LINGUSTIC EQUALITY
A STUDY IN COMPARATIVE CONSTITUCIONAL LAW *

per Bruno de WITTE

Assistant Professor at The European University Institute, Florence

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A) INTRODUCTION

The principle of equality is one of the pillars of most constitutional systems. Its specific value in the case of language has been recognised by a

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number of constitutions, especially in the form of a non-discrimination clause singling out language as a specially protected ground (art.3 of the German Basic Law, art.3 of the Italian Constitution, art.5 of the Greek Constitution). Yet, the obvious and superficial meaning of the principle —no differentiations should be made between people on the basis of the language they happen to speak— does not seem to be very useful for the members of a linguistic minority: it constitutes only a kind of generic protection which treats the speakers of a minority language as abstract citizens, without acknowledging their cultural identity. Indeed, the absence of distinctions, the application of one-and-the-same rule to everyone is precisely the favourite instrument of linguistic domination and assimilation: everyone in the same school classes, for everyone the same radio and television programmes, for everyone the same administrative forms, irrespective of their mother tongue.

Yet, I will argue in this article that equality can play an extremely important role in the protection of linguistic diversity, because the principle of equality is much richer than the mere 'schematic equality' outlined above. In fact, the deceptively simple rule of equal treatment has undergone, in legal writing and constitutional case-law, an important complexification and even transformation. The prohibition of unlawful differentiations remains an important aspect of it; but it is also increasingly recognised that 'real' equality, in certain circumstances, *allows* for differentiations, or even *requires* some distinctive treatment. Indeed, the definition of equality to which most writers, but also most constitutional courts nowadays adhere is the classical Aristotelian definition of justice: 'treating like things alike and different things differently'. In linguistic as in other matters, the role of the equality principle is therefore ambiguous: sometimes, lingustic differences between persons may not be taken into account, while in other ci-rcumstances, the establishment of a differential treatment, the taking of special measures, is mandatory. Such differential treatment can, in its turn, take two different forms. On the one hand, measures of *pluralist equality* grant to members of lingustic minorities the SAME advantages which the majority already has on the basis of the generally applicable rules: the right to have their children educated in their language, the right to use their language at court or with the administraive authorities, etc. Measures of *affirmative equality* on the other hand, give some ADDITIONAL benefits to members of linguistic minorities, to compensate for their handicap of being a minority.

This complexification of the principle of equality is the inevitable result of its role in legal discourse. Saying 'five is equal to five' has exactly the same meaning as saying «five is identical with five»: the two terms of the comparison have only one characteristic, namely their numerical characteristic, the identity of which makes for the identity of the objects as a whole.

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and Weiler (European University Institute), De Meyer (University of Leuven), Mény (University of Paris II) and Pizzorusso (University of Florence).

But this notion of equality-as-identity cannot be transferred from the world of pure mathematics into the more complex world of concrete objects. All existing objects possess many characteristics, some of which they may share with other objects, but never *all* of them. At the very least, every object has its own, specific position in time and space.[1] Declaring that two objects are equal, therefore, does not constitute a statement of general identity, but one of specific identity with regard to one specific point of view, the *tertium comparationis* or criterion of comparison between both. This can be illustrated by the following example, borrowed from P. Westen:[2]

«(...) assume two bottles of wine — one a rich red Burgundy, the other a sweet white Sauterne. Each bottle contains one liter of wine weighing twenty-five ounces. Are the two bottles equal or unequal? Obviously, the answer depends upon the standards by which one measures them. Measured by ordinary standards of volume, weight, and grape content, the bottles are identical and, thus, equal, in those respects. Measured by ordinary standards of color, taste and acidity, they are non-identical and, thus, unequal in such respects. To say they are equal or unequal merely spells out the identity or nonidentity that obtains among them by reference to given standards of measure.»

What applies to *objects* also applies, a fortiori, to *persons*. All persons are alike in some respect (e.g. the fact that they are born and have to die), but no two persons are alike in every respect. What does the *legal* principle of equality, entrenched in all Constitutions or Bills of Rights, then mean? Does it impose to make abstraction of all differences existing between persons, and to treat them alike in all circumstances? Of course not; it is unanimously accepted that such 'mechanical equality' would lead to absurd results. Every legal system is bound to make some distinctions between rich and poor, old and young, men and women, healthy and ill, vicious and virtuous... The definition of equality to which most writers and, as we will see, many constitutional courts adhere, takes account of this complexity; it is the classical Aristotelian definition in which the principle of equality breaks down into two sub-principles: «*treat like cases alike and different cases differently*, to the extent of their difference».[3]

Equality judgments can therefore not be made in the abstract, but become meaningful only by considering a particular situation: one can then decide whether, *within this specific context*, the similarities between persons outweigh the differences, or vice versa, and whether accordingly they should

1. O. WEINBERGER, «Gleichheitspostulate - Eine strukturtheoretische und rechtspolitische Betrachtung», in *Oesterreichische Zeitschrift fuer Oeffentliches Recht und Voelkerrecht*, 1974, 23-38, at 26.

2. P. WESTEN, «To Lure the Tarantula from its Hole: A Response», in *Columbia Law Review*, 1983, 1186-1208, at 1189.

3. ARISTOTLE, *Nicomachean Ethics*, 1134 c I.

receive a like treatment, or rather a different treatment; or, as Hart says, «a consideration of the objects which the law in question is admittedly designed to realise may make clear the resemblances and differences which a just law should recognise».[4] œhether one should make distinctions on the ground of age, of gender or of language becomes more arguable if one considers the specific contexts of, say, the right to vote, military service, access to the civil service, pregnancy leave, etc.

If the Aristotelian definition of justice thus makes equality into a realistic and meaningful concept, it also renders it very complex and pervasive. Equality becomes a fundamental right which outstrips all other rights by its all-encompassing field of application and by its open-ended meaning:

1) Equality is ubiquitous: «any case, any challenge can be put in an equal protection framework by competent counsel»;[5] if the rule operates a distinction between two classes of persons, it can be criticised on the ground that they should have received a like treatment; if the rule makes no differentiations at all, it can be argued on the contrary that it has failed to recognise differences existing in reality. While other constitutional rights are linked to a relatively well-defined substantive domain; the scope of equality has no such intrinsic limits; it requires a justification why any rule is as it is.

2) Moreover, the *meaning* of equality is also exceedingly vague. Even when one applies the Aristotelian formula to a specific context, one merely sets the terms of the debate into sharper relief, but without beginning to give an answer. The answer is provided by a *substantive value judgment*, laying outside the equality formula. As Kelsen notes, «any desired difference can thus be ranked as essential in the treatment of its subjects by an actual legal order, and hence be the basis of differential treatment, without the régime thereby coming into conflict with the principle of equality. This principle is too empty to be able to determine the content of a legal system».[6]

Most authors agree in qualifying the Aristotelian formula as an «empty form»,[7] an «empty idea»,[8] or a «simple tautology».[9] But there is disagree-

4. H. L. A. HART, *The Concept of Law*, Oxford, Clarendon Press, 1961, at 159. See also H. BATIFFOL, according to whom the principle of equality «oblige (...) à analyser les situations dans leurs contextures objectives, c'est-à-dire au-delà des sujets qui y sont parties, et qui tiennent aux modes de la vie sociale» (*Problèmes de base de philosophie du droit*, Paris, L.G.D.J., 1979, at 406).

5. J. H. ELY, *Democracy and Distrust*, Cambridge, Harvard University Press, 1980, at 32. See also H. L. A. HART, *op. cit.*, at 154: «justice-as-equality may be levelled against almost any rule, because almost every rule is distributive, directly or indirectly».

6. H. KELSEN, «What is Justice?», in *Essays in Legal and Moral Philosophy*, Dordrecht/Boston, D. Reidel Publishing Company, 1973, at 15.

7. H. L. R. HART, *op. cit.*, at 155.

8. P. WESTEN, «The Empty Idea of Equality», in *Harvard Law Review*, 1982, 537-596.

9. *Id.*, at 547-548: «Equality is an undeniable and unchangeable moral truth because it is a simple tautology». See also, in the same sense, O. WEINBERGER, *op. cit.*, at 29;

ment on the status of the substantive values which are incorporated in the formal framework. According to one view, recently restated in an article by Peter Westen which has sparked off a heated debate in the United States,[10] those substantive values do not themselves belong to the equality complex, but are autonomous notions of right and entitlement. Clothing these values in terms of equality is not only useless, but also misleading, because it impedes a straightforward discussion of the moral values involved. As Alf Ross forcefully affirmed: «to present them as a demand of justice founded on an evident idea of equality in sharp practice aimed at bestowing on certain practical postulates determined by interest the apparent evidence which belongs to the idea of equality».[11] Therefore, «equality as an idea should be banished from moral and legal discourse as an explanatory norm».[12]

Others have argued, on the contrary, that the formal framework of equality, far from confusing the debate, might be an enlightening instrument of analysis, which helps making explicit the implicit criteria or value judgments which underlie the distribution of rights.[13] The more basic counter-argument is that the material side forms an integral part of the right to equality, and indicates a conscious societal choice to constitutionalise certain values that are not already covered by other fundamental rights. This content can be found in the historical and social context in which the right to equality was adopted or is still operating in every single constitutional system; as Kenneth Karst tersely wrote: «Equality, as an abstraction, may be value-neutral, but the fourteenth amendment is not.»[14] It is true that many clearcut cases can be solved in this way: red hair is not an admissible differentiating criterion for tax purposes; the colour of one's skin should not be considered for matters of access to public transportation; social security allowances should not be reserved for one language group, etc. Yet, a considerable uncertainty con-

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P. G. POLYVIOU, *The Equal Protection of the Laws*, London, Duckworth, 1980, at 7.

10. P. WESTEN, «The Empty Idea...», *op. cit.*, and the following reactions and replies: S. J. BURTON, «Comment on 'Empty Ideas': Logical Positivist Analyses of Equality and Rules», in *Yale Law Journal*, 1982, 1136-1152; P. WESTEN, «On Confusing Ideas: Reply», in *Yale Law Journal*, 1982, 1153-1165; E. CHEMERINSKY, «In Defense of Equality: A Reply to Professor Westen», in *Michigan Law Review*, 1983, 575-599; A. D'AMATO, «Is Equality a Totally Empty Idea?», in *Michigan Law Review*, 1983, 600-603; P. WESTEN, «The Meaning of Equality in Law, Science, Math, and Morals: A Reply», in *Michigan Law Review*, 1983, 604-663; K. GREENAWALT, «How Empty is the Idea of Equality», in *Columbia Law Review*, 1983, 1167-1185; P. WESTEN, «To Lure the Tarantula...», *op. cit.*

11. A. Ross, *On Law and Justice*, Berkeley, University of California Press, 1974, at 274.

12. P. WESTEN, «The Empty Idea...», *op. cit.*, at 542.

13. O. WEINBERGER, *op. cit.*, at 31.

14. K. KARST, «The Supreme Court —1976 Term— Foreword: Equal Citizenship under the Fourteenth Amendment», in *Harvard Law Reviw*, 1977, 1-68, at 7; K. GREENAVAL, *op. cit.*, at 1180 ff.

tinues to exist on the appropriate interpretation of the equality dictate in a large number of situations.

Because of those two characteristics —the ubiquity of its scope, and the open-endedness of its meaning— equality has a potentially disruptive effect on the legal system. As it is enshrined in most constitutions, it raises delicate problems as to the respective roles of political and judicial bodies. The remainder of this Chapter will consider the various strategies that exist in order to mitigate this disruptive effect. They can be grouped in two categories: first, the (largely unsuccessful) effort to restrict the *scope* of the equality principle, by excluding certain domains and norms from its reach (Section 1); and secondly, the groping efforts to establish some 'objective' guiding principles as to the substantive *meaning* of equality (Section 2). Both analyses will of course be conducted in relation to the specific context of *linguistic* equality.

Section 1

THE SCOPE OF EQUALITY

A) Equality before the Law or Equal Protection of the Laws?

The first, and very radical, possibility to minimise the scope of the equality principle is to 'formalise' the substantive element within the equality formula, and deprive it of its value content. The substantive element is provided by a preexisting, and unchallengeable, general rule determining in which cases an equal or a differential treatment is due. Taken in this sense, the principle of equality merely lays down «that we should treat each case in accordance to an antecedently promulgated rule, which we should apply to all cases falling under it, and which thus specifies what features are to count as relevant».[15] The general rule defines certain characteristics with regard to which a certain treatment should take place (e.g. 'speakers of different languages should receive a like treatment in field A, and a different treatment in field B'), and the application of the equality principle is then nothing but the purely deductive operation of assessing whether the characteristics of the particular case at hand coincide with those set forth in the general rule,[16] the latter being beyond any challenge.

15. J. R. Lucas, *The Principles of Politics*, Oxford, Clarendon Press, 1966, at 246. This conception of equality could therefore be called 'heteronomical equality' (see J. Jiménez Campo, «La igualdad jurídica como límite frente al legislador», in *Revista Española de Derecho Constitucional*, 1983, 71-114, at 74).

16. K. Hesse, «Der Gleichheitsgrundsatz im Staatsrecht», in *Archiv des oeffentlichen Rechts*, 1951-52, 167-224, at 175.

The 'emptiness' of the equality formula is thereby filled in a very modest way: «the grounds for deciding between two persons should be only those laid down by the law, and not legally extraneous ones, whether reasonable grounds of moral sentiment of Natural Law, or unreasonable ones of private caprice».[17] This conception of equality, which is often called equality-before-the-law, has had its historical importance, as it implies the equal subjection of all to common rules, and the abolition of extra-legal privileges.[18] But nowadays, this function is superfluous, and equality-before-the-law, as Kelsen remarks, «has scarcely anything to do with equality any longer. It merely states that the law should be applied as it is meant to be applied. It is the principle of legality or legitimacy which is by nature inherent in every legal order, regardless of whether this order is just or unjust».[19]

The effect of this conception on the role of equality is quite remarkable. Political controversies about the nature of true equality are deliberately kept outside the legal forum. The judge or interpreter cannot, by the use of a substantive value conception, upset the democratic decision of the political organs, embodied in the general rule. All he has to do is to correctly translate the political decision into practice. The consistent set of values served by this restricted vision of equality is well rendered by Marshall's restatement of the prevailing Diceyan doctrine of his country: «Let the Queen-in-Parliament clearly place unequal burdens on one class of subjects compared with another and the subject knows where he stands. If where he stands is uncomfortable or unjust, that is no concern of jurisprudence or judge. It is a part of politics and a task for moral judgment with which legal tribunals should have as little as possible to do.»[20] In addition, «the proper response if one feels that the rule the judge is applying is unjust cannot be to disobey

17. J. R. LUCAS, *op. cit.*, at 253.

18. J. JIMÉNEZ CAMPO, *op. cit.*, at 74: «es en esta universalización de la condición de ciudadano, en la abolición del privilegio y en la consiguiente destrucción de ámbitos inmunes al poder legislativo del Estado donde reside la aportación inicial —válida aún— del primer constitucionalismo». Very characteristic in this regard is the Preamble to the 1791 French Constitution, which provides a catalogue of existing status inaquelities:

«L'Assemblée nationale, voulant établir la Constitution française sur les principes qu'elle vient de reconnaître et de déclarer, abolit irrévocablement les institutions qui blessaient la liberté et l'égalité des droits.

Il n'y a plus ni noblesse, ni pairie, ni distinctions héréditaires, ni distinctions d'ordres, ni régime féodal, ni justices patrimonials, ni aucun des titres, dénominations et prérogatives qui en dérivaient, ni aucun ordre de chevalerie, ni aucune des corporations ou décorations, pour lesquelles on exigeait des preuves de noblesse, ou qui supposaient des distinctions de naissance; ni aucune autre supériorité que celle des fonctionnaires publics dans l'exercice de leurs fonctions.

Il n'y a plus ni vénalité ni hérédité d'aucun office public.

Il n'y a plus, pour aucune partie de la Nation, ni pour aucun individu, aucun privilège, ni exception au droit commun de tous les Francais (...)».

19. H. KELSEN, *op. cit.*, at 15.

20. G. MARSHALL, *Constitutional Theory*, Oxford, Clarendon Press, 1971, at 141.

them; it must rather be to go to the legitimate legislative body and pursue one's interest in a different rule».[21]

However, the «traditional model of administrative law that conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases»[22] simply does not correspond to reality. The fiction that all discretionary choices can be made by a democratic legislator has long been abandoned. Due to the 'open texture' of law,[23] a general rule is often not clear and self-evident enough to make simple syllogistic deductions from it, to lie the case side by side with the rule in order to see whether the former 'squares' with the latter. This indetermination exists first of all in the reality of administrative activity: in every country now, a fundamental distinction is made between *rule-bound* and *discretionary* administrative activity, between 'compétence liée et pouvoir discrétionnaire',[24] between 'attività amministrativa vincolata e discrezionale',[25] between 'gebundene Verwaltung und Ermessensverwaltung'.[26] This discretion does not only take the form of some leeway in the individual application of general rules; it also, very often, means the power, for the administration, to create its own, more particularised, rule as an intermediate layer between the legislative norm and the individual application. There are even, in some countries, areas of autonomous administrative activity, where no formal legislative guidelines exist.[27]

21. D. KENNEDY, «Legal Formality», in *Journal of Legal Studies*, 1973, 351-398, at 369-370. Yet, as this author adds, those possible future amendments by the legislator will be predetermined by the outcomes of all the individual formal applications of the original rule. Rule application is therefore *not* neutral in terms of justice (id., at 385 ff.).

22. R. STEWART, «The Reformation of American Administrative Law», in *Harvard Law Review*, 1975, 1669-1813, at 1675.

23. H. L. A. HART, *op. cit.*, at 124-125.

24. See e.g. P. VEDEL & P. DELVOLVE, *Droit administratif*, Paris, P.U.F., 1980 (7th ed), at 421 ff.

25. S. SANDULLI, *Manuale di diritto amministrativo*, Napoli, Jovene, 1982 (13th ed), Vol I, at 523 ff.

26. E. FORSTHOFF, *Lehrbuch des Verwaltungsrechts*, I, Muenchen, C. H. Beck, 1973 (10th ed), at 81 ff.; H. U. ERICHSEN & W. MARTENS (eds), *Allegemeines Verwaltungsrech*, Berlin, de Gruyter, 1977 (2nd ed), at 151 ff. For a more sociological distinction between 'Zweckprogramme' and 'Konditionalprogramm', see N. LUHMANN, «Lob der Routine», in *Verwaltungsarchiv*, 1964, 1-33.

As for the other countries, see G. RESS, «Judicial Protection of the Individual against Unlawful or Arbitrary acts of the Executive», in *Judicial Protection against the Executive*, Koeln, Carl Heymanns & Dobbs Ferry, Oceana, 1971, Vol. 3, 47-76, at 70, with further references to the national reports in the first two volumes.

27. France is the most conspicuous example: Art. 37 of the Constitution empowers the government to enact quasi-legislative 'règlements'; see *Le domaine de la loi et du règlement*, Paris, Economica & Aix, Presses Universitaires d'Aix-Marseille, 1981 (2nd ed). Situating the French case in a comparative context, M. CAPPELLETTI, «Loi et règlement en droit comparé: partage de compétences et controle de constitutionnalité», *id.*, 247-255. Such 'independent' administrative activity also exists, e.g. in the United Kingdom: see

Some activities are entirely rule-bound, such as promotion by seniority, or the delivery of certain welfare benefits; but are there also entirely discretionary areas, in the sense of excluding any judicial review on their operation? This has long been an important issue in the developing administrative systems, all along the 19th century. The prevailing answer nowadays, with some minor exceptions,[28] is that no such unfettered discretion exists, and that the judiciary is called to control the use made of executive discretion. On the other hand, one is generally reluctant to go into the merits of the public authorities' policy, and one prefers to adopt a neutral, 'objective' approach. The typical feature of such a 'marginal' control is whether the discretion has been exercised in an impartial manner without disadvantaging some persons with respect to others; that is, whether the administration, in the absence of a clearcut legislative norm, has established a kind of 'internal' norm which it evenly applies to all individual cases. In indeterminate cases, the rule-applier should consider whether the present case resembles the plain, paradigmatic case 'sufficiently' in 'relevant' aspects.[29] But such reasoning by analogy is typically the way in which substantive equality is applied!

This type of review exists in practically every administrative law system. Only in some systems does it explicitly go under the *name* of equality,[30] while it is known elsewhere as the *reasonableness* doctrine,[31] or the (extended) principle of *legality*.[32] I do not need to go into the detail of the various existing

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the police cases discussed by H. W. R. WADE, *Administrative Law*, Oxford, Clarendon Press, 1982 (5th ed), at 359 ff.

28. For some exceptions, particularly with regard to normative acts of the executive, see G. RESS, *op. cit.*, at 72 ff.

29. H. L. A. HART, *op. cit.*, at 124.

30. In Germany, for instance, the concept of legality is not stretched beyond its original, formal, meaning, and equality has therefore a decisive role to play in the control of administrative discretion; see E. STEIN, «Art. 3», in *Kommentar zum Grundgesetz fuer die Bundesrepublik Deutschland*, Neuwied/Darmstadt, Luchterhand, 1984, at 400 ff.; and A. PODLECH, *Gehalt und Funktionen des allgemeinen verfassungsrechtlichen Gleichheitssatzes*, Berlin, Duncker & Humblot, 1971, at 117 ff. The same is true in Austria (see Th. OEHLINGER, «Objet et portée de la protection des droits fondamentaux - Cour constitutionnelle autrichienne», in *Revue internationale de droit comparé*, 1981, 543-579, at 571), and in Switzerland (Y. HANGARTNER, *Grundzuege des schweizerischen Staatsrechts*, Zuerich, Schulthess, 1982, vol. II, at 185).

31. On the role of the 'reasonableness' doctrine in 'ultra vires' review in Britain, see WADE, *op. cit.*, at 353 ff. For Norway (with references to other Scandinavian countries), see E. BOE, «Court Review of Free Administrative Discretion in Norway», in *Scandinavian Studies in Law*, 1983, 11-35.

32. In France, legality is still the overall ground of administrative review, but it has become an altogether different concept, which no longer means 'conformity to statutes' but 'conformity to all higher law', including the Constitution and general principles of law. Only in this sense can one explain that the autonomous 'règlements' are subject to 'legality' review, as the 'Conseil d'Etat' decided in the *Syndicat général des Ingénieurs-Conseils* case (decision of 26 June 1959, in M. LONG, P. WEIL, G. BRAIBANT, *Les grands arrets de la jurisprudence administrative*, Paris, Sirey, 1978 (7th ed), at 482).

doctrines here. What is important for present purposes is that there exists, in every country, a substantive evaluation of the discretionary activity of the executive, based upon some concept of 'impartiality' or 'equal treatment'. Therefore, the concept of 'equality-before-the-law' as a purely formal concept, whose content is predetermined by a general rule, does not correspond to any living reality in contemporary legal systems. The most 'equality before the law' can mean is *'equality below the level of formal legislation'*; there is still an important restriction in the scope of equality as the legislator himself is entirely free to create the categories he wants without any judicial check; but activities beneath the level of legislation, whether discretionary or not, do not escape a substantive review. The distinction, in other words, is that between countries with or without *judicial review* of the constitutionality of legislation.[33]

The introduction of such judicial review in an increasing number of countries, has meant a further devastating blow to the formal notion of equality. It implied that not only administrative, but also legislative activity was henceforth bound by the observance of the equality principle. Instead of 'equality before the law', one has to speak of 'equality in the law' or 'equal protection of the laws'.[34] True, the introduction of judicial review did not automatically trigger a full-blown substantive scrutiny of legislative choices on the basis of the equality principle. In some places, as in France,[35] older traditions of ju-

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Equality is one of those general principles; it is also, of course, a written constitutional principle, but «le Conseil d'Etat préfère y voir des principes généraux valables indépendamment de tout texte: il évite ainsi de lier leur sort aux avatars des changements constitutionnels» (P. WEIL, *Le droit daministratif*, Paris, P.U.F., 1975 (6th ed), at 87). Equality therefore plays a distinctive role as one of the sub-categories of the overall principle of legality; see e.g. the analysis of P. DELVOLVE, *Le principe d'égalité devant les charges publiques*, Paris, L.G.D.J., 1969, Part I.

33. On the concept of judicial review, its various models and its recent expansion in a number of countries, see generally M. CAPPELLETTI, *Judicial Review in the Contemporary World*, Indianapolis, Bobbs-Merrill, 1971; L. FAVOREU (ed), *Cours constitutionnelles et droits fondamentaux*, Paris, Economica, 1982; L. FAVOREU, «Actualité et légitimité du controle juridictionnel des lois en Europe occidentale», in *Revue de Droit Public*, 1984, 1147-1201.

34. The terminological distinction used here is the one proposed by H. KELSEN, *Reine Rechtslehre, Wien*, Franz Deuticke 1960 (2nd ed), at 146 and 396. But it is frequently disregarded in practice. Many countries, where equality operates as a check on the legislator, define it in their Constitution as 'equality before the law': see art. 3.1 of the German Basic Law, art. 3.1 of the Italian Constitution, art. 14 of the Spanish, and art. 40.1 of the Irish Constitution.

35. The French Consell Constitutionnel applied the equality principle for the first time in its decision of 27 December 1973, that is, fifteen years after the adoption of the 1958 Constitution which introduced judicial review. In the United States, to quote another example, the recent flourishing of equality review should not hide the fact that the older case-law held that the legislator may freely establish classifications, as long as these are impartially applied: *Missouri Pacific v Humes*, 115 U.S. 512 (1885) and *Powell v Pennsylvania*, 127 U.S. 678 (1888).

dicial deference have been lingering on for some time. Elsewhere, there have been doctrinal rearguard actions to restrict the scope of equality and prevent the imposition of substantive value judgments upon the legislator:

i) Equality has been described, in legal writing, as a 'programmatic' norm, which binds the legislator, but cannot be directly enforced by the constitutional judge. Yet, none of the constitutional courts has accepted such a drastic self-limitation.

ii) Other authors proposed to restrict equality to a formal concept, by merely reading into it a requeriment of 'generality' and a prohibition of '*personal laws*', singling out their addressees. Apart from the fact that the concept of 'personal law' is difficult to define, this theory has been rejected on its merits in most countries. In *Germany*, the question personal laws is dealt with in a different article of the 'Grundgesetz' (art. 19.1), and can therefore not serve as a guideline for the interpretation of the principle of equality in art. 3: a law may be in conformity with the principle of equality, but not with that of generality, and vice versa.[36] In *Italy*, the doctrine used to have some influential proponents,[37] but has been flatly rejected by the Constitutional Court.[38] Similarly, the *French* Conseil Constitutionnel has upheld a tax law with a differential treatment for 'electricity producers', of which there is in fact only one, the nationalised 'Electricité de France'.[39] Personal laws have also been upheld by the *United States* Supreme Court, despite a constitutional ban on 'bills of attainder' (art. 1, para. 9).[40] The most one can say is that 'personal' or 'specific' laws are more *likely* to violate the principle of equality, but certainly not automatically: there are many excellent reasons why the legislator may single out certain persons for specific treatment.[41]

36. See H. H. RUPP, «Art. 3 als Masstab verfassungsgerichtlicher Gesetzeskontrolle», in *Bundesverfassungsgericht und Grundgesetz*, II, Tuebingen, J. C. B. Mohr (Paul Siebeck), 1976, 364-389, at 369. The case law of the Constitutional Court is not entirely consistent however.

37. C. ESPOSITO, «Eguaglianza e giustizia», in *La Costituzione italiana. Saggi*, Padova, CEDAM, 1954, 17-66, at 30 ff.; and L. PALADIN, «Eguaglianza (diritto costituzionale)», in *Enciclopedia del Diritto*, XIV, Milano, Giuffrè, 1965, 519-551, at 525.

38. Judgment n. 80 of 14 April 1969, in *Giurisprudenza Costituzionale*, 1969, 1141, at 1147. L. PALADIN adopts this view in «La legge come norma e come provvedimento», in *Giurisprudenza Costituzionale*, 1969, 871-897; see also, along the same lines, C. MORTATI, *Istituzioni di diritto pubblico*, Padova, CEDAM, 1976, 9th ed., II, at 1021-1022.

39. *Taxe professionnelle* case, decision of 9 January 1980, in *Dalloz-Sirey*, 1980, 420.

40. NOTE, «The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause», in *Yale Law Journal*, 1962, 330-367. See the Supreme Court judgment in *City of New Orleans v Duke*, 427 U.S. 297 (1976), upholding a city ordinance applying to selected persons.

41. In Ireland, however, personal laws would seem to be impermissible *in se*, according to the Supreme Court in *East Donegal Co-operative Livestock Mart Ltd v*

iii) Another restrictive interpretation consists in extending the formal concept of equality to the level of the legislator: not only should there be «equal subjection of all classes to a common rule»,[42] but there should also be guarantees for the impartiality of the enforcement, such as the principles of natural justice, equal access to the courts, independence of the judiciary.[43] Legislation which would fail to ensure those procedural guarantees, and *only* such legislation, could be struck down by the judiciary. The *rule of law*, in its contemporary understanding,[44] includes in fact such substantive components, but Britain has of course no system of judicial review in order to enforce these obligations on the legislator. On the continent, a similar tradition of distinguishing procedural from substantive requirements does not exist and has therefore never been used as a means to restrict the scope of constitutional equality review, some recent attempts in legal writing notwithstanding.[45]

As a conclusion of this sub-section, one can say that the various limitative interpretations of the equality principle have been unable, in the long run, to contain the irruption of a full-blown substantive review. Not only has the will to limit administrative discretion led everywhere to the imposition of an equality-like standard in the judicial review of administrative action, but attempts to immunise legislative action from such a substantive reading of equality have similarly failed. The only clear practical limit to the scope of equality is that deriving from the absence of judicial review of the constitutionality of legislation.[46] But this is a general limit to the enforcement of *all* fundamental rights which does not derive from a specific conception of equality itself.

Attorney General, in *Irish Reports* 1970, 317; see the comment by M. FORDE, «Equality and the Constitution», in *The Irish Juris*, 1982, 295-339, at 303-305.

42. G. MARSHALL, *op. cit.*, at 137.

43. There is also an important linguistic dimension to those 'procedural guarantees'; see *infra*, p. 105.

44. See, above all, J. RAZ, «The Rule of Law and its Virtues», in *Law Quarterly Review*, 1977, 195-211. Also E. BODEUHEIMER, *Treatise on Justice*, New York, Philosophical Library Inc., 1967, at 11: «(...) the rule of law does not exhaust its significance in the institutionalisation of legality, but in addition requires for its realization a modicum of substantive rationality in law and the recognition of at least some minimum standards of due process».

45. See the recent (but undoubtedly vain) attempt of a French author to temper the recent activism of the Conseil Constitutionnel in its enforcement of the equality principle: Ch. LEBEN, «Le Conseil Constitutionnel et le principe d'égalité devant la loi», in *Revue de Droit Public*, 1982, 295-353. According to Leben, substantive equality tests should be limited, apart from the explicit grounds listed in art. 2 of the 1958 Constitution (origin, race and religion), to the 'égalité devant la justice' (at p. 316-317 and 353).

46. In practice but not in theory As we saw, the absence of judicial review does not mean that the Constitution is not a 'higher law' binding on the legislator. See above, p. 108 ff.

B) CONTROL ON DIFFERENTIATIONS AND EQUIPARATIONS?

The Aristotelian definition of distributive justice, by itself, does not establish any priority among its two elements, the like treatment of alike, and the different treatment of unalikes; both are necessary components of the overall principle. Yet, there is no general agreement, in moral and legal theory, to recognise the equivalence of both elements. An alternative vision of the equality principle holds that «all men must be treated alike except when there are relevant differences between them, and the relevance of the supposed differences must be proved by the person or authority responsible for the distinctions under investigation».[47] In other words, there exists a *presumption* of like treatment, which shifts the burden of proof to those who want to establish a differentiation. On the judicial level, the presumption could also be used in order to radically narrow down the scope of the equality principle: equiparations (like treatment) would be presumed to be lawful, and escape all judicial, review, and *only differentiations would be the object of scrutiny* as to whether there really exist objective differences justifying the distinction in the case at hand.

1. Before discussing the existence of such a presumption in the various positive constitutional systems, I will first consider, and try to reject, the theoretical arguments buttressing this theory.

A first argument in favour of a priority for like treatment is of a *moral* nature: equal treatment corresponds to a basic moral principle, which is «deeply embedded in modern man»,[48] that human beings, notwithstanding all factual differences, are equal at least to one fundamental aspect, their common humanity. This moral principle, it is worth stressing, only characterises 'modern' man, and was quite unknown to former historical periods that frankly established qualitative differences between men, within the 'great chain of beings'.[49] The idea of the fundamental equality of all human beings, as introduced by Christian doctrine (the human 'soul'), was vigorously affirmed, in its secular version, by the Enlightenment (Rousseau's «men are born equal», and Kant's equality of men as rational agents); it is still absolutely dominant in contemporary thought,[50] and even the grossest discriminators pay lip-service to it.

The problem, though, is not with the moral validity of the doctrine, but

47. P. G. POLYVIOU, *op. cit.*, at 12. A number of supporters of this presumption are mentioned in P. WESTEN, «The Empty Idea...», *op. cit.*, at note 118.

48. H. L. A. HART, *op. cit.*, at 158.

49. A. O. LOVEJOY, *The Great Chain of Beings. A Study of the History of an Idea*, Cambridge, Harvard University Press, 1964.

50. See e.g. J. RAWLS, *A Theory of Justice*, Oxford University Press, 1972, at 504 ff.; P. G. POLYVIOU, *op. cit.*, at 8 ff.; G. SARTORI, *Democratic Theory*, Westport, Greenwood Press ,1973, at 331; D. A. J. RICHARDS, «Rights and Autonomy», in *Ethics*, Oct. 1981, 3-20, at 17 ff. For a recent critical discussion of the assumptions of this theory, see D. A. LLOYD THOMAS, «Equality Within the Limits of Reason Alone», in *Mind*, Oct. 1979, 538-553.

with the possibility of drawing any meaningful legal consequences from it. Can one really derive from this fundamental belief the consequence that «prima facie human beings should be treated alike»?[51] I would submit, on the contrary, that 'equal concern and respect' has nothing to do with uniform treatment; «the more anxiously a society tries to secure equal opportunity, the greater will be the differentiation of treatment and the more pronounced certain positive forms of discrimination».[52] A paradox which lies at the heart of all contemporary social policies is that one must take positive actions of differentiation, in order to move closer to the objective of equal respect for all human beings. There is, thus, no clear progression, in moral theory, from the assumption of the equal worth of all men, to a presumption of like treatment in concrete cases.

Another, at first sight more convincing, argument can be found in the *logical nature of legal activity*. All rulemaking is based on a principle of rationalisation, through which endlessly varied human reality is brought under manageable categories; equalities are actively discovered in a world which, on first view, is nothing but an atomised chaos. This rationalisation is even inherent in the Aristotelian principle itself: «even if we repeat, with Aristotle, that equal things should be treated equally, but unequal things differently, even so we are asserting that justice demands the *same* treatment for the *same* difference».[53] The consequences of this view are well expressed by Is. Berlin:

«The assumption is that equality needs no reasons, only inequality does so; that uniformity, regularity, similarity, symmetry (...) need not be specially accounted for, whereas differences, unsystematic behaviour, change in conduct, need explanation, and, as a rule, justification. If I have a cake there are ten persons among whom I wish to divide it, then if I give exactly one tenth to each, this will not (...) call for justification; whereas if I depart from this principle of equal division I am expected to produce a special reason.»[54]

Yet, if one takes the analysis further, one discovers that the precondition for such legal generalisation is precisely a strongly diversified reality. Indeed, in a uniformised 'primitive' society, there is no need for an equality rule.[55] Equality must be seen as a principle disciplining the necessarily existing

51. H. L. A. HART, *op. cit.*, at 158.
52. P. G. POLYVIOU, *op. cit.*, at 13.
53. G. SARTORI, *op. cit.*, at 330.
54. I BERLIN, «Equality as an Ideal», in F. Olafson (ed), *Justice and Social Policy*, 1961, 128 ff., at 131.
55. «L'égalité ce n'est pas la coexistence dans la horde. Création de la société humaine elle apparaît lorsque celle-ci, quittant ses formes les plus primitives, passe à une division du travail annonciatrice à travers la division sociale, de la constitution en classes, de l'inégalité voulue des hommes.» (H. BUCH, «La notion d'égalité dans les principes généraux du droit», in *L'Egalité*, Vol. I, Bruxelles, Bruylant, 1971, 196-225, at 212).

diversity and division of labour. The question then is: when is the generalisation of the diversified 'life-world' justified, and when is it, on the contrary, an untolerable streamlining of societal plurality? Within legal activity, generalisation may be the dominant principle, but legal intervention, itself, is but a subsidiary instrument of societal ordering. Equal treatment, when seen in this broader perspective, becomes the exception rather than the rule.

In fact, the principle of generalisation constitutes an interference of the *formal* aspect of equality with its *substantive* content. My criticism, then, will be along two lines:

i) if one treats it as a purely formal concept, it is easily manipulable;

ii) the formal nature of the rule hides a substantive value judgement which is open to criticism.

That the 'like treatment' formula can be used in rules which could equally well be rendered through the opposed 'different treatment' formula, can be shown by the following example, mentioned by the Swiss Federal Tribunal:[56] all civil servants are due for retirement at the end of the calendar year in which they have celebrated their 65th birthday. This may, at first sight, seem a rule of equal treatment. But it implies that A, who was born on a January, 1st, works one year longer than B, who was born on a December, 21st. In fact, the Federal Tribunal had no difficulty in calling this rule a *differentiation*, while strict equality would have commanded the retirement of every civil servant on his 65th birthday. But such 'equal treatment' entails more administrative complication (and less generality!) than the alleged differentiation.

To demonstrate further that the equiparation and differentiation formula are often interchangeable renderings of an identical legal rule, one might consider the hypothetical case of an educational authority having to decide the language of education to be used in a school catering for English — and French-speaking students.

Formulation *a*): «All pupils shall be educated in their mother tongue.»
Formulation *b*): «English-speaking pupils shall be educated in English, and French-speaking pupils in French.»

Both rules are identical as to their content; still, on a presumption in favour of equal treatment, the first rule ould escape review, and the second not. The conclusion must be that, in order to be meaningful, the priority of the first term of Aristotle's definition cannot be purely formal or semantic, linked to the outward appearance of a rule. It would take only a minimal drafting skill of the rule-maker to escape all equality review on his decisions. Generality, therefore, cannot be used as a purely formal category, but only,

56. An *obiter dictum* in the judgment of 11 December 1974, in *Arrets du tribunal fédéral*, 100 Ia, 322, at 329.

in the final outcome, as a substantive value which one could describe as 'uniformity'.

This might be illustrated by the last example. The school authority could enact one of the following two rules:

a) All children shall be aducated in English.
b) All children shall be educated in their mother tongue.

Both rules are couched in formal terms of like treatment; both are therefore equally general. Yet, their substantive content is obviously different: in the first hypothesis, all pupils will follow a common program; in the second hypothesis, a double set of classes must be established.[57] The first can truly be described as *uniform* treatment, while the second is a *differential* treatment without formal categorisation.

If uniformity is no longer a formal, but a substantive value, then it must also be justified in substantive terms. The presumption that uniformity should be given precedence over diversity can no longer be based on 'neutral' principles of logic or metaphysics, — it must «derive from particular experience that distinctions between persons are either *usually* unjustified or sufficiently grave to outweigh the harm of *usually* doing the opposite».[58] Claims to that effect have a long tradition in political thought; they are very present in the work of Rousseau [59] and his contemporaries, for instance, which is quite understandable in a context marked by the absence of the principle of legality and equal subjection of all to the laws. But the same claims are still frequently made today. In the words of an American author, «human experience strongly suggests that the danger of erroneous discrimination incomparably exceeds the danger of erroneous uniformity. A presumption of equality provides an analytical counterweight to the prejudices of dominant groups, thereby serving a critical political function no other concept can perform as well».[60] The same theme rings in an oft-quoted passage by Justice Jackson in *Railway Express Agency v New York*:[61]

57. This is, of course, a simplification of the real-world alternatives as regards the status of a language in the classroom. A given language can be: entirely excluted from the program; used as a pedagogical tool in order to facilitate the teaching of, or in, another language; taught as a subjec in its own right, but outside the normal program (as an optional course, during extra hours); taught as a subject in the normal curriculum, during a varying number of hours; used as one of the media of instruction, alongside another language; used as the exclusive medium of instruction (except, eventually, for the teaching of other languages).

58. P. WESTEN, «The Empty Idea...», *op. cit.*, at 574.

59. See e.g. J. J. ROUSSEAU, *Du Contrat Social*, Paris, Garnier-Flammarion, 1966, at 70: «Ainsi par la nature du pacte, tout acte de souveraineté, c'est-à-dire tout acte authentique de la volonté générale, oblige ou favorise également tous les citoyens, en sorte que le souverain connaît seulement le corps de la nation et ne distingue aucun de ceux qui la composent».

60. E. CHEMERINSKY, *op. cit.*, at 590.

61. *Railway Express Agency v New York*, 336 U.S. 106 (1949), at 111-113.

«(T)here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that the laws be equal in operation.»

In other words, the plight of a minority in society can never be very harsh, if it can live by rules that are common to all.

These arguments are questionable for two reasons. First of all, stressing unilaterally the notion of erroneous discrimination is sometimes self-defeating; and at other times, it constitutes an inadequate response to social reality.

There is, first of all, an amount of ingenuity in the equal treatment presumption. When such a presumption is recognised and enforced by the legal system, would-be discriminators are warned in advance that open distinctions are likely to be struck down, and might therefore try to mask their unaltered discriminatory intention behind facially neutral norms, which make no classifications at all and seem perfectly uniform. American case-law offers many examples of such 'indirect' discrimination and the way it has puzzled classical equal treatment theorists. An outstanding example is *Palmer v Thompson* where the decision of the city of Jackson, Mississippi, to close all public swimming pools rather than desegregate them was upheld by the Supreme Court;[62] and the problem of 'vote dilution', adressed for the first time in the 1960 *Gomillion v Lightfoot* judment,[63] and which has remained controversial up to the present.[64] In such cases, the presumption of equal treatment undermines the position of the weaker group. It means, at the very least, that they have to carry the burden of proof that the rule, despite its neutral appearance, was motivated by an invidious motive. Sophisticated discriminators are therefore comforted by the very principle which was intended as a weapon against them.

The second objection is of a more fundamental nature. Contrary to the view of Justice Jackson, dominated groups in society do not crave for a

62. *Palmer v Thompson*, 403 U.S. 217 (1971).

63. *Gomillion v Lightfoot*, 364 U.S. 339 (1960) (the Alabama legislature changed the boundaries of the city of Tuskegee from a square into a bizarre twenty-eight-side figure; nearly all the black voters, but none of the white, were thus removed from the city limits).

64. See the recent Supreme Court judgment in *City of Mobile v Bolden*, 446 U.S. 55 (1980), where a facially neutral electoral system was upheld because the discriminatory intent of the legislator could not be proven. The presumption of validity for a uniform rule has therefore the rather paradoxical effect of precluding effective remedies against indirect racial discriminations; see the NOTE, «Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law», in *Yale Law Journal*, 1982, 328-351.

uniform treatment in every respect; nor do the dominant groups always prefer to subject the weak or the minority to a different standard; if the rich were sufficiently powerful, one might imagine them having a tax law enacted whereby every person would pay an equal amount of taxes (uniformity), instead of the present system of progressive taxation (diversity). Or, to quote once more the famous phrase of Anatole France, «the law in its majestic equality forbids the rich a well as the poor to sleep under bridges, to beg in the streets, and to steal bread».[65]

As for the speakers of a minority language, their main problem is certainly not excessive differentiation, but rather excessive uniformity. They do not want, admittedly, any distinction in access to parks or swimming pools, or in the entitlement to welfare benefits, but the immediate dangers facing those persons are elsewhere: a uniform school system where all teaching is held in the majority language, a single official language of the courts and administration, one broadcasting network from which their language is excluded.

There are, in fact, two situations in which differential treatment is justified, according to Marshall: «In the one a departure from sameness of treatment is undertaken out of respect for equality, and to restore individuals to some position of comparability with others, which is regarded as having been lost or disturbed. In the other a difference of treatment reflects a deliberate and justifiable rejection of the claims of equality out of respect for the claims of some other value such as liberty or security.»[66] I do not pretend that both forms are easily distinguishable; but that considering *any* differential treatment *a priori* as a *limitation* of equality and therefore in need of special justification, is a one-sided view. It is also true that maximal differentiation (mother-tongue education for all children, television programmes in all languages...) is often utopical and that a uniform norm may in some cases be preferred for reasons of finance or convenience. The only point I want to make here is that, from a moral point of view, the presumption of equal treatment is unjustified. This is particularly clear in matters of *linguistic* equality but also holds in other fields. There has been in recent years a kind of paradigmatic shift whereby minorities of all kinds tend to stress their need for identity rather than their aspiration to assimilation.[67] Thus, the dominant issue in racial policy nowadays is whether 'affirmative action', that is, pre-

65. A. FRANCE, *Le lys rouge.*

66. G. MARSHALL, *Constitutional Theory, op. cit.*, at 153.

67. E. ALLARDT, «Le minoranze etniche nell'Europa occidentale: una ricerca comparata», in *Rivista italiana di scienza politica*, 1981, 91-136, at 129: «Un tempo erano soprattutto le maggioranze che operavano la categorizzazione e l'etichettura delle minoranze. Lo scopo principale della categorizzazione era l'esclusione: le maggioranze agivano in modo da salvaguardare i loro privilegi materiali o per perseguitare le minoranze (...) adesso sono soprattutto le minoranze ad aperare le categorizzazioni. La mancanza di sensibilità della maggioranza non si estrinseca piu come discriminazione ma come negazione dell'identità che invece la maggioranza enfatizza».

ferential treatment of the racial minorities, is justified.[68] And even in the case of sexual equality, the dominant assimilation model is currently under attack.[69]

A final argument in favour of the presumption of equal treatment is that control on differentiations better fits the *judicial role* than the opposed operation; there would be inherent institutional limits for judicial bodies to engage in review of equiparations. In fact, as I will try to show, the judicial approach in both cases is not that different at all.

When a court finds that a rule makes an undue differentiation (that it is, in other words, 'under-inclusive'»,[70] it can either act in a negative way, by invalidating the regulation partially or entirely, or act positively and order the restoration of equal treatment by extending the benefit or burden to the classes which were wrongly excluded. Conversely, when a courts is faced with an unlawful equal treatment (or over-inclusive classification),[71] it can again either strike down the rule (or exempt the wrongly included group from it), or indicate itself the proper alternative way in which this group should be treated. In both cases, the first, negative, alternative is most respectful of the legislator's prerogatives: the court merely declares that the law, as its stands, is not in conformity with the equality principle, but does not preempt the options offered to the legislator for remedying this situation. Most European courts have adopted this view,[72] which is not so negative after all: .indeed, «giving precise reasons for invalidating a statutory provision is essentially no different from suggesting an appropriate form of replacement».[73]

68. On affirmative action, see below, p. 111 ff.

69. See e.g. NOTE, «Toward a Redefinition of Sexual Equality», in *Harvard Law Review*, 1981, 487-508, esp. at 487: «Women are thus convinced to demand no more, and often substantially less, than the chance to assimilate themselves into existing educational, labor and other social institutions - rather than to demand that the institutions change to meet women's needs as they see them»; and at 487-488: «(...) the goal of sexual equality» (as currently understood) «is to create a world in which persons of both genders are encouraged to act as men currently do and in which current 'female behavior' will gradually wither away».

70. «A law is under-inclusive where it imposes burdens on one group but not on another essentially similar group; or where, in allocating certain benefits, it grants them to some groups but not to others who, in the light of the law's objective, are in a situation essentially similar to the former» (M. FORDE, «Equality and the Constitution...», *op. cit.*, at 314).

71. «A law is over-inclusive where it imposes burdens on various groups, some of which are not in fact within the 'mischief' the law was designed to combat; or, alternatively, where the law grants benefits, *inter alia*, to groups which in fact should not be beneficiaries in the light of the law's overriding goals» (*ibid.*).

72. A characteristic pronouncement in this sense was given by the German Constitutional Court in its judgement of 28 November 1967 (in *Bundesverfassungsgerichtsentscheidungen* 22, 349, at 361-362): «Das Bundesverfassungsgericht darf daher bei Feststellung des Verfassungsverstosses nicht selbst die verletzte Gleichheit wiederherstellen, indem es die gesetzliche Verguenstigung auf die uebergangene Personengruppe ausdehnt, weil es damit der Entscheidung des Gesetzgebers vorgreifen wuerde».

73. M. FORDE, *op. cit.*, at 337.

Anyway, there is strictly no distinction between reviewing equiparations or differentiations in this respect.

Strong reasons push the courts towards more 'activist' stances, however. The interest of a plaintiff often does not lie in obtaining the withdrawal of rights from *others* (which would only be a pyrrhic victory), but rather the amendment of the rule in a sense which is more consonant with his interests. Also for other reasons, the mere annulation of a norm may render the legal situation even more objectionable than before. American court decisions, in particular, have not been wary of ordering the extension of underinclusive legislative classifications,[74] even if this entailed increased governmental spending, and even beyond what was authorised by the budget. The dominant attitude in legal writing seems to be that «the courts act legitimately (...) when they employ common sense and sound judgment to preserve a law by moderate extension where tearing it down would be far more destructive of the legislature's will».[75] In Italy too, there have been examples of the Constitutional Court pronouncing a so-called 'accoglimento additivo', i.e. ordering the extension of an existing measure to persons originally not covered by it.[76]

Again however, the argument that courts should not positively 'legislate', especially if their decision entails financial consequences, holds either in the case of an extension of rule A to a new category of persons, or in the case of the formulation of a new rule B for persons wrongly included under rule A. The difference existing between two cases does not lie in the 'positive' or 'activist' nature of the court's decision, but in the specific *content* of the remedy: in the first case, the remedy is pre-determined by the existing rule (which is merely extended on the same terms to other persons), while in the second rule, no such model exists, and the court itself has to fashion the proper remedy by constructing the alternative rule B. But even this difference is not so absolute. The typical 'positive' remedy claimed in linguistic litigation is that the linguistic minority be granted what the majority already has: the teaching of courses in language B like in language A, having the public administration address itself to the speakers of language B in their own language, as it already does with the speakers of A, etc. In other words, one claims the establishment of a differentiation, whose content is nevertheless

74. See e.g. *Shapiro v Thompson*, 394 U.S. 618 (1969); *Weinberger v Wiesenfeld*, 420 U.S. 636 (1975).

75. R. B. Ginsburg, «Some Thoughts on Judicial Authority to Repair Unconstitutional legislation», in *Cleveland State Law Review*, 1979, 301-324, at 324; see also, Note, «Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative», in *Columbia Journal of Law and Social Problems*, 1975, 115 ff.; for a more critical voice, see G. E. Frug, «The Judicial Power of the Purse», in *University of Pennsylvania Law Review*, 1978, 715-794.

76. See e.g. the judgement of the Constitutional Court of 11 July 1975, in *Foro Italiano*, 1975, I, 1882, with note by A. Pizzorusso; see further the discussion by G. Zagrebelsky, *La giustizia costituzionale*, Bologna, Il Mulino, 1977, at 156-165; and N. Picardi, «Le sentenze 'integrative' della Corte costituzionale», in *Scritti in onore di Costantino Mortati*, Milano, giuffrè, 1977, vol. 4, 597-634.

closely based on an existing norm. Even the financial consequences should not be exaggerated. In most public programs, personnel costs are the main item of expenditure; establishing a bilingual service instead of a unilingual one implies the displacing of some persons by others who possess bilingual skills, but only few, if any, *additional* personnel.

The delicate issue of the proper balance between the legislator and the judiciary in the implementation of the equality principle will be taken up again in the next section, in the concrete context of the various constitutional systems. For present purposes, however, one can conclude that judicial control on equiparations requires an only marginally higher measure of judicial creativity than control on differentiations, and that the separation of powers argument is therefore not prohibitive against the former type of judicial action.

2. After this theoretical rejection of the presumption of equal treatment, there remains to be seen how this doctrine has been treated in the constitutional practice of the various states. As far as I can see, there is only one country, *France*, where equiparations escape all judicial review, at least according to the case law of the 'Conseil d'Etat'. This body holds that the existence of differences in fact does *not require* a differential treatment by the administration; the decision to establish or not a differential regime in such cases is a discretionary matter.[78] Some authors have taken the view that the 'Conseil Constitutionnel' follows the same lines, as far as legislation is concerned.[79] Its standard formula, indeed, is that «the principle of equality only imposes to treat equally similar situations but does not prohibit a different treatment for dissimilar situations».[80] Yet, the use of this unilateral formula does not exclude the possibility that differential treatment might also be *imposed* under certain circumstances; it can be explained by the fact that the equality case law of the Council is not yet very rich — compared to other constitutional courts — and that issues of wrongful equiparations have

78. Council of State, decision of 22 March 1950, *Société des ciments français*, in *Recueil Lebon*, 1950, 175; decision of 13 July 1963, *Aureille*, in *Recueil Lebon*, 1963, 829. See Ch. WOLFERS, «Note sur le principe d'égalité dans la jurisprudence du Conseil d'Etat français en matière de réglementation économique», in *L'Egalité*, Vol. I, Bruxelles, Bruylant, 1971, 127-137, at 132.

79. F. MICLO, «Le principe d'égalité et la constitutionnalité des lois», in *Actualité juridique - droit administratif*, 1982, 115-131, at 128: «lorsque le législateur intervient à l'égard de catégories de personnes se trouvant dans des situations différentes, il a le choix entre édicter des règles identiques ou stipuler des régimes particuliers à chaque catégorie. (...) Le juge constitutionnel refuse, semble-t-il, de donner un contenu négatif à l'égalité, ce qui équivaudrait à créer un véritable 'droit à la différence'».

80. «Considérant que le principe d'égalité impose seulement qu'à des situations semblables soient appliquées les mêmes règles et qu'il n'interdit pas qu'à des situations non semblables soient appliquées des règles différentes» (*Taxe professionnelle* case, cit.). For references to other cases, using quasi-identical language, see Ch. LEBEN, *op. cit.*, at 314-315.

not yet been raised. In view of its general activism, it seems doubtful whether the Constitutional Council would, if such a case arose, adopt the same differential views as the Council of State.

In the other countries, there is generally a long line of pronouncements of the supreme courts interpreting the general equality clause according to the Aristotelian formula,[81] and specific examples will be quoted in the next section.[82] The only delicate issue, in some of those countries, is whether this general interpretation of equality also applies to the specific case of *linguistic* equality. Indeed, many constitutional provisions on equality specifically mention certain criteria of classification, among which one often finds *race, sex* and *religion. Language* is also among those specially protected grounds in a few Constitutions (art. 3 of the Italian Constitution, art. 3.III of the German Basic Law, and also art. .2 of the Greek Constitution).[83]

What is now the role of those enumerations? They, first of all, constitute a recognition of the fact that these characteristics, more than any others, have been extensively used throughout history in order to subject certain groups to an inferior status; they remind the legislator and all other authorities of this historical fact and warn him of any new attempt in this direction. But usually, one also tends to find in those enumerations a distinctive *legal* meaning, implying a reduction of the scope of judicial discretion in the application of the equality clause. The most radical theory is that the use of any of those enumerated grounds as criteria for classification is *prohibited*, and brings about an automatic violation of the equality principle. Conversely, of course, the like treatment of persons belonging to the enumerated groups can never be unlawful. The theory is based on the, extremely bold,

81. According to the German Constitutional Court, Art. 3 imposes «weder wesentlich Gleiches willkuerlich ungleich, noch wesentlich Ungleiches willkuerlich gleich zu behandeln». The rule has been formulated in one of its earliest decisions (in *Bundesverfassungsgerichtsentscheidungen*, 1, 14, at 52), and has since constantly been repeated (see e.g. *id.*, 4, 143 at 155; *id.*, 15, 167 at 201; *id.*, 27, 364 at 371). The *Swiss* Federal Tribunal takes the same view; see e.g. the judgment of 27 january 1963, in *Arrets du tribunal fédéral* 89 I 36, and further *id.* 94 I 654; *id* 104 Ia 295; *id.* 104 Ib 210. In *Italy*, see the judgement of th Constitutional Court of 29 March 1960, in *Foro Italiano* 1960, I, 538, confirmed many times since (see e.g. the analysis of case-law by L. PALADIN, «Corte costituzionale e principio generale d'eguaglianza. Aprile 1979 - dicembre 1983», in *Giurisprudenza Costituzionale*, 1984, I, 219-262, at 227 ff. See also the *Italian, Austrian* and *American* cases quoted in the next section).

82. *Infra*, p. 96 ff.; 103; 106 ff.

83. Language does *not* figure among the grounds listed in art. 1.1 of the new Dutch Constitution, art. 4.1 of the Swiss Constitution, art. 2 of the French Constitution of 1958, art. 14 of the Spanish Constitution. For those countries, therefore, the question whether the enumeration has got legal consequences is not directly relevant for the purposes of this study.

On the other hand, some grounds of classification con be made the object of special judicial attention even in the absence of a special mention by the Constitution; see the theory of 'suspect classifications' in American constitutional law, on which see *infra*, p. 75 and 121.

assumption that a valid or justifiable reason to make a distinction between persons on those grounds can *never* be found, and those distinctions *always* have the intention or effect of harming the groups thus defined.

As has been argued before,[84] this argument is untenable. Even the most 'colour-blind' person might accept the selection of a person with black skin for the role of Othello. It should therefore not come as a surprise that doctrinal constructions of unconditionally prohibited grounds have quickly been shattered by case-law, and the reality of life situations revealed by it. This has brought about, among some German and Italian authors, a certain doctrinal schizophrenia: they still refer to the list of grounds as 'Differenzierungsverbote',[85] or 'divieti di differenziazione',[86] while acknowledging, afterwards, that constitutional case-law has shown the not so absolute character of those prohibitions.

Moreover, this attenuation of outright prohibitions into mere 'presumptions of unconstitutionality' has occurred in cases which can hardly be called extreme. The criterion of 'sex' has posed particular problems to the constitutional judges: while alleging its general irrelevance, the Italian Constitutional Court felt nevertheless able to uphold legislation providing that a criminal jury should not be composed of a majority of women,[87] as well as a statute making only female adultery a criminal offence.[88] The German Constitutional Court has similarly been skating on thin ice when upholding a statute criminalising male, but not female, homosexuality, because in this case, «the biological differences between the sexes so decisively shape the subject matter that similarities between them entirely recede».[89]

With these precedents in mind, the claim of the 'Bundesverfassungsgericht' that the enumerated grounds can «concretise the general equality rule and put firm limits to the discretion of the legislator»,[90] sounds as little more than deceptive rhetoric. In theory, there is, in German constitutional law, a presumption *in favour* of the equal treatment of persons speaking different languages and against their *differential* treatment, but one wonders whether it

84. *Supra*, p. 45.

85. See MAUNZ-ZIPPELIUS, *Deutsches Staatsrecht*, Muenchen, C. H. Beck, 24th ed, 1982, at 197; E. STEIN, *op. cit.*, at 399; E. KLEIN, «The Principle of Equality and its Protection in the Federal Republic of Germany», in T. Koopmans (ed), *The Constitutional Protection of Equality*, Leiden, Sijthoff, 1975, 69-124, at 87.

86. See C. MORTATI, *Istitutzioni di diritto pubblico*, Padova, CEDAM, 9th ed, 1976, II, 1019; L. PALADIN, «Eguaglianza (diritto costituzionale)», in *Enciclopedia del Diritto*, XIV, Milano, Giuffrè, 1965, 519-551, at 532.

87. Judgment of 3 October 1958, n. 56, in *Giurisprudenza Costituzionale*, 1958, 861 (with notes by V. CRIBAFULLI and C. ESPOSITO).

88. Judgement of 28 november 1961, n. 64, in *Giurisprudenza Costituzionale*, 1961, 1224 (with note by C. ESPOSITO).

89. Judgement of 10 May 1957, in *Bundesverfassungsgerichtsentscheidungen*, 6, 389, at 423.

90. In *Id.*, 21, 343.

makes a difference in concrete cases.[91] In *Italy*, the whole theory is on the verge of being abandoned. A recent, authoritative account of the Court's case law argues that art. 3 should be read as prohibiting only *arbitrary* distinctions on the basis of sex, language, etc.,[92] and this means nothing else than the application of the ordinary equality test.[93] Besides, the existence of article 6 of the Constitution, imposing special measures for the protection of linguistic minorities, neutralises the possible inhibiting effect of art. 3 as far as language is concerned.[94]

Section 2

THE MEANING OF EQUALITY

A) General Remarks

The conclusion of the foregoing section is that the scope of equality is practically all-encompassing. In countries with judicial review, the constitutional adjudicator has the power to control an unlimited number of legislative rules on their conformity with the principle of equality; more than a 'law-maker', which he undoubtedly is, he could become a sort of 'appeal legislator', not just in a limited number of domains specifically protected by 'sectoral' fundamental rights, such as freedom of expression or the right to education, but across the board. And indeed, in all systems of constitutional review, equality has effectively proved to be the provision most frequently invoked and applied by the courts.[1] This raises in all its acuteness the 'mighty

91. For a German case denying the need for differentiations in the context of language use, see *infra*, p. 105.

92. L. Paladin, «Corte costituzionale e principio generale d'eguaglianza...», *op. cit.*, at 258. See also the views of A. Pizzorusso, *Lezioni di diritto costituzionale*, Roma, Edizioni de 'Il Foro Italiano' (2nd ed), 1981, at 159: «Il divieto di discriminazioni fondate sul sesso, la razza, la lingua, la religione, le opinioni politiche, le condizioni personali e sociali, piuttosto che comportare un'esclusione tassativa di qualunque discussione circa la razionalità o l'oportunità di discriminazioni siffatte, assume la portata di un promemoria volto a segnalare quell i che sono stati in passato i piu frequenti fattori in base ai quali sono state compiute ingiustificate discriminazioni. L'elenco di questi fattori, di conseguenza, rappresenta bensi un monito per il legislatore, per il giudice della costituzionalità delle leggi e per chiunque altro a non ricadere negli errori del passato, ma non esime una regola rigida che imponga o escluda qualunque differenziazione».

93. On this 'ordiary' equality est, see below, p. 68 ff.

94. On art. 6, see below, p. 89.

1. In *Austria*, 98 of the 113 annulations decided by the Constitutional Court during the period 1946-1977 were based on the equality clause (Th. Oehlinger, «Objet et portée de la protection des droits fondamentaux - Cour constitutionnelle autrichienne»,

problem of judicial review' and its alleged countermajoritarian nature.[2]

Now, it is generally agreed that «in its role of institutional guarantor of fundamental rights, a court cannot allow itself to become a forum for resolving the grievances of factions that have lost out in the ordinary political process. Such a role would duplicate the legislative function, would drastically affect the court's work load, and most importantly, would be anti-democratic».[3] The only way out, if one cannot restrict the SCOPE of equality, is to develop some *principled standards* as regards the substantive MEANING of equality. In fact, the standards used by the courts in the various countries are strikingly similar: they all refer to a notion of legislative *rationality*[4] or —its negative counterpart— *non-arbitrariness*.[5] This means that the judge will only control the REASONABLENESS and not the inherent JUSTNESS of a legislative choice, leaving thereby to the political bodies a considerable margin of discretion. Taken in the abstract, the concept of 'rationality' is nothing more than this statement of judicial self-restraint, but gives no guidance as

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in *Revue International de Droit Comparé*, 1981, 543-579, at 574); in *Italy*, more than 75 % of all cases submitted to the Constitutional Court in recent years were based, wholly or in part, on the right to equality (L. PALADIN, «Corte costituzionale e principio generale d'eguaglianza. Aprile 1979 - dicembre 1983», in *Giurisprudenza Constituzionale*, 1984, I, 219 - 262, at 219-220). Similar trends can be witnessed in *France* (L. FAVOREU, «La jurisprudence du Conseil constitutionnel en 1980», in *Revue de Droit Public*, 1981, 621-649, at 635) and in *Spain* (CRUZ VILLALÓN, «Zwei Jahre Verfassungsrechtsprechung», in *Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht*, 1983, 70-117, at 92).

2. See e.g. the discussion by M. CAPPELLETTI, «The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis», in *Legal Issues of European Integration*, 1979, 1-29; and ID., «Nécessité et légitimité de la justice constitutionnelle», in *Revue Internationale de Droit Comparé*, 1981, 625-657. Other recent contributions to this perennial debate include J. H. ELY, *Democracy and Distrust*, Cambridge, Harvard University Press, 1980; J. CHOPER, *Judicial Review and the National Political Process*, Chicago/Lond, Chicago University Press, 1980; M. J. PERRY, *The Constitution, the Courts and Human Rights*, New Haven London, Yale U.P., 1982; E. GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal Constitucional*, Madrid, Ed. Civitas, 1981; L. FAVOREU, «Actualité et légitimité du controle juridictionnel des lois en Europe occidentale», in *Revue de Droit Public*, 1984, 1147-1201; «Die Verfassungsgerichtsbarkeit im Gefuege der Staatsfunktionen», reports by KORINEK, MUELLER and SCHLAICH in *Veroeffentlichungen der Vereinigung von deutschen Staatsrechtslehrern*, Vol. 39, Berlin/New York, W. de Gruyter, 1981; *Corte Costituzionale e sviluppo della forma di governo in Italia*, Bologna, Il Mulino, 1982; the contributions by ELIA, CARETTI & CHELI, DE VITA, LANCHESTER and ROLLA *in Quaderni Costituzionali*, 1984, n. 1, 7-141.

3. M. FORDE, «Equality and the Constitution», in *The Irish Jurist*, 1982, 295-339, at 310.

4. 'Rationality' is the term used by the American Supreme Court; 'ragionevolezza' by the Italian Constitutional Court; 'razonabilidad' in Spain.

5. The concept of 'Willkuer' (arbitrariness) as the central interpretative standard in equality litigation was originally developed by G. LEIBHOLZ, *Die Gleichheit vor dem Gesetz*, 1925, 72 ff., and is now currently used by the constitutional courts of the Federal Republic of Germany, Switzerland and Austria.

to its SUBSTANTIVE meaning. Yet, as mentioned above,[6] the consideration of the particular context of the given case may make rationality judgments more feasible: the usual standard of review becomes *whether the classification (or absence of classification) in particular rule is rationally related to the legislative object.*

To assess this relationship, two different interpretative methods are currently used. The first method is *purpose-oriented*, and analyses the 'legislative object' as the purpose which the legislator sought to achieve; the second is *situation-oriented*, and analyses the object as the life-situation which is to be regulated. In fact, the terminology may be misleading; in many cases, what goes under the name of 'purpose' does not indicate the REAL purpose which the rulemaker sought to achieve, but the OBJECTIVE purpose as reconstructed by the judge without referring to the actual state of mind of those who enacted the rule. A good example of such a semantic shift is provided by a decision of the French 'Conseil Constitutionnel'.[7] The object of scrutiny was a Bill reforming the labour courts in France, which gave to the employers, in the designation of their representatives in the courts, weighted votes according to the number of personnel employed. The Constitutional Council held that

«In relation to the designation of members of a court, the fact that some electors employ a greater number of workers than others is no reason why the former should be given weighted votes; because this differentiation is incompatible with the objectives of an election which is intended solely to designate the members of a court and which has no connection with circumstances that may have preceded such a designation.»

The Council, although using 'purpose' language, does not inquire which was the REAL motive inspiring the legislator, but authoritatively decides that the PROPER purpose of enacting a law of this kind should be to constitute an impartial bench for adjudicating labour disputes; accordingly, a distinction on the basis of the dimension of the enterprises was not rationally related to the law's 'constructed' purpose, and was struck down. This method of interpretation is even more strikingly illustrated by the use of the notion of 'intérêt général' as the overall standard of equality review in France:[8] here, the 'objective' or 'reconstructed' nature of the 'purpose' is very obvious.

The real distinction in methods of equality review is therefore between

6. See the phrase of H. L. A. Hart quoted above, p. 46.

7. Decision of 17 January 1979, in *Dalloz-Sirey* 1981, 117 (as translated by M. FORDE, *op. cit.*, at 317).

8. See e.g. the references to the 'nationalisations case' in Ch. LEBEN, «Le Conseil constitutionnel et le principe d'égalité devant la loi», in *Revue de Droit Public*, 1982, 295-353, at 327. The 'general interest' is also the criterion generally used by the 'Conseil d'Etat' in its equality case law; see the references in C. A. COLLIARD, *Libertés publiques*, Paris, Dalloz, 1975 (5th ed), at 208-209.

subjective rationality (rational as 'purposeful and sensible action') and *objective rationality* (rational as 'conformable to a certain context or ordre of things'). The European courts all tend to use the second method, whether they cloth it in the language of purposes, as do the French, but also the Italian, Spanish or Belgian courts,[9] or use the situation-oriented language of intrinsic comparability and 'nature of things' as do the German, Swiss or Austrian courts.[10] In both cases, the process is the same: the court first defines what is, in its eyes, the object or life situation which the law regulates (e.g. voting, taxation, constitution of a jury...) and then considers whether the classification (or absence of classification) in issue is rationally related to this object.[11] Thus, to give just one example, the Italian Constitutional Court found that gender differences are rationally related to selection in a juny,[12] but not to teaching in a nursery school,[13] and that a different treatment of men and women was therefore permitted in the first, but not in the second case.

In the United States on the contrary, the purpose-oriented inquiry is predominantly used in its original, *subjective* sense: the courts try to discover what the legislature or administration had in mind in making a certain clas-

9. The *Italian* Constitutional Court has not always used a consistent terminology. Yet it has been shown it usually resorts to *objective purpose analysis*, with some exceptions where it inquired in the effective purpose of the legislator (see A. S. AGRO, «Art. 34, in G. Branca (ed), *Commentario della Costituzione - Principi Fondamentali*, Bologna, Zanichelli & Roma, Ed. de Il Foro Italiano, 1975, 123-161, at 143 and 146-147).

In *Spain*, see the judgment of the Constitutional Tribunal of 2 July 1981, in *Boletin de Jurisprudencia Constitucional*, 1981, n. 4, 243, at 250: «la igualdad es sólo violada si la desigualdad está desprovista de una justificación objetiva y razonable y la existencia de dicha justificación debe apreciarse en relación a la finalidad y efectos de la medida considerada, debiendo darse una relación razonable de proporcionalidad entre los medios empleados y la finalidad perseguida».

In *Belgium*, see e.g. the Council of State decision of 1 February 1973, in *Pasicrisie* 1974, IV, 109, at 110: «l'article 6 de la Constitution n'interdit pas qu'à des situations différentes soient appliquées des règles juridiques différentes, pour autant que les différenciations ainsi établies soient fondées sur l'intéret public, qu'elles aient donc un but en rapport avec cet intéret (...)».

10. For Germany, see the judgement of the Constitutional Court of 17 March 1959 (to which the Court consistently refers ever since), in *Bundesverfassungsgerichtsentscheidungen*, 9, 201, at 206: the legislator violates equality when he «versaeumt, tatsaechliche Gleichheiten oder Ungleichheiten der zu ordnenden Lavensverhaeltnisse zu beruecksichtigen, die so bedeutsam sind, dass sie bei einer am Gerechtigkeitsgedanken orientierten Betrachtungsweise beachtet werden muessen».

For Austria, see R. RACK & N. WIMMER, «Das Gleichheitsrecht in Oesterreich», in *Europaeische Grundrechte Zeitschrift*, 1983, 597-613, at 603-604 (and the judgments of the Constitutional Court quoted in their notes 78 and 79).

11. The test is not *objective* in the sense that it restricts itself to the terms used in the regulation, but rather in the sense that the judge tries to define the societal object the legislation regulation regulates, disregarding the motives why the rulemaker wanted to regulate it.

12. See above, p. 65.

13. Judgment of 16 June 1983, in *Giurisprudenza Costituzionale*, 1983, I, 946.

sification. When this classification is not related to the purpose discovered, or when the purpose is illegitimate by itself (e.g. there is ample evidence of the intent to discriminate against a racial minority), then there is a violation of the principle of equality. On first view, this might appear as a more principled approach to equality review as the courts leave the determination of public policy and social goals to the elected representatives. However, as has often been noted by American commentators, assessing the true aims of the legislator can be an extremely difficult hermeneutic enterprise.[14] The clearest and uncontroversial goal of a given distinction is precisely that of distinguishing between the persons involved: a rule excluding persons speaking language A from a certain benefit has the aim of excluding those persons. Of course, such tautological reasoning makes purpose inquiry utterly meaningless. One must therefore look for some more encompassing goal. Here, however, one enters into the domain of speculation. Seldom, if ever, is such a general purpose clearly articulated in the text of the norm, or even in the minds of the rule-makers. Therefore, American courts often reconstruct the purpose from the context of the law,[15] moving thereby a long way towards European-style 'objective rationality' review. But if the courts autonomously construe the context in which the equal or unequal treatment is made, then they can also easily manipulate it in order to fit an underlying value judgment or desired outcome. An American commentator even said that «in every case in which the Court has construed a statutory goal in such a way that the statutory classification could be found to be not rationally related to the legislative purpose, it would have been equally possible to define the purpose so that the statute could have been found rational».[16] Of course, one can construct hypothetical examples in which the classification cannot correspond to any intelligible purpose (e.g. a law taxing bald butchers),[17] but those are rare occurrences in case practice. In the great majority of equality litigation cases, «the decisive question is how courts formulate the legislative purpose against which the ra-

14. The subjective rationality test has been classically formulated by TUSSMAN & TEN BROEK, «The Equal Protection of the Laws», in *California Law Review*, 1949, 341 ff. For recent discussions of the dilemmas involved in purpose inquiry, see e.g. NOTE, «Legislative Purpose, Rationality and Equal Protection», in *Yale Law Journal*, 1972, 123-154; J. H. ELY, «Legislative and Administrative Motivation in Constitutional Law», in *Id.*, 1970, 1203-1341; G. BINION, «Intent and Equal Protection: A Reconsideration», in *The Supreme Court Review*, 1983, 397-457, esp. at 424 ff.

15. For a recent analysis of this shift see C. E. BAKER, «Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection», in *University of Pennsylvania Law Review*, 1983, 933-998; at one point (976-977) this author argues that: «Although the Court often uses the language of subjective intent, its opinions can best be understood as treating objective or contextual purpose as the key constitutional concern».

16. NOTE, «Legislative Purpose...», *op. cit.*, at 132 (and the examples given at 132 ff.).

17. Example given by S. M. HUANG THIO, «Equal Protection and Rational Classification», in *Public Law*, 1963, 412-440, at 418-419.

tionality of the statutory classification is to be tested».[18] One important variable here is the level of abstraction at which the purpose is set; the narrower one defines the overall purpose of a regulation, the more chances a distinction has to survive scrutiny.[19]

If the American 'subjective' test leaves so much discretion to the law enforcing bodies, the same holds a fortiori for the *European* 'objective' test which does not even constrain the judge in seeking the effective aim pursued by the rulemaker. Examples of this 'flexibility' of objective rationality control will be given further on, in the specific context of LINGUISTIC equality. Here, I will consider the THEORETICAL remedies one has tried to elaborate in order to restrict this margin of judicial discretion. A principle which has strongly been emphasized, especially by the German and, more recently, the Italian Constitutional Court is that of *system rationality*. As the latter Court said in a recent judgment:

«In the name of equality, this Court (...) is not entitled to make choices that are of the exclusive competence of the legislator, but may only reconduct the unjustified derogations and arbitrary exceptions to the rules established by the law or to the general principles that can unequivocally be derived from the legal order as a whole.»[20]

The discretion inherent in the assessment whether a given classification (or absence of classification) is adequate with regard to the legislative object, is reduced by considering whether the legislator has established *comparable* differentiations in *comparable* situations.[21] Thus, in order to assess whether the criterion has been validly used in a given case, the judge must determine first of all within which system or 'life sphere' the comparison should take place.[22] Indeed, one should not extrapolate from one system to another; as argued earlier on, there is not a single criterion of classification which may not be justified for SOME purposes. A typical example of such 'system rationality' analysis is provided by an early decision of the German Constitutional

18. NOTE, «Legislative Purpose...», *op. cit.*, at 124.

19. *Id.*, at 137.

20. «In nome dell'eguaglianza questa Corte non è (...) abilitata a esercitare scelte di esclusiva spettanza del legislatore, ma puo solo ricondurre le deroghe ingiustificate e le arbitrarie eccezioni alle regole già stabilite dalla legge ovvero ai principi generali univocamente desumibili dall'ordinamento» (judgment of 18 October 1983, in *Giurisprudenza Constituzionale*, 1983, 2062).

21. One is, in a sense, referred back to the *subjective* intention of the rulemaker, but then taken *in globo*, and not in reference to the particular regulation.

22. E. KLEIN, «The Principle of Equality and its Protection in the Federal Republic of Germany», in T. Koopmans (ed), *The Constitutional Protection of Equality*, Leiden, Sijthoff, 1975, 69-124, at 78: «The argumentation of adequacy with regard to the system presupposes a certain determination and delimitation of various fields of life, for each of these is subject to a different system. Whether a provision fits into a system can only be decided in relation to that system. The equality clause cannot be used to impose assimilation of various fields of life».

Court holding that the profession of midwife belonged to a different life sphere ('Lebensbereich') than that of doctor, and that differentiated age limits for the exercise of those professions are therefore justified.[23]

The German and Italian Constitutional Court have often recurred to such an approach and several commentators have analysed it as the dominant mode of equality review.[24] Yet, this attractive (and modish) systematic approach conceals a number of dangers. First of all, it is often *falsely objective*. Discovering an autonomous system within the overall legal or societal order (or, if one prefers, a sub-system within the global system) is an *a posteriori* interpretative exercise which usually does not correspond to a clearly manifested intention of those who built the system. There are, of course, cases in which the legislator has set some general guidelines in a framework law, to be implemented in particular laws. But apart from this hypothesis, a 'system' is often not clearly visible, and the court can be tempted to smuggle in its own value judgments under the cover of a 'neutral' construction.[25] Secondly, the method can be *undemocratic*. Even if one accepts that the courts are equipped to make the artificial reconstruction of a systematic design in the legislator's initiatives, why should the legislator not be allowed to derogate from it? As a control on ADMINISTRATIVE acts, such a systemic analysis (in the form, e.g., of the rule 'patere legem quem ipse fecisti') is justified and widely used. But, when applied to LEGISLATIVE norms, it is bound to lead to a «bureaucratisation of politics»;[26] existing legislation becomes a constitutional parameter for future legislation, and political change is thereby inhibited.

23. Judgment of 16 June 1959, in *Bundesverfassungsgerichtsentscheidungen*, 9, 338, at 349.

24. In *Germany*, see e.g., in addition to the judgment mentioned in the previous note, the judgments of 25 July 1960 in *Bundesverfassungsgerichtsentscheidungen*, 11, 283, at 293; and 27 January 1965, in *id.*, 18, 315, at 334. For a complete overview, see E. KLEIN, *op. cit.*, at 78 ff.; H. H. RUPP, «Art. 3 GG als Massstab verfassungsgerichtlicher Gesetzeskontrolle», in *Bundesverfassungsgericht und Grundgesetz*, Berlin, Duncker & Humblot, 1976, II, 364-389, at 379 ff.

In *Italy*, see the recent overview by L. PALADIN, *op. cit.*, who argues (at 229 ff.) that all the equality opinions of the Constitutional Court can be analysed in terms of systematic rationality.

25. G. ZAGREBELSKY, «Corte costituzionale e principio d'uguaglianza», in N. Occhiocupo (ed), *La Corte costituzionale tra norma giuridica e realtà sociale. Bilancio di vent'anni di attività*, Bologna, Il Mulino, 1978, 103-120, at 110; and A. BALDASSARRE, «Intervento» in *id.*, 121-132, at 125: «Ma che l'ordinamento normativo costituisca un 'sistema', nel senso proprio della parola, dotato di una razionalità sua propria tanto forte e manifesta da potersi far valere anche contro singoli atti del suo stesso fattore, è un postulato indimostrato».

For similar criticisms in German legal doctrine, see C. DEGENHART, *Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat*, Muenchen, Beck, 1976, at 49-57; H. F. Zacher, «Soziale Gleichheit», in *Archiv des oeffentlichen Rechts*, 1968, 341-383, at 352-355.

26. «Amministrativizzazione della politica» (A. BALDASSRRE, op. cit., at 125).

The courts acknowledge these facts, and allow for exceptions to systematic rationality. The Austrian Constitutional Court characteristically said:

«The legislator is not prevented, within a legal ordering system he has created, to regulate certain points in a non-systematic way, when this is justified by objective grounds. One cannot read in the equality clause, and the Constitutional Court can therefore not impose, a duty for the legislator to refrain from making an exception which appears necessary for the only reason that it does not correspond to the legal ordering system.»[27]

This appears very reasonable, and is accepted by the German and Italian courts as well.[28] Yet, the promise of a 'neutral' standard of review through the use of systems analysis is likely to get lost, if exceptions are permitted. Instead of a formal reasoning of analogy —promised by the systems approach— one is referred back to some substantive value judgment.

This value judgment, however, needs not be an act of pure judicial discretion, with self-restraint as the only limiting device. Indeed, the courts can recur to a different, *hierarchical* (or Kelsenian) system rationality by checking whether the classification adopted is in conformity with the *highest principles* of the legal order, expressed above all in the Constitution. The argument that earlier legislation blocks future legislation does not hold here; the constitutional norm is hierarchically binding on *all* legislators.

Three categories of constitutional norms can conceivably play this role of providing values which facilitate the interpretative task of the courts in equality litigation. First of all, there are the (other) *fundamental rights* contained in the Constitution. On first blush, they cannot easily be combined with the equality principle; a mesure may violate equality or another fundamental right, but not both at the same time. For instance, a governmental measure encroaching upon some fundamental right of person A, but not of person B will be quashed for violation of that particular fundamental right, and NOT of the equality principle. If every infringement of constitutional rights which disproportionately affects some persons would be covered by the equality principle, then the other fundamental rights provisions of the Constitution would hardly have a role to play. To take only one example from the linguistic field: the prohibition which still exists in Alsace to publish a newspaper entirely written in another than the French language,[29] implies a discrimination (German-speakers being treated less favourably than French-speakers, and than members of linguistic minorities elsewhere in Fran-

27. Judgment n. 5862/1968, quoted in R. RACK & N. WIMMER, *op. cit.*, at 604.

28. See the judgments of the German Constitutional Court of 7 May 1969, in *Bundesverfassungsgerichtsentscheidungen*, 25, 372, at 401-402; and of 2 October 1969, in *Id.*, 27, 58, at 65.

29. A French 'Ordonnance' of 13 September 1945, which is still in force, orders that all periodicals published in Alsace must have a minimum content of 25 % written in French —including all sports and youth features.

ce), but in constitutional terms, there is (or can be) a direct violation of freedom of expression which does not involve the equality principle.

Nevertheless, a number of governmental measures regulate the EXERCISE of fundamental rights, without VIOLATING the right itself; they are either justifiable restrictions on the right, or contributions to its effective exercise. Yet, if this regulation disproportionately affects or favours some persons, an issue of equality arises, which commands special attention of the courts because of the importance of the interest at stake.[30]

Secondly, recourse may be had to *objective* or *institutional* norms of the Constitution. Many norms that do not protect an individual entitlement contain nevertheless a substantive value judgment which can help deciding an equality case. If, for instance, the Constitution contains the rule «no taxation without representation», then a statute exempting a particular category of public authorities from having its taxes adopted by a representative body, could be struck down as a violation of equality. In this manner, equality acts as a procedural instruments through which the Constitution in its entirety can be made a parameter of judicial review. The so called 'fundamental rights' strand in the equality doctrine of the United States Supreme Court is a variation of this hypothesis: certain rights, that are *not* explicitly entrenched as constitutional rights, are nevertheless so basic for the functioning of the entire constitutional fabric that distinctions in their enjoyment are inherently suspect. An equal vote, an equal treatment of citizens of other states, have thus been made the object of heightened judicial scrutiny.[31]

The third type of constitutional value-judgment is that offered by the existence of *specifications of the general equality clause*. As we saw in the preceding section, several European constitutions list a number of 'suspect' grounds specifying the general principle of equality such as sex, race, and —in some cases— language.[32] They do not help, as has been shown, to restrict the SCOPE of the equality clause, but they might perhaps impose a special

30. To give again an example in language law: the French 'Loi sur l'emploi de la langue française' of 31 December 1975 restricts the use of other languages than French in commercial activity and labour relations. This should be analysed as a limit on the freedom of expression through the language of one's choice. This limit may in itself be justified by the need to protect the integrity of the French language against the commercial dominance of English; but why then should *other* languages (including France's regional minority languages and the languages spoken by immigrants) be outlawed as well? Is the fact that *all* languages other than French are subject to the same restrictive regime not an unlawful equiparation? For more details, and similar examples from other countries, see B. DE WITTE, *The Protection of Linguistic Diversity through Fundamental Rights, Florence*, European University Institute (doctoral thesis), 1985, 260 ff.

31. On interstate travel, *Shapiro v Thompson*, 394 U.S. 618 (1969); on the right to vote, *Harper v Virginia Board of Elections*, 383 U.S. 663 (1966), and *Reynolds v* Sims, 377 U.S. 533 (1964). For a general description of the 'fundamental rights' theory, see L. TRIBE, *American Constitutional Law Mineola* (N.Y.), The Foundation Press, 1978, 1002 ff.

32. *Cf. supra*, p. 64 ff.

standard of judicial review. Yet, in several countries, like Italy and Austria, this is not the case, and classifications based on the enumerated grounds do not trigger a special mode of equality review.[33] Among the countries where LANGUAGE is among the listed grounds, only Germany seems to attach special consequences to this fact: differential treatments based on those grounds are *prima facie* unconstitutional, but this presumption is rebuttable.[34]

Particular embodiments of the general equality rule can not only be found in one and the same article of the Constitution, but also in other provisions. In our case, those other provisions are even more important: as will be argued further on, the Italian, Spanish, Austrian, and Finnish Constitutions give clear guidelines that LINGUISTIC equality should be interpreted in a 'pluralistic' sense.[35]

Specifications can, finally, also be discovered outside the Constitution. Thus, the Fourteenth Amendment to the United States Constitution guarantees equal treatment in the most abstract terms. Yet, the Supreme Court and legal writing have autonomously developed a theory of *suspect classifications*, which call for a stricter judicial scrutiny. The genesis of this doctrine lies in the famous footnote n. 4 of Justice Stone in the *Carolene Products* case of 1938:

«Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.»[36]

The Suprem Court, as a whole, adopted the test in *Korematsu v the Uni-*

33. For Italy, see e.g. G. ZAGREBELSKY, «Objet et portée de la protection des droits fondamentaux - Cour constitutionnelle italienne», in *Revue Internationale de Droit Comparé*, 1981, 511-542, at 538, arguing that those special grounds have been 'absorbed' by the general principle of equality and are not subject to a different regime; see also above, p. 66.

For Austria, see M. BERGER, «Die Gleichheit von Frau und Mann in Oesterreich», in *Europaeische Grundrechte Zeitschrift*, 1983, 614-623, at 619; M. SACHS, «Der Geltungsverlust des Art. 7 Abs. 1 Satz 2 B-VG», in *Oesterreichische Zeitschrift fuer Oeffentliches Rech* 1985, 305-324 (who regrets this evolution in case law, but recognises its existence).

34. See above, p. 65.

35. See below, pp. 89-104.

36. *United States v Carolene Products Company*, 304 U.S. 144 (1938), at 152, n. 4. Beyond its specific role in equality litigation, this footnote is also considered to have started a new era in American constitutional law, by offering a theory which reconciles judicial review with the need to respect majoritain legislative decision-making: the primary task of the constitutional judge should be that of protecting the interests of those groups who are effectively excluded from the democratic decision-making.

The theory has been most elaborately developed by J. H. ELY, *Democracy and Distrust*, *op. cit.* For a recent analysis (and critique) of the impact of the 'Carolene Products' footnote, see B. A. ACKERMAN, «Beyond Carolene Products», in *Harvard Law Review* 1985, 713-746.

ted States in 1944. During the World War, more than 100.000 persons of Japanese origin living on the West Coast where subjected to a certain number of measures ranging from relocation to prolonged confinement in camps. The Supreme Court held, that while the regulation affected a distinctive racial group, it should be considered as inherently suspect and commanding a special judicial scrutiny.[37] Later on, the reasoning was extended from race to other criteria which have been described by the Supreme court as follows:

«An immutable characteristic determined solely by accident of birth, or a class saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a political powerlessness as to command extraordinary protection from the majoritarian political process.»[38]

Language groups, in se, do not seem to be covered, but some of them, and above all the large Hispanic group, certainly conform to this picture of a 'discrete and insular minority'.[39]

When such powerless minorities are involved, the standard of equality review becomes the following: the *end* must not merely be legitimate, but must present a 'COMPELLING state interest'; the *means* must not merely be rationally related to the end, but must be NECESSARY for achieving it. Yet, it has been argued that the 'suspect classification' test has lost much of the bite it might have had. Indeed, the greatest danger for 'powerless minorities' nowadays stems from *indirect* discrimination, that is, facially 'neutral' regulations which have a discriminatory *effect* on those minorities. Now, the insistence, in recent Supreme Court decisions, on the necessity to prove a discriminatory purpose of the legislator makes such indirect discriminations very difficult to challenge.[40]

In the rest of this section, I will try to apply the general principles of interpretation presented above, to the specific issue dealt with in this study, and see how the various constitutional systems have handled *linguistic equality*. I will separately consider the there categories of linguistic equality outlined earlier on: non-discrimination, pluralistic equality, and affirmative equality.[41]

37. *Korematsu v United States*, 323 U.S. 214 (1944). Ironically, despite the alleged use of a strict scrutiny, the legislative discriminations againts the Japanese were upheld in this case.

38. *San Antonio v Rodriguez*, 411 U.S. 1 (1975), at 28.

39. The Hispanics are, in certain domains, worse off than the Blacks. For instance, in 1980, only 7.8 % of all persons of Hispanic origin had completed college studies, againts 8.8 % of blacks, and 18.5 % of 'whites' (*Statistical Abstract of the United States*, 1984, at 144).

40. NOTE, «Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law», in *Yale Law Journal*, 1982, 328-351, at 351.

41. *Cf. supra*, pp. 43-44.

B) Non-Discrimination

The basic principle, as stated above, is that the use or knowledge of a certain language is a legitimate criterion for distinguishing among persons only when the specific context or object of regulation so warrants. Some cases can easily be solved in this way: the language criterion is obviously rational when it comes to selecting the personnel of an administrative service which has to use a given language: in unilingual settings, civil servants must of course be able to use the official language. And the same holds for jobs in the private sector where a certain linguistic skill forms an inherent part of the job description (most obvioously, in the case of an interpreter or translator).

There are other cases where a linguistic differentiation is clearly *arbitrary*, as in the Austrian Law on the Assistance to Victims ('Opferfuersorgegesetz') which reserved its benefits to *German*-speakers; the Constitutional Court had no difficulty in finding that there is no objective relationship between the language one speaks and the entitlement to war damages.[42]

Often, it is not so easy to tell whether language is a relevant factor to take into account. A very controversial domain is that of *plurilingual administrative services*, i.e. services using more than one language in their normal operation. Is the knowledge of one of those languages a legitimate requirement or condition for employment or promotion?

In two very recent cases, the Spanish 'Tribunal Supremo' annulled decisions of the Guipúzcoa and Alava provincial governments regulating the regime of examinations for access to the provincial services and attributing extra points to candidates showing a knowledge of Euskera.[43] The Court considered the litigious measures as linguistic discriminations, «restricting the right of access to public functions for those Spanish citizens who do not speak Euskera».[44] In interpreting the equality principle, the court recurred to 'higher' constitutional principles, along the linies described above. The 'super-norm' to which the Court refers is article 3, first sentence, of the Constitution, declaring Castillian to be the country's official language and recognising to every citizen the right to use it. A norm which has a negative impact on Castillian speakers is therefore, according to the Court, contrary to the equality principle, as interpreted in connection with art. 3.

42. Judgment of 15 October 1960, in *Sammlung*, 1960/3822, 507: «Eine Differenzierung der Anspruchsberechtigung im Rahmen des Opferfuersorgegesetz nach der Sprachzugehoerigkeit oder der Herkunft aus dem deutschen Sprachgebiet und die Schlechterstellung der Sprache einer Minderheit ist niemals sachlich. Denn die Sprachzugehoerigkeit steht zu Aufgabe und Zweck der Opferfuersorge in keinem sachlichen Zusammenhang».

43. Judgments of 25 January 1984, in *Repertorio de Jurisprudencia Aranzadi*, 1984, n. 205; and judgment of 3 May 1984 (not yet reported).

44. Judgment of 25 January 1984, *cit.*,: «esta situación rompe el principio de igualdad del art. 14 de la vigente Constitución, en cuanto que se conculca el derecho de los españoles al acceso de las funciones públicas disminuido para todos aquellos que no sean parlantes del euskera (...)».

The arbitrariness in choosing and construing a constitutional principle for the purposes of equality review is very clear here. Indeed, the Court could as well have referred to the SECOND sentence of the same art. 3, stating that the «other Spanish languages will also be official in accordance with the Statutes of the respective Autonomous Communities». On the basis of this constitutional norm, the Basque Statute has provided, in its art. 6.1, for the co-officiality of Castillian and Euskera within the Basque Community, including the right of the citizens to use any of these two languages in dealing with the public administration.[45] But, if, as the 'Tribunal Supremo' has ordered, no weight my be attributed, in the selection of civil servants, to knowledge of Euskera, then the right of all citizens to address themselves to the public administration either in Castillian or in Euskera is in jeopardy. In fact, the right to use a certain language (be it Castillian in art. 3 of the Constitution or Euskera in art. 6 of the Statute) in only a *right* of the CITIZEN and implies a *duty* of the CIVIL SERVANT. Indeed, one can only exercise the right to use one's language if the administration is equipped to understand this language and to act upon it —and this means in turn that civil servants are, in the exercise of their function, restricted by the options expressed by the users of the service, and the ensuing internal organisation arrangements. Only outside his professional duty is the civil servant also a citizen with the right to speak Castillian (or Basque); in the exercise of his function, he must adapt himself to the wishes of the users of the service. Therefore, I would argue that the advantage given, in the examination rules, to persons speaking Euskera, is rationally justified by the objective needs of a bilingual administration, and is not in contrast with any constitutional norm. In addition, the decision of the two Provincial Governments only applied the Basque 'normalisation law' of 24 November 1982; if it had any doubts as to the constitutionality of that law, the Tribunal Supremo should have referred the case to the Constitutional Tribunal, but was certainly not entitled to act as if that enabling law did not exist.[46] The answer of the Constitutional Tribunal would certainly have been different; indeed, this court (which has final authority on the interpretation of the Constitution) held, in a 1983 judgment, that a linguistic bonus in personnel recruitment is a perfectly legitimate consequence of the citizen's right to use the official language of his choice. Yet, the Tribunal added in the same breath that making the knowledge of both official languages of the Autonomous Com-

45. Art. 6.1 of the Basque Statute (Organic Law of 18 december 1979): «El euskera, lengua propia del Pueblo Vasco, tendrá, como el castellano, carácter de lengua oficial en Euskadi, y todos sus habitantes tienen el derecho a conocer y usar ambas lenguas».

46. I. AGIRREAZKUENAGA ZIGURRAGA, «El euskera discrimina al castellano a juicio del Tribunal Supremo. La igualdad lingüística efectiva a debate», in *Revista Vasca de Administración Pública*, n. 9, 1984, 241-260. For another very harsh but, in my view, entirely justified critique of the Court's decision, see E. COBREROS MENDAZONA, «Cooficialidad lingüística y discriminación por razón de la lengua», in *Civitas. Revista Española de Derecho Administrativo*, n. 42, 1984, 461-476.

munity an *absolute* requirement (instead of a mere bonus) would be unconstitutional. Only the administration AS A WHOLE should be bilingual, and not every SINGLE member of it.[47]

Yet, this latter, more radical alternative for ensuring an adequate linguistic performance of the administration, is used in other places. In the local administration of the bilingual language area of *Brussels*, every civil servant must be able to address himself to the users in each of the area's two official languages, French or Dutch.[48] In the *Val d'Aosta* region, article 38 of the Statute prescribes that the State administration may only consist of «civil servants originating from the Region or knowing the French language». As all Valdostans (due, in part, to the educational system)[49] are supposed to be bilingual, this clause implies in fact a general requirement of knowledge of both official languages. This statutory provision has however been satisfactorily implemented only in 1978.[50] The same condition of bilingualism is imposed to the civil servants working in the province of *Bolzano* (South Tyrol).[51] In a recent judgment, the Italian Constitutional Court has taken the opposite view from its Spanish counterpart and explicitly held that a regime of official bilingualism imposes on EVERY SINGLE civil servant the duty to speak both languages.[52] The Court held that the measure does not discri-

47. Judgment of 5 August 1983 (concerning a conflict of competence between the central State and several Autonomous Communities), in *Boletín de Jurisprudencia Constitucional*, 1983, n. 30, 1121 at 1176: «Una interpretación sistemática de los preceptos constitucionales y estatutarios lleva, por una parte, a considerar el conocimiento de la lengua propia de la Comunidad como un mérito para la provisión de vacantes, pero, por otra, a atribuir el deber de conocimiento de dicha lengua a la *Administración autonómica en su conjunto, no individualmente a cada uno de sus funcionarios,* como modo de garantizar el derecho a usarla por parte de los ciudadanos de la respectiva Comunidad» (emphasis added).

48. See art. 21.5 of the Law on the Use of Languages in Administrative Matters (coordinated version of 1966): «Nul ne peut etre nommé ou promu à un emploi ou à une fonction mettant son titulaire en contact avec le public, s'il ne justifie oralement, par une épreuve complémentaire ou un examen spécial, qu'il possède de la seconde langue une connaissance suffisante ou élémentaire, appropriée à la nature de la fonction à exercer».

Note that civil servants that do *not* come into contact with the public need not be bilingual (except for the higher hierarchical levels).

See, on these points, C. WILWERTH, *Le statut linguistique de la fonction publique belge*, Bruxelles, Editions de l'Université de Bruxelles, 1980, at 65-70.

49. According to art. 39 of the Regional Statute of Val d'Aosta, both Italian and French shall be used in all classes, at all levels of the educational system within the Region.

50. (National) Law of 16 May 1978; see, on this point, G. MOR, «Minoranze linguistiche», in S. Cassese (ed), *Guida per le autonomie locali*, 1979, 418-420, at 420.

51. This provision is not contained in the Statute of the Region Trentino-Alto Adige, but in a later Decree (of 26 July 1976, art. 1) implementing art. 100 of the Statute (which guarantees the right to use either Italian or German in dealing with the public administration).

52. Judgment of 18 October 1983, in *Le Regioni*, 1984, 238, at 255: «La parifica-

minate between Italian —and German-speakers (both are concerned about the condition of bilingualism) and aims on the contrary at guaranteeing an effective equal treatment.[53]

Ireland has been moving from the 'strong' to the 'weak' regime. Irish is no longer, what it used to be, a compulsory requirement for entrance or promotion in the civil service. Knowledge of Irish is only imposed when it is essential for the performance of the duties of a specific post. But proficiency in both languages remains of course a special credit in selection matters.[54] The system was considered as perfectly legitimate in a recent *dictum* of a Supreme Court judge:

«It is incontestable that under a Constitution which recognises Irish as the first official language (Article 8) and which empowers the State in its enactments to have due regard to differences of capacity, physical and moral, and of social function (Article 40.1), a law may provide that proficiency in Irish is relevant to the discharge of the duties of that office.»[55]

In contrast with such requirements of *linguistic competence*, there is also an entirely different criterion of linguistic differentiation in the access to civil service, namely *membership of a language group*. The prime objective of such a system of 'linguistic proportionality' is not so much that of enabling the administration to perform its linguistic tasks, but that of ensuring an *adequate representation of the language groups in public administration*. Thus, in the Belgian central administration, *knowledge* of French and Dutch is not required (except for the higher hierarchical levels); instead, one selects roughly equal numbers of *members* of the Dutch and French language group, who are then assigned, as far as possible, to unilingual services within the administration.[56] Similarly, the posts of civil servants in the province of *Bol-*

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zione delle lingue (...) esprime il riconoscimento (...) del dovere di ogni cittadino, quale che sia la sua madre lingua, di essere in grado di comunicare con tutti gli altri cittadini, quando è investito di funzioni pubbliche o è tenuto a prestare un servizio di pubblico interesse».

53. *Ibid.*: the condition of bilingualism «ha come destinatari non soltanto i cittadini (rientranti in quelle categorie e operanti nella provincia di Bolzano) di lingua madre italiana, ma anche quelli di lingua madre tedesca e, lungi dal violare, realizza il principio di eguaglianza». The Court does not articulate why precisely such a system makes equal treatment more effective: the reason presumably is that an administrative service in which only *part* of the personnel is bilingual might offer only a second-rate service to one of the language groups.

54. See S. O'CIOSAIN, «Bilingualism in Public Administration - The Case of Ireland», in *Revista de Llengua i Dret*, n. 2, 1983, 11-19, at 13.

55. Henchy J. in *The State (Cussen) v Brennan*, in *Irish Reports*, 1981, 181, at 194.

56. Arts. 43 of the Law on Language Use in Administrative Matters (coordinated version); see the analysis of this regime in C. WILWERTH, *op. cit.*, at 15 ff.

A different regime applies for the *local* administrations in the *Brussels* area. There, according to art. 21.7 of the same law, *half* of the newly recruited personnel must be chosen on a fifty-fifty basis among the French and Dutch language group (so that the

zano (South Tyrol), are attributed to members of the Italian, German and Ladin language groups in proportion to the numerical importance of those groups within the province.[57]

In Belgium, the group equality is only approximate; the proportion attributed to French —and Dutch-speakers is based on a political compromise, and does not correspond to the *effective* number of members of the two linguistic groups, which, by the way, can no longer be assessed because of the absence of a linguistic census.[58] In Bolzano, the distribution is far more objective, as the consistency of each of the three linguistic groups is reassessed in every decennial official census.[59] Yet, several problematical aspects are involved here. At the time the proportional system was adopted, the Italian group was grossly overrepresented in the civil service: 20 % of the Italian population was employed by the government, against only 6.2 % of the German-speakers.[60] Therefore, the adjustment of the existing situation to the new rule required a temporary over-recruitment of German-speakers, which

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Dutch-speakers have a guaranteed proportion of 25 %); in addition, all the highest levels of the hierarchy had to be staffed by equal numbers of French —and Dutch— speakers by the year 1973. On the partial antinomy between those two provisions, and the difficulties in implementing them, see C. WILWERTH, *op. cit.*, at 71-85.

57. The principle is stated, with regard to the State administrative offices within the province, by art. 89 of the Regional Statute: «Per la provincia di Bolzano sono istituiti ruoli del personale civile (...). I posti dei ruoli (...) sono riservati a cittadini appartenenti a ciascuno dei tre gruppi linguistici, in rapporto alla consistenza dei gruppi stessi, quale risulta dalle dichiarazioni di apartenenza rese nel censimento ufficiale della popolazione».

But the same principle also holds for the regional, provincial and local administration operating within the Bolzano province. See the details in A. PIZZORUSSO, *Il pluralismo linguistico tra Stato nazionale e autonomie regionali*, Pisa, Pacini editore, 1975, at 85 ff.

58. The last available official statistics on language use are from 1947. Since then, the language question has been omitted from the population census for political reasons: the Flemings feared that a number of persons (especially in the area around Brussels) might falsely declare to be French-speakers because of the greater social prestige attached to that language, and thereby provoke a modification of the linguistic regime of some localities at the linguistic 'border'. See M. G. LEVY, «Le recensement linguistique du 1 janvier 1960 ou naissance, vie et mort d'un recensement», in *Res Publica* 1959, 58 ff.

59. This does not mean that the census acts as a neutral and reliable indicator of the linguistic composition of the population. The most recent 1981 census allegedly gave a false picture, because concrete benefits depended on one's individual language declaration: as there are generally less German-speaking candidates for the civil service jobs attributed to their group, bilinguals or Italian-speakers might have been tempted to declare themselves as German-speakers in order to stand better chances for public employment. See P. CARROZZA, «La dichiarazione di appartenenza ai gruppi linguistici nella provincia di Bolzano», in *Le Nuove Leggi Civili Commentate* 1983, 1137-1157, at 1150-1151.

60. H. LAQUIEZE, «Italie: Statut d'autonomie et rapports culturels intercommunautaires dans la Région Trentino-Sud-Tirol», in Y. Mény & B. De Witte eds), *Centres et périphéries. Le partage du pouvoir*, Paris, Economica, 1983, 149-179, at 169.

was resented by the Italian group. As for the *Ladin* minority, its small dimension makes the application of the proportionality rule problematic. As they constitute only 4 % of the provincial population, a given public service must comprise at least 25 persons before a Ladin has the right to be selected; they tend also, and for the same reason, to be excluded from the highest level of the administrative hierarchy.[61] A Presidential Decree of 1981 has offered a partial remedy by allowing for the pooling of various public services in order to attain the 1/25 quota.[62]

The justification of such regimes of linguistic proportionality in terms of equal treatment is less evident than in the cases discussed before: if one considers the specific object of regulation to be: 'ensuring a functionally adequate civil service capable of dealing with the citizens in each of the official languages', then the system of proportional representation may appear discriminatory: in the particular case, the better candidate (who, among other qualities, speaks both official languages) may be passed over because he belongs to the 'wrong' language group.

The justification generally offered is that *group equality* takes precedence over *individual equality*. This is generally the line taken by *Belgian* legal writing and the Council of State, who has consistently upheld appointments in which there was a linguistic balancing.[63] Now, the concept of group equality, as such, is not constitutionally entrenched. Therefore, it cannot simply be used to overrule individual equality, which is the only form provided by the Constitutions of the countries concerned. The ultimate justification, therefore, has to be that *effective* individual equality requires such a recourse to group considerations. Two arguments could be advanced in support of this thesis.

The FIRST argument is that the proportional system makes the representation of the language groups independent of the existence of bilingual skills within the group. Indeed, where language COMPETENCE is the only requirement, the administration could be flooded with members of one of the language groups, who happens to count more bilinguals. Thus, in the Belgian case, requiring only proficiency in both official languages would almost certainly lead to a disproportionate selection of Dutch-speakers. The criterion of linguistic membership achieves the same purpose as that of linguistic competence —providing for the linguistic skills needed to operate a bilingual service; and the means employed for that purpose are not more discrimina-

61. See R. INGICCO, «Censimento e dichiarazione di appartenenza linguistica in Alto Adige - Sudtirol», in *Notiziario Giuridico Regionale*, 1982, 130-143, at 137.

62. Presidential Decree of 22 October 1981.

63. See e.g. the judgments n. 3372 of 5 May 1954, *Hoebanckx c. Etat belge*, in *Recueil des Arrts et Avis du Conseil d'Etat*, 1954, 444; and n. 12924-12926 of 26 April 1968, *Simoens, Mourlon-Beernaert, De Witte c. Office national d'allocations familiales pour travailleurs salariés*, in *Id.*, 1968, 294.

In writing, see e.g. L. INGBER, «A propos de l'égalité dans la jurisprudence belge», in *L'Egalité*, I, Bruxelles, Bruylant, 1971, 3-35, at 17-19.

tory, and perhaps less, as nobody is forced to be bilingual.[64] Note however that this argument may hold for the Belgian central administration, but not in the case of *Brussels* and *South Tyrol*, where language competence and linguistic membership are cumulative conditions.

In these cases, one can only use the second argument: that the equal treatment of the members of the various linguistic groups implies not only a right to address themselves to the administration in their language, but also a guarantee that their interests will be impartially considered through a fair representation of members of their group within the administration.[65] This presupposes a situation of ethnolinguistic animosity, in which one can fear an invidious treatment, by the officials, of members of the other language group. The same argument that an adequate representation of minority groups in public bodies may be necessary for guaranteeing an equal treatment of their individual members, has been used in a number of *jury selection* cases in the United States.[66] One should, however, not lighly assume the existence of such an inter-group hostility; one might well wonder whether such a 'corporate' selection system is really warranted in the ethno-linguistic context of the two regions of Brussels and South Tyrol.

64. The indirect link between linguistic membership and the objective needs of the service is articulated by art. 43.3 of the Belgian Law: «Le Roi détermine pour chaque service central le nombre des emplois à attribuer au cadre francais et au cadre néerlandais, en tenant compte, à tous les degrés de la hiérarchie, de l'importance que représentent respectivement pour chaque service de la région de langue française et la région de langue néerlandaise».

A similar practice —but without any hard rules— seems to be followed in the Swiss central administration. See e.g. P. SCHAEPPI, *Der Schutz sprachlicher und konfessionneller Minderheiten im Recht von Bund und Kantonen,* Zuerich, Schulthess, 1971, at 71.

65. A. PIZZORUSSO, *Il pluralismo linguistico..., op. cit.*, at 84-85. In Belgium, this type of reasoning is not only used to justify the proportional recruitment of civil servants on the basis of language groups but also on the basis of *political opinion*. The Council of State has consistently held that a proportional recruitment of adherents to the various political 'ideologies' gives better guarantees of administrative impartiality than a system based on a forced belief in the neutrality of every single civil servant. In my opinion, the objective reasons which might justify the linguistic criterion do not exist in the case of the 'ideological' criterion (one is necessarily a member of a language group, but one should not be forced to profess a political opinion in order to gain access to public administration). See, for an analysis and mild critique of the regime, J. DE MEYER, «Levensbeschouwelijk en politiek pluralisme in openbare diensten», in *Miscellanea W. J. Ganshof van der Meersch*, Bruxelles, Bruylant, 1972, Vol. III, 79-94.

66. In *Hernandez v Texas* (347 U.S. 475 (1954)), the Supreme Court held that «it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury (...) from which all persons of his race or color have because of that race been excluded by the State».

In the more recent case *Castaneda v Partida* (430 U.S. 482 (1977), the Supreme Court extended its holding to substantial underrepresentation of such minority groups that constitute a recognizable, distinct class (as the Mexican-Americans do). A statistical showing that their group is underrepresented in the jury amounts to a presumption of a discriminatory purpose of the selectors (*Id.*, at 494).

The use of language qualifications in the sector of *private* employment does NOT automatically raise the constitutional issue of equality. Indeed, the leading constitutional doctrine in most countries holds that the principle of equality has no direct HORIZONTAL effect: it only constrains acts of the public authorities, but not also private relations.[67] Equal treatment standards can only be made to bear on the private sector in an INDIRECT way, through the intermediary of a legislative act. Equal treatment can thus be statutorily imposed in two different ways: *a*) through a general clause of 'public order' or 'good faith' governing contractual relationships, which leaves to the courts the possibility to enforce basic equal treatment standards in contractual disputes; or *b*) through legislative acts specifically aimed at combatting discrimination. There have, recently, been a spate of such acts imposing respect of non-discrimination principles by private persons, and particularly private employers. However, they do not contain a GENERAL principle of equality, but restrict themselves to certain selected grounds of discrimination, such as race or sex. A random sample of such laws includes: Title VII of the *Civil Rights Act* of 1964 in the United States, which is a comprehensive prohibition of private acts of employment discrimination,[68] the Race and Sex Discrimination Acts in the United Kingdom,[69] arts. 15 and 16 of the *Statuto dei Lavoratori* in Italy,[70] art. 611a of the German Civil Code imposing the equal treatment of men and women in labour relations,[71] the Dutch Acts making racial discrimination a criminal offence,[72] art. 416.3 of the French *Code Pé-*

67. Denying the existence of a direct horizontal effect of fundamental rights, and of the right to equality in particular: T. KOOPMANS, «Comparative Analysis and Evaluation», in Koopmans (ed), *The Constitutional Protection of Equality*, Leiden, Sijthoff, 1975, at 227 ff.; K. HESSE, *Grundzuege des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg, C. F. Mueller, 1982, 13th ed, at 139; E. KLEIN, *op. cit.*, at 91-92; Italian Court of Cassation, judgment of 11 November 1976, in *Il Foro Italiano*, 1977, I, 403-404; A. S. AGRO, *op. cit.*, at 130; E. ALONSO GARCÍA, «El principio de igualdad del Artículo 14 de la Constitución española», in *Revista de Administración Pública*, n. 100-102, 1983, 21-92, at 86 ff.

For comparative discussions of this subject, see M. J. HORAN, «Contemporary Constitutionalism and Legal Relationships between Individuals», in *International and Comparative Law Quarterly*, 1976, 848-867; and the contributions in *René Cassin Amicorum Discipulorumque Liber III, La protection des droits de l'homme dans les rapports entre personnes privées*, Paris, Pédone, 1971.

68. For a recent, comprehensive presentation in legal writing, see M. CHAMALLAS, «Evolving Conceptions of Equality under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle», in *UCLA Law Review*, 1983, 305-383.

69. See L. LUSTGARTEN, *Legal Control of Racial Discrimination*, London, Macmillan, 1980; M. J. BELOFF, *Sex Discrimination - the New Law*, London, Butterworths, 1976.

70. See L. ANGIELLO, *La parità di trattamento nei rapporti di lavoro*, Milano, Giuffrè, 1979; R. PANZARINI, «Gli atti discriminatori nel rapporto di lavoro», in *Il Diritto del Lavoro*, 1980, 8-41.

71. See e.g. R. A. EICH, «Das Gesetz ueber die Gleichbehandlung von Maennern und Frauen am Arbeitsplatz», in *Neue Juristische Wochenschrift*, 1980, 2331 ff.

72. See e.g. the analysis by J. HOENS, «De strafrechtelijke bestrijding van rassendiscriminatie», in *Ars Aequi*, 1981, 547-557.

nal punishing discrimination in job recruitment and in labour relations, if based on gender, family situation, ethnic, national, racial or religious characteristics.[73]

Language, AS SUCH, is nowhere among the protected grounds. Yet, language use correlates rather closely to other characteristics such as race, ethnic or national origin, and may therefore be employed as a substitute for one of the forbidden grounds. This concept of *indirect* discrimination is widely used in equality litigation in the United States,[74] but only slowly penetrates in Europe.[75]

In addition, a ban on linguistic discrimination in private relations is contained in INTERNATIONAL instruments, which have, in certain countries, the status of 'higher law'.[76]

If *employment* (whether public or private) is certainly the main field in which language discriminations may occur, there are also other domains where the relevance of linguistic differentiations has been challenged. In the *United States*, the RIGHT TO VOTE has been made dependent in many States on English literacy tests. Such tests were «originally formulated as an indirect but effective means of achieving discrimination on the basis of race, creed or color»,[77] but had nevertheless been upheld by the Supreme Court in the *Lassiter* case of 1959.[78] The underlying rationale seems to be that lan-

73. See J. COSTA-LASCOUX, «La loi du 1 juillet 1972 et la protection pénale des immigrés contre la discrimination raciale», in *Droit Social*, 1976, mai, 181-187.

74. The Civil Rights Act, although primarily intended for the protection of racial minorities and women, also forbids 'national origin' discrimination. The term was defined by the Supreme Court as referring «to the country where a person was born or, more broadly, the country from which his or her ancestors came» (*Espinoza v Farah Mfg. Co*, 414 U.S. 86 (1973), at 88). Thus, a bias towards English, in situations where it is not required by the task to be performed, can often be a discrimination based on national origin; for an exhaustive analysis of case law on this point, see NOTE, «Language Discrimination under Title VII: The Silent Right of National Origin Discrimination», in *John Marshall Law Review*, 1982, 667-691, at 679 ff. It should be noted that in Title VII cases, in contrast with constitutional equality litigation, no direct proof of discriminatory intent has to be made; if the plaintiff can show that a 'neutral' practice has a disparate impact on one of the protected groups, there is a prima facie case of indirect discrimination, which then has to be balanced against the 'business necessity' of the practice (*Griggs v Duke Power Co.*, 401 U.S. 424 (1971)). See, on this latter concept, COMMENT, «The Business Necessity Defense to Disparats Impact Liability under Title VII», in *University of Chicago Law Review*, 1979, 911-934.

75. In legal writing, see e.g. L. LUSTGARTEN, *op. cit.*,; see also the case law of the European Court of Justice, *infra*, p. 610.

76. Article 119 of the *E.E.C. Treaty guarantees* equal pay for men and women; art. 2.1 (d) of the 1965 *Convention against Racial Discrimination* holds that «each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization».

77. A. H. LEIBOWITZ, «English Literacy: Legal Sanction for Discrimination», in *Notre Dame Lawyer*, 1969, 7-67, at 7.

78. *Lassiter v Northampton County (North Carolina) Board of Elections*, 360 U.S. 45

guage competence is rationally related to voting, because voting requires an adequate information of issues and standpoints of the candidates, which persons not conversant in the national language cannot possess. Some doubts have been cast on this reasoning in a *dictum* of a later Supreme Court case, *Katzenbach v Morgan*,[79] and it was completely rejected by the California Supreme Court decision of 1970, *Castro v State of California*; here, the court held that conditioning the right to vote upon an ability to read the English language was, as applied to persons literate in Spanish but not in English, unconstitutional as violative of the equal protection clause; the Court argued that «because of the availability of sources for translation, the Spanish speaker is in a position to be aware of political issues, and thus capable of exercising the franchise in as competent a manner as any citizen».[80]

A similar link between language skills and the granting of a certain franchise or benefit is made in some countries, who make the knowledge of the national language a prerequisite for NATURALISATION. Such conditions exist in many Third World, but also in some Western countries. In the *United Strates*, section 304 of the Nationality Act holds that

«No person (...) shall be naturalized as a citizen of the United States upon his own petition who cannot demonstrate

(1) an understanding of the English language, including an ability to read, write and speak words in ordinary usage in the English language (...).»

Article 69 of the *Code de la Nationalité française* also holds that «no one can be naturalised if he does not justify his assimilation to the French com-

(1959). In this case, the Court considered the relevance of literacy tests in general, but entirely neglected the question whether *English* literacy tests could be discriminatory against the country's linguistic minorities (in the concrete case, only blacks were concerned).

79. *Katzenbach v Morgan*, 384 U.S. 641 (1966). In this case, the Supreme Court was asked to rule on the constitutionality of an *exemption* from the English literacy test, which had been federally imposed in favour of the Puertoricans, and was not asked to decide whether such tests were constitutional in all remaining cases. Nevertheless, Brennan J. wrote some interesting dicta in his opinion for the Court:

«Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary and appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as an ability to read English for those to whom Spanish-language newspapers and Spanish-language radio ante television programs are available to inform them of election issues and governmental affairs».

80. *Castro v State of California*, 85 California Reporter 20 (1970).

That English literacy tests are now clearly illegitimate is further proven by the federal provisions on bilingual elections: far from requiring English literacy, the electoral procedure is now specially adapted to the needs of the non-English-speaking... (see *infra*, p. 109).

munity, notably by a sufficient knowledge, depending on his condition, of the French language».[81]

It is true that language skills are generally a fair indication of a person's integration in his country of residence. But as naturalisation decisions normally leave already a considerable margin of discretion to the legislator or administration (depending on the countries), one does not see the need for expressly enacting such linguistic requirements.

A final domain that could be mentioned is that of POSITIVE STATE INTERVENTIONS in the field of fundamental rights. 'Negative' rights like freedom of expression, freedom of religion, freedom of education, and many others, do not generally impose a positive contribution from the side of the public authorities. If, however, the state chooses to intervene in orde to make those rights more meaningful, it must do so in a non-discriminatory manner. Otherwise, as has correctly been said, the government «could buy unanimous support for orthodox opinions»;[82] by stimulating, financially or otherwise, one language group, it could jeopardise the rights of other groups. One example of a discrimination in this field is the Dutch system of direct aids to the press. Temporary financial aids can be granted by the Government to press organs in difficulty, but only to those written in the Dutch language.[83] In Belgium, aids to the press are divided along linguistic lines, and such a proportional system raises the same issues as in access to public administration.[84]

C) PLURALISTIC EQUALITY

According to many authors, the principle of equality is not very useful for language minorities. What such groups need are specific, 'positive' rights, which go beyond the nondiscriminatory application of rights attributed to all.[85] This, however, is a reductionist view of equality. As Koopmans notes,

81. Law n. 73.42 of 9 January 1973, art. 69. The knowledge of French is to be verified by an administrative body (see implementing Decree of 10 July 1973, art. 31).

82. J. H. GARVEY, «Freedom and Equality in the Religion Clauses», in *The Supreme Court Review*, 1981, 193-221, at 209, note 67.

83. See the *Staatscourant* of 3 October 1974, and of 12 May 1975. For a description of the aids system, see A VAN DER FELTZ & R. ZELDENRUST, «Een liaison met gemengde gevoelens», in *Ars Aequi*, 1983, 20-34.

84. See the Royal Decree of 14 November 1978, art. 1: of the total fund, 6 % goes to the national press agency Belga, 4 % to the German language dailies (of which there is only one, 'Grenz Echo'), and 45 % to both the French —and Dutch— language dailies. Thereby, the French-speaking press gets more than its share of the total population, but less than its share in newspaper circulation, while the German minority is advantaged on both scores. On this regime, see F. DELPEREE, «Present et subventions», in *Mélanges Fernand Dehousse*, Paris, F. Nathan & Bruxelles, Labor, 1979, vol. 1, 183-192.

85. The principle of non-discrimination, so the argument goes, is practically worthless, because it does not meet the central demand of linguistic minorities: to be protected against assimilation by the dominant language group.

equality is «the freedom to be different without being disfavoured by the law for that reason».[86] Now, in the case of linguistic diversity, the right to be different is not guaranteed by systematic *identical* treatment, but by a treatment *by analogy*.[87] If, for instance, only one medium of instruction is used in a country's educational system, then pupils with a different mother tongue are clearly disadvantaged; and the same holds in all other domains of public life, ranging from broadcasting to public administration. What linguistic minorities claim are special measures, whose purpose is not to grant them a *preferential* treatment, but to grant them *what the majority group already has*, the normal use of its language throughout public life. Therefore, special measures are not equivalent, as is so often said, with 'favouritism' or 'affirmative. action', which must be considered as still another type of equality. On the other hand, it is also clear that ensuring a PERFECT 'pluralistic' equality along those lines would lay an intolerable financial burden on

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See e.g. A. DEMICHEL, «L'évolution de la protection des minorités depuis 1945», in *Revue Générale de Droit International Public*, 1960, 22-51, at 35; F. MUENCH, «Volksgruppenrecht und Menschenrechte», in *System eines internationalen Volksgruppenrechts*, Wien, Wilh. Braumueller, Vol. I, 1970, 55-104, at 102: «Insbesondere ist der Gleichheitssatz, so wie er heute verstanden wird, noch nicht geeignet, ein Volksgruppenrecht dort einzufuehren, wo es nicht besteht. Gewiss ist er ein wesentlicher Schutz fuer den Angehoerigen der Volksgruppen, weil er eine Diskriminierung verbietet; aber dessen besonderen Belangen als Volksgruppenanghorigen genuegt er nicht».

See also the discussion *supra*, p. 43-44.

86. T. KOOPMANS, «Comparative Analysis and Evaluation», in Koopmans (ed), *The Constitutional Protection of Equality*, Leiden, Sijthoff, 1975, 213-255 at 249.

87. A. MANDELSTAM, «La protection des minorités», in *Recueil des Cours*, 1923, 367-517, at 418: «Dans un certain nombre de cas, l'égalité accordée aux membres des minorités se manifeste non par l'octroi de droits *identiques* à ceux de la majorité, mais par la concession de droits *analogues* - tel le droit de professer une religion ou celui de se servir d'une langue, distinctes de celles de la majorité». See also CLAYDON, «Internationally Uprooted People and the Transnational Protection fo Minority Cultures», in *New York Law Review*, 1978, 125-151, at 135: «Equality is effectuated and not undermined by protecting minority cultures, for what is involved is simple equality in the cultural sphere».

See also the *Albanian Minority Schools* judgment of the Permanent Court of International Justice in which the Court distinguishes two aspects in the notion of equality as used in the context of the minority treaties:

«The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority» (*Minority Schools in Albania*, Advisory Opinion, P.C.I.J. (1935), Series A/B, No. 64, at 17).

the state. Yet, this does not mean that measures providing for the 'public' use of minority languages are *entirely* within the discretion of the legislator or the executive. In several countries, the constitutional right to equality has been read to imply some duty of linguistic pluralism.

Admittedly, the task of a constitutional court to impose differentiations (as regards the regime of language use) where the legislator has not already provided them, is not simple. Like in their review of legislative discriminations, the courts will want to recur to some principled method of review, and above all try to find a guideline elsewhere in the Constitution, ordering such linguistic differentiations. And indeed, a fairly neat dichotomy can be made between those countries (Italy, Spain, Austria, Finland) where the Constitution itself specifies the need for pluralistic equality in linguistic matters, and the other countries where equality is stated in general terms without reference to linguistic diversity. In the latter case, judges have been very reluctant to impose, on their own initiative, any obligation to take special measures for linguistic minorities.

1. *Italy*

In Italy, the fact that the public authorities are under a constitutional duty to take positive action in favour of the country's linguistic minorities is not open to doubt. *Article 6* of the Constitution provides that «the Republic safeguards the linguistic minorities with special measures».[88] What might appear doubtful, on the theoretical level, is whether this article can be considered as an application of the general equality principle, or rather as a specific language right of an idiosyncratic nature. After all, equality is guaranteed by a separate provision, article 3, of the Italian Constitution. Therefore, a number of authors used to be of the opinion that art. 6 is a *derogation* to article 3: while the latter generally prohibits the making of differentiations (and expressly adds 'language' as a 'forbidden' ground), article 6 allows for derogations in the special case of linguistic *minorities*.[89] This thesis is illogic. If language is specially mentioned in article 3, it is presumably with the intention to protect linguistic *minorities* (the country's dominant language group does not need such a special guarantee); but then, the Constitution would at one place (art. 3) *prohibit* differentiations in order to protect linguistic minorities, and elsewhere (art. 6) *impose* differentiations with the same purpose.

In fact, this doctrine has long been overruled by constitutional case law. As we saw earlier on,[90] the Italian Constitutional Court has analysed arti-

88. «La Repubblica tutela le minoranze linguistiche con apposite misure».

89. C. ESPOSITO, «Eguaglianza e giustizia nell'art. 3 della costituzione», in *La Costituzione italiana. Saggi*, Padova, CEDAM, 1954, at 49; P. BISCARETTI DI RUFFIA, «Uguaglianza (principio di)», in *Novissimo Digesto Italiano*, XIX, Torino, UTET, 1973, 1088-1092, at 1091.

90. See above, the note 81 at p. 64.

cle 3.1 as an obligation to treat equal things equally and different things differently, and this holds for the specially listed grounds (language, sex, race, etc.) as well as for 'ordinary' grounds. This interpretation is further confirmed by the *second* sentence of article 3 which imposes on all public authorities the duty «to remove obstacles of a social and economic nature, which, by limiting in fact the freedom and equality of the citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the Country»,[91] and this can only be done by making differentiations.[92] Now, not being able to use one's language in public life is certainly an 'obstacle' limiting one's «full development and effective participation». Article 6, therefore, does nothing else than applying the general rule of equality of art. 3.1, and especially the rule of 'substantive equality' of art. 3.2, to the case of language diversity. The fact that this is done through a separate article of the Constitution is not exceptional: the Constitution contains several other specifications of substantive equality.[93] In sum, article 6 is not a 'specific' right derogating from the equality principle, but a particularisation and implementation of this general principle.[94]

What, now, is the precise content of article 6? As to its scope *ratione personae*, the preparatory work of the Constitution clearly shows that it was specifically meant to cover only the minority language groups at the State border: in the mind of its proponents, the article was to make clear that Italy had SPONTANEOUSLY decided to undertake the protection of its frontier minorities, and not just to comply with any INTERNATIONAL pressure (Val d'Aosta, Trieste) or legal obligation (the 1946 de Gasperi-Gruber Agreement on South Tyrol).[95] Of course, it was precisely the international pressure, and not so much the fate of the minorities themselves, that put the matter on the constitutional agenda. It is quite plausible anyway, that none of the framers of the Constitution ever thought of the country's other minorities in enacting article 6. Whatever the by-thoughts or objectives of the Constituent Assembly in 1947, the fact remains that article 6 protects linguistic minorities *in*

91. My translation.

92. «L'art. 3, 2. comma, e le sue specificazioni (...) pongono come scopo dell'attività dei pubblici poteri, non soltanto l'abolizione delle discriminazioni sfavorevoli, ma anche la realizzazione in positivo di interventi diretti a correggere le diseguaglianze di fatto derivanti dalle ingiustizie del passato o anche da cause puramente naturali» (A. PIZZORUSSO, *Lezioni di diritto costituzionale*, Roma, Edicioni de 'Il Foro Italiano', 1981 (2nd ed), at 154).

To the extent that the first sentence of art. 3 *also* implies a need to treat different things differentily, there is a certain overlapping between both sentences; see B. CARAVITA, «L'art. 3, comma 2, nella giurisprudenza della Corte costituzionale», in *Giurisprudenza costituzionale*, 1983, 2359-2383, at 2367 ff.

93. See the list of those specifications in A. PIZZORUSSO, *Lezioni...*, op. cit., at 162.

94. See also the demonstration of this thesis in A. PIZZORUSSO, *Il pluralismo linguistico...*, op. cit., at 36-42.

95. A. PIZZORUSSO, *op. ult. cit.*, at 28.

general terms, without enumerating single groups. And as *all* linguistic minorities face the same handicap of speaking another than the country's official language, art. 6 must be considered to be applicable to all groups on Italian territory characterised by the use of a language that is not that of the Italian State, whatever their dimension or location.[96]

The first hurdle, then, in the application of art. 6, is the existence of a separate *language*. While the protection of local dialects may be commendable cultural policy, it cannot be considered to be constitutionally imposed, as this would stretch article 6 too far.[97] While no definitional problems arise in the case of minority idioms that are at the same time the official language of a foreign state (German, French, Slovene, Albanian, Greek), or have explicitly been called a language in legislative acts (Ladin), more controversy surronds the nature of two idioms of relatively wide currency, *Friulian* and *Sardinian*. Both were considered until recently in Italian nationalist circles and by some linguist as mere dialects belonging to the Italian language cluster. At present, linguists tend to agree that Friulian is a separate language, or a separate branch of the Rhetoromanic language of which another branch (Ladin) is legally recognised, but certainly not an Italian dialect.[98] Even less doubt is possible with Sardinian, that has very distinctive features. The problem, here, is whether a common standard 'Sardinian' can be discerned amongst the various regional varieties.[99]

Once the linguistic minorities have been defined, there remains a second, and more difficult hurdle: what are those «special measures» to be taken on their behalf? The abstract formulation of the article makes it difficult to draw any well-defined entitlements from it. For a long time, the uncontested view has been that the legislator is granted a large measure of discretion in implementing the constitutional mandate, the court's role being only that of *preventing* the application of a given, minority-hostile regulation, but not that of *imposing* a specific course of action.

One aspect of this discretion was that legislative implementation could take the form either of general protective norms applying to all minorities, or of specific treatment of the single groups. The national parliament and

96. M. Udina, «Sull'attuazione dell'art. 6 della Costituzione per la tutela delle minoranze linguistiche», in *Giurisprudenza Costituzionale*, 1974, 3602-3613, at 3609; A. Pizzorusso, «Problemi giuridici dell'uso delle lingue in Italia (con particolare riferimento alla situazione delle minoranze linguistiche non riconosciute)», in *Le Regioni*, 1977, 1031-1039, at 1035; S. Salvi, *Le lingue tagliate*, Milano, Rizzoli, 1975, at 9 ff.; A. Pubusa, «Considerazioni sulla tutela della lingua in Sardegna», in *Rivista Trimestrale di Diritto Pubblico*, 1983, 552-599, at 570-571.

97. A. Pizzorusso, *loc. ult. cit.*

98. See the discussion in G. Francescato, «A Sociolinguistic Survey of Friulian as a 'Minor Language'», in *Linguistics* 1976, 97-121, at 101 ff.; D. Bonamore, «Autonomia, lingua e diritti scolastici per il Friuli e il Friulano», in *Rivista Giuridica della Scuola*, 1982, 833-847, at 837 ff.

99. A. Pubusa, *op. cit.*, at 571 (note 34) and 578 ff.; see also L. Sole, «La Sardegna come minoranza etnico-linguistica», in *Città e Regione*, 1980, n. 3, 132-148, at 143 ff.

government have taken the latter direction, but without following it to its last consequences; only four minorities (German, French, Ladin and Slovene) currently enjoy (a widely varying degree of) official protection, and the others have been 'forgotten' by the central authorities. More even, initiatives taken at the *regional* level for the protection of some of those groups have, until recently, been systematically thwarted by the national government.[100] For instance, a Law enacted by the southern region of Molise in favour of its ethno-linguistic minorities (Albanians and Croats)[101] was immediately blocked by the central government who argued that Molise had intruded upon the State's jurisdiction on the following three points: language legislation, education (the Act provided for courses in minority language and culture), and external relations (the Act adumbrated the possibility of cultural contacts between the minorities and their cultural kin-state).[102] On the other hand, two northern Regions (Piedmont and Veneto) managed to carry through their minority enactments, but at the price of setting themselves more modest targets. No substantive action by the regional authorities is contemplated in these Laws, but only the provision of a (modest) annual subvention for private activities promoting minority culture.[103] Sardinia has been more cautious even. Its regional council did not adopt any measure itself, but voted a short (but ambitious) text of two articles «recognising the legal equality of the Sardinian and the Italian language and introducing bilingualism in Sardinia», which it submitted to the *national* Parliament as a 'Bill on regio-

100. The central government traditionally interpreted art. 6 as making of the 'protection of linguistic minorities' a separate policy matter which, in the absence of any explicit attribution to the Regions, is reserved for the central State. This view is rejected by most authors, who conclude from the location of article 6 (among the general principles of the Constitution) and from the use of the word 'Republic' (considered as embracing both the State and the Regions), that the directive to protect linguistic minorities is addressed to *all* public authorities within their respective sphrere of competences (see e.g. A. PIZZORUSSO, «Tutela delle minoranze linguistiche e competenza legislativa regionale», in *Rivista trimestrale di diritto pubblico* 1974, 1093-1102).

For an analysis of the role which regional autonomy has effectively played in the protection of Italy's minority cultures, see A. PIZZORUSSO, «L'activité des régions italiennes pour le développement et la défense des cultures locales», in Y. Mény & B. De Witte (eds), *Dix ans de régionalisation en Europe. Bilan et perspectives 1970-1980*, Paris, Cujas, 1982, 243-263.

101. For a general picture of the smaller linguistic minorities in South Italy, see J. U. CLAU:: & B. DE WITTE, «Linguistic Minorities in Southern Italiy: A. Periphery far from the Border», in B. De Marchi & A. M. Boileau (eds), *Boundaries and Minorities in Western Europe*, Milano, Franco Angeli Editore, 1982, 229-244.

102. See R. INGICCO, «Minoranze linguistiche: due iniziative regionali rinviate dal governo», in *Le Regioni*, 1977, 971-976.

103. Veneto Regional Laws of 1 August 1974, n. 40, and 18 May 1979, n. 38; Piedmont Regional Law of 20 June 1979, n. 30. See the comments by R. INGICCO, «La legge regionale piemontese sulla tutela del patrimonio linguistico e culturale», in *Le Regioni*, 1980, 7-10; and P. CARROZZA, «Lingue (uso delle)», in *Novissimo Digesto Italiano*, Appendice IV, Torino, UTET, 1983, 976-988, at 987.

nal initiative';[104] no further action has followed since.[105] Finally, a Sicilian law of 1981 for the protection of the region's linguistic minorities [106] has been referred by the Government to the Constitutional Court for annulation. Yet, in view of the changing attitude of the Court on the question of legislative jurisdiction to implement art. 6,[107] the verdict could now well be favourable to the Sicilian region, which would at the same time enable all other regions to enter the field of minority protection.

As was said above, initiatives by the central authorities have been limited hitherto to only four minorities. Even those groups have not been made the object of a global treatment but rather of territorially differentiated regimes, leaving out certain segments of each minority. While the bulk of the French and German groups are protected through the special regimes applying to Val d'Aosta and South Tyrol,[108] the same is not true for the other two. The *Ladins* are compactly settled in a relatively small area of the Dolomites, the valleys surrounding the Sella mountain. Unfortunately, this traditional area is administratively split up over three provinces. Those living in the province of Belluno are not protected at all, with the exception of the rudimentary Veneto regional law mentioned above; those living in Trento have been granted some rights, e.g. in the field of education, but less than their kin-group living in the Val Gardena and Val Badia, in the province of Bolzano, who participate in the benefits of the elaborate protection regime established for the German majority of that province.[109]

As for the *Slovene* group at the north-eastern border, it has also been split up in three differently treated segments. Those of the Udine province have been entirely neglected, those of Gorizia have been granted the right to mother tongue education,[110] and only the Slovenes living in the province of

104. The power for the Regional Councils to submit Bills of national statutes to the Parliament is provided in art. 121 of the Constitution.

105. For an analysis of the Sardinian draft, see A. PUBUSA, *op. cit.* On the scarce possibilities of enactment of the Bill, also due to internal contrasts within Sardinian political circles, see A. PUBUSA, *op. cit.*, at 568 ff., and P. CARROZZA, «Minoranze linguistiche», in *Annuario delle autonomie locali*, 1982, 391-401, at 396.

106. Sicilian Regional Law of 6 May 1981, n. 85.

107. See the recent judgment of 18 October 1983 (concerning a law enacted by the Province of Bolzano), in *Le Regioni*, 1984, 238 (with note by A. PIZZORUSSO).

108. Isolated communities speaking German dialects are to be found in the provinces of Belluno, Udine, Verona, Vicenza, Novara, Vercelli, and Aosta (see T. DE MAURO, «Note sulle minoranze linguistiche e nazionali in Italia», in *Il Mulino*, 1979, 349-367, at 356-357); a limited number of Franco-Provençal speakers live in Piedmontese valleys neighbouring to the Aosta Valley (*Id.*, at 361).

109. For an overview of the legal protection of the Ladin minority, see A. PIZZORUSSO, *Il pluralismo linguistico*, op. cit., at 215-228; E. PALICI DI SUNI, «La minoranza linguistica ladina in Trentino-Alto Adige», in *Le Regioni*, 1983, 527-538.

110. An Act of 1961 established schools in which Slovene is the exclusive medium of instruction at all grades; it codified the existing situation which had been initiated after the war by the Allied Military Government in the two provinces of Trieste and Gorizia which it controlled.

Trieste have more encompassing rights granted by the London Memorandum of 1954 and confirmed by the Treaty of Osimo in 1975,[111] including full equality in law and in fact (art. 2 of the Memorandum), and the right to use their language in official matters (art. 5). Yet, legislative implementing measures of those international agreements have been limited to the field of public education.[112] Other, more fragmentary measures, exist only on an administrative, and therefore rather precarious, level.[113] Both the existence of an international obligation and a recent judgment of the Constitutional Court —to be discussed below— seem to imply a need for rapid legislative action on behalf of the Slovenes.[114]

In contrast, the French language group in Val d'Aosta and German language group in South Tyrol (province of Bolzano) have been granted roughly speaking equal rigts to those of the Italian group. The basic implementing measure of art. 6 is, in both cases, the Regional Statute, which is an Act adopted by the national Parliament but with the status of 'higher law'.[115] For all practical purposes, the more detailed rights laid down in those Statutes have superseded the generic provision of art. 6.

In Val d'Aosta, an equal status is recognised to the French and Italian languages by art. 38 of the Statute. As a consequence, the citizens have a right to use either of those languages in the public sector.[116] As all civil servants must be bilingual,[117] and all (autochthonous) citizens are bilingual as well (thanks to the bilingual educational system), no significant problems exist in this Region as to the practical implementation of this right.

In South Tyrol, the picture is more complex, as the German, Italian and Ladin language groups are three neatly separated communities. The need for special measures protecting the German group was already indicated in the 'de Gasperi-Gruber Agreement' signed on 5 September 1946 between Austria and Italy. Its art. 1 states that:

For a detailed analysis of the legal regime of these schools, see D. BONAMORE, *Disciplina giuridica delle istituzioni scolastiche a Trieste e Gorizia*, Milano, Giuffrè, 1979.

111. On the interplay between those two instruments, see S. BARTOLE, «Tutela della minoranza linguistica slovena ed esecuzione del Trattato di Osimo», in *Rivista di diritto internazionale* 1977, 507-525.

112. See the Act mentioned in note 110, above.

113. For a general survey of the present regime of protection of the Slovene minority, see S. BARTOLE, «La tutela del gruppo linguistico sloveno tra legislazione e amministrazione», in *Città e Regione*, 1980, n. 3, 58-71.

114. Various bills for the global protection of the Slovene language group have been pending for years before Parliament.

115. In contrast with the fifteen so-called 'ordinary Regions', the five 'special statute Regions' (Trentino-Alto-Adige, South Tyrol, Sicily, Sardinia, Friuli-Venezia-Giulia) have had their Statute adopted, not by an ordinary law of the national parliament but by a 'constitutional law' (ranking immediately beneath the Constitutions itself).

116. A. PIZZORUSSO, *Il pluralismo linguistico...*, op. cit., at 278.

117. See above, p. 79.

«German speaking inhabitants of the Bolzano Province and of the neighbouring bilingual townships of the Trento Province will be assured a complete equality of rights with the Italian-speaking inhabitants within the framework of special provisions to safe-guard the ethnical character and the cultural and economic development of the German-speaking element (...).»

Yet, this international agreement could not have a decisive impact on the Italian legal order as it was incorporated by means of an ordinary legislative act.[118] The Regional Statute of 1948, which implemented the Agreement, *did* have higher law rank, but was considered as totally unsatisfactory by the German minority and its foreign protector. After years of protracted conflict, a new Statute was enacted in the early seventies.[119] It recognises the full equality of the German and Italian language: according to article 2, «within the region the equality of rights of the citizens are recognised, whichever language group they belong to, and their respective ethnic and cultural characteristics are protected».[120] This general statement, echoing the 1946 Agreement and specifying article 6 of the Constitution, applies to *all* language groups of the Region; but while the German inhabitants of the province of Bolzano have indeed been granted a full right to use their language in all areas of public life,[121] the Ladins have only been granted limited rights, above all in the field of education.[122]

118. Therefore, it did not have supremacy over subsequent national legislation. See the Constitutional Court judgment of 18 May 1960, rejecting a challenge based on the terms of the Agreement against national legislation applying to the Region (in *Giurisprudenza Costituzionale*, 1960, 537, at 555); see also the case note by C. MORTATI, «Influenza delle convenzioni internazionali in ordine alla tutela dell'uso della lingua tedesca nella Provinzia di Bolzano», *Ibid.*; and A. PIZZORUSSO, «Aspetti dell'efficacia giuridica dell'accordo Degasperi-Gruber», in *A 30 anni della firma dei Patti Degasperi-Gruber, 5 sett. 1946. L'accordo di Parigi*, Trento, Regione Trentino Alto Adige, 1976, 137-148.

119. The present Statute is contained in the Presidential Decree of 31 August 1972 ('Testo unico delle leggi costituzionali concernenti lo statuto speciale per il Trentino-Alto Adige'), coordinating the original Statute with the amendments enacted by the Constitutional Law of 10 November 1971, n. 1.

120. «Nella regione è riconosciuta parità di diritti ai cittadini, qualunque sia il gruppo linguistico al quale appartengono, e sono salveguardate le rispettive caratteristiche etniche e culturali».

121. However, the rights granted in the new Statute have only very slowly been implemented. Thus, the right to use German before the courts of the Region, guaranteed by art. 100 of the Statute, has still to be implemented in practice (a draft regulation has however been recently adopted; see a first (critical) comment by A. PASQUALI, «Uso della lingua davanti agli organi giudiziari nella provincia di Bolzano», in *Il Foro Italiano*, 1984, V. 379-382).

122. Art. 19.2 of the Special Statute guarantees the teaching *in Ladin* in nursery schools, and the teaching *of Ladin* in the primary schools of the province of Bolzano.

In addition, one should mention art. 102 of the Statute: «Le popolazioni ladine hanno diritto alla valorizzazione delle proprie iniziative ed attività culturali, di stampa e ricreative, nonché al rispetto della toponomastica e delle tradizioni delle popolazioni stesse (...)».

So far the overview of the variety of linguistic regimes applying to Italy's minorities. One cannot escape the impression that, by leaving the legislator free to pick and choose among the various minorities, one tends to make the constitutional mandate of article 6 subservient to pedestrian policy considerations. Many authors have argued that this has been the case in Italy. Not only, it is said, have only those minorities been protected on whose behalf there was some international pressure, but even among those, a clear gradation was made according to the degree of their centripetal attraction (in political, economical or cultural terms) to foreign states.[123] Several proposals for a global framework law on the protection of all linguistic minorities have been submitted to Parliament but, as yet, to no avail.[124]

If the legislative implementation of art. 6 shows an extremely chequered pattern, constitutional case law has nevertheless added some unifying interpretative guidelines. The fact that art. 6 is framed as an 'objective' institutional norm has not been an obstacle for it being invoked for the protection of *individual* claims; in this sense too, art. 6 runs strictly parallel to the general equality clause of art. 3.

In relation to both problems indicated above, that of the IDENTIFICATION of linguistic minorities, and that of the definition of the SPECIAL MEASURES to be taken, the formerly prevalent course was to considerer them as political questions ill-suited for judicial decision-making. In particular, the type of action involved in the implementation of art. 6 ('positive' state action) seemed to exclude its direct enforceability. Yet, as was indicated above,[125] the courts can perfectly well scrutinise the omission, by the legislator, of necessary differentiations without overstepping the bounds of their function. They can invalidate legislative acts failing to take the necessary special measures, while leaving it to the legislator to decide on the exact terms of the remedy.

The Italian Constitutional Court has followed this course in a 1970 South Tyrolean case,[126] in which it partially invalidated a law which failed to make a necessary linguistic differentiation. The law in question organised job placement for agricultural workers, including an obligation for private employers to hire such workers according to their numerical order on the waiting list.[127] Small farmholders in the Trentino-Alto-Adige could thus be forced to recruit

123. «Più forte era ed è la forza di attrazione economica, politica, culturale degli Stati al di là dei confini, maggiore è la quantità e qualità di tutela accordata dalla Repubblica italiana a coloro che vivendo in Italia ne avvertono —e fanno pesare sul tavolo delle richieste e delle trattative— il richiamo» (D. BONAMORE, *op. cit.*, at 837).

124. Private Bills n. 107 of 20 June 1979 (Radical Party), n. 2068 of 24 October 1980 (Socialist Party), n. 2318 of 4 February 1981 (Communist Party). See, on these proposals, P. CARROZZA, «Minoranze linguistiche», in *Guida per le autonomie locali*, 1982, at 393 ff., and ID., in *id.*, 1983, at 404 ff.

125. *Cf. supra*, p. 62 ff.

126. Judgment of 28 December 1970, n. 192, in *Giurisprudenza Costituzionale*, 1970, 2203 (on a recourse by the President of the Region Trentino-Alto Adige).

127. Law of 11 March 1970, art. 10.

workers belonging to another linguistic group than their own. This, the court held, was in contrast with art. 2 of the Regional Statute of Trentino-Alto-Adige, because it affected the linguistic homogeneity of the local communities: indeed, art. 2, «by prescribing the safeguarding of the ethnic and cultural characteristics of the language groups living within the Region, forbids measures that aim at forced assimilations between them or that may compromise their free development according to their own traditions and customs».[128] Therefore, the territory of the Region should be exempted from the application of the act. In all truth, it must be admitted that the Court did not create this duty to differentiate *ex nihilo*. The fact that 'mixed language zones' had been excluded from the field of application of the FORMERLY existing legislation in this field,[129] has probably prompted the Court to strike down the new legislation which failed to repeat this distinction. Yet, the rule developed by the Court, that equiparations leading to forced assimilation are in contrast with art. 2 of the Regional Statute, is generally valid. In addition, as was argued above (and as the Court explicitly acknowledged in this case),[130] art. 2 of the Statute is but a more particularised reformulation of art. 6 of the Constitution. Therefore, this judgment has paved the way for the application of article 6 to similar cases of legislative equiparation which affect the integrity of linguistic minorities.

Another landmark is the recent Constitutional court judgment of 11 February 1982,[131] dealing with article 137.1 of the Italian Code of Criminal Procedure which imposes the use of Italian in all procedural acts, and article 137.3 which makes it a criminal offense for a person to refuse to speak Italian when he knows that language. Mh. Pahor, a Slovene speaker from Triestre, was prosecuted on the latter basis, and raised the issue of the compatibility of both provisions with article 6 of the Constitution. Some twenty

128. *Id.*, at 2209-2210: «Pacifico infine e soprattuto, che l'art. 2 dello Statuto, prescrivendo la salvaguardia delle caratteristiche etniche e culturali dei gruppi linquistici coesistenti nella Regione, si oppone a misure rivolti a determinare forzate assimilazioni tra di essi o suscettibili di comprometterne il libero sviluppo, secondo le rispettive tradizioni e costumanze».

129. Law of 29 April 1949, art. 11, n. 6, exempting from the obligation of recruitment the small agricultura enterprises (less than 6 workers) in 'mixed language zones'».

130. Article 2 of the Statute is «sistematicamente inquadrato nel più generale principio di tutela delle minoranze linguistiche affermato nell'art. 6 Cost.».

131. Judgment of 11 February 1982, in *Giurisprudenza Costituzionale*, 1982, I, 247. There are a number of comments on this case: P. CARROZZA, «Il prudente atteggiamento della corte in tema di 'garanzie linguistiche' nel processo e le sue conseguenze sulla condizione giuridica della minoranza slovena», in *Il Foro Italiano*, 1982, I, 1815-1825; G. TIBERINI, «La protezione della minoranza slovena a Trieste», in *Id.*, 1825-1829; S. BARTOLE, «Gli sloveni nel processo penale a Trieste», in *Giurisprudenza Costituzionale*, 1982, I, 249-259; E. PALICI DI SUNI, «Corte costituzionale e minoranze linguistiche: la sent. n. 28 del 1982 tra tradizione e innovazione», in *Id.*, 808-825; G. MOR, «L'uso ufficiale della lingua di una 'minoranza riconosciuta': il caso della minoranza slovena», in *Le Regioni*, 1982, 389-400; V. MARCHIANO, «Uso delle lingue nei procedimenti giudiziari e principi costituzionali», in *Giurisprudenza Italiana*, 1982, I, 1387-1396.

years earlier, a similar recourse to article 6 in order to challenge the constitutionality of art. 122 of the Code of *Civil* Procedure, similarly prescribing the use of the Italian language, had been flatly rejected by the Appeals Court of Trieste.[132] The 1982 case, however, was not as quickly dismissed by the Constitutional Court.

First of all, the Court continues to accept that the basic decision of which minorities to protect with what type of norms is within the discretion of the legislator. More particularly, there is no constitutional duty, as the applicant pretended, to align the treatment of all linguistic minorities on that meted out to the South-Tyroleans; nor, apparently, is there any need to emanate a uniform legal regime for all Slovenes: the Court, indeed, expressly restricts its holding to the province of Trieste.[133] In this sense, article 6 remains a programmatic, non-directly applicable norm.

But once the legislator has decided to act, he must do so in a *systematic* manner. Applying its favourite method of equality review to this case, the Court finds that the legislator has enacted various norms for the protection of the Slovene group, including measures in the field of education, of radio and television, of the European elections, etc.[134] As a consequence, the Trieste Slovenes must be considered as a *recognised minority*, a fact which triggers supplementary rights on their behalf, directly imposed by article 6. The Court, apparently, argues that, if the legislator chose to say B, C and D, he must also say A: if he decided to enact those special protective measures in favour of the Slovene language, then he can no longer consider the use of that same language as a criminal offense.

The exact scope of the Court's findings in this case is however ambiguous; the crucial passage of the judgment holds as follows: «If we are here in the presence, without any doubt, of a 'recognised minority', then this situation is incompatible, logically even more than legally, with any type of sanction ("qualsiasi sanzione") affecting the use of their mother tongue by the members of this minority.»[135]

132. Judgement of 9 July 1963, in *Giurisprudenza Costituzionale*, 1965, 1603. In his case comment, Paladin approves the Court's decision and puts great emphasis on the 'programmatic' nature of art. 6: «non è dell'art. 6 che vanno ricavati i criteri per la valutazione della legittimità delle norme sull'uso della lingua italiana; ed è insostenibile che, difettando l'apposita tutela delle minoranze, disposizioni generali sul tipo dell'art. 122, siano da considerare incostituzionali ed inapplicabili, limitatamente ai soli territori mistilingui» (L. PALADIN, «Sulla legittimità delle norme processuali in tema di uso esclusivo della lingua italiana», *Id.*, at 1607).

133. Judgment of 11 February 1982, cit., at 255.

134. *Id.*, at 256-257. On the educational measures, see *supra*, note 110; on the regime for the elections to the European Parliament, *infra*, p. 124; as for broadcasting, the reference is to the law on the national broadcasting service which imposes the transmission of radio and television programmes in German and Ladin (South Tyrol), French (Val d'Aosta), and Slovene (Trieste) (Law of 14 April 1975, art. 19. c).

135. *Id.*, at 257: «Se ormai si è in presenza, al di là di ogni dubbio, di una 'minoranza riconosciuta', con tale situazione è incompatibile, prima ancora logicamente che

But what does «any type of sanction» mean? Does it only refer to the *penal* sanction provided by art. 137.3 of the Code of Criminal Procedure? Or is the term 'sanction' used in the wider meaning of 'negative impact'? In this latter sense, it would mean that the mere *inability to use* their mother tongue, apart from any additional specific punishment, is already a considerable handicap for the Slovenes. If read in this way, the Constitutional Court judgment could imply a *positive duty* for the (national or regional) legislator to reorganise the judicial system or even the whole public administration in such a way that Slovenes can use their language without obstacles or hindrances.[136] This 'generous' interpretation seems contradicted by the fact that the Court, through a rather voluntaristic 'constructive' interpretation did not hold art. 137.3 of the Criminal Procedure Code *unconstitutional*, but merely declared it *inapplicable* to Slovenes appearing before the courts of Trieste.[137] Yet, on the other hand, if article 6 only embodies a negative obligation of state abstention, then the 1982 judgment does not add anything to the 1970 judgment mentioned above which already prohibited all kind of 'measures aiming at the forced assimilation of minorities'. Yet, the fact of being a 'recognised minority' should logically involve additional rights to those already guaranteed to *all* minorities; these can only consist of *positive* measures to remedy their linguistic handicap.[138]

2. *Spain*

Article 3.3 of the Spanish Constitution, holding that «the richness of the linguistic modalities of Spain is a cultural patrimony which will be the object of special respect and protection», seems to be quite comparable to article 6 of the Italian Constitution.[139] Its scope is somewhat wider as it does not only apply to *minorities*, and therefore also includes Castillian among the objects of protection,[140] and does not only protect *languages* but the some-

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giuridicamente, qualsiasi sanzione che colpisca l'uso della lingua materna da parte degli appartenenti alla minoranza stessa».

136. Favouring such a wide interpretation, G. MOR, «L'uso ufficiale...», *op. cit.*, at 400; E. PALICI DI SUNI, «Corte constituzionale e minoranze linguistiche...», *op. cit.*, at 823. More cautious, S. BARTOLE, «Gli sloveni nel processo penale...», *op. cit.*, at 257.

137. Judgment of 11 February 1982, cit., at 259.

138. See G. MOR, *op. ult. cit.*, at 396: «Ciò non esclude che laddove esiste un gruppo minoritario non riconosciuto singole disposizioni di legge potrebbero essere dichiarate incostituzionali se perseguono un risultato opposto rispetto a quello fatto proprio dalla Costituzione, portano cioè alla distruzione, anziché alla tutela del gruppo».

139. As is also argued by A. MILIAN MASSANA, «La regulación constitucional del multilingüismo», in *Revista Española de Derecho Constitucional*, n. 10, 1984, 123-154, p. 146, at note 63.

140. R. ENTRENA CUESTA, «Art. 3», in F. Garrido Falla (ed), *Comentarios a la constitución*, Madrid, Ed. Civitas, 1980, 50-59, at 57.

what looser category of *linguistic modalities*. Yet, like art. 6, this clause can also be read as a specification of the principle of equality of art. 14 of the Constitution, and more particularly of the principle of 'substantive equality' of art. 9.2, despite the fact that it is mentioned in a separate article of the Constitution.[141]

Yet, the effective role of art. 3.3 is unlikely to be of the same nature as that of art. 6 in Italy, because other 'higher law' sources for the protection of linguistic diversity are more widely available in Spain than in Italy. Indeed, the Statutes of a number of Autonomous Communities spell out in all clarity the rule of equal treatment, in law and in fact, of persons speaking the national language (Castillian) and those speaking the other official language of the Community.[142] Moreover, and contrary to Italy, there is no doubt that the Autonomous Communities are empowered to act in the field of language law and to further implement this 'pluralistic' equality.[143] Therefore, even the issues that are not directly regulated by the Statutes can be dealt with by further legislative action from the side of the Communities. And, in fact, four plurilingual Communities (Catalonia, Euzkadi, Galicia, Valencia) have adopted what are called in Spanish legal parlance *normalisation laws*, containing more detailed measures to ensure a full equal status to the formerly oppressed regional languages.[144]

141. See, in this sense, R. ENTRENA CUESTA, *op. cit.*, at 58 («en perfecta consonancia con el artículo 9.2») and A. MILIAN MASSANA, *op. cit.*, at 145-146: «El artículo 3.3 no sería más que una concreción en el campo idiomático del principio de igualdad sustancial genéricamente incorporado por la Constitución en el artículo 9.2 al requerir a los poderes públicos que remuevan los obstáculos que impidan o dificultan que la libertad y la igualdad del individuo y de los grupos en que se integra sean reales y efectivas».

142. The following Statutes contain provisions proclaiming the co-officiality of Castillian and the respective regional language: the Basque Statute (art. 6.1 - Basque ('Euskera'); the Catalan Statute (art. 3.2 - Catalan); the Galician Statute (art. 5.2 - Galician); the Statute of the Valencian Community (art. 7.1 - 'Valenciano', i.e. Catalan); the Navarra Statute (art. 9.2 - Basque ('Vascuence')); the Statute of the Balearic islands (art. 3 - Catalan). For an overview of the statutory provisions on language use, see A. MILIAN MASSANA, «La ordenación estatutaria de las lenguas distintas al castellano», in *Revista Vasca de Administración Pública*, 1983, n. 6, 237-246.

143. In Spain, the regulation of language use seems to be considered as an ancillary matter, which is to be exercised both by the State and the Communities, each within its own jurisdiction (see A. MILIAN MASSANA, «La regulación...», *op. cit.*, at note 58).

144. In Euzkadi, the Law of 24 November 1982, n. 10, «Ley básica de normalización del uso del Euskera»; in Catalonia, the Law of 18 April 1983, n. 7, «Ley de normalización lingüística»; in Galicia, the Law of 15 June 1983, n. 3, «Ley de normalización lingüística»; in the Valencian Community, the Law of 23 November 1983, n. 4, «Ley de uso y enseñanza del valenciano».

Those Acts cover all the domains of public language use falling within the jurisdiction of the Autonomous Communities. They are in the process of being supplemented, in their turn, by Decrees specifying the regime of specific fields (education, administration, etc.); see the survey by A. MILIAN MASSANA, «Notes de legislació i jurisprudència», in *Revista de Llengua i Dret*, 1984, n. 3, 135-155.

Yet, article 3.3 of the Constitution might still display a *direct* (though perhaps not individually enforceable)[145] impact in the following domains:

i) within the jurisdiction of the central State (where the autonomous Communities cannot intervene), article 3.3 can be read as a generic duty to act in accordance with the principle of linguistic pluralism;

ii) for those, smaller, linguistic varieties, that are not fully supported by regional institutions. It is difficult to identify any such groups at this point, because all regional Statutes made it a point of honour to 'discover' and protect such minority language groups.[146]

3. *Austria*

Austria belongs to the same category of countries where special measures for (linguistic) minorities are mandated by constitutional law. The principle of the equal rights of all linguistic groups, and its consequences for the purposes of language use, are clearly spelled out in art. 19.1 of the Basic Law of 1867 ('Staatsgrundgesetz'):

«All ethnic groups ('Volksstaemme') within the State have equal rights, and each ethnic group has an unabridgeable right to the protection and promotion of its nationality and language.

»The equal rights of all customary languages of the country ('landesuebliche Sprachen'), in the schools, the administration and public life are recognised by the State.

»In those countries ('Laender') inhabited by a plurality of ethnic groups, the public educational institutions shall be organised in such a way that each

145. *Amparo*, the direct individual recourse to the Constitutional Tribunal, can only be based on those articles of the Constitution dealing directly with fundamental rights, and not on article 3.

146. *Bable* is protected by art. 4 of the Asturian Statute: «El bable gozará de protección. Se promoverá su uso, su difusión en los medios de comunicación y su enseñanza, respetando, en todo caso, las variantes locales y voluntariedad en su aprendizaje».

Aranés (an Occitan dialect) is mentioned by art. 3.4 of the Catalan Statute: «El habla aranesa será objeto de enseñanza y de especial respeto y protección».

Art. 7 of the Aragon Statute, finally, holds that «Las diversas modalidades lingüísticas de Aragón gozarán de protección, como elementos integrantes de su patrimonio cultural y histórico».

On the legal regime of those various languages, see the following comments: X. X. SÁNCHEZ VICENTE, «La lengua asturiana y el estatuto de autonomía», in *Las Lenguas Nacionales en la Administración*, Valencia, Diputación Provincial, 1981, 189-197; X. LAMUELA, «Política lingüística a la Vall d'Aran: les regles del joc», in *Revista de Llengua i Dret*, 1984, n. 3, 59-64; F. NAGORE LAIN, «Notas sobre el uso administrativo del Aragonés», in *Revista de Llengua i Dret*, 1983, n. 2, 97-110; A. QUINTANA, «El marc legal del català a l'Aragó», in *Id.*, 141-145.

of those ethnic groups is given the necessary means to have education in its language, without an obligation to learn a second language.»[147]

This 'Basic Law', which dates from the Austro-Hungarian Empire (but was only valid for its Austrian part) has been incorporated as a whole in the Constitution of the Austrian Republic in 1920 (art. 149). Yet, the continued validity of *this* specific article 19 has been questioned. The argument goes that Austria is no longer a multinational State with globally equivalent 'Volksstaemme' (ethnic groups), but a nation-state with some rest-minorities, whose languages cannot be considered as 'landesueblich' and who cannot therefore advance the same right to full equal treatment. Earlier decisions of the Constitutional Court have thus denied that art. 19 forms part of present Austrian constitutional law [148] but a recent judgment has explicitly considered this issue as unsettled and seems thereby to move closer to the opinion of those legal writers who affirm the continued validity of art. 19, be it in a diluted from.[149]

Yet, this question is largely preempted by the existence of other constitutional norms that are undoubtedly valid and repeat this principle of equal treatment, be it in reference to the INDIVIDUAL members of linguistic minorities, rather than the groups as a whole. Art. 67 of the St.-Germain Treaty imposes «the equal treatment in law and in fact» of the minority members, a phrase which implies a duty, where need should be, to take special 'pluralistic' measures in favour of their languages.[150] Other constitutional norms specify in more detail the appropriate measure of linguistic pluralism in certain fields of public language use: art. 66.4 of the St.-Germain Treaty, and art. 7.3 of the Vienna State Treaty of 1955.[151]

147. «Alle Volksstaemme des Staates sind gleichberechtigt, und jeder Volksstamm hat ein unverletzliches Rech auf Wahrung und Pflege seiner Nationalitaet und Sprache. Die Gleichberechtigung aller landesueblichen Sprachen in Schule, Amt und oeffentlichem Leben wird vom Staat anerkannt. In den Laendern, in welchen mehrere Volksstaemme wohnen, sollen die oeffentlichen Unterrichtsanstalten derart eingerichtet sein, dass ohne Anwendung eines Zwanges zur Erlernung einer zweiten Landessprache jeder dieser Volksstaemme die erforderlichen Mittel zur Ausbildung in seiner Sprache erhaelt».

For a quick overview of the rich case law on this article in pre-1914 Austria, see E. MELICHAR, «Die Freiheitsrechte der Dezember-Verfassung 1867 und ihre Entwicklung in der reichsgerichtlichen Judikatur», in *Oesterrechische Zeitschrift fuer Oeffentliches Recht* 1966, at 283-288.

148. Judgements n. 2459/1952, 3509/1959 and 4221/1962.

149. See e.g. F. ERMACORA, *Handbuch der Grundfreiheiten und Menschenrechten, Ein Kommentar zu den oesterreichischen Grundrechtsbestimmungen*, Wien, Manz, 1963, at 531-532.

150. P. PERNTHALER & F. ESTERBAUER, «Moeglichkeiten des rechtlichen Volksgruppenschutzes», in *System eines internationalen Volksgruppenrechts*, Vol. 2, Wien, Wilh. Braumueller, 1972, 175-188, at 175. This is also the interpretation given to this clause by the Permanent Court of International Justice in the *Albanian Minority Schools* case, quoted *supra*, in note 87.

151. Article 7.3 of the Vienna State Treaty holds that: «In the Administrative

The Austrian Constitutional Court declared in a 1981 judgment that all the aforementioned provisions have in common that «they contain a value judgment of the constituent power in favour of minority protection»,[152] and this value judgment must be taken into account for the interpretation of the general principle of equality in art. 7 of the Austrian Constitution. This means in turn that the general principle of equality can impose the enactment of special protective measures in favour of the minorities,[153] even beyound the existing explicit norms (one might think here of a field like public broadcasting, which is not covered by any of the norms listed above). The Court thus established a potentially fruitful dialectical relationship between the specific constitutional language rights and the general principle of equality.

4. *Finland*

An even closer link between the principle of equality and a specific guarantee of language use exists in Finland. As Modeen points out,[154] article 14 of the Finnish Constitution, declaring Finnish and Swedish to be the official languages of the country, appears in the section of the Constitution dealing with fundamental rights. The correct interpretative sequence is therefore not that the equal rights of Finnish —and Swedish-spakers derive from the fact that their language is official, but that the co-officiality itself is a specification of the general equality principle of art. 5 the Constitution.[155]

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and judicial districts of Carinthia, Burgenland and Styria, where there are Slovene, Croat or mixed populations, the Slovene or Croat language shall be accepted as an official language in addition to German».

On this provision, see the recent judgment by the Austrian Constitutional Court of 28 June 1983, in *Europaeische Grundrechte Zeitschrift* 1984, at 20.

152. Judgment of 5 October 1981, in *Europaeische Grundrechte Zeitschrift*, 1982, Wertentscheidung des Verfassungsgesetzgebers zugunsten des Minderheitenschutzes enthalten».

153. *Ibid.*: «Eine mehr oder minder schematische Gleichstellung von Angehoerigen der Minderheiten mit Angehoerigen anderer gesellschaftlicher Gruppen wird der verfassungsgesetzlichen Wertentscheidung nicht immer genuegen koennen. Je nach dem Regelungsgegenstand kann es der Schutz von Angehoerigen einer Minderheit gegenueber Angehoerigen anderer gesellschaftlicher Gruppen sachlich rechtfertigen oder sogar erfordern, die Minderheit in gewissen Belangen zu bevorzuegen».

In the present case, the court estimated however that there was no constitutional claim to a special treatment; but then, the claim was one of *affirmative* equality and not of *pluralistic* equality; see further, p. 122-123.

154. T. Modeen, «The Situation of the Finland-Swedish Population in the Light of International, Constitutional and Administrative Law», in *Mc Gill Law Journal*, 1970, 121-139 at 128.

155. T. Modeen, *loc. cit.*: «Article 14 of the Constitution Act is an expression of the principle of equality that should exist between citizens of different population groups which the state has recognised as being of equal standing».

Can one extend this reasoning to the other countries whose constitution contains a clause recognising a plurality of official languages, such as *Canada*, *Ireland* and *Switzerland*? Are all those provisions to be seen as specific embodiments, in the linguistic domain, of the principle of equality? One should be cautions in the absence of any clear textual, judicial or doctrinal authority in this sense. On the one hand, co-officiality is certainly an embodiment of the idea of equality taken in the wide sense; indeed, the highest measure of 'pluralistic' equality a minority language group can hope to obtain is the recognition of a full official status to its language. Yet, if co-officiality logically implies the recognition of equal rights for those speaking the official languages, the reverse is not true: precisely because of its far-reaching consequences, an official status cannot be considered as inherent in equality, taken in its legal-technical sense. The official status needs therefore to be explicitly proclaimed by the Constitution, an eminently political decision which cannot be unilaterally imposed by the constitutional adjudicator by means of a generic guarantee of equal treatment.

5. *Other European Countries*

This can be demonstrated by looking at the countries where no constitutional guidelines exist as to the need of special protection measures of linguistic minorities. The courts of those countries have been extremely reluctant to derive any such measures from the general principle of equality. Sometimes, like in Belgium, the negligible role of equality in matters of language use is due to the absence of judicial review of the constitutionality of legislation. The conformity of Belgian linguistic legislation to standards of equality could more easily be challenged by reference to INTERNATIONAL law but the European Human Rights Court in the *Belgian Linguistics* case considered the basic principles of territorial unilingualism, as applied in this country, to be compatible with the Convention,[156] an attitude which Belgian courts are unlikely to challenge.

Yet, the same holds true also for countries which have judicial review.

That art. 14 can be considered as an embodiment of equality is further borne out by the text of the article: after stating the principle of co-officiality, art. 14 goes on in a second paragraph:

«The cultural and economic needs of the Finnish-speaking and the Swedish-speaking populations shall be met by the State in accordance with the principle of equality». On this clause, see *infra*, p. 118.

156. Case *'relating to certain aspects of the laws on the use of languages in education in Belgium'*, judgment of the European Court of Human Rights of 23 July 1968, in *Publications of the European Court of Human rights*, Series A (unnumbered). Among the many comments on this decision, see J. VERHOEVEN, «L'arrêt du 23 juillet 1968 dans l'affaire relative à certains aspects aspects du régime linguistique de l'enseignement en Belgique», in *Revue Belge de Droit International* 1970, 353-382; L. WILDHABER, «Der Belgische Sprachenstreit vor dem europaeischen Gerichtshof fuer Menschenrechte», in

In a recent case, dealing with the use of languages in judicial proceedings, the German Constitutional Court flatly held that «the prohibition of discrimination of art. 3.3 of the Basic Law does not impose the compensation of linguistic handicaps».[157] This negative attitude may derive from the presumption of *like* treatment which German doctrine reads in art. 3.3,[158] but the picture is not essentially different in other countries. While one acknowledges the desirability of special facilities for minority language use, this is considered as a matter of governmental policy and not of constitutional obligation. One area should be excepted, that of *judicial proceedings*, and more particularly the *criminal process*. Here, practically all countries provide for the assistance of an interpreter to the persons who do not have a sufficient knowledge of the language used by the court; such aid is usually provided without cost for the accused, except, in some cases, for a reimbursement which can be claimed if the person is found guilty.[159] Yet, this guarantee is only indirectly linked to the general principle of equality, and more closely to the more specific constitutional principles of 'fair trial', 'equality of arms', or, in the United States, 'due process'.[160] Furthermore, recent improvements in this sector have been influenced, in many European countries, not so much by their own constitutional provisions as by the fair trial guarantees of the European Human Rights Convention; indeed, this is one of the areas in which this Convention most clearly went beyond the existing 'minimum standard' of its contracting states.[161]

Annuaire Suisse de Droit International 1969-1970, 15-38; B. De Witte, *The Protection of Linguistic diversity..., op. cit.*, 569-594.

157. Judgment of 17 May 1983, in *Bundesverfassungsentscheidungen*, 64, 135, at 157: «Zum Ausgleich sprachbedingter Erschwernisse, die im Tatsaechlichen auftreten, verpflichtet das Diskriminierungsverbot des Art. 3 Abs. 3 GG nicht».

158. *Cf. supra*, p. 65.

159. For some world-wide comparative data, see *Study of Equality in the Administration of Justice*, U.N. Doc. E/CN. 4/Sub. 2/296/Rev. 1 (1972), at paras. 410-418 and 431-442.

160. The linguistic implications of the constitutional right to a fair trial are spelled out e.g. in the German Constitutional Court judgment of 17 May 1983, at 145: «Das Recht auf ein rechtsstaatliches, faires Strafverfahren verbietet es, den der deutschen Sprache nicht oder nicht hinreichend maechtigen Angeklagten zu einem unverstandenen Objekt des Verfahrens herabzuwuerdigen; er muss in die Lage versetzt werden, die ihn betreffenden wesentlichen Verfahrensvorgaenge verstehen und sich im Verfahren verstaendlich machen zu koennen».

In the United States, a number of lower court decisions have increasingly recognised that the right to an interpreter is indirectly contained in the general right to a fair trial guaranteed by the due process clauses of the 14th Amendment, as well as in the more specific fair trial rights of the 6th Amendment. See, above all, the judgment of the Court of Appeals in *United States ex rel. Negron v New York*, 434 F. 2d 386 (2d Cir. 1970). For a comment on this and other decisions, see Note, «Non-English-speaking Persons in the Criminal Justice System: Current State of the Law», in *Cornell Law Review*, 1976, 289-311.

161. In the articles 5 and 6 of the Convention, one finds three references to the use of languages in criminal proceedings.

6. *United States*

One court which showed a greater degree of activism is the United States Supreme Court in *Lau v Nichols*.[162] In this case, non-English-speaking students in San Francisco had brought a class action suit against the local school authority, alleging that it had failed to provide special language instruction to a large majority of the Chinese children in the district. Justice Douglas, speaking for the majority of the Supreme Court, held that the exclusive use of the English language amounted to an unlawful equiparation:

«Under these state-imposed standards there is no equality treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.» (...) «It seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking

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Article 5.2 deals with the time of arrest: «Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him».

Article 6, for its part, deals with criminal proceedings in the strict sense. According to art. 6.3, «Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly in a language which he understands and in detail, of the accusation against him;

(...)

(c) to have the free assistance of an interpreter if he cannot understand or speak the language used in the court».

This latter provision has been interpreted in more detail by the European Human Rights Court in the case of *Luedicke, Belkacem and Koç*, judgment of 28 November 1978, in *Publications of the European Court of Human rights*, Series A, n. 28.

162. *Lau v Nichols*, 414 U.S. 563 (1974). See the following discussions of the issues raised by this case, and of subsequent developments: S. D. SUGARMAN & E. G. œIDESS, «Equal Protection for Non-English-speaking School - children: Lau v. Nichols», in *California Law Review*, 1974, 157-183; W. E. JOHNSON, «The Constitutional Right of Bilingual Children to an Equal Educational Right of Bilingual Children to an Equal Educational Opportunity», in *Southern California Law Review*, 1974, 943-997; K. FONG, «Cultural Pluralism», in *Harvard Civil Rights Civil Liberties Law Review*, 1978, 133-173; P. D. ROOS, «Bilingual Education: Opportunity», in *Law and Contemporary Problems*, 1978, 111-140; COMMENT, «Bilingual Education and Desegregation», in *University of Pennsylvania Law Review*, 1979, 1564-1606; S. ROBENBAUM, «Educating Children of Immigrant Workers: Language Policies in France & the USA», in *American Journal of Comparative Law*, 1981, 429-465, at 439 ff.; NOTE, «Assuring Equal Opportunity for Language-Minority Students», in *Columbia Journal of Law and Social Problems*, 1983, 209-293; R. C. FARRELL, «Bilingual Education: The Extent to an Entitlement», in *George Mason University Law Review*, 1983, 69-110; NOTE, «Supplemental Language Instruction for Students with Limited English-Speaking Ability: The Relationship between the Right and the Remedy», in *Washington University Law Quarterly*, 1983, 415-434; PROPOSAL, «Bilingual Education Guidelines for the Courts and the Schools», in *Emory Law Journal* 1984, 577-629.

majority from the respondents' schools system which denies them a meaningful opportunity to participate in the educational program —all earmarks of the discrimination banned by the regulations.»[163]

Note the reference to the 'regulations'; indeed, the Supreme Court, in *Lau*, did not reach the equal protection clause of the CONSTITUTION, but based itself on federal law of lower rank, Title VI (section 601) of the 1964 Civil Rights Act as implemented by regulations promulgated by the Department of Health, Education and Welfare, which expressly indicate the need for special educational programs:

«Where inability to speak and understand the English language excludes national origin —minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.»[164]

In other words, the Supreme Court does not take the lead in ordering measures of linguistic pluralism in education, but rather defers to the policy followed by the administration. The Court considers it as a reasonable governmental choice, but would not have imposed it on its own behalf. More importantly, the exact scope of the remedy ordered by the *Lau* decision is left uncertain; indeed, the linguistic deficiencies of the minority children can be remedied by two different types of «affirmative steps»: special transitional courses in English (according to the so-called English-as-a-Second-Language (ESL) method), or the establishment of bilingual education.[165] The Supreme Court itself did not express a preference, but the administrative guidelines issued in 1975 —known as the 'Lau Guidelines' or 'Lau Remedies'— interpreted the court decision as requiring some form of bilingual education; this interpretation was also adopted by a number of lower court decisions who granted a right to bilingual education to minority plaintiffs.[166]

As appears clearly from the opinion of Douglas J. quoted above, the Supreme Court used an EFFECTS test in *Lau*: the practice of the school district was declared unlawful because the minority children did not get a meaningful education out of it, not because the district was motivated by an intention to discriminate. But in the subsequent famous *Bakke* case which

163. *Lau v Nichols*, cit., respectively at 566 and 568.

164. Guidelines of 1970, 35 *Federal Register* 11595, quoted in *Lau v Nichols*, cit., at 568.

165. Note that the *structural* difference between these alternative remedies does not automatically imply also a *functional* difference. The objective of bilingual education can indeed be, like that of special English courses, to promote the assimilation of the minorities in the English mainstream.

166. See e.g. the following cases: *Serna v Portales Municipal Schools*, 499 F. 2d 1147 (10th Circ. 1974); *Cintron v Brentwood Union Free School District*, 455 F. Supp. 57 (E.O.N.Y. 1978); *Rios v Reed*, 480 F. Supp. 14 (E.D.N.Y. 1978).

was also decided on the authority of Title VI of the Civil Rights Act, the Supreme Court decided to use the same test as in the cases based on the constitutional equality cases, i.e. a test of discriminatory INTENT,[167] and added that it now had «serious doubts concerning the correctness of what appears to be the premise of the decision in Lau».[168]

Reverting to a purpose-oriented test has indeed serious consequences. Proving that, by adopting an ESL-program, rather than a bilingual education program, the state or school district had the intention of harming the minority students is an extremely arduous enterprise, especially in an ideological climate which is still pervaded by the conviction that the 'melting-pot' policy is in the good interest of the country's minority language groups. Yet, more recently again, in *Guardians Association v Civil Service Commission*, the majority of a deeply divided Supreme Court returned to its earlier view that Title VI, not in itself but together with its implementing regulations, may prohibit actions having a DISPARATE IMPACT on minorities, even if no discriminatory purpose is present.[169] The trouble, however, is that administrative regulations have been changing under the Reagan administration and do no longer require bilingual education, it seems.[170]

In fact, claims to a bilingual educational program are now more likely to succeed under ANOTHER legislative act, the Equal Educational Opportunities Act (EEOA) of 1974, which has become the central focus of litigation. It provides that:

«no state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by

»(...) (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program.»[171]

On its face, the duty to take 'appropriate action' is as vague as that imposed by section 601 of the Civil Rights Act. Yet, this provision was never construed by the courts as requiring INTENTIONAL failure to act, but rather as prohibiting «non-intentional, inadvertent actions which have the effect of failing to take appropriate action, even if there is no design or purpose to discriminate».[172] Bilingual education is, again, not imposed *per se*. Yet, the

167. On the prevalence of the intent standard in American equality doctrine, see above, p. 69-70.

168. *Regents of the University of California v Bakke* 438 U.S. 265 (1978), at 352. On this case, see also *infra*, p. 121 ff.

169. *Guardians Association v Civil Service Commission*, 103 Sup. Court 3221 (1983). For a discussion of the various opinions expressed by the judges, see «The Supreme Court - 1982 Term», in *Harvard Law Review*, 1983, 70-306, at 244 ff.

170. «Current administrative interpretations of section 601 are not to be read as requiring bilingual instruction» (R. C. FARRELL, *op. cit.*, at 86).

171. 20 United States Code section 1703 (f) (1982).

172. R. C. FARRELL, *op. cit.*, at 93; PROPOSAL, *op. cit.*, at 594. One generally accepts

tripartite standard by which every educational program is assessed, a standard formulated by the Appeals Court in *Castaneda v Pickard*,[173] and more or less applied by the other courts, can arguably only be met by bilingual programs.[174]

Bilingual Education Acts have now been enacted, at state-wide level, by more than twenty states,[175] a policy which was encouraged by the availability of federal funds for that purpose under the federal Bilingual Education Act of 1968 (as amended in 1978).[176] But even where bilingual education is thus widely provided, its avowed purpose seems to be to favour the assimilation of the country's linguistic minorities, rather than to ensure a permanent protection of linguistic diversity. The preamble of the Californian Act, e.g., states that «the Legislature finds and declares that the primary goal of all programs (...) is, as effectively and efficiently as possible, to develop in each child fluency in English».[177]

The judicial moves to impose some measure of linguistic pluralism in *education* have been entirely based on STATUTORY provisions. There is one other field in which a similar federal legislative initiative was taken: that of *election proceedings*. The Voting Rights Act Amendments of 1975 requires the provision of bilingual registration and voting notices, forms, instructions, ballots, etc. in states and other political subdivisions where more than 5 % of voting-age citizens are members of a single linguistic minority with a less than average English literacy rate. In all *other fields* of public life, litigation in favour of greater linguistic pluralism cannot be based on existing statutory provisions, but can only be based directly on the CONSTITUTIONAL principle of equality, a much more problematic endeavour. Courts have been

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this interpretation because of a comparison of (f) with other provisions of the same Act that explicitly *do* require discriminatory purpose.

173. *Castaneda v Pichard*, 648 F. 2d 989 (5th. Cir. 1981). The tripartite standard can be summarised as follows:

(1) the program must be based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some experts in the field; (2) the program must be reasonably calculated to implement that theory; and (3) the program mus have produced satisfactory results after having been used for a sufficient period of time.

174. For arguments that only bilingual education can meet the third step of the standard, see R. C. FARRELL, *op. cit.*, at 98 ff., and Columbia NOTE, *op. cit.*, at 291.

175. 22 States as of March 1980, according to S. ROSENBAUM, *op. cit.*, at 447.

176. But the budget of this program has been severely cut under the Reagan administration; see «Toughen Up: U.S. Schools Must Improve», in *Time*, 16 May 1983, p. 73. The new course is outlined in the Official Report by B. F. BIRMAN & A. L. GINSBURG, *Addressing the Needs of Language-Minority Children: Issues for Federal Policy*, Washington D.C., Department of Education, Office of Planning, Budget and Evaluation, 1981.

177. California Education Code, section 52161.

The federal Bilingual Education Act itself was amended in the same direction; in order to benefit from federal funds instruction in the native languages can only be organised «to the extent necessary to allow a child to achieve competence in the English language».

extremely reluctant to act on this basis. In *Carmona v Sheffield*, a federal district court rejected a claim that civil servants should be made available to help citizens with difficulties in English. The court argued:

«The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt (...). The extent to which special consideration should be given to persons who have difficulty with the English language is a matter of public policy for consideration by the appropriate legislative bodies and not by the Courts.»[178]

In appeal, the Ninth Circuit of the U.S. Court of Appeals affirmed that equality was not violated in this case: «even if we assume that this case involves some classification by the state, the choice of California to deal only in English has a reasonable basis».[179] The California Supreme Court, in *Guerrero v Carlson* also used the argument of practical impossibility to affirm that using Spanish in public administration would be desirable in terms of public policy, but that no directly enforceable constitutional imperative existed in this sense.[180]

These decisions are open to criticism. In particular, the practical difficulties should not be exaggerated. A court need not grant a universal right to every person to use whichever language in all fields of public life, but can easily modulate its remedy in order to take account of numbers and available possibilities. It might well appear, then, that the bilingual staffing of a public service is not such a costly and complicated endeavour to preclude any judicial intervention.[181] Yet, the American decisions clearly confirm the general picture that has emerged from other countries: that the courts are reluctant to create a plurilingual system *ex nihilo*, and are prepared to play en active role only when they can find some constitutional or legislative authority as to the need of such language measures.

178. *Carmona v Sheffield*, 325 Federal Supplement 1341, at 1342.

179. 475 F. 2d 738 (9th Cir. 1973), at 739.

180. *Guerrero v Carlson*, 109 California Reporter 201 (1973). For a general comment on all three cases, see C. P. BLAINE, «Breaking the Language Barrier: New Rights for California's Linguistic Minorities», in *Pacific Law Journal*, 1974, 648-674.

181. A striking illustration of this fact is provided by the Californian *Bilingual Services Act* of 1973; the Act requires state and local agencies which furnish information or render services by contact with a *substantial* number of non-English-speaking people to employ a *sufficient* number of qualified bilingual persons in public contact positions or as interpreters. Yet, *no fiscal appropriations* were made for the Act, which seems to imply that the target of the Act can be met by the administrative personnel that is currently available.

D) Affirmative Equality

Like pluralistic equality, which was examined in the previous sub-section, afirmative equality also involves a differential treatment, but of another kind. The term of 'affirmative action' is commonly associated with the efforts, in the United States, to eliminate racial, and to a certain extent also sexual, discrimination, by means of special preferences for the minorities involved; it can be defined as «a public or private program designed to equalize (...) opportunities for historically disadvantaged groups by taking into consideration those very characteristics which have been used to deny them equal treatment».[182] Another country where afirmative action is an important feature of the legal landscape, for a longer time even than in the United States, is India, where art. 15.4 of the Constitution mandates special promotional measures «for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes». Indeed, comparative studies of afirmative action tend to focus on these two countries.[183]

Yet, even if the concept was —until recently at least—[184] relatively unknown to Europe, the underlying phenomenon is certainly not. Every legal system has created policies designed at the promotion of certain target groups of very diverse nature, such as war veterans, the disabled, pregnant women, etc.

In a certain sense, afirmative action is the mirror image of discrimination. Whereas 'pluralistic equality' only consists, as was explained above,[185] in giving to the minority what the majority population already has, affirmative equality goes further: in order to boost the rights of some individuals or groups, it imposes a corresponding disadvantage to another individual or group. This has led opponents of such a regime to the use of disparaging terms like 'affirmative discrimination' or 'reverse discrimination',[186] implying

182. M. L. Duncan, «The Future of Affirmative Action: A Jurisprudential/Legal Critique», in *Harvard Civil Rights Civil Liberties Law Review*, 1982, 503-553, at 503.

183. See e.g. A. M. Katz, «Benign Preferences: An Indian Decision & the Bakke Case», in *American Journal of Comparative Law*, 1977, 611-640; S. M. Witten, «Compensatory Discrimination in India: Affirmative Action as a Means of Combatting Class Inequality», in *Columbia Journal of Transnational Law*, 1983, 353-387; W. Mc Kean, *Equality and Discrimination under International Law*, Oxford, Clarendon Press, 1983, p. 228 ff.; J. S. Sigler, *Minority Rights - A Comparative Analysis*, Westport, Greenwood Press, 1983, pp. 133-148.

184. But see the following recent contributions on this subject in a number of European countries: H. J. Mengel, «Massnahmen 'Positiver Diskriminierung' und Grundgesetz», in *Juristenzeitung*, 1982, 530-538; L. Lustgarten, *Legal Control of Racial Discrimination*, London, Macmillan, 1980, at 14 ff.; R. Pelloux, «Les nouveaux discours sur l'inégalité et le droit public français», in *Revue de Droit Public*, 1982, 909-927; B. Sloot, «Legitimatie van positieve discriminatie. Twee redeneerpatronen», in *Ars Aequi*, 1981, 655-663.

185. See above, p. 87-88.

186. For the use of those terms, see e.g. N. Glazer, *Affirmative Discrimination:*

therewith that such action is only a new form of invidious treatment, equally perverse as the old discrimination it is intended to combat.

One should note however that the advantage for one group is not always symmetrical with the burden on the other. Two hypotheses should in fact be distinguished. In the first case, the advantage granted to a member of the favoured group exactly corresponds to the disadvantage of a member of the other group. The typical example here is the *quota* system, which is often used in the United States: in the access to a school or enterprise, a person of the minority group is directly preferred over a person belonging to another class.

In the second case, on the contrary, the advantage accruing to the favoured group is financed by general (budgetary) means, and its impact is thereby more evenly spread. The disfavoured class, as a group, still undergoes a loss, but the negative effect on each of its members individually may be negligible (especially when they are a large numerical majority of the population) and will be of a quantitative rather than a qualitative nature. In addition, the burden is evenly divided among all members of the 'dominant' group. Indeed, one of the more justified criticisms against affirmative action in the American fashion (characterised by its use of quota) is that it tends to penalise the WEAKER members of the white majority and to advantage the STRONGER members of the Black of Hispanic minority, thereby operating a social redistribution in reverse.[187]

Supporters of afirmative action, on the other hand, hold that one can easily distinguish legitimate afirmative action from unjustified discrimination, by considering *which groups benefit*. In the case of affirmative action, the beneficiaries are persons belonging to a group which has either been a traditional victim of disadvantageous treatment, or is still in an inferior social position (these two possibilities being not mutually exclusive). In other words, affirmative measures do not destroy equality, but aim precisely at establishing a more perfect equality of opportunities. By imposing a 'handicap' to certain participants, one wants to make the 'race of life' more fair, which is entirely consonant with the best traditions of liberal reformism.

The troublesome question, at this point, is how to define the groups that are worthy of such special protection. For our purpose, the question is whether *linguistic* minorities qualify for such benefits, under which circumstances and to what extent. In constitutional terms, one has to examine whether preferential treatment of certain language groups, which goes beyond 'pluralistic equality' as described in the previous sub-section, can be *reconciled* with the constitutional principle of equality, and whether it may even be *mandated* by it.

Ethnic Inequality and Public Policy, New York, Basic Books, 1975; A. H. GOLDMAN, *Justice and Reverse Discrimination*, Princeton University Press, 1979; R. K. FULLINWIDER, *The Reverse Discrimination Controversy: A Moral and Legal Analysis*, Totawa (N.J.), Rowman and Littlefield, 1980.

187. For this argument, see L. LUSTGARTEN, *op. cit.*, at 14 ff.

Two arguments can be advanced to justify affirmative action in favour of linguistic groups: the fact that they are *cultural minorities* and the fact that they are *political-economic minorities*. The first argument is the more widely applicable, as its only condition is that the group should be in a numerical minority within the country. The second rationale, on the contrary, does not apply to those language minorities whose social-economic situation is relatively good; while it plays a very important role in the United States, this argument is much less widely accepted, as far as language groups are concerned, in Europe.

1. *Language Groups as Cultural-Linguistic Minorities*

Even when pluralistic equality fully applies, and the use of a minority language is permitted in all possible settings of public life, its speakers may still be at a disadvantage in cultural terms. Despite the formally impeccable status of his language, a person speaking a minority language may still face more difficulties than someone speaking the majority language. Although legally equal, the languages may continue to have a different social status, due either to *past oppression* or to *present numerical imbalance*, two hypotheses that will be examined in the following pages.

a) Enduring oppression in the past may have seriously weakened the cultural position of a language, even if its present legal status in satisfactory. The example of *Spain* is very enlightening in this context. In a few years time, the peripheral languages, which were not recognised at all and even actively persecuted under the Franco regime, have been elevated to the status of fully official language of their Community. But, of course, those languages are not equipped for their new tasks. While Castillian has always and without interruption been the language of the administration and of the educational system, Catalan, Basque and Galician must start from scratch: a specialised administrative language must be created, civil servants, educators and journalists must be trained in the language, text books and teaching aids must be printed, etc. In other words, the co-official status proclaimed by the Statutes of those Communities remains largely formal, and the citizens cannot effectively exercise their right to use the regional languages, without the enactment of some accompanying measures. In the United States, these would be called 'compensatory measures'; in Spain, one tends to use the term of 'normalisation' measures which is more accurate: the purpose is not to exercise a revengé for past injuries, but to eliminate the effects of this injustice for the future. Several Statutes of Autonomy accompany the provision of the formal equal status of Castillian and their respective regional language with a further provision authorising the Autonomous Community's political organs to enhance the status of the minority language, so that it can effectively overcome its legacy of oppression. Typical in this respect is the

Catalan Statute; its art. 3.2 having declared Catalan and Castillian to be the official languages of the Community, art. 3.3 adds:

«The Generality shall guarantee the normal and official use of both languages, shall take the necessary measures to ensure knowledge of them and shall create the conditions in order to arrive at their full equality in the exercise of the rights and duties of Catalan citizens.»[188]

More strongly still, art. 5.3 of the Galician Statute:

«The Galician public authorities shall guarantee the normal and official use of the two languages and shall promote the use of Galician in all spheres of public life, of culture and information, and shall take the necessary measures to facilitate its knowledge.»[189]

Four Autonomous Communities (Catalonia, Euskadi, Galicia, and the Valencian Community) have used those enabling provisions and have enacted 'normalisation laws' providing, in addition for the formal equalisation of the two official languages, also for a number of affirmative measures.[190] The Catalan normalisation law has put special emphasis on the field of culture and the communication media: its articles 22 and 23 allow and even impose financial and other actions to stimulate the use of Catalan in the press, the broadcasting media, theater, cinema, and book publishing.[191] In the field of

188. «La Generalidad garantizará el uso normal y oficial de los dos idiomas, adoptará las medidas necesarias para asegurar su conocimiento y creará las condiciones que permitan alcanzar su plena igualdad en lo que se refiere a los derechos y deberes de los ciudadanos de Cataluña.»

189. «Los poderes públicos de Galicia garantizarán el uso normal y oficial de los dos idiomas y potenciarán la utilización del gallego en todos los órdenes de la vida pública, cultural e informativa, y dispondrán los medios necesarios para facilitar su conocimiento.»

190. See note 144, above.

191. Law of 18 April 1983 «de normalización lingüística de Cataluña.

Art. 22: «1. (...) la Generalitat podrá subvencionar las publicaciones periódicas redactadas total o parcialmente en catalán mientras subsistan las condiciones desfavorables que afectan a su producción y difusión. Esta subvención está otorgada sin discriminación y dentro de las previsiones presupuestarias.

»2. La Generalitat debe impulsar la normalización del catalán en las emisoras, a las que podrá subvencionar bajo el correspondiente control parlamentario y con la debida previsión presupuestaria.»

Art. 23: «1. La Generalitat debe estimular y fomentar con medidas adecuadas el teatro y la producción de cine en catalán, el doblaje y la substitución en catalán de películas no catalanas, los espectáculos y cualquier otra manifestación cultural pública en lengua catalana.

»2. La Generalitat debe contribuir al fomento del libro en catalán con medidas que potencien su producción editorial y su difusión. (...)».

In this same sector, see also the characteristic art. 3 of the Basque Law of 20 May 1982, setting up its autonomous broadcasting company, which specifies that the company's activity must be based, among others, on the principle of linguistic equality, but adding that the objective is to arrive at «an equilibrium in the global level of Basque-

education, the Basque Community has been particularly active; the relevant provisions of the normalisation law have been further implemented by a series of decrees favouring Basque-language education:

— special financial aids are attributed to private educational institutions teaching through the medium of Euskera (the so-called 'Ikastolas' that had sprung up in the last years of the Franco regime);[192]

— subsidies for the drafting of school books and teaching aids in Euskera;[193]

— reimbursement of the cost of transportation and lunch meals of those pupils of the Ikastolas whose home is more than 3 km away from a Basque language school.[194]

All those measures, it is submitted, are not in contrast with the non-discrimination rule of art. 14 of the Spanish Constitution, which, significantly, is repeated in the Statutes and the normalisation laws themselves.[195] Indeed, their objective is only to help the regional languages attain an *effective* equal status; this also implies that they should be reconsidered at the time (if ever it will come) when the regional languages will have fully recovered from their historical handicap.

In addition to the typical Spanish cases, one can mention other, rather isolated examples, of measures of affirmative equality inspired by the will to compensate for historical injustice. In *Belgium*, affirmative action does not exist, as a rule, in the relations between the Dutch and French language groups whose numerical and political strength is quite comparable. Yet, the former discrimination of Dutch-speakers has for a long time left its mark on the way certain governmental services were staffed. A proportional recruitment of Dutch —and French-speakers of the type outlined above [196] would have taken a very long time to restore the balance; it was therefore decided, in some cases, to recruit a more than proportional number of Dutch-speakers until one reached the point of equilibrium. This 'temporary preference' was applied, not without some polemics, in the Foreign Affairs Ministry and the

language programs wihin the Autonomous Community». Now, as the national networks already offer Castillian programs, the Basque government can perfectly decide to establish an Euskera-only channel.

192. Order of the Basque Government of 7 June 1982, and Resolution of 5 May 1983. This measure, as well as those mentioned in the following two notes, is quoted in A. MILIAN MASSANA, «Notes de legislació i jurisprudència», in *Revista de Llengua i Dret*, n. 2, 1983, 149-165, at 164.

193. Resolutions of 26 May 1982 and of 6 April 1983.

194. Resolutions of 7 October 1982 and 8 November 1982.

195. Art. 6. 3 of the Basque Statute; art. 5.4 of the Galician Statute; art. 3 of the Catalan normalisation law; art. 4 of the Basque normalisation law.

196. See above, p. 81.

diplomatic service,[197] and among higher army officials,[198] to quote the most conspicuous examples. Exactly the same remedy has been used in the Italian state administration located in the province of Bolzano: according to article 89.4 of the Special Statute of Trentino-Alto-Adige, the number of German— and Ladin-speakers in administration shall be gradually brought to the level of their proportion in the total provincial population.[199]

b) Even without any historical legacy of oppression, two equally official languages are not in a fair competition with each other if the first is a language spoken by a large number of persons, or even a world language, and the second is a language spoken by a small group. The *dimension* is a crucial element in the development and survival of a language, which needs to be supported by a communicative network covering a certain range of societal uses for each of which there is a critical quantitative mass;[200] below this threshold, a language is no longer self-supporting. The comparative disadvantage suffered by the smaller of two official languages can further be specified as follows:

i) the per capita *cost* of all language-related services and investments is comparatively higher, because their users or beneficiaries are fewer in number; at a certain point, this cost will become prohibitive and the service will no longer be delivered;

ii) due to this restricted diffusion, *social mobility* within the language area will be limited; for certain activities, such as university studies, or employment in neighbouring areas, a person will be forced to use the majority language; the prospect of social mobility has always played a major role in processes of linguistic assimilation.

Maintaining their language loyalty thus requires special dedication and financial sacrifices from the side of members of a linguistic minority. A compensation of those sacrifices by the public authorities is therefore only a restoration of the balance of equality.

This form of affirmative equality is widely used in *Switzerland* in favour

197. In this field, see the comments by Cr. HUBERLANT & Ph. MAYSTADT, «Exemples de lois taxées d'insconstitutionnalité», in *Actualité du controle juridictionnel des lois*, Bruxelles, Larcier, 1973, 443-516, at 495 ff.

198. See the analysis by K. HOUBEN, «Wet en werkelijkheid inzake het taalevenwich in het Belgisch officierencorps. Een overzicht van de periode 1938-1982», in *Res Publica*, 1983, 83-93.

199. See above, p. 82.

200. «For each field of activity there will be a minimum 'critical mass' of speakers of a given language which must be present before this language can be effectively used in that particular situation» (D. M. Mc RAE, «The Constitutional Protection of Linguistic Rights in Bilingual and Multilingual States», in A. Gotlieb (ed), *Human Rights, Federalism and Minorities*, Toronto, Canadian Institute for International Affairs, 1970, 211-227, at 214).

of the minor national languages, French and above all Italian and Romansh. This action is considerad as mandated, to a certain extent, by art. 116.1 of the Constitution. This article declares German, French, Italian and Romansh to be the country's «national languages»;[201] it is generally accepted that this is not a mere statement of fact, but also constitutes a normative program (which is fairly obvious for a legal norm): those are not only the four languages presently spoken in Switzerland, but they should also be preserved as such in the future, and therefore the public authorities have the duty to provide the means for their effective use in daily life. See, for instance, the following illustrations:

— on top of the general federal aids to cantonal primary education, a special 'linguistic supplement' is attributed to the cantons Ticino and Graubuenden for each Italian-speaking pupil; a considerably larger sum (in view of the extremely costly provision of primary school texts in each of the four larger dialect groups of Romansh) is granted to the latter canton for each Romansh-speaking pupil. As an observer notes, «this kind of financial supplementation from federal sources has permitted the canton of Graubuenden to provide Romansh children with primary texts of high quality, thus keeping them current and consonant with those available to German-speaking pupils».[202]

— Relatively more money is spent on public broadcasting through French and Italian than through German.[203]

— The smaller linguistic groups tend to be over-represented within the public administration; according to one source, «while only 4 % of the entire population are Swiss Italian, as opposed to Italian-speakers, 7.6 % of all federal administrative employees and 6.0 % of railway employees, are Swiss Italians. Only at the upper levels of the administration of the civil service is the proportion of Ticinese and Swiss Italians from Graubuenden precisely equivalent to their share of population».[204]

— Special federal subsidies are granted for the general promotion of cultural activities of the Italian and Romansh groups.[205]

201. Of the four *national* languages, only three (German, French, Italian) are also *official* languages of the Confederation, according to the *second* sentence of article 116 of the Constitution.

202. R. H. BILLIGMEIER, *A Crisis in Swiss Pluralism. The Romansh and their Relations with the German —and Italian— Swiss in the Perspective of a Millennium*, The Hague, Mouton, 1979, at 335.

203. See the figures given by K. D. MAYER, «Groupes linguistiques en Suisse», in *Recherches Sociologiques*, 1977, 75-97, at 84.

204. J. STEINBERG, *Why Switzerland?*, Cambridge University Press, 1976, at 113.

205. 3 million Swiss francs are granted to the 'Lia Rumantscha' and to 'Pro Grigione Italiano', two private cultural organisations. 2 million go to the canton Ticino. See *Europa Ethnica*, 1984, 38-39.

In a certain sense, Switzerland is more generous for its minorities in terms of affirmative equality than in terms of pluralistic equality, as the legal status of the Romansh language, in particular, is still rather unsatisfactory.[206] A similar pattern can be discovered in *Canada*. There, a modest sum of about 5 million $ is yearly made available to subsidise the cultural institutions and events of the ethnic minorities. Yet, this affirmative policy can only be called a poor substitute for the failed recognition of an official status to those languages: «the political purpose, of course, has been to protect the flanks of the official languages policy at relatively low financial cost from groups that have little reason to favour it and might be in a position to do it harm».[207]

In *Finland*, on the contrary, both aspects of equality go hand in hand; article 14 of its Constitution proclaims the official status of Finnish and Swedish, and then adds, in a second sentence, that «The cultural and economic needs of the Finnish-speaking and the Swedish-speaking populations shall be met by the State on equal principles». The exact nature of those 'equal principles' is controversial, but it is commonly accepted that this should include some affirmative bias towards the Swedish minority. That such compensatory measures must be finely balanced against competing policy interests is well brought out in the following statement of the leading Finnish author in this field:

«The correct interpretation (of art. 14) should be that, in those cases where the community supports cultural and economic (as well as social) aspirations within one population group, then the other should also receive support. The size of this support should be such that a similar degree of activity is possible for both in accordance with similar principles. For example, the level of education in Swedish institutions should be the same as that in Finnish institutions. On the other hand, account should of course be taken of the size of both population groups so that the minority cannot demand as many institutions as the majority. In certain areas where the minority is too small to warrant its own institution it should be possible to incorporate the minority into a predominantly Finnish institution.»[208]

One characteristic illustration of affirmative action is the entrance requi-

206. On this point, see R. H. BILLIGMEIER, *op. cit.*, passim; R. VILLETTA, *Abhandlung zum Sprachenrecht mit besonderer Berueecksichtigung des Rechts der Gemeinden des Kantons Graubuenden*, Zuerich, Schulthess, 1978, at 146 ff.; 185 ff.; 230 ff. See also the recent *Giovanoli* case decided by the Federal Tribunal (judgment of 7 May 1982, in *Europaeische Grundrechte Zeitschrift* 1982, 317), in which the facts showed that the tribunal of a local district (Albula) in which Romansh was spoken by 50 % of the population, only used German or Italian in its procedings.

207. M. J. ESMAN, «The Politics of Official Bilingualism in Canada», in *Political Science Quarterly*, 1982, 233-253, at 242.

208. T. MODEEN, «The Situation of the Finland-Swedish Population...», *op. cit.*, at 129.

rements to the University of Helsinki.[209] In a certain number of academic disciplines, the number of Swedish-speaking students had sunk to such a low level that one might anticipate a lack of competent Swedish-speaking personnel in certain civil services. The University was therefore empowered to modify the existing 'numerus clausus' system and to set aside a quota for Swedish-speakers. While apparently violating the principle of non-discrimination, this measure may well be considered as a true implementation of the principle of equal treatment.[210]

This need to make the right to use a language effective by an adequate staffing of the public administration is more directly apparent in those measures which provide for special training courses for civil servants in the 'weaker' of two official languages. In *Ireland*, e.g., a special language teaching institute, the 'Gaeleagras na Seirbhise Poible' has been set up in order to help civil servants improve their knowledge of Irish; scholarships are also available to spend some time in the 'Gaeltacht' areas, for immersion in Irish-only surroundings.[211] In *Catalonia*, the Generalitat (Catalan government) established an 'Escola d'Administració Pública' whose primary purpose also is the training of the administrative personnel in specialised uses of the Catalan language.[212]

The affirmative aspects of linguistic equality have also been acknowledged in a recent *Austrian* law, the Act on Ethnic Groups ('Volksgruppengesetz') of 7 July 1976. Its article 1.1 states the general principle that «the Austrian ethnic groups and their members are protected by the law; the maintenance of the ethnic groups and the protection of their existence are guaranteed. Their language and culture must be respected».[213] The third paragraph of the same article adds the important principle that «no member of an ethnic group may be disadvantaged by the exercise or non-exercise of the rights he holds as such».[214] This negative statement finds its positive counterpart in articles 8 and following, which provide for the procedure and conditions of the promotion of ethnic groups ('Volksgruppenfoerderung'). Those measures are certainly in conformity with (and may have been conducive to) the recent reinterpretation of equality by the Constitutional Court.[215]

209. See M. HIDEN, «Bestand und Bedeutung der Grundrechte im Bildungsbereich in Finnland», in *Europaeische Grundrechte Zeitschrift*, 1981, 640-643, at 641-642.

210. This is also the view of M. *HIDEN, ibid.*

211. See. S. O'CIOSAIN, «Bilingualism in Public Administration. The Case of Ireland», in *Revista de Llengua i Dret*, 1983, n. 2, 11-19, at 14.

212. See J. R. SOLÉ & R. ALAMANY, «La situació del català com a llengua de l'administració al Principat de Catalunya», in C. Duarte & R. Alamany (eds), *Actes del colloqui sobre llengua i administració*, Barcelona, Generalitat de Catalunya, 1984, 107-127, at 120.

213. «Die Volksgruppen in Oesterreich und ihre angehoerigen geniessen den Schutz der Gesetze; die Erhaltung der Volksgruppen und die Sicherung ihres Bestandes sind gewaehrleistet. Inhre Sprache und ihr Volkstum sind zu achten».

214. «Keinem Volksgruppenangehoerigen darf durch die Ausuebung oder Nichtausuebung der ihm als solchem zustehenden Rechte ein Nachteil erwachsen».

215. See above, p. 101.

Yet, one author finds the use of the word 'promotion' presumptuous, as those means are grossly insufficient to reverse the secular trend towards assimilation.[216]

A final case in which the constitutionality of affirmative measures for the compensation of a cultural handicap has been upheld, is the *Association de parents d'élèves* decision of the Belgian Council of State.[217] At issue was a Royal Decree of 5 May 1971 amending the rules on financial subsidies to kindergartens and primary schools; the minimum number of pupils which a school must have in order to qualify for subsidy was lowered in the case of the Dutch language schools of the bilingual district of Brussels (art. 3 of the Decree). The parents' association of a French language school of the Brussels district complained of discriminatory treatment: the Decree permitted the creation of very small schools in the Dutch language network, with accordingly closer contacts between teachers and pupils, and therefore a more efficient education. This could, the parents claimed, provide an incentive for certain, especially bilingual, parents to send their children to Lutch rather than to French schools.

The administrative court upheld the legitimacy of the differentiation on the basis of its usual purpose-means test.[218] The *purpose* of the act was easily found, by the court, in the enabling legislation, the Law on the Use of Languages in Education of 30 July 1963,[219] whose article 5 provides that the conditions for subsidy should be enacted by the 'King' in such a way that all parents can send their children to schools using their language (whether French or Dutch) within a reasonable distance from home. As for the *means*, the Council of State found that relaxing the numerical criterion was necessary, due to the fact that Dutch-speakers are a relatively small minority in Brussels, and that their right to have schools within reasonable distance could not be implemented if one used the ordinary standards.[220] Nor are those means in disproportion to the purpose: there is no sign, according to the Council, that the preferential treatment of the Dutch schools has a detrimental effect on French language education.

Note however that the Belgian court only had to decide whether affirmative differentiation was *legitimate*, and not also whether it was *mandatory*; it merely stated that «Article 6 does *not prohibit* the application of different legal rules to different situations».[221]

216. T.h VEITER, «Volksgruppenrecht und Volksgruppenproblematik in Oesterreich-Ende 1976», in *Der Donauraum*, 1976, 54-69, at 63-64.

217. Decision of 1 February 1973, in *Pasicrisie*, 1974, IV, 109.

218. *Cf. supra*, p. 68 (and footnote 9).

219. This Law is inspired by a stringent policy of territorial unilingualism in conformity with Belgium's overall linguistic policy: Dutch is the exclusive medium of instruction in the Dutch linguistic area (Flanders), French in the French linguistic area (Wallonia), only Brussels having two parallel networks of public schools in each of the languages.

220. Decision of 1 February 1973, *cit.*, at 113.

221. *Id.*, at 112.

2. *Language Groups as Economic-Political Minorities*

The first rationale for affirmative action, in the case of linguistic minorities, applies to all of them: they all bear a cultural handicap, even those groups among them who are relatively well off in social-economic terms, like the Catalans, the South Tyroleans or the Swedish Finns. For a number of minorities, however, the language is only part of a larger 'stigma' bearing upon them, and excluding them from access to a wide range of societal benefits. They could be called 'economic minorities',[222] or, in United States constitutional parlance, 'discrete and insular minorities'. Indeed, a number of ethnic minorities, in the U.S., and above all the large Hispanic minority, are generally considered to be such powerless groups, comparable to the traditional victims of societal discrimination, the blacks.

As was indicated before, a special, more severe standard has often been used by the Supreme Court as regards differentiations relating to such groups.[223] Yet, as has been shown in a number of cases, this very theory of 'suspect classifications', which was devised for the protection of the weaker groups, was turned against them in cases of affirmative action. Classifications based on race or national origin, as many argue, are always inherently suspect, and no difference should be made according to the avowed statutory purpose, whether this is to burden or to favour the insular minorities. The credibility of neutral standards of equality review would be jeopardised if the theory of 'suspect classification' was used against whites, but not against blacks. As Justice Powell said in the *Bakke* case, «the guarantee of equal protection cannot mean one thing when aplied to one individual and something else when applied to a person of another color».[224] Others have strongly attacked this 'color-blind' theory, and point to the substantive reality underlying the emergence of the theory of suspect classifications. Race has become suspect, not on the basis of some logical or neutral argument, but because of the historical experience of the United States. In another, racially homogeneous country, race might not be suspect as a criterion, while others like religion, or language, or political opinion, might be. In other words, the (justified) search for principled standards in equality adjudication should not deteriorate into a blind formalism, but should continue to reflect substantive values. Therefore, affirmative action in favour of powerless minorities is entirely legitimate.[225]

222. An expression used by L. THUROW, *The Zero Sum Society. Distribution and the Possibilities for Economic Change*, New York, Basic Books, 1981, at 184-187.

In a certain sense, the *real* economic minority of any country are the *poor*. What is meant by the expression 'economic minority' in the present context are *structural* minorities that are at the same time globally disadvantaged in socio-economical terms.

223. See above, p. 75.

224. *Regents of the University of California v Bakke*, 438 U.S. 265 (1978). In legal writing, see e.g. R. POSNER, «The DeFunis Case and the Constitutionality of Reverse Discrimination», in *Supreme Court Review*, 1974, 1 ff.

225. Sharing this view, althought with partially different arguments: J. H. ELY,

Despite the clamorous *Bakke* judgement, the second view has on the whole prevailed in the case law of the Supreme Court. In *Bakke* itself, while the use of fixed racial quota in entrance examinations to state medical schools was declared unlawful, the use of more flexible methods for favouring minority members was explicitly upheld in the decisive vote of Justice Powell.[226] In addition, the Court accepted the use of set-aside quotas in other fields, such as a private sector hiring regulation adopted by collective bargaining (*Steelworkers v Weber*),[227] or public contracting under the Public Works Employment Act of 1977 (*Fullilove v Klutznick*).[228]

It can therefore safely be said that affirmative action has —in principle, if not in all its concrete forms— been considered compatible with the equal protection clause of the Fourteenth Amendment. Yet, these judicial decisions only constitute deference to preexisting legislative choices. There is no question that the American courts would, at present, not dream of *imposing* such positive remedial measures on a reluctant legislator. This limitation is increasingly important at a time when the government does no longer take any new affirmative initiatives, and even attempts to scale down existing schemes.

European courts are also very reluctant to order affirmative measures for (linguistic) minorities in fields that are not directly connected to language use. *Immigrant linguistic minorities* appear as typical economic minorities, to be compared with the Hispanics in the U.S. Yet, despite some isolated pleas in the literature,[229] they are seldom or ever made the object of preferential treatment, and the first dimension of equality, non-discrimination, still remains the most practically meaningful for them. As for the *endogenous* minorities, they have occasionally benefitted from preferential treatment in areas that are not directly linked to their linguistic handicap, but those were, according to the constitutional courts, discretionary decisions of the legislator which were not judicially constrained.

In the *Austrian* case of 1981, already mentioned before,[230] the Constitu-

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Democracy and Distriust, op. cit., at 150 ff.; O. M. FISS, «Groups and the Equal Protection Clause», in *Philosophy and Public Affairs*, 1975-76, 107-177, at 154 ff.; M. J. HORWITZ, «The Jurisprudence of *Brown* and the Dilemmas of Liberalism», in *Harvard Civil Rights Civil Liberties Law review*, 1979, 599-613; K. L. KARST & H. W. HOROWITZ, «The Bakke Opinions and Equal Protection Doctrine», in *Id.*, 7-29; S. WRIGHT, «Color-Blind Theories and Color-Conscious Remedies», in *University of Chicago Law Review*, 1980, 213-245; see also the cautious but well-argued views of T. SANDALOW, «Racial Preferences in Higher Education: Political Responsability and the Judicial Role», in *University of Chicago Law Review*, 1975, 653-703.

226. *Bakke* case, cit., at 316 ff.

227. *Steelworkers v Weber*, 443 U.S. 193 (1979).

228. *Fullilove v Klutznick*, 448 U.S. 448 (1979).

229. See e.g. G. LYON CAEN, «Les travailleurs étrangers - étude comparative», in *Droit Social*, 1975, 1-16, at 16.

230. Judgment of 5 October 1981, cit. (note 152).

tional Court stated the general principle that positive measures might be needed in favour of minorities, but did not accept the specific claim of a Slovene political party that the electoral districting for the Land elections in Carinthia should be adapted so as to allow for the election of at least one representative of the Slovene minority. Although the Court did not fully articulate the reasons for its rejection, it might have been that a political issue like electoral procedure was considered as too tenuously linked to the ethno-linguistic distinctiveness of the minorities. In addition, the Court explicitly argued that nothing indicated that the electoral districting in Carinthia had been adopted with the intention of discriminating against the Slovenes; it rather corresponded to a long-established internal administrative division of Carinthia.[231]

In fact, the idea that ETHNIC minorities should benefit from some special POLITICAL representation, which echoes John Ely's theory of the process-oriented protection of powerless minorities,[232] is a recurring theme. In similar cases dealing with the electoral law of the Land Schleswig-Holstein, the *German* Constitutional Court held, in the 1950's, that a preferential treatment of the party representing the Danish minority was constitutionally legitimate, though not imposed.[233] Many examples of such special representation exist in the history of minority protection.[234] Some modest political 'privileges' for minorities have also been adopted in *Italy*:

— the 'guaranteed' representation of the small Ladin minority in the Trentino Regional Council and in the Bolzano Provincial Council,[235] as well

231. *Id.*, at 26.

232. J. H. ELY, *Democracy and Distrust*, op. cit., Chapter 6, p. 135 ff.

233. Judgment of 11 August 1954 in *Bundesverfassungsgerichtsentscheidungen* 4, 31, at 42: «Mit Bezug auf die parlementarische Repraesentation des als Einheit gedachten Staatsvolkes begruendet die Eigenschaft als Partei einer nationalen Minderheit keine Verschiedenheit die *wesentlich* ist, und die der Gesetzgeber daher bei der Gestaltung der Rechte der politischen Parteien im Wahlverfahren beruecksichtigen muesste».

234. See the overview in S. FURLANI, «Sulla rappresentanza parlamentare delle minoranze nazionali», in *Rivista Trimestrale di Diritto Pubblico*, 1955, 213-226 and 972-986. The most radical solution is that experimented for some years in Moravia (and later in Bucovina) during the Austro-Hungarian regime: the total number of seats was divided, from the outset, between the German and Czech population, according to their proportion of the total population, and each voter was registered in a national 'matricle'; see S. FURLANI, *op. cit.*, at 976 ff.

In *American* constitutional law, there seems to be wide legislative discretion, though certainly no compulsion, to benefit minorities through an electoral apportionment made at the (moderate) expense of the majority. See the Supreme Court decision in *United Jewish Organizations v Carey*, 430 U.S. 144 (1977), and the following comments: NOTE, «Group Representation and Race-Conscious Apportionment: The Role of States and the Federal Courts», in *Harvard Law Review*, 1978, 1847-1873; NOTE, «*United Jewish Organizations v Carey* and the Need to Recognize Aggregate Voting Rights», in 87 *Yale Law Journal* 1978, 571-602.

235. Art. 62 of the Special Statute of Trentino-Alto Adige, as implemented by the

as the automatic representation of all linguistic groups who have obtained two municipal councillors in the local boards ('giunta communale') of the province;[236]

— the national law on the public funding to political parties, in which the general numerical criteria are slightly relaxed in favour of parties that, though marginal in national terms, are strongly represented within a «special statute region providing for the protection of linguistic minorities»;[237]

— the 1979 Law on the Elections to the European Parliament which, in order to compensate for the fact that its electoral districting is less favourable to small parties than the one used for national elections, allows parties representing the French, German or Slovene minorities to pool their votes with those of a national list.[238]

The question whether affirmative measures are necessary for the effective exercise of formal language rights, the central issue of this sub-section, is clearly posed under *Italian* constitutional law. As mentioned earlier, the Constitutional Court holds that the central objective of article 6 of the Constitution is to protect the integrity of linguistic minorities against forced assimilations.[239] Now, it might be argued that the failure to make special allowance for their minority status, even in areas not directly dealing with the use of languages, is an *indirect* way to provoke the assimilation of those groups. The 1970 judgement on the recruiment of agricultural workers, mentioned above, goes some way in this direction. Yet, it merely consisted in *exempting* the minority from a general norm; the Constitutional Court has been much more reluctant as far as *special positive measures* are concerned. A 1975 case concerned the constitutionality of national legislation which recognised a given benefit only to social institutions run by the *national* trade unions, excluding thereby the South Tyrolean trade union which is dominant in its own province. The Court held that the legislator was not bound to include the German union because language or ethnic differences

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Regional Law of 23 July 1973: one seat is reserved to the Ladin group; when no candidate, declaring himself a Ladin, is elected according to the normal electoral rules, the Ladin candidate with the highest number of votes replaces the non-Ladin candidate of the same list who is elected with the lowest number of votes. See A. PIZZORUSSO, «La 'garanzia di rappresentanza' del gruppo linguistico ladino nel Consiglio regionale e nel Consiglio provinciale di Bolzano», in *Le Regioni*, 1973, 1119 ff.

236. Art. 61.2 of the Special Statute of Trentino-Alto Adige. This requirement is couched in general terms, so that it not only benefits the Ladins, but also the German and Italian groups in those areas where they form only a small minority.

237. Law of 2 May 1974, «Contributo dello Stato al finanziamento dei partiti politici», art. 1; the same rule applies to the funding of the parliamentary fractions (art. 3 b of the same Law).

238. Law of 24 January 1979, art. 12.9.

239. Above, p. 96.

were not legally relevant in the case at hand, which was of a social nature.[240] It reiterated its position in a similar case one year later: a national decree, regulating a new local tax, exempted cultural, recreational and sports associations adhering to *national* organisations, excluding thereby the German and Ladin associations which lead a separate existence.[241] The Court expressly argued that this measure was not a covert means of forced assimilation, because the minority associations were entirely free to join the national organisations and thus benefit from the tax exemption.[242] The picture would be different only if membership of those national organisations implied a threat to their linguistic identity,[243] which, according to the Court, it did not. Thus, the specific nature and 'institutional autonomy' of the minorities in matters not directly linked with language or culture is not particularly protected under article 6 of the Constitution (or by the Regional Statute).[244]

240. «Gli interessi afferenti a tali oggetti sono, infatti, comuni a tutti gli appartenenti alla stessa categoria professionale, lavoratori o datori di lavoro che siano, senza che le differenze di lingua o di origine etnica assumano al riguardo giuridica rilevanza» (judgment of 16 April 1975, in *Le Regioni*, 1975, 942, at 953).

241. Judgment of 19 February 1976, in *Le Regioni*, 1976, 503 (with note by A. PIZZORUSSO).

242. *Id.*, at 511: «Né può ravvisarsi nella imposizione dell'onere di adesione ad organizzazioni maggiori, legalmente riconosciute e rapperesentate nel CNEL, una menomazione delle caratteristiche peculiarità tradizionalmente proprie di quelle associazioni, attraverso una sorta di larvata assimilazione forzata che porti a snaturarle, essendo rimesse alla loro libera determinazione la scelta tra aderire o non aderire alle corrispondenti organizzazioni maggiori».

243. *Id.*, at 511-512: «Verament, invece, i diritti di tali minoranze sarebbero vulnerati qualora l'adesione delle (loro) associazioni (...) alle organizzazioni nazionali comportasse, in forza di particolari norme che queste disciplinano o di concrete determinazioni adottate dai loro organi deliberanti, delle limitazioni al modo d'essere originario delle prime, con specifico riguardo alla differenziazione etnicolingustica in esse esprimentesi».

244. See the remarks by S. BARTOLE in his case-note under the judgment of 16 April 1975, *cit.* (note 240).

But see the contrasting views of the Regional Administrative Tribunal for Friuli-Venezia Giulia (judgment of 16 January 1976, in *Le Regioni*, 1976, 1189, with note by S. BARTOLE), annulling the appointment, by the regional authorities, of the members of the Provincial Committee for Artisanship of Trieste, because of the lack of any representative of the 'Associazione slovena per l'economia', grouping the Slovene operators of the sector. Equal treatment implied, according to the tribunal, that the Slovene association be represented in proportion to its numerical importance, or even have a guaranteed representation beyond any numerical condition. The Tribunal did not need to decide between the 'proportional' and the 'affirmative' option, as the decision of the regional authorities did not meet any of the two standards.

In contrast with this innovative decision, the very same court has recently taken a very restrictive stance on the rights of the minority, by annulling an act of the Trieste Provincial Council which authorised the use of the Slovene language in the Council's debates: decision of 23 September 1982 of the Regional Administrative Tribunal for Friuli-Venezia Giulia, in *Le Regioni*, 1983, 250 with note by S. BARTOLE, «Uso della lingua slovena nelle assemblee elettive e riserva di legge». The court argued that action

Conclusion

The concept of equality has undergone, in recent decades, an important doctrinal refinement from a rather formal rule prohibiting overt discriminations into a central element of every constitutional order with complex substantive ramifications, implying a duty to differentiate among societal groups according to their specific needs. This new interpretation of equality is also gradually trickling down to the specific field of *linguistic* equality, and this article wants to contribute to the growing awareness that many measures for the protection of linguistic minorities should not so much be considered as 'specific minority rights', but rather as concrete applications of the general principle of equality. Analysing those measures within the framework of general fundamental rights theory rather than under the heading of 'minority rights' is perhaps more promising for the linguistic groups involved. Indeed, special 'language rights' or 'minority rights' tend to appear as supplementary measures, as derogations from a basic pattern needing some special justification. They do not benefit from an aura of «inherent rights of man» which makes of fundamental rights such a strong weapon in political aragumentation, but are considered as strictly dependent on the peculiarities of a given country, and the good-will of its authorities. Opponents can easily invoke the argument that the introduction of special measures for a particular group is contrary to a basic principle of liberal democratic theory, that of the universal guarantee of rights to each citizen. I wanted to show, on the contrary, that a protection against linguistic assimilation can be read in the principle of equality, and therefore forms part of the best democratic tradition. Democracy, in the cultural as in other domains, means the recognition of the right to be different.

in favour of linguistic minorities could only be taken by the central State; yet, as was argued earlier on, the Constitutional Court itself has now abandoned this doctrine (*cf. supra*, p. 92-93).