deutsches Verwaltungsblatt, 1983, 193-204.

67. Decision of 23 November 1977, in Actualité juridique - droit administratif, 1978, 565, with note by J.RIVERO.

68. A.EMBID IRUJO, "El contenido del derecho a la educación", in Civitas - Revista Española de Derecho Administrativo, 1981, 653-683, at 675 ff.

69. See the general overview of the various, extremely elaborate, doctrinal constructions in S.MASTROPASQUA, Cultura e scuola nel sistema costituzionale italiano, Milano, Giuffrè, 1980, at 83 ff.

70. For some clarification, see e.g. M.GIGANTE, "Il concetto di parità tra scuole statali e non statali e le modalità di attuazione del principio", in Foro Amministrativo, 1972, III, 736 ff.

71. Judgment of June 25, 1973, 413 U.S. 825.

72. Judgment of June 28, 1971, 403 U.S. 602.

73, 103 S.Ct. 3062.

74. See the comment in "The Supreme Court, 1982 Term", in Harvard Law Review, 1983, 70-306, at 148-156.

75. Art.24.2 of the Act of 29 May 1959.

76. On this regime, see the next section, at p.397-398, and accompanying notes.

77. One author has therefore drawn the conclusion that freedom of education does not, in Belgium, include the freedom to choose the language of education (G.CRAENEN, op.cit., at 37). Legally speaking, this is inaccurate. As long as no positive claims are made upon the State, schools are perfectly free in their linguistic regime.

78. See the data provided by J.VELU, "Contenu et signification des droits fondamentaux dans le domaine de l'instruction", in Administration publique, 1982, T.1, 1-26, at 5.

79. See T.MODEEN, "The International Protection of the National Identity of the Aland Islands", in Scandinavian Studies in Law, 1973, 175-210 (with the text of the Act in annex).

80. For a full analysis of this act, see J.ROBERT, "La loi Debré du 31 décembre 1959 sur les rapports entre l'Etat et les établissements d'enseignement privé", in Revue de Droit Public, 1962, 213-269.

81. G.MARCOU, "La liberté de l'enseignement et la liberté des enseignants", in Revue de Droit Public, 1980, 35-82, at 38.

82. During the year 1976-77, only 15.000 pupils out of 1 million at the primary level, and 100.000 out of 1 million at the secondary level belonged to this second category of 'écoles hors contrat' (G.MARCOU, op.cit., at 44, note 23).

83. Law of 8-6-1977, art.13.3 : minimum size to qualify for subsidies is 10 for national minority schools, instead of 28 for other private schools (J.ZEH, Die deutsche Sprachgemeinschaft in Nordschleswig. Ein soziales Gebilde im Wandel, Stuttgart, Ferdinand Enke Verlag, 1982, at 139).

84. See Europa Ethnica, 1983, at 208.

85. For a description of their case from a sociological point of view, R.PAULSTON, "Separate Education as an Ethnic Survival Strategy", in Anthropology and Education Quarterly, 1977, 181-188.

86. Half of all Frisian bilingual schools are private (H.KLOSS, "Volksgruppenrecht und Schule", op.cit., at 15). This is due of course to the exceptionally high subsidies granted to private schools in the Netherlands.

87. Such as the Greek and Muslim immigrants (e.g. in Germany). Their private schools are often of the 'afternoon'

or 'evening' type, complementing, rather than substituting for the public school.

88. See above, p.101-102.

89. In the case of Switzerland, the obligation rests on the cantons, and not on the national authorities. Whether it is a judicially enforceable right was left undecided by the Federal Tribunal (in Arrêts du Tribunal Fédéral 103 Ia 398), but is affirmed by legal writing (W.KAEMPFER, op.cit., at 697).

90. For France, see e.g. P.H.TEITGEN, "Commentaire du Préambule", in Luchaire & Conac (eds.), La Constitution de la République française, T.1, Paris, Economica, 1979, 37-58, at 44. For Italy, see S.CASSESE & A.MURA, "Art.33-34", in Commentario della Costituzione (a cura di G.Branca), Bologna, Zanichelli & Roma, Soc.Ed.del Foro Italiano, 1976, 210-257, at 253 ff.

91. See the discussion in F.BRUNO, "Prime considerazioni sui soggetti attivi del diritto allo studio", in Scritti in onore di Costantino Mortati, Milano, Giuffrè, 1977, vol.3, 171-202, at 176-187. There is a similar condition for the access of foreigners to French universities (Decree of 31 December 1981, art. 16 al.3).

92. In Bundesverfassungsgerichtsentscheidungen, 33,303.

93. Idem, at 333.

94. Cf. the characteristic summary of the Court's decision by O.KIMMICH (case note, in Juristenzeitung 1972, 686-699, at 696: "Unzulaessigkeit 'an sich', Zulaessigkeit in der gegebenen faktischen situation, Unzulaessigkeit auch in dieser Situation bei Ueberschreitung gewisser Grenzen". See also the negative appreciation by J.ISENSEE, "Verfassung ohne soziale Grundrechten", in Der Staat, 1980, 367-384, at 372.

95. See the status questionis in H.J.FALLER, op.cit., at 618.

96. Arguing in this sense, K.SPIELBUECHLER, "Bestand und Bedeutung der Grundrechte im Bildungsbereich in Oesterreich", in Europaeische Grundrechte Zeitschrift, 1981, 675-686, at 682.

97. For a recent overview of the rich case-law on this matter, see F.E.HUMBORG, "Die Vergabe von Studienplaetzen durch die ZVS. Eine Rechtsprechungsbericht ueber neuere entscheidungen", in Deutsches Verwaltungsblatt 1984, 545-552.

98. Equality may at times take the form of affirmative action attributing a more than proportional share of available places to members of a language minority; see e.g. the Finnish case discussed infra, p.556.

99. "La educacion tendra por objeto el pleno desarrollo de la personalidad humana en el respeto a los principios democraticos y a los derechos y libertades fundamentales".

100. Cf.supra,p.66 ff.

101. A.MILIAN MASSANA, "Los derechos linguisticos en la ensenanza, de acuerdo con la Constitucion", in Revista Española de Derecho Constitucional, 1983, 357-371, at 364-365. Art.2 of the German Basic Law, for its part, protects a general right to a 'free development of one's personality'. It may be considered to apply to education, as to any other domain, but in order to serve as a basis for claims regarding the linguistic regime of public education, this freedom right should be given a 'positive' dimension, which it presently lacks (see the analysis by R.SCHOLZ, "Das Grundrecht der freien Entfaltung der Persoenlichkeit in der Rechtsprechung des Bundesverfassungsgerichts", in Archiv des oeffentlichen Rechts, 1975, 80-130 and 265-290).

102. On the amparo, see above, p.190 and accompanying notes.

103. A.GRISEL, "Les droits sociaux", in Revue de droit suisse, 1973, 1-153, at 73-74.

104. See the text of the proposed right to education in J.VELU, op.cit., at 16.

105. On the reasons of this failure, see F.C.L.M.CRIJNS, op.cit.

106. See e.g. the codification proposals in BOECKENFOERDE, JEKEWITZ & RAMM (eds), Soziale Grundrechte, Heidelberg/Karlsruhe, C.F.Mueller, 1981; and the overview of the discussions in J.LUECKE, "Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsauftraege", in Archiv des oeffentlichen Rechts, 1982, 15-60, at 16 ff.

107. The possibility is discussed in J.M.LAVIEILLE, "Les principes fondamentaux de l'enseignement dans le droit positif francais", in Actualité juridique - Droit administratif, 1978, 188-202, at 197-198.

108. The Loi Deixonne, adopted in 1951, provided for instruction in some of the minority languages (Breton,

Basque, Occitan, Catalan), but outside the regular school curriculum and hours schedule, and on an optional basis (requiring the agreement of the parents, the teacher and the school direction). Its provisions have been effectively implemented from the 1970's onwards, and have been extended to Corsican and German (in Alsace). See the overview in Le Monde de l'Education, n.20, September 1976, "Le réveil des langues régionales". Promises by the new socialist government to enhance the status of the 'regional languages' have not yet resulted in spectacular improvements. At the secondary school level, there is often a wide choice among foreign languages, some of which happen to be of interest to indigenous (German or Dutch) or immigrant (Portuguese or Arabic) minorities. A recent ministerial 'circulaire' of 21 June 1982 now also offers the possibility of introducing the study of regional languages in secondary education.

109. See W.KAEMPFER, "Bestand und Bedeutung der Grundrechte im Bildungsbereich. Generalbericht", in Europäische Grundrechte Zeitschrift, 1981, 721-737, at 725.

110. Art.27.3 of the Spanish Constitution: "Los poderes publicos garantizan el derecho que asiste a los padres para que sus hijos reciban la formacion religiosa y moral que esté de acuerdo con sus propias convicciones". For a general discussion of the parental right in Germany, See Th.MAUNZ, "Das Elternrecht als Verfassungsproblem", in Festschrift fuer Ulrich Scheuner, Berlin, Duncker & Humblot, 1973, 419-430.

111. See G.EISELT, "Islamischer Religionsunterricht an oeffentlichen Schulen in der Bundesrepublik Deutschland", in Die Oeffentliche Verwaltung, 1981, 205-211.

112. Judgment of 26 February 1980, in Bundesverfassungsgerichtsentscheidungen, 53, 185.

113. Judgment of 30 December 1981, in Die Oeffentliche Verwaltung, 1982, 244.

114. See the case-notes by H.J.MENGEL, in Die Oeffentliche Verwaltung, 1982, 246; H.U.EVERS, "Grundrecht auf Vermittlung umfassender Allgemeinbildung?", in Juristenzeitung, 1982, 459; and L.DIETZE, "Elternrecht als Bestimmungsrecht und Anspruchsgrundlage der schulischen 'umfassenden Allgemeinbildung' ihrer Kinder", in Neue Juristische Wochenschrift, 1982, 1353-1362.

115. On this neglect of social rights in American constitutional law, see generally L.HENKIN, "Economic-Social

Rights as 'Rights': A United States Perspective", in Human Rights Law Journal, 1981, 223-236.

116. San Antonio Independent School District v Rodriguez, 411 U.S. 1 (1973), at 35.

117. See "The Interpretation of State Constitutional Rights", in Harvard Law Review, 1982, 1324-1502, at 1444-1459. School finance litigation provides a good example of the role played by state educational rights; see L.KADEN, "Courts and Legislatures in a Federal System : The Case of School Finance", in Hofstra Law Review, 1983, 1205-1260.

118. L.TRIBE, American Constitutional Law, op.cit., at 1005.

119. On the right to vote : Reynolds v Sims, 377 U.S. 533 (1964); on the right to travel : Shapiro v Thompson, 394 U.S. 618 (1969).

120. W.P.FOSTER, "Bilingual Education...", op.cit., at 158.

121. Cf.infra, p.536 ff.

122. On the ideological climate at the time of the adoption of the 1932 law, see J.D.RYCX D'HUISNACHT, "L'opinion parlementaire et la réforme du régime linguistique de l'enseignement en 1932", in Res Publica, 1970, 543-589.

The principle of territorial unilingualism is not yet absolute however. First of all, French public education is provided by the law in six suburbs of Brussels and the communes of Leuven and Heverlee, within the Dutch linguistic area; their regime was discussed by the European Human Rights Court in the Belgian Linguistics case, cf.infra, p.590.

In addition, there are a number of 'border localities' with facilities for the non-official language; their educational regime has been the object of some legal controversy (see the recent overview in "Droit à l'instruction et liberté d'enseignement", in Documents CEPESS, 1983, n.5-6, at 152). As for the German linguistic area, German is the ordinary medium of education, but French has a protected minority status at the primary level (articles 3 and 6 of the 1963 law), and even at the secondary level (without any express legal authorisation).

123. For some years, though, no such free choice existed in Brussels, but parents had to send their children to the schools corresponding to the language used at home. The language declaration they had to make to that effect could (theoretically) be controlled by 'linguistic inspectors'. The provision, which provoked considerable hostility among the

Francophones, but was principally upheld by the European Human Rights Commission (infra, p.592), was abandoned by the Law of 26 July 1971, art.88, in the framework of a general package-deal on the question of Brussels (see the discussion by P.WIGNY, La troisième révision de la Constitution, Bruxelles, Bruylant, 1972, at 386-389.

Finally, a recent Decree adopted by the Council of the French Community attempts to circumvent the principle of territoriality by favouring the creation of French public schools in Flanders under the formal guise of subsidiaries of public schools situated in Wallonia or Brussels (Decree of 2 December 1982 "relatif aux institutions françaises d'enseignement qui dispensent un enseignement en dehors des limites territoriales de la Communauté française"). This Decree is open to the same objection of being ultra vires the jurisdiction of the French Community as the Decree on language use in private enterprises mentioned above, p.268.

124. Separate French and German secondary schools exist in the larger bilingual towns of Fribourg and Murten (canton of Fribourg), Biel/Bienne (canton of Berne), Sion and Sierre (canton Valais). For a general overview of the regime existing along the linguistic border, see J.A.HUNT, "Education and Bilingualism on the Language Frontier in Switzerland", in Journal of Multilingual and Multicultural Development, 1980, 17-39.

125. Derungs gegen Gemeinde St.Martin und Regierung des Kantons Graubünden, Judgment of 30 October 1974, in Arrêts du tribunal fédéral, 100 Ia, 465.

126. On this procedure, see above, p.189 ff.

127. On the significance of art.116.1, see above, p.273 ff.

128. Ibid.

129. Derungs, cit., at 466.

130. Id., at 470. The Tribunal does not specify on what legal basis such a right might arise. Is it a 'positive' component of linguistic freedom, as I tentatively argued earlier (see p. above), or is it part of an unwritten constitutional right to education? In both cases, one may wonder whether it would hold only for children whose mother tongue is one of the country's official languages, or for others (migrant children...) as well.

131. On the right to use a language as flowing from its official status, see below, p.638 ff.

132. Judgment of 21 April 1980, in Tribunal Supremo - Repertorio de Jurisprudencia, 1980, n.1392.

Note however that the Tribunal Supremo is the highest court in the ordinary judicial order, but its pronouncements on constitutional law do not have the same authority as those of the Constitutional Tribunal.

133. See the arguments developed by A.MILIAN MASSANA, "Los derechos linguisticos en la ensenanza...", op.cit., at 361-363.

134. Terms used by A.MILIAN MASSANA, op.ult.cit., at 360.

135. Art.15 of the 'Ley basica de normalizacion del uso del Euskera' of 24 November 1982 : "se reconoce a todo alumno el derecho de recibir la enseñanza tanto en euskera como en castellano en los diversos niveles educativos".

136. Art.19.1 of the Statute of Trentino-Alto-Adige : "Nella provincia di Bolzano l'insegnamento nelle scuole materne, elementari e secondarie è impartito nella lingua materna italiana o tedesca degli alunni da docenti per i quali tale lingua sia ugualmente quella materna". The identification of the mother tongue is entirely subjective, as it depends on a declaration of the father which cannot be second-guessed by the school authority (art.19.3).

137. See a description of the early practice in M.SIGUAN, "Education and Bilingualism in Catalonia", in Journal of Multilingual and Multicultural Development, 1980, 231-242. The bilingual option was later confirmed by the regional 'Ley de normalizacion linguistica' of 18 April 1983, art.14.5; yet, children at the earlier stages of education have the right to be educated either in Catalan or in Castillian (art.14.2). See the analysis by A.MILIAN I MASSANA, "De la separacio a la conjuncio linguistica a l'ensenyament : el titol II de la Llei 7/1983, de 18 d'Abril", in Revista de Llengua i Dret, 1984, n.3, 33-41.

138. Art.39 of the Special Statute : "Nelle scuole di ogni ordine e grado, dipendenti dalla regione, all'insegnamento della lingua francese è dedicato un numero di ore settimanali pari a quello della lingua italiana. L'insegnamento di alcune materie puo essere impartito in lingua francese". Note the subordinate position of French, which constitutes an exception to the general principle of equality of both languages (judgment of the Constitutional Court of 11 December 1969, in Rivista giuridica della scuola, 1970, 198, at 203 (and note by R.CHIARELLI)). Yet, a recent implementing law (Law n.196 of 16 May 1978, art.28) has attributed the

final responsibility to decide which courses will be taught in French to the regional authorities themselves (be it with the previous agreement of the national Ministry of Education). As from the school year 1983-84, both languages were used for the same number of hours at the nursery school level (Europa Ethnica, 1983, at 105).

On the question whether the local Franco-provencal 'patois' should be taught instead of, or in addition to, French, see G.CORNILOLO, "Insegnamento della lingua dei valdostani. Ma quale ?", in Cinquenes Jornades del Ciemen - Ensenyament de la llengua i mitjans de comunicacio social, Publicacions de l'Abadia de Montserrat, 1981, 207-224.

139. For this argument, see A.PIZZORUSSO, Il pluralismo linguistico tra Stato nazionale e autonomie regionali, Pisa, Pacini editore, 1975, at 275-276 and A.MILIAN MASSANA, op.cit. at 360, note 5.

140. On the role of autonomy in the protection of linguistic diversity in general, see above, p.72 ff.

141. For more details on the role of educational autonomy, see B.DE WITTE, "La pluralité ethnique et l'autonomie culturelle - étude comparative", in Y.Mény & B.De Witte (eds), Centres et périphéries - le partage du pouvoir, Paris, Economica, 1983, 97-126, at 105 ff.

142. Art.149.1.30.

143. Art.148.1.17.

144. Organic Law n.5 of 19 June 1980, art.2 b.

145. This provision was upheld by the Constitutional Tribunal against a recourse by the Basque government, that argued that its educational autonomy had been unduly limited by the Organic Law ; judgment of 27 October 1983, in Boletín de Jurisprudencia Constitucional, 1983, n.31, 1373, esp. at 1378

:
"El Gobierno ha fijado unos horarios minimos para todo el territorio nacional, y en materia linguistica los ha fijado solo con relacion al castellano, ya que al referirse a ensenanzas minimas en todo el Estado se ha limitado correctamente a regular la ensenanza de la unica lengua que es oficial en todo su territorio y que, por tanto, debe ensenarse en todo él con arreglo de unos minimos criterios concernientes tanto al contenido como a los horarios minimos; mientras que la regulacion de la ensenanza de otras lenguas oficiales corresponde a las respectivas Instituciones autonomicas. Pero de las veinticinco horas semanales lectivas

que normalmente comprende el horario escolar en el ciclo medio de EGB, el horario minimo fijado por el Real Decreto impugnado ocupa solo dieciseis horas. Quedan, pues, a disposicion de la Comunidad Autonoma nueve horas, mas de un tercio de las veinticinco horas senaladas, lo que parece razonable para poder organizar en ese tiempo las ensenanzas de euskera, asi como completar, ampliar o adaptar las ensenanzas minimas en la forma que estime conveniente".

146. On the distribution of powers in this field, see A.MILIAN MASSANA, op.cit., and L.LOPEZ GUERRA, "La distribucion de competencias entre Estado y Comunidades Autonomas en materia de educacion", in Revista Espanola de Derecho Constitucional, 1983, 293-333.

147. F.CAPOTORTI, op.cit. (note 1), at 85; E.H.LINDSEY Jr., "Linguistic Minority Educational Rights in Canada : an International and Comparative Perspective", in Georgia Journal of International and Comparative Law, 1983, 515-547, at 521; W.TETLEY, op.cit., at 183-185 (Manitoba) and 188-190 (Ontario).

148. On the educational provisions of the 1977 Charter, see e.g. W.D.COLEMAN, "From Bill 22 to Bill 101 : The Politics of Language under the Parti Québécois", in Canadian Journal of Political Science, 1981, 459-485, at 466 ff.

149. E.H.LINDSEY, op.cit., at 535.

150. Op.ult.cit., at 538.

151. Op.ult.cit., at 536.

152. Quebec Association of Protestant School Boards et al. v. Attorney General of Quebec et al., Quebec Superior Court, judgment of 8 September 1982, in 140 Dominion Law Reports (3rd) 33 (1983), upheld by the Quebec Court of Appeals on 9 June, 1983. The court further rejected the argument of the Quebec government that its linguistic legislation could be justified on the basis of s.1 of the Charter of Rights and Liberties, according to which the fundamental rights may be subject to reasonable limits that can be "demonstrably justified in a free and democratic society" (id., at 49 ff.).

153. What is meant are public schools (F.ERMACORA, Handbuch der Grundfreiheiten und der Menschenrechte. Ein Kommentar zu den oesterreichischen Grundrechtsbestimmungen, Wien, Manz, 1963, at 554).

154. For a description of the minority school situation in Carinthia, and the reasons for the lack of complete implementation, see Th.VEITER, Das Recht der Volksgruppen und Sprachminderheiten in Oesterreich, Wien, Braumueller, 1970, at 708-735.

155. In Burgenland, an old provincial statute of 1937 organises public education in Croat and Hungarian in the localities where those minorities constitute at least 30% of the population. See Th.VEITER, op.ult.cit., at 675 ff. On the question whether art.7.2 of the State Treaty could, in the absence of implementing legislation, be considered as directly applicable, see F.ERMACORA, op.cit., at 533-34. In a recent judgment of 28 June 1983, the Constitutional Court considered the first paragraph of art.7.3, dealing with the use of languages in judicial proceedings, as directly applicable (see infra, p.648-649). Yet, it seems difficult to extend this by analogy to art.7.2 and the right to mother tongue education; see on this point G.STADLER, Note under the judgment of 28 June 1983, in Europaeische Grundrechte Zeitschrift, 1984, 22-24, at 23.

156. On the contents of the 'Volksgruppengesetz', see infra, p.557 and 648.

157. K.SPIELBUECHLER, "Bestand und Bedeutung der Grundrechte im Bildungsbereich in Oesterreich", in Europaeische Grundrechte Zeitschrift, 1981, 675-686, at 680.

158. This provision may be considered as a specific embodiment of the general principle of equality; cf. infra, p.532.

159. On the Special Statute and the Treaty of Osimo, see above, pp.170-171.

160. According to 1978 figures, 3700 pupils were registered in Slovene schools of Trieste, and 1500 pupils in those of Gorizia (G.FRANCESCATO & M.IVASIC KODRIC, "La comunità slovena in Italia - aspetti di una situazione bilingue", in Quaderni per la promozione del bilinguismo, Dicembre 1978, 1-38, at 15). For a detailed analysis of the regime, see D.BONAMORE, Disciplina giuridica delle istituzioni scolastiche a Trieste e Gorizia, Milano, Giuffrè, 1979.

161. Cf.infra, p.512 ff.

162. This also means, accessorially, that German- and Italian-speaking children living in the Ladin localities will have

bilingual education, as an exception to the right to mother-tongue education generally guaranteed by art.19.1 of the Regional Statute (A.PIZZORUSSO, "La tutela delle minoranze linguistiche in Italia : il caso sudtirolese", in Le Regioni, 1978, 1093-1110, at 1105).

163. Judgment n.101 of 28 April 1976, in Giurisprudenza Costituzionale, 1976, 551, at 554. See the case comment by A.PIZZORUSSO, "Problemi di tutela della minoranza nella minoranza", id., at 607-610.

164. In France, for instance, the status of the languages of migrants in education is largely regulated by ministerial 'circulaires'; see the survey by S.ROSENBAUM, op.cit. (note 10), at 433-439; and J.DELRIEU, "Scolarisation des enfants de migrants et enseignement des langues d'origine. Les textes officiels et leurs applications dans le premier degré", in L.Dabène, M.Flasaquire, J.Lyons (eds), Status of Migrant Workers' Mother Tongues, Strasbourg, European Science Foundation, 1983, 23-29.

In the Federal Republic of Germany, the responsibility for education lays essentially with the Laender. Although their policy regarding guestworker children was somewhat coordinated by a Decision of the Permanent Conference of Ministers of Culture of the Laender ('Staendige Konferenz der Kultusminister der Laender') of 8 April 1976, wide differences continue to exist. One can, for instance, distinguish between a 'Bavarian model', providing for mother-tongue education in order to facilitate the children's possible reintegration in their country of origin, and a 'Berlin model', which stresses the need of assimilation in German society, with less openings towards mother tongue education (see the analysis by R.RIST, Guestworkers in Germany - The Prospects for Pluralism, New York, Praeger, 1978, at pp.187-245).

In the United Kingdom, the pattern is even more diversified, due to the large autonomy of the local educational authorities within very broad ministerial guidelines. For some views of the practice, see M.R.M.BROOK, "The 'Mother-Tongue' Issue in Britain : Cultural Diversity or Control ?", in British Journal of the Sociology of Education, 1980, 237-256; M.TSOW, "Ethnic Minority Community Languages : A Statement", in Journal of Multilingual and Multicultural Development, 1983, 361-384.

For comparative overviews, see L.PORCHER, L'éducation des enfants des travailleurs migrants en Europe : l'interculturalisme et la formation des enseignants, Strasbourg, Conseil de l'Europe, 1981; and M.REY VON ALLMEN, "Le statut des langues d'origine dans les pays d'accueil", in Status of Migrants' Mother Tongues, op.cit., 17-22.

notes to p.415

165. Cf.infra, p.614.

Chapter Two

International Law

1. This means that the legal status of the educational rights may be different from that of other rights, guaranteed by the main text of the Convention. Some countries (Spain and Switzerland) have ratified the Convention, but not the First Protocol, and are therefore not bound by its provisions.
2. Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (merits), judgment of 23 July 1968, Publications of the European Court of Human Rights, Series A (no number), to be cited as Belgian Linguistics. See above, p.316 ff.
3. See e.g. T.OPSAHL, "The Convention and the right to respect for family life, particularly as regards the unity of the family and the protection of the rights of parents and guardians in the education of children", in A.H.Robertson (ed), Privacy and Human Rights, Manchester, Univ.Press, 1973, 182-254, at 231-232.
4. Belgian Linguistics, cit., p.32, para.5.
5. A.KHOL, "Zur Diskriminierung im Erziehungswesen - das Sachurteil des Europaeischen Gerichtshofes fuer Menschenrechte vom 23-7-1968", in Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht 1970, 263-320, at 285.
6. Belgian Linguistics, cit., at p.31.
7. The Court does not exclude the possibility that there be more positive duties; see the words "inter alia"; ibid.
8. Ibid.
9. An argument which has some weight in Spanish (supra, p.391), and in American (infra, p.536) constitutional law.
10. Belgian Linguistics, cit., at p.31. On the articles 5 and 6, see infra, p.595.
11. Belgian Linguistics, cit., at p.31.

12. Id., at p.42.

13. Id., at p.31 (emphasis added).

14. See above, p.31 ff.

15. This interpretation is confirmed by the European Commission of Human Rights in a slightly later case also dealing with the language regime of education in Belgium :

"whereas the applicant's son has available to him in the area where he resides a complete set of schools which teach in that Belgian national language which is his usual or mother tongue and therefore the legal provisions which do not allow him to receive his education in another national language do not amount to a refusal of the right to education but merely to a regulation of this right". (Appl. 2924-66, Roger Van den Berghe v Belgium, in Yearbook 1968, vol.11, 412, at 454).

16. The same would of course apply to the Swiss, Finnish or Canadian systems of territorial unilingualism in education, if those countries were bound by the First Protocol to the Convention.

17. Cf.infra, p.569 ff.

18. In order to have their children educated in a public or subsidised private school, they had therefore to send them to Wallonia or (upon certain conditions) to Brussels; see above, p.398 and accompanying notes.

19. See above, p.421.

20. Belgian Linguistics, cit., at p.31 (emphasis added).

21. See above, p.387 ff.

22. E.BANNWART-MAURER, Das Recht auf Bildung und das Elternrecht. Art.2 des ersten Zusatzprotokolls zur Europaeischen Menschenrechtskonvention, Bern, Herbert Lang & Frankfurt, Peter Lang, 1975, at 87.

23. Belgian Linguistics, cit., at p.33.

24. See J.VERHOEVEN, "L'arrêt du 23 juillet 1968 dans l'affaire relative à certains aspects du régime linguistique de l'enseignement en Belgique", in Revue belge de droit international, 1970, 353-382, at 363 : "sous cet aspect, l'article 2 du protocole, ainsi interprété, n'a d'autre

notes to pp.424-429

raison d'être que d'assurer la possibilité d'une mise en oeuvre de l'art.14".

25. Infra, p.569 ff.

26. European Court of Human Rights, Campbell and Cosans v United Kingdom, judgment of 25 February 1982, in Publications of the European Court of Human Rights, Series A, n.48, at para.40.

27. European Court of Human Rights, Case of Kjeldsen, Busk Madsen and Pedersen (also known as the 'Danish Sex Education case'), judgment of 7 December 1976, in Publications of the European Court of Human Rights, Series A, n.23, at para.50.

28. Cf.infra, Sub-section B of this Section.

29. Kjeldsen..., cit., at para.50.

30. Id., para.51.

31. Belgian Linguistics, cit., at p.32.

32. E.BANNWART-MAURER, op.cit., at 116-117.

33. The argument is quoted in Belgian Linguistics, cit., at p.22

34. The importance of the language of education in the socialisation process has been discussed above, p.66 ff.

35. On this thesis of 'linguistic relativism', see above, p.61 ff.

36. One may question the universal validity of a, seemingly obvious, remark like "(...) the choice of one language as an obligatory medium does not represent the same danger of indoctrination as, for example, a teaching of political content (T.OPSAHL, op.cit., at 235).

37. Kjeldsen..., cit., para.50.

38. See above, p.54 ff.

39. Campbell and Cosans, cit.

40. Id., para.36.

41. Ibid. See however the criticism on this extensive interpretation in the dissenting opinion of Judge Evans.

42. Id., para.37.

43. Ibid.

44. See their list in E.VITTA & V.GREMENTIERI (eds), Codice degli atti internazionali sui diritti dell'uomo, Milano, Giuffrè, 1981, at 794-798.

45. E.A.ALKEMA, Studies over Europese grondrechten. De invloed van de Europese Conventie op het Nederlandse recht, Deventer, Kluwer, 1978, at 88.

46. Kjeldsen, cit., para.50.

47. Id., para.54.

48. Id., para.50.

49. The Commission commented unconclusively on the matter in the Church of Scientology case (Appl.3798/68, decision of 17 December 1968, in Yearbook of the European convention on Human Rights, XII, 306), and in the Kjeldsen... case (Appl. 5095/71, 5920/72, 5926/72, report of 21 March 1975, in Publications of the European Court of Human Rights, Series B, Vol.21, 8)

50. For the view that Art.2 guarantees private education, see e.g. T.OPSAHL, op.cit., at 243, and C.EISELSTEIN, "Staatliches Bildungsmonopol und Europaeische Menschenrechtskonvention", in Kulturverwaltungsrecht im Wandel, Stuttgart-Muenchen-Hannover, Richard Boorberg Verlag, 1981, 178-194, at 183. Contra, e.g. E.BANNWART-MAURER, op.cit., at 124, and R.ERRERA, "La Convention et les problèmes de la laïcité et de l'enseignement", in Revue des Droits de l'Homme, 1970, 579-587, at 585.

51. Church of Scientology, cit., at 320(emphasis added).

52. See Section 2 of this Chapter.

53. Belgian Linguistics, at p.49.

54. Cf.infra, p.581.

55. Cf.supra, p.418.

56. Cf.infra, p.580.

57. On a similar clause in the Spanish Constitution, see above, p.391.

notes to pp.437-443

58. See the Table at p.218a.

59. E.H.LINDSEY Jr., "Linguistic Minority Educational Rights in Canada : an International and Comparative Perspective", in Georgia Journal of International and Comparative Law, 1983, 515-547, at 541 ff.

60. On the equality clause of the Civil Covenant, cf.infra, p.624 ff.; 628 ff.

61. See e.g. The Use of Vernacular Languages in Education, Paris, Unesco, 1953, at 48.

62. Cf.infra, p.671-672.

For a different opinion, denying any relevance of art.27 to problems of education, M.LEBEL, "Le choix de la langue d'enseignement et le droit international", in Revue Juridique Thémis, 1974, 221-248, at 236-37.

63. Infra, p.654 ff.

64. P.MERTENS, "L'application de la convention et de la recommandation de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement - un bilan provisoire", in Revue des Droits de l'Homme, 1968, 91-108, at 101.

65. Art.3 (e) of the Convention.

66. For this restrictive interpretation, see M.TABORY, "Language Rights as Human Rights", in Israel Yearbook on Human Rights, 1980, 167-223, at 184.

67. The argument is used, in relation to the similar clause of art.2.2 of the Civil Covenant, by G.GAJA, "Introduzione ai patti internazionali sui diritti economici, sociali e culturali e sui diritti civili e politici", in E.Vitta & V.Grementieri (eds), Codice degli atti internazionali sui diritti dell'uomo, cit., 47-60, at 52.

68. Supra, p.158-159.

PART FIVE : EQUALITY

Chapter One

Comparative Constitutional Law

Section 1 : The Scope of Equality

1. O.WEINBERGER, "Gleichheitspostulate - Eine strukturtheoretische und rechtspolitische Betrachtung", in Oesterreichische Zeitschrift fuer Oeffentliches Recht und Voelkerrecht, 1974, 23-38, at 26.
2. P.WESTEN, "To Lure the Tarantula from its Hole : A Response", in Columbia Law Review, 1983, 1186-1208, at 1189.
3. ARISTOTLE, Nicomachean Ethics, 1134 c I.
4. H.L.A.HART, The Concept of Law, Oxford, Clarendon Press, 1961, at 159. See also H.BATIFFOL, according to whom the principle of equality "oblige (...) à analyser les situations dans leurs contextures objectives, c'est-à-dire au-delà des sujets qui y sont parties, et qui tiennent aux modes de la vie sociale" (Problèmes de base de philosophie du droit, Paris, L.G.D.J., 1979, at 406).
5. J.H.ELY, Democracy and Distrust, Cambridge, Harvard University Press, 1980, at 32. See also H.L.A.HART, op.cit., at 154 : "justice-as-equality may be levelled against almost any rule, because almost every rule is distributive, directly or indirectly".
6. H.KELSEN, "What is Justice ?", in Essays in Legal and Moral Philosophy, Dordrecht/Boston, D.Reidel Publishing Company, 1973, at 15.
7. H.L.A.HART, op.cit., at 155.
8. P.WESTEN, "The Empty Idea of Equality", in Harvard Law Review, 1982, 537-596.
9. Id., at 547-548 : "Equality is an undeniable and unchangeable moral truth because it is a simple tautology".

See also, in the same sense, O.WEINBERGER, op.cit., at 29; P.G.POLYVIOU, The Equal Protection of the Laws, London, Duckworth, 1980, at 7.

10. P.WESTEN, "The Empty Idea...", op.cit., and the following reactions and replies : S.J.BURTON, "Comment on 'Empty Ideas' : Logical Positivist Analyses of Equality and Rules", in Yale Law Journal, 1982, 1136-1152; P.WESTEN, "On Confusing Ideas : Reply", in Yale Law Journal, 1982, 1153-1165; E.CHEMERINSKY, "In Defense of Equality : A Reply to Professor Westen", in Michigan Law Review, 1983, 575-599 ; A.D'AMATO, "Is Equality a Totally Empty Idea ?", in Michigan Law Review, 1983, 600-603; P.WESTEN, "The Meaning of Equality in Law, Science, Math, and Morals : A Reply", in Michigan Law Review, 1983, 604-663; K.GREENAWALT, "How Empty is the Idea of Equality", in Columbia Law Review, 1983, 1167-1185; P.WESTEN, "To Lure the Tarantula...", op.cit.;

11. A.ROSS, On Law and Justice, Berkeley, University of California Press, 1974, at 274.

12. P.WESTEN, "The Empty Idea...", op.cit., at 542.

13. O.WEINBERGER, op.cit., at 31.

14. K.KARST, "The Supreme Court - 1976 Term - Foreword : Equal Citizenship under the Fourteenth Amendment", in Harvard Law Review, 1977, 1-68, at 7; K.GREENAWALT, op.cit., at 1180 ff.

15. J.R.LUCAS, The Principles of Politics, Oxford, Clarendon Press, 1966, at 246. This conception of equality could therefore be called 'heteronomical equality' (see J.JIMENEZ CAMPO, "La igualdad juridica como limite frente al legislador", in Revista Espanola de Derecho Constitucional, 1983, 71-114, at 74.

16. K.HESSE, "Der Gleichheitsgrundsatz im Staatsrecht", in Archiv des oeffentlichen Rechts, 1951-52, 167-224, at 175.

17. J.R.LUCAS, op.cit., at 253.

18. J.JIMENEZ CAMPO, op.cit., at 74 : "es en esta universalizacion de la condicion de ciudadano, en la abolicion del privilegio y en la consiguiente destruccion de ambitos inmunes al poder legislativo del Estado donde reside la aportacion inicial - valida aun - del primer constitucionalismo". Very characteristic in this regard is the Preamble to the 1791 French Constitution, which provides a catalogue of existing status inequalities :

"L'Assemblée nationale, voulant établir la Constitution française sur les principes qu'elle vient de reconnaître et de déclarer, abolit irrévocablement les institutions qui blessaient la liberté et l'égalité des droits.

Il n'y a plus ni noblesse, ni pairie, ni distinctions héréditaires, ni distinctions d'ordres, ni régime féodal, ni justices patrimoniales, ni aucun des titres, dénominations et prérogatives qui en dérivait, ni aucun ordre de chevalerie, ni aucune des corporations ou décorations, pour lesquelles on exigeait des preuves de noblesse, ou qui supposaient des distinctions de naissance, ni aucune autre supériorité que celle des fonctionnaires publics dans l'exercice de leurs fonctions.

Il n'y a plus ni vénalité ni hérédité d'aucun office public.

Il n'y a plus, pour aucune partie de la Nation, ni pour aucun individu, aucun privilège, ni exception au droit commun de tous les Français (....).

19. H.KELSEN, op.cit., at 15.

20. G.MARSHALL, Constitutional Theory, Oxford, Clarendon Press, 1971, at 141.

21. D.KENNEDY, "Legal Formality", in Journal of Legal Studies, 1973, 351-398, at 369-370. Yet, as this author adds, those possible future amendments by the legislator will be predetermined by the outcomes of all the individual formal applications of the original rule. Rule application is therefore not neutral in terms of justice (id., at 385 ff.).

22. R.STEWART, "The Reformation of American Administrative Law", in Harvard Law Review, 1975, 1669-1813, at 1675.

23. H.L.A.HART, op.cit., at 124-125.

24. See e.g. P.VEDEL & P.DELVOLLE, Droit administratif, Paris, P.U.F., 1980 (7th ed), at 421 ff.

25. A.SANDULLI, Manuale di diritto amministrativo, Napoli, Jovene, 1982 (13th ed), Vol.I, at 523 ff.

26. E.FORSTHOFF, Lehrbuch des Verwaltungsrechts, I, Muenchen, C.H.Beck, 1973 (10th ed), at 81 ff.; H.U.ERICHSEN & W.MARTENS (eds), Allgemeines Verwaltungsrecht, Berlin, de Gruyter, 1977 (2nd ed), at 151 ff. For a more sociological distinction between 'Zweckprogramme' and 'Konditionalprogramm', see N.LUHMANN, "Lob der Routine", in Verwaltungsarchiv, 1964, 1-33.

As for the other countries, see G.RESS, "Judicial Protection of the Individual against Unlawful or Arbitrary acts of the Executive", in Judicial Protection against the Executive, Koeln, Carl Heymanns & Dobbs Ferry, Oceana, 1971, Vol.3, 47-76, at 70, with further references to the national reports in the first two volumes.

27. France is the most conspicuous example : Art.37 of the Constitution empowers the government to enact quasi-legislative 'règlements'; see Le domaine de la loi et du règlement, Paris, Economica & Aix, Presses Universitaires d'Aix-Marseille, 1981 (2nd ed). Situating the French case in a comparative context, M.CAPPELLETTI, "Loi et règlement en droit comparé : partage de compétences et contrôle de constitutionnalité", id., 247-255. Such 'independent' administrative activity also exists, e.g. in the United Kingdom : see the police cases discussed by H.W.R.WADE, Administrative Law, Oxford, Clarendon Press, 1982 (5th ed), at 359 ff.

28. For some exceptions, particularly with regard to normative acts of the executive, see G.RESS, op.cit., at 72 ff.

29. H.L.A.HART, op.cit., at 124.

30. In Germany for instance, the concept of legality is not stretched beyond its original, formal, meaning, and equality has therefore a decisive role to play in the control of administrative discretion; see E.STEIN, "Art.3", in Kommentar zum Grundgesetz fuer die Bundesrepublik Deutschland, Neuwied/Darmstadt, Luchterhand, 1984, at 400 ff.; and A.PODLECH, Gehalt und Funktionen des allgemeinen verfassungsrechtlichen Gleichheitssatzes, Berlin, Duncker & Humblot, 1971, at 117 ff. The same is true in Austria (see Th.OEHLINGER, "Objet et portée de la protection des droits fondamentaux - Cour constitutionnelle autrichienne", in Revue internationale de droit comparé, 1981, 543-579, at 571), and in Switzerland (Y.HANGARTNER, Grundzuege des schweizerischen Staatsrechts, Zuerich, Schulthess, 1982, vol.II, at 185)

31. On the role of the 'reasonableness' doctrine in 'ultra vires' review in Britain, see WADE, op.cit., at 353 ff. For Norway (with references to other Scandinavian countries), see E.BOE, "Court Review of Free Administrative Discretion in Norway", in Scandinavian Studies in Law, 1983, 11-35.

32. In France, legality is still the overall ground of administrative review, but it has become an altogether different concept, which does no longer mean 'conformity to statutes' but 'conformity to all higher law', including the

Constitution and general principles of law. Only in this sense can one explain that the autonomous 'règlements' are subject to 'legality' review, as the 'Conseil d'Etat' decided in the Syndicat général des Ingénieurs-Conseils case (decision of 26 June 1959, in M.LONG, P.WEIL, G.BRAIBANT, Les grands arrêts de la jurisprudence administrative, Paris, Sirey, 1978 (7th ed), at 482). Equality is one of those general principles; it is also, of course, a written constitutional principle, but "le Conseil d'Etat préfère y voir des principes généraux valables indépendamment de tout texte : il évite ainsi de lier leur sort aux avatars des changements constitutionnels" (P.WEIL, Le droit administratif, Paris, P.U.F., 1975 (6th ed.), at 87). Equality therefore plays a distinctive role as one of the sub-categories of the overall principle of legality; see e.g. the analysis of P.DELVOLVE, Le principe d'égalité devant les charges publiques, Paris, L.G.D.J., 1969, Part I.

33. On this distinction, see above, p.181 ff.

34. The terminological distinction used here is the one used by H.KELSEN, Reine Rechtslehre, Wien, Franz Deuticke, 1960 (2nd ed), at 146 and 396. But it is frequently disregarded in practice. Many countries, where equality operates as a check on the legislator, define it in their Constitution as 'equality before the law' : see art.3.1 of the German Basic Law, art.3.1 of the Italian Constitution, art.14 of the Spanish, and art.40.1 of the Irish Constitution.

35. The French Conseil Constitutionnel applied the equality principle for the first time in its decision of 27 December 1973, that is, fifteen years after the adoption of the 1958 Constitution which introduced judicial review. In the United States, to quote another example, the recent flourishing of equality review should not hide the fact that the older case-law held that the legislator may freely establish classifications, as long as these are impartially applied : Missouri Pacific v Humes, 115 U.S. 512 (1885) and Powell v Pennsylvania, 127 U.S. 678 (1888).

36. See H.H.RUPP, "Art.3 als Masstab verfassungsgerichtlicher Gesetzeskontrolle", in Bundesverfassungsgericht und Grundgesetz, II, Tuebingen, J.C.B.Mohr (Paul Siebeck), 1976, 364-389, at 369. The case law of the Constitutional Court is not entirely consistent however.

37. C.ESPOSITO, "Eguaglianza e giustizia", in La Costituzione italiana. Saggi, Padova, CEDAM, 1954, 17-66, at 30 ff.; and L.PALADIN, "Eguaglianza (diritto costituzionale)", in

Enciclopedia del Diritto, XIV, Milano, Giuffrè, 1965, 519-551, at 525.

38. Judgment n.80 of 14 April 1969, in Giurisprudenza Costituzionale, 1969, 1141, at 1147. L.PALADIN adopts this view in "La legge come norma e come provvedimento", in Giurisprudenza Costituzionale, 1969, 871-897 ; see also, along the same lines, C.MORTATI, Istituzioni di diritto pubblico, Padova, CEDAM, 1976, 9th ed., II, at 1021-1022.

39. Taxe professionnelle case, decision of 9 January 1980, in Dalloz-Sirey, 1980, 420.

40. NOTE, "The Bounds of Legislative Specification : A Suggested Approach to the Bill of Attainder Clause", in Yale Law Journal, 1962, 330-367. See the Supreme Court judgment in City of New Orleans v Duke, 427 U.S. 297 (1976), upholding a city ordinance applying to selected persons.

41. In Ireland, however, personal laws would seem to be impermissible in se, according to the Supreme Court in East Donegal Co-operative Livestock Mart Ltd v Attorney General, in Irish Reports 1970, 317; see the comment by M.FORDE, "Equality and the Constitution", in The Irish Jurist, 1982, 295-339, at 303-305.

42. G.MARSHALL, op.cit., at 137.

43. On the importance of these notions in language matters, see infra, p.535 and 595 ff.

44. See, above all, J.RAZ, "The Rule of Law and its Virtues", in Law Quarterly Review, 1977, 195-211. Also E.BODENHEIMER, Treatise on Justice, New York, Philosophical Library Inc., 1967, at 11 : "(...)the rule of law does not exhaust its significance in the institutionalisation of legality, but in addition requires for its realization a modicum of substantive rationality in law and the recognition of at least some minimum standards of due process".

45. See the recent (but undoubtedly vain) attempt of a French author to temper the recent activism of the Conseil Constitutionnel in its enforcement of the equality principle : Ch.LEBEN, "Le Conseil Constitutionnel et le principe d'égalité devant la loi", in Revue de Droit Public, 1982, 295-353. According to Leben, substantive equality tests should be limited, apart from the explicit grounds listed in art.2 of the 1958 Constitution (origin, race and religion), to the 'égalité devant la justice' (at p.316-317 and 353).

46. In practice but not in theory. As we saw, the absence of judicial review does not mean that the Constitution is not a 'higher law' binding on the legislator. See above, p.108 ff.
47. P.G.POLYVIOU, op.cit., at 12. A number of supporters of this presumption are mentioned in P.WESTEN, "The Empty Idea...", op.cit., at note 118.
48. H.L.A.HART, op.cit., at 158.
49. A.O.LOVEJOY, The Great Chain of Beings. A Study of the History of an Idea, Cambridge, Harvard University Press, 1964.
50. See e.g. J.RAWLS, A Theory of Justice, Oxford University Press, 1972, at 504 ff.; P.G.POLYVIOU, op.cit., at 8 ff.; G.SARTORI, Democratic Theory, Westport, Greenwood Press, 1973, at 331; D.A.J.RICHARDS, "Rights and Autonomy", in Ethics, Oct.1981, 3-20, at 17 ff. For a recent critical discussion of the assumptions of this theory, see D.A.LLOYD THOMAS, "Equality Within the Limits of Reason Alone", in Mind, Oct.1979, 538-553.
51. H.L.A.HART, op.cit., at 158.
52. P.G.POLYVIOU, op.cit., at 13.
53. G.SARTORI, op.cit., at 330.
54. I.BERLIN, "Equality as an Ideal", in F.Olafson (ed), Justice and Social Policy, 1961, 128 ff., at 131.
55. "L'égalité ce n'est pas la coexistence dans la horde. Création de la société humaine elle apparait lorsque celle-ci, quittant ses formes les plus primitives, passe à une division du travail annonciatrice à travers la division sociale, de la constitution en classes, de l'inégalité voulue des hommes." (H.BUCH, "La notion d'égalité dans les principes généraux du droit", in L'Egalité, Vol.I, Bruxelles, Bruylant, 1971, 196-225, at 212).
56. An obiter dictum in the judgment of 11 December 1974, in Arrets du tribunal fédéral, 100 Ia, 322, at 329.
57. On the possible linguistic regimes in education, see above, p.354 ff.
58. P.WESTEN, "The Empty Idea...", op.cit., at 574.

59. See e.g. J.J.ROUSSEAU, Du Contrat Social, Paris, Garnier-Flammarion, 1966, at 70 : "Ainsi par la nature du pacte, tout acte de souveraineté, c'est-à-dire tout acte authentique de la volonté générale, oblige ou favorise également tous les citoyens, en sorte que le souverain connaît seulement le corps de la nation et ne distingue aucun de ceux qui la composent".

60. E.CHEMERINSKY, op.cit., at 590.

61. Railway Express Agency v New York, 336 U.S. 106 (1949), at 111-113.

62. Palmer v Thompson, 403 U.S. 217 (1971).

63. Gomillion v Lightfoot, 364 U.S. 339 (1960) (the Alabama legislature changed the boundaries of the city of Tuskegee from a square into a bizarre twenty-eight-sided figure; nearly all the black voters, but none of the white, were thus removed from the city limits).

64. See the recent Supreme Court judgment in City of Mobile v Bolden, 446 U.S. 55 (1980), where a facially neutral electoral system was upheld because the discriminatory intent of the legislator could not be proven. The presumption of validity for a uniform rule has therefore the rather paradoxical effect of precluding effective remedies against indirect racial discriminations; see the NOTE, "Making the Violation Fit the Remedy : The Intent Standard and Equal Protection Law", in Yale Law Journal, 1982, 328-351.

65. A.FRANCE, Le lys rouge.

66. G.MARSHALL, Constitutional Theory, op.cit., at 153.

67. E.ALLARDT, "Le minoranze etniche nell'Europa occidentale : una ricerca comparata", in Rivista italiana di scienza politica, 1981, 91-136, at 129 : "Un tempo erano soprattutto le maggioranze che operavano la categorizzazione e l'etichettatura delle minoranze. Lo scopo principale della categorizzazione era l'esclusione : le maggioranze agivano in modo da salvaguardare i loro privilegi materiali o per perseguire le minoranze. (...) adesso sono soprattutto le minoranze ad operare le categorizzazioni. La mancanza di sensibilità della maggioranza non si estrinseca piu come discriminazione ma come negazione dell'identità che invece la maggioranza enfatizza".

68. On affirmative action, see below, p.543 ff.

69. See e.g. NOTE, "Toward a Redefinition of Sexual Equality", in Harvard Law Review, 1981, 487-508, esp. at 487 : "Women are thus convinced to demand no more, and often substantially less, than the chance to assimilate themselves into existing educational, labor and other social institutions - rather than to demand that the institutions change to meet women's needs as they see them"; and at 487-488 : "(...) the goal of sexual equality" (as currently understood) "is to create a world in which persons of both genders are encouraged to act as men currently do and in which current 'female behavior' will gradually wither away".

70. "A law is under-inclusive where it imposes burdens on one group but not on another essentially similar group; or where, in allocating certain benefits, it grants them to some groups but not to others who, in the light of the law's objective, are in an essentially similar situation as the former" (M.FORDE, "Equality and the Constitution...", op.cit., at 314).

71. "A law is over-inclusive where it imposes burdens on various groups, some of whom are not in fact within the 'mischief' the law was designed to combat; or, alternatively, where the law grants benefits, inter alia, to groups who in fact should not be beneficiaries in the light of the law's overriding goals" (ibid.).

72. A characteristic pronouncement in this sense was given by the German Constitutional Court in its judgment of 28 November 1967 (in Bundesverfassungsgerichtsentscheidungen 22, 349, at 361-362) : "Das Bundesverfassungsgericht darf daher bei Feststellung des Verfassungsverstosses nicht selbst die verletzte Gleichheit wiederherstellen, indem es die gesetzliche Verguenstigung auf die uebergangene Personengruppe ausdehnt, weil es damit der Entscheidung des Gesetzgebers vorgreifen wuerde".

73. M.FORDE, op.cit., at 337.

74. See e.g. Shapiro v Thompson, 394 U.S. 618 (1969); Weinberger v Wiesenfeld, 420 U.S. 636 (1975).

75. R.B.GINSBURG, "Some Thoughts on Judicial Authority to Repair Unconstitutional legislation", in Cleveland State Law Review, 1979, 301-324, at 324; see also, NOTE, "Extension versus Invalidation of Underinclusive Statutes : A Remedial Alternative", in Columbia Journal of Law and Social Problems, 1975, 115 ff.; for a more critical voice, see G.E.FRUG, "The Judicial Power of the Purse", in University of Pennsylvania Law Review, 1978, 715-794.

76. See e.g. the judgment of the Constitutional Court of 11 July 1975, in Foro Italiano, 1975, I, 1882, with note by A.PIZZORUSSO; see further the discussion by G.ZAGREBELSKY, La giustizia costituzionale, Bologna, Il Mulino, 1977, at 156-165; and N.PICARDI, "Le sentenze 'integrative' della Corte costituzionale", in Scritti in onore di Costantino Mortati, Milano, Giuffrè, 1977, vol.4, 597-634.

78. Council of State, decision of 22 March 1950, Société des ciments français, in Recueil Lebon, 1950, 175; decision of 13 July 1963, Aureille, in Recueil Lebon, 1963, 829. See Ch.WOLFERS, "Note sur le principe d'égalité dans la jurisprudence du Conseil d'Etat français en matière de réglementation économique", in L'Egalité, Vol.I, Bruxelles, Bruylant, 1971, 127-137, at 132.

79. F.MICLO, "Le principe d'égalité et la constitutionnalité des lois", in Actualité juridique - droit administratif, 1982, 115-131 : "lorsque le législateur intervient à l'égard de catégories de personnes se trouvant dans des situations différentes, il a le choix entre édicter des règles identiques ou stipuler des régimes particuliers à chaque catégorie. (...) Le juge constitutionnel refuse, semble-t-il, de donner un contenu négatif à l'égalité, ce qui équivaldrait à créer un véritable 'droit à la différence'".

80. "Considérant que le principe d'égalité impose seulement qu'à des situations semblables soient appliquées les memes règles et qu'il n'interdit pas qu'à des situations non semblables soient appliquées des règles différentes" (Taxe professionnelle case, cit.). For references to other cases, using quasi-identical language, see Ch.LEBEN, op.cit., at 314-315.

81. According to the German Constitutional Court, Art.3 imposes "weder wesentlich Gleiches willkuerlich ungleich, noch wesentlich Ungleiches willkuerlich gleich zu behandeln". The rule has been formulated in one of its earliest decisions (in Bundesverfassungsgerichtsentscheidungen, 1, 14, at 52), and has since constantly been repeated (see e.g. id., 4, 143 at 155; id., 15, 167 at 201; id. 27, 364 at 371. The Swiss Federal Tribunal takes the same view; see e.g. the judgment of 27 January 1963, in Arrets du tribunal fédéral 89 I 36, and further id. 94 I 654; id. 104 Ia 295; id. 104 Ib 210. In Italy, see the judgment of the Constitutional Court of 29 March 1960, in Foro Italiano 1960, I, 538, confirmed many times since (see e.g. the analysis of case-law by L.PALADIN, "Corte costituzionale e principio generale d'eguaglianza. Aprile 1979 - dicembre 1983", in Giurisprudenza Costituzionale, 1984, I, 219-262, at 227 ff. See also the

Italian, Austrian and American cases quoted in the next section.

82. Infra, p.523 ff.; 532; 536 ff.

83. Language does not figure among the grounds listed in art.1.1 of the new Dutch Constitution, art.4.1 of the Swiss Constitution, art.2 of the French Constitution of 1958, art.14 of the Spanish Constitution. The question whether the enumeration has got legal consequences is therefore not directly relevant for the purposes of this study. On the other hand, some grounds of classification can be made the object of special judicial attention even in the absence of a special mention by the Constitution; see the theory of 'suspect classifications' in American constitutional law, on which see infra, p.493 and 561.

84. Supra, p.446.

85. See MAUNZ-ZIPPELIUS, Deutsches Staatsrecht, Muenchen, C.H.Beck, 24th ed, 1982, at 197; E.STEIN, op.cit., at 399; E.KLEIN, "The Principle of equality and its protection in the Federal Republic of Germany", in T.Koopmans (ed), The Constitutional protection of Equality, Leiden, Sijthoff, 1975, 69-124, at 87.

86. See C.MORTATI, Istituzioni di diritto pubblico, Padova, CEDAM, 9th ed, 1976, II, 1019; L.PALADIN, "Eguaglianza (diritto costituzionale)", in Enciclopedia del Diritto, XIV, Milano, Giuffrè, 1965, 519-551, at 532.

87. Judgment of 3 October 1958, n.56, in Giurisprudenza Costituzionale, 1958, 861 (with notes by V.CRISAFULLI and C.ESPOSITO).

88. Judgment of 28 november 1961, n.64, in Giurisprudenza Costituzionale, 1961, 1224 (with note by C.ESPOSITO).

89. Judgment of 10 May 1957, in Bundesverfassungsgerichtsentscheidungen, 6, 389, at 423.

90. In Id., 21, 343.

91. For a German case denying the need for differentiations in the context of language use, see infra, p.535.

92. L.PALADIN, "Corte costituzionale e principio generale d'eguaglianza ...", op.cit., at 258. See also the views of A.PIZZORUSSO, Lezioni di diritto costituzionale, Roma, Edizioni de 'Il Foro Italiano' (2nd ed), 1981, at 159 : "Il

divieto di discriminazioni fondate sul sesso, la razza, la lingua, la religione, le opinioni politiche, le condizioni personali e sociali, piuttosto che comportare un'esclusione tassativa di qualunque discussione circa la razionalità o l'opportunità di discriminazioni siffatte, assume la portata di un pro-memoria volto a segnalare quelli che sono stati in passato i più frequenti fattori in base ai quali sono state compiute ingiustificate discriminazioni. L'elenco di questi fattori, di conseguenza, rappresenta bensì un monito per il legislatore, per il giudice della costituzionalità delle leggi e per chiunque altro a non ricadere negli errori del passato, ma non esime una regola rigida che imponga o escluda qualunque differenziazione".

93. On this 'ordinary' equality test, see below, p.413 ff.

94. On art.6, see below, p.512 ff.

Section 2 : The Meaning of Equality

1. In Austria, 98 of the 113 annulations decided by the Constitutional Court during the period 1946-1977 were based on the equality clause (Th.OEHLINGER, "Objet et portée de la protection des droits fondamentaux - Cour constitutionnelle autrichienne", in Revue Internationale de Droit Comparé, 1981, 543-579, at 574); in Italy, more than 75% of all cases submitted to the Constitutional Court in recent years were based, wholly or in part, on the right to equality (L.PALADIN, "Corte costituzionale e principio generale d'eguaglianza. Aprile 1979 - dicembre 1983", in Giurisprudenza Costituzionale, 1984, I, 219-262, at 219-220. Similar trends can be witnessed in France (L.FAVOREU, "La jurisprudence du Conseil constitutionnel en 1980", in Revue de Droit Public, 1981, 621-649, at 635) and in Spain (CRUZ VILLALON, "Zwei Jahre Verfassungsrechtsprechung", in Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht, 1983, 70-117, at 92.

2. See e.g. the discussion by M.CAPPELLETTI, "The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis", in Legal Issues of European Integration, 1979, 1-29; and ID., "Nécessité et légitimité de la justice constitutionnelle", in Revue Internationale de Droit Comparé, 1981, 625-657. Other recent contributions to this perennial debate include J.H.ELY, Democracy and Distrust, Cambridge, Harvard University Press, 1980 ; J.CHOPER, Judicial Review and the National Political Process, Chicago/London, Chicago University Press, 1980; M.J.PERRY, The Constitution, the Courts and Human Rights, New Haven/London, Yale U.P., 1982; E.GARCIA DE ENTERRIA, La Constitución como norma y el Tribunal Constitucional, Madrid, Ed.Civitas, 1981; L.FAVOREU, "Actualité et légitimité du controle juridictionnel des lois en Europe occidentale", in Revue de Droit Public, 1984, 1147-1201; "Die Verfassungsgerichtsbarkeit im Gefuege der Staatsfunktionen", reports by KORINEK, MUELLER and SCHLAICH in Veroeffentlichungen der Vereinigung von deutschen Staatsrechtslehrern, Vol.39, Berlin/New York, W.de Gruyter, 1981; Corte Costituzionale e sviluppo della forma di governo in Italia, Bologna, Il Mulino, 1982; the contributions by ELIA, CARETTI & CHELI, DE VITA, LANCHESTER and ROLLA in Quaderni Costituzionali, 1984, n.1, 7-141.

3. M.FORDE, "Equality and the Constitution", in The Irish Jurist, 1982, 295-339, at 310.

4. 'Rationality' is the term used by the American Supreme Court; 'ragionevolezza' by the Italian Constitutional Court; 'racionalidad' in Spain.

5. The term of 'Willkuerverbot' is commonly used in the Federal Republic, Switzerland and Austria.

6. See the phrase of H.L.A.Hart quoted above, p.447.

7. Decision of 17 January 1979, in Dalloz-Sirey 1981, 117 (as translated by M.FORDE, op.cit., at 317).

8. See e.g. the references to the 'nationalisations case' in Ch.LEBEN, "Le Conseil constitutionnel et le principe d'égalité devant la loi", in Revue de Droit Public, 1982, 295-353, at 327. The 'general interest' is also the criterion generally used by the 'Conseil d'Etat' in its equality case law; see the references in C.A.COLLIARD, Libertés publiques, Paris, Dalloz, 1975 (5th ed), at 208-209.

9. The Italian Constitutional Court has not always used a consistent terminology. Yet, it has been shown that it usually resorts to objective purpose analysis, with some exceptions where it inquired in the effective purpose of the legislator (see A.S.AGRO, "Art.3", in G.Branca (ed), Commentario della Costituzione - Principi Fondamentali, Bologna, Zanichelli & Roma, Ed.de Il Foro Italiano, 1975, 123-161, at 143 and 146-147).

In Spain, see the judgment of the Constitutional Tribunal of 2 July 1981, in Boletín de Jurisprudencia Constitucional, 1981, n.4, 243, at 250 : "la igualdad es solo violada si la desigualdad esta desprovista de una justificación objetiva y razonable, y la existencia de dicha justificación debe apreciarse en relación a la finalidad y efectos de la medida considerada, debiendo darse una relación razonable de proporcionalidad entre los medios empleados y la finalidad perseguida". In this passage, the Tribunal expressly refers to the case-law of the European Court of Human Rights, on which see infra, p.583 ff.

In Belgium, see e.g. the Council of State decision of 1 February 1973, in Pasicrisie 1974, IV, 109, at 110 : "l'article 6 de la Constitution n'interdit pas qu'à des situations différentes soient appliquées des règles juridiques différentes, pour autant que les différenciations ainsi établies soient fondées sur l'intérêt public, qu'elles aient donc un but en rapport avec cet intérêt (...)".

10. For Germany, see the judgment of the Constitutional Court of 17 March 1959 (to which the Court consistently refers ever since), in Bundesverfassungsgerichtsentscheidungen, 9, 201, at 206 : the legislator violates equality when he "versaeumt, tatsaechliche Gleichheiten oder Ungleichheiten der zu ordnenden Lebensverhaeltnisse zu beruecksichtigen, die so bedeutsam sind, dass sie bei einer am Gerechtigkeitsgedanken orientierten Betrachtungsweise beachtet werden muessen".

For Austria, see R.RACK & N.WIMMER, "Das Gleichheitsrecht in Oesterreich", in Europaeische Grundrechte Zeitschrift, 1983, 597-613, at 603-604 (and the judgments of the Constitutional Court quoted in their notes 78 and 79).

11. The test is not objective in the sense that it restricts itself to the terms used in the regulation, but rather in the sense that the judge tries to define the societal object the legislation regulates, disregarding the motives why the rule-maker wanted to regulate it.

12. See above, p.478.

13. Judgment of 16 June 1983, in Giurisprudenza Costituzionale, 1983, I, 946.

14. The subjective rationality test has been classically formulated by TUSSMAN & TEN BROEK, "The Equal Protection of the Laws", in California Law Review, 1949, 341 ff. For recent discussions of the dilemmas involved in purpose inquiry, see e.g. NOTE, "Legislative Purpose, Rationality and Equal Protection", in Yale Law Journal, 1972, 123-154; J.H.ELY, "Legislative and Administrative Motivation in Constitutional Law", in Id., 1970, 1203-1341; G.BINION, "Intent and Equal Protection : A Reconsideration", in The Supreme Court Review, 1983, 397-457, esp. at 424 ff.

15. For a recent analysis of this shift see C.E.BAKER, "Outcome Equality or Equality of Respect : The Substantive Content of Equal Protection", in University of Pennsylvania Law Review, 1983, 933-998; at one point (976-977), this author argues that : "Although the Court often uses the language of subjective intent, its opinions can best be understood as treating objective or contextual purpose as the key constitutional concern".

16. NOTE, "Legislative Purpose...", op.cit., at 132 (and the examples given at 132 ff.).

17. Example given by S.M.HUANG THIO, "Equal Protection and Rational Classification", in Public Law, 1963, 412-440, at 418-419.

18. NOTE, "Legislative Purpose...", op.cit., at 124.

19. Id., at 137.

20. "In nome dell'eguaglianza questa Corte non è (...) abilitata a esercitare scelte di esclusiva spettanza del legislatore, ma puo solo ricondurre le deroghe ingiustificate e le arbitrarie eccezioni alle regole già stabilite dalla legge ovvero ai principi generali univocamente desumibili dall'ordinamento" (judgment of 18 October 1983, in Giurisprudenza Costituzionale, 1983, 2062).

21. One is, in a sense, referred back to the subjective intention of the rule-maker, but then taken in globo, and not in reference to the particular regulation.

22. E.KLEIN, "The Principle of Equality and its Protection in the Federal Republic of Germany", in T.Koopmans (ed), The Constitutional Protection of Equality, Leiden, Sijthoff, 1975, 69-124, at 78 : "The argumentation of adequacy with regard to the system presupposes a certain determination and delimitation of various fields of life, for each of these is subject to a different system. Whether a provision fits into a system can only be decided in relation to that system. The equality clause cannot be used to impose assimilation of various fields of life".

23. Judgment of 16 June 1959, in Bundesverfassungsgerichtsentscheidungen, 9, 338, at 349.

24. In Germany, see e.g., in addition to the judgment mentioned in the previous note, the judgments of 25 July 1960 in Bundesverfassungsgerichtsentscheidungen, 11, 283, at 293; and 27 January 1965, in id., 18, 315, at 334. For a complete overview, see E.KLEIN, op.cit., at 78 ff.; H.H.RUPP, "Art.3 GG als Massstab verfassungsgerichtlicher Gesetzeskontrolle", in Bundesverfassungsgericht und Grundgesetz, Berlin, Duncker & Humblot, 1976, II, 364-389, at 379 ff. In Italy, see the recent overview by L.PALADIN, op.cit., who argues (at 229 ff.) that all the equality opinions of the Constitutional Court can be analysed in terms of systematic rationality.

25. G.ZAGREBELSKY, "Corte costituzionale e principio d'uguaglianza", in N.Occhiocupo (ed), La Corte costituzionale tra norma giuridica e realtà sociale. Bilancio di vent'anni di attività, Bologna, Il Mulino, 1978, 103-120, at 110; and A.BALDASSARRE, "Intervento" in id., 121-132, at 125 : "Ma che l'ordinamento normativo costituisca un 'sistema', nel senso proprio della parola, dotato di una razionalità sua

propria tanto forte e manifesta da potersi far valere anche contro singoli atti del suo stesso fattore, è un postulato indimostrato".

For similar criticisms in German legal doctrine, see C.DEGENHART, Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat, Muenchen, Beck, 1976, at 49-57; H.F.ZACHER, "Soziale Gleichheit", in Archiv des oeffentlichen Rechts, 1968, 341-383, at 352-355.

26. "Amministrativizzazione della politica" (A.BALDASSARRE, op.cit., at 125).

27. Judgment n.5862/1968, quoted in R.RACK & N.WIMMER, op.cit., at 604.

28. See the judgments of the German Constitutional Court of 7 May 1969, in Bundesverfassungsgerichtsentscheidungen, 25, 372, at 401-402; and of 2 October 1969, in Id., 27, 58, at 65.

29. Cf.supra, p.259.

30. See the examples of interventions of this nature, supra, p.260 ff.

31. On interstate travel, Shapiro v Thompson, 394 U.S. 618 (1969); on the right to vote, Harper v Virginia Board of Elections, 383 U.S. 663 (1966), and Reynolds v Sims, 377 U.S. 533 (1964). For a general description of the 'fundamental rights' theory, see L.TRIBE, American Constitutional Law, Mineola (N.Y.), The Foundation Press, 1978, 1002 ff.

32. Cf.supra, p.476 ff.

33. For Italy, see e.g. G.ZAGREBELSKY, "Objet et portée de la protection des droits fondamentaux - Cour constitutionnelle italienne", in Revue Internationale de Droit Comparé, 1981, 511-542, at 538, arguing that those special grounds have been 'absorbed' by the general principle of equality and are not subject to a different regime; see also above, p.479.

For Austria, see M.BERGER, "Die Gleichheit von Frau und Mann in Oesterreich", in Europäische Grundrechte Zeitschrift, 1983, 614-623, at 619.

34. See above, p.479.

35. See below, pp.512-533.

36. United States v Carolene Products Company, 304 U.S. 144 (1938), at 152, n.4.

37. Korematsu v United States, 323 U.S. 214 (1944). Ironically, despite the alleged use of a strict scrutiny, the legislative discriminations against the Japanese were upheld in this case.

38. San Antonio v Rodriguez, 411 U.S. 1 (1975), at 28.

39. The Hispanics are, in certain domains, worse off than the Blacks. For instance, in 1980, only 7.8% of all persons of Hispanic origin had completed college studies, against 8.8% of blacks, and 18.5% of 'whites' (Statistical Abstract of the United States, 1984, at 144).

40. NOTE, "Making the Violation Fit the Remedy : The Intent Standard and Equal Protection Law", in Yale Law Journal, 1982, 328-351, at 351.

41. Cf. supra, p.144-145.

42. Judgment of 15 October 1960, in Sammlung, 1960/3822, 507 : "Eine Differenzierung der Anspruchsberechtigung im Rahmen des Opferfuersorgegesetz nach der Sprachzugehoerigkeit oder der Herkunft aus dem deutschen Sprachgebiet und die Schlechterstellung der Sprache einer Minderheit ist niemals sachlich. Denn die Sprachzugehoerigkeit steht zu Aufgabe und Zweck der Opferfuersorge in keinem sachlichen Zusammenhang".

43. Judgments of 25 January 1984, in Repertorio de Jurisprudencia, 1984, n.205; and judgment of 3 May 1984 (not yet reported).

44. Judgment of 25 January 1984, cit., : "esta situacion rompe el principio de igualdad del art.14 de la vigente Constitucion, en cuanto que se conculca el derecho de los espanoles al acceso de las funciones publicas disminuido para todos aquellos que no sean parlantes del Euskera (...)"

45. Art.6.1 of the Basque Statute (Organic Law of 18 december 1979) : "El euskera, lengua propia del Pueblo Vasco, tendra, como el castellano, caracter de lengua oficial en Euskadi, y todos sus habitantes tienen el derecho a conocer y usar ambas lenguas".

46. On this point, see also infra, p.637 and 647.

47. Judgment of 5 August 1983 (concerning a conflict of competence between the central State and several Autonomous Communities), in Boletin de Jurisprudencia Constitucional, 1983, n.30, 1121, at 1176 : "Una interpretacion sistematica de los preceptos constitucionales y estatutarios lleva, por

una parte, a considerar el conocimiento de la lengua propia de la Comunidad como un mérito para la provision de vacantes, pero, por otra, a atribuir el deber de conocimiento de dicha lengua a la Administracion autonómica en su conjunto, no individualmente a cada uno de sus funcionarios, como modo de garantizar el derecho a usarla por parte de los ciudadanos de la respectiva Comunidad" (emphasis added)..

48. See art.21.5 of the Law on the Use of Languages in Administrative Matters (coordinated version of 1966) :

"Nul ne peut être nommé ou promu à un emploi ou à une fonction mettant son titulaire en contact avec le public, s'il ne justifie oralement, par une épreuve complémentaire ou un examen spécial qu'il possède de la seconde langue une connaissance suffisante ou élémentaire, appropriée à la nature de la fonction à exercer".

Note that civil servants that do not come into contact with the public need not be bilingual (except for the higher hierarchical levels).

See, on these points, C.WILWERTH, Le statut linguistique de la fonction publique belge, Bruxelles, Editions de l'Université de Bruxelles, 1980, at 65-70.

49. See above, p.401-402.

50. (National) Law of 16 May 1978; see, on this point, G.MOR, "Minoranze linguistiche", in S.Cassese (ed), Guida per le autonomie locali, 1979, 418-420, at 420.

51. This provision is not contained in the Statute of the Region Trentino-Alto Adige, but in a later Decree (of 26 July 1976, art.1) implementing art.100 of the Statute (which guarantees the right to use either Italian or German in dealing with the public administration).

52. Judgment of 18 October 1983, in Le Regioni, 1984, 238, at 255 : "La parificazione delle lingue (...) esprime il riconoscimento (...) del dovere di ogni cittadino, quale che sia la sua madre lingua, di essere in grado di comunicare con tutti gli altri cittadini, quando è investito di funzioni pubbliche o è tenuto a prestare un servizio di pubblico interesse".

53. Ibid. : the condition of bilingualism "ha come destinatari non soltanto i cittadini (rientranti in quelle categorie e operanti nella provincia di Bolzano) di lingua madre italiana, ma anche quelli di lingua madre tedesca e, lungi dal violare, realizza il principio di eguaglianza". The Court does not articulate why precisely such a system makes equal treatment more effective : the reason presumably is

that an administrative service in which only part of the personnel is bilingual might offer only a second-rate service to one of the language groups.

54. See S.O'CIOSAIN, "Bilingualism in Public Administration - The Case of Ireland", in Revista de Llengua i Dret, n.2, 1983, 11-19, at 13.

55. Henchy. J. in The State (Cussen) v Brennan, in Irish Reports, 1981, 181, at 194.

56. Arts.43 of the Law on Language Use in Administrative Matters (coordinated version); see the analysis of this regime in C.WILWERTH, op.cit., at 15 ff.

A different regime applies for the local administrations in the Brussels area. There, according to art.21.7 of the same Law, half of the newly recruited personnel must be chosen on a fifty-fifty basis among the French and Dutch language group (so that the Dutch-speakers have a guaranteed proportion of 25%); in addition, all the highest levels of the hierarchy had to be staffed by equal numbers of French- and Dutch-speakers by the year 1973. On the partial antinomy between those two provisions, and the difficulties in implementing them, see C.WILWERTH, op.cit., at 71-85.

57. The principle is stated, with regard to the State administrative offices within the province, by art.89 of the Regional Statute : "Per la provincia di Bolzano sono istituiti ruoli del personale civile (...). I posti dei ruoli (...) sono riservati a cittadini appartenenti a ciascuno dei tre gruppi linguistici, in rapporto alla consistenza dei gruppi stessi, quale risulta dalle dichiarazioni di appartenenza rese nel censimento ufficiale della popolazione".

But the same principle also holds for the regional, provincial and local administration operating within the Bolzano province. See the details in A.PIZZORUSSO, Il pluralismo linguistico tra Stato nazionale e autonomie regionali, Pisa, Pacini editore, 1975, at 85 ff.

58. See above, p.17.

59. See above, p.18.

60. H.LAQUIEZE, "Italie : Statut d'autonomie et rapports culturels intercommunautaires dans la Région Trentino-Sud-Tirol", in Y.Mény & B.De Witte (eds), Centres et périphéries. Le partage du pouvoir, Paris, Economica, 1983, 149-179, at 169.

61. See R.INGICCO, "Censimento e dichiarazione di appartenenza linguistica in Alto Adige - Sudtirolo", in Notiziario Giuridico Regionale, 1982, 130-143, at 137.

62. Presidential Decree of 22 October 1981.

63. See e.g. the judgments n.3372 of 5 May 1954, Hoebanckx c. Etat belge, in Recueil des Arrêts et Avis du Conseil d'Etat, 1954,444; and n.12924-12926 of 26 april 1968, Simoens, Mourlon-Beernaert, De Witte c. Office national d'allocations familiales pour travailleurs salariés, in Id., 1968, 294. In writing, see e.g. L.INGBER, "A propos de l'égalité dans la jurisprudence belge", in L'Egalité, I, Bruxelles, Bruylant, 1971, 3-35, at 17-19.

64. The indirect link between linguistic membership and the objective needs of the service is articulated by art.43.3 of the Belgian Law : "Le Roi détermine pour chaque service central le nombre des emplois à attribuer au cadre français et au cadre néerlandais, en tenant compte, à tous les degrés de la hiérarchie, de l'importance que représentent respectivement pour chaque service la région de langue française et la région de langue néerlandaise".

A similar practice - but without any hard rules - seems to be followed in the Swiss central administration. See e.g. P.SCHAEPI, Der Schutz sprachlicher und konfessioneller Minderheiten im Recht von Bund und Kantonen, Zuerich, Schulthess, 1971, at 71.

65. A.PIZZORUSSO, Il pluralismo linguistico..., op.cit., at 84-85. In Belgium, this type of reasoning is not only used to justify the proportional recruitment of civil servants on the basis of **language** groups but also on the basis of **political opinion**. The Council of State has consistently held that a proportional recruitment of adherents to the various political 'ideologies' gives better guarantees of administrative impartiality than a system based on a forced belief in the neutrality of every single civil servant. In my opinion, the objective reasons which might justify the linguistic criterion do not exist in the case of the 'ideological' criterion (one is necessarily a member of a language group, but one should not be forced to profess a political opinion in order to gain access to public administration). See, for an analysis and mild critique of the regime, J.DE MEYER, "Levensbeschouwelijk en politiek pluralisme in openbare diensten", in Miscellanea W.J.Ganshof van der Meersch, Bruxelles, Bruylant, 1972, Vol.III, 79-94.

66. In Hernandez v Texas (347 U.S. 475 (1954)), the Supreme Court held that "it is a denial of the equal protection of

the laws to try a defendant of a particular race or color under an indictment issued by a grand jury (...) from which all persons of his race or color have because of that race been excluded by the State".

In the more recent case Castaneda v Partida (430 U.S. 482 (1977)), the Supreme Court extended its holding to **substantial underrepresentation** of such minority groups that constitute a recognizable, distinct class (as the Mexican-Americans do). A statistical showing that their group is underrepresented in the jury amounts to a presumption of a discriminatory purpose of the selectors (Id., at 494).

67. Denying the existence of a direct horizontal effect of fundamental rights, and of the right to equality in particular : T.KOOPMANS, "Comparative Analysis and Evaluation", in Koopmans (ed), The Constitutional Protection of Equality, Leiden, Sijthoff, 1975, at 227 ff.; K.HESSE, Grundzuege des Verfassungsrechts der Bundesrepublik Deutschland, Heidelberg, C.F.Mueller, 1982, 13th ed, at 139; J.SCHWABE, Die sogenannte Drittwirkung der Grundrechte, Muenchen, Wilhelm Goldmann Verlag, 1971, esp. at 149 ff.; E.KLEIN, op.cit., at 91-92; Italian Court of Cassation, judgment of 11 November 1976, in Il Foro italiano, 1977, I, 403-404; A.S.AGRO, op.cit., at 130.

For comparative discussions of this subject, see M.J.HORAN, "Contemporary Constitutionalism and Legal Relationships between Individuals", in International and Comparative Law Quarterly, 1976, 848-867; and the contributions in René Cassin Amicorum Discipulorumque Liber III, La protection des droits de l'homme dans les rapports entre personnes privées, Paris, Pédone, 1971.

68. For a recent, comprehensive presentation in legal writing, see M.CHAMALLAS, "Evolving Conceptions of Equality under Title VII : Disparate Impact Theory and the Demise of the Bottom Line Principle", in UCLA Law Review, 1983, 305-383.

69. See L.LUSTGARTEN, Legal Control of Racial Discrimination, London, Macmillan, 1980; M.J.BELOFF, Sex Discrimination - the New Law, London, Butterworths, 1976.

70. See L.ANGIELLO, La parità di trattamento nei rapporti di lavoro, Milano, Giuffrè, 1979; R.PANZARANI, "Gli atti discriminatori nel rapporto di lavoro", in Il Diritto del Lavoro, 1980, 8-41.

71. See e.g. R.A.EICH, "Das Gesetz ueber die Gleichbehandlung von Maennern und Frauen am arbeitsplatz", in Neue Juristische Wochenschrift, 1980, 2331 ff.

72. See e.g. the analysis by J.HOENS, "De strafrechtelijke bestrijding van rassendiscriminatie", in Ars Aequi, 1981, 547-557.

73. See J.COSTA-LASCOUX, "La loi du 1 juillet 1972 et la protection pénale des immigrés contre la discrimination raciale", in Droit Social, 1976, mai, 181-187.

74. The Civil Rights Act, although primarily intended for the protection of racial minorities and women, also forbids 'national origin' discrimination. The term was defined by the Supreme Court as referring "to the country where a person was born or, more broadly, the country from which his or her ancestors came" (Espinoza v Farah Mfg.Co, 414 U.S. 86 (1973), at 88). Thus, a bias towards English, in situations where it is not required by the task to be performed, can often be a discrimination based on national origin; for an exhaustive analysis of case law on this point, see NOTE, "Language Discrimination under Title VII : The Silent Right of National Origin Discrimination", in John Marshall Law Review, 1982, 667-691, at 679 ff. It should be noted that in Title VII cases, in contrast with constitutional equality litigation, no direct proof of discriminatory intent has to be made; if the plaintiff can show that a 'neutral' practice has a disparate impact on one of the protected groups, there is a prima facie case of indirect discrimination, which then has to be balanced against the 'business necessity' of the practice (Griggs v Duke Power Co., 401 U.S. 424 (1971). See, on this latter concept, COMMENT, "The Business Necessity Defense to Disparate Impact Liability under Title VII", in University of Chicago Law Review, 1979, 911-934.

75. In legal writing, see e.g. L.LUSTGARTEN, op.cit.; see also the case law of the European Court of Justice, infra, p.610.

76. Cf.infra, p.624 and the accompanying note 140.

77. A.H.LEIBOWITZ, "English Literacy : Legal Sanction for Discrimination", in Notre Dame Lawyer, 1969, 7-67, at 7.

78. Lassiter v Northampton County (North Carolina) Board of Elections, 360 U.S. 45 (1959). In this case, the Court considered the relevance of literacy tests in general, but entirely 'neglected the question whether English literacy tests could be discriminatory against the country's linguistic minorities (in the concrete case, only blacks were concerned).

79. Katzenbach v Morgan, 384 U.S. 641 (1966). In this case, the Supreme Court was asked to rule on the constitutionality of an exemption from the English literacy test, which had been federally imposed in favour of the Puertoricans, and was not asked to decide whether such tests were constitutional in all remaining cases. Nevertheless, Brennan J., wrote some interesting dicta in his opinion for the Court :

"Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary and appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs".

80. Castro v State of California, 85 California Reporter 20 (1970).

81. Law n.73.42 of 9 January 1973, art.69. The knowledge of French is to be verified by an administrative body (see implementing Decree of 10 July 1973, art.31).

82. J.H.GARVEY, "Freedom and Equality in the Religion Clauses", in The Supreme Court Review, 1981, 193-221, at 209, note 67.

83. See the Staatscourant of 3 October 1974, and of 12 May 1975. For a description of the aids system, see A.VAN DER FELTZ & R.ZELDENRUST, "Een liaison met gemengde gevoelens", in Ars Aequi, 1983, 20-34.

84. See the Royal Decree of 14 November 1978, art.1 : of the total fund, 6% goes to the national press agency Belga, 4% to the German language dailies (of which there is only one, 'Grenz Echo'), and 45% to both the French- and Dutch-language dailies. Thereby, the French-speaking press gets more than its share of the total population, but less than its share in newspaper circulation, while the German minority is advantaged on both scores. On this regime, see F.DELPEREE, "Presse et subventions", in Mélanges Fernand Dehousse, Paris, F.Nathan & Bruxelles, Labor, 1979, vol.1, 183-192.

85. See e.g. A.DEMICHEL, "L'évolution de la protection des minorités depuis 1945", in Revue Générale de Droit International Public, 1960, 22-51, at 35; F.MUENCH, "Volksgruppenrecht und Menschenrechte", in System eines

internationalen Volksgruppenrechts, Wien, Wilh.Braumüller, Vol.I, 1970, 55-104, at 102 : "Insbesondere ist der Gleichheitssatz, so wie er heute verstanden wird, noch nicht geeignet, ein Volksgruppenrecht dort einzuführen, wo es nicht besteht. Gewiss ist er ein wesentlicher Schutz fuer den Angehörigen der Volksgruppen, weil er eine Diskriminierung verbietet; aber dessen besonderen Belangen als Volksgruppenangehörigen genuegt er nicht". See also the discussion supra, p.127 ff.

86. T.KOOPMANS, "Comparative Analysis and Evaluation", in Koopmans (ed), The Constitutional Protection of Equality, Leiden, Sijthoff, 1975, 213-255, at 249.

87. A.MANDELSTAM, "La protection des minorités", in Recueil des Cours, 1923, 367-517, at 418 : "Dans un certain nombre de cas, l'égalité accordée aux membres des minorités se manifeste non par l'octroi de droits identiques à ceux de la majorité, mais par la concession de droits analogues - tel le droit de professer une religion ou celui de se servir d'une langue, distinctes de celles de la majorité". See also CLAYDON, "Internationally Uprooted People and the Transnational Protection of Minority Cultures", in New York Law School Law Review, 1978, 125-151, at 135 : "Equality is effectuated and not undermined by protecting minority cultures, for what is involved is simple equality in the cultural sphere". See also the Albanian Minority Schools judgment of the Permanent Court of International Justice, mentioned infra, at p.630-631.

88. On this basic distinction between 'generic' and 'specific' protection of language values, see supra, Part two, Chapter two, section 1 (esp. at p.146).

89. C.ESPOSITO, "Eguaglianza e giustizia nell'art.3 della costituzione", in La Costituzione italiana. Saggi, Padova, CEDAM, 1954, at 49; P.BISCARETTI DI RUFFIA, "Uguaglianza (principio di)", in Novissimo Digesto Italiano, XIX, Torino, UTET, 1973, 1088-1092, at 1091.

90. See above, the note 81 at p.476.

91. My translation.

92. "L'art.3, 2.comma, e le sue specificazioni (...) pongono come scopo dell'attività dei pubblici poteri, non soltanto l'abolizione delle discriminazioni sfavorevoli, ma anche la realizzazione in positivo di interventi diretti a correggere le disequaglianze di fatto derivanti dalle ingiustizie del passato o anche da cause puramente naturali" (A.PIZZORUSSO,

Lezioni di diritto costituzionale, Roma, Edizioni de 'Il Foro Italiano', 1981 (2nd ed), at 154).

To the extent that the first sentence of art.3 also implies a need to treat different things differently, there is a certain overlapping between both sentences; see B.CARAVITA, "L'art.3, comma 2, nella giurisprudenza della Corte costituzionale", in Giurisprudenza costituzionale, 1983, 2359-2383, at 2367 ff.

93. See the list of those specifications in A.PIZZORUSSO, Lezioni..., op.cit., at 162.

94. See also the demonstration of this thesis in A.PIZZORUSSO, Il pluralismo linguistico..., op.cit., at 36-42.

95. A.PIZZORUSSO, op.ult.cit., at 28.

96. M.UDINA, "Sull'attuazione dell'art.6 della Costituzione per la tutela delle minoranze linguistiche", in Giurisprudenza Costituzionale, 1974, 3602-3613, at 3609; A.PIZZORUSSO, "Problemi giuridici dell'uso delle lingue in Italia (con particolare riferimento alla situazione delle minoranze linguistiche non riconosciute)", in Le Regioni, 1977, 1031-1039, at 1035; S.SALVI, Le lingue tagliate, Milano, Rizzoli, 1975, at 9 ff.; A.PUBUSA, "Considerazioni sulla tutela della lingua in Sardegna", in Rivista Trimestrale di Diritto Pubblico, 1983, 552-599, at 570-571.

97. A.PIZZORUSSO, loc.ult.cit..

98. See the discussion in G.FRANCESCATO, "A Sociolinguistic Survey of Friulian as a 'Minor Language'", in Linguistics 1976, 97-121, at 101 ff.; D.BONAMORE, "Autonomia, lingua e diritti scolastici per il Friuli e il Friulano", in Rivista Giuridica della Scuola, 198 , 833-847, at 837 ff.

99. A.PUBUSA, op.cit., at 571 (note 34) and 578 ff.; see also L.SOLE, "La Sardegna come minoranza etnico-linguistica", in Città e Regione, 1980, n.3, 132-148, at 143 ff.

100. On the allocation of legislative jurisdiction to deal with language matters in Italy, see also above, p.78.

A general analysis of the role of regional autonomy in the protection of Italy's minority cultures is offered by A.PIZZORUSSO, "L'activité des régions italiennes pour le développement et la défense des cultures locales", in Y.Mény & B.De Witte (eds), Dix ans de régionalisation en Europe. Bilan et perspectives 1970-1980, Paris, Cujas, 1982, 243-263.

101. For a general picture of the smaller linguistic minorities in South Italy, see J.U.CLAUSS & B.DE WITTE, "Linguistic Minorities in Southern Italy : A Periphery far from the Border", in B.De Marchi & A.M.Boileau (eds), Boundaries and Minorities in Western Europe, Milano, Franco Angeli Editore, 1982, 229-244.

102. See R.INGICCO, "Minoranze linguistiche : due iniziative regionali rinviata dal governo", in Le Regioni, 1977, 971-976.

103. Veneto Regional Laws of 1 August 1974, n.40, and 18 May 1979, n.38; Piedmont Regional Law of 20 June 1979, n.30. See the comments by R.INGICCO, "La legge regionale piemontese sulla tutela del patrimonio linguistico e culturale", in Le Regioni, 1980, 7-10; and P.CARROZZA, "Lingue (uso delle)", in Novissimo Digesto Italiano, Appendice IV, Torino, UTET, 1983, 976-988, at 987.

104. The power for the Regional Councils to submit Bills of national statutes to the Parliament is provided in art.121 of the Constitution.

105. For an analysis of the Sardinian draft, see A.PUBUSA, op.cit.. On the scarce possibilities of enactment of the Bill, also due to internal contrasts within Sardinian political circles, see A.PUBUSA, op.cit., at 568 ff., and P.CARROZZA, "Minoranze linguistiche", in Annuario delle autonomie locali, 1982, 391-401, at 396.

106. Sicilian Regional Law of 6 May 1981, n.85.

107. See the recent judgment of 18 October 1983 (concerning a law enacted by the Province of Bolzano), in Le Regioni, 1984, 238 (with note by A.PIZZORUSSO).

108. Isolated communities speaking German dialects are to be found in the provinces of Belluno, Udine, Verona, Vicenza, Novara, Vercelli, and Aosta (see T.DE MAURO, "Note sulle minoranze linguistiche e nazionali in Italia", in Il Mulino, 1979, 349-367, at 356-357); a limited number of Franco-Provencal speakers live in Piedmontese valleys neighbouring to the Aosta Valley (Id., at 361).

109. For an overview of the legal protection of the Ladin minority, see A.PIZZORUSSO, Il pluralismo linguistico, op.cit., at 215-228; E.PALICI DI SUINI, "La minoranza linguistica ladina in Trentino-Alto Adige", in Le Regioni, 1983, 527-538.

110. See above, p.411.

111. On this international protection regime, see above, p.170-171.

112. Above, p.411.

113. For a general survey of the present regime of protection of the Slovene minority, see S.BARTOLE, "La tutela del gruppo linguistico sloveno tra legislazione e amministrazione", in Città e Regione, 1980, n.3, 58-71.

114. Various bills for the global protection of the Slovene language group have been pending for years before Parliament.

115. On the 'higher law' nature of the Special Statutes in Italian law, see above, p.107.

116. A.PIZZORUSSO, Il pluralismo linguistico..., op.cit., at 278.

117. See above, p.499.

118. See the Constitutional Court judgment of 18 May 1960, rejecting a challenge based on the terms of the Agreement against national legislation applying to the Region (in Giurisprudenza Costituzionale, 1960, 537, at 555; see also the case note by C.MORTATI, "Influenza delle convenzioni internazionali in ordine alla tutela dell'uso della lingua tedesca nella Provincia di Bolzano", Ibid.; and A.PIZZORUSSO, "Aspetti dell'efficacia giuridica dell'accordo Degasperi-Gruber", in A 30 anni della firma dei Patti Degasperi-Gruber, 5 sett.1946. L'accordo di Parigi, Trento, Regione Trentino Alto Adige, 1976, 137-148.

119. The present Statute is contained in the Presidential Decree of 31 August 1972 ('Testo unico delle leggi costituzionali concernenti lo statuto speciale per il Trentino-Alto Adige'), coordinating the original Statute with the amendments enacted by the Constitutional Law of 10 November 1971, n.1.

120. "Nella regione è riconosciuta parità di diritti ai cittadini, qualunque sia il gruppo linguistico al quale appartengono, e sono salveguardate le rispettive caratteristiche etniche e culturali".

121. However, the rights granted in the new Statute have only very slowly been implemented. Thus, the right to use German before the courts of the Region, guaranteed by art.100 of the

Statute, has still to be implemented in practice (a draft regulation has however been recently adopted; see a first (critical) comment by A.PASQUALI, "Uso della lingua davanti agli organi giudiziari nella provincia di Bolzano", in Il Foro Italiano, 1984, V, 379-382).

122. On the educational rights of the Ladins, see above, p.412.

In addition, one should mention art.102 of the Statute : "Le popolazioni ladine hanno diritto alla valorizzazione delle proprie iniziative ed attività culturali, di stampa e ricreative, nonché al rispetto della toponomastica e delle tradizioni delle popolazioni stesse (...)"

123. "Piu forte era ed è la forza di attrazione economica, politica, culturale degli Stati al di là dei confini, maggiore è la quantità e qualità di tutela accordata dalla Repubblica italiana a coloro che vivendo in Italia ne avvertono - e fanno pesare sul tavolo delle richieste e delle trattative - il richiamo" (D.BONAMORE, op.cit., at 837)

124. Private Bills n.107 of 20 June 1979 (Radical Party), n.2068 of 24 October 1980 (Socialist Party), n.2318 of 4 February 1981 (Communist Party). See, on these proposals, P.CARROZZA, "Minoranze linguistiche", in Guida per le autonomie locali, 1982, at 393 ff., and ID., in id., 1983, at 404 ff.

125. Cf.supra, p.474-475.

126. Judgment of 28 December 1970, n.192, in Giurisprudenza Costituzionale, 1970, 2203 (on a recourse by the President of the Region Trentino-Alto Adige).

127. Law of 11 March 1970, art.10.

128. Id., at 2209-2210 : "Pacifico, infine e soprattutto, che l'art.2 dello Statuto, prescrivendo la salvaguardia delle caratteristiche etniche e culturali dei gruppi linguistici coesistenti nella Regione, si oppone a misure rivolti a determinare forzate assimilazioni tra di essi o suscettibili di comprometterne il libero sviluppo, secondo le rispettive tradizioni e costumanze".

129. Law of 29 April 1949, art.11, n.6, exempting from the obligation of recruitment the small agricultural enterprises (less than 6 workers) in 'mixed language zones'.

130. Article 2 of the Statute is "sistematicamente inquadrato nel piu generale principio di tutela delle minoranze

linguistiche affermato nell'art.6 Cost.". Note that, for procedural reasons, art.6 could not be raised in this case (a direct recourse by the President of the Region can only be based on provisions of the Regional Statute, guaranteeing the equal rights of the language groups. See above, p.194).

131. Judgment of 11 February 1982, in Giurisprudenza Costituzionale, 1982, I, 247. There are a number of comments on this case: P.CARROZZA, "Il prudente atteggiamento della corte in tema di 'garanzie linguistiche' nel processo e le sue conseguenze sulla condizione giuridica della minoranza slovena", in Il Foro Italiano, 1982, I, 1815-1825; G.TIBERINI, "La protezione della minoranza slovena a Trieste", in Id., 1825-1829; S.BARTOLE, "Gli sloveni nel processo penale a Trieste", in Giurisprudenza Costituzionale, 1982, I, 249-259; E.PALICI DI SUINI, "Corte costituzionale e minoranze linguistiche: la sent.n.28 del 1982 tra tradizione e innovazione", in Id., 808-825; G.MOR, "L'uso ufficiale della lingua di una 'minoranza riconosciuta': il caso della minoranza slovena", in Le Regioni, 1982, 389-400; V.MARCHIANO, "Uso delle lingue nei procedimenti giudiziari e principi costituzionali", in Giurisprudenza Italiana, 1982, I, 1387-1396.

132. Judgment of 9 July 1963, in Giurisprudenza Costituzionale, 1965, 1603. In his case comment, Paladin emphasizes the 'programmatic' nature of art.6: "non è dell'art.6 che vanno ricavati i criteri per la valutazione della legittimità delle norme sull'uso della lingua italiana; ed è insostenibile che, difettando l'apposita tutela delle minoranze, disposizioni generali sul tipo dell'art.122, siano da considerare incostituzionali ed inapplicabili, limitatamente ai soli territori mistilingui" (L.PALADIN, "Sulla legittimità delle norme processuali in tema di uso esclusivo della lingua italiana", Id., at 1607).

133. Judgment of 11 February 1982, cit., at 255.

134. Id., at 256-257. On the educational measures, see supra, p.411; on those concerning broadcasting, supra, p.310; on the regime for the elections to the European Parliament, infra, p.565.

135. Id., at 257: "Se ormai si è in presenza, al di là di ogni dubbio, di una 'minoranza riconosciuta', con tale situazione è incompatibile, prima ancora logicamente che giuridicamente, qualsiasi sanzione che colpisca l'uso della lingua materna da parte degli appartenenti alla minoranza stessa".

136. Favouring such a wide interpretation, G.MOR, "L'uso ufficiale...", op.cit., at 400; E.PALICI DI SUINI, "Corte costituzionale e minoranze linguistiche...", op.cit., at 823. More cautious, S.BARTOLE, "Gli sloveni nel processo penale...", op.cit., at 257.

137. Judgment of 11 February 1982, cit., at 259.

138. See G.MOR, op.ult.cit., at 396 : "Cio non esclude che laddove esiste un gruppo minoritario non riconosciuto singole disposizioni di legge potrebbero essere dichiarate incostituzionali se perseguono un risultato opposto rispetto a quello fatto proprio dalla Costituzione, portano cioè alla distruzione, anziché alla tutela del gruppo".

139. As is also argued by A.MILIAN MASSANA, "La regulacion constitucional", op.cit., at note 63.

140. R.ENTRENA CUESTA, "Art.3", in F.Garrido Falla (ed), Comentarios a la constitucion, Madrid, Ed.Civitas, 1980, 50-59, at 57.

141. See, in this sense, R.ENTRENA CUESTA, op.cit., at 58 ("en perfecta consonancia con el articulo 9.2") and A.MILIAN MASSANA, op.cit., at 145-146 : "El articulo 3.3 no seria mas que una concrecion en el campo idiomático del principio de igualdad sustancial genericamente incorporado por la Constitucion en el articulo 9.2 al requerir a los poderes publicos que remuevan los obstaculos que impidan o dificultan que la libertad y la igualdad del individuo y de los grupos en que se integra sean reales y efectivas".

142. The following Statutes contain provisions proclaiming the co-officiality of Castillian and the respective regional language : the Basque Statute (art.6.1 - Euskera); the Catalan Statute (art.3.2 - Catalan); the Galician Statute (art.5.2 - Galician); the Statute of the Valencian Community (art.7.1 - 'Valencian', i.e. Catalan); the Navarra Statute (art.9.2 - Basque); the Statute of the Balearic islands (art.3 - Catalan). For an overview of the statutory provisions on language use, see A.MILIAN MASSANA, "La ordenacion estatutaria de las lenguas distintas al castellano", in Revista Vasca de Administracion Publica, 1983, n.6, 237-246.

143. Cf.supra, p.81-82.

144. In Euzkadi, the Law of 24 November 1982, n.10, "Ley basica de normalizacion del uso del Euskera"; in Catalonia, the Law of 18 April 1983, n.7, "Ley de normalizacion

linguística"; in Galicia, the Law of 15 June 1983, n.3, "Ley de normalización lingüística"; in the Valencian Community, the Law of 23 November 1983, n.4, "Ley de uso y enseñanza del valenciano".

Those Acts cover all the domains of public language use falling within the jurisdiction of the Autonomous Communities. They are in the process of being supplemented, in their turn, by Decrees specifying the regime of specific fields (education, administration, etc.); see the survey by A.MILIAN MASSANA, "Notes de legislació y jurisprudència", in Revista de Llengua i Dret, 1984, n.3, 135-155.

145. Amparo, the direct individual recourse to the Constitutional Tribunal, can only be based on those articles of the Constitution dealing directly with fundamental rights, and not on article 3.

146. Bable is protected by art.4 of the Asturian Statute : "El bable gozará de protección. Se promoverá su uso, su difusión en los medios de comunicación y su enseñanza, respetando, en todo caso, las variantes locales y voluntariedad en su aprendizaje".

Aranés (an Occitan dialect) is mentioned by art.3.4 of the Catalan Statute : "El habla aranés será objeto de enseñanza y de especial respeto y protección".

Art.7 of the Aragon Statute, finally, holds that "Las diversas modalidades lingüísticas de Aragón gozaran de protección, como elementos integrantes de su patrimonio cultural y histórico".

On the legal regime of those various idioms, see the following comments : X.X.SANCHEZ VICENTE, "La lengua asturiana y el estatuto de autonomía", in Las Lenguas Nacionales en la Administración, Valencia, Diputación Provincial, 1981, 189-197; X.LAMUELA, "Política lingüística a la Vall d'Aran : les regles del joc", in Revista de Llengua i Dret, 1984, n.3, 59-64; F.NAGORE LAIN, "Notas sobre el uso administrativo del Aragonés", in Revista de Llengua i Dret, 1983, n.2, 97-110; A.QUINTANA, "El marc legal del català a l'Aragó", in Id., 141-145.

147. "Alle Volksstaemme des Staates sind gleichberechtigt, und jeder Volksstamm hat ein unverletzliches Recht auf Wahrung und Pflege seiner Nationalitaet und Sprache. Die Gleichberechtigung aller landesueblichen Sprachen in Schule, Amt und oeffentlichem Leben wird vom Staat anerkannt. In den Laendern, in welchen mehrere Volksstaemme wohnen, sollen die oeffentlichen Unterrichtsanstalten derart eingerichtet sein, dass ohne Anwendung eines Zwanges zur Erlernung einer zweiten Landessprache jeder dieser

Volksstaemme die erforderlichen Mittel zur Ausbildung in seiner Sprache erhaelt".

148. Judgments n.2459/1952, 3509/1959 and 4221/1962.

149. See e.g. F.ERMACORA, Handbuch der Grundfreiheiten und Menschenrechten, Ein Kommentar zu den oesterreichischen Grundrechtsbestimmungen, Wien, Manz, 1963, at 531-532.

150. P.PERNTHALER & F.ESTERBAUER, "Moeglichkeiten des rechtlichen Volksgruppenschutzes", in System eines internationalen Volksgruppenrechts, Vol.2, Wien, Wilh.Braumueller, 1972, 175-188, at 175. This is also the interpretation given to this clause by the Permanent Court of International Justice in the Albanian Minority Schools case, on which see below, p.630-631.

151. On the details of this regime of public language use, see infra, p.648.

152. Judgment of 5 October 1981, in Europaeische Grundrechte Zeitschrift, 1982, 22, at 25 : "Allen diesen angefuhrten Rechtsnormen (...) ist gemeinsam, dass sie eine Wertentscheidung des Verfassungsgesetzgebers zugunsten des Minderheitenschutzes enthalten".

153. Ibid. : "Eine mehr oder minder schematische Gleichstellung von Angehoerigen der Minderheiten mit Angehoerigen anderer gesellschaftlicher Gruppen wird der verfassungsgesetzlichen Wertentscheidung nicht immer genuegen koennen. Je nach dem Regelungsgegenstand kann es der Schutz von Angehoerigen einer Minderheit gegenueber Angehoerigen anderer gesellschaftlicher Gruppen sachlich rechtfertigen oder sogar erfordern, die Minderheit in gewissen Belangen zu bevorzuegen".

In the present case, the court estimated however that there was no constitutional claim to a special treatment; but then, the claim was one of affirmative equality and not of pluralistic equality; see further, p.563-564.

154. T.MODEEN, "The Situation of the Finland-Swedish Population in the Light of International, Constitutional and Administrative Law", in Mc Gill Law Journal, 1970, 121-139, at 128.

155. T.MODEEN, loc.cit. : "Article 14 of the Constitution Act is an expression of the principle of equality that should exist between citizens of different population groups which the state has recognised as being of equal standing".

That art.14 can be considered as an embodiment of equality is further borne out by the text of the article : after stating the principle of co-officiality, art.14 goes on in a second paragraph:

"The cultural and economic needs of the Finnish-speaking and the Swedish-speaking populations shall be met by the State in accordance with the principle of equality". On this clause, see infra, p.555.

156. Cf.infra, p.582 ff.

157. Judgment of 17 May 1983, in Bundesverfassungsentscheidungen, 64, 135, at 157 : "Zum Ausgleich sprachbedingter Erschwernisse, die im Tatsaechlichen auftreten, verpflichtet das Diskriminierungsverbot des Art.3 Abs.3 GG nicht".

158. Cf.supra, p.479.

159. For some world-wide comparative data, see Study of Equality in the Administration of Justice, U.N.Doc.E/CN.4/Sub.2/296/Rev.1 (1972), at paras. 410-418 and 431-442.

160. The constitutional right to a fair trial is e.g applied in the German Constitutional Court judgment of 17 May 1983, at 145 : "Das Recht auf ein rechtsstaatliches, faires Strafverfahren verbietet es, den der deutschen Sprache nicht oder nicht hinreichend maechtigen Angeklagten zu einem unverstandenen Objekt des Verfahrens herabzuwuerdigen; er muss in die Lage versetzt werden, die ihn betreffenden wesentlichen Verfahrensvorgaenge verstehen und sich im Verfahren verstaendlich machen zu koennen".

In the United States, a number of lower court decisions have increasingly recognised that the right to an interpreter is indirectly contained in the general right to a fair trial guaranteed by the due process clauses of the 14th Amendment, as well as in the more specific fair trial rights of the 6th Amendment. See, above all, the judgment of the Court of Appeals in United States ex rel.Negron v New York, 434 F.2d 386 (2d Cir. 1970). For a comment on this and other decisions, see NOTE, "Non-English-Speaking Persons in the Criminal Justice System : Current State of the Law", in Cornell Law Review, 1976, 289-311.

161. On those fair trial guarantees, see infra, p.595 ff.

162. Lau v Nichols, 414 U.S. 563 (1974). See the following discussions of the issues raised by this case, and of subsequent developments : S.D.SUGARMAN & E.G.WIDESS, "Equal

Protection for Non-English-speaking School Children : Lau v. Nichols", in California Law Review, 1974, 157-183; W.E.JOHNSON, "The Constitutional Right of Bilingual Children to an Equal Educational Opportunity", in Southern California Law Review, 1974, 943-997; K.FONG, "Cultural Pluralism", in Harvard Civil Rights Civil Liberties Law Review, 1978, 133-173; P.D.ROOS, "Bilingual Education : The Hispanic Response to Unequal Educational Opportunity", in Law and Contemporary Problems, 1978, 111-140; COMMENT, "Bilingual Education and Desegregation", in University of Pennsylvania Law Review, 1979, 1564-1606; NOTE, "Assuring Equal Opportunity for Language-Minority Students", in Columbia Journal of Law and Social Problems, 1983, 209-293; R.C.FARRELL, "Bilingual Education : The Extent to an Entitlement", in George Mason University Law Review, 1983, 69-110; NOTE, "Supplemental Language Instruction for Students with Limited English-Speaking Ability : The Relationship between the Right and the Remedy", in Washington University Law Quarterly, 1983, 415-434.

163. Lau v Nichols, cit., respectively at 566 and 568.

164. Guidelines of 1970, 35 Federal Register 11595., quoted in Lau v Nichols, cit., at 568.

165. See the discussion of linguistic alternatives in education, above, p.354 ff.

166. See the following cases : Serna v Portales Municipal Schools, 351 Federal Supplement 1279; Cintron v Brentwood Union Free School District, 455 F.Supp. 57; Rios v Reed, 480 F.Supp.14.

167. On the prevalence of the intent standard in American equality doctrine, see above, p.484.

168. Regents of the University of California v Bakke 438 U.S. 265 (1978), at 352. On this case, see also infra, p.561 ff.

169. Guardians Association v Civil Service Commission, 103 Sup.Court 3221 (1983). For a discussion of the various opinions expressed by the judges, see "The Supreme Court - 1982 Term", in Harvard Law Review, 1983, 70-306, at 244 ff.

170. "Current administrative interpretations of section 601 are not to be read as requiring bilingual instruction" (R.C.FARRELL, op.cit., at 86).

171. 20 United States Code section 1703 (f) (1976).

172. R.C.FARRELL, op.cit., at 93. One generally accepts this interpretation because of a comparison of (f) with other provisions of the Act that explicitly do require discriminatory purpose.

173. Castaneda v Pichard, 648 F.2d 989 (5th.Cir. 1981). The tripartite standard can be summarised as follows :

(1) the program must be based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some experts in the field; (2) the program must be reasonably calculated to implement that theory; and (3) the program must have produced satisfactory results after having been used for a sufficient period of time.

174. For arguments that only bilingual education can meet the third step of the standard, see R.C.FARRELL, op.cit., at 98 ff., and Columbia NOTE, op.cit., at 291.

175. See the list in R.C.FARRELL, op.cit., at 101, note 181.

176. But the budget of this program has been severely cut under the Reagan administration; see "Toughen Up : U.S.Schools Must Improve", in Time, 16 May 1983, p.73. The new course is outlined in the Official Report by B.F.BIRMAN & A.L.GINSBURG, Addressing the Needs of Language-Minority Children : Issues for Federal Policy, Washington D.C., Department of Education, Office of Planning, Budget and Evaluation, 1981.

177. California education Code, section 52161.

178. Carmona v Sheffield, 325 Federal Supplement 1341, at 1342.

179. 475 Federal Reporter, second series, 738 (9th Cir. 1973), at 739.

180. Guerrero v Carlson, 109 California Reporter 201 (1973). For a general comment on all three cases, see C.P.BLAINE, "Breaking the Language Barrier : New Rights for California's Linguistic Minorities", in Pacific Law Journal, 1974, 648-674.

181. A striking illustration of this fact is provided by the Californian Bilingual Services Act of 1973; the Act requires state and local agencies which furnish information or render services by contact with a substantial number of non-English-speaking people to employ a sufficient number of qualified bilingual persons in public contact positions or as

interpreters. Yet, no fiscal appropriations were made for the Act.

182. M.L.DUNCAN, "The Future of Affirmative Action : A Jurisprudential/Legal Critique", in Harvard Civil Rights Civil Liberties Law Review, 1982, 503-553, at 503.

183. See e.g. A.M.KATZ, "Benign Preferences : An Indian Decision & the Bakke Case", in American Journal of Comparative Law, 1977, 611-640; S.M.WITTEN, "Compensatory Discrimination in India : Affirmative Action as a Means of Combatting Class Inequality", in Columbia Journal of Transnational Law, 1983, 353-387; W.MC KEAN, Equality and Discrimination under International Law, Oxford, Clarendon Press, 1983, p.228 ff.; J.S.SIGLER, Minority Rights - A Comparative Analysis, Westport, Greenwood Press, 1983, pp.133-148.

184. But see the following recent contributions on this subject in a number of European countries : H.J.MÄNGEL, "Massnahmen 'Positiver Diskriminierung' und Grundgesetz", in Juristenzeitung, 1982, 530-538; L.LUSTGARTEN, Legal Control of Racial Discrimination, London, Macmillan, 1980, at 14 ff.; R.PELLOUX, "Les nouveaux discours sur l'inégalité et le droit public français", in Revue de Droit Public, 1982, 909-927; B.SLOOT, "Legitimatie van positieve discriminatie. Twee redeneerpatronen", in Ars Aequi, 1981, 655-663.

185. See above, p.510-511.

186. See e.g. N.GLAZER, Affirmative Discrimination : Ethnic Inequality and Public Policy, New York, Basic Books, 1975; A.H.GOLDMAN, Justice and Reverse Discrimination, Princeton University Press, 1979; R.K.FULLINWIDER, The Reverse Discrimination Controversy : A Moral and Legal Analysis, Totawa (N.J.), Rowman and Littlefield, 1980.

187. For this argument, see L.LUSTGARTEN, op.cit., at 14 ff.

188. "La Generalidad garantizara el uso normal y oficial de los dos idiomas, adoptara las medidas necesarias para asegurar su conocimiento y creara las condiciones que permitan alcanzar su plena igualdad en lo que se refiere a los derechos y deberes de los ciudadanos de Cataluna".

189. "Los poderes publicos de Galicia garantizaran el uso normal y oficial de los dos idiomas y potenciaran la utilizacion del gallego en todos los ordenes de la vida publica, cultural e informativa, y dispondran los medios necesarios para facilitar su conocimiento".

190. See note 144, above.

191. Law of 18 April 1983 "de normalizacion linguistica de Catalunya",

art.22 : "1. (...) la Generalitat podra subvencionar las publicaciones periodicas redactadas total o parcialmente en catalan mientras subsistan las condiciones desfavorables que afectan a su produccion y difusion. Esta subvencion esta otorgada sin discriminacion y dentro de las previsiones presupuestarias.

2. La Generalitat debe impulsar la normalizacion del catalan en las emisoras, a las que podra subvencionar bajo el correspondiente control parlamentario y con la debida prevision presupuestaria.

Art.23 : "1. La Generalitat debe estimular y fomentar con medidas adecuadas el teatro y la produccion de cine en catalan, el doblaje y la substitucion en catalan de peliculas no catalanas, los espectaculos y cualquier otra manifestacion cultural publica en lengua catalana.

2. La Generalitat debe contribuir al fomento del libro en catalan con medidas que potencien su produccion editorial y su difusion. (...)

In this same sector, see also the characteristic art.3 of the Basque Law of 20 May 1982, setting up its autonomous broadcasting company, which specifies that the company's activity must be based, among others, on the principle of linguistic equality, but adding that the objective is to arrive at "an equilibrium in the global level of Basque-language programs within the Autonomous Community". Now, as the national networks already offer Castilian programs, the Basque government can perfectly decide to establish an Euskera-only channel.

192. Order of the Basque Government of 7 June 1982, and Resolution of 5 May 1983. This measure, as well as those mentioned in the following two notes, is quoted in A.MILIAN MASSANA, "Notes de legislacio y jurisprudencia", in Revista de Llengua i Dret, n.2, 1983, 149-165, at 164.

193. Resolutions of 26 May 1982 and of 6 April 1983.

194. Resolutions of 7 October 1982 and 8 November 1982.

notes to pp.551-555

195. Art.6.3 of the Basque Statute; art.5.4 of the Galician Statute; art.3 of the Catalan normalisation law; art.4 of the Basque normalisation law.

196. See above, p.501-502.

197. In this field, see the comments by Ch.HUBERLANT & Ph.MAYSTADT, "Exemples de lois taxées d'inconstitutionnalité", in Actualité du contrôle juridictionnel des lois, Bruxelles, Larcier, 1973, 443-516, at 495 ff.

198. See the analysis by K.HOUBEN, "Wet en werkelijkheid inzake het taalevenwicht in het Belgisch officierencorps. Een overzicht van de periode 1938-1982", in Res Publica, 1983, 83-93.

199. See above, p.502.

200. "For each field of activity there will be a minimum 'critical mass' of speakers of a given language which must be present before this language can be effectively used in that particular situation" (D.M.MC RAE, "The Constitutional Protection of Linguistic Rights in Bilingual and Multilingual States", in A.Gotlieb (ed), Human Rights, Federalism and Minorities, Toronto, Canadian Institute for International Affairs, 1970, 211-227, at 214).

201. On the role of this art.116.1 of the Constitution, see already above, p.273-274.

202. R.H.BILLIGMEIER, A Crisis in Swiss Pluralism. The Romansh and their Relations with the German- and Italian-Swiss in the Perspective of a Millennium, The Hague, Mouton, 1979, at 335.

203. See the figures given by K.D.MAYER, "Groupes linguistiques en Suisse", in Recherches Sociologiques, 1977, 75-97, at 84.

204. J.STEINBERG, Why Switzerland ?, Cambridge University Press, 1976, at 113.

205. 3 million Swiss francs are granted to the 'Lia Rumantscha' and to 'Pro Grigione Italiano', two private cultural organisations. 2 million go to the canton Ticino. See Europa Ethnica, 1984, 38-39.

206. On this point, see R.H.BILLIGMEIER. op.cit., passim; R.VILETTA, Abhandlung zum Sprachenrecht mit besonderer Beruecksichtigung des Rechts der Gemeinden des Kantons

Graubuenden, Zuerich, Schulthess, 1978, at 146 ff.; 185 ff.; 230 ff. And see below, p.646.

207. M.J.ESMAN, "The Politics of Official Bilingualism in Canada", in Political Science Quarterly, 1982, 233-253, at 242.

208. T.MODEEN, "The Situation of the Finland-Swedish Population...", op.cit., at 129.

209. See M.HIDEN, "Bestand und Bedeutung der Grundrechte im Bildungsbereich in Finnland", in Europaeische Grundrechte Zeitschrift, 1981, 640-643, at 641-642.

210. This is also the view of M.HIDEN, ibid.

211. See S.O'CIOSAIN, "Bilingualism in Public Administration. The Case of Ireland", in Revista de Llengua i Dret, 1983, n.2, 11-19, at 14.

212. See J.R.SOLE & R.ALAMANY, "La situacio del català com a llengua de l'administracio al Principat de Catalunya", in C.Duarte & R.Alamany (eds), Actes del col·loqui sobre llengua i administracio, Barcelona, Generalitat de Catalunya, 1984, 107-127, at 120.

213. "Die Volksgruppen in Oesterreich und ihre angehoerigen geniessen den Schutz der Gesetze; die Erhaltung der Volksgruppen und die Sicherung ihres Bestandes sind gewaehrleistet. Ihre Sprache und ihr Volkstum sind zu achten".

214. "Keinem Volksgruppenangehoerigen darf durch die Ausuebung oder Nichtausuebung der ihm als solchem zustehenden Rechte ein Nachteil erwachsen".

215. See above, p.532.

216. Th.VEITER, "Volksgruppenrecht und Volksgruppenproblematik in Oesterreich - Ende 1976", in Der Donauraum, 1976, 54-69, at 63-64.

217. Decision of 1 February 1973, in Pasicrisie, 1974, IV, 109.

218. Cf. supra, p.483 (and footnote 9).

219. On the content of this Law, see also p.381.

220. Decision of 1 February 1973, cit., at 113.

221. Id., at 112.

222. An expression used by L.THUROW, The Zero Sum Society. Distribution and the Possibilities for Economic Change, New York, Basic Books, 1981, at 184-187.

223. See above, p.493-494.

224. Regents of the University of California v Bakke, 438 U.S. 265 (1978). In legal writing, see e.g. R.POSNER, "The DeFunis Case and the Constitutionality of Reverse Discrimination", in Supreme Court Review, 1974, 1 ff.

225. Sharing this view, although with partially different arguments : J.H.ELY, Democracy and Distrust, op.cit., at 150 ff.; O.M.FISS, "Groups and the Equal Protection Clause", in Philosophy and Public Affairs, 1975-76, 107-177, at 154 ff.; M.J.HORWITZ, "The Jurisprudence of Brown and the Dilemmas of Liberalism", in Harvard Civil Rights Civil Liberties Law review, 1979, 599-613; K.L.KARST & H.W.HOROWITZ, "The Bakke Opinions and Equal Protection Doctrine", in Id., 7-29; S.WRIGHT, "Color-Blind Theories and Color-Conscious Remedies", in University of Chicago Law Review, 1980, 213-245; see also the cautious but well-argued views of T.SANDALOW, "Racial Preferences in Higher Education : Political Responsibility and the Judicial Role", in University of Chicago Law Review, 1975, 653-703.

226. Bakke case, cit., at 316 ff.

227. Steelworkers v Weber, 443 U.S. 193 (1979).

228. Fullilove v Klutznick, 448 U.S. 448 (1979).

229. See e.g. G.LYON CAEN, "Les travailleurs étrangers - étude comparative", in Droit Social, 1975, 1-16, at 16.

230. Judgment of 5 October 1981, cit. (note 152).

231. Id., at 26.

232. J.H.ELY, Democracy and Distrust, op.cit., Chapter 6, p.135 ff.

233. Judgment of 11 August 1954 in Bundesverfassungsgerichtsentscheidungen 4, 31, at 42 : "Mit Bezug auf die parlamentarische Repraesentation des als Einheit gedachten Staatsvolkes begründet die Eigenschaft als Partei einer nationalen Minderheit keine Verschiedenheit die wesentlich is, und die der Gesetzgeber daher bei der Gestaltung der

Rechte der politischen Parteien im Wahlverfahren beruecksichtigen muesste".

234. See the overview in S.FURLANI, "Sulla rappresentanza parlamentare delle minoranze nazionali", in Rivista Trimestrale di Diritto Pubblico, 1955, 213-226 and 972-986. The most radical solution is that experimented for some years in Moravia (and later in Bucovina) during the Austro-Hungarian regime : the total number of seats was divided, from the outset, between the German and Czech population, according to their proportion of the total population, and each voter was registered in a national 'matricole'; see S.FURLANI, op.cit., at 976 ff.

For a discussion of this issue under U.S. constitutional law, in the slightly different context of race, see NOTE, "Group Representation and Race-Conscious Apportionment : The Role of States and the Federal Courts", in Harvard Law Review, 1978, 1847-1873.

235. Art.62 of the Special Statute of Trentino-Alto-Adige, as implemented by the Regional Law of 23 July 1973 : one seat is reserved to the Ladin group; when no candidate, declaring himself a Ladin, is elected according to the normal electoral rules, the Ladin candidate with the highest number of votes replaces the non-Ladin candidate of the same list who is elected with the lowest number of votes. See A.PIZZORUSSO, "La 'garanzia di rappresentanza' del gruppo linguistico ladino nel Consiglio regionale e nel Consiglio provinciale di Bolzano", in Le Regioni, 1973, 1119 ff.

236. Art.61.2 of the Special Statute of Trentino-Alto Adige. This requirement is couched in general terms, so that it not only benefits the Ladins, but also the German and Italian groups in those areas where they form only a small minority.

237. Law of 2 May 1974, "Contributo dello Stato al finanziamento dei partiti politici", art.1; the same rule applies to the funding of the parliamentary fractions (art.3 b of the same Law).

238. Law of 24 January 1979, art.12.9.

239. Above, p.524.

240. "Gli interessi afferenti a tali oggetti sono, infatti, comuni a tutti gli appartenenti alla stessa categoria professionale, lavoratori o datori di lavoro che siano, senza che le differenze di lingua o di origine etnica assumano al riguardo giuridica rilevanza" (judgment of 16 April 1975, in Le Regioni, 1975, 942, at 953).

241. Judgment of 19 February 1976, in Le Regioni, 1976, 503 (with note by A.PIZZORUSSO).

242. Id., at 511 : "Né può ravvisarsi nella imposizione dell'onere di adesione ad organizzazioni maggiori, legalmente riconosciute e rappresentate nel CNEL, una menomazione delle caratteristiche peculiarità tradizionalmente proprie di quelle associazioni, attraverso una sorta di larvata assimilazione forzata che porti a snaturarle, essendo rimesse alla loro libera determinazione la scelta tra aderire o non aderire alle corrispondenti organizzazioni maggiori".

243. Id., at 511-512 : "Veramente, invece, i diritti di tali minoranze sarebbero vulnerati qualora l'adesione delle (loro) associazioni (...) alle organizzazioni nazionali comportasse, in forza di particolari norme che queste disciplinano o di concrete determinazioni adottate dai loro organi deliberanti, delle limitazioni al modo d'essere originario delle prime, con specifico riguardo alla differenziazione etnico-linguistica in esse esprimentesi".

244. See the remarks by S.BARTOLE in his case-note under the judgment of 16 April 1975, cit. (note 240). But see the contrasting views of the Regional Administrative Tribunal for Friuli-Venezia Giulia (judgment of 16 January 1976, in Le Regioni, 1976, 1139, with note by S.BARTOLE), annulling the appointment, by the regional authorities, of the members of the Provincial Committee for Artisanship of Trieste, because of the lack of any representative of the 'Associazione slovena per l'economia', grouping the Slovene operators of the sector. Equal treatment implied, according to the tribunal, that the Slovene association either be represented anyhow, or, at least, represented in proportion to its numerical importance. The Tribunal did not need to decide between the 'proportional' and the 'affirmative' option, as the decision of the regional authorities did not meet any standard, and could thus be annulled without further.

Chapter Two

International Law

1. The fact that the grounds mentioned in article 14 are not limitative is virtually unanimously accepted. For a recent, isolated dissent, see M.SACHS, "Art.14 EMRK : Allgemeines Willkuerverbot oder striktes Unterscheidungsverbot ?", in Oesterreichische Zeitschrift fuer Oeffentliches Recht und Voelkerrecht, 1984, 333-392.
2. Recommendation 234/1960 of the Assembly on a Fourth Protocol 'protecting certain additional rights'.
3. On the circumstances of this rejection, see M.BOSSUYT, L'interdiction de la discrimination dans le droit international des droits de l'homme, Bruxelles, Bruylant, 1976, at 69-70.
4. F.CASTBERG, The European Convention on Human Rights, Leiden, Sijthoff & Oceana, 1974, at 160.
5. In general international law, there might be a distinction between various regimes of responsibility, according to whether the unlawful act constitutes a mere 'delict' or a 'crime'; see the Draft Articles on State Responsibility codified within the International Law Commission and the analysis by M.SPINEDI, "Les crimes internationaux de l'Etat dans les travaux de codification de la responsabilité des Etats entrepris par les Nations Unies", E.U.I. Working Paper n.88 (1984).see the reports by W.Riphagen..
6. Isop v Austria, application n.808/60, Commission decision of 8 March 1962, in Yearbook of the European Convention of Human Rights, 5, 108.
7. On the background in Austrian law, see infra, p.648.
8. Cf.infra, p.600, note 82.
9. Isop v Austria, cit.
10. See the exhaustive analysis of case-law by M.A.EISSEN, "L'autonomie de l'article 14 de la Convention Européenne des droits de l'homme dans la jurisprudence de la Commission", in

Mélanges offerts à Polys Modinos, Paris, Pédone, 1968, 122-145.

11. Commission report of 12 December 1966, in Yearbook of the European Convention of Human Rights, 10, 626, at 678.

12. Art.4.3 states that "For the purpose of this Article the term 'forced or compulsory labour' shall not include :
(...) (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service".

13. Grandrath report, cit. (note 11), at 678.

14. Case 'relating to certain aspects of the laws on the use of languages in education in Belgium ('Belgian Linguistics' case), judgment of the European Court of Human Rights of 23 July 1968, in Publications of the European Court of Human Rights, Series A (unnumbered), at 33 (para.9).

15. Ph.VEGLERIS, "Le principe d'égalité dans la Déclaration universelle et la Convention européenne des droits de l'homme", in Miscellanea W.J.Ganshof van der Meersch, Bruxelles, Bruylant, 1972, Vol.I, 565-588, at 580. See also C.C.MORRISSON Jr., "Restrictive Interpretation of Sovereignty-Limiting Treaties : the Practice of the European Human Rights Convention System", in International and Comparative Law Quarterly, 1980, 361-375, at 374, according to whom the Court "broadened the scope of the provision to embrace rights and freedoms that are within the spirit, but not the language of the Convention".

16. Art.31.1 of the Vienna Convention on the Law of Treaties.

17. National Union of Belgian Police case, judgment of 27 October 1975, in Publications..., Series A, n.19, Separate Opinion by Judge Fitzmaurice, at para.20.

18. Id., para.25.

19. See the judgments in the Belgian Police case, cit., at para.44; in the Marckx case, judgment of 13 June 1979, in Publications..., Series A, n.31, at para.32; in the Swedish Engine Drivers case, judgment of 6 February 1976, in Publications..., Series A, n.20, at para.45; in the Engel case, judgment of 23 November 1976, in Publications..., Series A, n.22, at para.72.

20. Application n.5763/72, X v. The Netherlands, in Yearbook... 16, 274, at 296.
21. Application n.6573/74, X v. The Netherlands, in Decisions and Reports 1, 87, at 89.
22. Application n.5935/72, X v. Federal Republic of Germany, in Yearbook... 19, 276, at 288.
23. Among the authors discussing in some depth the question of the 'autonomous application' of article 14, see M.BOSSUYT, op.cit., at 144 ff.; A.CHUECA SANCHO, "No discriminacion en la Convencion Europea de Derechos Humanos", in Revista de Instituciones Europeas, 1979, 29-51; E.W.VIERDAG, The Concept of Discrimination in International Law, with Special Reference to Human Rights, The Hague, Martinus Nijhoff, 1973, at 113 ff.; F.MATSCHER, "Betrachtungen ueber das Diskriminierungsverbot (Art.14 EMRK) nach der neueren Praxis der Strassburger Instanzen", in Auf dem Wege zur Menschenwuerde und Gerechtigkeit. Festschrift fuer Hans A.Klecatsky, Wien, Braumueller, 1980, 626-639, at 629-637; G.SPERDUTI, "Le principe de non-discrimination dans la jouissance des droits de l'homme (A propos de l'affaire "Syndicat national de la police belge")", in Revue des Droits de l'Homme, 1976, 71-80. The two last mentioned analyses are particularly important as they stem from members of the Court (Matscher) and Commission (Sperduti).
24. E.W.VIERDAG, op.cit., at 117; F.MATSCHER, op.cit., at 634; G.SPERDUTI, op.cit., at 73-74; also F.JACOBS, The European Convention on Human Rights, Oxford, Clarendon Press, 1975, at 190. M.BOSSUYT, on the contrary, only accepts the second hypothesis (op.cit., at 213).
25. Cf.supra, p.320 ff.
26. See Articles 8, 9 and 11 of the Convention.
27. F.MATSCHER, op.cit., at 636. See the Court judgment of 18 January 1978, Ireland v United Kingdom, Publications..., Series A, n.25.
28. On the concept of 'margin of appreciation', see above, p.324.
29. E.W.VIERDAG, op.cit., at 117.
30. G.SPERDUTI, op.cit., at 30 : "il est interdit toute discrimination susceptible de se repercuter negativement sur les droits et libertes reconnus dans la Convention et d'en

affecter de manière substantielle la jouissance, alors meme que rien n'est oté au contenu formel de ces droits et libertés, la discrimination ne portant en elle-meme que sur des droits accessoires et complémentaires".

31. Id., at 75 : "Si celles-ci (Parties Contractantes) veulent se prévaloir de la possibilité que leur donnent les dispositions précitées d'apporter des restrictions à la jouissance de certains droits et libertés reconnus dans la Convention, ces mesures restrictives doivent s'appliquer à toutes les personnes à l'égard desquelles subsistent les raisons qui justifient l'adoption de ces mesures".
For an example of the Court's case law, see the Marckx judgment, cit., at 27-28 (violation of property right of art.1 of the First Protocol, in conjunction with art.14).

32. See for instance the Belgian police case, cit. The Court first holds that the right of association guaranteed by article 11 has a positive aspect, namely the right for the association to be heard by public authorities in matters concerning the interests of its members (at para.39). Yet, this positive right is ill-defined : "Article 11.1 certainly leaves each State a free choice of the means to be used towards this end. While consultation is one of these means, there are others" (ibid.). And this is where article 14 comes in; it applies autonomously "in particular where a right embodied in the Convention and the corresponding obligation on the part of the State are not defined precisely, and consequently the State has a wide choice of the means for making the exercise of the right possible and effective" (para.44).

33. Cf.supra, p.259.

34. Cf.supra, p.260-272.

35. Cf.supra, p.435.

36. Cf.supra, p.424.

37. Cf.supra, p.302 ff.

38. Cf.supra, p.381 and 398.

39. For a more detailed account, see the Belgian Linguistics case, cit., at 13-19.

40. Belgian Linguistics, cit., at 34.

41. See above, p.481 ff.

42. See above, p.482.

43. Appl.Nos.9214/80, 9473/81 and 9474/81, Abdulaziz Cabales and Balkandali v United Kingdom, decision of 12 May 1983, in European Human Rights Reports, Vol.6, 1984, 28, at para.103.

44. Belgian Linguistics, cit., at 34-35.

45. Id., at 44.

46. J.VERHOEVEN, "L'arrêt du 23 juillet 1968 dans l'affaire relative à certains aspects du régime linguistique de l'enseignement en Belgique", in Revue Belge de Droit International, 1970, 353-382, at 375; Ph.VEGLERIS, "Le principe d'égalité...", op.cit., at 583; B.SUNDBERG WEITMAN, "Legal Tests for Applying the European Convention on Human Rights and Freedoms in Adjudicating on Alleged Discrimination", in Nordisk Tidsskrift for International Ret, 1980, 31-58, at 39.

48. Belgian Linguistics, cit., at 38.

49. Supra, p.79.

50. See also, on this point, H.KLOSS, "Objektive und Subjektive Kriterien zur Bestimmung der Volkszugehoerigkeit", in System eines internationalen Volksgruppenrechts, vol.I, Wien, Wilh.Braumuehler, 1970, 155-180, at 179 : "Auch hat die Urteilsbegrueudung nicht versucht, den entscheidenden Unterschied herauszuarbeiten, der besteht zwischen dem von einem Nationalstaat angewendeten, ruecksichtslos das Recht der Staerkeren durchsetzenden Staatssprachenprinzip und dem fuer einen Nationalitaetenstaat charakteristischen Versuch, durch das Sprachgebietsprinzip die (zahlenmaessig oder soziologisch) schwaecheren Gruppen vor den staerkeren zu schuetzen, wobei es dann unvermeidlich zur Hintansetzung oertlich eingesprengter Kleinstminderheiten kommt".

51. Belgian Linguistics, cit., at 49 and 55.

52. Id., at 61; but see the text infra, p.592.

53. Id., at 70.

54. Id., at 69: "The situation is completely different in the case of the six communes 'with special facilities', which belong to the agglomeration surrounding Brussels, the capital of a bilingual state and an international centre. According to the information supplied to the Court, the number of French-speaking families in these communes is high; they

constitute, up to a certain point, a zone of a 'mixed character'."

55. Id., at 92.

56. Whether the communes must be considered as belonging to the Dutch linguistic area as defined in art.2 of the Law of 2 August 1963 must not be decided; it is enough to note that Dutch is clearly considered as the principal language of the zone both in administrative and educational matters, and that the provisions for the use of French are presented as exceptions to this main rule.

The issue has been debated in Belgian legal writing; see P.MAROY, "Les six communes périphériques font-elles partie de la région de langue néerlandaise ?", in Annales de Droit, 1967, 309-319; R.VANDEZANDE, "De zes randgemeenten", in Rechtskundig Weekblad, 1968-69, 721-732; L.A.WAUTIER, "De quelle région linguistique les six communes périphériques bruxelloises font-elles partie ?", in Journal des Tribunaux, 1969, 419-420.

The debate has been ended by the adoption in 1970 of the new article 3 bis of the Constitution, which divides the country in four linguistic regions (Dutch, French, German, and bilingual Brussels), and expressly adds that "every commune is part of one of those linguistic regions". The six communes now undoubtedly belong to the Dutch linguistic area.

57. Cf. supra, p.486 ff.

58. Appl.2924/66, Roger Van den Berghe v Belgium, in Yearbook of the European Convention of Human Rights, vol.11, 412.

59. See above, p.398.

60. In addition to the cases mentioned earlier, at note 19, see also the Airey case, judgment of 9 October 1979, in Publications..., Series A, Vol.32, at 16; and the Dudgeon case, judgment of 22 October 1981, in Publications..., Series A, Vol.45, at 26.

61. Thus, according to a Swiss author, the principle of territorial unilingualism in Swiss education might be acceptable as such, but some of its aspects (such as the restrictions on private education which is not conducted in the language of the region (see supra p.371)) might constitute disproportional discriminations (L.WILDHABER, "Der Belgische Sprachenstreit vor dem europaeischen Gerichtshof fuer Menschenrechte", in Schweizerisches Jahrbuch fuer Internationales Recht, 1969-70, 15-38, at 38.

62. Belgian Linguistics, cit., at p.34.

63. Id., at p.35.

64. See the near unanimity on this point of the national constitutional courts, supra, p.476.

65. As shown in the comparative constitutional analysis, the courts have only actively enforced this obligation to differentiate when there was a clear constitutional mandate to that effect (in the form of a minority clause). The European Convention, for its part, lacks such a minority clause, in contrast with the Civil Covenant (see p.651 ff.)

66. See e.g. the Commission decision in appl.788/60, Austria v Italy, holding that art.6 embodies an idea of equality similar to that of art.14.

67. S.TRECHSEL, "Die Verteidigungsrechte in der Praxis zur Europaeischen Menschenrechtskonvention", in Schweizerische Zeitschrift fuer Strafrecht, 1979, 337-392, at 346.

68. Appl.2465/65, X v Fed.Rep.of Germany, in Collection of Decisions, 24, 57-58; Appl.4566/70, X v the Netherlands, in Id., 37, 142-143.

69. Judgment of 28 November 1978, in Publications of the European Court of Human Rights, Series A, n.28; see the detailed comments by P.J.DUFFY, "Luedicke, Belkacem and Koc : A Discussion of the Case and of Certain Questions Raised by It", in Human Rights Review, 1979, 98-128; and Th.VOGLER, "Das Recht auf unentgeltliche Beiziehung eines Dolmetschers (Art.6 Abs.3 Buchst.e EMRK)", in Europaeische Grundrechte Zeitschrift, 1979, 640-647.

70. See the rule of interpretation of the Vienna Convention on the Law of Treaties, art.31.1 : "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

71. Luedicke judgment, cit., at para.40.

72. S.TRECHSEL, op.cit., at 374.

73. Luedicke judgment, cit., at para.42; see also D.PONCET, La protection de l'accusé par la Convention européenne des droits de l'homme, Genève, Librairie de l'Université Georg & Cie, 1977, at 140 : "A cet égard, le critère décisif nous semble etre celui du principe d'égalité entre les parties :

celle qui ne comprend pas la langue a le droit d'etre placée sur le meme pied que les autres accusés qui l'entendent : et si, pour ce faire, elle doit supporter des frais, l'égalité est rompue, l'étranger étant désavantagé par rapport aux nationaux".

74. Appl.6185/73, X v Austria, in Decisions and Reports, 2, 70.

75. P.J.DUFFY, op.cit., at 104; Th.VOGLER, op.cit., at 643; S.TRECHSEL, op.cit., at 374.

76. Judgment of 21 February 1984, in Publications of the European Court of Human Rights, Series A, Vol.73.

77. See above, p.206.

78. See the discussion by G.RESS, "The European Convention on Human Rights and States Parties : The Legal Effect of the Judgments of the European Court of Human Rights on the Internal Law and before Domestic Courts of the Contracting States", in I.Maier (ed), Protection of Human Rights in Europe - Limits and Effects, Heidelberg, C.F.Mueller, 1982, 209-269, at 259-263.

79. Appl.n.9116/80, Alparslan Temeltasch v Switzerland, Report of 5 May 1982.

80. On the notions of interpretative declaration and reservation, see above, p.227-228 and accompanying notes.

81. P.H.IMBERT, "Reservations to the European Convention on Human Rights before the Strasbourg Commission : The Temeltasch Case", in International and Comparative Law Quarterly, 1984, 558-595; a more favourable comment is R.KUEHNER, "Die 'auslegende Erklarung' der Schweiz zu Art.6 Abs.3 lit.e der Europaeischen Menschenrechtskonvention - Anmerkung zur Bericht der Europaeischen Menschenrechtskommission im Fall Temeltasch von 5.Mai 1982", in Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht, 1983, 828-833.

82. Appl.2332/64, X and Y v Belgium, in Yearbook of the European Convention of Human Rights, IX, 418, at 424; Appl. Isop, cit.; see also J.VELU, "La Convention européenne des droits de l'homme et les garanties fondamentales des parties dans le procès civil", in M.Cappelletti & D.Tallon (eds), Fundamental Guarantees of the Parties in Civil Litigation, Milano, Giuffrè & Dobbs Ferry, Oceana, 1973, 245-333, at 325-26.

83. P.PESCATORE, "The Context and Significance of Fundamental Rights in the Law of the European Communities", in Human Rights Law Journal, 1981, 295-308, at 297.

84. See e.g. L.MARCOUX, "Le concept de droits fondamentaux dans le droit de la Communauté Economique Européenne", in Revue Internationale de Droit Comparé, 1983, 691-733; and J.W.BRIDGE, "Fundamental Rights in the European Economic Community", in Bridge, Lasok, Perrott, Plender (eds), Fundamental Rights, London, Sweet & Maxwell, 1973, 291-305. These authors also give an exhaustive (and even somewhat over-extensive) list of those rights.

85. GROEBEN-BOECKH-THIESING-EHLERMANN, Kommentar zum EWG-Vertrag, 3rd ed., Baden Baden, Nomos, 1983, vol.2, at 1481.

86. A.BLECKMANN, "Die Freiheiten des Gemeinsamen Marktes als Grundrechte", in Das Europa der zweiten Generation. Gedächtnisschrift fuer Christoph Sasse, Kehl/Strassburg, N.P.Engel Verlag, 1981, II, 665-684.

87. See e.g. C.W.A.TIMMERMANS, "Verboden discriminatie of (geboden) differentiatie. Het discriminatieverbod als open ruimte voor een creatieve rechtsvinding in het Europese gemeenschapsrecht", in Sociaal-Economische Wetgeving, 1982, 426-460, at 429, echoing adv.gen. Mayras in the cases 9 and 11/71, in E.C.Reports, 1972, 422.

88. A fear which materialised to some extent in the reservations expressed by the judgment of the German Constitutional Court of 29 May 1974 ('Solange-Beschluss'), in Bundesverfassungsgerichtsentscheidungen, 37, 271; and the 'Frontini' judgment of the Italian Constitutional Court of 27 December 1973, in Foro Italiano, 1973, I, 314.

89. Stauder v city of Ulm, case 29/69, in E.C.Reports, 1969, 419; Internationale Handelsgesellschaft v Einfuehr- und Vorratsstelle fuer Getreide und Futtermittel, case 11/70, in E.C.Reports, 1970, 1125; Nold v Commission, case 4/73, in E.C.Reports, 1974, 491, and a number of subsequent cases. for detailed analyses of the development of this case-law, see e.g. L.MARCOUX, op.cit., at 706 ff.; M.H.MENDELSON, "The European Court of Justice and Human Rights", in Yearbook of European Law, 1981, 125-165, at 129 ff.

90. Official Journal 1977, C 103, p.1.

91. In the same sense, see GROEBEN-BOECKH etc., op.cit., at 1478 ff.; Adv.Gen.Capotorti in Defrenne v Sabena, case 149/77, in E.C.Reports, 1978, 1365, at 1384 ff.; G.COHEN

JONATHAN, "La Cour des Communautés Européennes et les droits de l'homme", in Revue du Marché Commun, 1978, 74-100, at 94. Often, this essential distinction is not made; see e.g. L.MARCOUX, op.cit.; M.H.MENDELSON, op.cit.

92. In order to specify the meaning of one of the Community freedoms, the Court has, e.g. had recourse to an international human rights instrument, the European Convention (Rutili, case 36/75, in E.C.Reports, 1975, 1219. This external similarity with the method of discovering the 'general principles' explains the fact that this judgment is often wrongly listed in the 'general principles' line of cases.

93. Nold, cit., at 507.

94. Ibid. See, for further speculations on the role of those national and international sources in the formation of the general principles, P.PESCATORE, op.cit., at 298 ff.; M.H.MENDELSON, op.cit., at 153 ff.

95. See e.g. the Prais case (130/75, in E.C.Reports 1976, 1589), in which an intellectual right similar to freedom of expression (namely the religious freedom of an applicant for a post at the Council of Ministers) was at stake.

96. See e.g. cases 1176/76 and 16/77, Ruckdeschel & Diamalt, in E.C.Reports, 1977, 1753; and cases 124/76 and 20/77, Moulins et huilleries de Pont à Mousson & Providence agricole de la Champagne, in E.C.Reports, 1977, 1795.

97. The non-discrimination rule is however restricted to the official languages of the European Community; see the D'Aloya case (280/80 in E.C.Reports 1981, 2887) in which the plaintiff's shorthand performance in her mother tongue (Norwegian) was not taken into account for promotion purposes).

98. See e.g. the Hochstrass case, 147/79, E.C.Reports 1980, 3005 (staff members of the Court of Justice of Luxemburgian nationality may be denied certain benefits because they do not carry various burdens linked to expatriation).

99. Lassalle case 15/63, in E.C.Reports 1964, 31.

100. Kuster case 79/74, in E.C.Reports 1975, 725.

101. See e.g. the so-called 'Three Wise Men Report' (Council of the European Communities, Report on European Institutions, 1980), at pp.71-72, describing the increasing burden caused

by linguistic diversity ("over 60% of the personnel employed in the Council, the ESC and the Court of Justice are engaged in linguistic work"), and suggesting the maintenance of a formal right to use the various official languages, but combined with a greater flexibility in administrative practice.

On the linguistic problems in the Community's operation, see also European Parliament, Doc. 73.706 of 15 June 1981; H.KUSTERER, "Das Sprachenproblem in den Europaeischen Gemeinschaft. Ein Plaedyer fuer Pragmatik", in Europa-Archiv, 1980, 693-698; A.CIANCIU, "Elargissement et problèmes linguistiques : la traduction", in W.Wallace & I.Herreman (eds), A Community of Twelve ? The Impact of Further Enlargement of the European Communities, Bruges, De Tempel, 1978, 113-125; and R.VAN HOOFF, "Elargissement et problèmes linguistiques : l'interprétation de conférence", in Id., 126-134.

102. Resolution of 16 October 1981, in Official Journal of the European Communities, 9 December 1981, C 287/106. On this Resolution, see also p.618, below.

103. For the first time in the Sotgiu case, 152/73, in E.C.Reports, 1974, 153, at 164 :

"The rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No. 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result."

104. See the comparative table in C. de WENDEN, "La représentation des immigrés en Europe", in Revue Française des Affaires Sociales, 1978, n.2, 159-183, at 180-181. For a discussion of some judgments of the French 'Cour de Cassation' on the question whether collective agreements in an individual enterprise may derogate from the law in a sense more favourable to the migrant workers, see A.F.BEYLIER, "L'action législative et réglementaire récente concernant les étrangers", in Id., 147-157, at 153-156.

105. P.LELEUX, "The Role of the European Court of Justice in Protecting Individual Rights in the Context of Free Movement of Persons and Services", in T.SANDALOW & E.STEIN, Courts and Free Markets : Perspectives from the United States and Europe, Oxford, Clarendon Press, 1982, at 387.

See also G.COHEN JONATHAN, op.cit. (note 91), at 75-76 : "Partant de dispositions essentiellement économiques, (la Cour) a su par une interprétation finaliste et très libérale en déduire toute une série de droits sociaux au sens très

large, meme s'ils ne se situaient pas dans le prolongement direct de l'activité économique en cause".

106. On this process of extension and the resulting broader scope of the free movement principle, see e.g. S.NERI, Le champ d'application du droit communautaire en matière de libre circulation des travailleurs, Milano, Franco Angeli Editore, 1982; M.BENEDETTI, "Eguaglianza e libera circolazione dei lavoratori", E.U.I. Working Paper n.50 (1983).

107. Such as military service and its consequences on seniority (Ugliola case, 15/69, in E.C.Reports, 1969, 363), or railway fare reductions (Cristini case, 32/75, in E.C.Reports, 1975, 1085).

108. Such as educational grants (Casagrande case, 9/74 in E.C.Reports 1974, 773)) or rehabilitation for handicapped children (Michel S. case, 76/72, in E.C.Reports 1973, 457).

109. Case 16/78, in E.C.Reports, 1978, 2293, at 2302.

110. See above, p.510 ff.

111. Regulation N.3 on social security for migrant workers, which has become (with some amendments) Regulation 1408/71.3

112. Case 55/77, in E.C.Reports 1977, 2327, at 2337.

113. See the conclusions of adv.gen. Trabucchi in the Farrauto case (66/74, in E.C.Reports, 1975, 157, at 168), mentioning the "need, which Community social legislation is designed to meet, to overcome obstacles in the way of full achievement of the free movement of workers in the Community, especially obstacles arising from inequality of treatment which, even if only de facto, place the foreign worker at a disadvantage compared with the national of the country concerned."

114. Maris case, cit.

115. Council Directive of 25 July 1977 on the education of the children of migrant workers, in Official Journal of the European Communities, 1977, L 199/32.

116. An author rejecting the legitimacy of the Directive on this ground is W.HIERMAIER, "Der Einfluss der Europaeischen Gemeinschaft auf das deutsche Bildungssystem", in Kulturverwaltungsrecht im Wandel, Stuttgart, Richard Boorberg Verlag, 1981, 81-110, at 95-96.

For general discussions of the issue of reverse discrimination in Community Law, see KON, "Aspects of Reverse Discrimination in Community Law", in European Law Review, 1981, 75 ff.; K.J.MORTELMANS, "Omgekeerde discriminatie en het Gemeenschapsrecht", in Sociaal-Economische Wetgeving, 1979, 654-674; M.A.REITMAIER, Inlaenderdiskriminierungen nach dem EWG-Vertrag. Zugleich ein Beitrag zur Auslegung von Art.7 EWGV, Kehl/Strassburg, N.P.Engel Verlag, 1984.

117. Above, p.470-471; 510 ff.

118. Above, p.359.

119. See e.g. C.C.CECIONI, "Il problema della lingua : l'insegnamento agli emigrati", in Città e Regione, 1982, n.1, 102-110.

120. See the criticism on this point by M.R.M.BROOK, "The 'Mother Tongue' Issue in Britain : Cultural Diversity or Control ?", in British Journal of the Sociology of Education, 1980, 237-256, at 242.

121. COM (84) 54 final.

122. See the text of those conclusions in Revue du Marché Commun, 1984, 434 ff.

123. On the controversial issue of the direct effect of directives, see C.W.A.TIMMERMANS, "Directives : their Effect within the National Legal Systems", in Common Market Law Review, 1979, 533-555.

124. Official Journal of the European Communities, 12 December 1977, C 229.

125. See the comments by R.BIEBER, "Besondere Rechte fuer die Buerger der Europaeischen Gemeinschaften", in Europaeische Grundrechte Zeitschrift, 1978, 203-207; G.GAJA, "L'attribuzione di diritti speciali ai cittadini della Comunità secondo il Parlamento europeo", in Rivista di Diritto Internazionale, 1978, 943-945.

126. R.BIEBER, op.cit., at 206.

127. Official Journal of the European Communities, 9 December 1981, C 287/106. See G.ARFE, "La carta di Strasburgo e le culture minoritarie", in Città e Regione, 1982, n.1, 59 ff.

128. On which, see J.P.HUMPHREY, "The United Nations Sub-Commission on the Prevention of Discrimination and the

Protection of Minorities", in American Journal of International Law, 1968, 869-888; W.MC KEAN, Equality and Discrimination under International Law, Oxford, Clarendon Press, 1983, at 72 ff.

129. For a list of those studies, see W.MC KEAN, op.cit., at 94, note 32.

130. B.G.RAMCHARAN, "Equality and Nondiscrimination", in L.Henkin (ed), The International Bill of Rights. The Covenant on Civil and Political Rights, New York, Columbia University Press, 1981, 246-269, at 249; see also the discussion by W.MC KEAN, op.cit., at 264 ff.

131. See above, p.122.

132. The traditional sources can be supplemented by legal writing, which is particularly intensive on this subject. See e.g. W.MC KEAN, op.cit.; M.BOSSUYT, L'interdiction de la discrimination..., op.cit. (note 3); E.W.VIERDAG, The Concept of Discrimination..., op.cit. (note 23); F.ERMACORA, Diskriminierungsschutz und Diskriminierungsverbot in der Arbeit der Vereinten Nationen, Wien/Stuttgart, Wilh.Braumüller, 1971.

133. See e.g. art.2 of the Universal Declaration, listing the following 12 grounds : race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

134. For M.BOSSUYT, op.cit., at 58-59, they have no legal meaning at all; they merely play a signalling role : "les motifs qui sont mentionnés dans une énumération sont ceux qui, en n'étant pas manifestement arbitraires aux yeux de tout le monde, courent une chance certaine de se voir invoqués comme fondement de certaines distinctions illégitimes" (Id., at 65).

135. See, on this point, E.SCHWELB, "The International Convention on the Elimination of All Forms of Racial Discrimination", in International and Comparative Law Quarterly, 1966, 996-1068, at 1006-1009; and N.LERNER, The U.N.Convention on the Elimination of All Forms of Racial Discrimination, The Hague, Sijthoff & Noordhoff, 1980, at 25-32.

136. Art.7 of the Universal Declaration, art.26 of the Civil Covenant.

137. See above, p.572.

138. On these two notions, see above, p.451 ff.

139. See e.g. art.2.c of the Convention against Racial Discrimination, and art.3.a of the UNESCO Convention.

140. Art.2.1 (d) of the Convention :

"Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization".

And the more detailed art.4 :

"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination, and to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article5 of this Convention, inter alia :

(a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law; (...)"

As the text clearly shows, this prohibition of 'horizontal' discrimination is not directly applicable, but rather needs implementing acts by the ratifying States.

See, generally, the analysis by N.LERNER, op.cit., at 43-53.

141. C.TOMUSCHAT, "Equality and Non-Discrimination under the International Covenant on Civil and Political Rights", in Staatsrecht - Voelkerrecht - Europarecht. Festschrift fuer H.J.Schlochauer, Berlin/New York, de Gruyter, 1981, 691-716, at 692 ff.

142. See e.g. p.480, above.

143. C.TOMUSCHAT, op.cit., at 708-709.

144. See e.g. B.G.RAMCHARAN, op.cit., at 254-255; M.BOSSUYT, op.cit., at 84-87; see also the detailed overview of the preparatory work by F.ERMACORA, op.cit., at 52-72.

145. C.TOMUSCHAT, op.cit., at 708.

146. See above, p.456.

147. See e.g. art.6 of the Draft Articles on State Responsibility adopted by the International Law Commission.

148. M.BOSSUYT, op.cit., at 88-89; E.W.VIERDAG, op.cit., at 110; W.MC KEAN, op.cit., at 139; B.G.RAMCHARAN, op.cit., at 254-256.

149. Supra, p.496.

150. Art.1 of the Convention against Racial Discrimination; art.1 of the UNESCO Convention uses practically identical terms ('limitation' instead of 'restriction').

151. Already in art.1.4 of the same Convention, "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals..." had been expressly exempted from the definition of 'discrimination'. Art.2.2 goes further by turning this exemption into a positive duty.

152. See the opening words of art.1 of the Convention against Racial Discrimination and art.1 of the UNESCO Convention.

153. See e.g. C.TOMUSCHAT, op.cit., at 715; W.MC KEAN, op.cit., at 140-142.

154. E.W.VIERDAG, op.cit., at 158-159.

155. See the contrasting indications given by B.G.RAMCHARAN, op.cit., at 260-261.

156. On the use of this interpretative principle, see generally Ch.ROUSSEAU, Droit International Public, I, Paris, Sirey, 1970, at 270.

157. Cf.supra, p.476.

158. Minority Schools in Albania, Advisory Opinion, P.C.I.J. (1935), Series A/B, No.64, at 17.

159. I.C.J.Reports, 1966, 248-316.

notes to pp.631-633

160. W.MC KEAN, op.cit., at 263; this Dissenting Opinion is also selected by I.BROWNLIE in his Basic Documents on Human Rights, Oxford, Clarendon Press, 1981 (2nd ed), at 441.

161. I.C.J.Reports, 1966, at 305.

162. Id., at 306.

163. U.N. Doc. E/CN.4/Sub.2/40/Rev.1 (7 June 1949), at para.7.

164. Infra, p.651 ff.

PART SIX : THE RIGHT TO USE ONE'S LANGUAGE

Chapter One

Comparative Constitutional Law

1. On the relationship between freedom of expression and freedom of education as regards language use, see above p.142-143.
2. See above, p.283 ff.; 385 ff.
3. See above, p.533.
4. On the distinction between specific and generic fundamental rights, see above, p.125 ff., esp. at 146.
5. Definition given above, p.130. See, along the same lines, the definition given by the Austrian Constitutional Court in its judgment of 28 June 1983, in Europaeische Grundrechte Zeitschrift, 1984, 19, at 20 : "Nach Art.8 B-VG ist die deutsche Sprache, unbeschadet der den sprachlichen Minderheiten bundesgesetzlich eingeräumten Rechte, die Staatssprache der Republik. Dies bedeutet, dass sie die offizielle Sprache bildet, in der die Anordnungen der Staatsorgane ergehen muessen und in der alle Staatsorgane mit den Parteien und untereinander zu verkehren haben.
6. See above, p.273-274.
7. See e.g the following decisions : n.15.990 of 17 August 1973, 17.414 of 3 February 1976, 19.552 of 20 March 1979, 23.282 and 23.284 of 24 May 1983.
This issue is especially controversial in a number of communes belonging to the Dutch linguistic area, where a derogatory regime allows for the use of French by the administration on request of the citizen. See, in literature, J.DELFOSSE, L'emploi des langues dans les assemblées communales - le cas des communes périphériques, Louvain la Neuve, Cabay, 1982.
8. Opinion ('Avis') of the Council of State of 25 January 1984, in La Revue Communale, juin-juillet 1984, 99-116, at 113 : "l'article 3 bis peut avoir et a directement pour effet (...) d'obliger les (mandataires locaux) à employer, meme

lorsqu'elles agissent isolément, la langue de la région unilingue dans laquelle ces personnes exercent leurs fonctions et, par conséquent, à avoir de cette langue une connaissance objectivement en rapport avec la nature de ces fonctions".

9. F.CAPOTORTI, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, United Nations Doc. E/Cn.4/Sub.2/384/Rev 1 (1979), at 75.

10. As is arguably the case in Finland (see p.533 above).

11. The language in which the Constitution has been enacted could thus be considered as the official language of the country.

12. Decree of 30 June 1981.

See the comment by C.DE BUSSCHERE, "Het Taaldecree van 30 juni 1981 van de Raad van de Vlaamse Gemeenschap : het Nederlands als bestuurstaal in het homogeen Nederlands taalgebied van België", in Tijdschrift voor Notarissen, 1982, 11-21.

13. See the High Court decision quoted by J.M.KELLY, The Irish Constitution, 2nd ed, Dublin, 1984, at 37.

14. K.D.MC RAE, "The Constitutional Protection of Linguistic Rights in Bilingual and Multilingual States", in A.Gotlieb (ed), Human Rights, Federalism and Minorities, Toronto, Canadian Institute for International Affairs, 1969, 211-227, at 221.

15. See the discussion by K.D.MC RAE, "Bilingual Language Districts in Finland and Canada : Adventures in the Transplanting of an Institution", in Canadian Public Policy, 1978, 331-351.

16. M.J.ESMAN, "The Politics of Official Bilingualism in Canada", in Political Science Quarterly, 1982, 233-253, at 237. On the division of powers as regards the regulation of language use, cf.supra, p.80.

17. M.J.ESMAN, op.cit., passim.

18. Cf.supra, p.274.

19. Cf.supra, p.273 and 371.

20. "Bildet die Erhaltung der Ausdehnung und Homogenitaet der Sprachgebiete eine Schranke der Sprachenfreiheit im

Allgemeinen, so darf vernuenftigerweise auch die Regelung des amtlichen Sprachgebrauches diesem Ziel nicht zuwiderlaufen" (C.HEGNAUER, Das Sprachenrecht der Schweiz, Zuerich, 1947, at 127).

21. M.PEDRAZZINI, "Les principes du droit des langues en Suisse", in Res Publica, 1962, 238-246, at 242.

22. C.HEGNAUER, op.cit., at 225; F.FLEINER & Z.GIACOMETTI, Schweizerisches Bundesstaatsrecht, Zuerich, Schulthess, 1976 (orig.ed. 1949), at 397.

23. See the overview by P.SCHAEPPPI, Der Schutz sprachlicher und konfessioneller Minderheiten im Recht von Bund und Kantonen, Zuerich, Schulthess, 1971, at 92 ff.

24. Art.46 of the cantonal Constitution.

25. Supra, p.398.

26. Eheleute Giovanoli gegen Skilifte Bivio AG und Bezirksgerichtsausschuss Albula (Graubunden), judgment of 7 May 1982, in Europaeische Grundrechte Zeitschrift, 1982, 317.

27. Id., at 317-318.

28. See above, p.274.

29. The relevant provisions are listed in note 142 to p.529.

30. See, very clearly, art.6.1 of the Basque Statute, and art.5.2 of the Galician Statute; more ambiguously, art.3.3 of the Catalan Statute.

31. Judgment of 5 August 1983, in Boletin de Jurisprudencia Constitucional, 1983, n.30, 1121, at 1176 (on which, see also above, p.499).

32. Art.7 of the Valencian Statute; art.9 para.2 of the Navarra Statute ('Ley organica de reintegracion y amjoramiento del Regimen Foral de Navarra').

33. Article 19 of the Law on the Use of Languages in Administrative Matters (coordinated version of 18 July 1966).

34. Decision of 4 June 1974, Verbond van het Vlaams Overheidspersoneel c. Commune de Schaerbeek, in Code Linguistique, III A-667.

35. On this point, see also above, p.498 ff.

36. Supra, pp.405-411.

37. Law n.102 of 1959, 'Gerichtssprachengesetz'.

38. Law of 7 July 1976, and implementing regulations ('Verordnungen') of 31 May 1977, the full text of which can be found in Th.VEITER, Das oesterreichische Volksgruppenrecht seit dem Volksgruppengesetz 1976, Wien, Wilh.Braumuehler, 1980, at 17-24.

39. Judgment of 28 June 1983, in Europaeische Grundrechte Zeitschrift, 1984, at 20.

40. See the overview by F.HARTWEG, "La situation linguistique au Grand-Duché de Luxembourg", in Carleton Germanic Papers, 1976, 37-63; and H.HOSTERT, "La situation multilingue au Grand-Duché de Luxembourg", in Recherches Sociologiques, 1983, 29-44.

41. For a view of the practice, see R.I.LEWIS, "The Welsh Language and the Law", in M.Stephens (ed), The Welsh Language Today, Llandysul, Gomer Press, 1979 (2nd ed), 207-222.

42. I.B.REES, "The Welsh Language in Government", in The Welsh Language Today, op.cit., 223-248, at 244.

43. F.CAPOTORTI, Study..., op.cit., at 79.

Chapter Two

International Law

1. See above, p.632-633.
2. See e.g. Y.DINSTEIN, "Collective Human Rights of Peoples and Minorities", in International and Comparative Law Quarterly, 1976, 102-120, at 118.
3. F.CAPOTORTI, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, United Nations, Doc. E/CN.4/Sub.2/384/Rev 1, 1979, para.209.
4. F.CAPOTORTI, "The Protection of Minorities under Multilateral Agreements on Human Rights", in Italian Yearbook of International Law, 1976, 1-30, at 19.
5. Advisory Opinion of 31 July 1930, P.C.I.J. Series B, n.17, p.19.
6. Ibidem.
7. F.CAPOTORTI, Study..., op.cit. On the background of this study, see above, p.172.
8. On the distinction, see above, p.3 ff.
9. Examples where linguistic differences do not coincide with an ethnic divide are the Irish- and English-speaking inhabitants of Ireland, or the Welsh- and English-speaking Welshmen.
10. F.CAPOTORTI, Study..., op.cit., para.36.
11. Op.ult.cit., para.567.
12. F.CAPOTORTI, "The Protection...", op.cit., pp.15-16; C.TOMUSCHAT, "Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights", in Voelkerrecht als Rechtsordnung - Internationale Gerichtsbarkeit - Menschenrechte. Festschrift fuer Hermann Mosler. Berlin-Heidelberg-New York, Springer, 1983, 949-979, at 957.

13. C.TOMUSCHAT, op.cit., at 958.

14. F.CAPOTORTI, Study..., op.cit., para. 566.

15. F.CAPOTORTI, "The Protection...", op.cit., at 16.

16. F.CAPOTORTI, Study..., op.cit., para.57.

17. Cf., in the same sense, M.TABORY, "Language Rights as Human Rights", in Israel Yearbook on Human Rights, 1980, 167-223, at 182; and C.TOMUSCHAT, op.cit., pp.960-962 (who restricts this right, however, consistently with his general views on art.27, to "well-defined and long-established groups", thereby excluding in practice most alien groups).

18. On this 'voluntary' nature as a basis for differentiation, see also supra, p.68.

19. As the preparatory work is only a subsidiary source of treaty interpretation (see articles 31 and 32 of the Vienna Convention on the Law of Treaties.

20. On the necessity of such an 'autonomous' international definition, see already A.MANDELSTAM, "La protection des minorités", in Recueil des Cours, 1923 I, 367-517, at 407-408.

21. U.N. Doc. CCPR/C/2/Add.5, p.2 (1982).

22. Art.19 of the Vienna Convention on the Law of Treaties.

23. F.CAPOTORTI, Study..., para

24. Rights of Minorities in Upper Silesia (Minority Schools), Judgment No.12, 1928, P.C.I.J., Series A, No.15. The Upper Silesian Convention, signed between Germany and Poland, faced this question in much more detail than all the other minority treaties, but this did not prevent the dispute of interpretation.

25. P. DE AZCARATE, League of Nations and National Minorities - An Experiment, Washington, Carnegie Endowment for International Peace, 1945 (New York, Kraus Reprint Co., 1972), at 147.

It might seem paradoxical that people want to join the ranks of the minority, but this has to be understood in the historical context of Upper Silesia, where German had been for a long time the socially dominant language, which had led to the creation of a large hybrid group of 'Wasserpölen' (ethnic Slavs aspiring to German language assimilation).

26. Op.ult.cit., at 141.

27. N.FEINBERG, "La juridiction et la jurisprudence de la Cour Permanente de Justice Internationale en matière de mandats et de minorités" in Recueil des Cours, 1937 I, 591-705, at 643.

28. C.TOMUSCHAT, op.cit., at 964.

29. Op.ult.cit., at 965.

30. The case of Lovelace v Canada; see the text in Human Rights Law Journal, October 1981, 158-167.

31. Op.ult.cit., 165-166.

32. J.W.BRUEGEL, "A Neglected Field : The Protection of Minorities", in Human Rights Journal, 1971, 413 ff., at 433. Equally skeptical, F.ERMACORA, Der Minderheitenschutz in der Arbeit der Vereinten Nationen, Wien, Wilhelm Braumüller, 1964, at 63 ("dass der Ausdruck 'to use their own language' so nichtssagend ist wie etwa die Aussage, dass jemand ueberhaupt sprechen duerfe, wenn ihm die Sprache gegeben ist"); and J.CLAYDON, "Internationally Uprooted People and the Transnational Protection of Minority Culture", in New York Law School Law Review, 1978, 125-151, at 143-144.

33. See the analysis of freedom of expression, above, p.315 ff.

34. See the text of the Committee's views in Human Rights Law Journal, October 1981, 158-167.

35. C.TOMUSCHAT, op.cit., pp.969-970; J.CLAYDON, op.cit., at 144; Y. DE MONTIGNY, "L'O.N.U. et la protection internationale des minorités depuis 1945", in Revue Juridique Thémis, 1978, 389-447, at 435.

36. L.SOHN, "The Rights of Minorities", in L.Henkin (ed.), The International Bill of Rights - The Covenant on Civil and Political Rights, New York, Columbia University Press, 1981, 270-289, at 287; C.TOMUSCHAT, op.cit., at 968.

37. See p.419, above.

38. See the discussion, above p.627 ff.

39. L.SOHN, op.cit., at 285.

40. C.TOMUSCHAT, op.cit., at 969.

notes to pp.669-673

41. See p.632-633.

42. F.CAPOTORTI, Study..., op.cit., para.214.

43. See the references to the preparatory work in L.SOHN, op.cit., pp.283-284; and C.TOMUSCHAT, op.cit., at 968 ff.

44. F.CAPOTORTI, Study..., op.cit., para.588.

45. Op.ult.cit., para.228 to 233; for TOMUSCHAT, see the passage quoted in the text above, p.668-669.

46. In the same sense, see M.TABORY, op.cit., at 183 : "The qualifying phrase in Article 27 would seem to limit the use of the minority's own language to communal purposes, such as in schools, religious worship and cultural activities." Art.27 would not apply "for individual purposes, such as in court or in parliament".

47. F.CAPOTORTI, Study..., op.cit., para.604. M.LEBEL, on the contrary, denies any relevance to art.27 with regard to education ("Le choix de la langue d'enseignement et le droit international", in Revue Juridique Thémis, 1974, 221-248, at 236-237.

48. F.CAPOTORTI, Study..., op.cit., para. 617.

49. Ibid.

50. Resolution 5 (XXX) of 31-8-1977 (UN Doc.E/CN.4/Sub.2/L.674).

51. The text of the Yugoslav Draft (revised version) can be found in UN Doc.E/CN.4/Sub.2/L.734, and in the article by L.SOHN, op.cit., at 288-289.

52. A.FENET, "Le projet de déclaration des Nations-Unies sur les droits des minorités", in Actualité de la question nationale, Paris, P.U.F., 1980, 189-201, at 191.

53. It has been welcomed in positive terms, on the contrary, by A.FENET, op.cit.; B.VUKAS, "Le projet de déclaration sur les droits des personnes appartenant à des minorités nationales, ethniques, religieuses et linguistiques", in Annuaire Français de Droit International, 1979, 281-294; and P.THORNBERRY, "Is There a Phoenix in the Ashes ? International Law and Minority Rights", in Texas International Law Journal, 1980, 421-458, pp.455-456.

54. See the criticism on this point by F.CAPOTORTI, "I diritti dei membri di minoranze : verso una dichiarazione delle Nazioni Unite ?" in Rivista di Diritto Internazionale, 1981, 30-42, at 38.

55. Op.ult.cit., at 34; see also above p.653.

56. See art.3 of the Draft : "it is essential to take measures...".

57. F.CAPOTORTI, "I diritti...", op.cit., at 38; C.TOMUSCHAT, op.cit., at 978.

58. See the remark by F.CAPOTORTI, op.ult.cit., at 39 : "Si ha l'impressione che gli autori del testo, consapevoli della diversità di impostazione dell'art.27 rispetto al loro documento, abbiano preferito escludere l'esistenza di un legame con quella norma e dare l'impressione che si stia per aprire un capitolo interamente nuovo nella vicenda della protezione delle minoranze sotto gli auspici delle Nazioni Unite."

59. C.TOMUSCHAT, op.cit., at 978.

60. On the first reactions of the States to the Yugoslav proposal, see B.VUKAS, op.cit., 283-284; and F.CAPOTORTI, "I diritti...", op.cit., 40 ff.

