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Protection of Minorities in Federal and Regional States

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FEDERALISM AND PROTECTION OF MINORITIES

Constitutional aspects in Austria

by

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MINORITIES IN THE FEDERAL STRUCTURE OF THE AUSTRIAN STATE

According to Article 2 of the 1920 Constitution of the Republic of Austria, the latter is a federal state composed of nine regions (Länder).

The Constitution divides legislative and executive powers between the Federation (Bund) and the regions; nevertheless, the most important powers, especially those concerned with the protection of minorities, come under the jurisdiction of the Federation.

A number of persons in Carinthia and Styria belong to the Slovenian minority, others in the Burgenland belong to the Croat and Hungarian minorities. There are minority groups of Croats, Hungarians and Czechs in Vienna.

As explained above, the protection of minorities is chiefly dealt with in federal (national) legislation. It is therefore not surprising that the constitutions of the regions in question (Carinthia, Styria, the Burgenland and Vienna) do not contain any provisions on the protection of minorities.

It should be noted that the constitutions of Carinthia, Styria, the Burgenland and Lower Austria follow the example of Article 8 of the Federal Constitution by stipulating that the official language of the region is German, save as otherwise provided in national laws on the use of minority languages (cf in particular the Law on Ethnic Groups of 1976).

It should be pointed out that, under the Carinthian constitution, the whole region used to form a single electoral district. The Slovenian minority (dispersed throughout the region, but more heavily concentrated in the south-eastern districts) could therefore muster enough votes to elect a candidate of its own. Nevertheless, in 1978, the Constitutional Court decided that the constitution required the division of the regions into several electoral districts.

In 1979 the regional constitution of Carinthia was amended to comply with this decision, and the region was split up into four electoral districts. Since then it has been almost impossible for a minority list to pick up enough votes in one district to return a member to parliament.

It must, however, be added that when regional and national elections are held, the lists of the political parties generally include representatives of the Slovenian minority, and municipal councils and other bodies (chambers of commerce, agriculture or industry) contain representatives elected from the minorities' own lists.

It is easier for federal states like Austria than for centralised states to make appropriate arrangements to take account of the presence of minority groups in a region. For example, the regional government of Carinthia (Landesregierung) has set up a special office to deal with questions concerning minorities (Bureau für Volksgruppenfragen).

Belgium

FEDERALISM AND PROTECTION OF MINORITIES

by

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1.1It is of course extremely difficult, shortly after the completion of a major overhaul of the Constitution[1], which has been elaborated upon in legislation, to give a precise description of the contribution of the "Belgian federal model" to the general problem area of protection for minorities.

However, the originality of the Belgian model can and must be emphasised. In our view, the solutions implemented in this country provide all sorts of lessons - both positive and negative - for other States confronted with the same problems and the same difficulties.

1.2The main distinguishing feature of Belgian federalism - as distinct from that of, say, Switzerland or the United States - is that it is not an original form of federalism but one built on the foundations of a unitary State. Belgian federalism has been established gradually to meet the growing need for autonomy expressed by the two great "peoples", Flemish and Walloon, who comprise the State.

All federal structures are the fruit of historical circumstances and can be understood only in relation to their specific history; this is particularly true of the very special and atypical brand of federalism found in Belgium, one which is dissociative in as much as it has grown out of a unitary State. It was only after 140 years of this unitary State's existence (1830-1970) that federal-type structures were introduced gradually and in stages. This process was partial and fragmentary in every case, since it required four major revisions of the Constitution, in 1970, 1980, 1988 and most recently in 1993.

1.3The historical catalyst for this transformation of a unitary State into a federal State was the desire of the Flemish population to have its language, Dutch, placed on an equal footing with French.

Indeed, when it first came into being and during the early decades of its existence, the Belgian State was dominated by a middle class whose vehicle of expression, in both the north and the south of the country, was the French language. French was the only official language. If a "linguistic frontier" existed, the origins of which are lost in the mists of time, that frontier was of hardly any importance since French was the language of the élites and the ruling classes throughout the country. In terms of theories applied to minorities, therefore, Belgium represents an interesting special case since the language of the majority of the population, in numerical terms, had the status of a minority language. In the 19th century, the linguistic divide was far more of a social cleavage than a geographical one. In the northern part of the country, various types of Flemish patois were spoken, while Walloon, Picardy and Lorrainese dialects were used in the south. The French language was the cement which bound together the élites and the Belgian State.

1.4The gradual extension of the right to vote, definitively acquired by men after the first world war and by women after the second world war, was to pose a radical threat to the very

[1]Constitutional amendments of 5 May 1993, Moniteur belge, 8 May 1993.

balance of this unitary State bound together by linguistic and cultural unity. From the end of the 19th century, a whole series of laws tended to place Dutch on the same footing as French. From the end of the 19th century onwards, an entire set of "language" laws was drafted, in respect of the official use of languages. These laws were limited in scope, at least in theory, by the principle of linguistic freedom set out in Article 23 of the Constitution (Article 30 of the Co-ordinated Constitution)[2] which is amenable to regulation by law only in the case of acts by public authorities and in matters of a judicial nature. However, this constitutional provision has been interpreted very broadly in legislative texts.

At the same time, the Flemish movement placed increasingly distinct emphasis on the principle of territoriality, which was seen as a means of defending a less widely used language, although one spoken by a majority in the country, against a language of wider international prevalence. A distinct change took place in this connection. The language laws of the period between the two wars provided for flexible dividing lines between languages, in as much as individual communes were able, on basis of the linguistic censuses carried out periodically, to change their language rules or to obtain special "facilities" entitling them to provide for the official use of the language of the minority if the latter became large enough. This system usually worked to the advantage of French speakers, especially on the outskirts of Brussels. After the second world war, the Flemings succeeded in having the linguistic census abolished. Acts of 1961 and 1962 laid down a definitive linguistic frontier, with no further reference to subsequent population movements or the wishes of the inhabitants. The establishment of this "frontier" produced some points of friction, as in the case of the commune of Fourons which caused a number of political difficulties at the highest level. Finally in 1970, the Constitution finished off a long-term task by itself recognising the existence of four linguistic regions: the French-, Dutch- and German-speaking regions and the bilingual region of Brussels-capital (Article 3 bis; Article 4 of the Co-ordinated Constitution).

1.5The historical developments outlined above would appear to justify the somewhat simplistic label of "linguistic quarrels" which is sometimes applied to the vicissitudes of Belgian political life.

As we shall attempt to show, there are many other aspects to the gradual federalisation of the country, which as a matter of fact began in 1970. However, it is important to bear in mind the "language battle" fought by the Flemish people, which resulted in the division of the territory into "linguistic regions" under the 1970 Constitution. The boundaries of those regions could henceforth no longer be modified except by so-called special legislation, ie laws adopted by a special majority (two-thirds of the votes in the two chambers, requisite quorum, and a majority of votes within each language group in each of the chambers). The regions thus served as a territorial base for the various regional and community institutions which were to be set up and developed from 1970 onwards. In other words, language frontiers paved the way for the development of political

[2]The text of the Belgian Constitution, which became difficult to read after the numerous revisions it had undergone since 1970, was co-ordinated on 17 February 1994. In this document, reference is made to both the old and the new numeration (Co-ordinated Constitution).

boundaries, and it was these boundaries (extremely difficult to alter in law and considered politically immutable by the Flemish political community) which provided the framework for the establishment of the regional and Community institutions proper to post-unitary Belgium.

2.1It is not part of our intention to give a detailed description of present-day institutions in Belgium. At the level of both the federal State and the federated entities (Regions and Communities), these institutions are extremely complex and furthermore - as was mentioned above - they recently underwent a further overhaul, in May 1993, which will no doubt not be the last one. Nor is it possible to dwell on the development of these reforms which were carried out in four major stages (1970 - 1980 - 1988 - 1993).

The aim will be to show how federal techniques of a particular nature have been applied in a country facing what is doubtless one of the most difficult situations to handle, namely a division between two populations separated by differences of language, culture and sensibility. As has been mentioned, this division did not become apparent right away, but was the outcome of a slow process which came to fruition in the fullness of time. This explains the radical break in the history of Belgium, between a relatively long period (140 years) during which the State existed in a unitary form, and a period of intense upheavals (1970 to the present day).

2.2Emphasis should therefore be placed on certain characteristics of Belgium's federal structure which are little or poorly understood abroad. It is also necessary to show how the special federal techniques applied in Belgium ensure the peaceful coexistence of majorities and minorities - albeit not without difficulty - at both national and local level.

As was pointed out above, Belgian federalism grew out of the transformation of a unitary State into a federal structure. This is an historically very rare case of federation by dissociation, and as such poses very different problems from those raised by a conventional - that is to say associative - type of federalism. In the case of Belgium, the regional and Community institutions were created from scratch, so to speak. Their autonomy, jurisdiction and organisational structure were fashioned by the central Government itself. Federalism was thus conceded, as it were, and this explains many of the features of the Belgian federal structure. After nearly twenty-five years of reorganisation, the State may still appear highly centralised to an observer familiar with genuine federalism. For example, the federated entities have no say in the process of revising the Constitution, residual jurisdiction lies with the federal State, the entire judicial system is also federal in structure and the level of taxation differs very little between federated entities. The latter have no Constitution of their own.[3] Moreover, the former territorial divisions of the unitary State, including the provinces in particular, have been kept intact. The situation of the local authorities is especially complex since they depend partly on the central Government (for their basic legislation, for example) and partly on the Regions (for finance and general supervision), as well as in some cases on the Communities. Under the most recent reform, in 1993, the province of Brabant - the last vestige of the Belgian unitary State since its territory encroached on all three

[3] Although a certain amount of "constituent autonomy" was allowed under the reform of 5 May 1993.

Regions - was divided into Flemish Brabant and Walloon Brabant, while the Brussels-capital region was no longer attached to any province.

This situation contrasts with the system of associative federalism, where the aim is to restrict existing sovereign or quasi-sovereign powers.

In the case of Belgium, the prevailing trend is centrifugal, while in most other federal States it is centripetal. In addition, the Belgian pattern of government comprises only a small number of units, and this obviously makes it more difficult to operate a federal system. Officially, the federal State is composed of three Regions and three Communities (Article 1 para. 1 of the Constitution; Article 1 of the Co-ordinated Constitution).

2.3This is precisely one of the most puzzling aspects of the current structure of the Belgian State. Belgian federalism is a two-tier form of federalism. The federated entities comprise both communities and regions. There is some territorial overlapping between communities and regions. Moreover, the notion of a community is not entirely territorial and opens the way for a "personal" type of federalism.

Once again, only history can explain this particularly complex situation. To simplify matters, it can be said that community-style federalism corresponds to a Flemish aspiration, while institutions of a regional nature meet the wishes of the Walloons and, to a lesser extent, the French-speaking inhabitants of Brussels. There is therefore a debate in Belgium about the very nature of the entities which are to be federated. The very difficulty of settling this question leads to the emergence of a structure which, in a manner of speaking, combines and seeks to reconcile these two approaches in a fragile balance liable at all times to be called in question.

2.4On the Flemish side, the language dispute and the need for cultural assertion, in a situation long perceived as deriving from a psychological minority, are naturally conducive to the espousal of the community concept. Indeed, since 1970, the Communities have been responsible for everything connected with the use of languages and culture. Their powers were broadened in 1980 to include various matters of a social nature (so-called "personalisable" matters) and since 1989 they have encompassed the entire field of education. Accordingly, Belgium is divided into three communities: a Flemish Community, a French Community and a German-speaking Community.

The latter is small in size and in fact reflects the wish to protect and guarantee the autonomy of a genuine minority. With a few exceptions (with regard to the use of languages, for example), German-speaking Belgians, of whom there are some 66 000, enjoy the benefit of the same Community institutions, the same areas of jurisdiction and the same degree of autonomy as the country's two major communities, namely the Flemings and the francophones. Consequently, despite its small numerical size, the German-speaking Community has full jurisdiction within the areas of culture, social ("personalisable") matters and education within the German linguistic region. In this respect, it is clearly a highly protected linguistic and cultural minority. However, it must immediately be added that, from the standpoint of the decision-making machinery at federal State level, Belgium's German speakers as such are almost totally excluded from the relevant mechanisms which are designed to ensure a balance between Flemings and French

speakers. In other words, while German-speaking Belgians are protected as a linguistic and cultural minority, they are hardly or not at all involved, as such, in the workings of the federal State.

The essentially Flemish idea of a community-style federalism, ie with its focus on language, culture and education, entails a conception based to some extent on non-territorial principles. Indeed, while the German-speaking Community is in the straightforward position of having jurisdiction over a clearly defined territory, namely the German-language region, the situation is much more awkward for the French and Flemish Communities which are required, in a manner of speaking, to "share" Brussels, or more precisely speaking the bilingual region of Brussels-capital. In this region, both Communities have jurisdiction over the same territory. However, Belgian law makes no provision for sub-nationality: neither Flemings nor French speakers are recognised under the law. That being the case, in the bilingual region of Brussels-capital, decrees (which are the equivalent of laws at the Community level) cannot be made applicable to persons but only to cultural and social institutions which have a direct connection with the culture or the "community" in question. It is in this respect that the community aspect of Belgian federalism is not entirely based on territorial principles. Nor does it constitute what is known as a personalised form of federalism, since there is no personal link binding individuals to a community. The solution adopted is a composite one, whereby two political groupings have dealings with the institutions "representing" their culture or their language in a given part of the territory.

2.5Among French speakers and more especially the Walloons, the federalisation of the country is primarily thought of in regional terms. From this point of view, Belgium comprises three regions: the Walloon Region, the Flemish Region and the Region of Brussels-capital.

The regions do not fully correspond to the Community "territories" described above. If the division of the country into linguistic regions is taken as the starting point, it is found that the Walloon Region comprises two linguistic regions, namely the French language region and the German language region. The German speaking Community, which has responsibility for cultural and social affairs within its territory, therefore forms part of the Walloon Region whose areas of responsibility are primarily economic. The Brussels-capital Region coincides with the bilingual linguistic region, that is to say the area where the Communities' responsibilities overlap. The Flemish Region corresponds to the monolingual, Dutch-speaking linguistic region.

Responsibilities are assigned to the Regions in the same way as to the Communities, while residual jurisdiction continues to lie with the central Government. These responsibilities mainly concern the economy, the environment, transport and subordinate powers. From the Walloon point of view, Belgium is divided into three distinct socio-economic units. Cultural or community-type claims are much less assertive among French-speaking Belgians who have never had to defend their language and their culture; on the contrary, the latter were for a long time predominant. The concept of regional federalism, that is to say a federal State with three component parts, one of them including the national capital (the Region of Brussels-capital), was for a long time vehemently opposed by the Flemings who feared that, since the central region of the country had over the years

become home to a clear majority of French speakers, the division of the country into three component parts, including two (the Walloon Region and the Brussels Region) in which the majority were French speakers, would structurally place them in the position of a minority (two against one), despite their demographic ascendancy (roughly 60% of the population) and their growing economic dominance.

3.1Federal Belgium is thus seen to have grown out of a unitary State split between two separatist tendencies, one being linguistic, cultural and essentially dualistic in nature (bearing in mind that, in this regard, the German-speaking Community is not a component part of the State but a protected minority), while the other is socio-economic, focusing on the existence of three regions.

Each of these conceptions is partially recognised in positive law, as a result of lengthy and laborious compromises worked out between Flemings and French speakers.

With regard to the actual organisation of the federal State, it is the dualistic approach which has certainly prevailed. As a result, the mechanisms for the protection of minorities incorporated in the Belgian Constitution are targeted not at the regions, but at the two great population groups characterised by their language. Since 1970, the Council of Ministers has had an equi-representative structure: with the possible exception of the Prime Minister, it must comprise an equal number of French- speaking and Dutch-speaking Ministers. This guarantee of parity representation at the highest level of government constitutes the most effective means of protection for the French-speaking population. In practice it is difficult, in a country applying the system of proportional representation, to set up a federal government which does not enjoy majority support or at least have an adequate base both north and south of the linguistic divide. Moreover, equal representation on the Council of Ministers is the extension of the linguistic parity introduced at the highest levels of central government.

Various other legal mechanisms highlight the fundamental duality of Belgium's central government institutions. For example, the two federal Chambers (House of Representatives and Senate) are divided into two language groups.

These groups exercise a major influence. Indeed, since 1970, the Constitution itself has laid down the requirement of a special majority for the adoption of a growing number of laws essential to the balance of the country or the protection of minorities. This requirement involves not only an overall majority of two-thirds but the presence of a quorum and of a majority in each language group, within both federal assemblies. For example, the "language frontier" could be altered only by a law of this type. Similarly, all essential aspects of the organisation of regional and Community institutions, as well as their powers and their financing, depend either on the constitution itself or, pursuant to the constitution, on laws of this kind known in Belgium as special laws.

It is through the requirement of such special laws, to a far greater extent than, for example, through the organisation and powers of the Senate, that the protection of the French-speaking minority is given practical effect in Belgium, subject to the restrictions imposed by the Constitution. In this regard, Belgium's system of federalism differs from the conventional type found in such countries as Switzerland and the United States,

where the second chamber is the major instrument of participation by the federated states in the political life of the federal State. The Belgian Senate was recently subjected to far-reaching reforms, in 1993, but these reforms - which we cannot describe here in detail - have not made the Belgian Senate a federal chamber like the Swiss Council of States or the American senate.

The language groups in the House and the Senate are also entitled to make use of a special protective mechanism which is very rarely used in practice. This mechanism, known familiarly as the "alarm bell", enables a language group to declare, on the basis of a three-quarters majority, that a Government Bill or a private member's Bill is likely to cause serious prejudice to relations between the communities. In such cases, the procedure is suspended and the text is submitted to the Council of Ministers, in which the language groups have equal representation and which must take a decision. This mechanism has been used only once since it was introduced in 1970, but it is not beyond belief that its mere existence may have something of a preventive effect and, more specifically, a protective effect for the French-speaking minority

3.2Apart from equal representation in the Council of Ministers and the requirement that laws be adopted by a special "linguistic" majority, other institutions reflect the dualistic nature of Belgium's federal system. For example, the Constitutional Court, which is known as the Arbitration Court, is composed of six French-speaking judges and six Dutch-speaking judges, on an equi-representative basis. An ingenious system is used to prevent deadlock in the pronouncement of judgments. This Court's original purpose was to monitor compliance with the apportionment of powers between the State, the Communities and the Regions, but it was subsequently given broader responsibilities. Through its task of reviewing compliance with the principle of equality, which was entrusted to it in 1989, it operates in many respects as a fully-fledged Constitutional Court. Language parity within this Court is therefore an essential element of balance in Belgium.

The same language parity is found in the highest ordinary and administrative courts (Court of Cassation and Council of State). Similarly, the membership of the Consultation Committee, a political body set up to prevent and, if possible, settle conflicts of interest between component units of central government, is linguistically equi-representative. The above are only a few of the almost unlimited instances of this phenomenon.

4.1While it is clear that the federal structure of the Belgian State is essentially dualistic, the fact remains that it is composed of three Communities and three Regions.

This two-tier federal structure has already been described. It only remains to give an account of its practical workings and how it has developed. It is obviously quite difficult to ensure the harmonious operation of a federal structure of this type. Indeed, the federal State retains residuary jurisdiction, while different institutions (Regions and Communities) exercise a variety of exclusive powers with regard to territories which partially overlap. The difficulty is compounded by the fact that responsibilities are assigned almost entirely on the basis of the system of exclusive jurisdiction. Belgian law only rarely has recourse to the technique of concurrent jurisdiction, with its mandatory corollary, namely that federal rules should take precedence over rules adopted by federated

entities. The use of this technique would appear in a way to contradict the centrifugal tendency characteristic of Belgian federalism. The system of exclusive jurisdiction is therefore bound up with the desire for autonomy of the newly established entities which have no wish to see the federal State "take back" what it has recently given them, by means of concurrent legislation. The fact remains, though, that the system of exclusive jurisdiction, which is practically the only one used in Belgium, makes the procedures for sharing responsibilities extremely rigid.

4.2All this goes hand in hand with a federal structure comprising two tiers, the Communities on the one hand and the Regions on the other. However, this system is subject to major deviations in institutional practice. Since 1980, the Flemish have carried out a "merger" of regional and Community institutions. The decision-making bodies are the same in all cases: it is sufficient to exclude the Flemings of Brussels from their membership when regional Flemish issues are being considered. The small proportion (2 to 3%) of Brussels Flemings in relation to the total Flemish population enabled this solution to be adopted in the north of the country. It is a very effective one in policy-making and administrative terms, as well as with respect to budgetary matters, as it facilitates transfers from one budget to another (regional and Community budgets). At the same time, it enables the Flemings to confirm and consolidate the position of the Brussels Flemings - who are substantially outnumbered by French speakers in Brussels - in the Flemish Community. Symbolically, the Flemings have chosen Brussels as the capital of their community.

The francophones have not taken the step of "amalgamating" their regional and Community institutions, a step which - it has to be admitted - would have had completely different political and financial implications from the one taken in the north of the country. The French speakers of Wallonia represent only about 32% of the population, or 3,200,000 people. The number of French speakers in Brussels is estimated at approximately 800,000. In other words, although the French speakers of Brussels constitute a minority within their Community, they nevertheless account for roughly one fifth of that Community's population. In addition, economic conditions and living standards are considerably different in Wallonia and Brussels. Lastly, as has already been mentioned, the idea of a Community does not have the same historical and symbolic appeal for the French speakers as it does for the Flemings. That is why French speakers and Walloons fought a fierce battle to obtain the establishment of a Region in Brussels, with success coming only in 1989. Flemish acceptance of the establishment of this Region, with its own autonomy, was made subject to several conditions.

The first condition is that the Region in question, in the institutional sense of the term, should correspond to the bilingual region of Brussels-capital. This is limited to 19 communes (including the city of Brussels proper). It does not coincide with the socio-economic region of Brussels which, like all major cities, is tending to broaden its economic hinterland extensively. However, this economic hinterland, especially in terms of housing, is located in the Flemish Region, a region which surrounds the Brussels Region on all sides. Some of the communes adjoining Brussels, which were originally Flemish, have absorbed a great deal of French influence and enjoy so-called "linguistic facilities". Other communes have been given no such facilities, even though they have substantial French-speaking or foreign minorities. This is because of the Flemish desire to check

the particularly significant inroads made by French influence in the area of Flemish-Brabant around Brussels.

The second condition laid down by the Flemings for the establishment of the region of Brussels-capital was the adoption of a set of measures to protect the Flemish minority in Brussels. At the 1989 elections for the Council of the Region, roughly 15% of the votes were cast for Dutch-speaking lists. The regional institutions of Brussels thus provide for a whole range of guarantees on behalf of this minority. Broadly speaking, it may be said that the guarantees in question are modelled on those granted to French speakers within the federal State. For example, two of the five members of the Brussels regional government must be Flemings, and this corresponds, *mutatis mutandis*, to the level of parity representation in the federal Council of Ministers.

4.3The establishment of the region of Brussels in 1989 enabled the francophones and the Walloons to envisage an institutional set-up based essentially on regional realities. For the demographic and economic reasons outlined above, they allowed the Community institutions and regional institutions to remain in coexistence, although this coexistence is very difficult to manage. Indeed, the French Community is isolated in institutional and budgetary terms, unlike the Flemish Community, which remains closely identified with its region. This Community has consequently been confronted with financial problems, especially since 1989, the first year in which the enormous education budget was transferred to it. Unlike the Flemish Community which receives regional grants on account of the merger of institutions, the French Community has to cope with its budgetary constraints unassisted. Moreover, the very special nature of its jurisdiction with regard to the territory of the bilingual region of Brussels-capital makes it awkward if not impossible for it to resort to taxation. The exercise of fiscal powers is hardly reconcilable with a brand of federalism that is not entirely based on territorial principles.

This problem area was central to the constitutional review carried out in the spring of 1993, a review which, on the basis of complex mechanisms, makes it possible for some of the powers of the French Community to be exercised at regional level in Wallonia and, what is more, to be exercised by institutions proper to the French speakers, institutions set up within the region of Brussels-capital.

The institutional map of Belgium will therefore once again be redrawn, since the two great Communities will no longer exercise the same powers. On the French-speaking side, certain responsibilities will be taken over either by the Walloon region or by the French-speaking representatives of the Brussels regional institutions.

The lack of symmetry between the two major component parts of the country is becoming even more marked than before. Although this complexity is perplexing to the foreign observer, it merely confirms the diagnosis above: the difficulty with Belgian federalism stems not only from its centrifugal nature or the small number of federated entities, but to an even greater extent from the fundamental debate about the nature of those entities. While the idea of a community is given clear priority by the Flemings, making their approach a more coherent one, preference is given to a regional philosophy in the south of the country. This is all the more true following the recent central government overhaul which provides for a radical re-organisation of the apportionment of

responsibilities among French-speaking Community institutions and Walloon and Brussels regional institutions. The very idea of a French Community has been partially challenged. It is quite obvious that the process of Belgian federal construction has not yet been placed on a fully stable footing.

5.1Certain problems relating to the protection of minorities also arise at the local level. The solutions applied to them have changed substantially over the years, as a result of the growing insistence by the Flemish movement on the principle of territoriality.

As was mentioned above, the language frontier had been definitively established by law in the early 1960s, and this led to difficulties, some of which had significant political repercussions (the problem of Fourons). After 1970, the language frontier could no longer be modified otherwise than by means of a law adopted by a special majority.

At the same time, the 1970 Constitution gave the Flemish and French Communities the task of regulating the use of languages in three areas: (i) administrative matters; (ii) education in institutions established, subsidised or recognised by the public authorities; (iii) social relations between employers and staff as well as the measures and documents required of firms by laws and regulations.

This Community jurisdiction in respect of the use of languages is broader than the powers previously (and still) exercised by the legislature under Article 23 of the original text of the Constitution (Article 30 of the Co-ordinated Constitution). Basically, this jurisdiction reflects an aspiration on the part of the Flemings to establish the maximum possible linguistic homogeneity (especially in social and economic matters) within their linguistic field of influence, that is to say in the Dutch-speaking region. It should be pointed out, however, that these areas of jurisdiction remain limited and that, what is more, the principle of linguistic freedom is regaining ascendancy. It should also be added that, out of a concern to protect minorities, certain exceptions to the Communities' jurisdiction in respect of languages has been provided for in the relevant legislation. The Communities never exercise such jurisdiction in the bilingual region of Brussels-capital, where the use of languages continues to be governed by national law. Similarly, the Flemish and French Communities have no authority over certain communes, although the latter are situated in a monolingual region: six communes on the outskirts of Brussels (situated in the Dutch-speaking region) and the so-called "language frontier commmunes" which have Flemish, French-speaking or German-speaking minorities, as the case may be. The linguistic status of these communes was regarded as so important that in 1988 it was decided by the constitution-making body that only a law adopted by a special majority could modify that status.

The territoriality rule is sometimes resented by French speakers as a sort of violation of "human rights". They conceive of language rights primarily as personal rights. It was precisely to counter this conception that the Flemish movement reacted, stressing the need to defend the linguistic homogeneity of Flemish territory against francophone "imperialism". In its famous judgment on the linguistic rules applicable to education in Belgium[4], the European Court of Human Rights recognised the overall legitimacy of the

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

aim pursued by Belgian linguistic legislation, namely the maintenance of regional linguistic homogeneity.

5.2Over and above the application of laws concerning the use of languages, the existence of local linguistic minorities also gives rise to a problem with regard to the drawing of constituency boundaries for national elections. In this connection, one particular constituency, that of Brussels-Hal-Vilvorde, plays a key role. This highly populated electoral district comprises both the bilingual region of Brussels-capital and the district of Hal-Vilvorde in the Flemish region. However, a large number of French speakers (approximately 100,000) are included in the population of this Flemish district, whether because they live in the six peripheral communes with special facilities or because they are resident in purely Flemish communes.

The amalgamation of these two administrative districts for the purpose of general elections thus enables a large number of French speakers living in Flanders to choose elected representatives who will take the oath in French and form part of the French language group in the House and the Senate. During the most recent institutional negotiations in Belgium, which resulted in the revision of the Constitution in May 1993, the Flemings demanded the splitting up of the constituency of Brussels-Hal-Vilvorde on the basis of the strict application of the territoriality rule. However, the French speakers were able to keep the district intact, both for elections to the House and for the direct election of senators.

The situation is different with regard to the Community Councils. Prior to the 1993 revision of the Constitution, as is illustrated by the judgment of the European Court of Human Rights in the Clerfayt and Mathieu Mahin case[5], French speakers living in the Hal-Vilvorde district could appoint representatives to the Council of the French Community through their votes cast in general elections. However, this Community had no territorial jurisdiction over them and, furthermore, by casting the votes in question, French-speaking voters forfeited all rights to regional representation.

This situation is radically altered by the current reform which eliminates the "dual mandate" system and provides for direct elections. These elections will take place on a purely regional basis: it follows that the large French-speaking minority established in Flemish Brabant will henceforth be required to vote exclusively for Flemish regional and Community representatives.

[5]Judgment of 2 March 1987, Series A No. 113.

Canada

THE CONSTITUTIONAL PROTECTION OF MINORITIES IN CANADA

by

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INTRODUCTION

Canada is a constitutional monarchy and a parliamentary democracy. It became a federation in 1867. Its constitution is partly written and partly unwritten. A Charter of Rights and Freedoms has been part of the Constitution since 1982. The principle of the rule of law applies in Canada, where the judicial system is both powerful and independent.

The Constitution Act of 1867, our basic law, contains several provisions covering the protection of minorities. In 1982, a second Constitution Act took this protection system further by embodying, inter alia, a Charter of Rights and Freedoms in the Constitution.

This paper will answer the following questions: has the division of legislative powers been influenced by the presence of minorities? Are minorities protected in federal and provincial institutions? Does the Canadian Constitution protect religious rights? language rights? fundamental rights? the rights of the aboriginal peoples? What conclusions can be reached regarding this protection?

I.THE DIVISION OF LEGISLATIVE POWERS AND THE PROTECTION OF MINORITIES

The division of powers adopted in 1867 was intended, first and foremost, to be politically, economically and socially functional, but it also took account of the presence of minorities in Canada.

Canada's decision to opt for a federal structure in 1867, instead of the legislative union desired by the Upper Canadian (Ontario) leader, Sir John A. MacDonald, was taken partly because Sir Georges Etienne-Carter, leader of the then Lower Canada (now Quebec), wanted this as way of protecting French-speaking "Canadians", who were a minority in the country as a whole, although they formed the majority in Quebec. Legislative union would have been unacceptable to Quebec.

Since Canada was a heterogeneous federation with more than one language and more than one culture, the thirty-three Fathers of the Federation decided, in Section 93 of the 1867 Constitution, to make education the preserve of the provinces; Quebec was thus able to choose its own education system.

Cartier, one of the Fathers of the Federation and mainly responsible for the Constitution's federal character[6], was very careful to include, in Section 92, "property and civil rights" - a category which, as the courts have pointed out[7], comes straight from the Quebec Act of 1774. This allowed Quebec to keep its own private and civil law, which it had codified and which had

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[6] *See M. Wade, "Les Canadiens français de 1760 à nos jours", vol. I, Cercle du Livre de France, 1963, p 340.*

[7] *See the Parsons judgment, (1881-1882) 7 A.C. 96.*

come into force on 1 August 1866. Sections 94 and 98 of the Constitution Act of 1867 put the finishing touches to this guarantee. Not being mentioned in Section 94, Quebec escapes the possibility of private law's being harmonised. Section 98 provides that Quebec judges must be trained in civil law. The French-speaking minority in Canada - mainly (though not solely) concentrated in Quebec - is thus protected by the Constitution. The common law system applies in the other provinces.

Finally, Section 41 of the Constitution Act of 1982 states that the unanimous consent of the federal government and the ten provinces is required for any change in the constitutional laws relating to the Supreme Court. The scope of this provision is a source of some discussion, since the Supreme Court Act is not mentioned among the constitutional laws[8]. If it does in fact make the "6-3" composition a constitutional requirement, then Quebec enjoys special protection here. In my opinion, the term "composition" in Section 41 covers both the figure "nine" and the "6-3" distribution.

II.THE PROTECTION OF MINORITIES IN INSTITUTIONS

A.The central institutions

"Representation according to population", current in Canada before the advent of federalism, still applies in the House of Commons in Ottawa. There are no exceptions to this basic principle of our parliamentary democracy.

In the Senate, the Fathers of the Federation opted for representation by region. Quebec and Ontario are both regions, with 24 senators each out of a total of 104. In 1867, the three maritime provinces formed a single region, which was assigned 24 senators. This is still the case today. Newfoundland joined the Canadian Federation in 1949 and was given six senators. The West of Canada comprises four provinces with six senators each. The federal territories, the Yukon and North-West, have one senator each.

Several provinces, apart from Quebec and Ontario, have been calling for the past twenty years or so for a Senate that would be "equal by province", rather than "by region". This principle has not so far been incorporated in the Constitution.

The Senate's composition provides, I believe, some protection for Quebec, which has had almost a quarter of the seats since 1915, as has Ontario. In 1867, each of these two provinces had a third of the seats. Cartier had accepted representation according to population in the House of Commons on condition that Quebec was given a third of the Senate seats and maintained parity with Ontario, whose population was larger.

The principle of representation by region is partly intended to protect Quebec. This protection is relative, however. Under the Constitution, it could be withdrawn. A consensus of the federal authorities and seven provinces representing 50% of the population would be enough to do this. This is one of the principal gaps in the constitutional amendment procedure adopted in 1982.

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[8] *P.W. Hogg, "Canada Act 1982 Annotated", Toronto, Carswell, 1982.*

The right of withdrawal provided for in Section 38 (3) of the Constitution Act of 1982 cannot protect Quebec here; withdrawal from the Senate is not possible.

The Senate was deprived of its right to veto constitutional changes on 17 April 1982 by Section 47 of the Constitution Act. Its veto now applies only in cases provided for in Section 44, which states:

> Subject to Sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

The scope of this power is restricted. It replaces Section 91 (1) of the Constitution Act of 1867, which was repealed in 1982.

In the Supreme Court, the court of last instance, Quebec appoints three of the nine judges, or one-third of the total. This provides special protection for Quebec which, as stated above, is the only province with a civil law system.

B.The provincial institutions

The provinces have only one legislative chamber. The principle of representation according to population applies, as it does in the Canadian Parliament.

The "first-past-the-post" electoral system applies at both provincial and federal levels.

III.RELIGIOUS RIGHTS

Education was considered very important in 1867, as indeed it is today. A separate article, Section 93, was devoted to it in the section covering the division of legislative powers. In the opinion of Chief Justice Duff, one of our leading legal authorities, this was one of the main elements in the great compromise of 1867[9]. This legislative power is backed by constitutional guarantees to protect the rights of the Catholics and Protestants, who made up almost the whole population in 1867, as well as the right to dissent. A system of special and conditional appeal by religious groups to the federal political authorities was also devised, although this proved ineffective in the Manitoba Schools case between 1890 and 1896 and has since fallen into disuse[10].

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[9] *"In Re Adoption Act of Ontario", (1938), S.C.R. 398, p. 402.*

[10] *G.-A. Beaudoin, "La loi 22: à propos du désaveu, du référé et de l'appel à l'exécutif fédéral", (1974) 5 R.G.D. 385. This protection still exists de jure, but has not been used for nearly a century. It is difficult to imagine the federal government's intervening in such a case.*

In Quebec, religious rights include the right to denominational schools in Montreal and Quebec, and elsewhere the right to dissent; they also include the right to manage schools, recruit teachers, choose textbooks and levy taxes. This list is not intended to be restrictive[11].

The guarantees contained in Section 93 gave rise to a number of celebrated judgments from the federation's earliest years, particularly from the 1890s on, with the Barrett judgment being one of the most significant[12]. The Catholic and Protestant communities then realised that these guarantees were relative, since they left Manitoba free, for example, to levy double taxes. It took some of the provinces many years to arrive at acceptable political compromises in this area.

The minorities also discovered, in 1917[13], that classroom languages were not protected by Section 93. This gap was not filled until 1982, when the Canadian Charter of Rights and Freedoms was adopted. In the meantime, it had done immense injustice to the French-speaking minorities outside Quebec, and had seriously shaken the Canadian federation.

Under Section 93, education is still exclusively a matter for the provinces. This article is subject to two constitutional guarantees: religious since 1867, and linguistic since 1982.

In its Greater Hull School Board judgment[14], the Supreme Court ruled that Sections 339, 346, 353, 362, 366, 375, 382, 495, 498, 499 and 500 of a Quebec local taxation act (Act No. 57) were invalid, since they failed to stipulate that grants must be distributed proportionally and since, if a referendum were held, the wishes of a school board might be outweighed by the wishes of voters other than those for whom the board was responsible[15].

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[11] *Professor Pierre Carignan has devoted a whole book to the question of religious rights: P. Carignan, "Les garanties confessionnelles à la lumière du Renvoi relatif aux écoles séparées de l'Ontario: Un cas de primauté d'un droit collectif sur le droit individuel à l'égalité", Montreal, Editions Thémis, 1992, P.268.*

[12] *Ex parte Renaud (1872-73) 14 N.B.R. 273; City of Winnipeg v. Barrett (1892) A.C. 445; Brophy v. A.G.Manitoba (1895) A.C. 202; Roman Catholic Separate School Trustees for Tiny v. The King (1928) A.C. 363. The Court's attitude in this judgment was less legalistic than in the Barrett judgment. See a study by F.Chevrette, H. Marx and A.Tremblay, "Les problèmes constitutionnels posés par la restructuration scolaire de l'Ile de Montréal", Quebec, Editeur Officiel, 1971. See P.Carignan, "De la notion de droit collectif et de son application en matière scolaire au Québec", (1984) 18 R.J.T. 1-103.*

[13] *Trustees of the Roman Catholic Separate Schools for Ottawa v. Mackell, (1917) A.C.62.*

[14] *Greater Hull School Board and Lavigne v. P.G. du Quebec (1981) C.S.337; (1983) C.A. 370, (1984) 2 R.C.S. 575; 56 N.R. 93. On the question of the Catholic and Protestant communities' control over their schools, the decision of the Supreme Court of Canada in Caldwell v. Stuart (1984), 2 R.C.S. 603, is of interest.*

[15] *P.G.(Qué) v. Greater Hull School Board (1984), 2 R.C.S. 575, p.598.*

In this judgment, the Supreme Court in no way departed from the earlier Hirsch judgment[16], which remains of capital importance, since it clearly defined the scope of Section 93. In a sense, it served as the basis of the later judgment. In it, the Court had ruled that the right of Protestants and Roman Catholics to manage and control their own denominational schools had been legally recognised in 1867 and that, in the matter of finance, the law gave school governors and school boards the right to receive proportional subsidies and to levy taxes in their own municipal areas[17].

In their schools legislation, the provincial legislatures must respect the religious rights given Catholics and Protestants in 1867. The Hirsch judgment shows, however, that they may also establish a neutral sector - Jewish, Moslem or other.

Since 1982, denominational education has also been protected by Section 29 of the Canadian Charter of Rights and Freedoms. The religious guarantees of Section 93 of the Constitution Act of 1867 are still in force; the Charter makes no changes here.

When asked for a ruling on Ontario Act No. 30[18], which deals with the financing of Catholic secondary schools in Ontario, the Supreme Court concluded that it was valid under the introductory provision and sub-section 3 of Section 93 of the Constitution Act of 1867. Under the great political compromise concluded in 1867, the religious rights and privileges already granted at that time were to continue, and the legislatures might establish others as the necessity arose.

The protection provided by Section 93 (1) is not the same as that provided by Section 93 (3), since laws adopted under the second provision may be amended or repealed, while rights conferred under the first are inalienable. The Court ruled that the rights covered by Section 93 (1) were protected by the Charter, even without Section 29 of the latter. The rights covered by Section 93 (3) were protected by the Charter because of the absolute power of the provinces to enact these laws. In short, as the Court declared, the confederal compromise is to be found in the whole of Section 93, and not in its constituent parts taken separately[19].

Judges Estey and Beetz took the view that provincial legislatures could legislate on educational matters with two restrictions: no law might violate the minimum constitutional guarantees set out in Section 93 (1), and the provinces' exercise of their powers could be limited by federal intervention under Section 93 (4).

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[16] *Hirsch v. P.B.S.C.M. (1928) A.C. 200.*

[17] *Supra, note 10.*

[18] *"Re an Act to Amend the Education Act (Bill No. 30) (1987) 1 R.C.S. 1148.*

[19] *Ibid., p.1198.*

In the Greater Montreal Protestant Schools Board case[20], the Supreme Court upheld two regulations issued by the Quebec Minister of Education, which introduced a common curriculum for all non-religious subjects in all Quebec schools.

According to the Court, Section 93 (1) of the Constitution Act of 1867 protects not only the religious aspects of denominational schools, but also the non-religious aspects which are needed to make the religious guarantees effective. The constitutional right of certain groups to denominational schools, financed by the state in a manner prescribed by law, must not be interpreted as an individual right or freedom guaranteed by Section 29 of the Charter, but rather as a right guaranteed by Section 93. The Court declared that the regulations in question did not have the effect of determining the content of moral or religious instruction in Protestant schools. The limited power to regulate the curriculum in denominational schools which school commissioners and governors had in 1867 is constitutionally guaranteed only insofar as it is needed to make the religious guarantees effective. The subsidiary argument that Section 93 (2) gave no constitutional force to rights and privileges conferred by the law existing in Ontario and Quebec in 1867 was rejected.

Chief Justice Dickson and Judge Wilson declared that, even if Section 93 (2) was intended to increase the constitutional protection of dissenting schools in Quebec in order to put them on an equal footing with the separate schools in Ontario, the Quebec legislature would still have authority to regulate the powers of the governors of dissenting schools concerning the curriculum, provided that such regulation was not prejudicial to the denominational character of those schools.

Finally, Judge Beetz, speaking for the majority, held that Section 93 of the Constitution Act of 1867 did not confer rights or freedoms of the kind provided for in the Canadian Charter but, rather, privileges and that it should, to this extent, be seen as an exception. He argued that, although it might have its roots in the concepts of tolerance and diversity, the exception stated in Section 93 did not constitute a general affirmation of freedom of religion or conscience. The constitutional right of certain groups of people in a province to have denominational schools, financed by the State in a manner prescribed by law, must not be interpreted as an individual right or freedom guaranteed by the Charter or, as Professor Peter Hogg had put it, as a small declaration of rights for the protection of religious minorities[21].

IV.LANGUAGE RIGHTS

A.In Schools

Section 23 of the Canadian Charter of Rights and Freedoms introduces a linguistic guarantee in the educational field. It applies to all ten provinces and provides that:

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[20]*Commission des écoles protestantes du Grand Montréal c. P.G. Québec (1989) 1 R.C.S. 377.*

[21]*Ibid., p. 401 ;*

23.(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 ofthe 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 their 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 liguistic 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 those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

In the French Language Charter case of 1984[22], the Supreme Court unanimously decided that Sections 72 and 73 of the French Language Charter (Act No. 101), adopted by Quebec, were incompatible with Section 23 of the Canadian Charter and thus invalidated, to that extent, by Section 52 of the Constitution Act of 1982. The Court added that the restrictions imposed by Section 73 were not legitimate restrictions within the meaning of Section 1 of the Charter.

The Court said that Section 23 of the Charter had been regarded by the framers of the Act in 1981 as a perfect example of the kind of situation which required reform. Had Section 73 been adopted after the Charter's coming into force, the decision would have been the same.

Section 73 of the French Language Charter is clear, precise and specific. It derogates sharply from Section 23 of the Canadian Charter and has the effect of modifying it. This is its true effect. The restrictive clause in Section 1 of the Charter cannot amount to a derogation (as provided for by Section 33 of the Charter in certain sectors) or to an amendment of the Charter, the procedure for which is specified in Sections 38ff of the Constitution Act of 1982.
The Supreme Court noted that Section 23 of the Charter guaranteed certain rights to certain categories of person; these categories were clearly specified. No provincial legislature was entitled to redefine or alter them. It was bound by the Charter and could not disengage from it.

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[22]*O.A.P.S.B. c. P.G. Québec (1984) 2 R.C.S. 66.*

In the Supreme Court's view, Section 23 was so precise, the right guaranteed so specific and the categories so clearly defined that the restriction incorporated in Section 73 could be regarded only as a straightforward derogation from it or a direct alteration of it. No real scope was left for Section 1 to come into play.

The Court pointed out that Section 23 was very concrete, and did not state general, abstract principles of the kind found in the other charters. Because of its specific character, it comprised a unique set of constitutional provisions, with no parallel outside Canada[23].

Section 23 is of historic importance for Canada; it remedies school systems considered deficient by the authors of the 1981 Constitution. The gap is filled by a single measure applying to all ten provinces.

The Supreme Court confirmed its decision on Act No. 101[24] in the Mahé judgment[25]. It repeated that Section 23 of the Charter was intended as a remedy and that this was the spirit in which it should be interpreted broadly and liberally[26].

The main, guiding principle which emerges from the Mahé judgment[27] is that the Supreme Court gives linguistic minorities speaking an official language the right to manage and control the language of instruction, the content of the curriculum and the minority schools. The extent of management and control may vary with the number of pupils actually enrolled. They will be absolute when "the number justifies it"; they will be relative, i.e. there will not necessarily be a homogeneous school board or a homogeneous school, when the number of pupils enrolled is too small.

Speaking for the Court, Chief Justice Dickson defined the minimum level of Section 23 of the Charter when he said that Section 23 required, at minimum, that instruction be provided in the minority language; if there were too few pupils to justify a programme that could be described as minority language instruction, Section 23 did not require that such a programme be established.[28]

He defined the upper level when he said that the phrase "minority language educatioinal facilities" established an upper level of management and control.[29]

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[23] *Ibid. p. 79.*

[24] *Mahé v. Alberta (P.G.) (1990) 1 R.C.S. 342.*

[25] *O.A.P.S.B. v. Quebec (P.G.), supra, note 17.*

[26] *Supra, note 19.*

[27] *Ibid.*

[28] *Ibid. p. 367.*

[29] *Ibid. p. 370.*

Every case must necessarily be assessed separately, since the Supreme Court does not specify "justifying" figures. It does, however, mention two factors which are to be taken into consideration: (1) the services appropriate to the number of pupils should be determined, as should (2) the cost of the planned services. In this connection, it specified that the most important point was, perhaps, that setting up wholly separate schools boards was not necessarily the best way of realising the aim of Section 23. What was, however, essential to realising it was that the language group should have control over those aspects of education which concerned or affected its language and culture. To a great extent, this degree of control could be secured by guaranteeing the minority representation on a joint schools board and by giving its representatives exclusive control over all those aspects of the minority's education which concerned linguistic and cultural matters.[30]

Section 23 of the Charter thus constitutes a general right to instruction in the minority language, its purpose being, as the Supreme Court affirmed, to preserve and promote the language and culture of the minority throughout Canada.[31]

In the Mahé judgment[32], the Supreme Court also considered equality rights and religious rights. It found that neither Sections 15 and 27 of the Canadian Charter nor Section 93 of the Constitution Act of 1867 were incompatible with Section 23 of the Charter.

Undoubtedly, as Professor Pierre Foucher wrote in an article, the Mahé judgment is the "judgment of the decade in the field of language rights"[33]. Firmly rooted in the logic of Section 23, but uncertain until it was confirmed by the Supreme Court, recognition of the right of management and control represents - although the extent of its exercise may vary - a definite step forward for the French-speaking minorities. Moreover, the positive obligation of legislating, imposed by the Supreme Court on the provinces less sympathetic to language equality, is a source of hope for all the country's French speakers.

B.English and French at parliamentary, legislative and judicial level

Speaking for his colleagues in the Manitoba language rights case, Chief Justice Dickson said that the importance of language rights was founded upon the essential role played by language in the existence, development and dignity of every human being. It was is language which enabled us to formulate ideas, to structure and order the world around us. Language was the bridge between isolation and community which enabled human beings to define their rights and obligations towards each other and so live together in a comunity[34].

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[30] *Ibid. p. 375-376.*

[31] *Ibid. p. 371.*

[32] *Ibid.*

[33] *P. Foucher, "L'affaire Mahé: le jugement de la décennie en droits linguistiques", (1990) Forum constitutionnel 10, pp.10-11.*

[34] *Renvoi sur l'article 23 de la loi de 1870 sur le Manitoba (1985) 59 N.R. 321 (C.S.C.), p.*

In 1867, language rights were enshrined in Section 133 of the Constitution Act. This section deals with legislative, parliamentary and judicial bilingualism in Quebec and in federal government[35]. French was not protected in any of the three other provinces which existed at that - surprisingly, not even in New Brunswick[36]. This was remedied in 1982.

French was, however, protected in Manitoba when it joined the Federation in 1870. Sir Georges-Etienne Cartier dreamed of making it a second Quebec. Section 23 of the Manitoba Act of 1870 essentially repeats for Manitoba the provisions contained in Section 133 for Quebec. However, Manitoba passed a law in 1890, removing this protection. Two lower courts declared the measure invalid, but Manitoba chose to ignore their judgments. It was not until 1979 that the Supreme Court of Canada had occasion to decree that Manitoba must comply with Section 23[37], since it had no right to strike out this constitutional guarantee unilaterally. In June 1985, the Supreme Court declared, in its judgment on language rights in Manitoba, that Section 23 was mandatory and that laws passed only in English were invalid; it added, however, that these laws would have temporary validity from the date of the judgment until the minimum period needed to translate, re-adopt, print and publish them had expired.

In 1982, the Constitution underwent enormous changes in respect of language rights. Sections 16 to 22 of the Constitution Act of 1982 supplemented Section 133 of the Constitution Act of 1867. New Brunswick agreed to be bound by the sections of the Charter concerning official languages. This provides appreciable linguistic protection for the Acadians. Section 23 of the Manitoba Act remained intact.

Sections 16 to 20 go much further than Section 133, taking in a number of very important services as well, and establishing institutional bilingualism. It is to be hoped that other provinces will follow New Brunswick's example.

Section 16 lays down the principle of equality of the two official languages at federal government level. This gives the French-speaking minority in Canada a very high degree of constitutional protection.

Although both languages are official at federal level, the same is not the case at provincial level, where asymmetry prevails.

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[35]*See the judgments in Jones v. P.G.N.B. (1975) 2 R.C.S. 182 and P.G. (Qué.) v. Blaikie no.1 (1979) 2 R.C.S. 1016; P.G. (Qué.) v. Blaikie no.2 (1981) 1 R.C.S. 312.*

[36]*See R. Patry, "La législation linguistique fédérale", Editeur officiel du Québec, 1981. The Acadians were, however, as the author emphasises, very numerous.*

[37]*P.G. Manitoba v. Forest (1979) 2 R.C.S. 1032.*

This question has been a focus of attention in Canada since the Laurendeau-Dunton Commission, the federal Act of 1969 on official languages, and Quebec Acts Nos. 63, 22 and 101.

Section 16 of the Canadian Charter of Rights and Freedoms provides:

16.(1)English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2)English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3)Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

In 1867, language minorities did not have the protection they enjoy today. What an enormous change there has been! Having made such a good start, however, we should not be content to leave things there: the struggle for protection of language rights at provincial level must continue.

In the Acadians' Society of New Brunswick case[38], the Supreme Court found that the principles of natural justice and Section 13 (1) of the Official Languages of New Brunswick Act entitled a litigant in a New Brunswick court to be heard by judges capable of conducting the proceedings and following the evidence regardless of the official language used by the parties. This right is not founded, however, on Section 19 (2) of the Constitutional Charter. The Court declared that the rights guaranteed by Section 19 were of the same kind as those protected by Section 133 of the Constitution Act of 1867 .

Judge Beetz remarked that these rights belonged to the speaker, drafter or author of the procedural documents produced in court, and gave the speaker or drafter the power, guaranteed in the Constitution, to speak or write in the official language of his choice. Furthermore, neither Section 133 of the Constitution Act of 1867, nor Section 19 of the Charter guaranteed, any more than did Section 17 of the Charter, that the speaker would be heard or understood in the language of his choice, or gave him the right to be.[39]

The judge in such cases must, however, take reasonable steps to understand the language used in the pleadings, in the interests of natural justice. It is up to him to decide honestly and as objectively as possible to what extent he can understand the language in which the proceedings are being conducted.

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[38]*Société des Acadiens du Nouveau-Brunswick v. Association of Parents (1986) 1 R.C.S. 549.*

[39]*Ibid. p. 574.*

The Court offered no definition of "reasonable steps". Simultaneous interpretation might be one such measure. It has left the door open for clarification in a later case.

The Court makes an important distinction between classic funadamental rights and language rights. The latter are the product of political compromise while the former are derived from long-established principles. This is why the two kinds are interpreted and applied differently. According to the Supreme Court, courts should be slow to alter language guarantees which result from political compromise. Judge Beetz suggested that the courts should treat them more cautiously than than they would when interpreting legal guarantees.[40]

In the Acadians' Society case, Chief Justice Brian Dickson asked, in his dissenting opinion, what use the right to express oneself in one's own language was if the people one was addressing could not understand it?[41]

Mrs. Justice Wilson shared this view.

In the Acadians' Society judgment[42], the Supreme Court took care to point out that legislatures also have a part to play in protecting language rights. The legislator must legislate in order to introduce bilingualism. The judiciary and the legislature both have parts to play.

V.FUNDAMENTAL RIGHTS

Since the end of the Second World War, there has been a strong movement in favour of incorporating charters of rights and freedoms in constitutions. The example originally set by America in 1789 has been followed by several countries since 1945. Canada has not escaped the trend. Indeed, having passed through various stages, and adopted legislative charters, it acquired a genuinely constitutional Charter[43] of individual rights in 1982. Having a strong judiciary, it has firmly followed the American line - and this is, for us, a very good thing.

In 1982, a Charter of Rights and Freedoms was incorporated in the Canadian Constitution. This Charter protects individual rights first and foremost. It safeguards the collective rights of the aboriginal peoples and of the Catholic and Protestant communities.

The classic fundamental rights, democratic rights, the right to freedom of movement, legal guarantees, the right to equality and language rights are all protected.

A.Freedom of religion

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[40] *Ibid. p. 578.*

[41] *Ibid. p. 566.*

[42] *S.A.N.B. v. Association of Parents, supra, note 33.*

[43] *Part I of the Constitution Act, 1982. Under section 52 of the Constitution Act of 1982, any law incompatible with the Charter is null and void.*

Canada has no state religion, as Judge Taschereau pointed out in the Chaptut v. Romain judgment[44]. In the Big M. Drug Mart judgment[45], the Supreme Court declared, in passing, that to impose a state religion would contravene Section 2 of the Charter.

In the same judgment[46], the Supreme Court concluded that Section 91 (27) of the Constitution Act of 1867 gave Parliament power to legislate on Sunday observance, but that the Sunday Act violated the principle of freedom of religion laid down in Section 2 (a) of the Charter and that Section 1 of the Charter could not make such an act lawful. In passing, it spoke of the interaction between Sections 93 and 2, but added that it was not required, for the time being, to give a ruling on this point.

B. Sex equality

The Canadian Charter of Rights and Freedoms provides constitutional protection for equality of the sexes. Section 15 of the Charter prohibits discrimination based, inter alia, on sex, and Section 28 expressly provides:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Women outnumber men in Canada, but can actually be said to have constituted a minority group until now in more respects than one. They have not been equal, but have been a "minoritised" majority.

Happily, Sections 15 and 28 of the Canadian Charter of Rights and Freedoms of 1982 have now rectified this situation. In our opinion, because of its wording, which begins with a derogation clause, Section 28 operates independently of the other articles in the Charter. It is a substantive, and not simply procedural article. It was added after the compromise of November 1981, and has its own raison d'être. It prohibits all discrimination between men and women. It covers all the rights mentioned in the Charter, and not only those which are in force. Section 15 provides, for its part, for social promotion programmes to make it possible, inter alia, for women to achieve equality in practice.

Section 28 applies to the whole Charter. I do not believe, for example, that any cultural group could use Section 27, which protects the multicultural heritage, to perpetuate a patriarchal or matriarchal system which violated the Charter.

C. Collective rights

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[44] *Chaput v. Romain (1955) R.C.S. 834.*

[45] *R. v. Big M. Drug Mart (1985) 1 R.C.S. 295.*

[46] *Ibid.*

The Constitution of 1867 includes a number of collective rights. Case law has stressed that the protection provided by Section 93 applies to Catholics and Protestants as groups, as "classes"[47]. The same case law has seen a "racial" category in Section 91 (24)[48]. Controversy continues, however, over Section 133. According to Chief Justice Laskin, Section 133 gives people a "constitutional right" to use either language[49]. Before he became a judge, Professor W.S.Tarnopolsky wrote that language rights seemed to lie in a kind of border zone[50]. Professor Pierre Carignan places them firmly in the category of collective rights[51].

Canadian lawyers have not so far concerned themselves greatly with the definition of collective rights.

In the Greater Hull School Board case, Judge Le Dain said that what the term "collective rights" suggested was that the interests of the entire class of people or community in respect of denominational education should be taken into account, and not the interests of the individual taxpayer.[52]

Professor Pierre Carignan has defined collective rights as follows:

> Writers on the law describe rights as collective either because they belong to communities or because of they must be exercised collectively.[53]

Judge W.S.Tarnopolsky has remarked that :

> The assertion of group rights [...] is based upon a claim of an individual or a group of individuals because of membership in an identifiable group.[54]

D.Multiculturalism

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[47] *On this subject, see the Mackell judgment, supra, note 8.*

[48] *See Judge John Beetz's reasons in P.G. Canada v. Canard (1976) 1 R.C.S. 170, p. 207.*

[49] *See the Jones judgment, supra, note 30, p. 193.*

[50] *W.S. Tarnopolsky, "Les droits à l'égalité", in G.-A. Beaudoin and W.S. Tarnopolsky (eds.), "Charte canadienne des droits et libertés", Montreal, Wilson et Lafleur (1982), p. 52.*

[51] *P. Carignan, supra, note 7, pp. 70-71.*

[52] *Supra, note 9, p. 599.*

[53] *P. Carignan, supra, note 7, p. 44.*

[54] *W.S. Tarnopolsky, "The effect of Section 27 on the Interpretation of the Charter" (1984), 4:3 Crown Counsel's Review 1 to 3.*

In 1982, also for the first time, the words "multicultural heritage" appeared in the Constitution. Section 27 of the Constitutional Charter provides that:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It will be noted that the words chosen are "multicultural heritage and not "cultural rights".

It will be recalled that, following the work of the Laurendeau-Dunton Commission, Prime Minister Trudeau made a statement on multiculturalism in the House of Commons on 8 October 1971, in which he said that, although there were two official languages, there was no official culture, and no ethnic group had precedence. He added that multiculturalism in a bilingual context seemed to the government the best means of preserving Canadians' cultural freedom.

Several Supreme Court judgments have already dealt with Section 27, as have a considerable number of judgments by other courts.

The scope of this article is subject to discussion. The words "rights and freedoms" do not appear in it! Professor Hogg has suggested that this article may be pure rhetoric[55], but Professor (now Judge) Tarnopolsky believed that it had real substance[56]. Professor Magnet wrote that Section 27 "requires a little dynamism"[57].

The courts have occasionally based their judgments on this article, as the Supreme Court did in the Big M. Drug Mart judgment[58], when it ruled that the Sunday Act violated freedom of religion and was not compatible with maintenance and enhancement of Canadians' multicultural heritage, as provided for in Section 27.

The purpose of Section 27 is plainly to indicate that Canada, although a bilingual country at federal level and in some provinces, has nonetheless a multicultural heritage.

Professor Magnet concludes his study of Section 27 of the Charter as follows:

This article allows the Charter's discipline to be relaxed in cases where the full exercise of individual rights would threaten the survival of certain cultural communities. Thus Section 27 makes it possible to orientate development of the Charter to match the

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[55] *P.W. Hogg, supra, note 3, p. 72.*

[56] *W.S. Tarnopolsky, "Les droits à l'égalité", in G.-A. Beaudoin and W.S. Tarnopolsky (eds.), "Charte canadienne des droits et libertés", supra, note 45, pp. 550ff.*

[57] *J.E. Magnet, "Multiculturalisme et droits collectifs: vers une interprétation de l'article 27", in G-.A. Beaudoin and E. Ratushny (eds.), "Charte canadienne des droits et libertés", 2nd edition, Montreal, Wilson-Lafleur, (1989), 1058 p., pp. 817-866, on page 819.*

[58] *R. v. Big M. Drug Mart Ltd., supra, note 40.*

> special demands of the dual nationality and cultural pluralism which are, perhaps, the most striking features of a cultural tradition which is genuinely unique.[59]

It can therefore be said that the Constitution Act 1982 changed the fate of the ethnic minorities.

Section 15, which concerns equality rights, prohibits various forms of discrimination, particularly those based on national or ethnic origin. This article can be taken in conjunction with Section 27.

The possibility of combining Sections 2 and 27 of the Canadian Charter of Rights and Freedoms can be used to protect an ethnic minority's religion.

In the Edwards Books judgment[60], the Supreme Court ruled on the closing of shops on Sunday. It recognised the validity of an Ontario law, the Retail Business Holidays Act, which was intended to provide a uniform weekly day of rest. This act was passed in pursuance of the legislative powers given Ontario by Section 92 of the Constitution Act of 1867. The Court added that Section 2 of the Ontario Act struck a blow at the religious freedom of retailers whose day of rest was Saturday, but that this was justified by Section 1 of the Charter.

In the Edwards Books case, Chief Justice Dickson noted that freedom of religion had both individual and collective aspects[61]. He added that Section 27 of the Charter might be taken into account in interpreting freedom of religion.

This means that the provinces may legislate to introduce a uniform weekly day of rest without infringing the Charter. The Court referred to other countries where Sunday was also the day of rest: France and Japan, for example. The French Constitution states, however, that France is a secular country, while Japan is not a Christian country[62].

VI.THE RIGHTS OF THE ABORIGINAL PEOPLES

The aboriginal peoples had little protection in 1867. The 1867 Constitution gave the central Parliament full legislative authority over the "Indians and the land reserved for the Indians". Protection of the aboriginal peoples derived from the Royal Proclamation of 1763 and the treaties concluded with the British Crown. This protection was, however, extremely relative. In fact, although the provinces could not interfere with these treaties in their general legislation, the

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[59] *J.E. Magnet, "Multiculturalisme et droits collectifs: vers une interpretation de l'article 27", supra, note 52, p. 866.*

[60] *R. v. Edwards Books et al (1986) 2 R.C.S. 713.*

[61] *Ibid. 781.*

[62] *The Court did not rule on the inequality between small shops with seven or fewer employees and other shops, because Section 15 was not yet in force when the case began.*

federal Parliament was allowed to go against them by Section 91 (24) of the Constitution Act of 1867[63]. Such was the opinion of the courts.

Parliament defined the term "Indians" in the Indian Act[64]. In 1939, the Supreme Court ruled that the Eskimos were covered by Section 91 (24).

The Constitution Act of 1982 uses the word "métis" for the first time in the Canadian Constitution.

Although the rights of the aboriginal peoples are far better protected than they were in 1867, they have still to be satisfactorily defined. The whole country has now realised this. The aboriginal peoples - the first majority to become a minority in this country - have a constitutional means of having their rights defined and protected in Sections 35 and 35 (1) of the Constitution Act of 1982.

The first constitutional amendments introduced in Canada after up-dating of the Constitution in 1982 were made in June 1984 and concerned the aboriginal peoples' rights[65].

Section 25 of the Charter states that the Charter does not detract from the rights and freedoms of the aboriginal peoples of Canada. The aboriginal peoples enjoy special status.

In the Sparrow judgment[66], the Supreme Court developed the the Constitution Act of 1982. The Sparrow judgment is highly important: it is to Section 35 of the Constitution Act of 1982 what the Oakes judgment is to Section 1 of the Charter.

Chief Justice Dickson and Judge La Forest drafted the judgment with the unanimous (6-0) approval of the Court, and laid down the framework for interpretation of Section 35 (1).

The Court took the view that the exercise of a right provided for in Section 35 (1) of the Constitution Act of 1982 might be restricted.

In its justification test, the Court ruled out two principles - the concept of "public interest" and the presumption of validity. Concerning these two principles, it said that the justification founded upon "public interest" was so vague that it offered no useful guideline, and so general that it could not be used as a criterion to determine whether a restriction imposed on certain constitutional rights was justified.[67]

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[63] *"In Re Indians" (1939) S.C.R. 104.*

[64] *Indian Act, L.R.C. 1985, c.1-6.*

[65] *Particularly on inequality between men and women among the aboriginal peoples.*

[66] *(1990) 1 R.C.S. 1075.*

[67] *Ibid., p. 1113*

It added that, although the "presumption" of validity was now obsolete, given that the ancestral rights in question had constitutional status, it was clear that the importance of the aims of conservation had long been recognised in legislation and government action.[68]

Finally, when subsistence fishing and conservation measures were the issue, absolute priority should be given to the aboriginal peoples' right to fish. In this connection, the Supreme Court explained that the constitutional right stated in Section 35 (1) required Her Majesty to ensure that her regulations respected this priority, but that this requirement was not intended to undermine Parliament's authority and responsibility to introduce and administer general conservation and management plans for salmon fishing. The aim was, rather, to make certain that these plans treated the aboriginal peoples in a way which ensured that their rights were taken seriously[69].

Under a constitutional amendment in force since 1984, sex equality applies to the aboriginal peoples[70].

A Royal Commission, chaired by Judge René Dussault and Dr. George Erasmus, has been set up to study and report on the situation of the aboriginal peoples. One of the issues it is considering is self-government for them.

VII.THE AMENDMENT PROCEDURE

Education and culture (other cultural matters) are protected under the constitutional amendment procedure, and specifically by Sections 38 and 40 of the Constitution Act of 1982. If seven provinces, comprising 50% of the population, were to decide to transfer this sector to the central Parliament, the constitution would be amended accordingly. A dissenting province might still choose, however, to keep its jurisdiction in this area, and would then be entitled to "just compensation" from the federal authorities. This provision is of vital importance for Quebec, the only place where French-speakers are in the majority. Although they are in a minority nationally, it allows them to oppose the centralisation of education, insofar as it concerns them in Quebec, and to keep their legislative competence without suffering considerable economic loss.

Section 40 is worded as follows:

> Where an amendment is made under subsection 38 (1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

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[68] *Ibid., p. 1114.*

[69] *Ibid., p. 1119.*

[70] *Proclamation of 1983 amending the Constitution of Canada, 21 June 1984, Gazette du Canada, Part II, 11 July 1984, volume 118, p. 2984.*

CONCLUSION

Minorities were already constitutionally protected in 1867. The Constitution Act of 1982 developed and expanded this protection, particularly for the aboriginal peoples. We must pursue this process.

What of the derogation clause provided for in Section 33 of the Canadian Charter of Rights and Freedoms? Democratic rights, freedom of movement, language rights, religious rights the rights of the aboriginal peoples and, in my view, sex equality lie outside the scope of this clause. Otherwise, however, Section 33 applies and can be used to waive application of Sections 2, 7 and 15 of the 1982 Charter. We are against using this clause. In our opinion, the restrictive clause included in Section 1 of the Charter is sufficient.

The Canadian Charter of 1982 is not concerned with social and economic rights. However, these rights are covered by the provincial charters which all the provinces have and which have semi-constitutional status.

Our Charter is partly based on the U.S. Bill of Rights and this, the last great "Enlightenment" text, was clearly founded on the notion of individual rights. This is the case of most rights and freedoms in Canada.

We must, I think, be cautious in dealing with collective rights. They exist in some states for certain purposes. In Canada, such rights are incorporated in Sections 91 (24) and 93 of the Constitution Act of 1867. They seem to be justified.

Constitutional charters are designed primarily to protect the citizen against the growing power of the state. This was certainly Thomas Jefferson's intention[71], and many American judges, from William C. Douglas on, have agreed[72].

Charters also exist to protect minorities against parliamentary majorities. Majorities are fickle and, if left to their own devices, can very easily interfere with the rights of minorities. This is why minorities must be protected.
Canada is composed of several peoples. The words "aboriginal peoples" appeared in the Constitution for the first time in 1982.

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[71] *The author of the Declaration of Independence and third President of the United States declared: "Nothing then is unchangeable but the inherent and unalienable rights of man". S.K. Padover, "Thomas Jefferson on Democracy", New York, The New American Library (1939), p. 68.*

[72] *W.O. Douglas, "Go East Young Man. The Early Years. The Court Years 1939-1975", "The Autobiography of William O. Dougalas", New York, Random House (1980). Judge W.O. Douglas's dictum, "Keep the government off the backs of the people", is well-known.*

In 200 judgments given on the Charter since 1984, the Supreme Court has revealed its true character. Once again, its drafters were obliged to use such expressions as "where the number...so warrants", "reasonable limits", "minority language educational facilities", to take only three examples of terms which remain ill-defined.

The Court will also have to decide whether or not the Charter protects certain implied rights. This was the case in the United States. It may also be the case in Canada - particularly since, in the Press in Alberta judgment of 1938[73], the Supreme Court had already begun to speak of rights implied by the Constitution.

The Canadian Supreme Court, which is strong and independent, and which crowns the Canadian judicial system, has sought, in interpreting the Constitution, to improve the protection of minorities, particularly in respect of language and of rights and freedoms generally. It has given the rights of the aboriginal peoples its attention. The remarkable work which it has done in a few short years commands admiration.

Canada has made two attempts to improve its constitutional system since 1982 - in the Meech Lake Accord, which lapsed on 23 June 1990 because it had not been ratified by all the provinces, and the Charlottetown Accord of 8 August 1992, which was accepted by our political leaders, but rejected by the Canadian people in the referendum held on 26 October 1992. Had they succeeded, these two initiatives would have improved the constitutional protection of minorities.

[73] "*In Re Alberta Statutes*" *(1938) R.C.S. 100, p. 134.*

Germany

PROTECTION OF MINORITIES IN FEDERAL AND REGIONAL STATES

by

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The structure and organisation of Germany as a federation of individual states does not rely on ethnic, religious or linguistic differences of its constituent states, but on the historical diversity of regions as well as on the territorial division of the allied post-war zones of occupation.

The federal rules protecting minorities are very few. Efforts to include a clause on minority protection in the Basic Law have been made within the Commission on Amending the Basic Law, composed of members of the Bundestag and of the Bundesrat, but have not as yet been approved by the legislature. Proposed articles for the Federal Basic Law for the protection of minorities as outlined by the constituent states of Sachsen, Brandenburg and Niedersachsen use the terms "national and ethnic" (Sachsen), "ethnic, cultural, religious or linguistic" (Brandenburg) and "cultural minorities" (Niedersachsen).

Federal law happens to use the term "minority" or equivalent terms, e.g. s. 6 of the Federal Electoral Law provides for an obligatory exception from the 5 % blocking clause to parliament in favour of "national minorities".

Protocol N° 14 to art. 35 of the German-German Unification Treaty of 1990 refers to "Sorbish nationality ... culture ... tradition ... people". The Unification Treaty itself uses the term "Sorbes" and "Sorbish population" in Appendix I, which is a constituent part of the treaty. The Basic Law does not contain any reference to an official language. However, Appendix I to the Unification Treaty provides for the right to use the Sorbish minority language in public affairs and therefore constitutes an exception to s. 184 of the Federal Constitution of Courts Act, in favour of the Sorbish minority. This exception, which relates to the use of language in court only, resulted from the process of unification, and has taken into account that the "Sorbish privilege", set by art. 40 of the former east-German constitution, should be continued. The treaty is part of federal law.

At the federal level, since 1965 the Danish minority has had the benefit of a special participatory body attached to the Ministry of the Interior.
Art. 25 of the constitution of Brandenburg provides for the right of the Sorbish people to use their language in public affairs. This gives effect to the above protocol referring to art. 35 of the Unification Treaty.

The term "minority" or equivalent terms are more often used in state law, e.g. in constitutions of some constituent states where minorities reside, as in art. 5 of the new constitution of Schleswig-Holstein of 1990 (using the terms "minorities and ethnic groups"), in art. 25 of the constitution of Brandenburg of 1992 (using the term "Sorbish people" to describe an ethnic minority) and in art. 6 of the constitution of Sachsen of 1992, using the term "national minorities".

Further examples are found, in common legislation, s. 3 of the Electoral Law of Schleswig-Holstein ("minority"), s. 58 and 60 of the Schools Act of Schleswig-Holstein ("minority") as well as in draft laws in matters of public concern such as elections, schooling, media and culture.

In the above mentioned texts, neither the federal or state constitutions nor the statutes define the term "minority" or the equivalent terms used. But the texts imply both German citizenship (expressly stipulated in the proposed article of Sachsen for the Basic Law in view of the protection of minorities) and a lasting presence on the national territory, because the texts were outlined in consideration of the minorities already existing on the German territory, i.e. the Danish, Frisian and Sorbish minorities.

The only exception in this connection is the article proposed by Brandenburg as an amendment to the Basic Law, because this proposal is aimed at the protection of aliens settling on German territory.

The principle of affirmative action whereby minority interests are promoted by public authorities is not expressly provided for in the Basic Law, but is recognised by the proposed articles for the Basic Law and by the constitutions of Schleswig-Holstein (art. 5), Brandenburg (art. 25) and Sachsen (art. 6). These provisions tend to improve the legal status of minorities and prescribe an explicit public obligation to promote them in the fields of language, religion and cultural identity and tradition.

Except for a limited federal power concerning framework legislation on tertiary education (art. 75 (1a) of the Basic Law), legislative and executive powers over the schools lies with the constituent states pursuant to arts. 70 and 30 of the Basic Law. These have been implemented by various state laws, including laws licencing schools.

The constitutions of those states where minorities reside guarantee both protection and promotion of their minorities. Education is regarded as a component factor of the linguistic and cultural life of minorities (art. 5 of the constitution of Schleswig-Holstein, art. 6 of the constitution of Sachsen). Art. 25 of the constitution of Brandenburg refers expressly to an active promotion of private and public schools, which are to be promoted with regard to the minority language and culture.

Schooling laws specify the recognition of independent schools which teach in minority languages and provide for public allowances especially for them (ss. 58 and 60 of the Schools Act of Schleswig-Holstein, s. 2 of the Schools Act of Sachsen and the draft Schools Act of Brandenburg). In the Eastern states of Germany, three years after reunification, most of the relevant laws have been drafted or are the subject of legislative procedures.

The above mentioned constitutions and existing and draft Schools Acts provide both for the study of and for the education in the languages of the Danish, Sorbish or Frisian minorities, not only in private schools, but also in public schools in the areas of settlement of the minorities (eg, s. 2 of the Schools Act of Sachsen).

State constitutions refer to an active promotion of minorities by affirmative action in cultural matters, an obligation which is to be implemented by public authorities in the administrative process. For example, art. 25 of the constitution of Brandenburg prescribes bilingual topographical information in the settlement area of the Sorbish minority.

Like s. 6 of the Federal Electoral Law, s. 3 of the Electoral Law of Schleswig-Holstein and s. 7 (6) of the Electoral Law of Sachsen provide obligatory exceptions from the 5 % blocking

clauses to parliament in favour of minorities. It only facilitates eligibility, without guaranteeing a minimum membership in the respective legislative body.

Art. 26 of the constitution of Brandenburg provides for an active participation of the Sorbish minority in the legislative process, as far as they are concerned.

Consultative and participatory bodies in favour of minorities are part of the governments of those constituent states concerned; in Schleswig-Holstein at state level there exists a consultative body in favour of the Frisian minority as well as a state agent for minority affairs; a body for participation even in legislative affairs is outlined in art. 26 of the constitution of Brandenburg.

Italy

FEDERALISM AND PROTECTION OF MINORITIES

Regional aspects in Italy

by

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Italy is not a federal State. It can be defined as a regional State : the powers of the central government are counterbalanced by the powers assigned to the regions (and to the local government). However, one cannot say that the Italian Republic is an association of regions, because the regions did not take part in the establishment of the Italian State. Instead they were created by the State at a later stage of its history through a devolution of functions to newly established regional authorities. Like the other institutions of the local government (Comuni and Province), the regions are autonomous (not sovereign) bodies which have legislative and administrative functions. These functions are different from the sovereign powers of the State because they were developed on the basis of a decision of the central authorities of the State.

Since the regional powers are committed and not proper to the regions, these cannot be deprived of them without a revision of the Constitution. Therefore we can say that the autonomy of these bodies is founded on and guaranteed by the Constitution. Nevertheless the constitutional rules outline only the chief elements of the regional organisation and functions, leaving to the State Parliament some discretion as to their implementation. This is a further difference between Regions and member States of a federation, as the central State and the regions do not have equal constitutional position and guarantees.

The regions have a representative government. As a matter of fact their legislative assemblies consist of elected counsellors. A region is a self-governing institution because the people living in the territory under its rule can participate in the government of their own affairs through the election of the regional representative body as far as those affairs fall within the competence of the region itself.

When the Constitutional Assembly decided the creation of the regions in 1947, the regional reform was not directly aimed at the protection of linguistic minorities. Linguistic minorities are not a main problem of the Italian Society. They are established only in some border regions of Italy : a German speaking group in the province of Bolzano; a French speaking group in the Valley of Aosta; a Slovenian speaking group in the eastern part of Friuli-Venezia Giulia (especially in the provinces of Trieste and Gorizia) and the Ladinian speaking group living in the provinces of Bolzano and Trento. Notwithstanding the limited dimension of the phenomena, the Constitutional Assembly immediately realized that the regional institutions could be helpful in dealing with the problem of the protection of minorities. Besides, the implementation of the De Gasperi-Gruber Agreement required Italy to follow this way, and internal political obligations bound Italian authorities to a similar arrangement in Valle d'Aosta. The presence of the German speaking group and of the French speaking group in the territories of Trentino-Alto Adige and Valle d'Aosta suggested giving these two regions a special constitutional status, and taking into account the protection of linguistic minorities within the organization of these regions. As a matter of fact the provisions concerning both these regions were adopted by constitutional statutes in 1948 (the statute concerning Trentino-Alto Adige was modified in 1971) and the space left to national Parliament discretion for their implementation is much more limited than it is when other regions are at stake.

Both the above-mentioned constitutional statutes provide for the use of the languages of the minorities, for the preservation and development of their cultural identities, for the protection of

their traditional social and economic distinctive features. In Trentino-Alto Adige some of these provisions interest the Ladinian speaking group as well, but the main stage of the protection of this minority is set up at a sub-regional level. Also the protection of the Slovenian minority is implemented at a sub-regional level, especially at a municipal level. Therefore we can say that the general principles of the Italian legal system do not carry out the protection of the linguistic minorities through the regional institutions only, but imply the resort to all the institutions of the local government for that purpose according to the dimension of the concerned minority. The Slovenian speaking group is a very limited minority in relation to the dimension of the population of the Friuli-Venezia Giulia region. This region has a special constitutional status as well, but this status was adopted because of the economic and social problems of a border region and the presence of the Slovenian minority was not really determinant for that decision. In the constitutional statute concerning Friuli-Venezia Guilia we do not find provisions which are similar to those concerning the German and French minorities contained in the Trentino-Alto Adige and the Valle d'Aosta statutes.

In conclusion, it can be said that in the Italian legal system there is a link between the protection of the minorities and the institutions of the local and regional self-government. But only the statutes concerning Trentino-Alto Adige and Valle d'Aosta take care of the protection of the minorities directly, while in other situations the implementation of the protection of the minorities is shifted to a sub-regional level.

The purpose of the general regional reform was the conversion of the centralised Italian State into a State with large regional autonomies, but we believe to be pertinent to the matter in hand only an analysis of certain legal provisions relating to the regions, that is to say of those concerning the above-mentioned two special regions. Therefore, the next pages will deal with Trentino-Alto Adige and Valle d'Aosta, and some final remarks will be made as to the local self-government in Friuli-Venezia Giulia with regard to the situation of the Slovenian minority.

The Trentino-Alto Adige region is divided into two provinces, which are given a special constitutional status and a peculiar autonomy that is very similar to the autonomy of the regions. The splitting up into two separate bodies is aimed at insuring the German speaking minority (which mainly lives in the territory of the province of Bolzano) a territorial self-government, and, therefore, at implementing its protection within Trentino-Alto Adige, that is in a regional frame as required by the De Gasperi-Gruber Agreement.

Both the Trentino-Alto Adige region and the province of Bolzano have legislative powers (namely a primary function, a concurrent function and a supplementary function) and administrative powers. No Italian region has judicial powers. The distinction between the three legislative functions is based on the different limits bounding the regional autonomy in the exercise of each of those functions. The peculiar limits of the primary functions are the general principles of the Italian system of law, the international obligations of the Italian State, the guidelines of the economic and social reforms and the national interests (with the enclosed interests in the protection of linguistic minorities). With regard to the concurrent function, there exists not only the above-mentioned limits but the limit of the principles laid down by special national statutes as well, and the supplementary function is bounded by the limit of each of the national statutes for the implementation of which it has to provide. The legislative and the administrative functions must be exerted exclusively with regard to the regional or provincial territory and to the fields (or matters) assigned to the region and to the province by their

constitutional statutes. As to these fields, we can say they concern the organisation of the local institutions in the case of the region, and the local economic, social and cultural activities and the local environment and territorial planning in the case of the province.

The Province has a concurrent legislative function in the field of public education. There are schools for the Italian speaking and German speaking students where the teaching language is their own language respectively. The administrative staff of these schools is under the direction of the province while the teaching staff has a state employee status. Both the province and the State concur in the appointment of the heads of the administrative and teaching staff.

The most important governing bodies of the province are the provincial legislative council, the executive board and the President. The legislative council is elected by the people who have been resident in the province for four continuous years. The provincial counsellors are members of the legislative council of the Trentino-Alto Adige region together with the counsellors of the legislative council of the Trento Province. In the executive board and in the presidency of the legislative council, the presence of representatives of both linguistic groups is required : special provisions ensure their rotation in the main offices of both the bodies. Similar rules have to be applied in the minor local self-government authorities.

In the Trentino-Alto Adige region German is given the same constitutional status as Italian. In the province of Bolzano, the German speaking people can use their language in the relations with the public authorities. The offices of the State Administration in the Bolzano province must have German and Italian speaking employees according to the size of the respective linguistic groups which is ascertained on the basis of personal statements in the last census.

The powers of the Trentino-Alto Adige Region and of the Bolzano Province, and the minority rights of their inhabitants can be enforced by the constitutional court.

The provisions concerning the representation of linguistic groups in the bodies of the Bolzano province and of the local minor self-government, the staff of the State authorities and the teaching in the nursery and primary schools are also applied with regard to the Ladinian language in the territories where the Ladinian group is settled.

Valle d'Aosta as well is a region with special autonomy. The provisions concerning its functions and organization were adopted by a constitutional statute.

The region has legislative (primary and supplementary) functions in many fields of local relevance : their list is in some way similar (but more restricted) to the list of the matters assigned to the competence of Trentino-Alto Adige. In the statute there are no rules concerning the distribution and the rotation of the offices between Italian and French speaking groups. However, French bears in this region the same constitutional status as Italian. The State employees have to be born in Valle d'Aosta or to know French. In the schools of the region the same time is devoted to the teaching of French as to the teaching of Italian, and French is also used as a teaching language.

In Italy, the statutes concerning the election of the two chambers of Parliament do not have special provisions on the representation of the recognised linguistic minorities which however may and do have representatives within Parliament. Nevertheless, special rules allow the

political parties of the linguistic minorities settled in Valle d'Aosta, the Province of Bolzano and in Friuli-Venezia Giulia to arrange electoral alliances with other political parties in such a way that in any case one (or more) of them can be represented in the European Parliament.

The local branches of the state-owned radio and television company provide daily programs for the German and French minorities.

The principles of the Italian system of law imply, therefore, an implementation of the constitutional protection of linguistic minorities which may vary with regard to the different situations of linguistic minorities, according to the peculiarities of the areas where they live. Moreover the link between the regional and local self-governments and the protection of minorities is not always similar.

On the above-mentioned basis, the protection of the Slovenian minority in Friuli-Venezia Giulia can be analyzed. In the provinces of Trieste and Gorizia, where this minority is settled, there are schools for the Slovenian speaking children and the Slovenian language is taught and used as teaching language. In the little "comuni" of both provinces where the Slovenian group reaches a important percentage of the population, the Slovenian language can be used in the relations with the public authorities directly and in the meetings of the self-government bodies. Otherwise, and in the judicial procedures, a system of translation by interpreters is provided. The Fruili-Venezia Giulia region and the local self-government authorities are given powers to implement the policy of the protection of the minority, especially through financial aids to the preservation and development of its ethnic and cultural identity. The Slovenian names of the localities are recognised and place name signs in the minority language are installed. The local branches of the state-owned radio and television company have special daily programs for the Slovenian minority.

Spain

**MINORITIES AND
THE STATE OF REGIONAL AUTONOMY
IN SPAIN**

by

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CONTENTS

0.Presentation of the problem

One of the major challenges facing the drafters of the Spanish Constitution in 1978 (and consequently one of the most critical problems in the transition to democracy) was no doubt the matter of the State's territorial organisation.

This problem, which merely originated last century in the failure to achieve political, legal and economic unity in multicultural Spain, was greatly exacerbated, especially in Catalonia and the Basque Country, by the centralistic rigidity and intransigence of the Franco era. Consequently, in late the 70s, restoring the democratic system was seen as going hand-in-hand with solving this problem. The fact that immediately after the first democratic elections (June 1977) the Government of Adolfo Suárez gave priority to restoring the regional autonomous institutions, even before the process of formulating a constitution was properly under way, shows the urgency of the problem and the link between autonomy and democracy.

The first outcome of this process of reorganising the country launched by the 1978 authors of the Constitution was described as the "Estado de las Autonomias" (literally the "State of Autonomies" or "the system of Autonomous Communities"), a model of political organisation broadly based on two premises. The first premise is that Spain is a unitarian cultural, historical and social entity ("the Spanish Nation, the common and indivisible homeland of all Spaniards"), given concrete form by the Spanish State, a legal and national organisation which is unitary in both domestic and international terms. Concurrently, the autonomy of certain entities is recognised as a principle for structuring the State termed the "right to autonomy", a right which the nationalities and regions enjoy to set up structures of self-government (Article 2). Needless to say this right is meaningful only within the limits expressly defined in the Constitution itself. For example, the first Additional Provision of the Constitution stipulates that the general updating of the "Fuero" system "shall be carried out ... within the framework of the Constitution", an expression which the Constitutional Court interpreted in judgments 123/84 of 18 December 1984 and 76/88 of 26 April 1988, pointing out that the "Fuero" system "is not the result of an agreement between territorial authorities which preserve rights predating and outweighing the Constitution, but rather it is a rule which is issued by the constituent authority and has general force within the scope of the Constitution and extends also to prior circumstances in history.

However, it would be a mistake to consider the "Estado de las Autonomias", as a model for the territorial distribution of competence which was completed and perfected at the same time as the Constitution. In fact the material delimitation of regional autonomy established in the Constitution is relatively narrow, being confined to setting out procedures for acceding to autonomy and leaving extensive scope for manoeuvre around the governing principle. This is why Professor Cruz Villalón, in a statement very frequently quoted by Spanish experts, affirmed that the Spanish Constitution launched a process of deconstitutionalising the form of the State[74], and also why Professor Rubio Llorente has said that Title VIII of the Constitution (concerning the territorial organisation of the State) is the product of history, and not a system.

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[74] ***Cruz Villalón, P.***, *"La estructura del Estado, o la curiosidad del jurista persa", Rev. de la Facultad de Derecho de la Universidad Complutense, no. 4, 1981.*

The purpose of this **MEMORANDUM** is to briefly analyse the most significant aspects of this complex (and largely dynamic) phenomenon which we have defined as "Spanish system of Autonomous Communities", in so far as it may be a constitutional model for the study of cultural minorities. However, this paper will not go into the following subjects: defining the concept of "minority", its possible applications to the Spanish reality, the applicability of the concept to historic nationalities, the status of minorities in Spanish law and the internal contradictions of such status, since the historical demand for the principle of equality before the law contradicts "the right to be different", the basic nucleus of the affirmation of what are known as the rights of minorities.

In any case we should stress that the Spanish Constitution contains an exhaustive declaration of the fundamental rights and public freedoms (Articles 10 to 52), as well as the principle of equality before the law stated in general terms in Article 14 of the Constitution, that the combination of the two aforementioned ideas give the individual a status based on the "dignity of the person", proclaimed by Article 10.1 as the "foundation of the political order and social peace" and that we can consequently consider that the rights of minorities are sufficiently protected by the Spanish constitutional system despite the absence of a specific concrete provision on the subject in the Constitution itself[75].

1.General aspects of "the State of regional autonomy"

"The State system of Autonomous Communities", the result of a hard-won agreement acceptable both by Catalan and Basque nationalists[76] and upholders of the unitarian conception of the State, is not, as one might think, a closed model arising out of a pre-agreed conception delimited according to plan. Article 2 of the Constitution, which sets forth the premises forming

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[75] *In view of the very broad nature of the declaration of rights, the lack of a specific mention of minorities in the Constitution is offset by a certain implicit recognition of the right to be different. Nevertheless, this lacuna has made it difficult for minority groups to assert the rights which they enjoy and to secure implementation of the procedures to safeguard them. The Constitutional Court has repeatedly corrected this deficiency through what legal theories have defined as the constitutional protection of collective or diffuse rights. More specifically, judgment 214/1991 of 11 November 1991 accepted the standing of a person of Jewish stock to defend her honour which had been attacked in her capacity as a member of the Jewish social group: "In her dual capacity as a citizen and a member of a community, in this case the Jewish community, which suffered a full-scale genocide at the hands of national socialism and ... we must inevitably conclude that the interest mentioned in the appeal should be considered legitimate for the purposes of redressing the right to honour of our country's Jewish community, of which the appellant is a member".*

[76] *The abstention from the constitutional referendum advocated by the PNV (Basque Nationalist Party) was an expression of the party leadership's resignation vis-à-vis a formula which they could not reject but which they also could not formally accept (J. Pradera, "La liebre y la tortuga", Claves de razón práctica, no. 38, 1993).*

the basis of the model (see above) and Title VIII, which further develops them, are rather an "ad hoc" response drawn from a wide variety of sources (the 1931 Spanish Constitution, the Italian regional model, the specific dynamics of political life during the constitution drafting process with a number of "pre-autonomies" already in operation, etc) caused by hesitation on the part of the authors[77]. This is borne out by the wide varieties of texts used throughout the drafting process, which initially began with uniform, general territorial decentralisation (preliminary draft Constitution of January 1978) and ended, as far as possibilities for self-government are concerned, with a system of differentiated autonomy which ultimately benefited Catalonia, the Basque Country and Galicia.

As we have mentioned, the end result was an intermediate formula between the Federal State, formally with a greater degree of autonomy for the federated entities, which have a homogeneous and constitutionally guaranteed basic position) and the centralised State, with at most a mere administrative decentralisation. The aim of the Spanish system of Autonomous Communities is to solve the problems both of the traditional demands for political autonomy from regions with a more obviously autonomous destiny (particularly Catalonia and the Basque Country) and of achieving functional decentralisation to encourage better relations between government and governed and greater efficiency in State action, thus making the whole new institutional system more democratic.

In order to achieve such objectives and take account of the two dimensions to which they give rise, the Constitution lays down a series of elements and rules which should be properly defined from the outset.

-The right to autonomy is generally applicable throughout the country and is implemented by means of a process of setting up Autonomous Communities (ACs), based on substantial participation by the populations concerned; in other words any region of the country can potentially declare itself to be an AC or else join one of the existing Communities.

-Two procedures have been provided for setting up ACs. The first is general in nature and basically takes account of the will of the entities that make up the traditional local system (municipalities and provinces). The other is theoretically more complex: it requires formal evidence of a more deep-seated autonomous destiny and the holding of a referendum for the population involved. This latter procedure was considerably simplified for Catalonia, Galicia and the Basque Country.

-At the same time two levels of autonomy are established, in that ACs which achieve autonomy through the latter of the two procedures (in practice these are Catalonia, the Basque Country, Galicia and Andalusia) can exercise legislative and executive powers in important fields and thus accede to high levels of autonomy satisfying (or at least attempting to satisfy) the more conspicuously nationalistic sectors of Catalonia and the

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[77] *J. Pérez Royo has written on this subject "there were enormous political fluctuations concerning Title VIII and consequently the formation of the right to autonomy and the Senate, so that points of contact between the first draft and the final text of the Constitution hardly coincided at all". 'La reforma imposible", CLAVES de razón práctica, no. 20, 1992.*

Basque Country; the other level, the so-called general or common system, apparently did not allow the Autonomous Communities to exercise legislative powers for an initial 5-year transition period (the Constitution's ambiguity on this point prompted Professor Tomás Ramón Fernández to say, in a rather hasty, premature interpretation, that this second type of AC could on no account exercise legislative powers; subsequent practice has not confined this interpretation[78]), and the areas in which powers could be exercised were qualitatively and quantitatively inferior; nevertheless, once the 5-year period has elapsed these latter communities can increase their powers to levels similar to those enjoyed by the others.

This treatment, which in theory is standard and uniform but in practice comprises two different systems and is geared to solving two very different types of problem (J. Pradera speaks of the "political" problem of the Basque Country and Catalonia and the "administrative" problem of the need to decentralise[79]), is not without certain practical difficulties, and not only because of certain ambiguities in Title VIII of the Constitution. Above and beyond its openness, the territorial organisation established by the 1978 Constitution is susceptible of two different interpretations, one being more federalistic in that it advocates a uniform level of competences for all ACs (especially now that the 5-year transition period has elapsed), and the other more asymmetrical in that it recommends transferring the *de facto* differences in the desired levels of autonomy in the various nationalities and regions into the system for determining the Autonomous Communities' levels of autonomy and competences. Moreover, we must take account of the difficulties of rationalising administrative activities in a two-tier structure. However, subject to the further explanations set out below, it would be unfair to deny that the authors of the Constitution created an operational framework capable of addressing the problem of Spanish minorities in the context of the political situation obtaining in the late 70s.

2.Axiological principles of "the State of regional autonomy"

2.1The constitutional right to autonomy

The word "autonomy" recurs several times in the Spanish Constitution with reference to situations presupposing the possibility of exercising certain specific powers of self-regulation, which obviously all widely differ in scope. For instance, just as the right of the nationalities to autonomy is enshrined in the aforementioned Article 2, Article 27.10 recognises the autonomy of the universities, Article 72.1 starts by declaring that the Parliamentary Chambers shall establish their own rules of procedure and then goes on to grant them autonomy to approve their own budget, and Article 140 secures the autonomy of the municipalities. Countless further examples are to be found in ordinary legislation (including Article 6 of the Organic Law on the *Defensor del Pueblo* (Ombudsman), Article 2 of the Organic Statute on the State Counsel's Office, etc). We

[78]*Tomás Ramón Fernández Rodríguez, "La organización territorial del Estado" in Lecturas sobre la Constitución española, Vol. I, Madrid, 1978 (1st edition).*

[79]***J.Pradera,** op. cit.*

must base our analysis of the extent of autonomy in the nationalities and regions on the common idea underlying all these expressions, which basically boils down to the concept of autonomy with self-regulatory powers[80], but which also necessitates criteria differentiating the autonomy of the territorial entities set out in Article 2 from all the other aforementioned types of autonomy. This difference no doubt derives from the importance of the fields in which the autonomy faculty is implemented, but even more so from the nature of the powers which can be exercised in this way and which, in the case of ACs, include powers relating to the citizen's legal situation and powers of innovation, in short the production of legally binding norms.

The autonomy enshrined in Article 2 for the benefit of the nationalities and regions is consequently a right granted to certain well-defined communities ("bordering provinces with common historical, cultural and economic characteristics, island territories and provinces with a historical regional status", Article 143.1), which might be incorporated into the category of institutional safeguards which C. Schmitt used to define certain principles set out in the Weimar Constitution[81], but, if we go further, the right to autonomy is a structural principle of the State as a whole, or in the words of Sánchez Agesta "a general organisational principle"[82] which adjusts the nature of the State established in 1978. The Constitutional Court itself acknowledged when it stated that "ACs ... enjoy qualitatively greater autonomy than the administrative autonomy granted to local entities, as they also have legislative and governmental powers which give a political character to their autonomy" (judgment 25/1981 of 14 July 1981).

However, we should also point out that this right to political autonomy enshrined in the Constitution and the self-government which arise out of its implementation can in no case be approximated to the right of disposal which the State possesses *per se*. "Autonomy is not sovereignty", in the words of the Constitutional Court in judgment 4/1981 of 2 February 1981, given that it is a power bestowed by the Constitution and therefore not an inherent one, in other words restricted to a field of competence limited by the Constitution and which actually, from the legal point of view, has an impassable limit, the unity of the State considered as a principle structuring the new State through the oft-quoted Article 2: "The Constitution is based on the indissoluble unity of the Spanish nation".

2.2The equality principle

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[80]***García de Enterria, E., y Fernandández, T. R.,*** *Curso de Derecho Administrativo, Vol. I, Madrid, 1980, pp. 250 ff.*

[81]***Schmitt, C.,*** *Teoría de la Constitución, Madrid, pp. 197. The application of the concept of institutional safeguards to our subject is studied by* ***Parejo Alfonso, L.,*** *Garantía institucional y autonomías locales, Madrid 1981, pp. 115.*

[82]***Sánchez Agesta, L.,*** *Comentarios a las Leyes Políticas (directed by O. Alzaga), Vol. I, Madrid, 1983, p.122.*

Equality is a fundamental principle of the legal order which is set forth several times in the Spanish Constitution with various adaptations of content: for example, in Article 1 it is set out in a general manner as one of the higher values of the legal order, Article 9.2 presents it as one of the criterion on which the public authorities should base their action, in Article 14 equality is mentioned from the angle of equality before the law, and lastly it also appears as a criteria determining the substance of several rules relating to the fundamental rights (Arts. 23, 31 and 32, i.a.). However, its extrapolation to the field of autonomy, where it is shown in two different lights, namely as regards individuals and in respect of relations between ACs, does pose considerable problems. Let us consider these two dimensions separately.

a)At individual level, Article 139.1 states that "all Spaniards have the same rights and obligations in any part of the territory of the State", which, according to one approach, might be interpreted as a mere extension to the field of autonomy of the principle of equality before the law set out in Article 14. However, the Constitutional Court was quick to grasp that the said Article 139.1 involved much deeper complications than those deriving from the other Article in question which appears under Title I and which is indubitably one of the most complex articles from the angle of constitutional interpretation. The problems stemming from the proclamation of the principle of equality as a right[83] are here compounded by the problems arising out of the legislative pluralism of regional autonomy as practised in Spain, so that an excessively rigid interpretation of Article 139.1 would in practice render the legislative powers of the ACs meaningless; after all, as the Constitutional Court stated in its judgment 37/1981 of 16 November 1981, "it is obvious that this principle can in no case be interpreted as conveying a strict, monolithic uniformity in the legal order, to the effect that the same rights and obligations must be recognised under the same circumstances in any part of the national territory". Nevertheless, Professor I. de Otto later remarked[84] that the problem subsisted, albeit in mitigated form, despite the aforementioned judgment, because the rejection of "monolithic uniformity" does not block the way to a "certain" uniformity, which would in any case reduce the scope of the ACs' competences; according to Professor de Otto, the optimum interpretation would probably be that the declaration of equality set out in Article 139 does not prevent the various legal systems of the Autonomous Communities from regulating matters in different ways and establishing a legal position for Spaniards which varies in accordance with the territorial area but prohibits differentiated treatment within each of the regional legal systems. This does not mean that the individual aspect of the equality

[83] *The principle of equality before the law is not unanimously considered as a subjective fundamental right, and case law has varied. In any case its inclusion in Art. 14 means that it is protected by the amparo appeal, which means that it is indisputably protected by a legal remedy.*

[84] ***De Otto, I.,*** *"Los derechos fundamentales y la potestad normativa de las CCAA en la jurisprudencia del Tribunal Constitucional", Revista Vasca de Administración Pública, No. 10, Vol. II, 1984.*

principle is meaningless in the autonomy framework, with the emergence of legal positions which vary radically according to the AC in question, a hypothesis which the Constitutional Court has explicitly ruled out (judgment 37/1987 of 26 March 1987). However but the safeguard against such an eventuality is set forth in Article 149.1.1 which reserves exclusive jurisdiction for the State in the "regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties", not in the aforementioned Article 139.1.

b)Secondly, even though it is not included in the text of the Constitution, a second strand of the equality principle which directly concerns ACs is implicit in the Constitution, and derives from both the general principles (particularly the recognition of the right to autonomy in Article 2) and Article 138.2 ("The differences between the Statutes of the various Autonomous Communities may in no case imply economic or social privileges"). The problem stems from the existence of two different means of acceding to autonomy, which presupposes the creation of two types of ACs with very different levels of jurisdiction, and it is also very much in line with the direction implicitly taken by the Constitution. Nevertheless it is true that in the text of the Constitution as finally approved, and as highlighted by the Committee of Experts[85] in 1981, this distinction was based solely on political caution and attempted to tackle Spanish regional heterogeneity by providing facilities for transitional stages, though these would in no case be given sufficient legal force to depart from the aforementioned equality principle. As the Committee of Experts pointed out in its report, "we must insist that the Constitution does not impose two categories of ACs; the only stipulation it actually makes, and with considerable prudence, is a transition period aimed at giving most of the territories the specific powers of the single model". The constitutional practice in the ensuing years (1982/1993) has confirmed that this interpretation of the constitutional model for the territorial organisation of power prevailed, and currently, with the formulation of the Organic Law on Transfers which standardises the upper limits on competences (L.O. 9/1992 of 23 September 1992) and the subsequent transfer process, the transitional period of inequality is over (at least in theory).

2.3The solidarity principle

Although the Constitution proclaims equality (see previous paragraph), it is obvious that there are also *de facto* situations characterised by profound economic and social inequalities between the different nationalities and regions. This being the case, the right to autonomy is accompanied by a duty to show mutual solidarity, which is described in Article 2 of the Spanish Constitution as one of the elements defining the Spanish State and further developed in Article 138, which entrusts the State with the defence of the material implementation of this principle.

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[85]*This is refers to the committee of university professors under the chairmanship of Professor García de Enterría, mandated by the Government of L. Calvo-Sotelo in April 1981 to prepare a report to guide and rationalise the second phase of the autonomy process.*

If solidarity is to be effective, very specific instruments must be implemented requiring the State to construct the bases for its existence. These instruments include the "interterritorial clearing fund" (Article 158.2 of the Spanish Constitution), which is a specific part of the State budget earmarked for investment expenditure, and such capital is distributed in accordance with the criteria established by the law regulating it (Law no. 29/1990 of 26 December 1990).

3.The components of "the State of regional autonomy"

3.1Statutes of Autonomy

a)Legal nature

According to Article 147.1 of the Spanish Constitution, Statutes of Autonomy are the basic institutional rules governing the ACs and are a vital factor in their creation and organisation, in that when a regional entity adopts such Statutes it automatically accedes to AC status. As legal theorists have affirmed, although the Statutes can in no case be considered as the Constitution of a federate state on the grounds of its origin (since the concept of autonomy as hitherto set forth is very different from that of sovereignty), nevertheless from the functional angle there are great similarities, because it is the Autonomous Community's supreme norm, from both the logical and the prescriptive angle, which determines, inter alia, the body and procedure through which the Community's legislative power is exercised, the subjects covered by its activities and the extent of the Autonomous Community's other powers[86].

From the very outset a multitude of political and doctrinal positions have attempted to define the legal character or the nature of Statutes of Autonomy. These statements can be broken down into two basic positions. Some consider that the Statute of Autonomy is a norm which is part of the State's legal order since Article 147.1 stipulates that "the State shall recognise them and protect them as an integral part of its legal order", with, moreover, the force of an organic law (Article 81: "Organic laws are those ... approved by the Statutes of Autonomy"); others consider Statutes of Autonomy as norms with a unique, contracted character which expresses not the legislative will of the State but an agreement reached between the central legislative power and the populations involved, in a sort of "constitutional contract", to the extent that the draft is prepared by a specific Assembly representing the affected provinces (Article 146), or, if necessary, the text is ratified by referendum (Article 151) and its reform "shall be in accordance with the procedure established in them" (Article 147.3). Experts are nowadays unanimous that Statutes of Autonomy are State norms with all the consequent legal effects, though this does not prevent them having a very special position since firstly, for the aforementioned reasons, they have a special passive force vis-à-vis other State laws and a certain hierarchical superiority over the laws of the Autonomous Communities of which they are the foundations, and secondly they have a delimited physical framework

[86]*See* ***Pérez Royo, J.,*** *Las fuentes del derecho, Madrid, 1984, pp. 135 and 136.*

which strengthens their special force and explains the relationships between the different Statutes of Autonomy, which are by no means peaceful.

b)Drafting Statutes of Autonomy

As already mentioned, the Spanish Constitution lays down widely differing procedures for drafting Statutes of Autonomy which give rise to clearly differing levels of autonomy. Nevertheless, the common factor in all these procedures is the prior initiative phase, a simple expression of the desire for autonomy unbound by any statutory text, which can also take on a variety of forms depending on the level of autonomy aspired to and which consists (today it is fair to say "consisted", now that the map of Autonomous Communities is completed) in the primary decision to establish the constitution of the Autonomous Community. There are three basic procedures for the said initiative: an initiative under-taken under ordinary procedure by the Provincial Deputations and two thirds of the municipalities involved; an initiative undertaken by the *Cortes* by means of an Organic Law which can replace the aforementioned expression of desire for autonomy for reasons of national interest; and lastly, an initiative taken under the so-called special procedure by the aforementioned local bodies, though with greater majorities (three quarters of the municipalities) and ratification by referendum (the Basque Country, Catalonia and Galicia being exempted from the latter requirement under the Constitution), resulting in higher levels of autonomy.

When the initiative phase is completed, the procedure for drafting the Statute *stricto sensu* varies between the first two possibilities and the third one. The latter method, used by the aforementioned regions (Basque Country, Catalonia and Galicia), and later also followed by Andalusia on completion of an extremely complicated process, requires the Congress's Parliamentary Commission on Constitutional Affairs to monitor the progress of the draft (prepared by an Assembly made up of regional parliamentarians and representatives of the local authorities), ratification by regional referendum and ratification by the *Cortes*. The ordinary procedure followed by the Asturias, Cantabria, La Rioja, Murcia, Valencia, Aragon, Castilla-La Mancha, the Canary Islands, Navarra (with some distinctive features), Estremadura, the Balearic Islands, Madrid and Castilla-Léon more simply requires parliamentary follow up to the draft prepared by the same methods as in the previous procedure, whereafter it is merely approved as an Organic Law.

c)Content of Statutes of Autonomy

Statutes of Autonomy usually begin with general considerations of either a programmatic or structural nature (territorial framework of the Community, use of languages if appropriate, anthem and other symbols of identity, etc) and go on to dead with regulations on the main institutions of the Autonomous Communities and their mutual relations, the powers taken on by the Community, which are defined by subject and also the type of public action (legislative or executive); these themes (institutions and powers) make up the core of the Statute. Frequently, the Statute also specifies the Autonomous Community's financial foundations, and concludes with a description of the procedure for amending the Statute.

Moreover, this model content coincides with all the subjects which Article 147.2 of the Constitution reserves for the Statute of Autonomy: "name of the Community", "the delimitation of its territory", "the name, organisation and seat of its own autonomous institutions" and "the competences assumed within the framework of the Constitution". Nevertheless, some disputes have had to be settled by the Constitutional Court, which has found that the content of Article 147.2 refers solely to a "reserva estatutaria relativa" (a field which is in principle governed solely by the Statute of Autonomy), which may very well be complemented by the State laws provided for in Article 150 in connection with powers (Article 147.2.d) and also by regional laws, where the organisation and seat of the specific institutions are concerned (Article 147.2.c). The hypotheses set out in sub-paragraphs a) and b) of the same Article regarding the name of the Community and its territorial delimitation are somewhat different because, as concrete concepts, they must be considered as subjects which have to be regulated exclusively by the Statute (judgment 89/1984 of 29 September 1984).

3.2The competences of Autonomous Communities

The formula used in the Spanish legal system for apportioning competences does not tally with the traditional criteria of most systems which have opted for the federal or regional version of political decentralisation: these are based on a single list of competences attributed to either the State or the regional entities, leaving all remaining competences to the other authority (this is the so-called "residual clause"). On the contrary, the starting point in the Spanish Constitution is a heterogeneous, not a systematic, criterion which has left a great deal of scope for complementary legislation. The Constitution grants a great deal of freedom to the Statutes of Autonomy, within the limits of the Constitution, to acquire the powers which are deemed necessary to achieve the desired degree of autonomy. This shows that the Statute of Autonomy is the prime law-making corpus when it comes to determining the competences of a given Autonomous Community. Nevertheless, the distribution of competences can exceptionally be modified by the central authorities through extraordinary mechanisms such as those set out in Article 150 of the Spanish Constitution (organic laws on delegation or transfer of competences).

Formally, the Constitution devotes two articles to this question: Article 148, which enumerates the matters falling under the jurisdiction of all Autonomous Communities, and Article 149, which enumerates the competences of the State, areas in which the Communities have no jurisdiction. In addition to these two lists, the central authority adopts principles of prevalence or supremacy of central power (in cases of conflict of concurring competence, State law prevails), of the complementarity of state laws, and also the residual clause, whereby competence in respect of matters not attributed to the ACs by their respective statutes fall to the State (Article 149.3).

However, closer inspection of the Constitution enables us to qualify this initial outline . Firstly, we must point out that Article 148 only takes in the form of a guideline which in no case obliges the Communities to remain within the strict framework of their competences. Secondly, the Constitution assigned two very practical and different functions to Article 149.1: firstly, Article 149.1 establishes the matters which fall under the exclusive jurisdiction of the State, and consequently the State is not authorised to transfer them to

the autonomous bodies (apart from selective use of the provisions of Article 150 of the Spanish Constitution); but secondly, Article 149.1 provides possible new frameworks of competence for ACs with a higher level of autonomy or special autonomy in matters not reserved to the State, by means of a number of rather vague formulae which have on several occasions had to be interpreted by the Constitutional Court. In this connection we must bear in mind that the State has exclusive competence in some matters, in terms of both legislation and enforcement (international relations, defence, nationality, immigration, emigration, aliens and the Administration of Justice), that in other cases it only has legislative powers (including the power to issue standard-setting regulations, cf. Constitutional Court judgment 35/82), which empowers ACs to take responsibility for enforcing and organising services, and lastly that in yet other cases the State has only the competence to lay down principles - basic legislation[87] - while the ACs are empowered to legislate and further develop and implement these basic principles - constituting autonomous legislation.

3.3The institutional organisation of the Autonomous Communities

The question of institutional organisation is one which, together with that of competences, has revealed the largest number of lacunae and ambiguities in Title VIII, as the Spanish Constitution refers solely to the organisation of the privileged ACs, stating that it shall be based "on a Legislative Assembly elected by universal suffrage in accordance with a system of proportional representation which assures, moreover, the representation of the various areas of the territory; a Government Council with executive and administrative functions and a President elected by the Assembly from among its members and appointed by the King..." (Article 152.1 of the Spanish Constitution). The other ACs found no explicit organisational schema in the Constitution, which initially had very far-reaching effects since it seemed to imply that legislative assemblies were exclusively reserved for ACs which were from the outset authorised to attain the maximum level of autonomy allowed by the Spanish Constitution. However, it very quickly became obvious that it was inconceivable to refuse the so-called "second-rank" Autonomous Communities the right to form a Parliament because autonomy is based precisely on political decentralisation, in other words the right of an entity to pass its own laws. This fact was confirmed by the report of the Committee of Experts on Autonomy, the autonomy agreements and the Constitutional Court. It is therefore not surprising that when the institutional model laid down in Article 143 of the Constitution was

[87]*The Constitutional Court case law has considerably changed where the formal characteristics "bases" of the State are concerned. The position maintained in the first few years via two very influential judgments (Nos. 32/81 and 1/82) was inconsistent with a purely formalistic approach to the basic laws, as it held that the bases of the State were to be found in legislation in the strict sense of the word, and even implementing regulations, which gave rise to some uncertainty of the law vis-à-vis the apportionment of powers. Subsequently, judgment 69/88 in particular partly modified this doctrine by stressing the formal status of all post-constitutional basic norms and, even more importantly, requiring that the formal basic law explicitly set out the extent of all or some of these norms, or at least enable such status to be inferred without much difficulty (Judgments 80/88, 182/88,248/88 and 13/89, i.a.).*

implemented throughout the country, the result was that the corresponding Statutes were approved according to the procedure laid down in Article 144. This maximalist tendency enabled all ACs to closely mimic the State by adopting an institutional micro-model similar to the national institutions, a model of micro-parliamentarianism with conventional institutional powers (Parliament elected by universal suffrage, Government answerable to the Assembly, etc), complemented with the special features of the Spanish parliamentary system (constructive motion of censure - i.e motions of censure must be accompanied by proposals for alternatives).

Consequently, all the Autonomous Communities today have a single-chamber representative parliamentary institution which is elected by direct universal suffrage on the basis of a proportional system, has the specific rights of a parliament apart from parliamentary immunity, and is responsible for the legislative function. This Assembly, as the regional expression of democratic legitimacy, elects the President of the Autonomous Community, who is the supreme representative of the Community and directs the Government Council, an organ which exercises the executive and administrative functions within the Community; this means that the Government Council, headed by the President, is politically answerable to the Assembly; the particular right of dissolution appertains only to 4 executives (in Catalonia, the Basque Country, Galicia and Andalusia)[88]. The Judiciary, on the other hand, is considered as appertaining to the central government despite the different territorial constituencies.

3.4Linguistic pluralism

One of the most important aspects of Spain's cultural wealth is linguistic variety, the result of the coexistence of Spanish and the various regional languages, a subject which is also relevant to any discussion of the rights of minorities. Article 3 of the Spanish Constitution further develops a principle set forth in the Preamble ("The Spanish Nation proclaims its will to ... protect all Spaniards and peoples of Spain in the exercise of human rights, their cultures and traditions, languages and institutions") and addresses this question by declaring that Spanish is the official language; this implies the right to use it and the duty to know it, and also the official status of "all the other languages of Spain ... in the respective autonomous communities, in accordance with their Statutes". Lastly, the third sub-paragraph of this provision emphasises the cultural asset of linguistic variety and consequently the implicit requirement on public authorities to respect and protect it.

This is not the only article of the Constitution which proclaims the linguistic variety of Spanish society: the matter is also dealt with in Article 20.3 governing the State-run mass media and Article 148.1.17 on the competences of the Autonomous Communities. In any case, it would be worth commenting on the first of these articles, which in fact lays down the general, basic regulations on linguistic pluralism in the Constitution.

[88]*The reason for this particularity is the guarantee on the 4-year parliamentary mandate so that a common date can be respected for the elections in the Autonomous Communities.*

Firstly, the official status of the Spanish language, beyond the general right to use it, particularly as a means of communication between the citizen and the public authorities, also implies the equally general duty to know it, which establishes it as the common means of communication between all Spaniards, established throughout Spanish society. On the other hand the "other languages of Spain" have an official status subordinate to the declarations made thereupon by the various Statutes of Autonomy and limited to the territories identified by the territorial scope of the corresponding Autonomous Community. In any case, a declaration of "joint official status" implies that every citizen is entitled to express himself in either of the Autonomous Community's official languages (Spanish or regional language) in his contacts with public authorities having powers limited to by the Autonomous Community in question.

Several Statutes of Autonomy have availed themselves of Article 3 of the Constitution to proclaim the joint official status of more than one language in their respective Autonomous Communities (principally Catalonia, Basque Country, Galicia, Valencia and the Balearic Islands), and a number of legally binding regulations issued by both the State and the Basque, Catalan, Valencian or Balearic Autonomous Communities have developed specific mechanisms to give substance to the defence and promotion of the cultural asset of linguistic pluralism.

From the perspective of the State, the main regulations on this issue have been directed towards arbitrating on the means of linguistic communication between the citizen and the public authorities, which in principle corresponds to the idea of the official status of Spanish and the "co-officiality" of regional languages. In this context we might particularly stress Section 36 of Law No. 30/92 on the Legal System governing Public Departments, in connection with relations between the citizen and Government departments[89], Section 231 of Organic Law 6/85 on the Judiciary[90] and Section 540 of the Law on Criminal Procedure in connection with relations between the citizen and the judicial system.

Legal rules issued under Autonomous Community legislation may expand the communication function of such Communities languages by using the implicit argument that their use must be protected and promoted on account of the social predominance of Spanish within the ACs, a hegemony and domination which are in fact often more rhetorical than

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[89] "*The language of procedures undertaken by the Central Government shall be Spanish. Notwithstanding this affirmation, persons applying to the departments of the Central Government established within the territory of an Autonomous Community may also use the official regional language. In such cases the procedure shall be implemented in the language chosen by the person concerned ...*".

[90] "*In all legal proceedings judges, law officers and other officials of the Courts shall use Spanish, the official State language ... They may alternatively use the AC's specific official language, unless one of the parties has an objection on the basis that he/she does not know this language, in cases where this might interfere with the right to a fair trial. The litigant parties, their "procuradores" ("protectors") and their "abogados"("attorneys"), as well as any witnesses and experts, may use the official language within the territory of the AC where the proceedings are taking place ...*".

real. The euphemistic "Law on Linguistic Normalisation" laid down regulations on the subject in Catalonia, the Basque Country and Galicia. At one stage, appeals were lodged against these regulations with the Supreme Court, which subsequently declared them consistent with the Constitution.

In the light of these principles it is fair to say that sound legal guidelines have been laid down for the language problem in Spain, though in practice this does not prevent occasional conflicts. In fact this is not at all surprising in view of the multiple ramifications and impacts of the language theme, from the regulations on the right to education and the role reserved for indigenous language teaching in the curricula, through to the conditions stipulated for competitive examinations for civil service posts, including knowledge of the indigenous regional language: all these regulations show the degree of sensitivity in language issues. Nonetheless, case law is beginning to create extensive doctrine and the constitutional principles are becoming sufficiently specific, which allows us to conclude that the degree of protection afforded to linguistic minorities is satisfactory.

4.Participation of Autonomous Community authorities in State decision-making

The territorial division of the State into ACs must necessarily be integrated into the organisation of the State, for reasons not only of efficient administration but also of the desirability of reinforcing the legitimacy of the central structures and offsetting the centrifugal tendencies peculiar to decentralised structures.

The Constitution defines the Senate as "the chamber of territorial representation" (Article 69), an institution formally conceived as an instrument facilitating consultation and the participation of the ACs in the State structure. Nevertheless, the two-chamber structure of the Spanish Parliament is perhaps the aspect of the Constitution which, from the technical angle, has prompted the greatest criticism, most of which has centred on the vagueness of the official definition of the second chamber as quoted above.

The Senate has a twofold composition: on the one hand 200 senators are elected by direct universal suffrage by means of elections held in the provincial constituencies (commonly known as provincial senators), and, on the other the ACs (or the Legislative Assemblies of the ACS, to be more exact) each appoint a "basic" senator and an additional senator per million inhabitants of their respective territories, which in practice means some fifty senators, usually referred to as "senators of the Autonomous Communities". The numerical difference alone shows the inadequacy of this form of Autonomous Community participation in the central institutions.

A second constitutional instrument aimed at enabling the Autonomous Community authorities to participate in central decision-making is the ACs' right to initiate legislation and constitutional reform in the central Parliament.

Nevertheless, it is within the Government and the day-to-day administration that the requirements on proper organisation have necessitated closer co-operation and participation by Autonomous Community authorities in the Central Government's decision-making process. Section 4.1 of Law No. 12/1983 on the Autonomy Process set up the "Sectoral conferences of councillors from the ACs and the Minister(s) concerned, with a view to exchanging opinions

and jointly considering the problems facing each sector and the action envisaged to tackle and solve them". Following this example, a great many joint bodies have been set up in the last ten years, by means of legislation and also under bilateral agreements facilitating the participation of Autonomous Community governments in State decision-making.

5.The Autonomous Community constitutional model in practice

As stated above, the definitive form of the Spanish Constitution stipulates that the territorial organisation of power can have "differentiated systems of autonomy, which in the final analysis enhanced the possibilities of autonomy in Catalonia, the Basque Country and Galicia". However, realities have forced us to interpret this stipulation very differently.

Once, or even before, the Constitution was adopted (prejudging to a large extent the final text[91]), the Statutes of the Basque Country and Catalonia were drawn up. Far more laborious negotiations impeded progress in the drafting of the Galician Statute of Autonomy, which was adopted and promulgated in December 1980. The three aforementioned ACs have attained levels of autonomy comparable to those of Federate States within a Federal State.

However, the other areas of the country were expeditious in their drive to become ACs, with an eye to a physically more limited set of competences but nevertheless a genuine legislative power and a specific institutional organisation, ie an autonomous Parliament elected by direct universal suffrage. On the other hand, some of these regions are also beginning a long, complex process of achieving levels of autonomy similar to those of the Basque Country, Catalonia and Galicia. The strength of the political parties involved and their negotiations between them have enabled some of these regions (Valencia and the Canaries) to halt the process in exchange for certain concessions. This has not been the case in Andalusia, which, after a hurry of events which we need not go into in this memorandum, acceded to levels of autonomy similar to those of the three initial ACs. Cracks are appearing in the model. The initial objective, which was never explicitly declared but was nevertheless implicit in the intentions of the drafters, to give a large measure of autonomy to Catalonia, the Basque Country and, by analogy, to Galicia, while establishing basically administrative decentralisation for the rest, has been replaced by a territorial organisation of power which is different, but only transitionally, as virtually all the ACs set up by virtue of Article 143 of the Constitution have signalled their wish to increase their powers after the five-year period laid down in Article 148.2. Adolfo Suárez, the then Prime Minister, gave a clear account of the situation in his speech during a political debate in the Congress of Deputies, starting on 20 May 1980 (it is important to note that three months had elapsed, since the Andalusian referendum on autonomy, the veritable turning point in the Spanish autonomy system, according to Pérez Royo[92]): "from this angle it would seem difficult to deny that the distinction, which has been completely exaggerated for emotional reasons,

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[91] *I say "prejudging the final text" because in both the Basque Country and Catalonia the draft Statutes were prepared in parallel to the drafting of the Constitution, so that as soon as the latter was published on 27 December 1978, both the said Statutes were submitted to the Bureau of Congress, on 29 December.*

[92] ***Pérez Royo, J.,*** *"La reforma imposible", op. cit.*

between the two channels for exercising a single initiative for acceding to autonomy, has lost virtually all its initial meaning" (my underlining). The Committee of Experts meeting from April 1981 onwards used strict technical considerations to defend the new interpretation of the Constitution: "it is vital to stress that the Constitution does not in fact provide for two different types of Autonomous Community; the only stipulation which it very cautiously makes is the transitional period" (Report of the Committee of Experts on Autonomy, 1981). The "State of the Autonomies" established by the Constitution is thus replaced by a model for the territorial organisation of power which is very close to that of the Federal State (considered solely from a practical point of view as safeguarding general political autonomy for all nationalities and regions tending towards medium-term standardisation of spheres of competence).

Nevertheless, we cannot overlook the fact that this legal equality in powers, which might be the final stage in the federalisation of the State, very obviously has an element of political distortion, the undeniable, overriding aspiration towards national identity in Catalonia and the Basque Country, which takes concrete form in the so-called "hecho diferencial"[93], a *de facto* hypothesis which is inherently difficult to express in legal terms and transform into specific powers, apart from those deriving from the linguistic specificities of both Communities, a circumstance which can also be extended to Galicia, the third of the four ACs based on Article 153 of the Spanish Constitution.

In short, it would be fair to say that the "State of the Autonomies" is currently facing two problems relating to constitutional development: how to provide a practical vision of the increase in the competences of the Autonomous Communities conceived in the light of Article 143 of the Constitution, an increase which is dealt with by Organic Law No. 9/1992 and is currently envisaged by the various Statutes of Autonomy, and secondly, the search for formulae for fleshing out and organising the aforementioned concept of "hecho diferencial".

Efforts to solve the former problem, that of the increase in the powers of ACs based on Article 143, are proceeding satisfactorily: Hugs would appear to be settling, not quite effortlessly, into a rather convoluted constitutional procedure which might nonetheless eventually prove effective: cf. the Autonomy Agreements signed by the Socialist Party and the People's Party, the subsequent drafting of an Organic Law on transfers, the current reform of the various Statutes of Autonomy and, lastly, the current negotiations in the Technical Committees on Transfers

[93] *The expression "hecho diferencial" ("differential fact"), which is frequently used in political discussions in moderate nationalist circles, particularly in Catalonia, refers to the distinctive features of Catalonia and the Basque Country to justify differential treatment by the central State departments. These features and their consequences have never been given any practical substance.*

concerning the transfer of a multitude of services, the results of which will be enshrine in the corresponding Decrees on transfers.

The second problem to the extent that it lacks a specific constitutional basis, it could make its presence felt in legislation or in other types of political activity, goes beyond the subject of this **memorandum**.

Switzerland

FEDERALISM AND PROTECTION OF MINORITIES IN SWITZERLAND

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CONTENTS

FOREWORD

Switzerland is widely known as a composite state where several minorities have long co-existed. Moreover, each Swiss citizen can safely be said to belong in one way or another to a majority and to a minority as well. To give but one example, a French-speaking Protestant resident of Valais belongs to a denominational group forming a majority at federal level but a minority at cantonal level and speaks the canton's majority language, a minority language at federal level.

The principal demands and aspirations of minorities are equal treatment with the majority and some degree of autonomy as a means of preserving their cultural heritage.

The autonomy and self-determination aspired to by minorities are nevertheless only principles which must be given effect in everyday political affairs. Federalism is no doubt an excellent means of applying and fulfilling these principles, by virtue of its ability to foster pluralism and accommodate national differences. Its flexibility makes for a certain balance between the desire of the majority and the aspirations of minority groups to autonomy.

Swiss federalism does not basically differ from that of other states but is conspicuous in having ensured decades of peaceful co-existence for many minorities. This brief study sets out to examine the typical institutions and chief mechanisms of Swiss federalism.

I.PROTECTION OF MINORITIES THROUGH STATE INSTITUTIONS

A.Representation of minorities within the federal institutions

Minorities in Switzerland are protected primarily through their representation in the central bodies of the state.

1. Federal parliament

The federal parliament is bicameral. The people's representatives sit in the first chamber (National Council) and the representatives of the cantons in the second chamber (Council of States).

For the purpose of electing the 200 National Council representatives, the territory of the Confederation is divided into 26 constituencies corresponding to the boundaries of the 26 Swiss cantons (Article 73, Federal Constitution). The 200 seats are allocated to the cantons according to their respective populations under the proportional representation system (Article 72 (2), Federal Constitution). The procedure for allocating seats (rule of the largest remainder) has the effect of favouring the representation of the smaller cantons in the lower house. Elections are then held by direct universal suffrage. Each voter elects the members for his constituency, ie his own canton. There are from one to 35 members per canton depending on its population. Elections are conducted by proportional representation, so that minorities can be represented. The very small cantons with a population under 1/200th of the total Swiss population, which would be deprived of all representation by the proportional system, are nevertheless entitled by statute to one representative, who is elected by majority vote (Article 72 (2), Federal Constitution). As a result, the small cantons are in fact over-represented in the National Council because their single member, unlike those of the other cantons, represents over 1/200th of the population.

The second house of parliament, known as the Council of States, has 46 members, two per canton and one per demi-canton. The method of election is freely determined by the cantons. The membership of the Council of States distinctly favours the small cantons, which have two representatives on the same terms as the large ones. This also means that the minorities are protected and well-represented.

The two upper house representatives are frequently elected in such a way as to represent the various facets of the canton, eg the two language groups, the two denominations and the two main political tendencies. As the Council of State members vote without instruction (Article 91, Federal Constitution), these tendencies can be expressed at the time of voting.

It would be mistaken to believe that the federal element is represented solely in the Council of States. The National Council is also substantially "federalised"; since as already explained, its members are elected in the cantons. In Switzerland, moreover, the political parties are organised very much on a cantonal basis and a political

career at federal level is very difficult to achieve without support from the cantonal sections of the parties.

2. Federal government

The government, known as the Federal Council, is also made up in such a way as to represent the various components of the state.

Accordingly, to ensure that as many cantons as possible are represented in the Federal Council, Article 96 (1) of the Constitution stipulates that not more than one member may be chosen from the same canton.

According to an unwritten rule the seven members of the Federal Council must furthermore include two or sometimes three councillors representing the French and Italian-speaking minorities. At present the two minorities, which together make up less than 25% of the total Swiss population, are over-represented in the federal government with three out of seven members of the federal executive.

According to another unwritten rule observed since the early 1960s, the four main political parties share the seven government seats in a ratio, called the "magic formula", of two seats each for three parties and one seat for the fourth. These four parties, which are known as the governing parties and represent some 90% of the political forces in parliament, include three centre parties and one left wing party. Although the three "middle class" parties would be well able to govern on their own and leave the minority Socialist Party in opposition as is the case in other countries, they have elected to give it a share of responsibility for national affairs as part of the government. Thus a substantial political minority is involved in government. Only the very small political minorities, in particular the extreme right and the extreme left, are not represented within the executive.

3. Federal Court

Concern for equitable representation of minorities is also perceptible in the composition of the country's supreme judicial body, the Federal Court. Article 107 of the Constitution provides that in electing the Federal Court judges and their substitutes, the Federal Assembly shall ensure that the three official languages of the Confederation are represented. In practice, the composition of the Federal Court also reflects the various political tendencies in Switzerland, and judges are elected in such a way that all regions of the country are represented.

It will have been observed that the guiding principle underlying the composition of all federal bodies is proportionality, as they must reflect the political and linguistic components of the nation in proportion to their importance. Compliance with this principle understandably entails a search for compromises between the interests of the various communities constituting the nation (democracy of concordance).

B. <u>Cantonal self-government</u>

Another institutional means of protecting minorities in Switzerland is the autonomy of the cantons in all matters of self-government. Article 3 of the Constitution provides that the cantons are sovereign insofar as their sovereignty is not restricted by the Federal Constitution and that they accordingly exercise all rights not delegated to the federal power.

As space does not permit a detailed description of all fields within the cantons' sphere of competence, only the chief ones will be mentioned.

1. Constitutional law

a. <u>The cantonal institutions</u>

As decentralised public authorities, the cantons are free to adopt whatever forms of organisation they consider appropriate and to allocate the cantonal power to such bodies as they may see fit to establish. Thus each canton has its own constitution. Cantonal self-government is furthermore recognised indirectly by Article 5 and 6 of the Constitution and has enabled them to retain to some extent the political institutions handed down to them: assembly-based democracy (Landsgemeinden) in the cantons of early Switzerland; representative democracy in the former aristocratic cantons; direct democracy in the cantons where democratic ideas triumphed in the mid-19th century.

Article 6 of the Constitution simply requires the cantons to have a republican and democratic government. While all have adopted the collegial system of the central government, there is nothing to prevent them from choosing another political system, eg parliamentary or presidential government. All cantons have their own distinctive versions of four main bodies: the electorate, the parliament, the government and the judiciary.

i. The cantonal electorate

Within the limits imposed upon it by federal law, each canton establishes its own definition of the categories to be granted political rights, ie the right to vote, elect representatives and sign public proposals for legislation or reform (initiative populaire) or petitions for referendum in cantonal affairs (see Article 74 (4) of the Constitution). Consequently, there are fairly significant differences between cantons.

These firstly concern age, ten cantons having fixed the age of civic majority for cantonal affairs at 18 and the rest at 20 years.

The differences also relate to nationality; Jura canton, for example, gives foreigners resident in the canton for ten years the right to vote.

Two cantons allow their expatriate citizens to belong to the cantonal electorate, while residence in the canton is a condition laid down by the other cantons for enjoyment of political rights.

In the vast majority of cantons, the electorate avails itself of its rights through secret ballot. Five cantons, however, have preserved to this day a typical institution of early Switzerland, the Landsgemeinde. This is a general assembly of citizens which meets once a year outdoors and conducts all cantonal elections except the election of the parliament, which is by ballot. It is also empowered to revise the cantonal constitution and pass legislation. Voting is by show of hands.

ii. The cantonal parliament

All cantons have a parliament but its official title varies (Grand Conseil, Kantonsrat, Landsrat). The number of representatives in each assembly ranges from 60 to 200.

The method of election in nearly all cantons is that of proportional representation, the general rule (except in Geneva and Ticino) being that the cantonal territory is divided into several constituencies made up of the communes, circumscriptions (= cercles) or districts. Some cantons nevertheless have the majority system (Grisons, Uri, Appenzell Inner and Outer Rhodes).

Cantonal parliaments also have varying terms of office, usually four years but in some cases less (Grisons: 2 years) or more (Fribourg: 5 years). Grounds of incompatibility also vary greatly from one canton to the next.

There are further essential differences between the parliaments of Landsgemeinde cantons, which necessarily have limited powers, and those of the city cantons such as Geneva, Basel or Zurich, which are modern parliaments on the model of national parliaments.

This diversity stems from the specific history of each canton but also reflects the extent of citizen rights and the party system, which includes the single party (one canton) multiparty systems (in 15 or more cantons) the bipartite system with a dominant party.

iii. The cantonal government

Each canton has a governments, whose official title varies. The cantonal governments are all collegial bodies like the federal government, but their membership varies from five to seven according to the canton. They are usually elected by majority vote, but two cantons (Zug and Ticino) use the proportional representation system.

The age of candidacy also varies from one canton to the next.

While professionalism is the rule for the members of cantonal governments, some small cantons have citizen part-time governments whose members continue to hold another occupation.

iv. The cantonal courts

The cantons have considerable autonomy as to their judicial order. Except for the Federal Court and a few special appeals boards, all the Swiss judicial authorities are cantonal (see Article 64 and 64 bis of the Constitution). The salient feature of this judicial order is its great diversity. Civil, criminal, administrative and special or extraordinary courts must be differentiated separately for each canton. For instance, in addition to the ordinary civil courts some cantons have a special civil authority dealing with employer-employee disputes (conciliation boards). Some have the institution of trial by jury for serious criminal offences, others not.

There is also a variety of cantonal administrative courts. Twenty or so cantons have recently set up an administrative court ruling on the lawfulness of most administrative decisions. In cantons not yet having adopted this institution, appeals are made to the cantonal government or to specialised appeals boards.

b. <u>Local structures</u>

These are invariably governed by cantonal law, either stringently or with some scope for autonomy.

Where their internal structures are concerned, the communes can be divided into two main categories. While they all have at least two bodies, ie the local electorate and the local government, some also have an assembly. The bipartite structure (consequently without an assembly) is typical of the smaller communes; the tripartite structure is more commonly found in the large ones.

Owing to the importance of communes as the lowest tier of authority in the Swiss legal order, the right to preserve their autonomy is secured to them but the scope of this right is for the cantons to determine.

Subject to Article 43 (4) and (5) of the Federal Constitution, cantonal law determines the composition of the local electorate. In Neuchâtel canton, for instance, foreigners resident in the canton for five years and in a commune for one year may vote in matters affecting the commune, while they are not granted this right in the other cantons.

c. Other territorial authorities

The characteristic structure of the Swiss state comprises the Confederation, the cantons and the communes. However, within this three-tier state, there occur in a few cantons other authorities which will merely be mentioned in passing, eg the districts which come next above the communes in certain cantons. The circumstances of Grisons canton are true public authorities whose bodies hold considerable judicial, political and administrative powers.

2. Political rights

Political rights also vary considerably between cantons.

a. Mandatory referenda are normal in all cantons for review of the cantonal constitution (see Article 6 (2) (c) of the Federal Constitution), but some cantons apply this requirement to still other official acts. Fifteen prescribe it for the passing of ordinary legislation and some even for parliament orders, and 19 for expenditure over a certain amount (financial referendum) and for the conclusion of inter-cantonal agreements or treaties (treaty referendum).

Optional referenda may be held in respect of legislation in the 11 cantons which do not have a mandatory referendum for this purpose; 18 cantons also prescribe it for expenditure over a certain amount, and five do so for inter-cantonal agreements.

The time allowed for requesting a referendum is from one to two months depending on the canton.

b. The "initiative populaire" form of consultation exists in all cantons but the number of signatures required varies. Furthermore, cantonal law lays down the conditions of its success and in particular the time within which the lists of signatures must be lodged with the competent authority. Cantonal law also regulates the formulation of the question to be put to electors, especially where the government counters it with its own proposal.

c. Only seven cantons apply the right of revocation, enabling a faction of the electorate to move the dissolution of parliament, the dismissal of the executive or the removal of any official.

3. **Taxation law**

The Swiss cantons enjoy extensive autonomy as regards taxation. Except where taxes are levied solely by the Confederation, eg turnover tax (Article 41 bis (1) of the Federal Constitution), the cantons have freedom to define the purpose, basis and rate of cantonal taxes and the persons on whom they are levied. They also have free use of their tax yield.

In particular, the cantons levy a direct tax on personal income, on the turnover and capital of corporate bodies, private assets and capital gains. They collect excise on vehicles, property conveyance dues, entertainment tax, foreigners' residence fees, estate duty, etc.

Cantonal autonomy in taxation matters means that cantonal taxes are highly diversified.

4. **Federal law restrictions on cantonal self-government**

In all fields mentioned above, cantonal self-government is of course not absolute, is to be exercised strictly within the limits prescribed by federal law. The chief restrictions are as follows:

-As regards political institutions, Article 6 of the Federal Constitution requires the cantons to ensure that political rights are exercised in a republican, ie representative or democratic manner. In order to take effect, their constitutions must be accepted by the citizens of the canton and be open to review when the absolute majority of citizens so request (Article 6(2)(c) of the Federal Constitution). In other words, the cantons must arrange consultation by "initiative populaire" in constitutional matters. They are also required to have their constitutions guaranteed by request to the Confederation, which is not granted unless the cantonal constitution complies with federal law in general.

Furthermore, Article 43 determines to some extent who may vote in cantonal and local elections and other forms of consultation. Likewise, Article 44 settles some of the conditions under which foreigners may acquire or forfeit citizenship of a canton or commune.

Nor is the fiscal autonomy of cantons absolute. Apart from the need to respect the Confederation's sole power to levy certain taxes, established federal practice requires that their own taxes are prescribed by a law in the strict sense. Lastly double taxation is prohibited by the Federal Constitution, (Article 46(2)), as are certain ecclesiastical taxes (Article 49(6)). Article 42 quinquies gives the Confederation responsibility for harmonising federal, cantonal and local taxes.

Needless to say, in the exercise of cantonal powers, whatever their nature, the cantons must observe the basic principles of the rule of law, such as separation of powers, legality, independence of the courts and the fundamental rights of the individual.

II.PROTECTION OF MINORITIES THROUGH THE MAKING AND APPLICATION OF LAW

A. <u>Law-making</u>

1.Participation by the cantons in the federal process ofdecision

The Swiss cantons form one of the Confederation's basic entities, or even the chief entity alongside the Swiss people, and as such are actively involved in the process of central government decision.

a.Accordingly, every full or partial revision of the Federal Constitution must be approved by the majority of the people and by the majority of cantons. Thus the constitutional power in Switzerland consists of the people and the cantons (Article 123 of the Federal Constitution). This dual majority is also required to ratify international treaties of very high importance such as those dealing with collective security and instituting supra-national communities (Article 89(5)). It can therefore be said that in Switzerland no domestic or foreign policy decision is possible without the assent of the majority of the cantons.

The dual majority requirement has two implications.

Firstly, those cantons which constitute minorities, eg linguistic minorities, may oppose a project accepted by the majority of the population if they are supported by a few other cantons.

Secondly, as the vote of each canton is determined by the majority of its citizens and as each canton has one vote, irrespective of its population, a minority of the population can block a project accepted by the majority of the population if that minority is distributed throughout most of the cantons.

The constitutional history of the Confederation includes instances where a proposal to revise the Constitution did not come into force because it was rejected by the majority of the cantons.

b.The cantons also form an entity of the Confederation in that a law passed by the federal parliament can be subjected to referendum at the request of 8 cantons (Article 89). Thus cantons representing minorities may possibly defeat at referendum a law to which they object, thanks to this provision.

c.Each separate canton may furthermore submit a proposal to the federal parliament for the adoption of a law or constitutional provisions (Article 93(2)).

Lastly, according to firmly established practice, whenever the federal government has a federal act in preparation, before submitting the bill to parliament it applies the procedure known as consultation which serves to obtain the opinion of various entities or groups affected by the bill. These include political parties, trade unions, the various pressure groups and of course the cantons. If a bill is not

favourably received by the cantons, the federal government generally refrains from putting it to parliament or amends it before doing so. As a referendum can be requested by a minority of the population (50,000 citizens) or of the cantons (8), its likelihood compels the federal government to take account of the opinions expressed by the entities consulted.

2.Apportionment of responsibilities between the confederation and cantons; legislative autonomy of the cantons

a. Principles

Under Article 3 of the Federal Constitution, matters within the competence of the Confederation must be specified in the Constitution. In other words, if the Confederation is to intervene and legislate in a given area, it must be identified in the Constitution. Otherwise it rests with the cantons, so that they have their own powers in all matters for which the Confederation lacks competence. The extent of cantonal powers nevertheless varies according to the nature of the federal power.

Where the Confederation has sole competence, as in national defence (Article 18 to 22), customs (Articles 28 and 29), rail transport (Article 26), post and telecommunications (Article 36), currency and bank notes (Articles 38 and 39) and foreign affairs, the cantons hold no power in their own right.

In those areas where the Confederation has been assigned parallel competence above and beyond questions of principle, such as private law, intellectual property, prosecution for debt and bankruptcy (Article 64), criminal law (Article 64 bis), public labour law (Article 34 ter), the cantons no longer have undivided powers if the Federal Government has made full provision by enacting exhaustive legislation on the subject, pending which they hold such powers on a provisional basis only.

In fields where the Confederation holds parallel powers in respect of the principles only, ie power to enact outline legislation, eg on regulation of forests (Article 24), hunting and fishing (Article 25), spatial planning (Article 22 quarter), the cantons hold indefinite powers of their own, though only as regards regulation of the details.

In spheres where the Confederation and the canton are assigned corresponding powers, the two may enact concurrent legislation.

Lastly, the cantons have sole power in matters over which the Confederation has no authority.

b. Scope of cantonal powers

-In the private law sphere, the Confederation adopted a Civil Code in 1907 and a Code of Obligations in 1911, so that the private law sectors in which

cantons can legislate are very limited and consist of those few areas in which they have a delegated competence under either code (Section 52.1 and 55.1 in the last chapter of the Civil Code; Section 686 of the Civil Code). On the other hand, the cantons have retained competence in respect of civil procedure insofar as proceedings take place before the cantonal courts, and the rules of civil procedure vary accordingly between cantons.

-Criminal law was also unified by the adoption of the Swiss Penal Code in 1937, so that the cantons no longer have the authority to define certain acts as crimes or offences, although Section 335.1 of the Penal Code concedes their power to legislate on petty offences not covered by federal legislation. The cantons have nonetheless retained competence in respect of criminal procedure insofar as trials are held before the cantonal courts, and the rules of criminal procedure vary accordingly between cantons.

-Public law differs in that the cantons have retained considerable legislative autonomy depending on the public law field, so that wherever the Confederation has only an enacted outline legislation the cantons hold some degree of legislative power. Such areas are spatial planning, regulation of forests, hunting and fishing and routine naturalisation of aliens. To take just the foregoing example, it can be pointed out that as set forth in Section 12 of the Federal Act on the acquisition and forfeiture of Swiss nationality, Swiss nationality is acquired under normal procedure, through naturalisation in a canton and a commune. An alien therefore becomes Swiss by acquiring citizenship of a canton. Section 15 of the same act merely lays down the minimum requirements stipulated for securing Swiss nationality, while the naturalisation procedure is arranged by the cantonal authorities.

The cantons may also legislate in areas where both they and the Confederation are competent, namely their own political institutions, the political rights of citizens at cantonal level, the judicial order, procedural law and taxation law.

Lastly, there are fields where the cantons may legislate exclusively; these are education, public works, public health, culture, church-state relations and worship, law and order, fire prevention, building regulations etc.

3. Inter-cantonal agreements

In those areas where they hold legislative power, the cantons may also conclude mutual agreements known as inter-cantonal concordats. These are the chief instrument of what is commonly termed co-operative federalism.

Though such use of them is rather uncommon in practice, these agreements may enable cantons comprising minorities, for example linguistic minorities, to settle certain questions by common agreement without the federal authorities intervening.

B. Application of the law

The fact that certain matters rest with the Confederation does not completely remove them from the influence of the cantons. In Switzerland, legislative activity is the only field to which the principle of apportionment of powers between central and cantonal government applies absolutely. It is less rigidly adhered to in the field of judicial and executive activity.

In matters where legislation rests with the Confederation, it shares judicial power with the cantons. This is particularly so as regards private law and criminal law. Although the Civil Code and the Penal Code were enacted by the Confederation, disputes in private law and criminal law are settled initially by the cantonal courts. The application of federal law by the cantonal courts can result in differing interpretations of the same rule and have repercussions on the sometimes dissimilar settlements adopted by these courts in respect of litigation referred to them. One frequently mentioned example is abortion, for which Section 118 of the Penal Code provides prison sentences. While this provision is stringently enforced by certain cantonal courts, it has become virtually obsolete in other cantons, so much so that debate has arisen over the expediency of finding a federal solution, ie adaptable to each canton, to the problem of termination of pregnancy. This example shows that even in branches of law which have been unified there is room for some cantonal autonomy in the interpretation of the law.

These considerations also apply to the application of the law by the administrative authorities. Indeed, there are fields where the Confederation not only legislates but also takes decisions and has them enforced by federal officials, eg railways, postal services and customs. Elsewhere, however, legislation passed by the Confederation is carried into effect by the cantons in what is called executive federalism. In some cases, the Constitution explicitly provides for the enforcement of federal law by the cantons, for instance in the fields of civil defence (Article 22 bis (2)), nature conservation (Article 24 septies (2)), protection of animals (Article 25 bis (3)) and national highways (Article 36 bis (2)).

Legal practice and theory nevertheless concur in acknowledging that the federal legislator, even where not expressly authorised to do so by the Constitution, may delegate power to execute federal laws to the cantons. Executive federalism has moreover become a basic principle of Swiss federalism, enabling the cantons to retain some autonomy even in areas covered by federal legislation. The extent of this autonomy depends on the thoroughness of the federal legislation and the exactitude of the rules therein.

III.FEDERALISM AND ACHIEVEMENT OF AUTONOMY

Federalism is a type of political structure enabling minorities to achieve some degree of autonomy while averting secession. The constitutions of several federal states provide the

possibility of establishing new federated states within the supreme state, but the Swiss Federal Constitution contains no such rules.

Nonetheless, there is no impediment to a minority incorporated into a canton achieving autonomy by forming a new canton, as witness the creation of Jura canton.

In 1815 the Jura districts with their predominantly Catholic French-speaking population were attached to the mainly Protestant, German-speaking Bern canton, although historically the Jura districts, at least in the North, had always had special links with France and the Basel area rather than with Switzerland.

This minority expressed its wish to become an independent canton on several occasions. However, this necessitated a curtailment of Bern canton's territory. In 1970 the population of this canton agreed to a change in its constitution to allow the organisation of plebiscites in the Jura districts possibly resulting in the formation of a new canton. Under the newly adopted provisions, three plebiscites were held in succession.

During the first plebiscite on 23 June 1984, the population of the seven Jura districts in Bern canton voted by a small majority for the creation of a new canton (the northern districts in favour; the southern districts against).

The principle of a new canton being established, its boundaries remained to be defined. This was done in the second plebiscite on 16 March 1975, when each district was asked whether it wished to separate from or stay with Bern canton. The three northern districts chose separation, the four southern ones the perpetuation of the status quo.

In a third and final plebiscite held in October 1975, eight communes on the dividing line between the northern and southern districts voted to join the new canton while six others expressed the wish to remain part of Bern canton.

The reception of a newcomer by the Confederation still had to be approved by the majority of the Swiss people and cantons. Approval was given at a constitutional referendum held on 25 September 1978. 82% of electors and all cantons voted in favour of creating the new Jura canton. The object of the referendum was to amend Article 1 of the Federal Constitution containing the list of Swiss cantons.

The creation of this new canton thus took place in compliance with two major principles, the first being the democratic principle: the majority of the population of Bern canton in 1970 accepted the principle of ultimate separation from the Jura districts and resultant loss of territory, while the majority of the Jura population chose separation. The second essential principle on which the whole operation was founded is the federalist principle: the Jura districts did not become a new canton in law until the majority of the Swiss people and cantons agreed to amend Article 1 of the Federal Constitution.

The case of Jura canton shows how a minority formerly incorporated into a larger political unit was able to fulfil its aspiration to autonomy by becoming a canton. Had it not formed itself into a fully independent canton, it might have assumed demi-canton status like three Swiss cantons

which are divided into two. In one case, the division was carried out to enable the two denominational communities to lead separate lives.

IV.FEDERALISM, MINORITIES AND BASIC RIGHTS

The Federal Constitution of the Swiss Confederation contains no special provisions on minorities. Minorities can avail themselves of the basic rights secured to all citizens. Under Article 4 of the Constitution, these rights must be exercised without discrimination of any kind.

In two areas, however, minorities receive special protection. Firstly, certain guarantees are secured to linguistic minorities. Secondly, minorities of any kind have the opportunity to take part in the process of political decision.

A. Protection of linguistic minorities

1. The territoriality principle

Article 116 (1) of the Federal Constitution provides that Switzerland shall have four national languages, German, French, Italian and Romansh. This constitutional provision does no more than to set the official seal on an existing situation, ie the division of Swiss territory into four language zones, the German-speaking region (some 75% of the population), the French-speaking region (about 20%), the Italian-speaking region (about 5%) and the Romansh region (less than 1%).

The French and Italian language minorities are concentrated in certain cantons where they make up the bulk of the population.

Article 116 (1) of the Constitution establishes the principle of territoriality. This is designed as a constitutional guarantee of Switzerland's linguistic plurality. Relying on this provision, the Confederation can take such measures as it deems necessary on behalf of languages which are in a minority or endangered. For instance, Article 116 (1) was the basis for the adoption by the Confederation of the Federal Act on subsidies to Grisons and Ticino cantons for the preservation of their culture and language.

The territoriality principle also enables linguistic minorities to make use, in their own cantons where they form a majority, of their own language in official relations with the authorities and in schools.

2. Official languages

Of these four national languages, only three are official, viz German, French and Italian. Romansh, not being widespread enough, has not found sufficient favour with the constitutional power to be elevated to the status of an official language. However, the current preparations for a revision of Article 116 of the Federal Constitution include the question of Romansh as a further official language.

The recognition of three official languages in the Constitution has the effect of conferring on the minorities, particularly the French-speaking and Italian-speaking ones, the right to communicate in their own language with the political, administrative or judicial authorities at federal level. Another implication of the official languages principle is of course that these authorities are required to communicate with the minorities in their own language. Likewise, the three official languages are used for the publication of federal acts and for the conduct of Federal Parliament debates, with simultaneous interpretation. Within the federal administration, the three official languages can be used internally and in contacts with members of the public. Lastly, applications can be made to the Federal Court in each of the official languages, and its judgments must be set out in the language of the decision appealed from.

The territoriality principle and the official languages principle are also applied mutatis mutandis at cantonal level in the three bilingual cantons of Bern (French-speaking minority), Fribourg and Valais (German-speaking minorities). Each language may be used in relations with the cantonal authorities.

Grisons canton is the only trilingual one, with a German-speaking majority and two minorities using Romansh and Italian. However, the application of trilingualism is not all-embracing. Locally, the communes have a very wide degree of autonomy and consequently settle the official language problem in their own way. Matters are complicated by the fact that Romansh is not a single language but has five separate dialects. Efforts towards unification have resulted in a standard language, "Rumantsch Grischun", thanks to which it is hoped that a language threatened with extinction will be preserved.

As demonstrated above, at the level of the federal authorities the language minorities are duly represented in the Federal Council, the Federal Assembly and the Federal Court without the need to introduce a quota system.

B. Political rights

Political rights, particularly those of initiative and referendum, constitute the second area in which minorities enjoy special rights.

-The right of initiative enables 100,000 citizens to request the amendment of the Constitution (Article 121 of the Federal Constitution). This institution allows a religious, linguistic or other minority of the population to put forward at constitutional level a set of regulations in its own favour. As has been explained, this right can be exercised in constitutional as well as legislative matters by each canton (Article 93 (2)). It also enables any one canton inhabited by a minority (eg the Italian-speaking Ticino canton) to propose an amendment to the Federal Constitution or the enactment of a law on an issue concerning that minority. In order to take effect, the statutes proposed must of course be approved by the majority.

The right of initiative also applies in all cantons and can be exercised by their resident minorities.

-The right of referendum enables 50,000 citizens to request that any law passed by Parliament should be submitted to the people for approval. Here too, any minority considering itself disadvantaged by a law can therefore attempt to defeat it at referendum by collecting the required number of signatures. The same right can also be exercised by a minority of cantons (Article 89 (2)).

CONCLUSION

A few observations may be made to round off this succinct study.

In Switzerland, the solution to the problem of minorities lies chiefly in the fact that the country is primarily and essentially a political reality and much less a cultural entity. As a state, it is founded on common political convictions and ideals such as federalism, democracy, rule of law and determination to share these values. They are respected as long as they remain unchallenged by minorities, whatever their nature. On the other hand, when a state is not defined in terms of common political values but first and foremost by its linguistic and cultural characteristics, minorities have far more trouble in gaining acceptance.

Secondly, Switzerland is composed of older political entities, the cantons. These are historical realities which cannot always be defined in terms of their linguistic or denominational characteristics, three being bilingual and one trilingual. The cantonal boundaries thus do not coincide with the boundaries of the three language regions or indeed with the denominational communities. Because Switzerland is divided into cantons, not into three regions corresponding to the language regions, it cannot be split up into cultural, religious or linguistic entities. In other words, the political divisions of the country do not correspond to its cultural demarcations. As minorities are part and parcel of the cantons, the language regions are not the sole context of diversity but merely a further context.

This interweaving of the political and administrative boundaries with the linguistic and cultural boundaries makes it very hard for any group to predominate. As a result, Switzerland consists of a large number of minorities which offset and counterbalance each other. As pointed out earlier on, each Swiss citizen belongs to a minority in one way or another. This intricate patchwork is definitely more conducive to the protection of minorities than the clear differentiation and geographical localisation which often apply.