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VISIT CLUJ
The Heart of Transylvania

Proiect realizat cu sprijinul Primăriei și Consiliului Local Cluj-Napoca. Proiectul susține candidatura orașului Cluj-Napoca la titlul de Capitală Culturală Europeană.

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Abstract

This study briefly summarizes the major economic, sociological and anthropological theories on the relationship between ethnicity and economics, and examines how they can be applied to the economic situation of multi-ethnic Transylvania, and specifically the minority Hungarians, in its investigation. Following an institutionalist logic and a resource-based approach, two general questions are formulated, along separate paradigmatic trends: 1. How able is Romanian democracy and the development of its economic institutional system to exploit assets stemming from ethnic diversity? 2. What kind of cultural, structural and network resources do minority Hungarians possess, and to what extent and how do they succeed in utilizing them in the economy?

Keywords: ethnic diversity, economic development, ethnic Hungarians in Transylvania

1. Political Economics and Institutionalist Approach

The social science research of the relationship between ethnicity and economics has begun to make dynamic developments in recent decades. The bulk of political economics analyses deal with the question of whether there is a relationship between ethnic diversity and economic development, and whether the ethnolinguistic variety of people that live and work in a given country, community, or economic work-group, influences economic performance. In the logic of the marginal utility, the question arises as to what are the costs, as well as benefits of ethnic heterogeneity, considering a given group, community or the society as a whole (Alesina–La Ferrara 2005).

The costs stem from the fact that heterogeneity can signify differing lifestyle and consumption preferences. This, in turn, urges the actors more toward self-determination, and the production of private goods. The inclination toward contributing to common goods and collective action is significantly less. As a result, the quality of public institutions and public services (education, health care, justice, etc.) is lower, as is the legal control of transactions. This merely reinforces the fact that, instead of cooperative behavior, the pursuit of opportunism, rent-seeking and free-rider strategies prevail (Easterly–Levine 1997), which increases the transaction costs of economic control, and holds back economic development.

Ethnic diversity, however, can also have a positive effect on economic performance. On the production side, diversity of competencies and abilities, as well as confronting difference, usually brings forth creativity (Putnam 2007), and has a positive effect on innovation, and via mutual learning, on its rapid diffusion. At the level of workgroups, this implies the recombination of resources stemming from continuous knowledge generation, which increases the ability of the companies to adapt and compete. Beyond the production function, but still an impor-

tant source of returns, is the fact that in multi-ethnic locations, as a result of innovative strategies, products and services containing greater added value and thus more attractive to consumers, become accessible. This same positive effect can prevail in the development of public goods and public services as well, through which the amenity value of cities and regions increase (Ottaviano–Peri 2006).

In the logic of political economics, ethnic diversity can thus benefit the economy when the utility stemming from increased productivity outweighs the costs of the integration of diversity (Alesina–La Ferrara 2005). The following institutional conditions help ensure that the result of this trade-off is positive:

– the institutional control of economic transactions is efficient, as well as the enforcement of cooperation and the necessary collective action for the development of public goods; well-functioning bureaucracies are enforcing law and order, so that contractual non-compliance and the expropriation of public goods rarely takes place (e.g., via corruption: Knack and Keefer 1997). Thus, the presence of "good" institutions significantly mitigates the negative effects of ethnic diversity or it can even completely eliminate them. Contrastingly: "bad" institutions, alongside high ethnic diversity, can further spoil chances for economic growth and increase the risks of social conflict (Easterly 2001).

– efficient market coordination: resource allocation and economic transactions take place in a market whose operation is transparent, there are no major turbulences favoring opportunism, nor significant information asymmetries which can bring certain players an unfair competitive advantage.

– the service and creative industries are more developed: utility stemming from a diversity of competencies is more significant in complex societies (Alesina–La Ferrara 2005), and diversity principally increases productivity in the case of knowledge workers.

Along these dimensions, there is great variance among individual countries, regions and communities. Thus, the economic effects of ethnic diversity also vary greatly.

In (particularly Sub-Saharan) African countries, the majority of transactions are settled outside the formal market, the legitimate institutional control of the economy is characteristically small, and creative industries are almost absent. Ethnic diversity, in such an environment, rather aggravates economic development: along ethnic fault lines, collaborative tendencies and social capital are low, and no consensus is reached regarding the development of public goods. This could significantly slow down or even stop the development of the education system, communal infrastructure, financial system etc.; political instability and social conflicts could become more common (Easterly–Levine 1997). Certain assessments even go as far as quantification. According to Collier and Gunning (1997), the ethnolinguistic fractionalization accounts for more than a third of Africa's growth shortfall. Using the same index, Alesina and La Ferrara estimated that, going from perfect homogeneity to maximum heterogeneity would reduce a country's growth rate by 2 percentage points (2005:9).

These analyses, however, also have their fair share of critics, who resent the fact that behind these studies is implicitly present the idea of unidirectional economic development, from the "traditional" to the "modern" (Jerven 2011), and the conviction that African countries must take the same steps to economic recovery, regardless of local endowments and conditions (Austin 2008). According to them, the development of economies must not exclusively be mea-

sured by the presence/absence, or efficient operation, of the aforementioned institutions (private property, free market, legal control, etc.), but also by those particular production practices which are formed in the relationship between individuals and their environments, always according to site-specific resources. Due to the diversity of resource supply, varying population density, and differing institutional legacy of colonial intervention, etc., it is impossible to isolate the universal determinants of development. Thus, estimations regarding the role of ethnic diversity are not reliable.

A critique with a similar, evolutionist approach is also formulated by Grabher and Stark (1997) regarding Central-Eastern European societies, where according to them, actors in the post-socialist setting – "born of necessity" and along a certain type of institutional path dependency – "are restructuring by redefining and recombining resources" (p. 745). Thus they succeed to build innovative, recombinant organizational forms, whose long-term adaptability can surpass that of those which are created via external pressure, in the wake of privatization and marketization.

In spite of the aforementioned divergences, there is a convincing consensus that compared to the African countries, more developed democracies and economies are rather able to productively "handle" ethnic diversity, and reduce or even nullify its negative effects (Collier 2000). Or, as Page (2008: 14) put it simply: "At the country level, we find that in advanced economies, ethnic diversity proves beneficial. In poorer countries, it causes problems." Studies carried out in the United States of America, for example, demonstrated that in the long run multicultural diversity has powerful economic advantages (Putnam 2007) and its successful exploitation depends on the capacity to create new institutional forms of social solidarity which could dampen the short-term negative effects caused by it (low trust, social isolation etc.). In this respect, however, conditions have worsened in the last decades, the increasing income inequalities grew along with class gaps in socioeconomic mobility (Putnam 2015), which is a bad precursor for the prospects of economic growth in the future.

Research about major cities in the US confirmed the positive relationship between multiculturalism and economic prosperity: in cities where cultural diversity is greater, salaries and rents are higher. Diversity thus positively affects both production and consumption alike. As there is an increasing demand for varied, innovative services (e.g., in gastronomy, music, etc.) ethnic diversity can also generate a kind of positive amenity effect. As a result, these cities generally become attractive migration destinations. Diversity thus has a positive effect on the presence and productivity of businesses (Saxenian 1999), and via localized external effects, on consumer satisfaction as well. These effects are stronger among second- and third-generation immigrants, which means that a certain level of communal integration is necessary for them to unfold (Ottaviano–Peri 2006, Putnam 2007). These studies conducted in the United States were repeated in large Western European cities possessing similar diversity, and they arrived at similar results (Bellini et al. 2013). In parallel with these findings, however, there's a constant concern about social problems caused by growing inequalities, increasing ethnic polarization and residential segregation (Musterd 1998, Marcuse–Kempen 2000, Brenner et al. 2011), which, in the long run could jeopardize economic development as well.

Studies carried out at the level of workplaces show that the relation between diversity and performance is highly dependent on the organizational context in which the work takes place

(Kochan et al. 2003). For example racial diversity may enhance performance only if organizations foster an environment that promotes learning from diversity, and group leaders build on team members' creativity and information (p. 7, 17). De Vaan et al. (2011) in their study about the video game industry conclude that team performance is higher only if stylistic diversity[1] is accompanied by high social cohesion, these teams "are better able to harmonize the noisy cacophony of an (otherwise) excessive plurality of voices, thereby exploiting the potential beneficial effects of cognitive diversity" (p. 1). Unequivocal evidence was found, however, in some very interesting fresh research that revealed that ethnic diversity contributes to a more efficient functioning of financial markets. It turned out that traders in ethnically heterogeneous markets show less confidence and scrutinize other's decisions more often and thus are less likely to accept prices that deviate from true values, preventing the occurrence of price bubbles and devastating market failures. (Levine et al. 2014)

Beyond the scholarly efforts presented above, the European research tradition on diversity displays numerous particularities as well. One of the reasons for this is that the European Union is a multilingual entity and its rhetoric regards ethnic and cultural diversity as a resource to be conserved (Gazzola 2006), similar to biodiversity (for this parallel, see Maffi 1999, Skutnabb-Kangas 2003). Hence, to protect the rights of ethnic and linguistic minorities, numerous measures and non-statutory policy proposals are in effect. However, due to the continuous and recently increasing flux of immigrants, it becomes more difficult and costly to enforce them, and societal support for them varies as well. In this context, researchers search for a sensible compromise, an optimal trade-off between the utility stemming from the free flow of labor, and the costs of creating multi-lingual inclusion and social cohesion (Grin–Marácz–Pokorn–Kraus 2014).

Another characteristic of this research tradition is that there is a greater concern for the socially constructed nature of ethnicity. Accordingly, instead of the ethnic variable, they rather prefer to operate with more objectively measurable indicators, like the mother tongue of the subject, language use, language diversity etc. Thus, the constructivists' worry about the reification of ethnicity and "groupism" in ethnic research (Brubaker 2004, 2008), is at least partially, avoided. On the other hand, the nature of the relationship between language and ethnicity is left unclear, and it remains a subject of debate if in particular research contexts the dominant and systematic use of categories such as "linguistic" or "ethnolinguistic groups" instead of the more potentially conflict loaded "ethnic" concept, should be considered a euphemism or not.

Certain representatives of a strongly interdisciplinary approach known as the economics of language consider that multilingualism, by itself, generates value and can have a positive effect on economic development. For instance, according to Grin, Sfreddo and Vaillancourt (2010), about 10 percent of Switzerland's GDP is due to linguistic diversity. Thus, the 0,5 percent that is spent on children's multilingual education appears to be a rather good investment (Grin–Vaillancourt 1997), even if the development of multilingual communication in institutions may incur further costs.

1 In their conceptualization of stylistic diversity, the ethnic or racial heterogenity was not included since the majority of the participants in the field was young white male.

Econometric evaluations similar to those in Switzerland, however, are not too common. The reason for this is not just that – due to continuous immigration and growing linguistic diversity – there is no sufficient empirical data, but also that the local institutional conditions which play a role in mediating the relationship between diversity and economic development are extremely varied, and are themselves constantly transforming. Thus, the cost implications of multilingualism can vary greatly.

Because of this, another group of economics of language experts is rather skeptical about the economic rationality of multilingualism, and instead considers the use of a common language (lingua franca) in official communication to be a better compromise, even if this is clearly a surplus expenditure and economic liability for those who need to acquire it (Van Parijs 2002). Namely, if we regard the common language as a public asset (Taylor 2014), those whose mother tongue is the dominant language unfairly end up in an advantageous situation (and become "free-riders"), because (Grin 2004: 197-199):

– They save on the costs of learning the common language. In total, thousands of hours of study, education and language exposure is required to attain near-native knowledge of a language, which is accompanied by significant expenses, only partially covered by public funds.

– They don't have to reckon with the opportunity costs of learning the common language either. Instead of learning the common language, they can dedicate their time to other productive activities, recreation, etc. The same applies also to those who assist in learning the language.

– They can save on communication costs. These costs are present in any interaction where people with different mother tongues come into contact, since the message must be translated into the dominant language. Thus, in formal communication, often a concrete payment must also be paid.

– They are at a legitimacy and rhetorical advantage. Those who speak the common language at a native level have an advantage in every argumentation and bargaining. This tendency will most likely become stronger as the common language becomes dominant, while the status of the local/minority languages decrease.

In other terms, if minority language speakers have to learn the dominant language to have an equal access to resources, the majority causes a negative externality for the minority (Wickström 2007). Insufficient knowledge of the common language generally results in worse labor market opportunities. This, in turn, could lead to income disadvantages.

These inequalities not only turn up in countries with linguistic minorities, but are also valid for supranational entities (e.g., the European Union) where a group of experts push for the use of a lingua franca, characteristically the English. To even up the odds – in the name of fairness – they propose compensation solutions in multiple areas: e.g., putting the linguistic minorities in a free-rider position in other areas, partially taking on the educational costs of learning the common language, preferential access to publications issued in the dominant language, etc. (see. Van Parijs 2002).

Another important additional asset of the economics of language analyses is that they make us see the relationship between diversity and economics not only from the point of view of the entire society, but also from the perspective of minority/majority. Their results can thus fruitfully be utilized in areas of research belonging to other fields of science as well, which are specifically focused on the economic practices and strategies of ethnic minorities.

2. Resource-based approach

The theories outlined above argue that the positive or negative outcome of the relationship between ethnic diversity and economic development is fundamentally determined by the development of democratic institutions. However, there can also be significant differences within the same society. Cultural characteristics and social organizational patterns of individual minorities in the same region can lead to varying economic strategies and outcomes.

In the United States, especially in the 1990s, the "new economic sociology" paradigm was enjoying a great popularity since it started to analyze the entrepreneurial activity and economic performance of immigrant minorities from the perspective of social networks. (Aldrich–Waldinger 1990, Granovetter 1995, Portes–Sensenbrenner 1999, Light–Gold 2000). These analyses sought the answer to why certain immigrant groups thrive more economically, while others less so. Since they typically arrive without assets and are received by similar conditions, the presumption that their varying achievements are fundamentally explained not by economic, but social factors, is justified. Researchers have thus been afforded a good opportunity to chart and examine those minority community resources which could represent a comparative advantage vis-à-vis other immigrant minorities, as well as the already integrated majority. According to Mark Granovetter (1995) – one of the most important representatives of this paradigm – these advantages are the following:

– cultural advantages: As an ethnic group, certain economic activities can fall under varying moral judgment. Some can be prohibited by social norms relevant to the majorities, but not to the minorities, which creates an unadulterated market opportunity for the latter. Another factor at least as significant is that for certain ethnic groups, the cultural and cognitive embeddedness and the social formation of entrepreneurial habits is more comprehensive. Karády (1989), for instance, referring to the embourgeoisement of Eastern European Jews, writes that their relationship to writing, the presence of reading and text interpretation in their daily religious practice conveyed an advantage in their educational, and later in their commercial careers.)

– networking advantages: minority members of the society could be well positioned for inter-cultural (economic) relationship building. They can more easily occupy bridging or broker positions, which has numerous advantages: they can cultivate more, and more varied economically useful "weak ties" and relations, through which they can acquire valuable market information and opportunities (Granovetter 1972); they can provide mediator-integrative functions; they can call upon resources from both sides (Burt 1992); they can help stimulate commerce between ethnically homogeneous regions and countries (Alesina–La Ferrara 2005). These network resources – which other authors also call "bridging" social capital (Putnam 2000) – from the perspective of economic development, also contribute to the creation of one of the most important public assets, generalized trust. And where there is trust, trade and work management will be substantially cheaper, less will need to be spent on discipline, monitoring, enforcement, contractual compliance, sanctioning economic deviances, etc. Transactions costs spared in this manner can thus be turned to more productive investments, innovation, and welfare programs. These relationships are thus extremely important from the perspective of further economic development and integration. Not to mention that it is simply better, more pleasant, and safer to live in a society integrated by trust and consensus.

– advantages stemming from solidarity: This alludes to the fact that more densely interwoven relationships, common traditions, customs, culture (or merely the collective experience of constraints imposed by the majority), contribute to a greater social cohesion, and to a more powerful *"bounded solidarity"* among the members of the minority (Portes 1998). The resource also known as "bonding" social capital (Putnam 2000) creates "enforceable trust", because of which, within the group, the institutional operation of the economy becomes cheaper, the management of public assets can be more efficient and the chances of success of community projects can be higher. Excessively strong bounded solidarity, however, can have negative consequences as well, since there stands the danger that the relationships will become too inward, and outward-reaching "bridge ties" will not form, which can lead to the enclavization of the minority and its economic fall-back. Moreover, if the interaction density between ethnic groups is chronically low, it can also have a serious disintegration effect on the society as a whole, and can contribute to the growth of prejudice and racism, which can create a legitimizing foundation for more serious political conflicts, open ethnic aggression, or even civil war.

– advantages arising from marginal situations: In some cases the minority is not bound to satisfy local traditional obligations. It can employ new, more competitive commercial techniques without risking the danger of (further) ostracism and sanctioning (since it is already a marginal actor).

Granovetter's opinion (1995) concerning the use of these resources is that for these minority communities neither excessively great, nor excessively low levels of internal solidarity is advantageous for their economic development. To be successful, they must find the fine balance of how to connect to, as well as disconnect from, the majority's network structures and normative system ("a balance between coupling and decoupling").

Granovetter's theory on the social embeddedness of economic processes contains numerous elements that also appear in economic anthropology analyses. (For economic anthropology literature in this domain, see: Eriksen 2005, Sárkány 2010, Letenyei 2002).

Trends built upon Polányi's (1994) substantive economics, for instance, emphasize the diversity of forms of economic coordination in societies directed by dominantly self-regulating markets as well, where ethnicity can be one of the relevant dimensions of economic activities and the social embeddedness of institutions. Here, such research questions arise as: how does ethnicity influence these coordination practices, from systems of reciprocity (e.g., participation in voluntary cooperative work, and rotating credit associations) through hierarchies (e.g., division of labor within companies) to more formalized market transactions (e.g., business collaboration networks). Their common feature is that they are built upon the structure, architecture and resource-nature of the relationships, and in this – similar to Granovetter's new economic sociology – ethnicity is treated as a kind of social capital.

In economic anthropology case studies, this "structuralist" approach is generally accompanied by arguments which trace back the varying economic performance of ethnicities to their specific collective values and norms. According to this, the economic adaptability of ethnic groups is by and large determined by the type of collective mental and habitual resources the members of the group have; what they think about work, rules of management, entrepreneurship, money, risk taking, success, etc. (Kuczi 2011, Schwartz 2011). Analyses built on Webe-

rian traditions explain economic prosperity with the rationalization of organization culture, a propensity toward saving, personal ambition, diligence, work-related technical know-how, etc.

In the social science approaches presented earlier – particularly those from the study of economics – ethnic groups are usually regarded as "objective categories", in which individuals can easily be classified through their exogenous characteristics. Contemporary economic anthropology approaches, however, often question the objectively palpable reality of ethnicity, and regard it as a socially constructed, "imagined" variable entity, which is formed in competition over economic resources, power, or various social endowments (Brubaker 2004, Kovács 2004).

In this interpretation, it is not just ethnicity that can be the organizing principle for economic actions and practices. Economic relations and consumption patterns can also determine aspects of ethnic classification and how strong the ethnic boundaries are, and where they move (Stewart 1994, Berta 2010). This approach has opened up productive perspectives on the further research of the relationship between ethnicity and economics.

Relevant here, for example, are analyses which deal with the marketing of cultural products that can be tied to ethnicity. In the expanding and globalizing tourism industry, the demand for variety and the exotic is ever increasing, which motivates developers of industry to make ethnic customs, architectural and material culture accessible to visitors in a digestible, hygienic form. This places diversity in a different economic policy perspective. Many state/regional authorities responsible for the national/regional image have realized that ethnic minorities – whom they perhaps earlier regarded as primitive, or treated as an adversary during modern nation building, or wanted to free themselves of, or attempted to assimilate – can contribute to the development of the economy via tourism (Leong 1997). In other situations, members of the ethnic group themselves attempt to showcase those elements of their cultural and ethnic heritage which best correspond to the wants and consumer tastes of the visitors. Leftist anthropological critique sees in this the commodification of ethnicity, in which the instrumental rationality of the tourism marketing technocrat prevails, and the care for diversity as a public asset and the effective revitalization of cultural heritage remains secondary. This new situation thus changes little in the asymmetry of the majority-minority relations (cf. Comaroff–Comaroff 2009).

3. Institutional environment, ethnic resources and economic performance among Hungarians in Transylvania

The research trends and conceptual frameworks presented above can also be productively used in the examination of multi-ethnic Transylvania, and specifically the economic conditions of minority Hungarians. Regarding this, along the two outlined paradigmatic trends, two broader questions can be formulated: 1. How able is Romania's democratic development and economic institutional system to exploit the advantages stemming from diversity? 2. What kind of structural, networking and cultural resources do minority Hungarians in Romania possess, and to what extent and how do they succeed in utilizing these in the economy?

For the time being, few economic and sociological surveys have been conducted that would examine the effect of diversity on the economic development of individual regions. An article dealing with the regional differences of entrepreneurial activity has demonstrated that the ethnic composition of villages – in a model which includes the whole Transylvania – has no effect on the variance of the number of businesses per 1000 people. (Csata 2012). At the level of counties and smaller regions, however, in some places there are differences that are connected to the varying ethnic composition of the villages (for example, in Mureș/Maros county). A further analysis (Csata et al. 2011) shows that in smaller towns in Szeklerland, where the Hungarians are in majority, there is a greater entrepreneurial activity. However, due to the poor explanatory power of regression models, as well as the significant territorial disparity in the density of businesses, the conclusion is that locality in Transylvania still plays a significant role in the formation of social conditions for entrepreneurship. It is for this reason that comparative anthropological case studies examining the connections between ethnicity and economics at the level of communities or small ethnographic regions are essential.

In a comprehensive synthesis study on the matter, Töhötöm Á. Szabó (2010) arrives at the conclusion that "in the case of Transylvanian villages today we can talk about ethnic determination of the economy only with reservations" and that "belonging to an ethnic community could be an organizing element of the economy, but ... not solely, not primarily and not exclusively" (p. 7). He gives illustrative examples of traditional occupations (sheep herding, ox raising, wine production, etc.) which at first glance appear to be ethnic. Yet if we examine them more thoroughly, it turns out that in practice they are not. The same applies to certain forms of work organization and community management practices (voluntary cooperative work, forestry commons), which could get an ethnic reading. But this, first and foremost, functions as one of the tools of symbolic demarcation, in fact, it legitimizes asymmetric power differences and resource access differentials. These strategies are typical for the relations between majorities and the Roma (cf. Biró–Oláh 2002, Fosztó 2003, Oláh 1996, Péter 2005, Szabó 2002, Toma 2009), but they arise in relationships between Hungarians and Romanians as well (see e.g., Peti Lehel [2006] and Töhötöm Á. Szabó's [2013] writings on the transformation of wine chivalries along the Târnava/Küküllő river in Transylvania.)

Tamás Kiss (2004) arrives at a similar observation in his analysis of narratives appearing in the life histories of Hungarian entrepreneurs in Transylvania. He highlights that ethnicity is not a central element to narratives on entrepreneurship and when it does show up, it commonly alludes to the fact that it was utilized as symbolic capital in resource acquisition.

Further research is necessary on the economic situation of Transylvanian Hungarians as well. What we do know from the descriptive analyses on social stratification and social structure is that Hungarians are under-represented in better paying (technical, commercial) occupations (Veres 2013) and that Hungarian university graduates get hired in the competitive private sector at a lower rate (Csata–Dániel–Pop 2010). This has a decided impact on the fact that among Hungarians salaries are lower and income inequalities are smaller as well (both the proportion of the economic elite and the poor are behind the national average, see Kiss 2010). It is also important to find out how much of these differences can be explained by the dissimilar economic structure of different regions and how much by the variations of individual competencies, and how much of a role the opportunity disadvantage that economics of language ex-

perts speak of plays in this. Relating to the latter, Horváth (2008) found that among Hungarians there is a significant relationship between the frequency of use of the Romanian language and wealth-income status (asset endowment of the household, size of income), which is a sign that knowledge of the majority language is an important tool for mobility among Transylvanian Hungarians.

Particularly in light of the new economic sociology approach and conceptual toolbar, the examination of how social resources attributed to the minority status of Transylvanian Hungarians are utilized in the economy is a very exciting and important research area. In Transylvania there is an increasing number of entrepreneurial initiative underway, which, appealing to the ethnic solidarity of Hungarians, attempt to gain a competitive market advantage (Gáll 2011). The popularity of local products specifically positioned as Hungarian brands in Szeklerland, for example, shows that consumer ethnocentrism is not only present at the level of dispositions, but rather increasingly determines the purchasing decisions of locals as well. Furthermore, on the basis of recent survey results (Csata–Deák 2010), we have good reasons to presume that similar practices turn up in other markets as well (labor market, rental market, etc.)

In these examinations it also comes to light that ethnocentric market preferences are most characteristic of those who live in the Hungarian countryside in an "ethnic shell", and who are more distrustful of Romanians. It does not depend, however, on the gender, age, educational level or wealth status of the consumers. A later examination – which included Hungarian students from Cluj Napoca/Kolozsvár – also demonstrated that a lack of Romanian language competency also significantly influences whether consumers make decisions on an ethnic basis (Csata 2014). These results show that Transylvanian Hungarians (and particularly those from Szeklerland) enjoy advantages stemming from "bounded solidarity" and it seems that the "bonding" type of social capital has an increasing economic utility. Moreover, from an anthropological perspective, it is particularly interesting that viable Hungarian companies, brands, products and economic cooperation practices also contribute to the further reinforcement of ethnic-regional identity.

However, the exploitation of positional advantages is substantially lower: Transylvanian Hungarians (particularly those who live in the countryside) are relationship poor with the majority. Thus, the validation of their network-wise advantageous, potential bridge roles lags behind what is possible. Another survey (Csata et al. 2011) demonstrated that among Hungarian SME owners in Transylvania the tendency to cooperate is generally lower, which is also accompanied by a higher level of mistrust of Romanians. So it seems that there is much more unexploited economic potential to be realized through the "coupling" to the majority society. In this respect, especially evocative are the studies on Szeklerland tourism, in which it is explicitly expressed that besides the "ethnic tourism" coming from Hungary, a larger opening toward the Romanian clients could dramatically improve the state of the industry (Horváth 2010, Kiss–Barna–Deák 2010, Csata–Pásztor 2015).

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László MARÁCZ

Transnationalizing Ethno-linguistic Hungarian Minorities in the Carpathian Region: Going Beyond Brubaker et al. (2006)[1]

Abstract

With the rise of globalization and Europeanization Hungarian ethno-linguistic minorities in the Carpathian Region have become 'mobile' in the broadest sense of the concept. This has allowed them to become independent actors in all sorts of transnational configurations. In Marácz (2014a), one of these transnational configurations has been characterized as a 'quadratic nexus' with at least four different actors, one of them being the ethno-linguistic minority. In this paper, I will argue that an analysis of inter-ethnic relations in terms of local dynamics, like the one elaborated in Brubaker et al. (2006) for the Romanian-Hungarian relations in the multi-ethnic, multilingual region of Romania's Transylvania is no longer adequate against the backdrop of globalization and Europeanization. Instead ethno-linguistic minorities interact with all sorts of political, cultural, communicative, and socio-economic global and transnational networks that affect the local relations, i.e., both everyday ethnicity and the power relations.

Keywords: ethno-linguistic relations, ethnic Hungarians in Transylvania, transnational configurations, quadratic nexus, minority, and language rights

Introduction

Brubaker et al. (2006) should be given credit for the fact that their work is an in-depth study of several aspects of the Romanian-Hungarian inter-ethnic conflict in Transylvania. The focus of their analysis is the two ethnic, Hungarian and Romanian communities of the "capital" of Transylvania, the town of Cluj-Napoca (Hungarian Kolozsvár, German Klausenburg) and their interaction. A central role in their analysis plays the fact that "everyday ethnicity" is a reality, which is the main topic of the second part of the book and furthermore Transylvania is viewed as a "borderland" on the cross-roads between neighbouring empires of the past and twentieth century nation-states. In the present constellation Brubaker et al. (2006) consider Transylvania as a territory, although belonging to Romania, as a kind of buffer zone where both Budapest and Bucharest each had and have their geopolitical interests. It is true that "everyday ethnicity" is relevant. Brubaker et al. (2006) unlock new fields of empirical data that have been omitted from heavily nationalized interpretations and descriptions of this complex case of intercon-

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nected ethnicity, like the observations bearing upon the multilingual context in Transylvania. Brubaker et al. (2006: 242) observe that "there are settings in which language itself – what language is spoken or how it is spoken – is likely to be noticed, discussed, or problematized". The discussion of the language use and choice of ethnic Hungarian bilinguals has to do with an identificational expression of ethnicity, including public interaction among strangers, private talk in public places, language choice and code-switching in mixed companies, and the use of Romanian words in Hungarian conversations.

It is true that the everyday ethnic conflict between Romanians and Hungarians should be studied in the local context and that its local dynamism deserves analysis. My main criticism of the framework outlined in Brubaker et al. (2006) is that transnational concepts play a role in these analyses as well, and are sometimes referred to in the book but are not seen as central to the ethnic conflict under study. However, it is my contention that real insight into the conditions and drivers of the Romanian-Hungarian ethnic conflict can only be gained against the backdrop of globalization, transnational configurations, structures and actors, and Europeanization.

The authors see Euro-Atlantic integration as a device to keep the status quo and to control the outbreak of extreme conflicts (Brubaker 2006: 55, 125-126). But it should be pointed out that the Euro-Atlantic integration of Romania had much more effects. It has affected the social-political structures of the country, it has empowered Hungarian civic movements in Transylvania, and has provided new venues to represent the Hungarian position in the international arena.

Hagan (2009: 613) refers in her study of the Vojvodina Hungarians who share a similar position to the Transylvanian Hungarians but then in the Serbian context in connection with the latter to the so-called "boomerang model". Hagan's metaphor expresses the idea that ethnic minorities can set up relations with foreign actors in order to back their claims and bring local change by mobilizing foreign pressure. According to her, Vojvodina Hungarians have put pressure on the Serbian government by teaming up with foreign actors, including the Hungarian government, the US government, EU institutions, NGOs and assorted media outlets. More precisely, the Vojvodina Hungarians have relied upon the boomerang to guide their activism, to develop transnational advocacy networks to underline human rights claims and lobby-efforts, and to use the "human rights repertoire", including a set of tactics that consists of the collection of information; the composition and framing of it into grievances and political claims; and the distribution of these claims to foreign audiences to involve foreign actors in its local conflict (Hagan 2009: 615). This complex configuration of global, transnational actors and structures gives content to the concept of "minority rights protection". The most constant actors siding with the Vojvodina Hungarians have been their kin state Hungary and the Hungarian diaspora leaders, especially those in the US.

The boomerang model has not been a guarantee for ultimate political success, though. Vojvodina Hungarians could have triggered attention in 1999 in the shadow of the Kosovo crisis and again in connection to Kosovo in 2004, when a series of interethnic incidents of violence and discrimination began, lasting for over a year and a half. In March 2004, tensions in Kosovo and southern Serbia erupted into violence and threats between ethnic groups. However, Vojvodina Hungarians failed to mobilize the international political actors in those periods.

This demonstrates that the basic scenario of the boomerang model – that an aggrieved group can secure foreign support using moderate strategies exhibits also limits. The Vojvodina Hungarian leaders looked for Hungarian MEPs and Western engagement with the minority to lobby in the European Parliament and with the European Commission's country reports, the OSCE and its High Commissioner on National Minorities. However, the Commission and Council were hesitant. Since Hungary's accession to the EU Hungarian MEPs have raised the claims and demands of the Vojvodina Hungarians but with little success however. The European Commission has tried to downplay the minority rights of the Vojvodina Hungarians in order to reinforce peace and stability in Vojvodina (Hagan 2009: 623) and pro-Hungarian lobby-activities were less successful, when Western political interests were contradicted. Hagan (2009: 628) discusses further blocking factors, including international actors to prioritise relations with the state authorities; their prioritisation of building a broad opposition movement rather than an ethnic-specific movement; their declining strategic interest in the Central and Eastern European region; and their concern for coming ethnic conflict (Hagan 2009: 628). The limitations on the Vojvodina Hungarians' transnationalization efforts have been considerable, though. Last but not least, successive Serbian governments have rejected political claims by the Vojvodina Hungarians.

However, even though the ultimate success is limited, this reference to the boomerang model unambiguously demonstrates how important transnational processes are in inter-ethnic conflicts. Although Brubaker et al. (2006) do not elaborate on the boomerang model, their analysis bears upon the local context the book refers to the importance of transnational configurations, structures, actors and so on.

Firstly, supranational institutions have had an impact on the political manoeuvring of the Hungarian political representatives gathered in the Democratic Alliance for Hungarians in Romania (DAHR). Brubaker et al. (2006: 148, fn. 95) report that with the support of the OSCE High Commissioner DAHR contributed to the changing of the governance structure of the Babeş-Bolyai University allowing separate Hungarian departments, institutes and tracks in the framework of a multilingual, multicultural university. This has become reality with the introduction of the Educational Law 1/2011. I will return to this case in more detail below.

Secondly, migration of Transylvanian Hungarians to Hungary is due according to the authors by a desire to flourish economically in Hungary (Brubaker 2006: 371), like Hungarian-language university education, and qualifying students for labour in Hungary. This is viewed in Brubaker et al. as an "exit" option that has caused the hindering of the formation of a radicalised, violence-prone Transylvanian Hungarian minority elite (Brubaker 2006: 163, fn. 153) losing its supporters and accelerating rather than arresting the demographic decline of Hungarians in Transylvania (Brubaker 2006: 369-370). Brubaker et al. remark that it is ironic that the international and transnational openness of the Romanian state, not its nationalistic closure, that had fostered the ongoing process of nationalization. This may disconnect the Transylvanian Hungarians that left Romania from the Romanian world. This is however not automatically the case. Ethnic Hungarians from Transylvania may set up a transnational connection with the Hungarian community in Transylvania and that can have a major impact on what is happening in the local socio-economic, political level playing field at home.

Thirdly, Brubaker et al. (2006: 373) argue that the self-production of the Hungarian world has been successful under nationalization efforts of the Romanian state but that in the age of post-nationalism and transnationalism the nationalization of the poly-ethnic and poly-lingual, multicultural Transylvania continues, even when in the new age the nation-state is weaker and claims of DAHR for autonomy, for extensive rights to the public use of Hungarian and a Hungarian university were realized in full (Brubaker et al. 2006: 373). However, even if it is true that the Romanian nation state has become weaker, the transnational contexts of mixed families and mixed working places have favoured the assimilation of ethnic Hungarians.

The first part of this paper is centred on the concept of the nationalizing state in the sense of Brubaker (1996). First, I will discuss Romania's ethno-linguistic diversity and Romania as a nationalizing state in which a hegemonic constitution plays a central role in the nationalizing policies. In this paper, I will discuss some aspects of the nationalizing Romanian state policies, especially its constitution and legal system that have introduced the concept of 'national minority' and 'language hierarchy', both at the expense of the Hungarian community. This part would fit in with the analysis defended in Brubaker (2006) to consider the Hungarian-Romanian ethnic conflict in Transylvania first and foremost as a local conflict. However, going beyond Brubaker et al. (2006) means that transnational configurations, structures and actors play a much more important role in the analysis of the local conflict. Hence, the second part of the paper reflects on transnationalism in which the supranational level plays an extremely important role. Here the triadic nexus of Brubaker et al. (2006), i.e. the local dynamics between the national minority, the Transylvanian Hungarian minority, its kin-state Hungary and its host state, the nationalizing state Romania is turned into a quadratic nexus by adding to it the supranational level. The norms and standards of the supranational institutions, actors and so on, which Romania has joined in 2007, has given the local Hungarian minority more space to manoeuvre (Kymlicka 1996, 2008; Kymlicka and Opalski 2001; Vizi 2002, 2012; Schimmelfennig and Sedelmeier 2005; Grabbe 2006). Due to Europeanization, including the democratization of the public sphere of Romania, multilingualism has received more recognition. In concrete terms this means that the Hungarian and other minority languages have strengthened their position. An important role has been played by the minority rights protection of the Copenhagen criteria for joining the European Union and the charters of the Council of Europe that provide more recognition to minority rights, including linguistic rights. As an outcome of this European integration a recent educational law has recognized multilingual, multicultural institutions that can facilitate the use of Hungarian and other minority languages in higher education. Due to Europeanization and democratization civic and language activist organisations have been established and have put on the agenda the multilingual use of Hungarian and other minority languages in Romania. Although the Romanian language is the official language of the state and enjoys a hegemonic position opposed to other languages, during the recent presidential elections for the first time Hungarian voters were addressed by the two Romanian candidates or their close representatives in Hungarian. The ethnic Hungarian vote was obviously too important to lose due to the fact that there was a neck-and-neck race between the Romanian candidates. Transnational norms and standards of multilingualism and multilingual communication have also been implemented in Romanian practice, although

there is a contradiction with the Constitution and the legal system that guarantees the Romanian language a hegemonic position.

Romania's ethno-linguistic diversity

In Romania, most of the ethnic Hungarians live in the north-western part of the country, i.e. the Transylvanian area which is traditionally a multi-ethnic region. In fact, the Hungarian minority in Transylvania lives in the northern part of the area stretching from the Hungarian-Romanian country border to Szeklerland at the feet of the Eastern Carpathians mountains deep in the centre of present-day Romania. The Szeklers (Hun. Székely) are an ethnic Hungarian group in Transylvania displaying a peculiar set of ethnographic, cultural and linguistic features. In the Hungarian kingdom, they were employed as border guards defending the isolated Eastern Carpathian mountain range. In this 'stroke', the ethnic Hungarians are not present in equal concentrations. The Hungarian minority counted by the latest 2011 census amounted to 1,227,663 persons who make up around 6.5 percent of the population of Romania. In the Transylvanian area where almost all of the ethnic Hungarians live, the percentages of geo-ethnic distribution of ethnic Hungarians and Romanians differ from the national percentages.

In the whole of the Transylvanian territory the ethnic Hungarians make up around fifteen percent of the total population, while the ethnic Romanians number around seventy percent. However, the percentages of ethnic Hungarians are again much higher in Transylvanian sub-regions of Romania where the ethnic Hungarians actually live in more or less concentrated areas. The Hungarian ethno-linguistic distribution displays an unequal and heterogeneous pattern, however. The ethnic Hungarians basically inhabit three spatially connected sub-regions with a different geo-ethnic distribution. The first sub-region is located in the Hungarian-Romanian border area in the former eastern Hungarian region and present-day Northwest Romania, i.e. 'Partium'. In this area, a substantial percentage of ethnic Hungarians constitute an absolute or relative majority in a number of municipalities and districts, especially in cities like Oradea (Hun. Nagyvárad) and Satu Mare (Hun. Szatmárnémeti). The second sub-region, the area landward is central Transylvania with the major city of Cluj-Napoca (Hun. Kolozsvár). In this region, ethnic Hungarians are often smaller minorities than in the Partium area and they often live in mixed Hungarian-Romanian-Roma communities, but in some municipalities and districts they can have a relative or absolute majority (Brubaker et al. 2006). The third sub-region, which is matching the historical area of Szeklerland (Hun. Székelyföld; Rom. Ţinutul Secuiesc) is of about 13,000 km^2 and consists of the three provinces, i.e. Harghita (Hun. Hargita), Covasna (Hun. Kovászna) and Mureş (Hun. Maros), although most parts of the province of Mureș fall inside the traditional region of Szeklerland. According to the 2002 census, the population of Szeklerland counted 809,000 persons of whom 612,043 are ethnic Hungarians yielding around 76 percent of the total. Ethnic Hungarians on average represent 59 percent of the populations in the Harghita, Covasna and Mureș provinces over all. Almost half of the Transylvanian Hungarians live in Szeklerland and they are in an absolute majority.

Note that the traditional Szeklerland is not recognized by the Romanian state. The term 'Szeklerland' itself does not appear in any official national or international document ratified by the Romanian state. In two of the three Szekler provinces the ethnic Hungarians have a clear majority according to the 2002 census. The percentages of the ethnic Hungarians are higher in Harghita and Covasna, i.e. 84.8 percent and 73.58 percent respectively, and much lower in Mureş, i.e. 37.82 percent. Compared to the census of 2002 the percentages of ethnic Hungarians in the three provinces of Szeklerland have hardly changed in the 2011 census. Actually there is an increasing concentration of ethnic Hungarians in Szeklerland. In Harghita, Covasna and Mureş, the percentages and absolute figures of the ethnic Hungarian population are as follows: 85.21 percent (257,707 persons); 73.74 percent (150,468 persons); and 38.09 percent (200,858 persons) respectively.

Nationalizing states in Europe

In essence, the tactics to ensure power and control with the introduction of a hegemonic language has been applied at a larger scale in the age of nationalism that followed the French Revolution (Bourdieu 1991). Everywhere in Europe where nation states arose, a language, mostly the language of the group in power, became the dominating paradigm for communication with and within the state guaranteeing that specific groups dominating the language of nation state formation could take control of the state's governance structures. Such states were designed as national states selecting the language of the majority group for official communication.

Note, however, that the "ideal" state of affairs, i.e. one nation using a pure language for official communication has never been achieved. Dialects or other languages treated as "foreign", even though they were indigenous, remained and were spoken and used even after a selection of an official language was made. The other, non-state languages have been classed under the misleading term 'minority languages', because the patterns, modes and traditions of language use were much more complicated than a simple opposition in terms of a numerical majority and minority speakers is able to capture. However, it was sufficient to exclude minority language speakers from the power structure of the so-called national state (Edwards 2010). In everyday ethnic practice to refer to a key concept of Brubaker et al. (2006) a situation of language contact remained and according to linguists that have been studying patterns of language contact, the power element is always present in the contact between two languages, i.e. especially in the relation between majority and minority languages. Notice that this linguistic observation of Nelde and others correlates with the analysis of a political scientist, like Pierre Bourdieu on 'the language policy of exclusion' (Bourdieu 1991; Nelde 1983; Nelde 1987; Nelde 1995)

Cases of linguistic hegemony and multilingual communication that result in far more complicated linguistic and communicational patterns trigger conflicts. These conflicts are basically political conflicts displaying an asymmetric structure. The language groups not controlling the state language are excluded from power and the groups being excluded from power are strugg-

ling for recognition in order to get access to the power structure of the state in their first language.

The end of the twentieth century left us with numerous such struggles over the inclusion and exclusion of indigenous linguistic minority groups. In Europe only a few cases have been solved successfully within the existing state patterns with the consent of both or more of the parties involved in such language conflicts. In most places, however, an embittered struggle, even though some modest international regulations in the framework of supranational forums have been elaborated, between linguistic groups is taking place and is the 'exclusion-inclusion dilemma' of speakers of the other, non-standard languages on the agenda. This gives rise to a variety of political conflicts. The Transylvanian case is no exception.

The Romanian Constitution

The Romanian Constitution declares Romania an 'indivisible and unitary nation state' (see article 1.1). and the constitution does define national communities or minorities only at the individual or personal level as 'persons belonging to a national minority' (see article 6.1). Hence, the minority rights and minority language rights are considered in fact personal, individual rights. Observe furthermore that the Romanian Constitution stipulates a hegemonic position for the Romanian language. Article 13 of the Romanian Constitution declares that the Romanian language is the only official language of the country. This has far-reaching consequences for the multi-ethnic and multilingual communities of Romanians, Hungarians, Germans and Roma in Transylvania. Next to the constitutional article specifying the official language of the state, further legal instruments have been designed in order to restrict the use of Hungarian and other minority languages, like laws specifying when the Hungarian language may be used and what percentage of the total inhabitants of an administrative-territorial unit must be ethnic Hungarians in order to use Hungarian officially. The second paragraph of article 120 of the Romanian Constitution guarantees the use of Hungarian in administrative authorities and public services and this is further specified by government decision No. 1206, from 27 November 2001, regarding the Law on Local Public administration no. 215/2001, Paragraph 19, Article 2, stating:

Authorities of public and local administrations, public institutions subordinated to them as well as decentralized public services, ensure the use of the mother tongue in their relationships with national minorities, in those administrative-territorial units in which the percentage of citizens belonging to national minorities are over 20 percent; all according to the Constitution, the present law and the international treaties to which Romania is a party.

Article 120 of the Romanian Constitution has been implemented in the Law on Local Public Administration of 2001 (Horváth et al. 2010: 7-9) where more provisions of language use in local public administration are spelled out and it has been interwoven in the Romanian Educational Law (Janssens et al. 2013: 16-17) to which we will return below.

One of these provisions, quite particular to the Central and Eastern parts of Europe, is the threshold rule. Hence, the twenty percent arrangement in Romania might seem reasonable from the point of view of the state it is still subject to intra-state politics and to the changing

relations between the host state, the kin state and the external minority (Brubaker 1996; Tóth 2004; Kovács-Tóth 2009; Batory 2010; Mabry et al. 2013). It leads in fact to all sorts of anomalies. As follows from the Romanian Constitution and Law on Public Administration and Education the Hungarian speaking inhabitants of Transylvania's "capital" Cluj-Napoca were not allowed to use Hungarian for contact and communication with the municipal administration because, according to the 2002 census, only 19.9 percent of the inhabitants had registered as ethnic Hungarians (Brubaker et al. 2006). Note that around 60,000 Hungarian-speaking people live in the city, which is much more than in the smaller Transylvanian towns with a Hungarian majority, where Hungarian can be used in communication with the administration (Marácz 2011a). The latest census does not change this anomaly. According to the 2011 census the percentage of the Hungarian inhabitants of Cluj-Napoca dropped to sixteen percent, i.e. around 50,000 persons from the total inhabitants of Cluj-Napoca that is around 309.136,00. The threshold rule has also consequences for the linguistic landscape. In Romania bilingual municipality signs are dependent on the twenty percent threshold (see administrative law 2001/215). So in a bilingual city, like Cluj-Napoca there are neither official topographic signs in Hungarian.

In sum, the Law on Local Public Administration gives ethnic Hungarian citizens specific rights in terms of communication and language use but it is restricted by a threshold in a specific administrative-territorial domain. So, the Territoriality Principle is relevant here but it is actually operating as a "container" of the Personality Principle (McRae 1975; Dembinska et al. 2014). Language rights for national and ethnic minorities are not guaranteed when the percentage of citizens belonging to a national minority is below twenty percent of the population in a certain administrative-territorial unit. So this may imply that even when there is a large community of citizens belonging to a national minority in absolute numbers language rights are not guaranteed. Let us turn to a discussion of the transnational configurations, structures and actors involved in the Transylvanian case.

Quadratic nexus

As long as the cases of multilingualism and complex diversity were "local", often within a region or the borders of a nation state, linguistic conflicts had a limited scope. These conflicts did not have to cause the outbreak of large-scale violence, but the constant tension between linguistic groups might have a paralysing effect on the functioning of the state and may traumatize the speakers involved. Due to globalization with its interconnectedness all over, local communicative conflicts are not restricted any more to local spaces but might cause a "spill-over" in the international arena (Holton 2011). International relations in the world of globalization form a complex web in which the classical state actors are joined by transnational institutional and non-institutional actors. The non-institutional actors can influence the politics of international relations by using the Internet and penetrating the media (Vertovec 2010). Following Smith and Brubaker, it will be claimed that these local conflicts embedded in the international relations web form a complicated transnational configuration (Smith 2002; Brubaker 1996). In fact, in these multilingual, communicative conflicts four actors are involved, i.e. the nation-

alizing state, other language groups, the external linguistic homeland or kin state of these groups and the supranational forums. Following Smith, I will refer to these transnational communicational patterns as the 'quadratic nexus' (Smith 2002; Marácz 2011a; 2011c; Korshunova & Marácz 2012). Due to the lack of international norms and standards and the complicated set of factors involved it is the interplay of the four poles in the quadratic nexus that is deciding on the outcome of these communicational conflicts (Sasse 2005a). This quadratic nexus will be used as an analytic framework in the discussion below.

Apart from ethnic Hungarians in Romania Hungarians are living in several Central European states due to historic restructuring after the First and Second World War and the collapse of communism in 1989. There is an extensive literature from different disciplines that describes and analyses the position of ethnic Hungarian communities in the neighbouring states of Hungary. These states include next to Romania Austria, Slovakia, Ukraine, Serbia, Croatia, and Slovenia. Especially the ethno-linguistic Hungarian communities in Romania and Slovakia are substantial in size, i.e. 1.5 million and 500.000 respectively (Fowler 2002; Kántor et al. 2004; Tóth 2004; Fenyvesi 2005; Csergo 2007; Gal 2008; Kovács and Tóth 2009; Batory 2010; Deets 2010).

The four actors involved in the quadratic nexus of the Hungarian cases have the following objectives. From a linguistic point of view, the nationalizing states have been trying to assimilate their Hungarian communities with different and changing intensity, as Brubaker et al. (2006) report. Their language policy has been designed to exclude the Hungarian language from the official domains or allow it only marginally. The Hungarian linguistic minorities have been struggling for the recognition of their language rights. After the collapse of communism the Central European states have been using political tools to reach their goals offered by a democratic society in development. The external homeland Hungary has employed several strategies to support the struggle of their co-nationals in Hungary's neighbouring countries. Only in the late period of communism did Hungary give some support to its co-nationals and in the beginning of the nineties after the collapse of communism this support was intensified. The supranational community has been drafting modest linguistic minority rights mainly for stability and security reasons in Central Europe (Sasse 2005b). This has empowered the Hungarian linguistic groups all over Central Europe (See for Transcarpathia Anikó Beregszászi and István Csernicskó 2003; see for Transylvania Brubaker et al. 2006; see for Slovenia Anna Kolláth 2003; see for Croatia Nádor & Szarka 2003; see for Vojvodina Sarnyai & Pap 2011; see for Slovakia Gizella Szabómihály 2003; and see for Austria Szoták 2003). As a consequence, there are some minimum conditions for Hungarian language use but there is no single norm or standard for Hungarian minority speakers practising their Hungarian language in Central Europe.

Transnational actors

Apart from the "national space" that is defined by the geo-ethnic distribution and the legal system there is not only the national space but also the transnational one. After the collapse of communism and the expansion of the European Union eastwards global and transnational

structures have led to the introduction of European human rights norms and standards in the field of minority rights and minority language rights. Even more robust policies in support of indigenous minority rights and languages have been adopted by the Council of Europe of which all the Member States of the European Union must be members. Although the Council of Europe has no sanctioning mechanism, if these resolutions are not met (Marácz 2011b), it has formulated clear legal treaties to protect national minorities and their languages, including the Framework Convention for the Protection of National Minorities (FCPNM) and the European Charter for Regional or Minority Languages (ECRML) signed on February 1, 1995 and November 5, 1992 in Strasbourg respectively (Trifunovska 2001). The Framework Convention supports the positive discrimination of national minorities on the basis of human rights and general freedom rights. It recognizes the fact that minority rights are group rights and that cross-border cooperation is not only restricted to states but that also local and regional authorities can take part in this. The Language Charter has been motivated by similar considerations. Languages are seen as part of a common European cultural heritage and the protection of languages is deemed necessary to counterbalance assimilative state policy and uniformisation by modern civilization (Brubaker et al. 2006, Marácz 2011b).

Note that all the Central and Eastern European states with Hungarian linguistic minorities have ratified these charters as is shown in tables 1 and 2:

Table 1: Framework Convention (FCPNM, CETS no. 157)

States	Signature	Ratification	Entry into Force
Romania	01/02/1995	11/05/1995	01/02/1998
Serbia	11/05/2001	11/05/2001	01/09/2001
Slovakia	01/02/1995	14/09/1995	01/02/1998
Austria	01/02/1995	31/03/1998	01/07/1998
Croatia	06/11/1996	11/10/1997	01/02/1998
Slovenia	01/02/1995	25/03/1998	01/07/1998
Ukraine	15/09/1995	26/01/1998	01/05/1998
Hungary	01/02/1995	25/09/1995	01/02/1998

Table 2: Language Charter (ECRML, CETS no. 148)

States	Signature	Ratification	Entry into Force
Romania	17/07/1995	24/10/2007	01/05/2008
Serbia	22/03/2005	15/02/2006	01/06/2006
Slovakia	20/02/2001	05/09/2001	01/01/2002
Austria	05/11/1992	28/06/2001	01/10/2001
Croatia	05/11/1997	05/11/1997	01/03/1998
Slovenia	03/07/1997	04/10/2000	01/01/2001
Ukraine	02/05/1996	19/09/2005	01/01/2006
Hungary	05/11/1992	26/04/1995	01/03/1998

Another side effect of the transnational configurations is that they have led to the softening of borders. As a result, the whole concept of 'ethno-linguistic allegiances' straddling borders is on the agenda again after being an anathema in the Cold War (Mabry 2013, Marácz 2014b). Note that the Central and Eastern European states with Hungarian ethno-linguistic minorities, including Romania, Serbia, Slovakia, Austria, Croatia, Slovenia, Ukraine and the kin state Hungary are part of the Carpathian Macro-region in which there is a free communicative interaction in the public space and the Hungarian language communities all over the Carpathian Macroregion enjoy some legal protection due to these two conventions (Janssens et al. 2013). These conventions provide protection for the speakers of Hungarian in the states where the Hungarian language is a minority language (Skovgaard 2007). Note that in the Carpathian Macroregion, although it matches for a large part with territories that belonged to the former Austrian-Hungarian Empire, Hungarian is spoken as a vernacular covering a much wider territory than Hungary or Transylvania. Hence, in the Carpathian Macroregion we have the following language constellation from the perspective of the Hungarian speakers. Hungarian is a transnational regional vernacular in a wider region: L1-speakers in Hungary, Slovenia, Austria, Slovakia, Ukraine, Romania, Serbia and Croatia (Marácz 2014b). The Hungarian language is used by Hungarian minority speakers in order to communicate with Hungarian speakers from Hungary and with the other Hungarian minority speakers in Central and East European states. The official state language is however used by Hungarian minority speakers as well – being multilingual speakers – with the authorities and L1-speakers of the Romanian and other state languages. However, L1-speakers of the state languages have a monolingual attitude (Brubaker et. al. 2006). This asymmetric relation is a source of conflict. The majority speakers have more power – their language enjoys a hegemonic position – than the minority speakers whose languages are almost excluded from the official and public domains in some countries. On the other hand there are a number of non-Hungarian L1-speakers who have developed a receptive competence of Hungarian in the Carpathian Macroregion. Hence, it is expected that the use of communication modes as lingua receptive or code-switching and mixing will be more frequent. Such forms of bi- and multilingual intercourse can be found in the urban spaces in Transylvania. As a consequence, the position of Hungarian as a regional vehicular language is becoming stronger in the Carpathian Macroregion resulting into increasing patterns of multilingualism.

Multilingual institutions

Article 120 of the Romanian Constitution has been implemented not only in the Law on Local Public Administration of 2001 (Horváth et al. 2010: 7-9), as discussed above but also in the Romanian Educational Law (Janssens et al. 2013: 16-17). The latter gives the Romanian Hungarians the right to establish their own educational institutions. This is not only relevant for the teaching of the Hungarian language but also for the teaching of the Romanian language to non-Romanians. Hungarians complain about the fact that in the Romanian educational system the Romanian language is taught to them, as if Romanian were their L1. However, for ethnic Hungarians Romanian should be taught rather as a foreign, L2 language. Note that the

Law on Local Public Administration and the Education Law are framed in terms of the Personality Principle because rights are assigned to individual citizens. As I discussed above the Territoriality Principle is not an option. The Educational Law of 1/2011 specifies when the Hungarian language can be used as the language of instruction in educational institutions. The Educational Law is flexible in a way because it does not specify the place of the educational institute but refers to the number of pupils needed to form Hungarian classes being restricted by a minimum number.

Article 135 of the Educational Law 1/2011 also specifies that three institutes for higher education where already national minorities' programmes exist in so-called multilingual, multicultural institutions have the right to establish 'mother tongue tracks' (Janssens et al. 2013: 17). The three institutions include the Babeş-Bolyai University in Cluj-Napoca (Rom. Universitatea Babeş-Bolyai, Hun. Babeş-Bolyai Tudományegyetem), the University of Arts of Târgu-Mureş (Rom. Universitatea de Arte din Târgu-Mureş, Hun. Marosvásárhelyi Művészeti Egyetem), and University of Medicine and Pharmacy of Tîrgu Mureş (Rom. Universitatea de Medicină şi Farmacie Tîrgu Mureş, Hun. Marosvásárhelyi Orvosi és Gyógyszerészeti Egyetem). All these three universities are in the Transylvania area and are traditionally attended by ethnic Hungarians. Following article 135 of Educational Law 1/2011 different language tracks have been introduced at these institutions for higher education. Apart from Romanian and Hungarian English is a language of tuition at these institutions as well. At the Babeş-Bolyai University German is a language of teaching as well in accordance with the traditional presence of the German language in Transylvania. So this university has a quadralingual profile, that is Romanian, Hungarian, English and German. Although the Educational Law allows for the introduction of different language tracks in these institutions this has not been successful in all the three 'multicultural, multilingual' universities. The reprofiling of the University of Medicine and Pharmacy of Tîrgu Mureş has been stagnating so far and the negotiations between the Romanian and Hungarian stakeholders are in progress. This process of re-profiling in terms of language tracks has been more successful at the Babeş-Bolyai University.

At the Babeş-Bolyai University there has been a priority to separate Hungarian and Romanian tracks, whenever this is possible. Making use of the legal right to establish its own Hungarian teaching track the Philosophy Department was split into two sections, a Romanian and a Hungarian one. The staff members and the students agreed that language in the case of philosophy is extremely important. Hence, the decision was taken to split the Department into two language sections, that is a Romanian and Hungarian one. However, the staff, i.e. both Romanians and Hungarians, of the Institute of Political Science decided not to split the Department into two sections but rather to increase the number of courses that are taught in the Hungarian language without setting up a complete, separate administration for it. Due to the fact that the Romanian collaborators of the Institute for Political Science have no command of the Hungarian language, English has become more and more the language of mutual communication in the Department itself. But not only some of the university state institutions have the possibility to implement a multilingual policy but also state sponsored research institutes, like the institute for the study of ethnic and minority issues, the Romanian Institute for Research on National Minorities (Rom. Institutul Pentru Studiera Problemelor Minorităţilor,

Hun. Nemzeti Kisebbségkutató Intézet) employ a multilingual policy. Their website (see www.ispmn.gov.ro) and their publications are trilingual, i.e. in Romanian, Hungarian and English.

Civic and language activism

Implementation of language rights for ethnic Hungarians in Romania in the official and public domain has been put on the agenda by several civil rights organizations. These organizations try to raise awareness among the population for the introduction of Romanian-Hungarian multilingualism in Transylvania without crossing the boundaries of the present legal system (Kovács 2003; Kovács and Tóth 2009). A civil rights group that is working on the empowerment of the Hungarian language and the introduction of bi- and multilingualism in the framework of the Romanian legal system is the Civic Engagement Movement (Hun. Civil Elkötelezettség Mozgalom (CEMO); Rom. Mişcarea Angajament Civic). CEMO is based in the town of Tîrgu Mureş (Hun. Marosvásárhely) which is part of the historic Szeklerland. According to the 2011 census the ratio between the Romanian and Hungarian population is almost in balance, that is 51.9 percent (66.000) and 45.2 percent (57.000) of the 134.000 inhabitants in total. The Romanian and Hungarian population together make up around 95 percent of the total population of Tîrgu Mureş. Note that the percentage of the Hungarian population in this town is far over the threshold of 20 percent as fixed in the Law on Local Public Administration required to introduce the Hungarian language as an official language and to realize full Romanian-Hungarian bilingualism in this municipality. This is the legal basis for the language activism pursued by CEMO.

CEMO's website (see www.cemo.ro) is trilingual, i.e. Romanian, Hungarian and English. A Mahatma Gandhi quote on the opening page of the website indicates that CEMO is ready to use first and foremost peaceful activism within the legal Romanian framework to reach their objectives. The activism of CEMO displays a modern European outlook and their language activists are trained in the circuit of European NGOs offering training and support. CEMO has organized several civic language rights campaigns that were unprecedented in connection with the Hungarian minority in Transylvania.

CEMO regularly protested against an exclusive Romanian linguistic landscape in Târgu Mureş, although according to paragraph 4 of article 76 of the Law on Local Public Administration 215/2001 street signs and other public signs in public offices and institutions must be in the minority language as well, when the percentage of citizens belonging to a national minority are over 20 percent in an administrative-territorial domain. CEMO referring to this law protested successfully against the 'Romanian-only' website of the town's mayoral office and against Romanian monolingual signs in post offices, the mayor's office, the culture palace, wedding rooms, police stations, offices of the national bank, and the chamber of commerce in the town of Tîrgu Mureş.

CEMO also campaigned for the legitimate right to address local authorities in the minority languages of Romania. The civil rights organization started to collect data on language rights and language use in official institutions and sent out a questionnaire in Hungarian to public institutions in town. The questionnaire inquired about language choice and use in Hungarian

in 76 of the state institutions in Tîrgu Mureş. A quarter of the institutions, i.e. 19 answered both in Hungarian and Romanian. Thirteen institutions, i.e. 17 percent answered only in Romanian. Eleven institutions, i.e. 14 percent replied to the CEMO questionnaire but noted that the questionnaire should be drafted in the state language. However, almost half of the respondents, 33, i.e. 44 percent did not answer at all. From this campaign, CEMO concluded that ethnic Romanians having no knowledge of Hungarian are overrepresented in state institutions and that ethnic Hungarians have not enough knowledge of the public administration vocabulary in Hungarian. The latter was sometimes admitted by Hungarian speaking respondents in their replies. The activities of CEMO are not only restricted to the national arena but CEMO targeted transnational organization as the Council of Europe as well setting up a boomerang in the sense of Hagan discussed above.

Above it was referred to that the Council of Europe's Charter for Regional or Minority Languages has been signed by Romania as well and that it has boosted the Hungarian language use of ethnic Hungarians (Gal 2000; Trifunovska 2001; Skovgaard 2007; and Marácz 2011). It gives the Hungarian language inside recognition within Romania and protection from outside the Romanian state (Marácz 2011a). Romania signed the Charter in July 1995, but only ratified it much later on 24 October 2007 (Law nr. 282 from 24 October 2007). This law states that the provisions of the Charter will apply to ten minority languages which are used in Romania, including Hungarian. The Charter ensures the use of regional and minority languages in various and significant areas of life, including education, public administration, the judicial system, media and in the context of social life and cultural activities. CEMO also managed to lobby the international monitors of the European Charter for Regional or Minority Languages in the sense of the boomerang model. In January 2011, the civic organization compiled a 'Shadow Report to the Initial Periodical Report on the Implementation of the European Charter for Regional or Minority Languages in Romania.' The initial Periodical Report was submitted on 26 October 2010. It was clear that CEMO tried to put pressure on the second cycle of the State Report. CEMO's lobbying was successful because the findings of their report were picked up in the evaluation report of the Committee of Experts released on 30 November 2011 taking sides against the threshold of twenty percent considering this incompatible with article 10 of the European Charter for Regional or Minority Languages Charter on the functioning of administrative authorities and public services and proposed to get rid of the threshold.

Language activism in order to empower Hungarian language use in Transylvania have been initiated by companies and shopkeepers as well. The initiative that uses the Hungarian slogan 'Igen, tessék!' "Yes, Please" can be viewed as an action not only for empowering Hungarian customers to speak Hungarian, when they are shopping in Transylvanian multilingual communities but also for shops, businesses, and so on to attract Hungarian speaking customers. The 'Igen, tessék-movement' employs two ways to indicate that in their members, like shops, businesses, hotels, and so on Hungarian is being spoken as well. Firstly, they are present in social media, there is a trilingual, i.e. Romanian, Hungarian, and English website (see www.igentessek.ro). On the website the shops, businesses and so on are listed where consumers and buyers can be served in Hungarian. So far this civil movement is active in three Transylvanian towns, i.e. Cluj-Napoca, Târgu Mureş and Sighetu Maraţiei (Hun. Máramarossziget). Secondly, apart from the slogan the main attribute of the initiative is a green sticker that can be pasted

on the display window or on the front door with the slogan 'Igen, tessék' "Yes, please!". It is a real bilingual sign, for the slogan's Romanian equivalent, i.e. 'da, poftiţi!' is also depicted on the sticker but under the Hungarian inscription and in smaller letters.

Presidential elections

Regularly, Romanian-Hungarian asymmetric bilingualism turned also up in all sorts of election campaigns so far. Hungarian politicians have quite often been using the Romanian language, especially in national or European election where Hungarian candidates had to debate with their Romanian counterparts. Their Romanian colleagues never spoke Hungarian in the electoral campaigns. This was also true for the language on election materials, like posters, badges, newspaper advertisements and so on. In sum, Hungarian political parties communicated their messages also in Hungarian or used bilingual Hungarian-Romanian communication, but not vice versa. Interestingly this has changed in the recent electoral campaign for the presidential elections.

The latest Romanian presidential elections took place in November 2014 over two rounds on November 2 and 16. Due to the fact that none of the candidates was able to get an absolute majority of the votes in the first round a second round was necessary. The best two candidates of the first round were able to take part in the second round. Victor Ponta representing the Social Democratic Party (PSD) took the lead in the first round with 40 percent of the votes, while the candidate of the Christian Liberal Alliance (ACL, a coalition of two parties PNL and PDL), Klaus Iohannis, a descendant of the Transylvanian Saxon-Germans got into the second round with 30 percent of the votes. The election map of Romania depicting the first round clearly shows that Ponta received the majority of his votes on the other side of the Carpathians, whereas Iohannis got the majority of his votes in Transylvania. In the first round the Szekler provinces with a Hungarian majority, Covasna and Harghita voted in majority for the Hungarian candidate Hunor Kelemen representing DAHR. Note however that in the second round Iohannis' position in Transylvania even got stronger and he also won the two Hungarian provinces of Covasna and Harghita, although after the first round the leadership of the DAHR did advice its voters not to vote for Klaus Iohannis who clearly won the elections with 54.43 percent of the votes against Victor Ponta who did not get more than 45.56 percent of the votes.

Table 3: Results for the presidential election in November 2014 in the provinces of Covasna and Harghita

Covasna	**Ponta**	**Iohannis**	**Kelemen**
First round	13.69 %	14.90%	50.41%
Second round	22.05 %	77.95 %	
Harghita			
First round	8.13 %	20.22 %	62.97 %
Second round	22.22 %	79.78 %	

Although the first round was a clear victory for Ponta, it was predicted that the second round between Ponta and Iohannis would be a neck-and-neck race. Because it was to be expected that the margins of the victory would be small, interestingly the Romanian candidates targeted the Hungarian speaking electorate for the first time in the history of the Romanian elections also in the Hungarian language. Ponta's PSD distributed a Hungarian-Romanian bilingual poster with the Romanian phrase 'Victor Ponta Preşedinte' "Victor Ponta president" and two Hungarian phrases 'Érte vagyunk' "We are for him" and 'Rá szavazunk' "We vote for him". Note that the first phrase seems to be a mirror translation from Romanian meaning "We support him" but the Hungarian equivalent is ungrammatical. Klaus Iohannis also got support in the Hungarian language between the two rounds. The prominent party member of the ACL coalition, the former foreign minister, Prime Minister and Director of the Foreign Intelligence Service Mihai Răzvan Ungureanu posted a short video clip on November 12, 2014 of one minute and four seconds on You Tube in which he explains in Hungarian why Romanian and Hungarian voters should vote for Iohannis. Ungureanu's Hungarian speech is subtitled in Romanian (see https://www.youtube.com/watch?v=RTVBb2MvQ3g, accessed at February 11, 2015).

Conclusions

In this paper, I have argued that the study of Brubaker et al. (2006) should be credited for the fact that it has undertaken an in-depth study into the inter-ethnic relations between Romanians and Hungarians in Romania, more in particular in the Transylvanian town of Cluj-Napoca. Although in the book reference is made to the role of transnational configurations, structures and actors in interethnic conflicts these are neglected in the analyses. In this paper, I have demonstrated the relevance of transnational configurations, structures and actors in the interethnic relations between Romanians and ethnic Hungarians in Transylvania. This was earlier argued for in Hagan (2006) who used the boomerang metaphor in order to refer to transnational configurations, structures and actors boosting the empowerment of the Hungarian minority in Vojvodina.

At this place, I have discussed five cases in which transnational configurations, structures and actors play an eloquent role in the analysis of the interethnic relations in Transylvania. I have discussed the 'quadratic nexus' as a model of international relations in which there is also a nexus between the local minority and all sorts of inter- and supranational actors that might cause the boomerang effect in the sense of Hagan (2006). A member of the quadratic nexus are also the supranational fora, like the Council of Europe and others whose norms and standards "spill over" to countries joining them, like Romania with national and ethnic minorities. The Language Charta protecting the local minority and regional languages in national states with a different official language is a clear example of such a transnational intervention. Against the backdrop of such configurations norms and standards carry over to the establishment of multilingual and multinational institutions. This is the case in some Transylvanian higher educational institutions as well. The democratization of the level-playing field due to the "spill over" effect of democratic norms and standards by the European Union have opened up the arena for

civic and language activism in its member-states, like Romania. In Romania, NGOs protecting the civic and language rights of ethnic minorities, like Hungarians and Roma have received more possibilities and opportunities to express their grievances via peaceful activism within the framework of the law state than in the pre-European Union age of the country.

Finally, Romanian presidential elections have been dominated by Romanian political parties so far. This has triggered the one-sided use of the Romanian majority and official language. However, a democratic institution as presidential elections have made it possible for the Hungarian language to receive recognition. It has turned out that the votes of the ethnic Hungarians are too important to neglect for the outcome of the elections. This was the case in the 2014 presidential elections that were a neck-and-neck race between Romanian speaking candidates. As a consequence, Romanian candidates addressed ethnic Hungarian voters in their mother tongue, Hungarian. In sum, these five contexts unambiguously demonstrate that transnational configurations, structures and actors play an important role in providing insight into inter-ethnic conflicts. If this is correct the analysis of such conflicts in terms of Brubaker et al. (2006) where there is too much focus on the local conflicts and their dynamics are insufficient. This means we have to go beyond Brubaker et al. (2006).

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Árpád Töhötöm SZABÓ

A Dairy Cooperative in the Making: History, Ethnicity and Local Culture in an Economic Enterprise

Abstract

The paper presents the case study of a newly launched – or re-launched – dairy cooperative in Szeklerland, and investigates how different layers of local traditions, new views of rurality and new roles of peasantry, as well as ethnic struggles interplayed in its formation and functioning. While the cooperative can primarily be perceived as a local economic institution, its analysis offers the possibility to shed a new light on the connections between different levels in agri-businesses and on the different, seemingly non-economic factors acting from the background. The cooperative was launched in 2012 within a favourable framework of other local, ethnic initiatives, but it is seen as the successor of a successful cooperative that was nationalised in 1948. Two strong historical experiences shaped its launching: the successes of cooperatives before WWII and the failures and negative impacts of cooperatives during socialism. The investigation can unfold the ways how these discursive strategies, the emergence of new rural elite, the restructuring of agriculture, the idea of autonomy and a sort of ethnic economy gave impetus or impeded the functioning of the cooperative and its shift from subsistence to market.

Keywords: market, local–global, community, cooperation, ethnic struggles, autonomy

Introduction: the scene and the actors of a ribbon-cutting ceremony

At the end of 2012 and beginning of 2013 different Hungarian newspapers and sites[1] from Szeklerland and Transylvania[2] announced that a dairy plant had been inaugurated in Cristuru Secuiesc (Székelykeresztúr)[3] in Harghita (Hargita) county. The ribbon-cutting ceremony was

1 See the list of these sites and newspapers at the end of the reference list.

2 Transylvania is a region in the North-Western part of Romania, which was part of the Kingdom of Hungary, the Habsburg Monarchy and the Austrian-Hungarian Empire until 1920. The three main ethnic groups that populated it were traditionally the Romanians, Hungarians and Germans (mainly Saxons and Swabians). But ethnic structure changed when Germans left during communism and right after the 1989 revolution, and nowadays mainly Romanians, Roma and Hungarians live in the region. Szeklerland is a historical-cultural region in the eastern part of Transylvania inhabited mostly by Szeklers, a Hungarian ethnic group. Szeklers constitute an important part of Hungarian national imageries since the end of 19th century. According to these views Szeklers nowadays represent the clearest version of an ancient Hungarianness that has generally been forgotten by other Hungarian ethnic groups.

3 Given the Hungarian majority of the region, and where indicated, I put the Hungarian names of the settlements in brackets.

held in December 2012 in the presence of the president of the county council, representatives of the Hungarian state, local authorities, representatives of local councils and other officials. The ribbon, which strongly reminded of the newly invented Szekler flag[4] was cut by the most important notabilities present at the ceremony; a girl in Szekler folk costume completed the view. The dairy plant, though indisputably of major importance for the region that is still weak in industrial activities, was not such a major investment implying considerable amounts and many new jobs that would justify all this ritualised behaviour and ethnic symbolism. One might ask, thus, for what reasons did local stakeholders organise this ceremonial event using elements from the arsenal of ethnic struggles, ensure a relatively large media coverage and speak about the dairy plant in celebratory notes?

The main reason was that the dairy plant was not simply a private or company-owned investment. It was launched as part of a dairy cooperative that had recently been organised in the region. The second reason was that locals and stakeholders alike viewed the cooperative and the dairy plant as the successor of the cooperative and dairy plant that functioned up until 1948. The third reason was the favourable framework within which political and economic factors intertwined: on the one hand the launch of the dairy plant is grounded in the regional and ethnic struggles for a sort of political autonomy of Szeklerland (Biró 2002), on the other hand these struggles are completed with different economic initiatives that aim at creating a new framework for locally produced and consumed goods, mainly food (Borsos 2013).

Consequently, news about this inauguration, especially from an (economic) anthropological point of view, is more than simply a piece of forgettable news that we come across day by day. Moreover, a thorough anthropological examination could reveal other aspects that in some way influenced the establishment of the cooperative and of the dairy plant. The present paper examines the reasons and aspects that constituted the general framework of this enterprise, and analyses this complex phenomenon from anthropological perspectives using on the one hand the scholarly literature on cooperatives (mainly in Hungarian contexts), on the other hand, and more generally, the results of economic anthropology and rural studies. From these perspectives this cooperative, while it is clearly an answer to the challenges of the global capitalist market – as it was at its emergence in the early 19th century –, it encompasses many other, multiple layers, thus in a sense it is a repository of rural and regional transformations in the light of global challenges. Its analysis offers the possibility to point out the ways the rural has been reconfigured in the context of the ideologies of new rurality, which in this case are topped up by certain deeply grounded ethnic elements, increasingly used in different spheres of Hungarian public discourses. The cooperative is a relevant phenomenon concerning the struggles of rural people to find their place in the global economy, it is about the ethnic processes and the activities of ethnic entrepreneurs in 21st century Romania and about the notion of community, ideologies and rival versions of different concepts related to the (imagined) Szekler community and (reinvented) Szekler countryside.

4 For an anthropological analysis of the invention and usage of the Szekler flag see Patakfalvi 2015.

Fieldwork and ethnographic data

In the last years I carried out fieldwork in the region where the cooperative was organised on the topics of inter-ethnic relationships (there are Hungarians and Hungarian speaking Roma in the region), traditional farming, and mainly the different forms of cooperation focusing on a specific form of cooperative work, the *kaláka*. This traditional form of cooperation is deeply rooted in the local economic, social and cultural life. It is linked to land use, labour use, ownership, but also to local environmental conditions. At the level of social life it is linked to kinship systems, neighbourhood relations, a local network of mutuality, while it is embedded in moral views as well. From an ideological point of view the *kaláka* went through an ethnic/national canonization becoming the symbol of the Hungarian villages/rural communities in Romania/Transylvania (Szabó 2014a). That is why it was somehow natural for me to continue my research on traditional farming and cooperation with the investigation of this present-day cooperative, as like other forms of cooperation, it is economically, socially and culturally embedded too in local circumstances. The actors of these new (communal) enterprises, willy-nilly, use elements of the same argumentation that can be found in the discourses around cooperative labour. They speak about traditions that facilitate cooperation, about moral views behind it and the willingness of villagers to help each other.

Finally, I have to make three important comments. Firstly, besides the results of the current research I rely heavily on the findings of my previous investigations. Secondly, since the new enterprises had a relatively large media coverage, I used extensively the media, especially the internet sources for analysing the different aspects of the cooperative. Thirdly, the most important comment, perhaps: the cooperative and the dairy plant are relatively young, despite their imagined long history. Since its launching in 2012 the dairy plant went through a crisis management and a sort of reshaping. In a sense, both the cooperative and the dairy plant are still in making. I conducted the first interviews at the beginning of the 2014, and continued the fieldwork in the summer of the same year. Consequently, neither the fieldwork, nor generally the research is closed. This paper, thus, offers rather perspectives for the analysis of ethnically embedded rural economic practices than final statements about agricultural cooperatives.

Agriculture and dairy production – a short description

The region where the cooperative is, the western part of Harghita county is characterised by the prevalence of rural settlements and therefore the dominance of agricultural activities. Urban settlements, except the era of socialism, could not offer real job opportunities for people living in rural regions, and that is a reason why small-scale agriculture has been preserved by the date. While there are differences between the different smaller districts in the range of the cooperative, it is generally true that they were launched in foothill areas with relatively low soil quality where the narrow valleys, the steep hillsides and gorges, and the closeness of the forests make crop cultivation difficult. Such climatic and environmental conditions limit somehow the range of agricultural activities: the cultivation of cereals or other cultures (e.g. cash-crop vegetables) is relatively difficult either due to the low soil quality, the abundant rainfall, long lasting winters or because wild animals would many times simply spoil the crop. That is why the re-

gion is much more conducive for animal husbandry (Benedek 2003: 173, 186–187). The other rediscovered crops are fruits (Pakot 2011), since traditionally several villages in the western part of Harghita county developed relatively intensive fruit production (Kozma 2010: 205–206).

During my fieldwork I focused on Şimoneşti (Siménfalva), a medium size village and the surrounding settlements, which are relatively close to the dairy plant. In the villages where I carried out fieldwork, beside some cultivation and fruit production, locals were traditionally oriented towards animal husbandry and, for instance, wealthier families kept a large number of cows before collectivization, when the oxen were the markers of wealth and competence in agrarian activities. A quick look at the historical data from the end of the 19th century would already confirm that smallholdings prevailed in the villages, but also that animal husbandry was of major importance (MKOMS 1897, Rubinek 1911). It is not incidental from this point of view either that the movement for cooperatives found here a fertile ground[5] and that one of the first dairy cooperatives had been founded in the region.[6] All these historical backgrounds are important for the present-day cooperative, because they offer an argument when arguing for or against cooperative actions.

The collectivization and the socialist modernization shifted these traditional orientations, and after re-privatisation, while locals still continued to follow the new patterns introduced during collectivization, the need for a better agricultural strategy became more and more conspicuous. After the collapse of collective farms in the early 1990s and the gradual withdrawal of state subsidies, the local agriculture had its ups and downs: the enthusiasm of the smallholders lasted roughly to the mid 1990s, then agriculture entered a long lasting decline followed by overall changes in the country's economy and by local economic restructuration, demographic changes, abandonment of agricultural land and increasing out-migration. However, the dairy production seemed to be a good solution for those who lost their jobs or earned below the national average: until the regulations brought by EU integration 4-5 cows could ensure a decent living standard for a family of four (Benedek 2003: 187). In this context two alternatives emerged: fruit production[7] and the farming, since locals considered that these two sectors suited the local conditions best. Beside this, they, that is mainly the intellectuals, constantly kept the need for cooperation on the agenda. However, it was clear for them that, despite the fact that many locals still had sweet memories of the successes of the cooperatives in the interwar period, due to the experiences of socialism they would be reluctant to join some sort of cooperative organisation.

5 There is no room here to go into details, but one must not neglect the role of Protestantism and the activity of Protestant (mainly: Unitarian) pastors.

6 The first rural reading clubs (Hungarian: olvasókör) that aimed at facilitating education in agriculture were also founded in these villages (Dávid 2000: 356).

7 In one of the villages the socialist modernizers implemented a development programme turning the nationalized lands into a large state farm for fruit production. The fruit trees, however, were not local varieties, and after re-privatisation the majority of the locals abandoned the orchards turning them mostly into pastures.

The transformations in agriculture and agricultural policies, however, made them revise their convictions, and practical pressures like the bankruptcy of the dairy plant in Cristuru Secuiesc, the concomitant dominance of a company-owned dairy plant that abused of its monopoly and the new favourable circumstances resulted in its organization and launching. These new circumstances included: the ideas of the new rurality,[8] the reinforcement of the idea of cooperation,[9] the positive examples of other successful networks, for instance, in fruit production and the willingness of the local authorities to support the cooperative.

The cooperative and the dairy plant

The present-day cooperative was founded in 2011 when the former dairy plant in Cristuru Secuiesc was closed and the local dairy producers were somehow forced to find solutions if they wanted to avoid the monopolization of the local dairy market by a company-owned dairy plant. Currently the cooperative has around 500 members in roughly 5-6 regions and subregions. What made this case special and unique[10] was that the members did not only join a cooperative in order to have better positions on the market, but they bought a former dairy plant, which originally, in the inter-war period, belonged to a cooperative that was very successful in that time. The dairy plant was nationalised in 1948, functioned as a regional branch of the county dairy factory. After the privatisation a foreign entrepreneur bought it, closed it after a short while, and intended to sell it. This was the point when the local authorities and local organisations in the field of rural development got mobilised and announced this unique opportunity to local leaders and people. Villagers and members of different organisations started a pro-cooperative campaign among the farmers and finally founded the new enterprise. The members who decided to join were obliged to buy at least three shares of 800 lei, but there were cases when a single member bought 40 shares in total. But this was not enough to buy the buildings and start the business: the Harghita County Council was one of the financial supporters, the other one was the Hungarian Ministry of Rural Development, and the money that was still lacking was loaned by a commercial bank.

Conquering history, struggling for the present: narratives about the cooperatives

"The social world is accumulated history" (Bourdieu 1986) and history, as we all know, is not simply the repository of successive past neutral events (Giordano–Kostova 2002: 77). History

8 Few elements of this new rurality: the shift from production to consumption, the role of the local small producers, the connection of the countryside with tourism and with the preservation of the traditional landscape (see Szabó 2013).

9 The idea of cooperation is supported by the Hungarian intellectuals from Transylvania. See later in this article and Szabó 2014a: 29.

10 There are a few other cases in Romania of dairy cooperatives. But this is the only case when the cooperative not only pools the milk to have a better price for it, but also owns a dairy plant, processes the milk and has its own products.

is used and abused on different levels from the nation-state to local competing elite groups in different settings, and every interest group tries to make use of different past events (Boia 2001, Hofer 1991). This is especially true for totalitarian and post-totalitarian regimes, hence it is true for socialist and post-socialist Romania. One can identify in this context two distinct strategies in making sense of the history. The first one is the 'annihilation of the past' (Giordano and Kostova 2002: 78), characteristic mainly of socialist regimes that intended to erase anything that was not in line with their grandiose modernist, futuristic projects. The second one is the 'reversibility of events' (ibid.), characteristic mainly of post-socialist strategies that aimed at reconnecting the present with the times before socialism as if socialism had never happened. In a sense this dynamics of ruptures and continuities is a major constituent in the historical grounding of the cooperative, too.

In the framework of these dynamics and of the reversibility of events the present-day cooperative pretends to be the direct or indirect successor of all those attempts that aimed at ameliorating the peasants' condition in the 19th century and providing the necessary means for being present on the market. Cooperatives are generally regarded in European history as attempts to fight against the disadvantages of the newly emerging markets (Ploeg 2008: 182) that started to dominate every level of life and to overwhelm vulnerable groups like workers and peasants. In Hungarian history cooperatives emerged roughly at the end of the 19th century and soon became the subject of class struggles and ideological battles between the different actors of the political life (Gyimesi 1965). However, in spite of these struggles, some forms of the cooperatives turned into very successful businesses with broad social and cultural impact. I refer here to two of these cooperatives that marked the locals' experiences to an extent that the memories of these experiences are still present in nowadays debates concerning the cooperation.

The largest and the most successful, the Hangya Fogyasztási Szövetkezet [Ant Consumption Cooperative], in today's popular discourse most commonly referred to as Hangya, had at its peak several thousand members in the whole country (Gyimesi 1965) and within it, in Transylvania (Hunyadi 2007), which was still part of Hungary at that time. Following the Treaty of Trianon in 1920 the Hangya had been reorganised but it remained a successful story for Hungarians in Transylvania (Hunyadi 2007), thus for the villagers of the studied region as well. It is worth mentioning in a short note that these traditional forms of cooperatives had already intersected with ethnic groups: Transylvanian Romanians, Saxons and Hungarians had their own, ethnically organised networks of cooperation (Hunyadi 2006). The Hangya is, thus, one of the positive historical references for the new discourse around cooperation.

The other positive historical reference is the dairy cooperative that worked in the villages during the inter-war period, when Hungarian organisations in Romania had many attempts to offer new economic opportunities and solutions for peasants and generally for rural people (Hunyadi 2007). In this region one of these solutions was the dairy cooperative that started with a small cooperative to pool milk, and continued with the funding of the dairy plant and the start of production in Cristuru Secuiesc in 1937 and 1938, respectively (Hunyadi 2007). The dairy plant was one of the success stories, it processed around 10-15,000 litres of milk on a daily basis, managed to get a better price for the peasants and besides reaching the markets of the capital city, Bucharest, they exported butter to different foreign countries.

It is important to emphasise that none of the active members of the present-day cooperative experienced the inter-war period, but they envision themselves as the followers of those ancestors who were members of those cooperatives. Agriculture and rural life is generally characterised by the imagined presence of ancestors and moral obligations towards them (Szabó 2014b: 467). In several villages of the region the Hangya had its shops, and locals generally refer to it in positive terms. The positive views about the cooperatives are augmented by the memories of the short-lived (50 months, between 1940 and 1944) Hungarian rule when following the Second Vienna Dictate the northern part of Transylvania was reattached to Hungary. Here the economic and national (ethnic) aspects intersect again, since in the locals' memories the successful modernisation of agriculture is linked to the Hungarian administration. People have memories of machines and buildings that were installed and built in those times. For instance, hand powered separators and silos came into use, and many animals for breeding were bought as well: "My father told me about a doctor, doctor B.[11] When he started his practice in the village, he brought a few bulls… and they were so beautiful." The memories of these cooperatives and modernisation projects still prevail and are good arguments for those who struggle for the present-day forms of cooperative in a sometimes hostile or unfavourable environment.

The dynamics of ruptures and continuities is coupled at the same time by a constant oscillation between a pro-cooperative and anti-cooperative attitude. Cooperatives do not evoke only positive experiences. The strategy of 'reversibility of events' links the present with certain series of events before socialism, but in the meantime the annihilation of socialism went on. Those forty-five years of socialism, however, could not simply fall into oblivion. And it is not primarily about the cruelty and evil that people experienced when collective farms were organised and the well-to-do peasants, the so-called *kulaks* and part of local intelligentsia got imprisoned or were forced into labour camps, but about the deficiencies of everyday life of the collective farms that definitely diverted the idea of cooperation.

There is a vast scholarly literature about the sufferings of the villagers during the collectivisation campaigns,[12] thus I think there is no need to enumerate the details that made the collective farms one of the worst experiences of rural people in recent history. A strange case from research work conducted in the summer of 2014 clearly exemplifies this: within the framework of an inter-ethnic survey I supervised four field operators who went from house to house with a questionnaire. A man in his 50s (so he was born in the late 1950s and had no real experiences of the collectivisation campaigns) refused to speak with the field operators a few times. Later his son-in-law explained it when he said that "When the kulaks were gathered and seized, it began like this." (i.e. with the gathering of data and the filling out of forms). But, as I mentioned above, the experiences related to the collective farms are not primarily from the period of the organisation in the late 1950s and early 1960s. The collective farms were not only organised in a mischievous way, but they also worked with obvious deficiencies. People accuse mainly the duplicities, the fake behaviour of the leaders and the mismanagement of the agricultural units, all inherently characteristic of the system. Under the auspices of 'cooperation' and 'com-

11 The vet between 1940-1944.

12 One of the most recent works in this aspect is Kligman–Verdery 2011.

munity' the leaders publicly spoke about the benefits of the community, the people and the state, but in the meantime they targeted their own individual gains. The split between the elite and the people unavoidably deepened the convictions according to which the idea of collectivisation was brought in by strangers.[13] Although the collective farms often had their local followers or even promoters, they are generally regarded as the consequence of outsiders' activities. It is absolutely clear that the initially positive notion of cooperation was turned into something very different from the idea of cooperativeness; and it is significant that these memories are used in present-day debates about cooperation. Those who are not willing to join the cooperative always find arguments at hand taken from its history to fight against the idea of cooperation.

The historical patterns are repeated again when the activities of the intellectuals[14] are opposed to ordinary people's activities. There are two, in some respects contradicting patterns. Szekler communities have always shown some kind of reluctance and mistrust towards those leaders whom they did not acknowledge as being from their own communities or whom they saw as distancing themselves from their communities of origin often expressed in changing their outfits. The conflict is in some cases latently, in other cases overtly present in the life of the present-day cooperative. These concerns are often given voice in opposing those who only worked out strategies and those who really put their hands into the mud and produce milk. While there are several intellectuals who worked for the founding of the cooperative, the invention of a brand and so on, the majority of the farmers are concerned rather with the immediate economic gains of the cooperative then with the future benefits for the whole community. The opposition, nevertheless, bears some paradoxes since there are several intellectuals in the cooperative who are at the same time real farmers, put their hands into the mud and produce milk. The other historical pattern is the role played by intellectuals in the cooperatives. It is known from the history of cooperatives that these organisations functioned with relative successes mostly in the cases when intellectuals, like local priests, teachers, but also politicians as the promoters or animators took part in them (Gyimesi 1965: 647–648, Hunyadi 2007: 86–88). The present-day cooperative somewhat repeats the historical pattern: the cooperative enjoys the constant support of local intellectuals and teachers, and former agrarian leaders, pastors engage themselves in promoting the cooperative and/or in producing milk.

Rival moralities, competing ideologies and meaning formation in the cooperative

The cooperative is not simply an economic enterprise – just like Szeklerland is not simply a place. The parallel is not simply a writer's trope: the discourses around the cooperative are built

13 This attitude can be perceived as an alternative strategy for the annihilation or at least for delimitation: people do not identify with the events of these years.

14 In local Hungarian terms: 'pantallós gazda' (farmers with suits) whose activities are sometimes criticised by the real farmers, the people of the land, who traditionally wore not suits but tight trousers, the Szekler outfit for men, which could mark social status in a closed community.

many times on the same expressions that are also frequent in the promotion of rural tourism. 'Authentic', 'local', 'home-made', 'small scale' are only a few of the terms that are used by the local members, the leaders and the media, and needless to say that these are frequently used in rural tourism, as well (Szabó 2012 and 2013). The cooperative is not only embedded in local culture, but it is actively perceived and presented by its stakeholders as being an organic part of the local settings. Thus, if one wants to understand the cooperative beyond its economic aspects, they definitely have to understand its cultural and ethnic aspects that – besides the historical experiences described above – shape its functioning at least to the same extent as the economic factors. The cooperative can be perceived in this sense as the battlefield of different competing concepts that are sometimes called values by local stakeholders. These alleged values are believed to emerge from the local traditions and are incorporated into the endeavours and discourses of the new rurality that are constantly contrasted with the moralities/values of the market and ideologies of globalization.[15] The cooperative and the villagers constantly position themselves within this network of different, but obviously overlapping concepts like communalism versus individualism, cooperation versus competition, political and economic autonomy in the context of Hungarian versus Romanian nation-building, local versus global, alternative food networks versus market exchange, ordinary smallholders versus intellectuals and leaders. In what follows I offer an analysis of these concepts that in some cases are overlapping, in other cases are opposing, and I highlight the tensions that are inherently present in them.

Cooperation versus competition and the shifting meaning of community

Since any type of long term cooperation implies a sort of community or communal sense, the most important issue related to cooperation is the existence or absence of, and the shifting meaning of community.[16] There are three interrelated aspects regarding the issues of community in the context of the present-day dairy cooperative, consequently the direct and indirect historical experiences are reinterpreted from other perspectives, too: first, the issue of the traditional forms of cooperation, the reciprocal help in different types of work, called *kaláka*; second, the canonisation of *kaláka* in Hungarian national contexts; and third, the everyday experiences of the villagers about the disintegration of local communities. They are important because the communality that is generally thought to be characteristic of Szekler communities is an important background when building up the epistemological frameworks of the cooperative. The logic is simple and encompasses somehow the turning of the social phenomena into natural facts (cf. Bourdieu 1991: 222, Ulin 1995, especially pages 522–523): if these traits of communal behaviour are naturally part of Szekler communities, then any newly established communal enterprise incorporates this inherent communality. The community is in this sense the foundation, the core or *sacra* (cf. Gudeman 2001) of the economic sphere.

15 "We are in the middle of an economic war, that cannot be fought but with cooperation." See Katona 2013

16 There is a large scholarly literature about this issue since the question of community is practically on the agenda of social sciences like sociology or anthropology from the very beginning.

The *kaláka* seems to be a very simple and clear economic practice that at first glance shows the generosity, the moral behaviour and the willingness of the villagers to help each other, thus it is at hand when the embedding of the cooperative in the local culture occurs at a discursive level. The practice, nevertheless, is much more complex and as such it is not simply about the generosity of the villagers or about their alleged charity. I have described at length elsewhere the practice of *kaláka*, pointing out also that the practice of mutual aid in the field of different rural works is not limited to Szeklerland and it is known in various peasant and farmer communities (see Szabó 2014b). In this sense the *kaláka* is not unique. It is rather the specific historical and economic circumstances reinforced by the processes of national canonisation that make it relatively unique. To sum up briefly the functioning of, and the main issues related to this practice one should emphasise that it is generally linked to Szekler, or Transylvanian villages and it is thought to be rooted in long historical traditions.

The *kaláka*, however, was rather a locally comprehensible rational[17] answer to given economic and social conditions than simply the display of an imagined communality. These economic and social conditions included traditional agriculture that was poor in resources, the feudal type of agriculture implying the traditional management of common resources, the thick social networks and ritual events that abounded the life of villagers. The *kaláka*, therefore, worked in the following way: if a household in a village needed to carry out work that required more labour than that available within the family, they organised a *kaláka*, in some cases calling for the village fellows' help, in other cases this help being simply offered as a reward for their previous participation in reciprocal work exchanges. The *kaláka* was characteristic especially of periods of accumulated agricultural works, thus harvesting, threshing, corn husking, mowing, hay making etc. was organised in this way, but work related to the construction of family homes, stables and barns also made use of *kaláka*.

Although seemingly not complicated, the *kaláka* was a very complex system starting immediately with its origins: it is not clear whether the practice was embedded in the organisation of the feudal *corvée*, or if it was rather part of the economic life of former free peasant (yeoman) communities. Although it is an issue of major importance for the general understanding of *kaláka*, this would be a marginal question when trying to understand how meanings related to community were generated, if the present-day canonisation of *kaláka* would not take for granted that the practice shows the willingness of Hungarian villagers to cooperate and to act as members of a community.

When depicting life in Hungarian villages in Transylvania, Hungarian elites use many times simplifying views of these villages. It is well known that the ideological reconfiguration of the rural – either in a positive or negative way – has a long history, thus it is no wonder that the present-day elites operate with this framework of simplification.[18] Hungarian villages are very

17 It is important to emphasise that this logic is valid only when taking into account all those symbolic revenues, the prestige and honour called symbolic capital by Bourdieu (1990) that determines local economic and social life, but falls outside of the domain of mainstream economics. From an outsider point of view all these practices would be regarded irrational.

18 The 'peasant' and the 'rural' in general played an important role in the nation-building, and followers of different ideological orientations (mainly: conservatives vs. liberals) interpreted the rural in different ways opposing the values on the one hand with the backwardness on the other.

often perceived as locales of traditions, true Hungarian culture, closeness to nature and above all the willingness to cooperate.[19] In this sense the *kaláka* went through a canonisation at the national level, since the elites viewed it as the main characteristic of rural people. In 1945 the Hangya Cooperative was reorganised and the new cooperative was called Kaláka Cooperative. The Hungarian Studios of the Romanian State Television in the 1970s launched a TV-show called *Kaláka* that presented the folk culture of Hungarians in Romania. But more recently the *kaláka* has been revived in a special movement that aimed at rebuilding the small local mineral baths (*borvízferedők*) in Szeklerland: usually a few locals, ordinary people and leaders alike, together with volunteers (mainly students from architecture) from all over Transylvania and Hungary worked for several days to rebuild the baths in a local style using local materials. The president of Harghita County Council even declared that a small airport could be built in the framework of *kaláka* (Kozán 2015). The ideological reinterpretation becomes clear especially if one takes into account that the *kaláka* in its original meaning worked only in smaller communities and that elites here speak rather about volunteering than about real work parties in the traditional sense of the word. But the term 'volunteering' does not bear that ideological layer that is evidently present in the term *kaláka*.[20]

In this sense the *sacra* is extended to encompass the whole ethnic community, which becomes replaceable with the ethnic group and *vice versa.* Thus the newly established cooperative could benefit in this respect from the ideologically constructed willingness of the locals to cooperate. All these interpretations are far from the original meaning of the *kaláka*. However, they are useful means to approach the local cultures of the villages and to subtract its imagined essence. These views contribute to the formation of a positive framework regarding the chances of cooperatives, and the actors on different levels refer to these when arguing in favour of cooperatives, or sometimes it is just a hidden background to these discourses.

The existence of this ideal community, however, which would be in line with the alleged expectations of the Hungarian ethnic group in Transylvania – or of its leaders –, is at least questionable. Negative experiences are not linked exclusively to collectivisation. In villagers' perspectives something happened to the local communities compared even with the socialist period that might influence the cooperatives as well. In recent interviews locals have complained about the disintegration of local communities. The traditional *kaláka* does not work in the same manner as it did before. In most cases it implies only the contribution of close relatives, neighbours and friends. This is again a serious reason for the locals to have doubts regarding the chances of the cooperative. The dominance of the market principle and discourses of market economy do not favour the persistence of cooperative actions, and communal values

19 It is only a small detail, but it might be important: the foundation of the the Democratic Alliance of Hungarians from Romania is called Communitas Foundation. The *communitas*, beside its meaning in Latin, was the self-organisation of the Szekler communities in late Feudalism.

20 It is worth noting another aspect, too: the meaning of civil society and volunteering either was not known or traditionally accepted in Romania, or it was diverted by the socialist planning of society. Volunteering (called *muncă patriotică*) during socialism became emptied for it was practically mandatory to provide volunteer work for the benefit of the community, the state or different institutions.

are marginalised to a certain extent. However, one should not lose sight that, paradoxically enough, the inability of the locals to act collectively and the competition imposed by the privately owned dairy plant that pushed its influence towards the extremes contributed to the formation of the cooperative. I have mentioned above that in the last years a privately owned dairy plant managed to dominate the dairy sector of the region, and contributed also to the closing of the former privately owned dairy plant in Cristuru Secuiesc. The plant abused its monopoly, prices decreased and payments were delayed, but it still managed to pool the necessary quantity of milk because farmers competed for selling their milk to this plant. Thus issues concerning the willingness of the locals to cooperate gain another meaning in the context of this domination. The newly established plant owned by the cooperative not only offered a fairer treatment and better prices, but emphasised the importance of cooperation as opposed to competition.

It is important to emphasise again that from this point of view the cooperative is not just relying on an already existing community, but it actively contributes to the formation of a new community. Quite recently the cooperative and the dairy plant ventured in a joint project within which school trips are organised to the plant or the dairy plant visits the schools offering free products to the pupils. This newly created and constantly reinforced community is in a sense the result of market pressures, and this leads us again to the issue of tensions between market and community.

Community, culture and market: the cooperative in the making

The dairy cooperative is not unique and was not even the first enterprise in the context of the reinvention of the rural and of the agricultural production in Szeklerland. There are several new enterprises and networks of different size and influence around Szeklerland that attempt at this rural-urban reconfiguration. These social-economic attempts are not simply about the local histories and local interpretations of historical processes, but also about the new ideas and images that compete for or conquer the rural. In the case of Szeklerland the general view and the canonisation of the rural, the new concepts of the rural, the shift from production to consumption, the new forms of the rural–urban opposition/continuum are profoundly grounded in an ethnic/national framework. It is worth mentioning that the canonisation of rural Szeklerland as the truest, most traditional Hungarian land (Horváth 2003: 264) in the Hungarian public discourses takes place on multiple levels. Recently foundations, associations and other organisations have been launched to work on the (re)invention and branding of the local economy and culture, taking the first steps towards the shift between the description and the (re)production of a local/regional economy and culture (cf. Bourdieu 1991). The activities of these organisations are many times paralleled by the endeavours of the local authorities aiming at political autonomy and by the ongoing Hungarian nation building in the region.

The enterprises that form a favourable framework and/or offer a positive background for the dairy cooperative are – just to name a few – the Székely Termék (Szekler Product), Góbé[21]

21 This is a popular name for Szeklers that denotes their inherent cleverness and ability to get by in difficult situations.

Termék (Góbé Product), the Átalvető (Haversack Network), the Élő Szövet – Térségi Közösségi Együttműködésért Alapítvány (Foundation for Regional Cooperation) and the Székely Gyümölcs (Szekler Fruits) project (see Gáll 2011). All these projects use the rural image of Szeklerland, elements of the folk culture, and rely on an imagined communality in Szeklerland. The design often uses elements of folk culture, the Szekler rune that is going through a renaissance is often incorporated, and the related events are marked by folk costumes. It is striking how local cultural elements imbue economy and market activities, and how all these enterprises benefit from what Christopher Ray labelled culture economies emphasising the role of neo-endogenous elements in local rural development (Ray 2001). Moreover, some of these attempts are heavily supported by the Harghita County Council, just like the dairy cooperative and the organisations or even persons behind these enterprises took part in the founding of the cooperative. From this point of view this is rather a network of enterprises of different size and scale than independently functioning organisations. These enterprises are positioned on the intersection of economy and culture combining economic and ethnic, politic endeavours even if the latter are often only latently present.

The other sphere is that of the politics that often inseparably overlaps with these economic enterprises. It is not new that the people of Szeklerland are subjects of a doubled nation building. Politically they are integrated into the Romanian state even if many times they are reluctant to acknowledge this, but culturally maintain countless links to Hungary that have recently been topped up by the laws granting double citizenship for ethnic Hungarians abroad. On top of everything, according to a relatively recent study, Hungarians from Transylvania show higher willingness to consider ethnic factors in their economic decisions (Csata–Deák 2010). While Hungary failed to elaborate a consistent economic plan for the Hungarian communities in Transylvania[22], and the support came mainly in the domain of culture and education, there are cases when the Hungarian state, different actors of it or even private persons from Hungary offer substantive help to various Transylvanian endeavours. In the case of the dairy cooperative and dairy plant the financial support of the Ministry of Rural Development of Hungary is only one, but unquestionably very important aspect. The other one is that Hungarian experts take part in these actions that are – and this is important, too – imagined and implemented as Hungarian actions, as ethnically embedded economic endeavours. The cooperative follows a real or imagined Hungarian model and when arguing for the historical models, highlights and reinforces the national character of these antecedents.

The Hungarian nation building is complemented by local struggles for autonomy. Hungarian politics in Romania is generally characterised by the use and abuse of the often fuzzy notion of autonomy both in economic and ethnic terms, augmented by a sometimes stronger, other times weaker discourse about regional differences in Romania, especially related to the differences between Transylvania and the southern counties. This macro level discourse has its local replica, and locals willingly embed their arguments in favour of the cooperative into this context, too. The topics of autonomy imbued the political life at every level, and county officials

22 One has to admit that the most important Hungarian party in Romania, the Democratic Alliance of Hungarians in Romania, failed in this respect as well.

as well as village mayors quite frequently use these topics. Since political actors too play a role in the cooperative, or the middle level leaders of the cooperative are active in local politics, too, it is somehow expectable that these topics are present in the image of the cooperative.

The struggle for the cooperative, however, does not take into account only local or national stakes. According to Jan Douwe van der Ploeg, global markets exert an unprecedented pressure on peasants (van der Ploeg 2008, 2010), thus it is expectable that any peasant movement would operate to a certain extent with this local-global tension and would try to make use of the sense of locality and community. "We need local producers and local consumers" – stated a politician at the inauguration (Press release 2012). Globalism is definitely present in everyday people's life in various forms (Appadurai 1996). For instance the behaviour of the entrepreneur who bought the buildings of the dairy plant after the privatisation is labelled as typical of foreigners: "You know who bought the buildings? An investor from Israel. But that was only a cover story since he wanted only to close everything down and sell it as scrap iron." The condemnable strategies of the other, company-owned dairy plant that at some point started to dominate the local dairy production are also part of this local-global battle: "The butter that they sell is actually not made of local milk. Have you ever checked the label? It is written on it that they only distribute it. The butter is from Poland." In this context the terms 'local' and 'locality' gain a new, entirely positive meaning: the local in this context is not only a place of living, it is the opposite of the distant and yet present global structures that they are hardly able to influence. The cooperative is embedded in a community and it contributes to the creation and maintenance of this community. This holds true for the locality too: they not just embed their enterprise into this locality, but they actively contribute to the formation of this locality.

The opposition between the market exchange and alternative food networks, between the price and quality is another aspect of this global-local battle (van der Ploeg 2010). The aim of the dairy plant is to find a niche on the market and to ameliorate the situation of the partly self-sufficient farmers, who are very much divided from the market's perspective through market strategies. Given the context, however, market strategies are frequently hidden behind the techniques of recent local attempts enumerated above, that operate somehow with the logic of alternative food networks. The dairy plant not only collects the milk and sells its products, but encourages its members to buy and consume the same products. Dairy products are given out instead of dividends. In the framework of the campaigns that aim at branding the products and building a community at the same time, free products are handed out to school children. A few products have already received the Góbé Product label, which again reinforces the idea of local consumers reached directly by local producers. From a financial point of view, the products of the dairy plant sometimes can hardly compete with other cheaper products on the market. Beside other competing concepts that are used in arguing in favour of the cooperative, this aspect is interpreted in another context, the opposition between price and quality. The term 'authentic' is frequently used in the discourses around the cooperative and the dairy products, but this term often has another layer of meaning referring to quality. Members of the cooperative and managers emphasise that they put only local milk into the dairy products, that there are no harmful ingredients in their products and that is why they have to sell them at a higher price. The argumentation sometimes uses the loyalty of the locals towards local products as an extra element – and then we are back again at the contrast between local and global.

Instead of conclusions

It is not incidental and it is not just a minor detail in the whole story that besides the help of the Harghita County Council, the Hungarian Ministry of Rural Development also gave a substantial help, and Hungarian experts support the cooperative in general. The cooperative is an economic institution, but – just like its antecedents in the late 19th and early 20th centuries and during the inter-war period – it is deeply grounded in (local) culture and politics in the broadest sense of the term. That is why I argue that the cooperative tries to find its position at the intersection of positive and negative memories and experiences, local and global economy, local and global views about the rural, Hungarian nation building and the Romanian state. That is how the local authorities, the Szekler flag and the Szekler folk costume ended up at the scene of the inauguration and became the constituents of the image of a cooperative that basically aims at ameliorating the situation of the local farmers.

The economic conditions, however, cannot be neglected. Since its launching in 2012 the dairy plant went through a crisis and a crisis management. The dairy plant has had to find or has had to create its niches on the market. It is not an easy task, though. The dairy plant is not a private-owned business; it has in the background a group or groups of farmers with experiences, knowledge and expectations that can be an advantage or a disadvantage at the same time. These farmers sometimes stick together, while at other times are very much divided. Everyday cooperation is fairly widespread, but only with certain limits regarding kinship, neighbourhood etc., since it is important that they could control each other. There is no formal leadership in the *kaláka* that could offer any gains to its leaders. At another level, formal cooperation is often rejected, one of the reasons being that there is a formal leadership that, in people's perception, could use the enterprise for their individual purposes. They definitely have expectations regarding the results of the cooperative and the dairy plant. The situation is even more complicated as several actors of this domain see the cooperative as a flagship for similar attempts: if it succeeds, many others might follow in different fields; if it fails, other attempts might see it as a bad omen.

The analysis of the cooperative can shed new light on Gudeman's approach to the intersection of community and market (Gudeman 2001): they are not separate spheres of life, but rather mutually understandable and interconnected sides of the same reality. Market and community are intertwined in the functioning of the cooperative. But the local and global, the local and national and other levels also intertwine within it. Cooperatives constantly negotiate positions in relation to the market and in relation to state and development (van der Ploeg 2008: 182), but people have to find solutions within the context of their close surroundings and in that very moment when they face problems. If this 'immediate struggle' (Narotzky–Smith 2006) is partly given impetus from outside these communities, when local experiences are themselves twofold and do not always meet the ideological constructions of the elites, a huge tension is created within this struggle. It is important to emphasise that notwithstanding global conditions, rural people are not entirely devoid of power and capacity of action (van der Ploeg 2010). However, this agency is formulated and reformulated in the context of local communities, state and market (Wacquant 2012) and a careful interpretation should take into account the relative weight of each. All in all, different moralities and normative views become

inherent parts of these struggles, the performative discourse (cf. Bourdieu 1991: 223) of creating the local economy and the culture economies benefits from different experiences, thus if one wants to understand the cooperative as an economic institution, one has to understand its cultural, and in our case, its ethnic aspects, too.

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http://www.atalveto.ro/
Élő Szövet – Térségi Közösségi Együttműködésért Alapítvány
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TS

2 General Perspectives

Bengt-Arne WICKSTRÖM[1]

Language Rights: Efficiency, Justice, Implementation

Abstract

An economic analysis of language rights takes its point of departure in individual preferences. Individuals attribute values to different allocations of language rights. One then compares the implementation costs to the aggregate value attributed to the rights by the individuals; a certain allocation of rights should then be implemented if the aggregate value exceeds the costs of realizing the allocation. The costs of implementing a certain right are as a rule both conceptually and practically well defined. Generally they will decrease per capita *when the number of beneficiaries increases. This implies that optimal rules should be expressed in terms of a "critical mass" of beneficiaries.*

The definition of value is more difficult and, hence, more interesting. As in any cost-benefit analysis, the point of departure is the individual propensities of pay for the rights allocation. The benchmark is then that rights should be realized if aggregated benefits exceed costs. The benchmark, however, has to be modified in different directions. Modifications are necessary if:

- *rights increase the status of the language and this in turn increases the individual propensities to pay (more rights should be implemented than in the benchmark case).*
- *rights increase the size of future generations using the language (more rights should be implemented than in the benchmark case).*
- *rights decrease the size of future generations using other languages (fewer rights should be implemented than in the benchmark case due to the concave cost structure).*
- *the speakers of the language are poorer than speakers of other languages and the government wants to redistribute in favor of the poor (more rights should be implemented than in the benchmark case).*
- *linguistic diversity is a good in itself and the language is small and threatened (more rights should be implemented than in the benchmark case).*

The practical legal realization of language rights depends in part on the federal structure of the state. A sensible federal structure depends on the geographical distribution of the speakers of the languages. Manipulations of the federal structure can then be used by a majority to discriminate a minority.

Keywords: language rights, linguistic justice, efficiency, status planning, federalism, linguistic discrimination

1 Introduction

Like in any other analysis that claims to be scientific, the problem of language rights has to be structured in such a manner that it can be made operative in principle. That is, we need to find

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sensible definitions of language rights that can be made the object of policy analysis. Then we need to decide on the possible goals of the language policy and find an optimal policy with respect to these objectives. Finally, the optimal policy has to be translated into real-world implementations. In this section, we will briefly specify the ingredients of the analysis with the point of departure in welfare-economics theory.[2]

1.1 Normative analysis

Initially, we note that we are interested in a normative analysis. We are looking for policy decisions leading to some goals that are determined outside of the analysis. That is, the goals themselves are not the object of analysis; they are rather the independent variables of the problem. We could say, the policy makers decide on the goals, and our task is to find out how to come as close as possible to the goals of the policy makers. This would be a trivial exercise if there were not some constraints to be considered. In an economics analysis, such constraints are first and foremost given by human behavior. Human beings react to changes in their surroundings. These changes are, for instance, caused by policy decisions. One could say, the normative (prescriptive) analysis has to be subjected to the constraints given by the positive (descriptive) analysis of the workings of society.

A central concept in an economics analysis is methodological individualism. That signifies that the point of departure consists of individual wants and behavior. The goals of the policy makers (for short: the planner) are in our analysis supposed to be derived only from individual preferences. Collective preferences do not exist in their own right, but only as some aggregates of individual preferences.

Individuals are also supposed to have entitlements to various resources including "money" as a general store of value. From the assumption that any bilateral or multilateral exchange which no individual objects to is permissible and "good" comes the concept of Pareto efficiency which is generally seen as the foundation of welfare theory. Cost-benefit analysis makes the Pareto efficiency operational.[3] In this essay we will argue in terms of cost-benefit analysis.

In order to analyze distributional aspects of language rights, we need to define concepts of justice or fairness. The basic point of departure is equality of all individuals. For our purposes, all individuals are assumed to be endowed with the same rights with respect to their chosen language. Adding Pareto efficiency to this concept implies that one has to accept voluntary changes. Hence, individuals are in principle allowed to sell or buy rights. That is, the absence of rights for one group can be justified with compensation payments to the members of that group, such that they rather have no rights and the compensation than no compensation and certain rights.[4] In the absence of full compensation payments, we can translate the rights allocation and partial compensation payments into changes in an implicit income distribution and let the planner have preferences over such income distributions. For policy purposes, the evalu-

2 For a more detailed analysis, see Wickström (2013) and Wickström (2016).

3 Due to so called "income effects" there are a number of theoretical difficulties in the transition from Pareto efficiency to cost-benefit analysis, especially the so-called Scitovsky paradox. See Scitovszky (1941), as well as the discussion in Wickström (2016).

4 For a further discussion, see Wickström (2007).

ation of changes in implicit income can be expressed with the help of weights attached to the individuals by the planner. The sum of weighted individual changes in implicit income can then be interpreted as welfare changes. If all individual weights are equal and constant, the planner is only concerned with efficiency; if the weights increase with decreasing income, the planner wants to redistribute in favor of the poor.

1.2 Language rights

In order to operationalize the concept of language rights, we look at different domains that can be legally defined. An allocation of language rights, denoted by r, is then a matrix of zeroes and ones. In one dimension we have the domains in the other the legal status of the language in each domain; if it is one, the individuals have a legal right to use the language in the corresponding domain; if it is zero, no such right exists. That is, $r_{ld} = 1$ would mean that one has the right to use language l in domain d. Typical domains can be the courts of law, public education, debates in the parliament, street signs, official announcements, etc. Of course, several domains can be collected into one aggregate domain. That way one can define concepts like "official language","national language", or "working language".

1.3 Benefits and costs

The benefits of a certain allocation of rights is what this allocation is worth to the individuals of society. The costs are the resources used by the society to implement the language rights.

1.3.1 Individuals

Each individual i attributes a certain value b to a given allocation of language rights r: $b^i(r)$. This value, or *propensity to pay*, has its origin both in the need to be able to communicate, if one needs the language to communicate, and in a purely emotional attachment to the idiom, giving a boost to the proper identity. One can also consider each domain separately. The propensity to pay for rights for language l in domain d of individual i is then denoted b^i_{ld}.

1.3.2 Society

The aggregate propensity to pay of society b^s is simply the sum of the individual propensities to pay: $b^s_{ld} = \sum_i b^i_{ld}$. For the sake of simplicity, we assume that there are only two groups in society, a minority and a majority. Further, we will focus on language rights for the minority language, implicitly assuming that the majority language has all possible rights. We also make the simplifying assumption that only the members of the minority are interested in rights for the minority language, and we denote the average propensity to pay of a member of the minority by $\bar{b}$ and the size of the minority population by m. The aggregate propensity to pay can then be written as $b^s_{ld} = m\bar{b}_{ld}$. Finally, we assume that $\bar{b}$ is independent of m.

1.3.3 Costs

The costs to society c of introducing rights in a certain domain for the minority language generally will depend both on the rights allocation and the number of the beneficiaries, the size of the minority community: $c(r, m)$. The dependence on m can take various forms. Generally there is a fixed component and a variable one. In the case of street signs or public documents,

there is only the fixed component; that is, the cost curve as a function of *m* is horizontal as illustrated in figure 1. On the other extreme, public education has very low fixed costs, but high variable costs that are proportional to the number of beneficiaries. The cost curve goes from the origin with a constant slope. This is pictured in figure 2. In general, both components are present or the costs increase less then proportionally with the number of beneficiaries. Then the cost curve is a concave function as can be seen in figure 3.

Figure 1. The cost structure of street signs

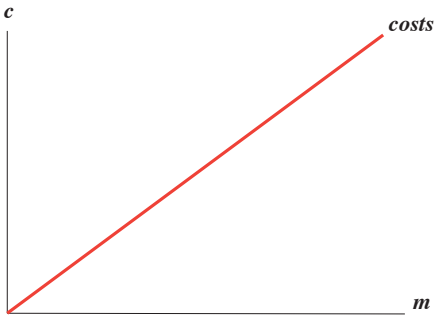

Figure 2. The cost structure of public education

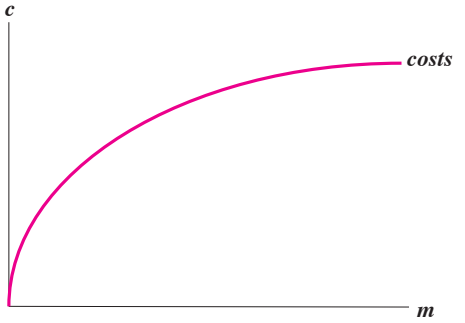

Figure 3. Concave cost structure in general

1.4 Goals

In the following we will analyze the implications of two sets of goals. First we will only consider efficiency and totally neglect distributional issues. That is, the only thing that matters is if the aggregate propensities to pay for a certain rights allocation exceed the costs of providing the allocation or not, independently of who carries the costs.

Thereafter, we will consider who carries the costs and take redistributional preferences of the planner into account. Normally, one wants to redistribute from the rich to the poor, but sometimes redistribution goes in the opposite direction. This can depend on the rich being more powerful than the poor and using their power to further their interests. Talking about minority languages, one could also imagine that there is a desire of having a uniform state – a nation. One way of achieving this might be found in the reduction of minority rights, if extensive minority rights lead to autonomy and centrifugal forces. In this case, the planner will give higher weights to the members of the majority than to those of the minority – a form of optimal discrimination.

2 Efficiency

In the simple cost-benefit analysis, costs are compared to benefits and a proposal is accepted if benefits exceed costs. In our case we find the net benefits p:

$$p(r) = m\bar{b}(r) - c(r, m) \tag{2.1}$$

If $p(r)$ is positive, the result is that the rights allocation r should be implemented. Under the assumption that $\bar{b}$ is independent of m and that c is a concave function in m, we immediately see that p will change from negative to positive at some value $m = m^*$. If m is below m^*, the rights allocation should not be introduced and if m is above m^*, it should be realized. The critical value of m, $m = m^*$ is shown in figure 4. For each individual right there exists a critical mass of beneficiaries. That is, the analysis says that there should be more rights in a big minority community than in a smaller one, and for the introduction of a certain right there should be a rule stating the minimal number of beneficiaries necessary – a critical-mass rule.

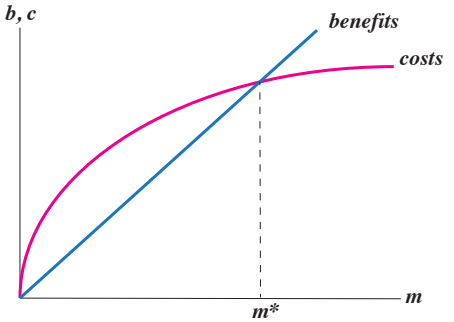

Figure 4. Concave cost structure and a critical mass

The critical mass will, of course vary between zero and infinite. In the case of proportional costs it is either zero or infinite. That is, the decision on providing public education in a minority language should only depend on the average propensity to pay of the members of the minority community in comparison to the *per capita* costs and not at all on its size. On the other hand, the decision to put up street names in the minority language will always depend on the size of the community.

2.1 Modifications

There are many reasons why the introduction of rights for a minority language can have feed-back effects on the variables entering our decision criterion $m\bar{b}(r) \overset{!}{\geq} c(r, m)$. The introduction of rights might increase the pride in the language and culture of the members of the minority, hence increasing $\bar{b}(r)$, the average propensity to pay for the rights in the community. More rights might also lead to the size of the minority community increasing, since more individuals in the next generation will stay in the community and adopt the language. This would increase m and also affect the costs of providing the rights.

2.1.1 Increase in the average propensity to pay for the rights

The affect of an increase in the average propensity to pay is straight-forward. The left-hand side of the inequality will increase and consequently the inequality will be satisfied in more cases. That is, more rights-allocations would be accepted by the decision criterion. In other words, the *ex ante* benchmark decision criterion is too strict and one should modify it, taking the feed-back effect into account.[5]

2.1.2 Increase in the size of the minority community

An increase in the size of the minority community leads to a decrease in the size of the majority community if the total population stays constant. The effect on our bench-mark criterion is an increase of both the left-hand side (due to m increasing) and the right-hand side due to an increase in the costs. However, since the cost function is assumed to be concave, the cost *per capita* $c(r, m)/m$ will decrease. See figure 5; the costs *per capita* are given by the slope of the lines from the origin. Hence, the left-hand side will increase more than the right-hand side, and we again have an argument for a smaller critical mass and more extensive rights than what is implied by our benchmark case.

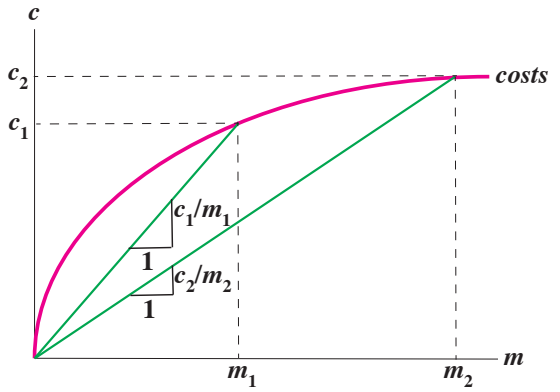

Figure 5. Costs per capita *for different m*

However, the majority community will decrease and the costs of providing the language rights for the majority will also decrease. Since the size of the majority community is greater than that of the minority one, the decrease in costs for implementing language rights for the majority will be smaller than the increase in costs for the implementation of the same rights for the minority. That is, for the implementation of a given rights allocation there will be a net increase in total costs. For the country as such there will hence be an increase in the *per capita* costs of implementing language rights if the total population stays constant. Hence, there is also a negative feed-back effect due to the increase in the size of the minority community. In this case, the benchmark condition overstates the benefits of minority-language rights.

5 A similar result with the opposite sign will be obtained if a right is removed. This could lead to a "cycle" and no clear result would be obtained, see Wickström (2016).

2.1.3 Language-ecology arguments

Some people claim that there is a value *per se* to have a large number of languages in the world. This is inspired by the arguments for a diversity of biological species. The argument is that if a language disappears, valuable knowledge is lost to humanity. This argument, of course, trivially implies that the benchmark case understates the benefits of minority-language rights if the minority language is threatened by extinction.

3 Distributional issues

To discuss distributional issues, we have to specify and evaluate the distribution of implicit income for different rights allocations. Generally speaking, we would need not only the individual propensities to pay for the rights allocations, but also the distribution of the associated costs as well as that of other goods and income on the different individuals. Since we are mainly interested in the language rights, we ignore the other aspects, implicitly assuming that there is no difference between the minority and the majority with respect to income distribution. Also, it is assumed that the costs of implementing language rights are distributed equally over the entire population. Then the remaining distributional issue is due to whether the members of the minority are enjoying rights for their language or not.

3.1 Point of departure

As the point of departure of the analysis, we let all individuals in society have the same rights.[6] The alternative then is that there are fewer rights for the minority and consequently a reduction in the costs caused by the implementation of language rights. The first best solution would be that the members of the minority be fully compensated with a higher income for the loss of rights and full equality would be preserved.[7] However, we consider this unrealistic and study the situation with inequality.

3.2 Modified cost-benefit analysis

Let the size of the majority be M and write the costs saved by the abolition of the rights for the minority as c and the average propensity to pay off the members of the minority for the abolished rights allocation $\overline{b}$. A member of the majority will then on average have a gain of $c/(M+m)$ and a member of the minority a (negative) gain of $c/(M+m) - \overline{b}$. The planner attaches a weight β to the members of the minority and the weight 1 to the members of the majority. The net weighted gain to society of abolishing the rights allocation for the minority is then:

6 The choice of *status quo*, however, is not quite straightforward. One gets slightly different results depending on whether the point of departure is one with universal rights (the "liberal" point of view) or with universal absence of rights (the "absolutist" point of view), or any point in between. This is analyzed in Wickström (2007).

7 This is the line of reasoning of Van Parijs (2011) who argues for the use of English as the sole official language in the European Union, but with compensation payments for the non-English speakers.

$$\triangle u = \frac{Mc}{M+m} + \beta\left[\frac{mc}{M+m} - m\bar{b}\right] = c\frac{M+\beta m}{M+m} - \beta m\bar{b} \tag{3.1}$$

If $\beta = 1$, the majority and the minority have equal weights, this reduces to our benchmark case:

$$\Delta u = c - m\bar{b} \tag{3.2}$$

However, if β is different from one, one gets a modified rule for giving the rights allocation to the minority, $\Delta u < 0$:

$$m\bar{b} > c\left[1 - \frac{\beta-1}{\beta}\frac{M}{M+m}\right] = c\left[1 - \frac{\beta-1}{\beta}(1-\alpha)\right] \tag{3.3}$$

The parameter α is the size of the minority as a fraction of the total population.

If $\beta > 1$, the planner wants to redistribute in favor of the minority when it does not enjoy rights for their language and, hence, is poorer than the majority. The benchmark condition is now modified and less restrictive. The desire to redistribute in favor of the weak thus leads to a more generous allocation of rights than what is implied by the simple benchmark condition. We also note that now the condition does not only depend on the absolute size of the minority, but also on its fraction of the population. This is due to the fact that the costs are distributed over the entire population and the costs *per capita* are the higher the bigger is the fraction of the minority by a given absolute size. The result of this is that the critical mass will depend negatively on α. The bigger is α, the smaller is the critical mass. Since the size of the minority is given by $\alpha(M + m)$, a minority of a fixed percentage size should enjoy more rights in a large country than in a small one. A minority of a given absolute size should also enjoy more rights in a large country than in a small one.[8]

3.3 Discrimination of the minority

The same model applies also to the case when the planner sees the minority as a liability *per se*. One sees homogeneity of the population as desirable. Then the weights allocated to the minority are smaller than one, $\beta < 1$. The condition for providing minority rights remains the same:

$$m\bar{b} > c\left[1 + \frac{1-\beta}{\beta}(1-\alpha)\right] \tag{3.4}$$

8 As the total population increases, the critical mass declines, since the *per capita* costs by a give rights allocation decline. Hence, a minority of a given size will have the same benefits from the rights, but the costs *per capita* decline both for the members of the minority and the members of the majority, making the inequality easier to satisfy. If the minority increases proportionally to the total population, the benefits to each member of the minority from the rights stay the same, but due to the concavity of the cost function the costs *per capita* again decrease for everyone. If β is very big there could even be a reversal of the critical mass, such that a minority smaller than the critical mass should receive rights. This would in general be the case if costs are proportional to m. We ignore this case here.

Now the condition is more difficult to fulfill and the critical mass is greater. Fewer rights will be allocated to the members of the minority than in the benchmark case. What was said above with respect to the size of the country is reversed.

In this case, we can in some cases derive a percentage rule for granting minority rights. If costs are proportional to the number of beneficiaries, like in the case of public education, this happens. Let the costs equal $m\bar{c}$. The condition becomes:

$$\bar{b} > \bar{c}\left[1 + \frac{1-\beta}{\beta}(1-\alpha)\right] \tag{3.5}$$

We can solve this for α:

$$\alpha > \frac{\bar{c} - \beta\bar{b}}{\bar{c} - \beta\bar{c}} \tag{3.6}$$

and the critical percentage, hence, becomes:

$$\alpha^* = \frac{\bar{c} - \beta\bar{b}}{\bar{c} - \beta\bar{c}} \tag{3.7}$$

Since the cost-benefit benchmark is $\bar{b} \geq \bar{c}$, in comparison to the simple cost-benefit analysis the minority is discriminated against, if $\bar{c} < \bar{b} < \bar{c}\beta$ and if it is smaller than the fraction α^* of the total population. The benchmark is not a sufficient criterion for the introduction of the right any more.

4 Implementation

In order to implement language rights in a territory, a number of practical considerations has to be taken into account. On the one side, one cannot have a different rule for each possible domain, but has to group domains together. On the other hand, there is a geographical dimension. Most states have federal structures with many different levels of government and the users of various languages are unevenly distributed over the territory of a state. In this section we will first discuss the definition of the relevant domains in general; then the geographical dimension will be addressed. Finally, the political economy of language rights will be illustrated with the help of a couple of simple examples.

4.1 Basic formal rule

We learned in section 2 that welfare theory clearly implies that a "critical-mass" rule is to be used in defining language rights. The determination of the size of the critical mass is, of course, an empirical problem. The cost side can relatively easily be estimated, whereas the benefit side involves not only straight-forward propensities to pay, but also has to take a number of external effects as well as preferences for redistribution into account. In the end, the number has to be determined by the political (constitutional) process.

That in most real-world cases not a critical-mass rule is being used, but a percentage rule, cannot easily be justified by welfare-economics analysis except in the case of proportional costs.

In this case, the critical mass is zero or infinite in the simple cost-benefit analysis. If it is infinite, that is the introduction of the right is efficient, we have seen, however, that the modification due to discriminatory desires of the planner towards the linguistic minority leads to the right being introduced only if the minority reaches a certain proportion of the population.

4.2 Quantification

In the theoretical discussion we have assumed that there can be different rules for each considered domain. In reality we often encounter only one single rule – a language is given an official status or not in a certain geographical area; occasionally one might distinguish between the status as a working language, the status as a national language, and the status as an official language. This choice could be made more flexible, though, bundling similar domains together. Mostly symbolic domains, like street names, important public documents etc. could be one such aggregated domain, everyday government services could be another one, and basic education a third one, for example. More than one category can certainly increase efficiency if sensibly applied. On the other hand, too many categories causes additional transaction costs. In the end, we would have a trade-off between allocative efficiency and transaction costs – a kind of Coase theorem.

Given the three bundles above, it is reasonable to assume that in the first one the costs are only fixed and not too high, whereas in the second one there are higher fixed costs as well as variable costs depending on the number of beneficiaries, and finally in the last case the costs are mainly variable and proportional to the number of beneficiaries. The two first cases would then call for critical-mass rules with a fairly small critical mass in the first case and a higher one for the government services. In the case of public education, we have seen that the critical mass coming out of the cost-benefit analysis is either zero or infinite, but we have also seen that in the case the planner wants to discriminate against the minority, a percent rule is called for.

In reality, the distinction made is between local and national rules, but rarely between domains. Finland here comes close to the theory. In Finland the rule for the use of Finish and Swedish is the same locally and nationally. It is also both a percent rule and a critical-mass rule: a language has official status in a given area if at least 3000 individuals or at least 8% of the population use it. Swedish is then an official language at the national level (more than 3000 people use it in the whole country) and locally in some counties; in the small ones, the percentage rule is important, but in the larger ones it is the critical-mass criterion that determines the status of the language. From a welfare-economics point of view this is, of course, the sensible criterion. It is also worth noting that the rule is symmetric and that there are a number of smaller counties in Finland where Finnish is not an official language.

The combination of a percentage and critical-mass rule also has the advantage that this combination is politically more difficult to manipulate than only the one or the other rule; see below.

It is interesting to compare the Finnish situation with the rules in Slovakia and Romania. In these countries, there is only a percentage rule, 15% in Slovakia and 20% in Romania. This leads to an official status of a minority language only locally and and in the smallest geographical units of the country. It also leaves the granting of minority rights open to political ma-

nipulation. It would be an instructive exercise to redraw the language maps of these two countries using the Finnish rule.

4.3 Local autonomy and optimal federal structures

Two principal types of considerations form the background of the federal structure of a country. On the one hand, the size of the different jurisdictions has to be determined. On the other hand, the composition of the population largely determines how the borders are to be drawn.

The main argument for big jurisdictions is economies of scale. If economies of scale are present, there are efficiency gains from increased size. This also adds a new dimension to the costs of implementing language rights. On the one extreme, the costs could be proportional to the physical size of the jurisdiction; for instance providing street signs in the minority language. If the composition of the population is homogeneous, also the number of beneficiaries will be proportional to the physical size of the jurisdiction. Then the critical mass will be proportional to the size of the jurisdiction as well, and the decision on providing the right will be unaffected by the size of the jurisdiction. On the other hand, the costs could be independent of the size of the jurisdiction – the most extreme case of economies of scale – like official communications from the head of the jurisdiction. Here, the critical mass will not change as a result of a change in the size of the jurisdiction, but since the number of beneficiaries is proportional to the size, the critical mass will not be reached in sufficiently small jurisdictions and the decision on providing the right will depend on the size of the jurisdiction.

The main welfare argument for small jurisdictions is that one can make the population in each jurisdiction more homogeneous, thereby making also the demand for public goods more homogeneous. This leads to different levels of the optimal public-goods supply in different jurisdictions, which is then closer to the individual demand and, hence, a gain in welfare. An immediate consequence of this is that in a linguistically heterogeneous landscape, there are welfare gains to be had if the borders are drawn in such a way that each jurisdiction is linguistically as homogeneous as possible.[9]

An argument against the welfare-optimal federal structure is a political one. With different very homogeneous areas the country can be threatened by dissolution. One just has to think about Belgium, Czechoslovakia, Yugoslavia, or the Soviet Union. If it is the goal of the central government to prevent an ever greater degree of autonomy, this is an argument for not having too homogeneous local or regional jurisdictions. This leads us to a discussion of the manipulability of rules that formally seem to be neutral, in order to reduce the influence of minorities.

4.4 A simple example

Imagine a fictitious country with 10 million inhabitants. 9.5 million belong to a linguistic majority and 0.5 million to a minority. The minority is concentrated to one region where it makes up half the population. The situation is pictured in figure 6. The minority is here evenly

9 See, for instance Boadway and Shah (2009) or Baldwin and Wyplosz (2012) for discussions of the principles of federalism.

distributed in the southern part of the country. We assume two possible rules for providing language rights to the minority:

1. It has to make up at least 20% of the population in the jurisdiction
2. It has to reach a critical mass of 150 000 individuals in the jurisdiction

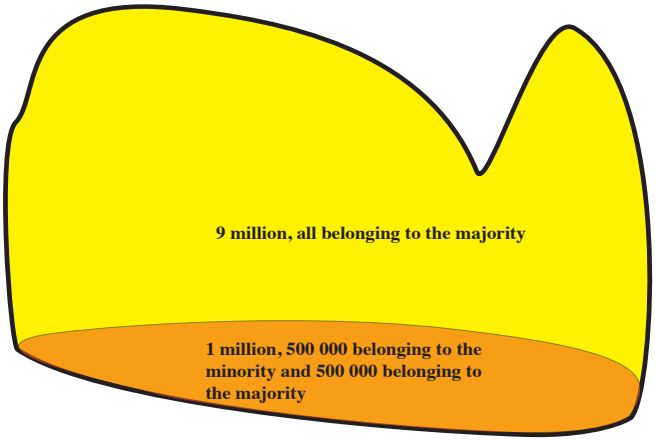

Figure 6. Some country with a 5% linguistic minority

For the sake of argument, we assume that the costs of providing the language rights in a jurisdiction are independent of its size. That is, the size of the critical mass does not depend on the size of the jurisdiction.

The federal structure in figure 7 could be welfare optimal. It is the one that the theory of federalism would suggest, making each jurisdiction as homogeneous as possible. In the southern county the minority makes up more than 45% of the population and counts 500 000 individuals. Both decision criteria are satisfied.

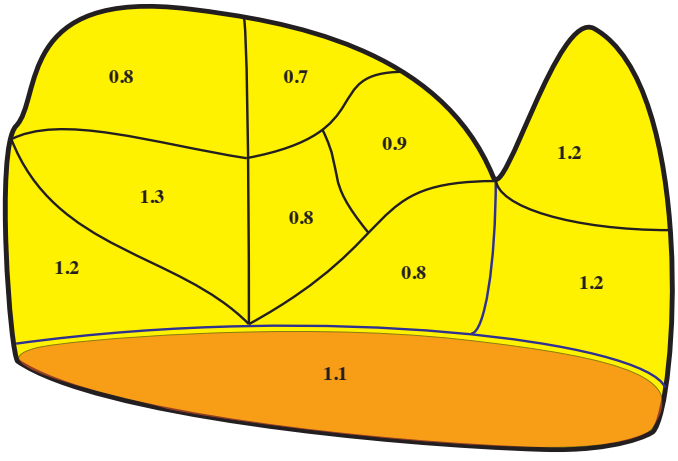

Figure 7. Welfare-optimal federal structure

An alternative division of the country is depicted in figure 8. This is not in line with the welfare theory, since several jurisdictions are rather heterogeneous. As a consequence, neither decision criterion is satisfied in any of the jurisdictions and no minority rights at all will be in effect.

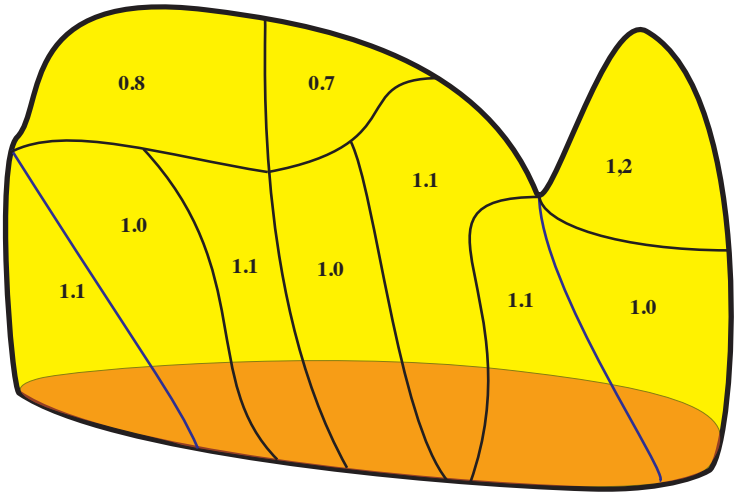

Figure 8. Discriminatory federal structure

To see the political importance of the two different rules, we reform the optimal federal structure in two ways. First the government creates bigger and (maybe) more efficient units, each consisting of about 2.5 million individuals. This is shown in figure 9.

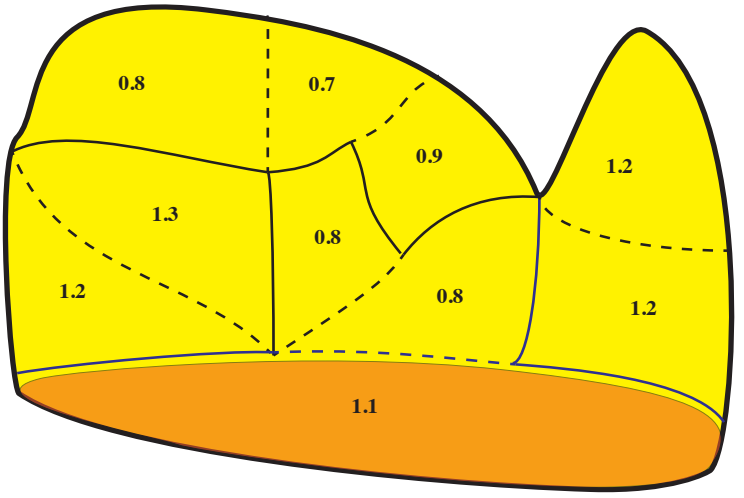

Figure 9. Big units federal structure

The minority will be found in the southern-most jurisdiction and the size, 500 000 individuals will not change. That is, the critical-mass rule, which is the sensible one from a welfare-economics point of view, implies that the minority rights be in effect. In the new jurisdiction, however, the minority will have only 18.5% of the population and no minority rights would be in effect if the percentage rule is applied.

Finally, the small-is-beautiful movement reaches our country and the jurisdictions are reduced to about the size of 250 000 people; see figure 10. With the percentage rule, the minority will have about 45% of the population in the four southern districts, but will not reach the critical mass of 150 000 if they are relatively evenly distributed geographically.[10] Hence, the critical-mass rule can be manipulated by reforms of the federal structure. With the Finnish type of rule, the rights allocation would to a large extent be immune to federal reforms. In that way, the percentage rule in combination with the critical-mass rule makes sense.

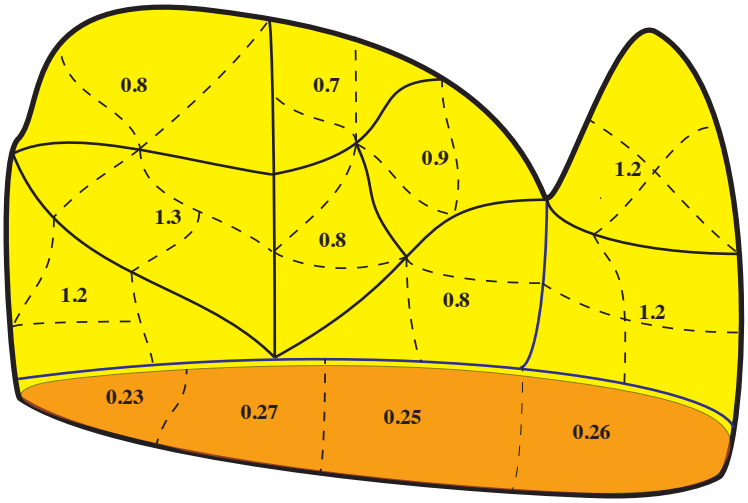

Figure 10. Small units federal structure

4.5 Summing up

With the help of a small example, we have tried to show that the implementation of minority-rights allocations can be manipulated very easily when the spatial dimension is considered. The welfare analysis can provide some guidance, but in the real-world political power determines the outcomes, and there is no guarantee that minorities will be respected.

10 On the other hand, the majority will also have problems to reach the critical mass. However, we assume that linguistic rights for the majority are not questioned in this country and only consider the situation of the minority.

5 Conclusions

In this essay, we have tried to outline a framework for the analysis of language rights based on normative economic theory. In the real world, of course, normative considerations play a very small role. Political opportunity and power are by by far more important. This, however, does not reduce the need for normative benchmarks that are needed in order to evaluate different political policies. Just as we need the welfare theory in order to evaluate the regulation of simple markets, we need a standard of comparison to evaluate government policies in non-market sectors.

The analysis can, and should, be extended in many different directions. Especially the question of implementation, which has only been touched upon in a very rudimentary fashion in this essay, needs to be elaborated further. One issue that has become very acute in our world with great movements of population is what constitutes a legitimate minority. When does a newly arrived group become a legitimate minority with the same rights as historical minorities? Many historical minorities today were majorities a few generations ago and became minorities as the results of wars or mass migration. Why should the situation today be different?

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Lia (C.R.M.) Versteegh

Minority Protection in the European Union: From Economic Rights to the Protection of European Human Values

Abstract

Minority protection did not receive attention in the original EC treaty of 1956. The concept of non-discrimination of laborers and later of EU citizens became the cornerstone for minority protection. Gradually the EU became familiar with the concept of human rights because of judgments of the European Court of Justice (ECJ). This concept has officially been introduced in the 2009 Lisbon Treaty, which includes the rights of persons belonging to minorities and has been elaborated in Article 21 of the EU Charter of Human Rights. If the Charter is not applicable, minorities have to address national legal instances where there is no say for the EU regarding minorities. In this paper, I will demonstrate that the complex European legal system is not easy to understand in terms of protection of minorities. Recently, the ECJ has decided in the CHEZ versus Nikolova case that it can empower lower national courts against measures of systematic discrimination against minorities based on EU equality directives and Article 21 of the Charter. This verdict together with the EU Commission's intention to give the Charter a broad practical legal context shown in the working areas of the Fundamental Rights Agency, should ensure national minorities that European institutions pay really attention to their problems.

Keywords: minority policy, minority protection, EU Charter of Human Rights, EU equality law, Fundamental Rights Agency

1. Introduction

Matters of European minorities, citizens and third country nationals received little attention in the original EC treaty of 1956. The 1956 EC Treaty was addressing EC Member States which were seen as the subjects of the EC legal order. The precursor of the European Union came together as a purely economic community. Freedom of movement in the European Union (EU) as part of labor market mobility became one of the foundations for migration of European laborers in the EU. The original treaty provided for the concept of non-discrimination on the grounds of nationality which was applicable to laborers working in a host country. In 1992 the concept of European citizenship was introduced. This automatically made each national of a European Union Member State a European citizen. National citizenship of a European Union Member state would guarantee European citizenship rights, also to nationals of EU Member States belonging to national minority groupings. The European equality principle – introduced by the 1997 Treaty of Amsterdam – would guarantee equal treatment of European Union citizens operating in cross-border situations to that of the citizens of the host-country.

Since 2009 a new treaty has been implemented in the European Union, the Lisbon Treaty– consisting of two parts, the treaty of the EU (TEU) and the treaty on the functioning of the EU (TFEU). This treaty claims that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. It gives the 2000 EU Charter of Human Rights legal force as primary law. The EU lawmaker has been promoting equal treatment for many years. At the same time, the European Commission has embarked on an ambitious action program[1] in the area of freedom, security and justice which aims at serving the interest of all European citizens and inhabitants of the EU. The European Parliament has taken several initiatives on behalf of EU citizens, also in the field of minority rights, which started with a Charter of Minority Rights that has never been voted upon.[2] It is the European Court of Justice that has recently given an interpretation of EU law regarding minorities in favor of the a Roma community in Bulgaria.

The aim of this article is to look at new elements in the aims of the Lisbon treaty with reference to the peoples of Europe and its individuals and to see in what way it can be useful in further establishing European values for minorities.

2. No Minorities Rights in the Original EC Treaty

In the original 1957 EC treaty there were rights granted to workers and concerns related to employment conditions. Freedom of movement for workers implied the prohibition of discrimination based on nationality. The Court of Justice (ECJ) put the position of individuals in perspective in its famous judgment Van Gend and Loos in which the Court recognized the rights of individuals as subjects of Community law. These subjects "comprise not only the Member States but also their nationals".[3] It became obvious that individuals confronted with unclear EC law could take a stance in proceedings on market issues. In further case law the ECJ took the position of individuals into consideration.[4] However, the EU was not competent to judge cases on discrimination of membership of a national minority.

The EU had prepared the accession of candidate member states to the Union by the regional development of projects which required rules of management of structural funds to support minorities. Regionalization gained an ethnic-political dimension due to minority problems. This became obvious in the case of Slovakia and ethnic Hungarians. In spite of its policy of non-interference in this kind of matter, the EU intervened in order to avoid uproar

1 Stockholm program, Council document 17024/09, adopted by the European Council at Stockholm in December 2009.
2 G. Toggenburg (2008) "The EU's Evolving Policies vis-a-vis Minorities: A Play in Four Parts and an Open End", Bozen/Bolzano: EUR.AC Research, pp. 3-5.
3 Van Gend en Loos versus Nederlandse Administratie der Belastingen, 1963 ECRI, zaak 26/62.
4 Although this position was never explicitly mentioned.

in the region.[5] It is not surprising that the EU posed explicit requirements on the applying candidate-countries from Central and Eastern Europe and any other candidate country. The European Council had made "the respect for and protection of minorities" one of the explicit requirements posed on the applying candidate-countries. This requirement became part of the so-called Copenhagen criteria at the council meeting of June 1993, which acknowledged the right to join the EU, stipulating however that "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities…"[6] These requirements aim to stimulate the development of diversity in social cohesion. The promotion of diversity however, is not the same as social integration of minority groupings. A requirement of social integration of minority groupings was left out of the 1992 Maastricht treaty and the 2000 Charter of Human Rights.

Yet, in the pre-accession period, the EU has used several tools for candidate states that aim to improve the protection of minorities. In this respect we can think of the PHARE program, for local democracy and cross-border operation. This program included in its national components funding projects especially for the position of minorities.[7] Another illustration of this policy is the Integration Fund for the integration of third country nationals.[8] The EU program directed at strengthening civil society in candidate countries and the integration of minority groups, is the EQUAL program that was meant to promote new means of combating discrimination. This initiative was related to the labor market, and was connected to the European Employment Strategy.[9] A proposal of the European Parliament in the field of majority rights, by drafting a Charter of Minority Rights, was never voted upon. Instead of a legal document for specifically minority situations, the EP started to build ideas on culture and language which are applicable to minority groupings.[10] The European Parliament initiative to protect minorities in the EU resulted in the European Initiative for Democracy and Human Rights, with references to minority issues and financial projects.[11] In its Resolution on the role of regional and local authorities in European integration,[12] the European Parliament insisted on more attention from the European Community for minority problems and proposed the

5 Attila Agh, "Regionalization and Europeanization in Central Europe", Paper presented at the Pan European Conference, Bologna, 24-26, June 2005, available at: http://www.jhubc.it/ecpr-bologna/416.pdf (accessed 15 August 2013)

6 Conclusions of the Presidency, 21-22 June 1993, the European Council in Copenhagen.

7 Commission Regulation No 2760/98 of 19/12/98 concerning the implementation of a program for cross-border cooperation in the network of the PHARE program, 19/12/1998, pp. 19-52

8 European Funds for the integration of third-country national, 2007-2013. European Commission, Unit B/4, Financial Support, Immigration and Asylum.

9 For the program see: http://employmnet_social/equl/about/key-doc_en.efm

10 Toggenburg, (2008a) o.w., pp. 3-5.

11 European Initiative for Democracy and Human Rights (EIDHR), "Advancing equality, tolerance and peace", deals with the promotion of human rights and Minority protection activities. See: http://ec.europa.eu/eu/europaid/what/human-rights/documents/cidhr_annual_.work_programme.2006_eu.

12 European Parliament (2002), Resolution on the role of regional and local authorities and local authorities in European integration, 2002/141 (INI).

following article to be inserted in the EC Treaty; "The Community shall within its spheres of competence, respect and promote linguistic diversity in Europe, including regional or minority languages as an expression of that diversity, by encouraging cooperation between Member States and utilizing other appropriate instruments in the furtherance of this objective". This proposal has not been accepted. Nevertheless, the European Community has taken initiatives to promote the regional and minority languages in Europe by funding projects for practical initiatives aiming at the promotion of regional and minority languages.[13] The lack of an appropriate legal basis restricted the European Community it is actions. In the field of education the Community was able to support actions of Member States with the objective to add a European dimension to education.[14] Other initiatives were taken in the context of regional development and cooperation between governments and local authorities.[15] A mainstreaming approach toward minority interests promoting diversity, has been reflected in bilateral agreements between Member States, which could be the result of "European" pressure on CEECs.[16] It proved to be difficult to enforce the provisions of such agreements before domestic courts.

The need for a legal EU provision became evident due to interstate tensions between national minorities. Tensions may exist between two new EU members, e.g., Slovakia and Hungary or Romania and Hungary, or between old and new states as, for example, between Slovenia and Austria[17] or between Roma people from former East-European countries and France. Also, there was a danger of minority problems being brought to light by a new member state complaining about other third countries.[18] Although the EU took little initiative regarding national minority groupings, attention was drawn to human rights protection, and, since nothing had been stated about minority rights and obligations for the existing EU member states, individuals and states had to seek help from the EU equality law provisions in order to solve minority problems. In 2013 the Council made a recommendation on effective Roma integration in the Member States.[19]

13 Olivier de Schutter (2006), the Framework Convention on the Protection of National Minorities and the Law of the European Union, CRIDHO Working Paper 2006/01, p. 13.

14 See Article 149 and 150 of the former EC Treaty on education and vocational training policy.

15 See: The European Commission Agenda 2000, http://ec.europa.cu/agenda2000/index_en.htm (accessed 14 August 2013)

16 Emil J. Kirchner (1998),Transnational Border Cooperation Between Germany and the Czech Republic: Implications for Decentralization and European Integration". See: www.eui.eu/RSCA/WP-Texts/98_50.html (accessed 14 August 2013)

17 Examples from Krzystof, Drzewicki, "National minority issues and the EU Reform Treaty, Security and Human Rights, 2008, nr. 2, p. 137-146, p. 145

18 G.B. Toggenburg, "A Remaining Share or a New Part? The Union's Role vis-à-vis Minorities After the Enlargement Decade, EUI Working Papers, Law, No. 2006/15, pp. 1-5

19 Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States , OJ C 378, 14.12.2013.

3. International Initiatives to Protect Minorities

The initiatives to protect minorities outside the European Union can be summarized as follows: The Committee of Ministers of the Council of Europe, adopted a Framework Convention for the Protection of National Minorities, in November 1994. The aim of this Convention, according to its explanatory report, is to specify legal principles, without the need for directly applicable provisions. Article 4 of this Framework Convention states that Member States should adopt "adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority". Although Article 4(3) prohibits these measures to be discriminatory in character, the framework leaves room to the participating Member States for measures of discretion, which means that participating Member States of the Framework are committed to minimum standards of protection for minorities. However, the Framework Convention does not imply the expectation that positive measures should be taken by the Member States in favor of minorities, for instance in the area of employment and housing. Moreover, it does not impose obligations on the Member States regarding the integration of minorities. This makes clear that it does not offer a model for uniform standards of integration of minorities to all Member States. Nevertheless, an exclusion of the use of language of minorities in the nation-wide public service and private broadcasting sectors is not considered compatible with the Article 9 Framework Convention.[20]

For the countries that were part of the Conference on Security and Cooperation in Europe (CSCE) the 1990 Document of the Copenhagen Meeting of the Conference of the Human Dimension offered minority rights. The positive influence of this document is that it received widespread recognition in national legislation, and international documents, and minority rights became legally binding in the area of security cooperation.[21]

At the global level the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is equally binding for its member states. In addition, th UN Committee for the Elimination of Racial Discrimination encourages Member States to "take special measures to promote the employment of Roma in the public administration and institutions, as well as in private communities", and to "adopt and implement, at the central or local level, special measures in favor of Roma in public employment such as public contracting and other activities undertaken or funded by the Government, or training Roma in various skills and professions."[22] These recommendations can require "States to take affirmative actions in order to prevent continuation of discrimination." In this respect De Schutter is referring to the Committee on Economic, Social and Cultural Rights and its

20 O. De Schutter, o.w., p. 16

21 Anders Rönquist, (1995). "The Council of Europe Framework Convention for the Protection of National Minorities", Helsinki Monitor 1995 no.1, see: http://heinoline.org/HOL/Page?handle=hein.journals/helsnkl6&div.

22 Committee for the Elimination of Racial Discrimination, General recommendation XXVII on discrimination against Roma adopted at the fifth-seventh session (2000),UN doc. HRI/GEN/1/Rev.7, 12 May 2004, p. 219.

plea for temporary special measures "to bring about de facto equality … for disadvantaged groups." Regarding possible positive actions of Member States he refers to the broad margin of appreciation of Member States and the number of possible measures they have at their disposal.[23]

There are some common features in the provisions on minorities adopted by the UN, the CSCE and the Council of Europe: they all mention minority rights as "individual rights", "rights of persons belonging to minorities", in other words there is no recognition of "collective rights"; minority rights are seen as part of the general concept of fundamental rights with the accent on non-discrimination. So, there is no minority right per se; the different legal instruments do not contain a definition of national minority, nor is it clear whether the individual should be a citizen of the state concerned. This brings us to the question of how the concept of minority should be understood. From the above mentioned documents it is not obvious that the term should be understood as it stands, neither that there should be a combination of terms such as national minority, ethnic minority, religious minority, linguistic minority or any combination of these words with the word minority. At least members of minorities groups within the European Union can hold the citizenship status of an EU country. Then, they can claim protection based on national laws from the national government, for instance the right to equal treatment according to national law. What protection can the individual belonging to a national minority expect from the European Union?

4. European Citizenship

Free movement was the original privilege of EU citizens active in the European market. In 1992 the Treaty of Maastricht introduced an overall right "to move and to reside freely within the territory of the Member States" for all European citizens. European citizenship status is automatically acquired by everyone holding a national citizenship status of an EU Member State. Article 20 TEU of the Lisbon Treaty has adopted the European citizenship paragraph. It has added European citizenship to national citizenship; both are considered of equal value. At the same time, the treaty text states that European citizenship is seen as a fundamental status. Obviously, the European legislator had the will to "enable those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality."[24] To get an insight into the development of the concept of European citizenship it is interesting to look at the secondary legislation, such as regulations and case law of the ECJ. European citizenship was formed by the 2004/38 directive "on the right of the citizens of the Union and their family members to move and reside freely within the territory of the member states." This directive consolidated the various pieces of EU secondary law on free movement and residence and integrated the vast amount of ECJ jurisprudence into one single legal text.[25] The right to free

23 O. De Schutters, o.w. , p. 9.
24 See ECJ, 20 September 2001, Grzelczyk case, C-184/99, para 31
25 Directive 2004/38/EC of 29 April 2004 on J L 158 of 30 April 2004.

movement is subjected to limitations and conditions, such as economic conditions and sickness assurances according to Article 18, – they should "not become a burden on the social assistance system" of the host state[26] – and the restrictions on the ground of "public policy, public security or public health should according to Article 27 of the Directive, only comply with the proportionality principle and should be based exclusively on the personal conduct of the individual concerned." Articles 16-21 deal with the right of European citizens to acquire a right to permanent residence after a legal residence of five years in the host state, irrespective of any economic conditions. Consequently, EU citizens, members of minorities groups, can claim the right to permanent residence under the same conditions.

Directive 2004/38 brings us to the conclusion that there is no space left for national policies toward EU citizens and family members residing in other EU Member States. Member States are in the position to grant or withdraw nationality to its nationals and by doing so they decide on the enabling status of EU citizenship. If they decide to allow nationality to third country nationals residing in their country, they decide on the status of European citizenship, also for their citizens belonging to minorities.[27] The ECJ has given judgments in cases on equal treatment and European citizenship. The value of equal treatment has become a legal norm in the EU, designed in Article 13 of the Treaty of Amsterdam. The first case in which the ECJ had to deal with these two notions, was the 1993 case of Martinez Sala in which Sala, a Spanish national residing in Germany, applied for a child-raising allowance. Germany rejected her application on the ground that she did not have German nationality, a residence entitlement, nor a residence permit.[28] The ECJ stated that the legality of Sala's residence in Germany was not questioned and putting her legal position of European citizen to the fore, she could rely on the prohibition of discrimination laid down in the EC Treaty and the national allowance she had applied for.[29] Criticism of the judgment speaks of the danger of social tourism and to the financial interests of the Member States,[30] which was not the view of the ECJ. In many more cases the ECJ has given judgments allowing for social security benefits for EU citizens residing in another EU member state, in the light of non-discrimination.[31] The famous Court saying in its case law is that member states are held to respect the principle of proportionality.[32] The approach on non-discrimination has also been taken in relation to third country nationals legally residing in the EU. The inhabitants of the European Union are European citizens or nationals of third countries. From the perspective of European Union law, the first group will be considered as a group with homogeneous rights, whereas the second group will not be considered as

26 See last note, o.w., Article 7 Directive 2004/38

27 G. N. Togenburg (2005), "Who is Managing Ethnic and Cultural Diversity in the European Condominimum? The Moment of Entry, Integration and Preservation", *Journal of Common Market Studies*, Vol. 43, nr. 4, p. 724.

28 Maria Martinez Sala versus Freistaat Bayern, 12 May 1998, Case C-85/96, para 16.

29 ECJ, C-85/96, Martinez Sala v Freistaat Bayern, (1988) ECR I 2691.

30 C. Tomuschat (2000) , "Radical Equality under Article 12 of the EC Treaty? The case of Martinez Sal" *Common Market Law Review*, p. 449.

31 See Directive 2004/38 of 29 April 2004 on the right of EU citizens and their families to move freely on the territory of Member States.

32 Baumbast, ECJ 17 September 2002, ECR I – 7091, Case C-413/99, paras 90-93.

such. For different types of immigrants of the last group the EU has issued directives that grant rights to move and reside in EU member states. Members of minority groups who are European citizens or third country nationals have rights dependent on the group to which they belong. This has to do with the concept of equality and equal treatment that the EU introduced in its 1997 Treaty of Amsterdam.

5. Equality Law for EU Citizens and third country Nationals

The value of equality, designed in Article 13 TEU gave the EU the legal competence to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation", through diverse appropriate actions. It has been characterized as "a sort of 'container-provision' whose concrete reach is dependent on the reading of equality applied."[33] The EU has issued several directives on equality such as the employment directive[34] and the race equality directive.[35] Both directives are applicable to EU citizens but are at the same time important for minorities, since non-discrimination clauses provide for the prohibition of discrimination in the private sector and as regards the access to and supply of goods and services. The aim of these directives is also to place third country nationals on an equal footing with the nationals of the host state. This includes "access to employment and self-employment activities, but also other areas relevant to their integration".[36] These instruments restrict themselves to a traditional non-discriminatory approach, and could be less effective in strengthening the position of minorities than by promotion of an effective integration system for ethnic and religious minorities within the European Union. A way to indicate discrimination of minorities could be the legal measure of "shifting the burden of proof in discrimination cases", as has been introduced in both treaties. However, since the forwarding of statistical data is dependent on the cooperation of the Member state and since the facts regarding discrimination are left to the national judges and authorities, it is difficult to feel confident about the potential of these directives in respect to discrimination of members belonging to minorities. Another critical point is the freedom of choice for Member States to introduce obligatory positive action measures in order to combat discrimination against members of minorities. These measures will not be sufficient. Actions should at least be taken in other societal areas, such as education, housing and access to public transportation. As De Schutter stated: "More is required in order to achieve effective equality than to outlaw direct and indirect discrimination."[37] Socio-economic disad-

33 G.N. Toggenburg, (2008a), o.w., p. 11.
34 Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303;
35 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between perons irrespective of racial or ethnic origin, OJ 2000 L 180.
36 Article II of 2003/109 Directive.
37 O. de Schutter (2006), CRIDHO Working Paper 2006/01, "The Framework Convention on the Protection of National Minorities and the Law of the European Union, o.w., p.7-8.

vantages will be difficult to overcome for minorities. In judging questions on equal treatment the ECJ emphasized the link between European citizenship and European values.

Article 13 of the Treaty of Amsterdam has been labeled as the core norm to combat discrimination against minorities. At least, the importance of this article for minority protection becomes clear from these directives. The broad scope of the provision makes it a useful instrument in combating discrimination toward minorities, especially ethnic minorities. Religious minorities can seek protection from the Framework Employment Directive, while the protection of groups other than minorities is best guaranteed by the Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. However, these directives do not foresee an obligation for a Member State to find equal prospects in practical situations.[38] The cosmopolitan approach of the European Union to foreigners legally residing in the EU is obvious. But what about the nationals/ foreigners who are part of a national minority grouping in the EU? Is there any European guarantee that national minorities will be protected against national discriminatory measures or individual discriminating behavior?

6. EU Soft-law and Minorities

The EU article on equality in the 1997 Treaty of Amsterdam allows the Community to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". So the EU, acting unanimously, can take measures to protect ethnic and religious minorities from discrimination. However, this article did not encourage the EU to take specific measures to protect minorities, nor did any other Article in the treaty. It did include Article 49 that could inspire the EU to encourage cooperation between Member States and supplement their actions "while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity",[39] but this provision does not contain any obligation for Member States to implement the principles of the Council of Europe's Framework Convention for the Protection of National Minorities. The lack of a legal basis for action has led the EU to other mechanisms to encourage Member States to improve the situation for their national minorities. In this respect we can think of the so-called Open Method of Coordination which is considered as a soft law mechanism and officially recognized in the treaty to provide a means to encourage Member States to improve the situation for their nationals, including their minorities. For this reason this method is said to demonstrate the flexibility of European multi-

38 G.N. Toggenburg (2008a), o.w., p. 12

39 O. de Schutter (2006), The Framework Convention on the Protection of National Minorities and the Law of the European Union, CRIDHO Working Papers, p. 6 mentions also other EC provisions which empower the Community to take measures, such as the provisions of the internal market and harmonization of national rules, which could be of use to develop a national minority protection system.

level governance.[40] It is seen as an additional means of lawmaking, consisting of "recommendations, guidelines, or even self-regulation within a commonly agreed framework."[41] This method has not been given legally binding force. What is of importance is that this method realizes a method of multilevel governance since it provides the Council and the Commission with the competence to influence national and sub-national policies "even when they have no formal competences. The method has been introduced as a means to stimulate policy change in the Member States and policy making happens inside a very small part of society. It aims at "generating and spreading best practices and achieving a better convergence toward the EU's policy",[42] which could also be a EU policy regarding the protection of minorities. Indeed, the working of this method is visible in various other areas of society and, due to the absence of competences for the Council, this method has proved useful. In this respect we can think of the 1997 European Employment Strategy that deals with the tackling of discrimination in employment with the promotion of access to employment of minorities as part of the strategy. This method forms an integral part of EU policy " ... and is a tool in deciding whether or not particular action should be taken by the EU."[43] At least, it puts emphasis on policy change by States. Change of national policies toward minorities could be integrated into EU policy, for instance: "... when systematic discrimination of certain groups of the population may justify special measures."[44]

7. Treaty of Lisbon: Attention for Minorities

In general the attention of the EU is directed toward protection of its citizens. But does this also implicate protection for EU minority groupings? The question is: "What will be the legal position of EU citizens who belong to national minorities and don't receive protection from their national governments against discrimination?" Should the European Union feel obliged to take up the task of protecting citizens belonging to national minorities or should the EU only be charged with the task of interference in cross-border situations just like the situation of moving EU citizens? In order to be able to answer these questions we have to look more closely at the characteristics of the Lisbon Treaty.

The Lisbon treaty does not take a general applicable model for the acceptance of minority rights. Even the EU, in its 2009 Lisbon Treaty, does not mention minority rights as a specific group of rights. The omission of a provision on minority protection would be corrected in the

40 A. Benz (2007), "Accountable Multilevel Governance by the Open Method of Coordination?" European Law Journal, Vol. 13., No. 4, July 2007, p. 505.
41 White Paper on European Governance (2001), COM (2001), 428, pp. 4 and 20-22.
42 Arthur Benz, o.w., p. 8
43 Dermot Hodson, (2001), The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination", Journal of Common Market Studies, Vol. 39, No. 4, p.726.
44 Olivier de Schutte, o.w. p. 9.

draft Constitution[45] but change came with the entry into force of the 2009 Lisbon Treaty and its formulation on minority protection. Article 2 of the TEU states that "respect for human rights, including the rights of persons belonging to minorities is one of the values of the EU". The mention of 'persons' refers to the individual dimension of minorities in a human rights context. Minorities as collective entities are not understood as objects of human rights treatment. The term 'minority' in Article 2 is formulated in a neutral way without reference to a special type of minority, such as 'ethnic', 'religious', 'linguistic' or any other qualification. Since minorities can consist of diverse existing national groups or incoming immigrant groups, definitions of minorities will lead to the classification of minorities. As yet no definition has been given of the word "minority".[46] What is clear is that the term as it is, could be the subject to interpretation by the ECJ. According to Drzewicki, the term should be construed in its double meaning: "Respect for human rights implies also respect for minority rights and minority rights in itself is part of European values." The 'double meaning' on minority issues refers to the accession procedure, and to the obligation for actual member states.[47] In this way there is no double standard in judging applicant Member States and existing Member States. The rights of individuals belonging to minority groupings are indicated as part of human rights. The question is whether fundamental rights could include minority rights in the EU context. The Equality principle has been repeated in Article 19 TFEU since the Union "shall aim to combat discrimination…. becoming active as legislator or as an executive organ." This obligation of Article 19 as such is not embedded in the EU Charter and so it will not cover two forms of discrimination that are explicitly enumerated in it, namely discrimination on the basis of language and discrimination on the basis of membership of a national minority. As a consequence, the EU has no competence to combat these forms of discrimination.

The EU network of independent experts on fundamental rights is of the opinion that the EU can take EU minority interests into account from different positions.[48] At the moment, the EU minority related interventions are fed by cultural and regional policies.[49] The European Union does not have an independent competence regarding the protection of minorities.[50] The addition of respect for "the rights of persons belonging to minorities" in the Lisbon Treaty does not provide the EU with new competences, since Member States remain sovereign regarding the protection of national minorities. If there is an obligation for Member States to respect minority rights, this implies individual rights, and not group rights. At least, the member state

45 Article 1-2 of the draft Constitution for Europe, dealing with European values, deals with respect for human right "including the rights of persons belonging to minorities".

46 K. Drzweicki, "National Minority Issues and the EU Reform Treaty, A perspective of the OSCE High Commissioner on National Minorities", Security and Human Rights 2008, nr. 2, p. 142.

47 Krzystof Drzewicki, o.w., p. 141.

48 EU Network of Independent Experts on Fundamental Rights, Report on the situation of fundamental rights in the European Union in 2003, pp. 101-103.

49 The EU changes its language regime in order to allow Member State to provide minority languages with a pseudo-official status. See: Council Conclusions of 13 Jun 2005, OJ C 181, 18 June 2005.

50 G. N. Toggenburg (2005), "Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation. JCMS Vol. 43, nr. 4, pp. 717-738, p. 730.

should be aware of the "fact that such a system has to conform to the EU's norms, most importantly the common market principles and the principle of proportionality."[51] Member States are supposed to take EU anti-discrimination measures, which take the form of affirmative action, requiring employers to comply with equal treatment. The question is whether affirmative actions are being applied to ethnic minorities.[52] Nevertheless, not only the EU equality rights but also the general fundamental rights framework of the EU will be of importance in revealing the controversies in the EU relating to EU minority rights. Lack of legal competence of the EU will not be a valid argument not to take a stance. The Open Method of Coordination described above will form an alternative to EU competences, encouraging special attention to be given to the position of minorities and to indicate to national authorities the need to apply affirmative actions to ethnic minorities.

Victims of discrimination through belonging to a national minority could claim protection under the EU Charter. In its Article 21 on Equality rights, it refers to lists of grounds on which discrimination is forbidden with "membership of a national minority" as one of these grounds. Discrimination against a member of a national minority does not have to be specially qualified, such as in discrimination on 'ethnic' or 'social origin' or 'language'. The pure fact of being a European citizen and a member of a national minority, taken together with discrimination could make Article 21 Charter applicable in legal proceedings. Another important article for minorities is Article 22 that speaks of respect of cultural, religious and linguistic diversity. Although this last provision belongs to principles, and does not afford rights to individuals, it can still be of importance for minorities. This article refers to cultures of member states and to respect for their national and regional diversity. The indication of regional diversity implies the right to preserve regional characteristics which takes a different approach from a national approach. Article 3 (3) TEU that refers to the cultural and linguistic diversity of the EU should be understood in the same sense. Taken together, the two Charter Articles could be useful for minorities claiming to maintain their regional or local habits, when attacked or discriminated for these. In view of that, the applicability of the Charter in each individual case will matter.

8. Applicability of the Charter on EU Policy on Minority Protection

The human rights and minority clauses can be placed against the background of other values described in the Lisbon Treaty, such as human dignity, liberty, democracy, equality and the rule of law. Those values are also expressed as being European values in the 2000 EU Charter on Fundamental Rights that gained a binding status with the entry into force of the Lisbon Treaty.[53] Jointly, they create a legal framework of human rights and minority issues. In that respect

51 G.N. Toggenburg (2005), o.w., p. 734.

52 Sacha Prechal (2004), "Equality of treatment, non-discrimination and social policy: Achievements in three times", *Common Market Law Review*, p. 538 states that affirmative action operate as an exception rather than a justified treatment of minority protection.

53 See also the accompanying Explanations governing the interpretation of the Charter.

it is important that the Charter of Fundamental Rights has achieved the legal value of a treaty in Article 6 (1) TEU and that Article 6 (3) TEU refers to fundamental rights as they emanate from the ECHR. Moreover, the preamble in the Charter states the EU's references to the ECHR and the general principles of EU law. The Charter reaffirms and consolidates the principle of equality and non-discrimination in its Article 21 and explicitly prohibits discrimination on the ground of membership of a national minority. Compared to the Treaty of Lisbon, Article 21 of the Charter seems to be quite progressive since it offers ground for attacking acts of discrimination against members of national minorities. However, the mention of membership of national minorities, which with the Charter aims to be in compliance, is not in line with Article 14 ECHR on the equality principle: the Charter stresses the individual membership of a national minority while the ECRM only speaks of an association with a national minority.

This brings us to the question of the degree to which the EU can take advantage of the harmonizing effect of Article 21 of the Charter. First of all, Article 51 of the Charter should be taken into account since it arranges the field of application of the Charter: Its provisions are directed at "institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity", with a limited position for Member States to apply the Charter. That is, according to the Explanation, "only when they are implementing Union law". This Article not only addresses EU Member States but also relates to "regional or local bodies, and to public organizations when they are implementing Union law.[54] This is a different way to assist minorities. According to Article 21 para 4 of the Charter the meaning and scope of Charter rights meet the ECHR standard. However, EU law can provide more protection than the ECHR, which ensures a minimum level of protection and consistency between the two human rights documents. The Explanations on Article 52 para 3 the Charter clarifies the applicability of the case law of both the ECtHR and the ECJ:[55] case law of the ECtHR is not binding for the ECJ, but we can expect that the ECJ will take ECtHR case law into account. In addition, the accession of the EU to the ECHR in the near future, will be of influence on minority protection by the EU. Once the EU is accessed, the EU and its institutions can be held responsible for its minority policy in the field of human rights protection by the ECtHR. As long as the Charter is not applicable, members of minority groupings in the EU can claim rights based on their EU citizenship or on the position of the third country national and the violation of equality principle. Directives in the area of freedom, security and justice will offer protection to both of them. Inhabitants of Member states of the European Convention on Human Rights can start proceedings before the ECtHR, provided they have finalized proceedings before the highest domestic court. Although the EU cannot be held responsible for its current minority protection policy, due to a lack of legal basis, its Fundamental Rights Agency could perform a European approach towards minority protection.

54 Explanations to the CFR, on Article 51, para 2 in which case-law of the ECJ is cited.
55 Explanations to the CFR, on Article 52, para 4.

9. Treaty of Lisbon: Area of Freedom, Security and Justice (AFSJ) and the Protection of Citizens

The Treaty of Lisbon has given rise to a new dynamism in EU initiative in the domain of freedom, security and justice. This treaty places the subjects in this field – asylum, immigration, police and justice cooperation - under the provisions of the internal market, which imply according to the Articles 68 to 89 TTFEU, submission of most policy areas to the ordinary legislative procedure, with qualified majority voting in the Council. At the same time the infringement proceedings has been introduced in the area of police and judicial cooperation in criminal matters which means that in case of breach of police and judicial rulings in transnational matters, individuals are allowed to start proceeding against other Member States before the ECJ,[56] making use of the preliminary ruling procedure.[57]

The Stockholm program adopted by the European Council in December 2009[58]sets the schedule for adopting measures in this area, which has been followed by Communications of the European Commission in 2009[59] and 2010.[60] The remarkable ambition of these communications is that in this area stress is put on the duty of the European Union to protect European values and to defend European's interests. In this respect it gives attention to human dignity, freedom, equality and solidarity. The reference to values is in line with Article 2 of the TEU that refers to European values, such as human dignity, freedom, democracy, equality, the rule of law and respect for fundamental rights, inclusive the rights of persons belonging to minorities. Article 3 of the TEU is based on economic values and non-discrimination. It also presents issues such as solidarity and respect between peoples, protection of its citizens.[61] According to the European Commission "A European area of freedom, security and justice must be an area where all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of fundamental rights."[62] The EU provides for adoptive measures to prevent and settle conflict of jurisdiction between Member States and will develop directives that provide for the rights of individuals. It has been active in formulating substantive criminal law in primary and secondary legislation. Articles 82 and 83 TFEU dealing with cross-border crime in the European Union, serve as a legal ground for further legislation in order to project EU society against trans-border criminality. One of the most important legal measures is Directive 2011/36/EU on preventing and combating trafficking in

56 In domains linked to the Area of freedom, security and justice, national parliaments will be involved in the control and evaluation of the police and justice institutions: Europol and Eurojust.
57 For limitations on the competence of the ECJ see article 276 TFEU.
58 Stockholm program, Council document 17024/09, adopted by the European Council in December 2009.
59 European Commission, 2009, "An Area of freedom, security and justice serving the citizen", COM (2009) 262.
60 European Commission, 2010, Delivering an Area of Freedom, Security and Justice for the Europe's Citizens Action Plan implementing the Stockholm Program". COM (2010) 171.
61 See Treaty of Lisbon, (part I Treaty of the European Union, Article 3).
62 See note 26 and 27

human beings and the protection of its victims. This directive allows the EU wider powers to intervene in national criminal law in order to protect its citizens.[63] In the interstate relations the principle of mutual recognition is active, which implies that cooperation is based on the respect of national authorities of Member States for the actions of the authorities of another Member State.[64]

Moreover, the Lisbon treaty enables the EU to become active in the field of criminal procedures[65] and proposals for minimum harmonization in areas of criminal procedures with regard to the position of individuals, such as suspects and accused persons and victims in proceedings.[66] The importance of these measures should be seen in the light of the free movement rights which are seen by Article 45 of the Charter as a citizen's right. Free movement and residence can be hampered by punitive state reactions of the state of origin for actions by citizens committed in the host state. It will be obvious that the transfer of criminal powers to the European Union needs to be accompanied by appropriate protection of fundamental rights at the European level.[67] It is not clear which way the European legislator wants to be bound by the principles of the Charter of Fundamental Rights, as in Articles 48 and 49 of the Charter. These Articles regulate the principles of the rule of law and proportionality principle regarding criminal acts and penalties. We can see that the EU aspires to be a Union of values and it has presented a cluster of rights for individuals in criminal cases. These rights will also affect the position of members of minorities when involved in criminal procedures.

10. Treaty of Lisbon: Migration and Asylum for Minorities

Regarding third country nationals, Member States are in the position to rule on them; according to the European asylum and immigration policy, as regulated in the Articles 77- 80 TFEU, there is a legal basis for the EU to issue rulings on the subject of migration and asylum. Directives have been issued on the status of third country nationals, to grant third- country nationals a permanent residency status[68] after five years of legal residency,[69] if they have a minimum level of resources and are not seen as a threat to public order or public security. Family members of EU citizens, being third country nationals have been granted residence rights in the Residence

63 M. Luchtman (2012), European Review of Private Law 2 -2012 (347-380), Principles of European Criminal Law: Jurisdiction, Choice of Forum, and the Legality Principle in the Area of Freedom, Security, and Justice, p. 358.

64 In this respect we can think of the European Arrest Warrant.

65 Council Document 11457/09, Brussels, 1 July 2009.

66 See directive 2010/64 EU on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280/1 and Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326.

67 See Luchtman, o.w., p. 366.

68 Council Directive 2003/109 of 25 November 2003, Council Directive concerning the status of third-country nationals that are long-term residents.

69 See note 13, o.w., p. 745 Toggenburg states that it "provides for equal treatment in a rather broad range of areas and guarantees a limited form of free movement."

Directive of 2004, [70] before fulfilling the five-year waiting period.[71]These directives are in line with the Common Basic Principles on Integration adopted by the European Council in 2001 in which the Council stressed[72] that a link should be developed between third country nationals and equal treatment. Third country nationals could be members of national minorities. Although the EU provides for equal treatment in a broad range of areas, it does not guarantee free movement and equal treatment for third country nationals being members of a minority generally. It is still the duty of national member states to apply EU standards of free movement and equality and take measures regarding third country members of national minorities. The difficulty regarding asylum seekers is that second Member States – to which the asylum seeker moves after consulting the first member state for asylum – have the duty to follow the third country national regarding his or her legal status which means that the second country may require third country nationals to live under national legal immigration conditions. There are more difficulties at the national level: National Member States are still competent to make political objections when the number of immigrants surpasses an established quantity. Although the European Union can monitor the standards of fundamental rights set in the EU Charter as "a common frame of reference", the EU will have to respect the rights of the Member States regarding the admittance of third country nationals.[73] This was decided in Article 79 of the TFEU.[74] Besides, Member States have no political consensus on the subject of group-rights and the EU has no clear understanding of who can be considered a member of a minority. In addition, the enlargement has shown differences in standards between the Council of Europe and the European Union regarding the concept of minorities.[75] At least, the European Union does not recognize collective rights. The main piece of information about minority protection in the EU is the above mentioned Framework Convention on the Protection of National Minorities(FCNM) of the Council of Europe. The EU is in a process of making contributions to the implementation of the principles of the FCNM. Apart from the EU measures on Equality rights, the EU is not competent in many areas that are relevant to the protection of minority rights, as there is a lack of a legal basis, for instance to promote regional and minority languages, which becomes clear from the EU policy regarding regional and minority languages.[76]

70 Council Directive 2003/86/EC on the right to family reunification.

71 Council Directive 2004/38/EC of 29 April 2004; see also Council Regulation 1030/2002 of 13/06/2002 laying down a uniform format for residence permits for third-country nationals.

72 Council of the Union, Presidency Conclusions, 19 November 2004, Press Release 1461504, p. 21.

73 G.N. Toggenburg (2005), "Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation", JCMS 2005 Vol. 43, pp. 717-38, p. 731.

74 Article 79 (para 5) TFEU states: "This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

75 Toggenburg, (2005) o.w., p. 733.

76 The EU Commission invites national and regional authorities "to give special attention to measures to those language communities whose number of native speakers is in decline from generation to generation, in line with the principles of the European Charter on Regional and Minority languages". See: COM (2003) 449, final, p. 12.

At the same time the EU, by seeking solutions with the help of soft law, such as by the application of the above-mentioned Open Method of Coordination, can be successful in the acceptation and implementation of measures at the national level. Since the framework in which the EU operates towards national minorities is rather limited, there should be an EU institution charged with supervision of the various actions and measures regarding national minorities.

11. Applicability of discrimination law on Roma: European Court of Justice (ECJ) in the case of CHEZ Razpredelenie Bulgaria AD versus Anelia Nikolova.[77]

In July 2015 the ECJ got the chance to decide on a case of discrimination against Roma communities based on Directive 2000/43/EG which prohibits discrimination based on race or ethnic origin which is in particular enshrined in Article 21 of the Charter of Human Rights. It had to decide on a case of discrimination against a Roma community by the electricity company CHEZ (aka CEZ) in Bulgaria that had repeatedly been condemned by the Bulgarian Anti-Discrimination Commission because of its practice of placing meters out of reach of consumers only in Roma districts. It was a non-Roma, Nikolova, who started this proceedings against CHEZ. This powerful company had persuaded the Supreme Court to reverse the condemnations. So the KZD, a specialized anti-discrimination Commission, an independent State body, referred questions to the ECJ, going over the head of the Supreme Court. The ECJ ruled that this Commission was not a court and rejected the reference as inadmissible. Then the Sofia Administrative Court used this case to refer similar question to the ECJ. The facts of the case are the following: "Ms Nikolova runst, as a sole trader, a grocer's shop in the "Gizdova mahala"distric of the town of Dupitsa in Bulgaria, a district inhabited mainly by persons of Roma origin. In 1999 and 2000 CHEZ RB installed the electricity meters for all the consumers of that district on the concrete pylons forming part of the overhead electricity supply network, at a height of between six and seven meters, whereas in the other districts the meters installed by CHEZ RB were placed at a height of 1.70 meters, usually in the consumer's property, on the façade or on the wall around the property " (ECJ, para 21 and 22). "In December 2008, Ms Nikolova lodged an application with the KZD in which she contended that the reason for the practice at issue was that most of the inhabitants of the 'Gizdova mahala' district were of Roma origin, and that she was accordingly suffering direct discrimination on the grounds of nationality. She complained in particular that she was unable to check her electricity meter for the purpose of monitoring her consumption and making sure that the bills sent to her, which in her view overcharged her, were correct" (para 23). In April 2010 the KZD issued an decision concluding that the practice at issue constituted prohibited indirect discrimination and later in May 2012 the KZD adopted a fresh decision finding that CHEZ RB had discriminated directly against Ms Nikolova on the grounds of her " personal situation" by placing her, on ac-

77 ECJ, Case of 16 July 2015, CHEZ Razpredelenie Bulgaria AD versus Komisia za zashtita ot diskriminatsia and Anelia Nikolova, C-83/14.

count of where her business was located, in a disadvantageous position. On the appeal of ChEZ RB before the Administrative Court of Sofia, that court finds that EU law is applicable, stating that the protected characteristic must be seen in relation to the common Roma "ethnic origin" of most of the inhabitants of the "mahala" district. It takes the view that the Roma community does constitute an ethnic community, one which in Bulgaria indeed has the status of ethnic minority. It also observes that the particular district is commonly referred to as the largest 'Roma district' and harbors various Bulgarian towns. From this it concludes that the persons of Roma origins felt victim to the practices of CHEZ RB (para 26- 31). Regarding the fact the Ms Nikolova is not a Roma herself, the ECJ refers to its case-law in which it decided that the application of the principle of equal treatment is not limited solely to persons possessing the protected characteristic (para 32). The ECJ states that the purpose of Directive 2000/43 is to end discrimination on grounds of racial and ethnic origin, not only to protect individual members of groups who are targeted by discrimination (para 56). This would imply in this case that if a measure against a district is based on grounds of the Roma origin of the district's majority, then the minority in that district can also be considered victims of that discriminatory measure. The practice of CHEZ is direct discrimination if the ethnicity of the majority is the reason of the practice, for example if CHEZ selected the districts because of their Roma population (para 76). Indirect discrimination in this case requires any measure disadvantaging a Roma majority district which is not applied to non-Roma majority districts to be objectively justified. The comparators are other urban districts provided with electricity by CHEZ (para 90) which means that authorities must show that the objective differences between the districts justify the differential treatment. Moreover, the ECJ ruled that the practice of CHEZ was seen by others as effectively labelling a Roma community as electricity thieves, which made CHEZs measures harmful and should be considered incapable of justification (para 128).

The case has been returned to the Sofia Administrative Court, where Ms Nikolova will ask to condemn CHEZ to restore the meters to their normal height for all users in her district. If the national court will decide, given the particular facts, that direct discrimination cannot be concluded of, then indirect discrimination will be the basis for a condemnation of CHEZ, unless there will objectively justification for CHEZs acts.

12. Fundamental Rights Agency (FRA) and Minority Protection

The institutional framework for a capable minority protection has been found in the European Monitoring Centre on Racism and Xenophobia (EUMC) that was created to focus on issues surrounding discrimination, racism and xenophobia.[78] The EUMC has proved to be limited in its legal capacities since the EUMCs functions did not include the right to take initiatives. Because of these the European commission transformed the EUMC into a new institution, a Fundamental Rights Agency, in order to make it possible to treat discrimination in a wider

78 Council Regulation (EC) no 1035/97 of 2 June 1997, establishing a European Monitoring Centre on Racism and Xenophobia, OJ C 194.

context. The establishment of this new institution took place on 15 February 2007, and the main task of this agency is according to Article 4 of the Regulation 168/2007, "the collection of information and data, the provision of advice to the EU and its Member States and the promotion of dialogue with civil society."

Regarding human rights protection, it is supposed to actively promote fundamental rights.[79] It will not only monitor the implementation of EU law, but also indicate what new legal measures should be taken.[80] The FRA is not able to deliver legally binding decisions, nor is its competence to judge individual human rights violations. It is able to take a mapping exercise that will give insight into the existing activities in the field of human rights.[81] The Agency's work is determined for five years by the Council of the European Union and its competences toward Member States are limited to cases of implementing EU law.[82]According to consideration no. 10 of the Agency's Founding Regulation its work should cover "the protection of rights of persons belonging to minorities, as well as gender equality, as essential elements for the protection of fundamental rights". The EP has stressed that the FRA should be occupied with minority issues,[83] and should play a dominant role in this matter. The FRA will deal with thematic subjects, such as the principle of equality and victimization, Roma rights and ethnic profiling. In 2008 the FRA launched a new program on the situation of Roma and Travellers in the EU,[84] for which the cooperation with the Council of Europe has been foreseen.[85] Another important task is the formulation and publication of "conclusions on specific thematic topics" for the EU and the Member States, but the FRA has been excluded from commenting on EU legislative instruments, which stands, according to Toggenburg, in contrast with the Paris principles prescribing that national human rights institutions may freely consider any questions.[86] Another important task of the Agency is to deliver annual reports on fundamental rights issues after indirect monitoring of the member states and dialogue with civil society.

13. Concluding Remarks

The legal position of minorities in the EU is not hopeless any longer. Although EU law and policies are not always clear, there are interesting developments for minorities since the introduction of EU Equality Directives and the introduction of the 2009 Lisbon Treaty and the recent case law of the European Court of Justice (ECJ).

79 Preamble to Founding Regulation, para 4.
80 EP Resolution: "Promotion and protection of fundamental rights"(2006) OJ C 117 E/242.
81 G. Toggenburg (2008), The role of the new EU Fundamental Rights Agency: Debating the "sex of angels "or improving Europe's human rights performance? ELR, Issue 3,o
82 See art. 2 of the Founding Regulation.
83 See note 61, o.w., P6_TA (2005) 0208, 26 May 2005, paras 39 and 40, OJ 2006 C 117 E, 242.
84 See website FRA: http://fra.europa.eu/fraWebsite/home/home_en.htm
85 See arts 6-10 of the Founding Regulation
86 G. Toggenburg, (2008)," The role of the new EU Fundamental Rights Agency: Debating the 'sex of angels' or improving Europe's human rights performance?" 33 E.L. Rev. June, Sweet & Maxwell and Contributors, pp.385-398, p.394.

In practice only EU Member States are competent regarding national minorities. Different types of "minorities" could be acknowledged, such as persons belonging to an old minority group, discriminated due to religious or cultural background, and new migrating EU citizens; although there are similarities between their legal and personal situations, they do have different needs and worries. At least, they need a perspective of integration into the society of their host state. The national authorities are supposed to take the necessary measures to promote integration of national minorities, in different areas of society, such as the labor market, the education system, and in the social context. What could be useful for integration are measures to be taken to preserve and foster group identities.

Member States have the legal means to grant national citizenship or withdraw national citizenship. By exercising their national sovereignty, they determine the possible European status of members of minorities. If they grant nationality, members of national minorities will have the right to free movement and residence and to other rights connected to the status of European citizenship. EU citizenship links questions of European migration. National migration policy regarding EU citizens and their family members is not possible. When EU citizens make use of their right of movement and to reside in another member state, there could be regional developments in the sense that members of minorities, living in another EU country, can join together because of the free movement rights of EU citizens.[87] However, as has been stated earlier, it is the member state that decides on who is entitled to hold citizenship.

The EU is a Union of values and the aims for protection of minorities is one of the issues of the EU in the context of anti-discrimination, although the concept of minority has not been clarified either in the treaty or in the text of the Charter of Human Rights. Individuals as members of minorities can claim human rights protection since minority protection is seen as part of human rights protection in Article 21 of the Charter. The application of the Charter by national authorities is obligatory when EU measures are being adopted or applied. Members of minorities have the right to start proceedings before the ECJ in cases of discrimination on the basis of Article 21 of the Charter. Minorities are not categorized as such. The EU policy of inclusiveness of treatment of third country nationals officially remaining in the EU, shows that equal treatment in a rather broad range, alongside ethnic and cultural diversity is welcomed by the EU system and is effectively working for EU citizens and third-country nationals. Obviously, the ECJ can empower lower national courts regarding measures of discrimination against minorities which is demonstrated in the 2015 ECJ case of CHEZ versus NIkolova. In this case the ECJ shows the important role of the ECJ to advance the struggle of Roma communities against systematic discrimination, be it direct or indirect discrimination, based on EU directives and Article 21 of the Charter of Human Rights. Ruling on equal treatment it can establish a powerful tool for national communities marginalized by local authorities or businesses.

If the Charter is not applicable, minorities have to address national legal instances and ultimately the ECtHR in order to claim their rights.

87 The border between Italy and Austria has, according to Toggenburg, "to a large degree been 'neutralized'y the European common market, providing the German speakers in South Tyrol being EU citizens with closer contacts to their former homeland Austria". See: Toggenburg (2005), o.w., p. 724.

The European directives on the protection of victims of criminal actions and defendants in procedures demonstrate the concern of the EU for its citizens in vulnerable positions. In fact there are EU policies related to the inhabitants of the European Union and the EU humane approach towards them, in the context of culture and language and in its acceptance of regional diversity. However, the EU has no say in national affairs regarding minorities.

The European multilevel structure contains provision for new forms of communication, interaction and cross-fertilization. These competences can be used in different areas, such as in that of minority protection and forms of migration. In the area of anti-discrimination and social inclusion the EU can link them to other issues, such as cultural, regional, language or social policy, integration of European citizens, all kinds of aspects in which the EU is managing national policies in order to integrate national differences under the EU umbrella. Toggenburg speaks of "diversity management"[88] as "the effort to integrate diversity within unity." The recognized method of cooperation is the Open Method of Coordination according to which the EU negotiates on the basis of best practices and the evaluation thereof with the Member States.

The EU is not prohibited from mainstreaming its policies in the interest of minorities and migrants. The EU engagement is not restricted solely to financial support, especially in regard of minority language projects, but also through the EU's cultural and regional policies and its fundamental rights experts. The latter is of importance because of the Human Rights Agency established in 2007 in Vienna.[89] This Agency can give the EU the opportunity to look at national minority issues and stimulate Member States to respect their minorities and to take integration measures. The preservation and protection of minority interests lies in the line of the FRA's functions. The FRA will be in a position to stimulate the adherence to fundamental rights principles and practices in the EU Member States. The Commission's intention is to give the Charter a broad practical legal context.[90] The FRA's thematic areas can be covered by the legal context of the Charter. The broad mandate given to the FRA will ensure that national minorities that attention will be given to their problems in the FRA.

After all, EU law and measures facilitate the EU in the development of post-national citizenship based on diversity, even though the actual scope of protection, due to lack of enforceability, remains questionable.

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The Right to Free Movement and the Dilemma of Reverse Discrimination in EU Law[1]

Abstract

The European Union (EU) is an area without internal frontiers in which goods, services and people can move freely. The absence of internal frontiers is an important prerequisite for the establishment of the internal market. At the same time, it sets major challenges for EU policy maker as it requires them to formulate smart legislation that pursues two goals concurrently. That is to say, policy makers are asked to formulate legislation that restrict free movement in order to prevent irregular migration and transfers from occurring, but that also obstruct the development of the internal market as little as possible. Particularly in the area of the equal treatment of EU citizens this balancing exercise has proved to be everything but straightforward. This becomes clear from case law of the European Court of Justice determining the content of and limitations to the right to equal treatment of EU citizens. In this paper this is illustrated by studying the issue of reverse discrimination and by focusing particularly on the difficulties arising from the legality of reverse discrimination in family reunification cases. In this article it is explained what reverse discrimination entails and why it is still accepted in the EU. Consequently, it is discussed that whilst many commentators have advocated abolishing the legality of reverse discrimination in order to allow EU citizens to fully enjoy their right to equal treatment, this may not be the panacea.

Keywords: equal treatment, reverse discrimination, EU law, European citizenship, family reunification

The European Union (EU) is an area without internal frontiers in which goods, services and people can move freely. The absence of internal frontiers sets major challenges for EU policy makers, as it requires them to formulate smart legislation that restricts the free movement of goods, services and persons in order to prevent irregular migration or movement from occurring, but also facilitates the development of the internal market. This is problematic as the former is best served by issuing restrictive legislation, whilst the latter is best served by issuing as little restrictive legislation as possible. To complicate things further, EU policy makers do not only have to strike a fair balance between security and market interests when issuing legislation in the area of free movement, but they also have to make sure that laws regulating free movement within the EU are in accordance with the constitutional traditions and competences of the Member States, as the European Treaties oblige them to do. Particularly in the area of the equal treatment of EU citizens who have made use of the right to free movement this complicated balancing exercise has proved to be everything but straightforward. This becomes clear,

1 Research financed by the Amsterdam School for Regional, Transnational and European Studies

for example, from case law of the European Court of Justice determining the content of and limitations to the right to equal treatment of citizens traveling to other member states for the purpose of settling there permanently or semi-permanently. In this paper this is illustrated by studying the issue of reverse discrimination and by focussing particularly on the difficulties arising from the legality of reverse discrimination in family reunification cases.

What is reverse discrimination? Within the EU discrimination on grounds of nationality is prohibited. This means EU law prevents Member States from treating citizens from other Member States *less favourably* than national citizens. EU law, however, does not prevent Member States from treating citizens from other Member States *more favourably* than national citizens. As a result, national citizens sometimes find themselves in a disadvantageous position compared to citizens that do not hold the nationality of their country of residence and have made use of their right to free movement. This phenomenon is called reverse discrimination and finds its basis in the legal principle that Member States of the EU can regulate so-called 'wholly internal situations' individually and autonomously, without interference of the EU institutions and/or courts. The term 'wholly internal situation' in this context refers to cases that do not have a transnational effect, i.e. cases in which only national citizens, goods or services are involved and in which there is no international exchange whatsoever. Such wholly internal situations are deemed irrelevant for EU law, as they are believed not to affect – most importantly not to negatively affect – the right to free movement from one member state to another.

The effects of the legality of reverse discrimination can be illustrated by explaining its outcome in family reunification cases that involve third country nationals, i.e. in cases in which a citizen of a member state wants a family member from a third non-EU country to join them in their country of residence. In these cases, the legality of reverse discrimination causes national citizens who have not made use of their right to free movement and who find themselves in a 'wholly internal situation' to be subjected to national immigration law, whereas EU citizens who have made use of the right to free movement are subjected to EU immigration laws that on average are far less strict than national law on this topic. This causes citizens to be treated differently only on the basis of them having, or not having made use of the right to free movement (Walter 2008: 12). This situation generally does not appeal to people's sense of justice and is by some even believed to be in violation of the fundamental right to equal treatment and the concept of European citizenship. As a result, people wanting to reunite with third country nationals in their state of residence have been looking for 'tricks' on how to circumvent national law in order to find a solution to the negative effects of reverse discrimination. In the Netherlands, for instance, where national legislation on family reunification is quite strict, people are widely making use of the so-called Belgium- or Germany-route. These routes entail that people deliberately settle in Germany or Belgium for a period of time and find employment there – often in border regions – with the sole intention of being subjected to EU instead of national law. This enables them to receive a residence permit for their spouses more easily and to travel back to the Netherlands as soon as this permit has been issued by German or Belgian authorities. Although this is by no means illegal, it does raises questions about the tenability of the legality of reverse discrimination.

Considering the inequalities that follow from reverse discrimination, various commentators have advocated reversing established case law on this topic and have expressly stated that it

would be best to officially ban instances of reverse discrimination in order to prevent two groups of citizens from coming into being – the haves and the have nots so to speak. This could be problematic, however. The question is, for instance, if reverse discrimination can indeed be considered to violate the right to equal treatment and whether EU citizenship indeed constitutes a valid argument for not maintaining the legality of reverse discrimination. Additionally, the question should be answered whether banning instances of reverse discrimination through EU law would establish a situation in which the traditional federal balance within the EU would still be respected, and if banning reverse discrimination could undermine the constitutional traditions of the Member States in this area through fostering – contrary to the Treaties – a situation of full and complete harmonisation of the right to equal treatment. If this would be the case, banning reverse discrimination would be a quite problematic development. At the same time one could argue that the EU is an internal market, i.e. an area without internal frontiers. From this point of view, it would appear to be unreasonable to value the crossing of interstate frontiers so highly and to insist on the transnational effect of a case by maintaining the wholly internal situations rule that causes reverse discrimination.

In this paper the fundamental questions raised in the previous paragraph will be elaborated upon by discussing what reverse discrimination entails in more detail and whether it would be advantageous to expand the scope of EU equality law to internal situations and thus to ban instances of reverse discrimination. To this end, the first section discusses the emergence of the wholly internal situation rule. Subsequently, the second section discusses the content of the wholly internal situation rule, while the third section elaborates on the pros and cons of maintaining the wholly internal situation rule and the legality of reverse discrimination. Finally, in the conclusion an answer is provided to the question if, considering the observations made in the first three sections, the legality of reverse discrimination should be maintained or not.

1. The emergence of the 'wholly internal situation rule'

Whenever states agree to establish international or supranational organisations, they are wary not to hand over too much of their national sovereignty to the supranational level. In such instances, states are challenged to strike a careful balance between devolving as few of their national powers as possible, while at the same time awarding sufficient competences to an international organization that enables it to achieve the general aim for which it has been established. In this process states have to decide on how to draw a demarcation line between the scope of application of supranational law and the scope of application of national law. This also applies to the process of EU integration, which has always been strongly affected by national and supranational government bodies having to reach agreement about establishing a fair balance between respecting Member States' autonomy and ensuring the enforcement and overall effectiveness of EU law. In this regard a system of multi-level governance has been introduced to overcome disputes over the division of powers between the Member States and the EU institutions. Within this system, competences that are believed to constitute a vital part of national sovereignty fall under the exclusive competence of the Member States. At the same time,

other policy areas are considered to fall under the exclusive competence[2] of the EU and some issues are labelled as a shared responsibility[3] of both the Member States and the EU. Although the Treaty of Lisbon contains several articles that specifically address the issue of the boundary between EU and national competence, the distinction between these two levels of governance remains blurred. Consequently, the European Court of Justice has considered it a necessity to define the boundaries between the scope of application of EU and national law and has formulated a general rule to determine whether something is an EU affair (Tryfonidou 2009: 6-7).

According to the Court, EU powers cover any situation connected with one or more of the aims of the Treaty on the Functioning of the European Union (TFEU). This prerequisite is usually already satisfied if a situation involves an impediment to reaching one of the goals of the treaties. In this context the Court has ruled that prohibition of discrimination on the basis of nationality[4] is only applicable in situations that have a sufficient link with its aim, which is to establish the internal market. That is why the non-discrimination rule can only be applied in situations that involve some form of interstate movement(Tryfonidou 2009: 6-7).

2 In accordance with article 3 TFEU, exclusive competences of the EU are: (a) the customs union; (b) establishing the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) common commercial policy.

3 In accordance with article 4 TFEU, shared competences of the EU and the member states are: (a) the internal market; (b) social policy, for the aspects defined in the TFEU; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) the area of freedom, security and justice; and (k) common safety concerns in public health matters, for the aspects defined in the TFEU.

4 The TFEU prohibits discrimination on grounds of nationality. This is laid down in article 18 TFEU and in article 21 (2) and article 23 of the Charter. These articles are primarily aimed at enhancing the unity of a European area without internal frontiers, i.e. the internal market. Apart from this prohibition, EU law prohibits discrimination on the grounds of sex, race or ethnic origin, religion or beliefs, disability, age and sexual orientation. This prohibition is laid down in the articles 10, 19 and 157 TFEU and covers the area of employment, although it sometimes goes beyond that policy area. In the Charter of Fundamental Rights of the European Union (the Charter) one can additionally find the following provision: 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' The principle of equality laid down in article 10, 19 and 157 TFEU and in the Charter is primarily aimed at enhancing the protection of individual dignity. While the prohibition of discrimination on grounds of nationality has always been interpreted to be relevant for EU citizens only and to apply solely in cross-border situations, the articles aimed at enhancing the protection of human dignity have always been deemed applicable in the legal order of member states even in situations without a direct cross-border effect and to offer protection – at least to some extent – to third country nationals as well as to EU citizens. Therefore, whenever in this paper the equality principle is referred to, the prohibition of discrimination on grounds of nationality is meant. For more information on the distinction between the two categories see: Muir, Elise - 2011 Enhancing the Protection of Third-Country Nationals Against Discrimination: Putting EU Anti-Discrimination Law to the Test. In: Maastricht Journal of European and Comparative Law, Issue 1, 136-156.

While at first sight this principle might appear rather simple, its application has proved to be rather difficult. In this context, particularly the dividing line between interstate and national economic activities has proved to give rise to confusion, as it has turned out to be hard to establish whether the effects of a certain activity are confined to one member state only, or whether they affect others as well. As the dividing line between these two has become rather thin, the European Court of Justice has formulated a number of principles that define the boundary between the scope of application of EU and national law. The wholly internal situation rule is one of these principles (Tryfonidou 2009: 6-7).

2. The content of the wholly internal situation rule

The prohibition on discrimination on grounds of nationality lies at heart of the EU's internal market as it facilitates the free movement of people, fosters the idea of an 'ever closer union among the people of Europe' and constitutes the heart and soul of union citizenship. Consequently, the obligation not to discriminate against nationals of other Member States is both of functional and foundational importance to the EU. This does not mean, however, that all discrimination on grounds of nationality is prohibited. The non-discrimination principle for instance finds it limits in the non-application of EU law – and therefore the non-application of the principle of non-discrimination – in wholly internal situations, i.e. situations that do not have a transnational effect and take place within the borders of one member state only, as was discussed in the introduction to this paper (Mei 2011: 63-64).

The first articulation of the wholly internal situation rule can be found in the 1979 *Saunders* case. In this judgement the Court stated that 'the provisions of the Treaty on freedom of movement for workers cannot […] be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law.' Throughout the years the European Court of Justice has not specified what is actually meant by the phrase 'wholly internal situation'. Nonetheless the Court's case law provides some insight into the content of this concept, as it has spelled out the criteria that are to be used to distinguish cross-border situations from purely internal ones. With a view to categorising these criteria, Tryfonidou has formulated a 'three-limb linking factor test' that is based on the procedure usually followed by the Court in cases concerning this topic. Although the Court itself has neither explicitly referred to a 'test', nor to any limbs, the 'three-limb factor test' Tryfonidou describes does provide a useful insight in the standard line of reasoning of the Court. The test consists of the following three limbs: first the Court establishes whether there has been movement from one Member State to another; secondly the Court analyses whether the movement has had an economic aim; thirdly, the Court considers whether the denial of inclusion within the scope of EC law of a given situation (and the subsequent denial of EC rights) would have a deterrent effect on the exercise of that movement and, thus, a negative impact on the construction of the internal market. This means, as Tryfonidou rightly points out, that the Court requires that there is, or will be, interstate movement for economic purposes *and* that there is a link between the right claimed under EC law and the exercise of that movement. The latter can be proved by providing evidence that the right one claims

is crucial for enabling that person to exercise one of the fundamental freedoms provided for in the TFEU and that the denial of that right would deter the exercise of one or more of these freedoms. Alternately, if the right one claims is not related to the exercise of one of the fundamental freedoms, the situation does not qualify for protection under EU law (Tryfonidou 2009: 10-11).

The general idea underlying the line of reasoning of the European Court of Justice is that the fundamental freedoms should only apply when there is a negative impact on the construction of the internal market. Thus, any situation that does not involve an obstacle to interstate movement must be governed by the Member States' own laws and regulations.

3. The wholly internal situations rule: a problematic solution?

The wholly internal situations rule has often been considered an easy and solid solution that establishes the right balance between promoting the objectives of the EU and respecting the sovereignty of the Member States. Some critical remarks can, however, be made about the rule. These critical remarks illustrate that as much as the wholly internal situations rule is to be respected because of its simplicity, its application has not always been an overall success. In the next four subsections the pros and cons of maintaining the wholly internal situations rule are discussed. The question that will be answered is if the wholly internal situations rule should be maintained and what the possible consequences are of extending the scope of application of the right to equal treatment to internal situations.

3.1 EU citizenship and the wholly internal situations rule

Ever since the introduction of the non-discrimination rule, dispute has arisen about its scope of application. This does not only apply to the application of the non-discrimination rule in wholly internal situations, but to the non-discrimination principle in general. With a view to the clarity of the analysis performed in this article, it is necessary to briefly elaborate on the content of these disputes and to take into consideration the notion of EU citizenship, as this plays an important role in discussions on reverse discrimination. After that the importance of EU citizenship for solving the dilemma of reverse discrimination will be briefly elaborated upon.

From very early on, the Member States have put forward reasons to assert why the non-discrimination principle would not be applicable in certain cases brought before the Court. At the same time the judiciary has stretched the scope of the right to equal treatment further and further. The tension between the two becomes apparent when studying the different views on equal treatment pushed forward by the Member States on the one hand, and the European Court of Justice on the other. During the earlier years of European integration the Member States of the EU promoted the so-called 'sectoral method' in an attempt to restrict the scope of EU non-discrimination law. This can be illustrated by the Casagrande case, which was brought before the Court in 1974. In this case the German government argued that the right to equal treatment, as enshrined in the treaties, was only applicable in policy areas where Member States had explicitly transferred their powers to the EU. In this case the Court did not endorse this

sectoral method, possibly because it considered it rather difficult to maintain why, apart from the power to establish the free movement of persons and the duty to protect citizens against discrimination on grounds of nationality, the EU should additionally be required to have been awarded the competence to contribute to the realisation of non-discrimination and freedom of movement in a specific policy area. Such a double competence would lead to a situation where the right to free movement would be rendered largely superfluous and the scope of the right to equal treatment would ultimately be limited to such an extent that it would become almost completely ineffective (Mei 2011: 65-68).

After Casagrande another restrictive interpretation of the non-discrimination rule was introduced by the Member States, who, through forwarding the so-called 'obstacle for free movement method', hoped to accomplish that the non-discrimination rule would only be applied in cases where a national rule would confer rights or benefits that are directly linked to – or deter – the exercise of the right to free movement (Mei 2011: 65-68).In the past, the European Court of Justice has issued a few judgements that could suggest that it had indeed opted for such an interpretation of the right to equal treatment, as the Court at times deemed it necessary to establish whether a national rule denying a certain right is 'capable of hindering or rendering less attractive the exercise of free movement rights'[5], has a restrictive effect on those rights[6] or may deter EU citizens from moving from one state to the other.[7]

All things considered, however, it appears that the European Court of Justice does not consider the significance for, or the impact on mobility of a measure when asked to establish whether the non-discrimination rule is applicable in a certain case. In the *Flemish Care Insurance* case[8], for instance, the EU Court rejected the argument put forward by the Belgian administration that a contested discriminatory rule would only have a marginal effect on the free movement of persons and thus could not be caught by the non-discrimination rule. In this context the Court stated that any restriction of the freedom of movement, albeit a minor restriction, is contrary to EU law. Moreover, the Court appears to have never accepted the legality of a discriminatory rule because its effect on the freedom of movement was too remote or marginal. Therefore, the discriminatory nature of a measure is of decisive importance for ruling that it is contrary to EU law and not the question whether the contested measure in fact constitutes a profound obstacle to free movement. This means the European Court of Justice has not endorsed the so-called 'obstacle to free movement method' through its case law (Mei 2011: 69-70).

What the European Court of Justice has ruled instead, is that the possession of a member state's nationality in combination with a cross-border element is enough to trigger the application of the non-discrimination rule. Most notably, since the 1992 Treaty of Maastricht the Court has started to include union citizenship in its interpretation of the right to equal treatment. The notion of EU citizenship introduced at that time, according to the European Court

5 See: European Court of Justice, *Casteels*, C-379/09, par. 22.
6 See: European Court of Justice*, Commission v Spain*, C-211/08, par. 65.
7 See: European Court of Justice, *Rüffler*, C-544/07, par. 65-66.
8 See: European Court of Justice, *Government of the French Community and Walloon Government v Flemish Government*, C-212/06.

of Justice, '[was] destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'[9] This development is important for two reasons.

First of all, from 1992 onwards the EU Court has connected the right to equal treatment to the non-economic, political status of Union citizenship, thereby awarding equal treatment rights to all member state nationals, regardless of whether they can be brought within the ambit of the rules on free movement. Citizens have thus been awarded the right to claim equal treatment in cross-border situations solely because they are EU citizens (Mei 2011: 71).

Secondly, the European Court of Justice has used the introduction of the notion of EU citizenship to support its judgement that the right to equal treatment can be relied upon whenever EU law applies. This is a fairly broad understanding of the scope of application the right to equal treatment, as from this perspective it includes – but is not limited to – situations in which citizens have exercised their right to free movement. This means that, whereas in the past the right to free movement and the right to non-discrimination were closely related, the EU Court has now cut through the link between the right to equal treatment and the freedom of movement (Mei 2011: 71).

Due to this case law, the prohibition of discrimination on the basis of nationality is no longer an instrument at the service of freedom of movement, but instead is 'at the heart of the concept of European citizenship, and to the extent to which the latter imposes on Member States the obligation to treat Union citizens as national citizens.'[10] That is to say, equal treatment is no longer primarily meant to promote freedom of movement and *vice versa*. Instead the two are more or less separate rights that are directly – but individually – linked to the fundamental status of Union citizenship. That is to say, the European Court of Justice has developed the view that the mere exercise of free movement rights is enough to establish the applicability of the non-discrimination rule in almost every policy area and concerning nearly every right or benefit. This observation is important, since this evolution of the Court's case law raises the question whether the right to equal treatment at present should still be dependent on a need for a transnational effect. Since the right to equal treatment has been formally cut loose from the freedom of movement, why should interstate movement still be a condition for claiming equal treatment rights (Mei 2011: 72)?

With a view to the evolution of EU case law on the right to equal treatment discussed in the previous paragraphs, various commentators have advocated to reverse established case law on reverse discrimination and to tackle the problem of EU law not being applicable in wholly internal situations. In this debate roughly two perspectives on reverse discrimination can be discerned. Some Advocates General and legal experts assert that reverse discrimination is an issue of EU law and should be dealt with by the EU courts; others, on the other hand, hold the opinion that wholly internal situations should be left to the Member States. The latter category considers reverse discrimination to be the unavoidable consequence of the division of powers

9 See: European Court of Justice, C-147/03, *Commission v Austria*, par. 44.
10 See: Opinion of Advocate General Maduro in Case C-524/06 *Huber*.

between the EU institutions and the Member States as enshrined in the Treaties and consider it an accurate reflection of the principle that the EU institutions can only act within the scope of their attributed powers. The former, however, consider reverse discrimination to produce unacceptable consequences and holds that the Court should tackle this problem by ruling that reverse discrimination is contrary to the content and spirit of the Treaties. This would mean moving away from existing case law on reverse discrimination. More moderate voices within this category perceive reverse discrimination as a temporary phenomenon, a 'growing pain' in the development of the EU law or an 'infant disease', that should be dealt with by giving fuller effect to the rights citizen can derive from the freedom of movement and the principle of non-discrimination on grounds of nationality (Hanf 2011: 30-33).

It is difficult to establish who actually is right here. That is to say, the Treaty of Lisbon provides arguments for both points of view, as it both underlines the importance of the protection of citizens' rights and pays particular attention to the rights and competences of the Member States *vis-à-vis* the EU institutions.[11] The Treaty thus offers grounds to reconsider the permissibility of reverse discrimination, as well as draw the conclusion that reverse discrimination should be considered a constitutional necessity (Hanf 2011: 32-33). Consequently, it is hard to establish whether, on this point alone, one can hold that reversing established case law on reverse discrimination constitutes a legal necessity or legal obligation.

3.2 Is reverse discrimination compatible with the right to equal treatment?

Another objection to the wholly internal situations rule often brought forward by those who would like to see it abolished, is that it can be questioned whether the wholly internal situations rule – and notably reverse discrimination that results from it – is in conformity with the right to equal treatment, as it is considered by them to entail discrimination on the basis of nationality (Editorial Comment 2008: 1-11) (D'Oliveira 1989: 83). In this context it needs to be underlined that EU law undeniably prohibits discrimination on grounds of nationality, as becomes clear from article 18 TFEU and article 20 and 21 of the EU Charter. Additionally, article 14 of the European Convention on Human rights contains the following clause: 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as […] national or social origin […] or other status.' Additionally, article 1 of Protocol 12 of the ECHR reads: The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as […] national or social origin […] or other status.'

At first sight it might therefore indeed appear unreasonable – especially considering the introduction of EU citizenship as discussed in section 4.2 – to deny a person this right solely on the basis of him/her not having made use of their right to free movement. As Tryfonidou (Tryfonidou 2009: 19), Davies (Davies 2009: 19) and van der Mei (Mei 2011: 77) have persuasively argued, it needs to be mentioned, however, that reverse discrimination in fact does not constitute discrimination on grounds of nationality. Instead reverse discrimination can be considered discrimination based on the ground of non-contribution to the internal market, or,

11 Considering the formal introduction of a system of multi-level governance. Supra note 1 and 2.

to formulate it differently, discrimination between mobile and immobile citizens. This means citizens cannot rely on article 18 TFEU or on article 21 of the EU Charter. It does not prevent them, however, from claiming equal treatment rights on the basis of article 20 of the EU Charter or article 14 ECHR, as these articles are not strictly confined to discrimination on the basis of nationality. The EU Charter, however, does not apply in wholly internal situations, as becomes clear from article 51 of the EU Charter. Therefore only the ECHR would offer sufficient ground for reversing established case-law on reverse discrimination. The question that should be answered is if reverse discrimination could be considered a violation of the right to equal treatment enshrined in the ECHR.

In the Lithgow case[12] the European Court on Human Rights has stated that article 14 ECHR 'safeguards people […] who are placed in 'analogous situations' against discriminatory differences of treatment'. An applicant would thus have to prove he finds himself in a situation comparable with persons who have been better treated.[13] The problem is, however, that the European Court on Human Rights has not forwarded clear criteria that have to be applied when wanting to establish if people can be considered to be in an analogous situation. It often passes over detailed consideration of whether an applicant is in a comparable situation to others who have allegedly been better treated, particularly if it seems likely that a state will be able to show justification for the differential treatment. In that context a state would have to prove that the differential treatment pursues a legitimate aim and that the there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised (Ovey and White 2006: 425-428).

With regard to the aim of the differential treatment of mobile and immobile EU citizens, it should be noted that mobile citizens have been granted certain rights to facilitate the free movement between Member States. As Van Der Mei rightly underlines, it does not seek to facilitate free movement within Member States, or between third countries and the EU and its Member States. This would support the conclusion that mobile and immobile citizens are not in an analogous situation. Even if the TFEU would be interpreted to include a right to internal freedom of movement, this does not automatically lead to the conclusion that internal and cross-border movers are in a comparable situation. In spite of the fact that one could hold that internal movers too face difficulties integrating into their new environment, this is quite another thing than having to move from one member state to another and having to integrate there. EU citizenship may entitle mobile and immobile citizens to claim equal treatment in comparable situations, but it does not imply that they should be regarded as being in the same position. The comparability requirement thus constitutes an obstacle to drawing the conclusion that reverse discrimination leads to unlawful discrimination (Mei 2011: 78).

12 See: European Court on Human Rights, *Lithgow and others v. United Kingdom*, Judgement of 8 July 1986, Series A, No. 102, (1986) 8 EHRR 329.

13 See: European Court on Human Rights, *Fredin v. Sweden,* Judgement of 18 February 1991, Series A, No. 192, (1991) 13 EHRR 784.

3.3 Interstate movement: an untenable criterion?

Although in section 3.1 and 3.2 no decisive clues were found that would allow us to conclude that there are sufficient grounds for reversing established case law on reverse discrimination, there are a few other arguments in favor of this development that could be put forward. One could wonder, for instance, whether maintaining that interstate movement is a prerequisite for the application of EU law is tenable in present-day society. That is to say, looking at the first limb of the three-limb-factor test discussed in the previous section, insisting on the element of *interstate* movement can lead to verdicts that are not in conformity with the economic realities of a case. One can, for instance, easily imagine a transnational case with little impact on the common market and a wholly internal situation with a major effect on the internal market (O'Keeffe and Bavasso 2000: 554-555). Therefore, simply adhering to the textual limitations of most treaty articles awarding equal treatment rights could be considered overly dogmatic (Hanf 2011: 38). Additionally, the internal market is an area without internal frontiers. From this point of view is seems unreasonable to value the crossing of interstate frontiers so highly and to insist on the transnational effect of a case. That is to say "aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is self-contradictory"(D'Oliveira 1989: 84). Moreover, the wholly internal situations rule falsely conceives the different areas of law to be watertight compartments. That is to say, in practice the operation of the law in one area frequently has spill over effects into other areas (Tryfonidou 2009: 58). Maintaining a strict distinction between national and EU law therefore appears intangible.

In this context, it needs to be noted, however, that the European Court of Justice has developed a new approach towards finding a link with EU law. This especially becomes apparent in case law concerning the free movement of goods and services.[14] Under this case law, provided that it has been established that an effect on interstate movement has occurred, the European Court of Justice has found national measures to be in violation of the free movement provisions even when they were applied to goods that were confined within the territory of one member state only. That is to say, the Court has not required the 'three-limb linking factor test' discussed in paragraph 2 to be satisfied on the facts of the case. Instead it has considered a national measure to fall under EU law as long as it has been established that its application may *potentially* have an effect on interstate movement. This does not mean that reverse discrimination has now come to fall under EU competence, but it does mean that the European Court of Justice has responded to the criticism voiced towards the traditional approach to the application of the linking factor test (Tryfonidou 2009: 67, 88, 94). All in all, we can conclude that the criterion of interstate movement has already been interpreted quite liberally by the European Court of Justice and that this criterion is therefore not as untenable as it might appear at first sight.

14 See for instance: European Court of Justice, C-293/02, *Jersey Potatoes*.

3.4 Judicial activism and the separation of powers

This final section discusses whether the European Court of Justice reversing established case law on reverse discrimination – a development that would amount to judicial activism - would be desirable considering the balance of powers between the European institutions and the member states, as established by the European treaties. This section should start with observing that while in the past the EU courts have indeed held that instances of reverse discrimination do not fall within the scope of EU law as it is considered a wholly internal situation, in recent years this outlook on the law seems to have shifted slightly. This is because over the last years, the principle of equal treatment has developed significantly and has evolved from a tool used to merge the markets of the Member States of the European Union, into a more mature concept, allowing the EU to impose limits on the free exercise of powers of Member States and individuals in both economic, social and political spheres. Especially the European Court of Justice has contributed extensively to this development, as its rulings have caused the prohibition of discrimination on the basis of nationality to a vital pillar of EU fundamental rights law and policy, in spite of the Treaty not explicitly spelling out these obligations (Muir and Mei 2011: 3). The introduction of European citizenship in the 1991 Treaty of Maastricht has contributed extensively to the evolution of the Court's case law on the right to equal treatment. Because of the proactive attitude of the EU Courts, stating '*civis europeus sum*' has come to mean something although, admittedly, it does not entail all rights associated with national citizenship.[15] Notwithstanding this fact, European citizenship can be – and has been – widely invoked by EU nationals to oppose violations of their fundamental rights (Witte 2011: 87).

As much as the outcome of EU case law on citizenship and the right to equal treatment could be considered a valuable asset to the process of European integration, especially when constitutional issues are at hand, it is not only the result that should be taken into account. The question we should therefore ask ourselves is whether the way this result has come about can be considered valid and desirable. This question of course cannot be answered objectively, but what can be said about the Court's case law on equality and EU citizenship is that it lays bare that there is perhaps a need for a clearer understanding of the competences of the actors involved in the process of Europeanising the right to equal treatment. After all the Court's case law underlines that it is unclear who is – or rather should be – primarily responsible for shaping EU equality law. While the Treaties seem to suggest that the EU legislator, i.e. the European Commission together with the Council and the European Parliament, is to be awarded this task, it is the EU Courts that have in fact contributed extensively to the development of the equality principle and have expanded the implications of the right to equal treatment without direct interference of the European Commission, the Council or the European Parliament.[16] What we witness here is a tension between the EU Court wanting to give substance to the

15 The phrase '*civis europeus sum*' is taken from the Opinion of Advocate General Jacobs, delivered on December 9 1992 in the case *Christos Konstantinidis v Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt,* Case C-168/91, par. 46.

16 See for instance: European Court of Justice, *Bidar* (C-209/03), *Kucukdeveci* (C-555/07), *Mangold* (C-144/04) and *Zambrano* (C-34/09).

promise of citizenship delivering true equality and the wish of the EU Member States to institutionalise diversity by maintaining their national legal systems (Maas 2011: 91).

The solution provided by the European Court of Justice, which basically boils down to promoting the equality principle almost unconditionally and giving it priority over nearly all other things, could be considered problematic, as it results in the Court imposing obligations on the Member States and on national law that do not directly follow from the Treaty texts or secondary law. The Court consequently seems to have produced 'federalising' effects without prior political and constitutional consent at the EU or national level. This is not in accordance with the traditional separation of powers between the different branches of government. Therefore, the main challenge that perhaps lies ahead for the future is to draw a clear demarcation line between national and EU law and to determine who actually is responsible for developing the right to equal treatment within the EU (Muir and Mei 2011: 5). The solution to this problem should not be left to unelected judges, but should be taken in the political arena. Although there exists no general constitutional rule that categorically prohibits EU law applying to domestic situations and the EU legislator can opt for extending the scope of application of the right to equal treatment to wholly internal situations, as the EU legislator in the past has neither opted for fully extending the scope of equal treatment law to internal situations through secondary , nor made amendments to 'correct' the current doctrine on wholly internal situations, the Courts should interpret the right to equal treatment to cover internal situations. The Court extending the scope of application of the right to equal treatment to wholly internal situations would endanger the federal balance between the EU institutions and the Member States and would potentially enable the EU Courts to check almost all national rules against the Treaty and the general principles of law including fundamental rights. Although – admittedly – this is a rather formalistic approach, as Hanf has rightly pointed out, it is based on persuasive constitutional reasons (Hanf 2011: 37-39). There are countries, such as Italy, Spain and Austria, that have voluntarily adapted their national laws to EU law in order to make an end to the phenomenon of reverse discrimination. Taking into consideration the division of powers between the EU and the Member States, this solution, however, should be left for the Member States to decide and should not be regulated by case law of the European Court of Justice.

To conclude this section, extending to scope of application of the non-discrimination principle to wholly internal situations would result in harmonising national laws and policies in areas the EU institutions have not been attributed powers. That is to say, extending the scope of application of the right to equal treatment to wholly internal situations would oblige Member States to grant the same rights to citizens as the EU does. This is problematic, as the ban on nationality discrimination was never meant to curtail the freedom of decision-making of the Member States. Instead, it has merely been adopted as an instrument to fight national protectionism (Mei 2011: 80). Consequently, if the European Court of Justice would reverse established case law on reverse discrimination, the balance of power in the EU between the EU institutions and the member states would be disturbed.

Conclusion

This paper has discussed the phenomenon of reverse discrimination and has shed light on the question whether settled case law on reverse discrimination should be reversed and what the potential consequences are of expanding the scope of EU equality law to internal situations, as some commentators have advocated. The main question that was to be answered in this regard was whether attempts to ban reverse discrimination do – or do not – infringe on the traditional federal balance within the EU, and whether the historical constitutional traditions of the Member States would be undermined by banning reverse discrimination.

Taking into consideration the elements discussed in this paper I would like to draw the conclusion that, as much as reverse discrimination might in itself be considered a somewhat peculiar phenomenon that may not appeal to people's sense of justice, there are indeed several arguments that can be made in favour of maintaining the wholly internal situations rule and thus maintaining the legality of reverse discrimination. First of all, the EU treaties do not contain enough elements to conclude that the introduction of EU citizenship compels the judiciary to extend the scope of application of the right to equal treatment to internal situations. Secondly, reverse discrimination cannot be considered to be in violation of the right to equal treatment, as the comparability requirement constitutes an obstacle to drawing the conclusion that reverse discrimination leads to unlawful discrimination. Moreover, strictly speaking reverse discrimination cannot be considered to constitute discrimination on the basis of nationality in the first place. Thirdly, in spite of commentators referring to the Court's failure to interpret the requisite of interstate movement rather dogmatically without having an eye for the intrinsic contradiction of maintaining a clear dividing line between EU and national law in an internal market without internal frontiers, the European Court of Justice has indeed developed a rather liberal interpretation of when a case can be considered to have transnational effects. Last but not least, extending the scope of application would infringe on the division of powers between the EU and the Member States and would produce federalising effects without any political consent.

I would therefore like to conclude that the legality of reverse discrimination should be maintained, at least as long as the legislator has not explicitly authorised adjusting the current status quo. I do want to note that in future it might be sensible to keep re-evaluating whether reverse discrimination is to be considered in line with the core values underlying European integration. Especially since the entry into force of the Treaty of Lisbon, the EU has the goal of becoming a Europe of values and a citizens' Europe. Commission President Barosso's State of the Union Address of 2013 already referred to this development and underlined the need to strengthen the foundations of the EU, such as respect for fundamental values, the rule of law and democracy. Reversing current case law on reverse discrimination in this context would appear a legitimate goal to pursue. This decision, however, should be left to politicians and not to unelected judges.

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Reviews 3

Christopher HOUTKAMP

Sonntag, S. & Cardinal, L. (eds.): *State Traditions and Language Regimes*. Montreal: Mc-Gill Queen's University Press, 2015

The field of language policies is widely studied by scholars from different disciplines. Researchers have in particular focused on the normative aspects of language policies (i.e. 'what is the most desirable policy-framework?') and their effects on society. However, less work has been done on the pure political aspect of language policy making. Cardinal and Sonntag's edited volume 'State Traditions and Language Regimes' aims to fill this gap. The book's articles are very diverse but fall under one methodological umbrella, namely historical institutionalism. Cardinal and Sonntag argue that this methodology, which has its roots in Political Science research, can shed light into the decision making process surrounding language policies. Using the key concepts 'state tradition' (i.e. the historical, institutional and normative dynamics that guide a state's public policies) and 'language regime'("language practices as well as conceptions of language and language use as projected through state policies and as acted upon by language users"), the volume's contributors research 'how' and 'why' certain language policy choices are made.

The book is divided into three parts. Part one, which is called 'contours', consists of articles that analyse the general language policy choices of four states (Canada, the United States, Ireland and Poland) and features one article on the connection between language policies, globalization and Global English. The case study articles offer an overview of the critical moments in the different states' history regarding language policy and use this as a basis to understand current politics of language policy. For example, Cardinal's article on Canada shows how important court rulings have been in forcing language policy choices. Sonntag's article on the United States outlines how a 'laissez-faire' language policy would in practice lead to linguistic assimilation, since the most dominant language benefits the most from little state intervention. Peter Ives' article on Global English looks at the relation between state traditions and language regime at a global level, using a Gramscian framework.

The second part of the book, entitled 'coalitions', features articles that emphasise the importance of competition, both in institutional and societal settings, when analysing language policy choices. Coalition building proves to be important for linguistic minorities to bolster their linguistic position. For example, as Harguindéguy and Itçaina show in their article regarding the linguistic position of Basques in France, the transnational coalition between the Basques in Spain and France strengthens the position of the latter in their struggle for linguistic recognition.

The third and last part of the volume, bearing the title 'components', focusses on specific aspects of language policies. Nuria Garcia discusses the education policy in France and its connection to language policy and state tradition. France recently made the shift from a strong monolingual state tradition towards one that seems to favour multilingualism. However, as

argued by Garcia, the motivations behind this policy-change are not of a cultural but of a political/economic nature. Languages that have practical use in managing foreign relations and/or in the international business world receive the most support in the French education system. In contrast, immigrant languages, still receive relatively little support. Catherine Baker's article analyses another aspect of language policy, namely its importance during peace-building missions. She shows how well-intended language policies, which mostly revolve around English as a working language, could potentially have a negative impact on the transition towards peace and well-functioning democracies of previously war-torn states.

Naturally it is not possible in the scope of this review to do justice to the rich diversity of articles published in Sonntag and Cardinal's book. The articles that are briefly discussed here do give a decent image of the book's overall content: it contains contributions on a wide array of topics and cases, ranging from Western-Europe, to North-America, to South-East Asia, that are still neatly bound together by the methodological framework of historical institutionalism. This topical and context diversity is a main strength of the volume, even though, as the authors also admit themselves, the analysis could have benefited if some contributions on Latin-America and/or Africa would have been included as well. Furthermore the volume sufficiently makes clear how much the field of language policy can benefit from a historical-institutionalist perspective. The authors succeed in showing the way towards a new research agenda.

An interesting addition to the volume might have been some more contributions discussing the role of migrant languages, and the impact of migration on the politics of language policy in general. Most articles deal with language policy towards autochthonous minorities. Given the sizeable migrant population in many countries, and the expectation that migrant flows will increase in the near-future, it is likely that the importance of migrant languages in the overall language policy framework will increase in the coming decades. It could be interesting to devote more attention to the interaction between migrant languages and different state traditions in future research.

In conclusion, the series of essays gathered in this volume present solid analyses as well as an innovative way to study language policy. The emphasis on the role of power and state traditions is a welcome contribution to the field. The book can be warmly recommended to anyone who has any academic or personal interest in the intricacies of language policy decision making.

Szidónia Katalin NAGY

Michele Gazzola: *The Evaluation of Language Regimes. Theory and Application to Multilingual Patent Organisations*. Amsterdam: John Benjamins Publishing Company, 2014

Michele Gazzola is a post-doc research fellow at the Department of education studies at Humboldt-Universität zu Berlin, and research fellow at the Institute for ethnic studies in Ljubljana. *The Evaluation of Language Regimes* is based on his PhD dissertation *(Multilingual Communication Management)*. *The Evaluation of Language Regimes* includes many of his research interests. Most of his work is interdisciplinary. He works within a wide range of disciplines from languages, language planning, through the more complex field of language economics, public economics policy analysis, policy evaluation and comparative analysis of language regimes in international organisations. The book includes results of a European integrated project called DYLAN (Language Dynamics and Management of Diversity). The aim of this project was to explore how the language-related (of several different languages) frames of mind and actions bear a part in the transmission of knowledge. Also its goal was to investigate the functions of these frames and actions in the control of interactions, problem solving and decision making process. In the empirical work focused on efficiency and fairness in language practices, the evolution of linguistic varieties, and patterns of multilingualism in three special terrains: in the institutions of EU, companies and educational systems in Europe.

The Evaluation of Language Regimes is a really complex work from several aspects. First of all, as I mentioned in the previous paragraph it is a multidisciplinary work. Basically the main focus is on language policy and planning (LPP). Moreover, the book presents not just a complex and clear theoretical framework, but also a detailed methodology bolstered up with the empirical analysis of matching and suggestive examples of two international patent organizations. These novelties will be discussed in detail in the paragraphs below. One definition has to be explained in advance. Language regimes mean international organizations, here with a special focus on international patent organizations.

The book has two main parts and each could be book in its own rights. The first part clarifies the theoretical background, introduces the main goals of the work and lays down a clear methodology for further analyses. The second part of the book uses this information for analysing two multilingual organizations, the Patent Cooperation Treaty division of the World Intellectual Property Organisation (WIPO) and the European Patent Office (EPO). From now on I will follow the main points of each chapter step-by-step.

Chapter 1 is a review of earlier LPP literature. From the 1960s, after the emergence of language policy and planning, the classical theories were dominated by positivistic and technicist approaches, i.e. economic models and terminologies served as a basis for LPP. From the 1970s the critics of the classical approach strengthened. But until the 1990s the LPPs missed policy

evaluation. According to the modern approach, language policies can contribute to the well-being of societies (this means a link to welfare economics). As other policies, language policies have both advantages and disadvantages, they are not bad or good per se, so they have to be compared with alternatives. Practically, these alternatives mean that we compare less multilingual situations with more multilingual situations. (E.g. Does the effectiveness increase or decrease if six languages are in use rather than two?)

Moreover, this Chapter lays down many important theoretical considerations. As the author suggested the term of language planning is more consistent with the aim rather than the policy in the meaning of 'laissez-faire' policy. However, policy and planning are generally used as synonyms in the literature. In this review I will also use them with the same meaning, but keeping the theoretical considerations of Gazzola in mind. So language policy is defined as "a systematic, rational, theory-based effort at the societal level to modify the linguistic environment with a view to increasing aggregate welfare." (p. 27.)

Chapter 2 starts to explain some of the most important definitions like fairness and efficiency. This part of the book could be called the foundations of economics and welfare economics. This chapter gives a detailed but at the same time focused introduction to the main economic notions and theories which are closely related to LPP. The chain of thoughts starts with the Pareto equilibrium, the Kaldor-Hicks compensation test, social welfare function, partial welfare analysis etc. Besides, it gives a great overview of the existing literature as it has some new contributions to the classical theories. According to Gazzola, language policies can be compared based on efficiency and fairness, where efficiency means resource allocation. He considers language policies public goods. This means that nobody can be excluded from the linguistic environment (non-rival good) and it is intrinsically provided. In the case of public goods the market mechanisms itself cannot lead to an optimal allocation (market failures) and the state needs to intervene. Usually the state uses some kind of policy intervention like in the case of language policies.

There is one more thing we have to say about language and externalities. There is a special type of externality, known in economics as network externality. LPPs also have network externalities; although in their case the results of policy intervention go beyond the classical economic theories. We know that when a given language's number of users increases, then the utility of its language increases in parallel, because it is good for those who learn the language, but also good for those who already know it. That's why LPPs can be seen as "hypercollective goods". Finally in this chapter the use of cost-benefit analysis (CBA) and cost-effectiveness analysis (CEA) is presented.

At the beginning of Chapter 3 the author continues describing the connection between LPPs and economics. As he mentions, for the evaluation of language policies effectiveness and fairness are criteria, which means that we need to find the right alternatives for comparison. There are two economic tools with which we can compute the pros and cons of language policy evaluation: CBA and CEA. The theory of CBA is reviewed in this chapter. Moreover, the author explains why effective communication is the object of this book. With the help of this we can use the CAB and CEA as well. Effective communication consists of three main domains: informatory, cooperative and strategic communication. This definition helps us to elaborate the effectiveness indicators of internal (language(s) within an organization) and external

communication (language environment). For the proper analysis of fairness of language policies we have to distinguish three levels of fairness: access, process and outcome. This is needed to enable us to compare the distributive effects of alternative language policies and not just in terms of financial benefits (e.g. language insecurity).

After defining all the essential notions the author switches to methodological considerations. In Chapter 4 the author explains the new methodology. First of all, how build the evaluation process up in the case of language policies. One corner-stone of the methodology is its multilevel nature. Language policies have to be evaluated at the micro- and at the macro level as well. From a methodological point of view, language regimes are considered as tools to convert inputs to public goods. So efficiency and fairness evaluations are based on the outcomes of a given policy. For the aims of the research the classical input-output-outcome approach is modified, hereby it puts emphasize on "culture of evaluation" as well. The outcome indicators have to be connected with cost indicators, thus we are able to compare the cost-effectiveness of different language policies. However for this we need a clear definition of costs. It includes three types of costs: primary (which can be direct and indirect as well), secondary and implicit cost. It's important to highlight that the last two does not necessarily have a monetary value. Like a language policy's secondary cost may be the misunderstandings, while the implicit costs appear when somebody's mother tongue is different from the organisation's official language.

In Chapter 5 the reader can learn how to make good indicators for LPP. This methodological consideration is given a special emphasis, because the indicators give information about the policies in different states, about the policy design, about the implementation and about the evaluation as well. Moreover, many concerned actors can use this information. This chapter deals with the main expectations for indicators and introduces some national indices. For the purpose of the research several new indicators were created by Gazzola, like the multilingualism index, the generalised multilingualism index and the weighted generalised multilingualism index. Indicators are not used for direct measurement of a given policy's effectiveness, instead they are used for comparison (E.g. How did the effectiveness/ fairness change as we changed to a more multilingual language policy?). The use of indicators today is still underrepresented in language policy evaluation, except in some multilingual countries.

At this point we reach the end of the book's first part and change over to the application of the theories and methods presented. Chapter 6 introduces the fundamental features of patent organizations and defines the role of languages in IP policies. The level of the patent application process is introduced and the language regimes of the patents are described. The patent organizations give multilevel information to the applicants, and the natures of these organizations affect their resources and thus their outcomes in the innovation processes. Gazzola says that a patent organization is effective if it shares knowledge and advocates the generation of knew knowledge at the same time. Numerous outputs for effectiveness can be defined e.g. the number of patent claims translated. For comparison to alternative regimes a good indicator may be e.g. the number of translated claims quoted in other patents.

In this case fairness of a regime is evaluated by its effects on the distribution of costs. But the fairness has to be explored by different variables (like the stage of the patenting process). According to this detailed characterization five types of transaction costs and four channels of

distribution can be distinguished. For further empirical research two international patent organization were selected: the Patent Cooperation Treaty division of the World Intellectual Property Organisation (WIPO) focusing on its Patent Cooperation Treaty (PCT) and the European Patent Office (EPO). The latter accepted 3 official languages, while the WIPO has 10 official languages.

Chapter 7 and 8 focus only on WIPO and EPO. These chapters give a detailed picture about the application processes in both patent offices. The author shares many descriptive results of the changes in language use within the organizations with his readers and tries to answer these trends by testing several opportunities. Moreover, comparative analyses of evaluations of different language regimes (within WIPO and within EPO) are added to demonstrate what a potential analysis would look like. Unfortunately these analyses are just partial as a lot of data is missing for a complete evaluation (e.g. the type and size of applying firms). In summary –before going into some details of each language patent system - we can say that as the language diversity increases the efficiency and the fairness of the patent systems develops as well.

Chapter 7 is about PCT. The overall results suggest that the filling language of PCT applications follows the international trends of diversification from English. But this is an overall tendency; there are countries where the opposite trend is observable. The behaviour, the language choice of the applicants has started to change over two decades. In North-Europe more applicants used English applications, but in the Mediterranean countries the ratio of applications filled in with the first spoken language has increased. In Asia the use of English applications is slowly growing, except in Japan and Korea. Also the reform in 1998 (accepting applications in languages not for publications, this increased the number of translations) had a significant role in this change. Taking into consideration the possible costs and the advantage of the increase in the number of accepted languages for applications this reform raised the cost-effectiveness. Another reform took place in 2008 and had similar overall cost-effectiveness effects.

The EPO system is different from PCT as is stated in Chapter 8. The dynamics in the EPO system was altered from the dynamics in PCT system: in the EPO system the role of English application did not decrease. French, German, Swiss and also Japanese users preferred English applications to the ones in their mother-tongue. The relative success of Euro-PCT routes played a significant role in this. However, the EPO systems includes considerable cost disparities. To check the possible opportunities for improvement three hypothetical alternative language regimes were tested.

This work has many contributions for the present literature and opens many new opportunities for future research. The author uses several books and articles about language policies and policy evaluation and adds many original ideas to make this a unique book. This list may serve as an excellent basis for those who would like to do some research in these fields. Hence the book serves as a good starting point for non-professionals in the field of language policy evaluation. In addition The Evaluation of Language Regimes is essential for the scientific audience, researchers in the field of LPP and policy evaluation too, as it has roots in classical theories from different disciplines but uses new methodology for LPP too. The book also has some practical relevance and should be useful for policy-makers.

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