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Cultural rights for minorities and antidiscrimination policy - a strenuous relationship?

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Abstract

The article discusses the connection between demands for cultural rights for minorities and antidiscrimination policies. It argues, that policies based on group rights mainly address the state and neglect the – often more important – area of private and economic relations. An understanding of antidiscrimination policies, which includes the notion of "reasonable accommodation", may overcome this deficiency.

1 Introduction[1]

Meetings on human rights – issues normally only attract a small and specific audience. Quite often "the usual suspects" attend them, and when times go by, the meetings tend to resemble family-reunions, where usually one prefers to talk about safe themes and avoids subjects, which might cause disputes and family rumours.

Quite often in each family there is a person, who does not always attend to these rules, and therefore has the image of the "black sheep of the family". S/he unsettles these reunions by asking "forbidden" questions or by confronting the collective remembrance of the family with his or her version of the past, which might not easily be reconcilable with collective family myths. Despite being unpopular, the black sheep helps to keep the family going by acting as a corrective - or by simply providing new rumours to talk about

Therefore I decided, that, instead of delivering a traditional academic lecture, it might be more profitable for you and me, if I would take over the role of the black sheep and question some of our normally undisputed ideas about minority rights – if my thoughts are not creative enough to enrich our thinking about the subject they hopefully will at least be provocative enough to give some reason for future family rumours.

[1] The article is based on a lecture given at the Conference "Migration and Minorities", organised by the Austrian League for Human Rights and the Dr. Karl Renner Institut in Vienna on October 30-31, 2004. The style of an oral presentation has been maintained for the printed version.

2 Two strands of thinking

Two strands of thinking characterise the area of minority studies. On the one hand there is the discussion on rights for so called "autochthonous" minority groups – mostly linguistic and representational rights, and on the other hand, the field of antidiscrimination policy and positive action, which in most cases is discussed with reference to immigrant groups. In the first case, minority organisations are the main actors at national national level and the Council of Europe, the UNESCO and the OSCE are the main international fora. In the second case, human rights NGO´s, trade unions and immigrant groups are the main actors at the level of the nation-state, and the ILO, the European Union and – hesitantly - the Council of Europe are the main international actors. Only few experts of one area also have expertise in the other, within the international organisations different departments deal with the subject, and only few activists know the activists of the other "camp". So legal and political developments in the two arenas most often are disparate and unconnected and characterised by mutual ignorance.

This mutual ignorance would not pose a problem, if it were possible to prove, that the two policy-areas do not interfere. But even a short glimpse shows, that this is not the case: Take e.g. the question of language tuition for children: Mother tongue-tuition is seen as an important linguistic right for "autochthonous" minorities, but most often only as a "bridge to the majority language" for children of immigrants. If one adheres to the idea, that each child has to be treated equally, there is no argument for the different approach. Another example: In several bilingual areas the knowledge of both regional languages is a precondition for access to civil service and public employment, or, as in the case of South-Tyrol, there is a quota-system for access to social housing based on ethnicity. These regulations are most probably violating the antidiscrimination-directives of the European Union, and they constitute a discrimination of immigrants, who now do not only have to learn the "majority language", but also that of the regional minority, whereas the knowledge of their mother-tongue is not valued at all. These are only two examples, where minority rights and antidiscrimination policy interfere or even contradict each other, so there is a good reason to question the relationship of both concepts.

3 Traditional minority politics

Let us at first have a look at the type of logic behind the two concepts. Rights of autochthonous minorities are mainly linguistic rights, rights to specific forms of representation (parliamentary seats, advisory councils) and rights to public funding of their organisation. These types of rights are strongly associated with the idea of the nation-state. It is has been the nation state, which has enforced the general use of the "majority language" through its school-system and military service, thus privileging one regional language and intentionally or unintentionally oppressing or even destroying the use of other languages, which lead to the development of linguistic minorities. The idea of specific representational rights also is derived from the concept of the nation-state with its basic paradigm of the congruence of culture and political representation. Giving minorities extra seats in parliament tries to apply this principle in places, where cultural homogeneity was not enforced "successfully", and thus echoes the nation-state paradigm, that cultural homogeneity should be the base for the right to

representation. The same goes for specific funding – here the nation-state accepts its responsibility for the survival of recognised minorities, but only for those, who are historically linked with its own development.

Let us first have a closer look at this concept of linguistic rights. As we all know, forced and even violent assimilation including the prohibition to speak one´s language not only in public, but also in private life, has been characteristic for the Europe of the 19th and most parts of the 20th century. Although fascist regimes have the worst record with regard to the extinction of languages - and often also their speakers - these types of policy can also be found in democratic, socialist or other types of regimes. Meanwhile there is – at least in Europe - common agreement that the state should not interfere in the use of languages in the private realm, although this right is not yet practised everywhere.

Heinz Kloss (1977) has drawn the distinction between "tolerance-oriented" and "promotion-oriented" language rights. The right to speak whatever language one wants to speak in his/her private life is a classical example of a "toleration-oriented" right. "Promotion-oriented" language rights concern the right to use one´s language in the public, before the court, the legislature, in the public school system or the delivery of public services. Kloss argues, that autochthonous as well as immigrant groups should be granted "tolerance oriented rights", whereas "promotion-oriented" rights only should be granted to autochthonous groups, as only they would form a traditional part of the history and identity of a given state.

Interestingly enough, the concept of "the private" and "the public" has never been questioned thoroughly in the literature on linguistic rights. So, although there is common agreement about tolerance-oriented rights in the private sphere, a huge part of the "private realm" never has been discussed by theorists of minority rights: The workplace. Here the general accepted idea is, that the owner of the company has the right to define what language(s) shall be used for internal and external communication. So even members of autochthonous groups – which in reality normally are bilingual – will have to follow the language regime at their workplace even if it – as in most cases – excludes the right to use their minority-language at the workplace. So in reality promotion-oriented rights only concentrate on symbolic promotion, and largely neglect the communicative function of a language in a major realm of everyday life.

As a consequence, the demand for promotion-oriented rights is in most cases exclusively directed at state institutions, although normally – except of lawyers and judges – people spend much more time of their life at the workplace than in a courtroom or are much more often clients of a private than of a public service. Obviously, here we find a strong, but nevertheless wrong, belief in the linguistic competence of the invisible hand of the market.

This imbalance clearly shows the predominance of the *symbolic dimension* in traditional minority-

politics. Traditional minority rights are inseparably linked with the development of nation states and have been granted to those groups, who, although not successful in forming their own, nevertheless succeeded to keep their language alive despite the powers of assimilation and were able to have their demands recognised by the political system. There main aim is not to facilitate communication, but to give *symbolic recognition* to a language (and their speakers) as legitimate part of the historic identity of a given state. As already mentioned, most members of autochthonous minorities are bilingual and fluent in the dominant language of the state they live, which is another sign for the dominance of *symbolic policy* in traditional minority policies.

There is one area, where this argument does not hold: Schooling. As numerous studies have shown, children growing up in a bilingual family have to learn both languages at school to allow them to develop general language fluency. Cut off from one of their mother tongues, they will not be able to develop a high level of competence neither in one nor in the other language. Therefore bilingual education has been established in most areas with a minority population.

But in this area "promotion-oriented" language rights for children from minority families do not stand for themselves, but are a necessary precondition for another, human-rights based set of rights, the right of the child to the best possible education, as it is enshrined in the UN-Convention of the Right of the Child.

If bilingual education for children bilingual families is a precondition for the fulfilment of the human-rights based right of the child to the best possible education, these considerations of course do not only hold true for children from autochthonous minorities, but also for children from immigrant groups. Interestingly enough, the international conventions on minority rights, like e.g. the European Convention for the Protection of National Minorities, exclude children from immigrant families from the right to education in their mother tongue and thus still follow the nationalist path of privileging autochthonous minorities, which also has inspired the writing of Heinz Kloss and other authors, who, instead of focusing on the individual rights of the persons concerned, focus their thinking on group rights vis-à-vis the state.

Specific forms of representation in parliament or advice-councils or special rights to funding pose a similar problem: In a time, when immigrant minorities normally are much larger than autochthonous groups, why should the latter be still privileged with regard to parliamentary representation? Do not immigrant cultures have at least the same impact on cultural diversity as local autochthonous minorities? Should we really still follow the paradigms of 19th century to mange cultural diversity in the 21st?

Summing up, one has to consider two major problems with the traditional approach towards linguistic rights of autochthonous minorities: On the one hand, they are state-centred and highly symbolic, whereas they undervalue the communicative dimension of language by neglecting the question of

language rights at the workplace. On the other hand, their state-centred privileging of autochthonous groups conflicts with a human-rights based understanding of linguistic rights, especially with regard to the rights of children. Although aimed at correcting the assimilative forces of the nation state, they echo its main principle of privileging groups because of their history against others, who even might have better arguments and stronger needs for public recognition of their language.

4 New challenges

But what does this general set-up mean in a time, when we witness the gradual loss of power of the nation state and the transfer of most of its competencies to supranational organisations like the EU? Will the provision of traditional linguistic rights stay unaffected from the demise of the "caring state" (Abraham de Swann), which was characteristic for the development of Europe between 1945–1975? What effects will the ongoing privatisation of public goods and the reduction of social and cultural services have on the position of autochthonous minority groups?

I do not pretend to be able to answer all questions, but I will try to sketch some directions.

In the last twenty years, autochthonous minorities have been successful in safeguarding their rights vis-à-vis the state in international covenants and agreements, whereas in the markets and civil society of their respective country the predominance of the national language (and English) has been growing. Immigrant groups have grown in size and now are much larger than most autochthonous groups.

Minority activists and scholars will have to confront this reality and find new paradigms, which will have to go beyond the state-centeredness of the prevailing arguments. On the other hand, it will not be possible any longer, to restrict the demand for these rights on autochthonous groups or citizens, as immigrants now are as well a normal part of European culture as autochthonous groups and thus will have to gradually be granted the same rights as the autochthonous groups[2].

Within this context, the focus on the preservation of minority cultures has to be questioned. Quite often this approach has led to cultural folklorisation within the autochthonous minority communities,

[2] From a purely economic point of view, it is even hard to argue in favour for the prevalence of national languages – in economic terms, a Europe with one common language – English - would be much more efficient than the language mosaic we find now. Although our economies and societies are still organised according to the principle of national economies and the states safeguard the national languages through the public school system, they will loose much of their national characteristics in the years to come. We have to be aware, that, given the shrinking of state funding and activities, in the long run, the market forces will prevail over cultural considerations: For our children the knowledge of English, and not of their mother-tongue, will be the main professional linguistic demand, and maybe the gentleman or–woman of the future will be characterised as a person who has forgotten how to speak the language of their lullabies.

One may regret this development, but I do not think that it can be halted, and sometimes I doubt if it is even worth a try. One may regret that most people are not able to read the Ilias in Greek, but this regret is a private sentiment and there is no reason for public concern. Would there be reason for public concern, if, say, the Italians or Dutch would given up their mother-tongues in exchange for English? If the decision was to be taken in a democratic procedure, there still would be apt reason for private sentiment, but for a public affair ? I doubt so.

where on the other hand the demand for general intercultural competence in our societies is growing day by day. So instead of functioning as a seedbed for social innovation in intercultural relations, traditional minority policies often have ended up in intellectual and political stagnation. In my understanding the main reason for this stagnation is the ongoing, nationalist belief, that *competence* in a minority language is a sign of ethnic *affiliation*.

Until now, the traditional congruence of minority-membership and use of a minority language only has survived, where there has massive state intervention to safeguard the societal borders between the groups, like e.g. in South Tyrol, which is characterised by a high degree of institutional separation and institutional completeness of the language groups. In the more common situation of bilingualism in one territory the language use of many minority languages has declined, but in the same time the interest of non-minority members in learning the minority language as a second language has risen, wherever, especially since the break down of communist closure, the minority language gained economic importance, e.g. as main language of the neighbour country. This interest is not driven by ideological or symbolic motivation, but by the simple economic motivation to learn a language, which might be useful in one's professional or private life as a tool of communication. Competence in a minority language for those speakers does not mean any ethnic identification or group-membership, but is a tool to get access to the economic and cultural life of another country or region.

I think, that this de-ethnisation of minority languages is the only way to overcome the stagnation of traditional minority politics. For the future it will be necessary to break the link between languages and identity-policy and to foster general bilingualism and intercultural competence instead of "minority membership" and "ethnic cultures". If one wants to e.g. safeguard a minority language, it is not important, that as many group members as possible know and speak the language, it is important, that the language is learned and spoken by as many people as possible. To secure this, the question of linguistic rights at the workplace has to be discussed, and to learn a minority languages has to be made an asset at the labour market, which influences our everyday life to a much higher degree than the state. This also means, that minority-languages, which are not spoken by a large group of people or which cannot be made economically attractive, are not likely to survive, except maybe in some small specialist circles. I fear, that reliance on the state is no realistic remedy to this fate.

But as the state continuously is withdrawing from social and cultural funding, it is also not likely that it will continue to engage in the funding for minority rights. Thus for those interested in linguistic diversity there is also the need to find other sources in the civil society and among companies. Here one can learn from environmentalist groups, who have started to buy debt certificates from states in order to rescue ecological important areas from destruction (*dept-for-nature-swaps*). Why not develop *dept-for-language-swaps*, financed by private funding and administered by a global organisation for linguistic diversity, a kind of "Greenpeace" for linguistic minorities? There are a lot questions for the future, which have to be thought anew, and I fear, that the mainstream of the recent discussion is not very helpful for finding sustainable answers.

But let me now turn to the second part of my lecture, antidiscrimination politics and legislation.

5 Antidiscrimination politics

Antidiscrimination policy has become a major issue at the European level in the recent years. The idea of antidiscrimination legislation goes back to the US-American history of slavery and racial segregation, when in the late 19th century constitutional provisions establishing the same right for all persons to equal protection of the laws and to make and enforce contracts (including employment contracts) were established. In the 1950s the doctrine of "separate but equal" in public schools was declared unconstitutional paving the way for sweeping legislation against racial discrimination. The Civil Rights Act of 1964 (CRA) is the landmark in attempts to eliminate discrimination against African Americans as well as other minorities, and, partly women. The Civil Rights Act of 1964 (CRA) also strongly influence the development of antidiscrimination legislation and Race-Relations-Policy in the UK, which was the first European country to introduce legal provisions against racial discrimination already in the 60s (cf. Cinar 2003, p. 74). Following the two EU-directives against discrimination, antidiscrimination legislation will have come into force in all European member states by the end of 2003.

Antidiscrimination policy and legislation follow a profoundly different approach then traditional minority policy. Starting from the assumption, that differences of origin (ethnic, religious) in most societies lead to discrimination with regard to access to the markets – labour market, housing market, market for goods and services – and the most important societal systems (schooling, social provisions), their main aim is not the safeguarding of cultural difference vis-à-vis the state, but the prevention of individual penalties for this difference in the markets and social systems. Following a market-oriented model of equality of chances, antidiscrimination policy tries to make the markets in reality what they are supposed to be in theory: colour (ethnicity, language, disability etc.) blind. Thus antidiscrimination policy on the one hand conforms with the traditional liberal idea of the replacement of ascribed status by earned status, while on the other hand acknowledging the deficiency of the really existing markets and bringing the state in as regulator. Antidiscrimination policy and legislation is not mainly concerned with identity policy, but with distribution policy and asks for a correction of market-failures by state action and legislation.

So far antidiscrimination policy can be seen as a specific aspect of labour-market and social policy not connected with broader issues of minority policy. Nevertheless, within the last 20 years antidiscrimination legislation and policy has developed from a purely negative, prevention-oriented approach to a much more sophisticated instrument, which might entail much more relevance for minority groups than traditional minority policy does. Two developments have to be mentioned in this context:

a) the British Race Relations Amendment Act of 2000

b) the adoption of the American concept of "accommodation" in the new antidiscrimination legislation in Belgium

a)

As already mentioned, Britain has the oldest tradition of antidiscrimination legislation in Europe. Whereas the Race Relations Act of 1976 makes it unlawful for anybody to discriminate on grounds of race, colour, nationality (including citizenship), or ethnic or national origin (referred to as "racial grounds") and gives individual victims a right of direct access to the civil courts and industrial tribunals for legal remedies against unlawful discrimination, the Race Relations Amendment Act of 2000 extends the RRA 1976 to prohibit discrimination in all functions of public authorities, defining public authorities as anyone whose work involves functions of a public nature.
Further to the extension to public authorities the Act also imposes a positive duty on public authorities to tackle institutional discrimination. All public authorities listed in a schedule to the Act (central and local authorities, regional development agencies and enterprise networks, police and public bodies like the National Health Service or governing bodies of schools etc.) are required to have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good race relations in carrying out their functions. They are expected to consider the implications for racial equality of everything they do. The Commission of Racial Equality (CRE) is given the power to issue codes of practice to provide practical guidance to public authorities on how to fulfil their general and specific duties.

The Race Relations Amendment Act follows the recommendations of the so-called "MacPherson – Report", which thoroughly investigated the murder of the black teenager Stephen Lawrence by a group of four white Skin-heads and the failures of the police to prevent the murder and find Stephen Lawrence killers. A large part of the report deals with institutional racism in the British police forces, which is seen as a major reason for their failures. In the report, Sir William MacPherson, who conducted the review, gives a new understanding of institutional discrimination and institutional racism. It reads:

> *6.34 Taking all that we have heard and read into account we grapple with the problem. For the purposes of our Inquiry the concept of institutional racism which we apply consists of:*
>
> *The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.*
> *It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the*

organisation. It is a corrosive disease" (The Stationery Office 1999).

This definition has revolutionary qualities: It does not define discrimination and racism as a failure of a person, but of the institutional setting, the institutional culture of an organisation and demands, that all institutions scrutinise their procedures with regard to discrimination. In defining institutional racism as the *"collective failure of an organisation to provide an* ***appropriate and professional*** *service to people because of their colour, culture or ethnic origin"* it implicitly states, that neglecting cultural needs does not allow to deliver appropriate services and thus constitutes discrimination. The implementation of the duty to deliver appropriate and professional services for public authorities thus also includes the consideration of cultural or linguistic diversity within service provision – but without the nationalist overtone of similar demands in traditional minority policies. And it includes the need to monitor the position of migrants and members of minorities in the company with regard to income and career development as a main tool to open the private sector to minority employment.

b)

The new law against discrimination in Belgium is the first European antidiscrimination legislation implementing the principle of "reasonable accommodation" with regard to people with disability in Europe. Art 2.§3 of the law[3] defines the lack of providing adequate adaptation of the company environment to the needs of a person with disablement as discrimination, which can be charged at the court.

The concept of "reasonable accommodation" has been developed in the United States as a part of the US Affirmative Action Policy, where in 1953 President Harry S. Truman's Committee on Government Contract Compliance urged the Bureau of Employment Security "to act positively and affirmatively to implement the policy of non-discrimination . . . ." The actual phrase "affirmative action" was first used in President Lyndon Johnson's 1965 Executive Order 11246 which requires federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, colour, or national origin." (Cinar 2003, S.75)

Whereas antidiscrimination legislation does not transcend the traditional legal approach to compensate victims for damages, as well the concept of "positive action" as of "positive duty" imposes the duty on companies and institutions to change their internal structures to prevent discrimination and to adapt to the needs of the persons who (want to) work there. Thus those two approaches have a much stronger link to the position of immigrants and minorities in society than pure antidiscrimination legislation. They entail a paradigm shift from compensating the individual for discrimination or adapting it to overcome unjust barriers to the adaptation of social structures and transfer the responsibility to action from the state to the company. This paradigm shift can be best seen in the area of disablement, where since the 1980s a shift from what Olivier De Schutter has called the "medical model" to the "civil

[3] Act of February 25, 2003 pertaining to the combat of discrimination and to the amendment of the Act of February 15, 1993 pertainin g to the foundation of a centre for equal opportunities and opposition to racism

rights model" can be watched (De Schutter 2002, p.4):

> *"Under the "medical model", the impairment of the person with a disability is seen simply as a consequence of that individual disability, rather than a result of the combination of that disability with an environment which has not adapted itself to the disability. Therefore, the person with the disability must be integrated into the labour market, if possible at all, through "rehabilitation programmes", aimed at transforming the individual rather than a reshaping of the environment (….). Persons with disabilities are seen as having a "medical" problem. (…) Instead, under the "civil rights model", also called "social model", it is not the disabled person, but the environment, which has to adapt: the failure to provide* ***reasonable accommodation*** *is defined as constituting discrimination." (De Schutter/van der Plancke 2002, p.4).*

The concept of „reasonable accommodation", connected with the demand to prove accommodation whenever public money is used, can well be transferred to the area of cultural and linguistic rights and provides a means to overcome the state-centeredness of the prevailing discussions. Whenever all companies employing persons, who see themselves as members of a specific minority, have to reasonably adapt their procedures to the needs of their diverse workforce, the focal point of minority rights might be shifted from the symbolic level to everyday life, and instead of discussing the right to using one´s language at the court, the discussions shifts to the right to use one´s language at the workplace.

Transferred into the area of minority-policy, a civil-rights model of minority policy would not concentrate on the right to e.g. symbolic language use, but on the right to everyday language use and demand from companies, stores etc. to provide reasonable accommodation for bilingualism, granting internal and external use of one's mother tongue as a right. It would place much more concern on the bilingual education of children than on the right to speak a minority language at the court or the right to bilingual road signs. And it would ask for reasonable accommodation of cultural needs within factories or schools and thus put the topic of diversity on the agenda of the places people spend their everyday life, instead of holding it exclusively in the realm of the state.

That is not to say that there is not need for changes at the state level. Administrative state action is shaped by cultural traditions and often neglects the growing diversity of the population. But the accommodation of state structures to cultural diversity has to focus on the quality of services, which is connected with communication, and not on the purely symbolic dimension of language use. And diversity has not only to be seen as a concern for the state, but also has to be implemented in economic life and the civil society by promoting general intercultural competence and multilingualism disconnected from ethnic identity politics. In this sense a new type of non - ethnicist minority policy might develop, which will accept the fact, that the future of our cultural diversity does not lie in nation-state bound concepts of the 19th century, but in a society open to individual diversity and

safeguarding this diversity by a set of individual rights not based on group-membership. Thank you for your attention.

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