Thomas Burri

Models of Autonomy?

Internationales Zentrum für Minderheiten
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Foreword by the Vice-President of Convivenza

You hold in your hands, dear reader, the second book of the Convivenza Foundation series. The first book was a collection of articles by eminent international minority experts, which was launched for the inauguration of the Foundation; with this second book Convivenza lives up to its ideal of promoting new, innovative ways of managing diversity.

Linguistic-cultural or religious autonomy and other forms of federal organization are particularly appropriate to promote the harmonious coexistence of peoples. *When* and *in what ways* is autonomy appropriate, though? These are the questions that Thomas Burri seeks to answer in his doctoral dissertation. He approaches the topic of "Models of Autonomy" in an innovative way, daring a fresh look at old problems and questioning the basics without prejudice. His original idea of a model of autonomy wraps up the particular with the general, while avoiding any kind of paternalism – "Sloterdijk's ironic pitfall" which lurks for any author coping with minority situations. Dr Burri's study crosses borders, in the literal and the figurative sense. We learn from French Polynesia, a place about as remote from Europe as it gets – but nonetheless closer than expected – and from the German minority in Hungary, which has been drowsing in the oversize shadow of the Hungarian community abroad.

Above all, Dr Burri's study is a testimony to international constitutional law. We have known for some time now that international and constitutional law can no longer be separated: international law evolves with constitutional law, while constitutional law is informed by international law. Dr Burri researches this interdependence using the interdisciplinary, holistic approach that is characteristic of modern international legal scholarship and that we seek to foster at the Institute for Public International and Foreign Constitutional Law at the University of Zurich. The results are highly encouraging. Moreover, Dr Burri's refreshing style shows us that academic legal writing need not necessarily be insipid or overly technical. That being so, the book is a highly recommended read for all those involved in nation building or minority protection and promotion – or for those simply curious about what is going on beyond their own province.

In the meantime, Convivenza continues its efforts to engage minorities and majorities in dialogue as well as further authors in the Convivenza Foundation series.

Prof. Daniel Thürer
Zurich, 1 December 2009

For Barbara

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Zurich, May 2009

Summary contents

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List of abbreviations

AJDA	*Actualité juridique de droit administratif*
AJIL	American Journal of International Law
ASIL Insights	American Society of International Law Insights
art.	article or articles (as the case may be)
BC	before Christ
BGBl.	*Bundesgesetzblatt*
CEP	*Centre d'expérimentation nucléaire du Pacifique*
CETS	Council of Europe Treaty Series
Civil Rights Covenant	International Covenant on Civil and Political Rights (see bibliography)
Constitution	*Constitution de la Cinquième République* or the Constitution of the Republic of Hungary (as the case may be, see bibliography)
Declaration	United Nations Declaration on the Rights of Indigenous Peoples or United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (as the case may be, see bibliography)
Declaration on Minorities	United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (see bibliography)
Doc.	Document
EC	European Community or European Communities (as the case may be)
ECR	European Court Reports
EC Treaty	Treaty Establishing the European Community, consolidated text ("the Nice Treaty"; see bibliography)
ed.	editor
eds	editors
EJIL	European Journal of International Law
EL Rev	European Law Review
EU	European Union
ff.	following pages
FN	Footnote
Framework Convention	Framework Convention for the Protection of National Minorities (see bibliography)

Friendly Relations Declaration	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (see bibliography)
GAOR	General Assembly Official Records
HJIL	Heidelberg Journal of International Law (*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*)
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJMGR	International Journal on Minority and Group Rights
ILO	International Labour Organization
JEMIE	Journal on Ethnopolitics and Minority Issues in Europe
JO	*Journal officiel de la République française*
Language Charter	European Charter for Regional or Minority Languages (see bibliography)
Minority Act	Act on the Rights of National and Ethnic Minorities (see bibliography)
Official Journal	Official Journal [of the European Union]
Original Minority Act	Act on the Rights of National and Ethnic Minorities (before the amendment in 2005; see bibliography)
OSCE	Organization for Security and Co-operation in Europe
p.	page or pages (as the case may be)
para.	paragraph or paragraphs (as the case may be)
RD publ.	*Revue du droit public et de la science politique en France et à l'etranger*
Regio	Regio – Minorities, Politics, Society
Rev. jur. polynésienne	*Revue juridique polynésienne*
RFDA	*Revue française de droit administratif*
RFDC	*Revue française de droit constitutionnel*
SCOR	Security Council Official Records
Status Act	Act on Hungarians Living in Neighbouring Countries
Statute 1977	*Loi relative à l'Organisation de la Polynésie française* of 1977 (see bibliography)
Statute 1984	*Statut du territoire de la Polynésie française* of 1984 (see bibliography)
Statute 1996	*Statut d'autonomie de la Polynésie française* of 1996 (see

	bibliography)
Statute 2004	*Statut d'autonomie de la Polynésie française* of 2004 (see bibliography)
Statute of New Caledonia	*Loi organique relative à la Nouvelle Calédonie* (see bibliography)
Supp.	Supplement
SZIER	*Schweizerische Zeitschrift für internationales und europäisches Recht*
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
Wall opinion	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion (see bibliography)
WiRO	Wirtschaft und Recht in Osteuropa
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law)
ZöR	*Zeitschrift für öffentliches Recht*
ZSR	*Zeitschrift des Schweizerischen Rechts*

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Introduction

In summer 2008, two pieces of art vied for attention in the entry hall of the new museum of modern and contemporary art in Bolzano, the Museion. Martin Kippenberger's oversize crucified frog, which loomed above the visitors entering the Museion, caught the eye. It had caused an outburst of protests by South Tyrolean Catholics, when the museum had opened on 24 May 2008. The attention of the more perceptive visitor, however, was drawn towards a subtler, more thought-provoking project vis-à-vis the frog: the Pneumatic Parliament. A small plastic model of a transparent parliament was exhibited. Peter Sloterdijk's idea for the project was ingenious. He had devised an inflatable parliamentary building that would be dropped by airplane and that would unfold by itself upon touching the ground. The infrastructure for a functioning democracy could be established within less than a day wherever it was needed. Parliamentary assemblies could be held in remote or inaccessible regions. According to the project, the Pneumatic Parliament will be needed in up to 100 failed States over the coming 20 to 30 years. Countries that are "Outposts of Tyranny" or "Sponsors of International Terrorism" would be democratized instantly. All you need to do is drop the hall. It is self-sustaining and hosts up to 160 members of parliament.[1]

Sloterdijk's venture is of course sarcastic. Yet, strip the sarcasm away and the Pneumatic Parliament still delivers a message that is important for this study: that the quest for models is a risky business. Universal models of any kind – be they models of democracy or of autonomy, architectural or metaphysical models – smack of cultural imperialism. Moreover, any model that purports to be universally applicable runs the risk of disregarding the local circumstances. This study undertakes to heed Sloterdijk's message. It attempts to do so by developing a functional, systemic approach to models of autonomy. Put simply, autonomy régimes are perceived as answers to specific minority issues. They are functional solutions to particular conflicts. If an autonomy régime has a proven track record in resolving one or more issues, it is considered to be a model of autonomy for similar situations. Two case studies are conducted to apply this conception. They yield concrete proposals of model traits of the examined autonomy régimes. With this approach, Sloterdijk's ironic pitfall is avoided. In doing so, this study obviously walks a tightrope between the universal and the specific. It is

[1] The information and the citations in this paragraph are taken from the leaflet INTERNATIONAL SOCIETY OF DEVELOPMENT AND DEMOCRACY EQUIPMENT, *Instant Democracy: The Pneumatic Parliament*, 2008, which was distributed at the exhibition in the Museion – Museum of modern and contemporary art in Bolzano, Italy, in summer 2008. [On file with the author, original in German, translation by the author]. Some photos and information on the Pneumatic Parliament in German are available at GIO - GLOBAL INSTANT OBJECTS (MUELLER VAN DER HAEGEN and JORDAN), <http://www.g-i-o.com>.

this balance act between the general and the particular that is also the underlying theme of this study.

The conceptual basis is laid in chapter 1. First, the basic terms are discussed (autonomy and model). The focus is on the international legal dimension of autonomy and on efforts made mostly by international lawyers to develop models of autonomy. From these efforts, the conceptions of autonomy régimes and of models of such autonomy régimes arise naturally. In chapters 2 and 3, two autonomy régimes are scrutinized for model traits: the autonomy régime of the German minority in Hungary (chapter 2) and the autonomy régime of French Polynesia in France (chapter 3). Each of the two case studies follows the same pattern: the autonomy régime as such and the legal setting are first examined and explained; next, the factors that have an impact on the autonomy régime are analysed; then, based on this analysis, model traits of the autonomy régime are proposed. To conclude, the implications of the case studies for other autonomy régimes are discussed.

The core arguments of this study are about the model traits derived *separately* from each of the two autonomy régimes examined. These model traits are discussed at the end of each case study and in the concluding chapter. The possibilities for common arguments deduced from *both* case studies together, however, are limited. Indeed, the two case studies do not share much common ground: the case of French Polynesia is about a territorial autonomy régime of several joined archipelagoes in the South Pacific, which were originally inhabited by indigenous tribes; the case of the German minority in Hungary is about a cultural autonomy régime of a traditional, dispersed minority and about the personal approach employed for this régime. Due to the fundamental differences between the two cases, the prospects for insights based on comparisons of the two cases are naturally limited. Indeed, it would be tantamount to stepping into Sloterdijk's ironic pitfall to make simple cross-inferences or to deduce simple conclusions from both cases together. What links the two case studies, then? The link is established by the approach of models of autonomy that is developed in this study and that is applied to both cases. Thus, the disparity between the cases examined is also the greatest strength of this study: it is a testimony to the potential of the approach developed.

Despite the differences between the two cases examined, one core argument can be made nevertheless, because it is rooted in the approach chosen in this study and corroborated by both case studies. The argument claims that an autonomy arrangement should be designed in a way so as to address the specific issues a minority faces. As this argument relies on the conception of models of autonomy that is developed in this study, it can only be briefly stated here. However, the argumentation becomes obvious

throughout the following chapters of this study. The argument is then summed up in the concluding chapter.

Besides validating this argument and working out models of autonomy régimes, this study serves to clarify two broader points (i and ii), which are usually not addressed with the necessary clarity. These points guide us through the following chapters. As a first point (i), this study provides clarification as to the way that autonomy régimes are linked to the State as a whole of which they form part. Autonomy régimes are closely entwined and intricately knitted together with the State as a whole. French Polynesia is, for instance, similar to a French *département* or *région*. French Polynesia thus cannot be properly assessed without understanding the French unitary State. It seems that any particular quality of an autonomy régime must be seen first and foremost through the prism of the State as a whole. The entire State – that is the State and its other regional and local branches, apart from the autonomy régime examined – and its unique structure primarily determine what an autonomy régime looks like. That is why any deduction and inference beyond the State concerned, i. e. for another State, must be treated with caution. However, the complicated vertical and horizontal correlation between the State as a whole and autonomy régimes also provides opportunities, notably research opportunities. The correlation is the reason why autonomy régimes have not attracted wider international attention. The complicated correlation makes easy assessments by outsiders (such as international lawyers rooted in other jurisdictions) impossible, as a deep understanding of the specific State and its legal tradition and culture is needed for an assessment. Hence, crossover thorough analyses of autonomy régimes by international lawyers remain the exception. However, to those who are not averse to bringing in the input required a fertile field of study is opened up.

As a second point (ii), this study clarifies the specific aspect of minority protection of autonomy régimes. This study sheds light on the features of autonomy régimes that serve to protect minorities, have this effect, or conversely impede effective minority protection. This clarification is useful, because the features of autonomy régimes that relate to minorities are often enshrouded, notably by the vertical and horizontal correlations between States as a whole and autonomy régimes. As an example, think of the municipality, which may be part of an autonomy régime as well as of the State and the existence of which may, in concrete circumstances, have the effect of protecting a local minority. Sometimes, constitutional or administrative principles and structures, such as the *unité et indivisibilité* of the French Republic, may also obscure the view on minorities. The position of a minority in a legal order is then clouded.

When case studies are conducted to prove a hypothesis, the selection of the cases is crucial. The choice of the cases to be examined often predetermines whether the hypotheses later proves right or wrong. With the approach developed in this study, though, basically any autonomy régime could be examined on model qualities. The only condition is that an autonomy régime works. It must have been stable for some time, else it would not make much sense to look for model qualities as they are defined in this study. That is why the case of Kosovo, for instance, would probably yield little insight, at least for the moment. The autonomy régimes of the German minority in Hungary and of French Polynesia, however, have been more or less stable for some time. Despite periodic revisions, their legal framework remains rather secure. This is one reason why they were chosen as cases for this study. The other reasons relate to each case separately. The autonomy régimes established in Hungary have been widely praised as progressive and exemplary. It therefore makes sense to analyse in detail to what extent and in which regard an autonomy régime *à la Hongroise* (in our case the autonomy régime of the Hungarian German minority) could serve as a model. French Polynesia has hardly attracted any international attention so far. The geographical isolation of French Polynesia, the context of decolonization, and the indigenous dimension also promise insights.

By now, it should be clear that this study relies on a framework and a basic assumption. Human rights and the principles of rule of law and democracy form the framework. The entire discussion that is led in this study (about the functions of autonomy régimes, about models of autonomy, etc.) relies on this framework of democracy where human rights are generally respected. Of course, the functional approach developed in this study could also be applied to situations of non-democratic rule – and it would probably yield interesting results. Yet, this is not the subject of this study. The basic assumption concerns group rights. The study does not call into question group rights as such. While aware that the theory on group rights is evolving and subject to debate, this study without further discussion assumes that the theory on group rights generally holds water. This is not to say that no valid objections to group rights can be made or that they would not merit further discussion. However, this is not the place for such discussions. The group rights assumption is simply made, because one can hardly work with autonomy régimes without accepting a minimum of group rights.

So, let us run the gauntlet, while keeping an eye out for Sloterdijk's ironic pitfall – let us hope, indeed, that at the end of our circuit we will *not* find a Pneumatic Autonomy.

Chapter 1 The Anatomy of Autonomy: Terms and Models

Chapter 1— In which the terms autonomy and model are explored; in which an alternative, broad conception of autonomy is proposed; in which the notion of a model is used to explain this study's approach; in which it is argued that a model of autonomy implies a specific feature of an autonomy régime which successfully deals with one (or more) specific issue(s) and that such a feature of an autonomy régime is a model trait which is fit for export; and in which it is claimed that particular attention must be paid to the limits of these model traits.

This chapter outlines what has been done before regarding autonomy and models. It also lays the conceptual basis of what is going to be done in the following chapters of this study. Emphasis is laid first on the notion of autonomy and then on the idea of a model.

The chapter begins by looking at the term autonomy in general. First, the meanings of the term autonomy that are relevant for this study are singled out (section 1.1). Two aspects emerge as central from this discussion: the régime aspect (the multi-dimensional links between an autonomy arrangement and the structure of a State) and the aspect of minority protection. With this twin focus in mind, it is examined next how general international law deals with the term autonomy (section 1.2). The analysis of the principle of self-determination, the law on minority protection, the law relating to indigenous peoples, and the principles on self-government reveals that general international law defines a framework that must be observed by those who design autonomy régimes. This framework depends on the concrete circumstances (the specific State, region, etc.). It is flexible to some extent and leaves some space for manoeuvres.

In section 1.3, the interpretation of the notion of autonomy in academia (within the limits of the term identified in section 1.1) is explored. Then, an alternative way of understanding autonomy is proposed, because the doctrine regarding autonomy is not yet consolidated. This conception of autonomy régimes is a systemic answer to what autonomy is and is adopted with a view to devise models and analyse the cases in the following chapters. According to this conception, an autonomy régime is a tool to ensure diversity in terms of the identity, voice and resources of a minority.

The last section of this chapter examines the concept of a *model* of autonomy (section 1.4). Previous studies, which implicitly or explicitly examined autonomy under the

angle of model characteristics, are scrutinized. These studies attempted to deduce universally valid principles, but gave only little reflection on what a model actually is or should be. A more nuanced approach, which is grounded in a functional perception of autonomy régimes, is then proposed. It is argued that one should only speak of a model, when an autonomy régime addressed and solved one or more problems. This duo of a problem and its successful solution, the argument submits, qualifies an autonomy régime as a model. However, the quality of being a model is only attributed within the limits of this duo of problem-solution, not beyond or in general. Hence, the quest for models of autonomy undertaken in this study is essentially a quest for model *traits* of autonomy régimes. The chapter then concludes with some further observations (section 1.5).

1.1 The concept of autonomy

The term autonomy has many meanings. This section identifies the dimensions of the term that are relevant for this study. Our starting point is the definition of autonomy in the New Shorter Oxford English Dictionary. The term autonomy obviously comes from Greek: *auto* ('self') and *nomos* ('law') combine to *autonomia*. It means "having its own laws" according to the New Shorter Oxford English Dictionary.[2] Apparently, the idea of freedom is predominant in all sub-meanings of the term. Autonomy suggests that one is free to manage his or her own affairs. As such the term has a liberal connotation. Autonomy may have a meaning for an individual as well as for a community. For the individual, autonomy may have various implications. It may be discussed from several perspectives, in particular from a philosophical (e. g. autonomy as a result of the free will of the individual) or a legal (e. g. autonomy resulting from human rights) perspective. For this study, the autonomy of the community, not the individual, is in the focus, while it is of course acknowledged that the autonomy of groups and the autonomy of the individual are interrelated to some extent.

The law of the community

"Having its own laws" hints at two collective dimensions. It implies (i) that a connection to the law ("laws") is inherent to the term autonomy. Thus, the Oxford dictionary adds that autonomy is "[t]he right or condition of self-government (frequently only in specified matters) of a State, community, institution, etc."[3] In accordance with this qualification, autonomy in the sense relevant here shall refer to a régime that is linked to the State as a whole, for established within the latter (although in principle the term could also relate to other actors, such as inter- or supranational organisations). This *régime* element is an important aspect for this study. We shall see that an autonomy régime in this sense is intricately intertwined with the structure of the State as a whole. This entwinement, which has a vertical and a horizontal dimension, is the reason why the outfit of an autonomy régime depends to a large extent on the structure of the State as a whole. One regular reflection of this entwinement between the State and an autonomy régime is that the autonomy régime normally has got its own place in the constitution of the State, i. e. a place apart from other regional and local entities that are also a part of the State as a whole. Due to this unique entwinement between the entity of the State and autonomy régimes, moreover,

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[2] Brown (ed.), *The New Shorter Oxford English Dictionary*, vol. 1, Oxford, Clarendon Press, 1993, p. 151 and 153.

[3] Brown (ed.), *The New Shorter Oxford English Dictionary, supra* FN 2, p. 153 [brackets added].

not necessarily the same thing is meant, when two persons refer to an autonomy régime. In fact, a whole range of different situations is commonly associated with some form of autonomy: Quebec and the First Nations in Canada; parts of Bolivia; the Aborigines in Australia; the Maori in New Zealand; Tibet and other parts of China; parts of India, Iraq, or Sudan; the Kurds in Turkey; many territories in the Balkans (e. g. Republika Srpska or Kosovo); populations in Eastern Europe (in Hungary, Romania, the Baltic States, etc.) and in Western Europe (for instance, the Basques in Spain and France; Corsica in France; Wales, Scotland, and Northern Ireland in the United Kingdom; the Sami in the Nordic countries); to name just a few. From this (selective) tour around the globe it appears that autonomy régimes exist, no matter what the form of the State (federal, unitary, or other). Thus, the term autonomy covers a wide variety of situations. No wonder then that that the explanation in the Oxford dictionary does not say anything about the extent and the substance of "self-government": it occurs "frequently only in specified matters."[4] Autonomy understood in this sense appears as an umbrella notion: a notion under which many different structures find a place. The term simply seems to refer to a structure – an autonomy *régime* – that has its roots in the law of the State as a whole. The basic purpose of this structure is to provide some space of liberty.

Ownership of the community

With "having its own laws" the Oxford dictionary also takes into account ownership (ii). The sense is that the community that creates the laws, by this very fact, owns them. One might see the idea of self-determination of the community through ownership in this. Furthermore, in this feature (a community determining its own fate) another element that plays an important role in this study is discernible: autonomy regards (more or less) compact communities and mostly minorities within States. This correlation between autonomies and minorities (be they national minorities, indigenous populations, peoples, etc.) is also apparent in the above range of situations where autonomy plays a role. Most of the examples mentioned concern minorities. Indeed, it is conceivable that by means of the creation of some space of liberty to shield the minority from the majority, autonomy appears as a means of minority protection. However, a different perspective is possible, too: autonomy is not only a structure that creates space for the minority and protects it, but also a structure that shields the majority from the minority, for instance when a minority strives for secession. This perspective contrasts with the belief that to grant autonomy to a minority is necessarily a first step towards secession (i. e. the belief of a rampant nature of autonomy). These perspectives are briefly juxtaposed here to show that

[4] Brown (ed.), *The New Shorter Oxford English Dictionary*, *supra* FN 2, p. 153.

autonomy régimes may be apprehended in different ways. In this study, a functional perspective of autonomy is explored (see below section 1.4). For now, we retain only that one understanding of autonomy establishes a connection between autonomy and minority protection. This connection is one of the cornerstones of the understanding of autonomy in this study. Hence, two dimensions of autonomy (the correlations with the structure of the State as a whole (i) and with some form of minority protection (ii)) are the basis of this study. When we refer to an autonomy régime, these two dimensions are implied.

Two examples of autonomy where these two dimensions are typically involved spring to one's mind: territorial and personal autonomy régimes. In the first case, the régime is based on a territory within a State, which belongs to a minority. In the second case, personal characteristics of the members of the minority (their ethnicity, nationality, language, etc.) – the borders in the mind rather than the territorial borders[5] – serve as a basis for the régime. In both cases, autonomy is correlated with the structure of the State as a whole and with minority protection. Other classifications (such as cultural, financial, legislative, or administrative autonomy) may, but need not necessarily be based on the two dimensions.

From this overview of what autonomy generally means two points should be retained. Firstly, autonomy is construed in this study in the sense of an autonomy régime. In this interpretation autonomy is linked in form to the State as a whole and in substance to minority (or group) protection. Secondly, autonomy is still a broad term that covers a wide variety of cases. In fact, the variety is so wide that the term remains quite vague. Further clarification is therefore provided (in section 1.3). But first, let us turn to international law and see what it says about autonomy.

[5] EIDE, GRENI, and LUNDBERG, 'Cultural Autonomy: Concept, Content, History and Role in the World Order', *in* Suksi (ed.), *Autonomy: Applications and Implications*, The Hague, Kluwer, 1998, p. 251-276, p. 252.

1.2 Autonomy and international law

This section analyses general international law regarding autonomy. The focus is on the four domains of international law that are most relevant to autonomy:[6] self-determination (a), minority protection (b), indigenous peoples (c), and self-government (d). The section concludes by summarizing the implications of international law for autonomy (e).

It is still true that "'[a]utonomy' is not a term of art […] in international law"[7] – but only to a certain extent. It is not true, when understood in the sense that positive international law does not use the term. To the contrary, some documents explicitly mention autonomy. In 1921, the Commission of Rapporteurs in the Åland island dispute referred the Åland islanders to a statute of autonomy within Finland (instead of allowing them to join Sweden).[8] The "Badinter Commission" in its opinion no. 1 made reference to "communities that possess a degree of autonomy" in "federal-type State[s]".[9] UN Security Council Resolution 1244 of 10 June 1999 acknowledged that Kosovo was entitled to autonomy within Serbia: "[r]eaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo".[10] The UN Declaration on the Rights of Indigenous Peoples of 13 September 2007 in art. 4 recognizes *expressis verbis* the right to autonomy of indigenous peoples.[11] These examples show that autonomy indeed is a *term* of positive

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6 For a general study of group rights in international law, see Alston (ed.), *Peoples' Rights*, Oxford, Oxford University Press, 2001 (in particular ALSTON, 'Peoples' Rights: Their Rise and Fall', *in* Alston (ed.), *Peoples' Rights*, Oxford, Oxford University Press, 2001, p. 259-293, for the development of group rights). MINORITY RIGHTS GROUP INTERNATIONAL, <http://www.minorityrights.org>, provides a very useful overview of international law regarding minorities and indigenous peoples (with court cases, legal materials, etc.).

7 HANNUM and LILLICH, 'The Concept of Autonomy in International Law', (1980) 74 AJIL (4) 858 [brackets added].

8 COMMISSION OF RAPPORTEURS, The Åland Island Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, 1921, League of Nations Council Doc. B7/21/68/106 VII, April 1921. On the first commission, which advised on the jurisdiction of the League of Nations in the Åland island dispute (the "Commission of Jurists"), see DIGGELMANN, 'The Aaland Case and the Sociological Approach to International Law', (2007) 18 *EJIL* (1) 137 (in particular on the role of Max Huber as a member of the commission).

9 ARBITRATION COMMISSION OF THE CONFERENCE ON YUGOSLAVIA (BADINTER COMMISSION), Opinion no. 1, 1991, 31 ILM 1494 (1992), para. 1.d (both citations) [brackets added].

10 UN SECURITY COUNCIL, Resolution 1244, 1999, S/RES/1244, SCOR 54th Year 32, preamble [brackets added]. The future status of Kosovo was left open, though, in Resolution 1244, leaving the status decision to the political process (DE WET, *The Chapter VII Powers of the United Nations Security Council*, Oxford, Hart, 2004, p. 330).

11 UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, 2007, UN Doc. A/RES/61/295, GAOR 61 session supp. 49 vol. 3, 15, art. 4: "Indigenous peoples, in exercising their right to

international law. Conversely though, the statement that autonomy is not a term of art proves to be true in the sense that there is often not much "art" behind the term. The outlines of the term are unclear and its content remains vague, because no international legal definition is commonly agreed to.[12] It would be wrong, though, to say that autonomy is a concept without any substance in international law. International law does provide guidance; but it is indirect guidance: international law sketches the outlines of autonomy régimes by means of terms and concepts other than autonomy. These terms and concepts give substance to many constituent elements of autonomy régimes. In particular the following domains of international law are relevant in this regard: the principle of self-determination, international and regional minority protection, and the rules on indigenous peoples and on self-government.

a) Self-determination

We have told the story of self-determination in full elsewhere.[13] Suffice it here to explain the relevance of the principle of self-determination for autonomy. The standard ground on which the principle of self-determination is applied is the process of decolonization. The Friendly Relations Declaration of 24 October 1970, which is the most detailed document on the principle of self-determination, states:

> *"The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."*[14]

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self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

12 Hannum and Lillich indeed add: "Autonomy is not a term of art or a concept that has a generally accepted definition in international law." (HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 858).

13 THÜRER and BURRI, 'Self-determination', *in* Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition), Oxford, Oxford University Press, 2009. Another recent comprehensive study on self-determination is, for instance, ROSSKOPF, *Theorie des Selbstbestimmungsrechts und Minderheitenrechts - Fortentwicklung der Gruppenrechtstheorie im Staats- und Völkerrecht*, Berlin, Berliner Wissenschafts-Verlag, 2004. See also Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, Martinus Nijhoff, 1993; Danspeckgruber and Watts (eds), *Self-Determination and Self-Administration*, London, Lynne Rienner Publishers, 1997.

14 UN GENERAL ASSEMBLY, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970, Resolution 2625 (XXV), UN Doc. A/8028, GAOR 25th session supp. 28, 121, principle V.

According to this clause, the peoples entitled to self-determination in decolonization could opt for an autonomy régime within the metropolitan State. Such an autonomy régime would amount to "any other political status". Thus, many French overseas territories are for instance constituted as autonomy régimes within France today.[15] This is the relatively obvious application of the principle of self-determination within decolonization. It is important to note, however, that the principle of self-determination may also apply outside the context of decolonization. The application of the principle is not, according to the Friendly Relations Declaration, *per se* limited to decolonization. Thus, the principle is also applied in cases that have little or nothing to do with decolonization, such as Palestine[16] or Kosovo[17].

Indeterminacy

The content of the principle of self-determination remains indeterminate, no matter whether it is applied in decolonization or outside thereof. This becomes evident in the *Wall opinion:* though the International Court of Justice found that the Wall built by Israel partly on Palestinian territory violated the self-determination of the Palestinian

[15] Autonomy within *another* State, which had emerged from decolonization, was an alternative, too. Thus Eritrea, for instance, initially enjoyed autonomy within the federation with Ethiopia until 1962. See for further details the UN General Assembly Resolution that laid out the details of the federation: UN GENERAL ASSEMBLY, [Resolution on Eritrea], 1950, Resolution 390 (V), GAOR 5th Session Supp. 20, 20 (see CRAWFORD, *The Creation of States in International Law*, 2nd edition, Oxford, Clarendon Press, 2006, p. 402-403, and THÜRER and BURRI, 'Secession', *in* Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition), Oxford, Oxford University Press, 2009, para. 14.

[16] The International Court of Justice in the *Wall opinion* applied the principle of self-determination to the Palestinian people: International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 136 (2004), para. 118: "the existence of a 'Palestinian people' is no longer in issue" and "those rights [of the Palestinian people] include the right to self-determination [...]" [brackets added]. This application of the principle of self-determination beyond decolonization is not self-evident, as Judge Higgins pointed out in her separate opinion in the Wall case: "The Court has for the very first time, without any particular legal analysis, implicitly also adopted this second perspective" [i. e. the post-colonial perspective of self-determination] (ICJ Reports (2004), p. 207, para. 30). Note that the UN General Assembly has always had the tendency to expand the scope of the principle of self-determination: the applicability of the Friendly Relations Declaration (*supra* FN 14) was not limited to decolonization issues and self-determination applies to indigenous peoples, even if there is no relation to decolonization (see UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, *supra* FN 11, art. 3).

[17] The Independent International Commission on Kosovo applied self-determination to the population of Kosovo without further discussion (INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, 'The Kosovo Report', 2000 (available at: <http://www.reliefweb.int/library/documents/thekosovoreport.htm>), section 6, para. 48: "Arguably, it [the strong moral and political duty on the part of the international community] extends to the realization of the right of self-determination for the people of Kosovo" [brackets added].)

people,[18] it remains unclear why and how exactly the Wall violates the principle.[19] This substantial indeterminacy of the principle of self-determination, exemplified by the *Wall opinion,* is particularly relevant for autonomy. Indicating autonomy indirectly as one option among others ("any other political status"), the principle of self-determination does not give any further hints as to what this means or how it is to be implemented. Outside decolonization in particular, self-determination becomes even more insubstantial. Here, "self-determination is normally fulfilled through *internal* self-determination".[20] Yet, internal self-determination, while possibly hinting at autonomy, remains an elusive concept. Despite the efforts of many scholars to fill the concept with content[21] and in spite of concrete applications such as Kosovo, it is unclear what the substantial imperatives of internal self-determination are (that is apart from the imperative that the State must, in principle, not be dismembered based on the principle of self-determination). Thus, the implications of internal self-determination for autonomy remain equally doubtful.

Mind the point that is made here, though: the indeterminacy of the principle of self-determination does not mean that the principle as such is useless. To the contrary, the principle is useful. But the point is that it is useful only as an indicator of a general

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[18] *Wall opinion*, *supra* FN 16, para. 122: "That construction, along with the measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right." Note that the Israeli-Palestinian conflict in the 1980ies caused most of the reflections on autonomy – the subject was "in vogue" according to HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 858. Notwithstanding these reflections, the *Wall opinion* exclusively deals with the legality and the legal consequences of the wall built by Israel. Although given in a setting of autonomy, the *Wall opinion* did not address the autonomy of the Palestinian people as such.

[19] See the argument made by Judge Higgins in her separate opinion to the *Wall opinion* (separate opinion of Judge Higgins, ICJ Reports (2004), p. 207, para. 28).

[20] Supreme Court of Canada, *Reference re Secession of Quebec*, 2 S.C.R. 217 (1998), para. 128 [emphasis in original].

[21] Among many FRANCK, 'The Emerging Right to Democratic Governance', (1992) 86 AJIL (1) 46-91; CASSESE, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995; ERMACORA, 'Autonomie als innere Selbstbestimmung', (2000) 38 *Archiv des Völkerrechts* (3) 285-297 (who rejects the idea that autonomy is a manifestation of the internal right to self-determination and argues that only a federal State-like structure is in compliance with the principle of internal self-determination [p. 296]; in my view Ermacora's argument is not entirely convincing, because it relies heavily on terminological distinctions, such as "people" and "minority"); or KLABBERS, 'The Right to be Taken Seriously: Self-Determination in International Law', (2006) 28 *Human Rights Quarterly* (1) 186-206. See also THÜRER and MACLAREN, 'In and Around the Ballot Box: Recent Developments in Democratic Governance and International Law Put into Context', *in* Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law / La promotion de justice, des droits de l'homme et règlement pacifique des conflits par le droit international, Liber Amicorum Lucius Caflisch*, Leiden, Koninklijke Brill, 2007, p. 549-568, who argue in favour of a legal entitlement of societies to democratic governance (p. 568; not necessarily based on self-determination, though).

direction, as a trigger that initiates, and as a catalyst that facilitates a process. Apart from that, the principle of self-determination does not provide much content (especially so outside decolonization). Rather, for content it relies on other norms and rules, which take up its spirit and give it a more tangible form. Other such norms and rules do exist. They may be of international legal nature, which is elaborated below, or of constitutional nature, which illustrated in the case studies. It is therefore important to see self-determination in the concrete legal context. Thus, it can only be retained that, while an autonomy régime may be the final outcome of a process that was initiated by the principle of self-determination and the establishment of the autonomy régime is therefore at least partly owed to self-determination, the principle alone does neither determine the substance nor the form of this autonomy régime.[22] In short, the principle of self-determination acts mainly as a trigger that can prompt autonomy régimes into existence. But self-determination does not make an essential contribution to the substance of autonomy régimes. For the content of autonomy, other rules need to be considered. These others rules in particular include the rules on minority protection.

b) Minority protection

The international rules on minority protection may be the liquid that fills up the vessel of self-determination.[23] The law on minorities covers constellations that are similar

[22] An early draft of the Declaration on the Rights of Indigenous Peoples, *supra* FN 11 (contained in Hannum (ed.), *Documents on Autonomy and Minority Rights*, Dordrecht, Martinus Nijhoff, 1993, p. 102-112), supports this perspective. Here the link between self-determination and autonomy is explicitly established; but it is left open what the content is: "Indigenous peoples have the right to self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. *An integral part of this is the right to autonomy and self-government.*" [Emphasis added] For further discussion of the autonomy of indigenous peoples, see *infra* part d).

[23] One could even say that minority protection is a means to contain the explosive potential of self-determination, for the rules on minority protection essentially amount to self-determination bar the external aspect (KOSKENNIEMI, 'National Self-Determination Today: Problems of Legal Theory and Practice', (1994) 43 ICLQ (2) 257: "UN law sought to domesticate self-determination by limiting the category of 'abnormality' to colonial situations and by treating self-determination claims as claims for the advancement of the human rights of the individual members of various national groups." [Cited without reference]) For an excellent overview of the challenges that minorities and the law relating to them face, see THÜRER, 'Minorities and Majorities: Managing Diversity - a fresh look at an old problem', (2005) 15 SZIER (5) 659-663. The article is the outcome of an expert meeting on minority issues in 2005 and serves as a "charter" for the newly established foundation "Convivenza", which is active in the domain of minority protection (for further information, see THÜRER, 'Convivenza - Über ein nicht spektakuläres, aber innovatives kleines Projekt des Minderheitenschutzes', *in* Fischer-Lescano, Gasser, Marauhn, and Ronzitti (eds), *Frieden in Freiheit, Peace in liberty, Paix en liberté - Festschrift für Michael Bothe zum 70. Geburtstag*, Baden-Baden, Nomos/Dike, 2008, p. 1199-1211, and CONVIVENZA - INTERNATIONAL CENTER FOR MINORITIES, <http://www.convivenza.ch>).

(but not the same) in substance to the constellations covered by (internal) self-determination.[24] Most importantly, minority protection law provides more content than the principle of self-determination. This content, however, comes at a price: the rules on minority protection do not enjoy as wide acceptance as the principle of self-determination. Indeed, some States have consistently rejected the concept of minority protection (for instance France or Turkey). This limited acceptance must be born in mind in the analysis of the rules on minority protection under the aspect of autonomy.

Weak wording and elusive autonomy

International protection of minorities happens in two spheres: the universal and the regional sphere.[25] In the universal sphere, one article constitutes the core of minority protection: art. 27 of the Civil Rights Covenant.[26] Art. 27 was further developed by the UN General Assembly in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[27] On the regional level, the conventions elaborated in the Council of Europe are the most prominent examples: the European Charter for Regional or Minority Languages[28] and the Framework

[24] There is, of course, a difference between peoples, who are entitled to self-determination, and minorities, who benefit from minority protection. Although aware of the distinction between the two groups and the terminological problems involved, this study does not examine these issues any further, because the insights they promise for the topic of autonomy are limited. Note only that, here, the focus is on national (traditional, "autochthonous") minorities, not on immigrant (new, "allochthonous") minorities. (The terms autochthonous and allochthonous are used by VON BOGDANDY, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship', (2007) 13/07 *Jean Monnet Working Paper* 12.)

[25] For an attempt to link two aspects of the two spheres (the EC- and the WTO-trade regimes), see BURRI, 'Breaking the Taboo: National Minorities in the EC- and WTO-Trade Regimes', *in* Eeckhout and Tridimas (eds), *Yearbook of European Law 2008*, Oxford, Oxford University Press, 2009, p. 321-348.

[26] International Covenant on Civil and Political Rights, 1966, 999 UNTS 171, art. 27: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[27] UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992, UN Doc. A/RES/47/135, GAOR 47th session supp. 49 vol. 1, 199.

[28] COUNCIL OF EUROPE, European Charter for Regional or Minority Languages, 1992, CETS no. 148 (in the following the Language Charter). For more details on the Language Charter, see WOEHRLING, *The European Charter for Regional or Minority Languages: A Critical Commentary*, Strasbourg, Council of Europe Publishing, 2006; see also for the application of the Charter to Switzerland: THÜRER and BURRI, 'Zum Sprachenrecht der Schweiz', *in* Pan and Pfeil (eds), *Zur Entstehung des modernen Minderheitenschutzes in Europa*, Handbuch der europäischen Volksgruppen, Wien, Springer, 2006, p. 242-266.

Convention for the Protection of National Minorities[29]. Of the many aspects of these universal and regional instruments,[30] two are of particular importance for the purposes of this study: (i) the wording of these instruments is weak, although much more tangible than the substance of the principle self-determination; and (ii) the concept of autonomy is not directly used, but only indirectly alluded to. The first trait (i) is apparent in that, generally, no rights of minorities as such are stipulated in these instruments but rather obligations of the participating States.[31] This is only different for art. 27 Civil Rights Covenant. However, the language of art. 27 remains general and is riddled with loopholes instead.[32] In all instruments moreover, no recognition of

[29] COUNCIL OF EUROPE, Framework Convention for the Protection of National Minorities, 1995, CETS no. 157 (in the following the Framework Convention). The Framework Convention was initially conceived as a protocol to the COUNCIL OF EUROPE, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, CETS no. 005 (for further details, see BENOÎT-ROHMER, *Les minorités, quels droits? - Etude de la Convention-cadre pour la protection des minorités nationales*, Strasbourg, Editions du Conseil de l'Europe, 1999, p. 26 ff.).

[30] See only, among many others, the still unresolved issue of defining a national minority (see with all details PENTASSUGLIA, *Minorities in International Law*, Strasbourg, Council of Europe Publishing, 2002, p. 55 ff., especially regarding the efforts by Francesco Capotorti [in CAPOTORTI, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, 1979, UN Doc. E/CN.4/Sub.2/384/Add. 1-7], and Jules Deschênes [in DESCHÊNES, Proposal Concerning the Definition of the Term "Minority", 1985, UN Doc. E/CN.4/Sub.2/1985/31]; see also, for instance, KRUGMANN, *Das Recht der Minderheiten - Legitimation und Grenzen des Minderheitenschutzes*, Berlin, Duncker & Humblot, 2004, p. 57 ff.).

[31] REHMAN, 'The Concept of Autonomy and Minority Rights in Europe', *in* Cumper and Wheatley (eds), *Minority Rights in the `New` Europe*, The Hague, Martinus Nijhoff, 1999, p. 217 - 231, p. 224.

[32] It is only briefly noted here that the Human Rights Committee, via the individual complaints procedure under the first optional protocol to the Civil Rights Covenant, has clarified art. 27 Civil Rights Covenant in certain regards (also art. 1 of the Covenant, see JOSEPH, SCHULTZ, and CASTAN, *The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary*, 2nd edition, Oxford, Oxford University Press, 2004, p. 142-153, describing the jurisprudence of the Human Rights Committee as to art. 1 as "brief and disappointing" [p. 153]). The most prominent cases are: Human Rights Committee, *Lovelace v. Canada*, R.6/24, UN Doc. Supp. no. 40 A/36/40 at 166, 1981 (1981); Human Rights Committee, *Kitok v. Sweden*, 197/1985, UN Doc. CCPR/C/33/D/197/1985 (1988), notably para. 9.2-9.8; Human Rights Committee, *Chief Ominayak and the Lubicon Lake Band v. Canada*, 167/1984, UN Doc. Supp. 1 A45/40 at, 1990 (1990), notably para. 33; Human Rights Committee, *Ballantyne et al. v. Canada*, 359 and 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1, 1993 (1993), notably para. 11.2; Human Rights Committee, *Länsman et al. v. Finland*, 511/92, UN Doc. CCPR/C/52/D/511/1992 (1994), notably para. 9.5-9.8; Human Rights Committee, *Länsman et al. v. Finland II*, 671/1995, UN Doc. CCPR/C/58/D/671/1995 (1996), notably para. 10.5-10.7; Human Rights Committee, *Diergaardt et al. v. Namibia*, 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000), para. 10.6 and *nota bene* 10.8. Two brief notes as to this case law are in order: i) *Diergaardt et al. v. Namibia* is a special case. *Prima facie*, it may seem that it is relevant from the perspective of autonomy régimes, because the newly constituted State of Namibia denied the Rehoboth Baster community the autonomy régime it had previously been entitled to when the territory of the community had still belonged to South Africa. However, self-government and the related powers were granted to the Rehoboth Baster community under the apartheid regime in South Africa (see the dissenting opinion of Rajsoomer Lallah, p. 17 of the case: "The real complaint […] would suggest that they still hanker after the privileged and exclusive status they previously enjoyed in matters of occupation of land, self-government and use of language under a system of fragmented self-governments which apartheid permitted. Such a system no longer avails under the unified nation which the Constitution of their country has created."). The fact that the autonomy was revoked and no violation of art. 27 Covenant was found in this

a collective dimension is implied.[33] That is why the instruments in general refer to the *members* of a minority, instead of the minority as such. The second trait (ii) is self-evident upon a closer look: the term autonomy (or any synonym thereof) is consistently avoided in all universal and regional instruments on minority protection.

However, it should not be concluded from these two traits (i and ii) that the provisions on minority protection are irrelevant for autonomy régimes. Their relevancy is just indirect: the provisions on minority protection spell out many aspects that play an important role in autonomy régimes. Consider only the aspects of the "effective participation" in "cultural, religious, social, economic, and public life" (art. 2(2)) and of the development of "culture, language, religion, traditions and customs" (art. 4(2)) in the UN Declaration on Minorities[34]. Clearly, these aspects are of high relevance to autonomy régimes. Let us take a closer look at indirect relevancy as well as the weak wording and the elusive nature of autonomy in minority protection by means of an example: art. 15 of the Framework Convention.[35]

Effective participation

Art. 15 of the Framework Convention[36] concerns participation. Like all other articles of the Framework Convention, art. 15 is non self-executing and divested of direct effect. Individuals are prevented from invoking the article against the State. Art. 15 Framework Convention addresses only persons belonging to national minorities (not minorities as such) and it is cautiously worded. It states:

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must therefore be seen in the context of the creation of a new State (Namibia) and its efforts to overcome the effects of apartheid. Hence, it should *not* be inferred from *Diergaardt et al. v. Namibia* that art. 27 Covenant in some way obstructs the establishment of autonomy régimes or favours their abolishment. (But, of course, the contrary should not be inferred from the case, either, that is that art. 27 Covenant prescribes the establishment of such régimes). ii) The decisions of the Human Rights Committee under the first optional protocol do not, technically, have binding force (see MORAWA, 'The United Nations Treaty Monitoring Bodies and Minority Rights with Particular Emphasis on the Human Rights Committee', *in* Council of Europe (ed.), *Mechanisms for the Implementation of Minority Rights*, Strasbourg, Council of Europe Publishing/European Centre for Minority Issues, 2004, p. 29-53, p. 36-37). For a new comprehensive review of international case law regarding minorities (structured according to subjects), see Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, Oxford, Oxford University Press, 2007.

[33] As to the collective dimension of art. 27 Civil Rights Covenant, see NOWAK, *UN Covenant on Civil and Political Rights - CCPR Commentary*, 2nd edition, Kehl, Engel, 2005, p. 655.

[34] UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* FN 27.

[35] COUNCIL OF EUROPE, Framework Convention for the Protection of National Minorities, *supra* FN 29.

[36] COUNCIL OF EUROPE, Framework Convention for the Protection of National Minorities, *supra* FN 29.

> *"The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."*

Apparently, the article aims at guaranteeing that minorities may take part in what concerns them most.[37] This is probably achieved best, when a minority is granted autonomy to manage its own affairs (when it has "its own laws"[38] in cultural, social, economic, and public affairs). The explanatory report to the Framework Convention includes this consideration, when it mentions "decentralized or communal forms of administration"[39] as options, among others, for States to implement art. 15.[40] Thus, art. 15 may be considered to elaborate a material feature of an autonomy régime (participation).[41]

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[37] The Human Rights Committee in *Länsman et al. v. Finland*, para. 9.5, and *Länsman et al. v. Finland II*, para. 10.4 and 10.5, both *supra* FN 32, stressed that, based on its General Comment, art. 27 Civil Rights Covenant requires the effective participation of minorities in decisions concerning them (although art. 27 does not mention this concept).

[38] See *supra* FN 2.

[39] COUNCIL OF EUROPE, Explanatory Report to the Framework Convention for the Protection of National Minorities, 1995, H (1995) 010, p. 11-26, para. 80, fifth lemma.

[40] For more extensive reading on art. 15 Framework Convention as well as on the State reporting and the recommendations given by the Advisory Committee under the Framework Convention, see WELLER, 'Art. 15', *in* Weller (ed.), *The Rights of Minorities in Europe - A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford, Oxford University Press, 2005, p. 429-461. Note also the remark of Henrard: "[…] it should be highlighted that the A[dvisory]C[ommittee] clearly focuses on the public affairs component in Art. 15, while participation in cultural, social and economic life is largely neglected." (HENRARD, '"Participation", "Representation" and "Autonomy" in the Lund Recommendations and their Reflections in the Supervision of the Framework Convention for the Protection of National Minorities and Several Human Rights Conventions', (2005) 12 IJMGR 154 [brackets added]). For further details on the other articles of the Convention consider also in general Weller (ed.), *The Rights of Minorities in Europe - A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford, Oxford University Press, 2005; THORNBERRY and ESTEBANEZ, *Minority Rights in Europe*, Strasbourg, Council of Europe Publishing, 2004, p. 89 ff.; PHILLIPS, 'The Framework Convention for the Protection of National Minorities', *in* Council of Europe (ed.), *Mechanisms for the Implementation of Minority Rights*, Strasbourg, Council of Europe Publishing/European Centre for Minority Issues, 2004, p. 109-129; and, most recently, Verstichel, Alen, De Witte, and Lemmens (eds), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* Antwerpen, Intersentia, 2008. For minority rights in Europe in general, see MALLOY, *National Minority Rights in Europe*, Oxford, Oxford University Press, 2005.

[41] The correlation between minority protection (i. e. effective participation) and autonomy régimes is also established for the Civil Rights Covenant in *Diergaardt et al. v. Namibia*, *supra* FN 32: in this case Martin Scheinin, in his individual, but concurring opinion (p. 17-18 of the case), argued in favour of this correlation (referring however to art. 25 and only implicitly to art. 27 of the Covenant): "In my view there are situations where art. 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under

Participation is only one feature of autonomy régimes that is detailed by the Framework Convention. Other attributes are treated by other articles of the Framework Convention, such as: the promotion of the conditions necessary for minorities to "maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage" (art. 5(1)); basic freedoms, i. e. of peaceful assembly, association, expression, thought, conscience, and religion (art. 7); the right to "establish religious institutions, organisations and associations" (art. 8); the right to "use freely and without interference his or her minority language, in private and in public, orally and in writing" (art. 10(1)); the right to "set up and manage their own private educational and training establishments" (art. 13(1)); or the establishment and maintenance of "free and peaceful contacts across frontiers" (art. 17(1)). The Framework Convention moreover includes special provisions for a factual situation that is typical for autonomy régimes, that is, when minorities settle in specific territories: "In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers […]" they might be – with numerous caveats – entitled to use their language in contacts with the administrative authorities (art. 10(2)), to display "topographical indications" in their own language (art. 11(3), or to have their language taught or to be taught in it (art. 13(2)).

Admittedly, the materialization of autonomy in the Framework Convention is only gaseous: the attributes of autonomy remain almost invisible; the references to autonomy are hard to grasp; and much room is left for forms of implementation other than autonomy. But is not autonomy exactly about being gaseous, about leaving free space? Of course, this rhetorical question mingles two aspects that must be kept apart: the discretion left to participating States in implementing the Framework Convention, on the one hand, and the material concept of autonomy as a means to protect minorities, on the other hand. However, the two aspects are not entirely unrelated. Autonomy régimes need the gaseous form the Convention provides, because autonomy régimes are intrinsically linked to the structure of the State. This structure is largely unique for each and every State. Thus leeway in the implementation of the Convention is required.

To sum up, the Framework Convention, in substance, addresses some of the aspects that are relevant to autonomy régimes (without ever using the term autonomy, though). The Convention provides a light framework, which provides some guidelines. Within

art. 25 to afford individual members of such communities the individual right to vote in general elections. *Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation."* [Emphasis added].

this light framework, autonomy régimes may come into or remain in existence. This consideration applies not only to the Convention, but also to the universal sphere of minority protection: art. 27 Civil Rights Covenant and the Declaration on Minorities provide a similar, but even more fragile framework for autonomy régimes. The allusions to the substance of autonomy are even more scarce here. Thus, in what regards autonomy, the rules on international minority protection do fill up the vessel of self-determination, but they do so – if one sticks to the metaphor – with gas rather than with liquid.

c) Indigenous peoples

After having examined minority protection, let us now move on to the rules applicable to indigenous peoples. The inverse proportionality between the precision of legal rules and their acceptance is not a special feature of minority protection law. It is even more patent in the law on indigenous peoples.[42] Today, the international law on indigenous peoples is denser than the law on minority protection.[43] The rules are more precise and accurate and fewer open terms are used. Collective rights are explicitly granted according to the 23rd paragraph of the preamble of the UN Declaration on the Rights of Indigenous Peoples.[44] The enhanced accuracy certainly comes from the greater legitimacy that the cause of indigenous peoples enjoys in general today. The greater legitimacy in turn is the product of hard work within the United Nations[45] and the International Labour Organisation, but also presumably a product of a sense of guilt caused by the fate of indigenous peoples who have been primary victims of colonization, subjugation, and other, less obvious forms of exploitation having developed in parallel with modernization.[46] But the legal precision, as in the domain of

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[42] Indigenous peoples normally benefit from the rules in all legal domains discussed so far: they are entitled to self-determination, to minority protection, and to the rights of indigenous peoples. Indigenous peoples effectively rely on the rules on minority protection: most of the cases decided by the Human Rights Committee based on art. 27 were brought by (alleged) members of indigenous peoples (see *Lovelace v. Canada*, *Kitok v. Sweden*, *Chief Ominayak and the Lubicon Lake Band v. Canada*, *Länsman et al. v. Finland*, *Länsman et al. v. Finland II*, all *supra* FN 32).

[43] For an analysis of the legal situation of indigenous peoples in 1991 see BROWNLIE, *Treaties and Indigenous Peoples*, Oxford, Clarendon Press, 1992.

[44] UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, s*upra* FN 11.

[45] See SWEPSTON and ALFREDSSON, 'The Rights of Indigenous Peoples and the Contribution by Erica Daes', *in* Alfredsson and Stavropoulou (eds), *Justice Pending: Indigenous Peoples and Other Good Causes - Essay in Honour of Erica-Irene A. Daes*, The Hague, Martinus Nijhoff, 2002, p. 69-77, regarding the development in the United Nations and the International Labour Organisation, and in particular regarding the contribution by Erica Daes.

[46] See for instance the description of the situation in the UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Report on Indigenous Issues (to the Human Rights Council), 2007, UN Doc. A/HRC/4/77 (referring in particular to the "implementation gap" [p. 1]).

minority protection, comes at a price: polarization between those supporting the standards regarding indigenous peoples and those opposing them is strong, despite the generally acknowledged legitimacy. ILO Convention no. 169,[47] the most authoritative, binding legal instrument on indigenous issues, has to date only been ratified by 20 States. The UN Declaration on the Rights of Indigenous Peoples[48] was adopted with 143 votes in favour, 4 against, and 11 abstentions.[49] The four opposing States were Australia, Canada, New Zealand and the United States – all States that include sizeable indigenous populations.[50]

A right to autonomy

In the following, the Declaration[51] is focused upon, ignoring the opposition to the Declaration and its non-binding nature for a moment. Autonomy is explicitly addressed in art. 4 of the Declaration:

> *"Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."*[52]

The link between autonomy and (internal) self-determination is established in this article: autonomy is a result of the exercise of the right to self-determination. The Declaration expressly grants a *right* to autonomy to indigenous peoples. This is a novelty in international law. The Declaration goes considerably further than the instruments on minority protection with their indirect allusions to autonomy. However, the right to autonomy of indigenous peoples according to art. 4 of the Declaration is not a blanket right. There are limitations. Indigenous peoples only enjoy autonomy in

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47 INTERNATIONAL LABOUR ORGANISATION, Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989, no. 169, 1650 UNTS 383.

48 UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, s*upra* FN 11.

49 UN GENERAL ASSEMBLY, Press Release, 2007, UN Doc. GA/10612.

50 However, in these objecting States some settlements with indigenous peoples have been concluded before the adoption of the Declaration. One reason given for the rejection of the Declaration is that it may ultimately prove difficult to fit these settlements into the framework of the Declaration (see, in this sense, the statements made by Australia, Canada, and New Zealand at the adoption of the Declaration, included in UN GENERAL ASSEMBLY, Press Release, *supra* FN 49).

51 UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, s*upra* FN 11.

52 There is a slight difference to the text of the French version of the Declaration: "[…] ont le droit *d'être autonome* et de s'administrer eux-mêmes […]" [emphasis added].

their internal and local affairs. The pair wise indication with "self-government" suggests that autonomy should be construed in a similar sense as self-government. This could mean that autonomy according to art. 4 does not necessarily imply political leeway. Autonomy in art. 4 could also be understood in a purely administrative sense. Finally, the right to autonomy necessarily includes the financial means to perform the tasks which are handed over to indigenous peoples.

In academia the right to autonomy has been discussed in general, i. e. in other contexts than the Declaration.[53] The express recognition of a right to autonomy by the Declaration certainly further fuels this discussion. A dogmatic approach would emphasize that a declaration does not by itself create an enforceable right. For our purposes, though, the lack of binding force of the Declaration is of limited relevance. But the indigenous peoples' right to autonomy must be weighed against our argument regarding a right to autonomy, which was made elsewhere.[54] We basically argued that the *prematurity mistake* must be avoided. The argument examined autonomy from the point of view of conflict prevention and resolution. It maintained that a general right to autonomy was not desirable from this point of view. A right to autonomy should not be an option, because such a right would be anticipatory in an unhelpful way: it would posit prematurely what could only be the outcome of negotiations; this outcome (autonomy) should not be predetermined at the beginning of negotiations. The main thought of the argument is that autonomy is only one possible means of addressing a conflict. It is only *one* instrument which, together with others, may be helpful in solving a conflict. To entitle groups to autonomy would have the consequence of limiting unnecessarily the options for solving conflicts – conflicts for the resolution of which flexibility is needed.[55]

No general right to autonomy

In light of art. 4 of the Declaration,[56] our argument must be further explained. Yet, the argument remains valid in principle. When the right to autonomy was laid down in art. 4 of the Declaration, the prematurity mistake was largely avoided. The point is that the right of indigenous peoples to autonomy is not *general*. It is subject to a number of qualifications (i-iii). (i) The right is only granted to indigenous peoples, not to

[53] See, for instance, Skurbaty (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Leiden, Martinus Nijhoff, 2005.

[54] THÜRER and BURRI, 'Minorities, Law, and Conflict Resolution', *in* Thürer and Kedzia (eds), *Managing Diversity – Protection of Minorities in International Law*, Zurich, Schulthess, 2009, p. 1-17, p. 10-11.

[55] See our similar argument for the right to secession in THÜRER and BURRI, 'Secession', *supra* FN 15, para. 20.

[56] UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, s*upra* FN 11.

minorities or peoples in general. Thus, the set of conflicts to be addressed and solved by this right is limited. In these conflicts many parallels exist.[57] The land issue or the membership question, for instance, may be such parallels.[58] Thus, the right to autonomy in art. 4 of the Declaration does not apply to the whole variety of group conflicts (i. e. those faced by minorities, peoples, etc.), but rather to some conflicts that are, at least to some extent, homogenous.

(ii) The right to autonomy of indigenous peoples is not general in its wording, either. To the contrary, it is limited: the right only relates to internal and local affairs, which is a significant limitation, because autonomy in the sense of "having its own laws"[59] would potentially relate to *any* domain. A right to autonomy in the sense of "having its own laws" could also extend to external affairs, such as foreign relations, or to other typically national affairs, such as defence or money matters. These domains are in all likelihood excluded from the right to autonomy.[60] Admittedly, the terms "local" or "internal" affairs are subject to interpretation, as well. It could be difficult, for instance, to discern local from regional affairs (assuming that the latter ought to be excluded at all from local affairs). Moreover, most domains somehow involve a local dimension, if only in terms of implementation. Nevertheless, the qualification of local and internal affairs do restrict the right to autonomy. They tie indigenous peoples to the State, the traditional attributes of which – its integrity and external sovereignty – are safeguarded.

(iii) The right to autonomy is not free-floating, either. Other articles of the Declaration provide a framework for the right to autonomy. The right must be construed in the light of the other articles of the Declaration, which provide a *firm basis* for, *enclose*, and *substantiate* the details of the right. The place of the right to autonomy in the Declaration is the *firm basis*: the right stands at the beginning of the Declaration, among the most basic provisions (human rights [art. 1], equality [art. 2], and self-determination [art. 3]). Various articles *enclose* the autonomy, to which a right is granted. Autonomous institutions and structures, for instance, are typically mentioned: Art. 5 mentions "distinct political, legal, economic, social and cultural institutions";

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[57] See WIESSNER, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', (1999) 12 *Harvard Human Rights Journal* 98-99.

[58] CASTELLINO and WALSH, 'Conclusion', *in* Castellino and Walsh (eds), *International Law and Indigenous Peoples*, Leiden, Martinus Nijhoff, 2005, p. 395-399, p. 399, point out that the main issues to be addressed regarding indigenous peoples are the issues of land, development, and intellectual property.

[59] *Supra* FN 2.

[60] See, however, the (limited) right to maintain contacts across borders in art. 36(1) of the Declaration (UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, *supra* FN 11).

and art. 33(2) provides for a "right to determine the structures and to select the membership of their institutions". Lastly, other articles indicate the *substance* of autonomy: "Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, […]" (art. 31(1)); according to art. 32(1), "[i]ndigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources"; and the indigenous peoples' prior, free, and informed consent is required on projects relating thereto (art.32(2)).

On the whole, the indigenous peoples' right to autonomy is not left without a framework. It is limited and given a context. In this context, the right to autonomy applies to a limited range of situations, which are detailed at least to some extent. Thus, it is clear where and when autonomy applies. Consequently, the prematurity mistake is avoided. Indeed, it is hard to imagine a situation of indigenous peoples, in which the right to autonomy as proposed by the Declaration does not make any sense at all. This said, it should be clear that a general right to autonomy based on the principle of (internal) self-determination and thus applicable to all peoples (and many minorities) would be an altogether different story. Such a general right to autonomy still does not appear as a sound idea.

What can be retained from the international law on indigenous peoples regarding autonomy? Autonomy is certainly much more concrete in the domain of indigenous peoples than in the domains of self-determination or minority protection. Autonomy is explicitly referred to in the Declaration, which is a step forward given that modern general international law up until the Declaration had refrained from using the term autonomy. Most importantly, autonomy in the sense of the Declaration is given a concrete form and a context. Thus, it seems that, on the one hand, it is not impossible to find a broad, though not universal, international consensus on autonomy. Autonomy must only be endowed with a concrete shape and must apply to a specific, limited set of situations.[61] On the other hand, the different structures of States do not, in principle, hinder a concrete, international standard on autonomy, although autonomy régimes tend to be linked to and depend on the structure of the State in a given case. But the differences in the anatomy of States, nonetheless, require a large degree of flexibility in any international concept of autonomy. Hence, the aphorism that international

[61] See HEINTZE, 'Territorial Autonomy and International Stability: Pros and Cons from the Viewpoint of International Law', *in* Skurbaty (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Leiden, Martinus Nijhoff, 2005, p. 47-62, p. 57, on the right of indigenous peoples to autonomy: "[…] the *unique character of these claims* has to be kept in mind […]" [emphasis in original].

standards must carefully strike a balance between concreteness and flexibility seems to hold especially true for autonomy.

d) Self-government

Let us now consider the international legal principles relating to self-government. Obviously, self-government is linked to autonomy. In many instances, the two terms are used a synonyms. The link between self-government and autonomy has become apparent on two occasions so far in this study. First, UN terminology tends to use the concept of self-government in the domain of self-determination, but obviously autonomy is also a way of implementing self-determination. Remember, for instance, that in the UN decolonization movement, territories where the principle of self-determination has not yet been implemented are called "Non-*Self-Governing* Territories".[62] Second, the UN Declaration on the Rights of Indigenous Peoples[63] ties autonomy to self-government (in art. 4). A third occasion is discussed in the following. In this occasion, self-government is as a manifestation of democracy and the idea of proximity to the citizen (*local* self-government). A helpful illustration for this dimension is the Council of Europe's Charter of Local Self-Government.[64]

Local self-government in Europe

Self-government in this third sense is probably of distinctly European character. Democracy, self-government, and autonomy have been the subject of debate in Europe for some time now. This is not by accident. With the Maastricht Treaty,[65] and ever since then, the scope and powers of the European Union[66] have been steadily

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[62] Chapter XI of the Charter of the United Nations, 1945, published in the annex of every Yearbook of the United Nations, e. g. 2005 Yearbook of the United Nations, annex II, p. 1601-1611, on Non-Self-Governing Territories [emphasis added]; see also e. g. Principle II, UN GENERAL ASSEMBLY, Resolution on Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Art. 73e of the Charter, 1960, Resolution 1541 (XV), GAOR 15th session supp. 16, 29:"Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a 'full measure of self-government'. As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under 73e continues."

[63] UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, *supra* FN 11.

[64] COUNCIL OF EUROPE, European Charter of Local Self-Government, 1985, CETS no. 122 (in this section: the Charter).

[65] Treaty on European Union, 1992, Official Journal C 191 of 29 July 1992.

[66] For the sake of simplicity we generally refer to the European Union in this study without distinguishing between the Communities, the Community, or the Union (except where a precise indication is indispensable).

expanded. A large part of the traditional powers of the States have been moved "upwards", toward the European Union. Naturally, this integration process does have effects on the participating States. A need has arisen to review the traditional internal (vertical and horizontal) power sharing mechanisms of States and to adapt these mechanisms to the new situation.[67] In this search for a new equilibrium that encompasses the European institutions the role and merits of the lower levels of the State (the local and the regional level) had to be reviewed, too.[68] The multi-level governance[69] or the subsidiarity discussions must be apprehended in this light, but also self-government and autonomy. The Committee of the Regions of the European Union, for instance, is a product of these discussions.[70] Hence, much of what is discussed under the aspect of self-government for the moment is distinctly European: that autonomy and self-government are a discussion topic is, at least partly, a result of the transformations that have been taking place in Europe. That said, it is evident that the considerations on self-government cannot be transposed without further reflection to other regional contexts (such as the Americas or Asia).

The Charter of Local Self-Government was elaborated in the Council of Europe. Here, it goes hand in hand with the Congress of Local and Regional Authorities (formerly the Conference of Local Authorities of Europe established in 1957) and with the Recommendations on local and regional democracy by the Committee of Ministers.[71] The Charter has been ratified by all member States of the Council of Europe, except for the micro-States.[72] This wide acceptance is, on the one hand, due to the flexibility of the instrument: it follows an "à la carte" approach. States can choose ten out of

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[67] Among others, the functional nature of the competences of the European Union (in particular in the domain of the market freedoms), the re-distribution mechanisms of the Union, or the need to implement the norms set on the level of the Union are elements that caused States to adapt.

[68] Concomitantly, the role of the individuals present in the European institutions (members of the European parliament, etc.) has shifted (see HALBERSTAM, 'The bride of Messina: constitutionalism and democracy in Europe', (2005) 30 *EL Rev* (6) 376: "[…] individual actors have drawn on principled commitments and principled conceptions of the democratic nature of the European enterprise. In particular, this appeal to principle has entailed an understanding of the Union as liberating the individual (and her communities of interest) from the comfortable monopoly of Member State processes of political decision-making.")

[69] See, among many, HOOGHE and MARKS, *Multi-Level Governance and European Integration*, Boulder, Colorado, Rowman & Littlefield, 2001.

[70] As to the significance of the Committee of the Regions for national minorities, see BURRI, 'Breaking the Taboo: National Minorities in the EC- and WTO-Trade Regimes', *supra* FN 25, p. 329.

[71] E. g. COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Recommendation to member states on capacity building at local and regional level, 2007, CM/Rec(2007)12 (other recommendations are available at the DEPARTMENT OF LOCAL AND REGIONAL DEMOCRACY AND GOOD GOVERNANCE, <http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy> [under "legal instruments"]).

[72] Andorra, Monaco, and San Marino (as of 24 October 2008). In these States, by definition, everything is local. Hence, it makes little sense for them to ratify the Charter.

fourteen basic principles to be binding.[73] On the other hand, the Europe-wide acceptance of the Charter is owed to the criteria for accession to the European Union. These so-called Copenhagen criteria include the condition of "stability of institutions guaranteeing democracy".[74] Owing to this criterion, candidates for accession to the European Union had (and have) an interest in ratifying the Charter. Some of the candidates *nota bene* ratified the Charter before the old member States.[75]

The Charter and autonomy

The Charter of Local Self-Government is relevant, because it lays down some details of autonomy régimes. Indeed, the French version of the Charter is called "*Charte européenne de l'autonomie locale*".[76] The Charter in French uses the term "*autonomie locale*" where the English version utilizes "self-government" instead. But the Charter in English also expressly mentions autonomy, if only in the preamble:

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[73] This "tool kit" approach, laid down in art. 12(1) of the Charter makes it difficult to assess the extent of the obligations of the participating States and, even more, the degree of implementation of the Charter. The same problem exists for the COUNCIL OF EUROPE, Language Charter, *supra* FN 28, but also to a much larger extent for the WORLD TRADE ORGANISATION, General Agreement on Trade in Services, 1994, Annex 1b to the Marrakesh Agreement establishing the World Trade Organization, 1869 UNTS 183, which contains a schedule of the commitments of each member State in the annex [for the latter see EECKHOUT, 'Constitutional Concepts for Free Trade in Services', *in* Scott and De Búrca (eds), *The EU and the WTO: Legal and Constitutional Issues*, Oxford, Hart, 2001, p. 211-235, p. 218].)

[74] EUROPEAN COUNCIL, Presidency Conclusions of the Copenhagen European Council, 1993, SN 180/1/93 Rev 1, para. 7 A iii) (on p. 13).

[75] See POULET, 'La dynamique des systèmes institutionnels en Europe: une stratégie à risque?' *in* Pauliat (ed.), *L'autonomie des collectivités territoriales en Europe - une source potentielle de conflits?* Limoges, pulim, 2004, p. 15-31, p. 19: "*Tous les Etats candidats à l'entrée dans l'Union européenne ont adopté une réforme de leurs institutions locales selons les principes de la charte: c'est un préalable au processus d'accession et un gage de réussite pour leur intégration."* [Emphasis added] Note that, in a similar way, the COUNCIL OF EUROPE, Framework Convention for the Protection of National Minorities, *supra* FN 29, was included in the Copenhagen criteria ("respect for and protection of minorities", also in para. 7 A iii) (on p. 13). This gave rise to the reproach that the European Union applied double standards in minority protection (i. e. a different, stricter standard vis-à-vis the acceding States than vis-à-vis the 15 old member States). A number of studies were then conducted on this subject: see for instance OPEN SOCIETY INSTITUTE: EU ACCESSION MONITORING PROGRAM, *Monitoring the EU Accession Process: Minority Protection - An Assessment of Selected Policies in Candidate States (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia)*, Open Society Institute (ed.), vol. 1, Budapest, Open Society Institute, 2002, and OPEN SOCIETY INSTITUTE: EU ACCESSION MONITORING PROGRAM, *Monitoring Minority Protection in EU Member States*, Open Society Institute (ed.), vol. 2, Budapest, Open Society Institute, 2002. For an example of the screening by the European Commission see EUROPEAN COMMISSION, Croatia 2007 Progress Report, 6 November 2007, SEC(2007)1431, (issued in the framework of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, 2001, Official Journal L 26/3 of 28 January 2005), in particular p. 7 on local governance and p. 12-15 on minority rights. Note the emphasis throughout the report on implementation of the legal standards. For further discussion, see *infra* chapter 2, p. 133.

[76] Emphasis added.

> *"Asserting that this entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing a wide degree of* autonomy *with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfilment".*[77]

In spite of these links, the relevance of the Charter for this study is not obvious for two reasons. (i) The Charter focuses more on democracy, the administration of the State, and the "decentralisation of power"[78] than on the protection of minorities. Hence, the Charter is more about the structure of a State and, indirectly, about the links between the State and autonomy régimes than about minority protecting aspects of autonomy régimes. The Charter never refers to minorities as groups or the related idea of group protection.[79] In spite of this absence, though, the Charter is relevant for our purposes, for it must be apprehended in an organic perspective. Local democracy and self-government according to the Charter, much like the structure of a federal State, *may* serve to protect minorities (in the national, traditional, ethnical, etc. sense). Of course, not *all* self-government authorities within the scope of the Charter represent or have a link to minorities. But *some* certainly do, for instance those of the Sami in the Nordic countries[80] or those of the minorities in Hungary. Similar to the Committee of the Regions of the European Union, members of which may (but need not necessarily) be representatives of minorities,[81] the Charter *may* be of relevance to minorities. It *may* have the effect of advancing the cause of minorities. Thus, the Charter could prove instructive for the purposes of this study.

(ii) The other reason why the Charter could only be of limited interest to this study is that the Charter promotes *local* self-government, whereas autonomy régimes are mostly found on the *regional* level of a State. Yet, the Charter basically, though not typically, does apply to regional entities. Art. 13, first sentence, states that "[t]he principles of self-government contained in the present Charter apply to *all the*

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[77] Emphasis added.

[78] COUNCIL OF EUROPE, European Charter of Local Self-Government, *supra* FN 64, second last part of the preamble.

[79] The Charter only makes reference to the protection of boundaries (art. 5), the "protection of financially weaker local authorities" through financial equalisation procedures (art. 9(5), the protection of the interests of local authorities by means of associations with other local authorities (art. 10(2)), and the legal protection of self-governing entities in the sense of the availability of judicial remedies (art. 11).

[80] But see the declaration of Sweden upon ratification, available at TREATY OFFICE OF THE COUNCIL OF EUROPE, <http://www.conventions.coe.int/> (under "full list", "Charter of Local Self-Government").

[81] See the argument in BURRI, 'Breaking the Taboo: National Minorities in the EC- and WTO-Trade Regimes', *supra* FN 25, p. 329 and in particular footnote 45.

categories of local authorities existing within the territory of the Party".[82] The possibility for States to confine the scope of the Charter to "certain categories of local or regional authorities" (art. 13, second sentence) when ratifying the Charter must, of course, be reckoned with. However, this possibility is ultimately of limited relevance for similar reasons as those discussed under (i).[83]

Details of autonomy

So what is the contribution of the Charter to autonomy? The Charter contributes a number of principles and ideas that are relevant to autonomy régimes. Among these principles are: the regulation and management "of a substantial part of public affairs under their [the local authorities'] own responsibility and in the interest of the local population"; the free election of the local council or assembly; the principle of subsidiarity; the limited control by the central authorities; the principle that the financial resources of local authorities must be commensurate with their responsibilities; the principle of local taxes; the establishment of financial equalisation procedures between the better off and the less well off entities; the right to associate on the national and international level.[84] Most relevant among these principles are the concepts of subsidiarity, of local representative bodies (and their free election), of the correspondence between responsibilities and financial means, of transborder contacts, of local tax jurisdiction, or of the judicial protection of the power sharing arrangement. These ideas and principles may be taken as international legal guidelines for autonomy régimes (within the limits explained above). These ideas and principles mostly relate to the formal aspects of autonomy and less to the substance, in the sense that they do not define what the local authority may do and in which domain it is competent. Hence, even if a State intends to implement the principles and ideas of the Charter in good faith, the authorities of an autonomy régime should not necessarily expect to be granted substantial leeway and powers. In other words, local autonomy in accordance with the Charter could be – in the worst case – an empty shell.

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[82] Brackets and emphasis added.

[83] On the issue of an additional instrument for *regional* self-government see ZARDI, 'Démocratie locale et régionale en Europe d'aujourd'hui: le rôle et l'action du Conseil de l'Europe', *in* Pauliat (ed.), *L'autonomie des collectivités territoriales en Europe - une source potentielle de conflits?* Limoges, pulim, 2004, p. 55-68, in particular p. 63-66.

[84] The principles are contained in the following articles of the Charter: public affairs under the authorities' responsibility and in the interest of the population: art. 3(1); free election: art. 3(2); subsidiarity: art. 4(2) and (3); limited control: arts. 4(5), 8(2) and (3); resources commensurate with responsibilities: art. 9(2); local taxation: art. 9(3); equalisation procedure: art. 9(5); right to associate: art. 10(1-3).

e) Implications of international law

Four domains were examined: self-determination, minority protection, indigenous peoples, and self-government. These domains are not the only legal domains that are relevant to autonomy,[85] but they are probably the most significant. International law does not offer a general right to autonomy. Only indigenous peoples can avail themselves of a right to autonomy.[86] This seems to be a reasonable approach. Apart from that, international law avoids the term autonomy, but not the concept. Autonomy as a concept is very much present in the domains examined. While the principle of self-determination does not provide much guidance regarding the content of autonomy, self-determination may act as a trigger for autonomy régimes. However, the rules on minority protection may provide further guidance. The example of participatory rights reveals that the rules on minority protection establish some aspects of autonomy régimes (without making reference to the term autonomy, though). The rules on minority protection establish a framework, which circumscribes and specifies the concrete appearance an autonomy régime may take in practice. This framework is a lot more solid for indigenous peoples than for minorities. The concepts used in minority protection are detailed more fully with regard to indigenous peoples. Typical issues concerning indigenous peoples, which partly relate to autonomy, are dealt with by the international law regarding indigenous peoples (e. g. the land issue). Most notably, a *right* to autonomy is provided and given a concrete framework. Moreover, international law also supplies principles on local self-government which are relevant for autonomy régimes (e. g. the principles of subsidiarity or of representative organs).

To sum it up briefly: in international law, we find incentives to establish autonomy régimes and specific rules regarding the design of such régimes. The rules amount to a corset for States, for they establish a framework within which autonomy régimes can be set up. Yet, these rules are not a straitjacket. States enjoy considerable freedom in developing autonomy régimes. This freedom is necessary, because States are not uniformly structured. The extent of this freedom is revealed by a simple comparison between the standards examined above and the legal provisions that establish concrete autonomy régimes: while international standards on autonomy are contained in a few,

[85] Other fields of interest, but probably only of indirect relevance, may be general human rights or non-discrimination instruments.

[86] And only if one accepts the UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, *supra* FN 11, as binding.

scattered provisions, the acts that establish autonomy régimes usually comprise dozens of dozens of highly detailed articles.[87]

However, the analysis of international law conducted in this section must be seen in the proper perspective. The analysis creates a fiction of homogeneity: the examined domains do not constitute a homogenous whole in which norms are in harmony. Yes, parallels exist and norms are often similarly worded. Yet, the fields of application and the implementation mechanisms of these norms differ considerably. The overlap between the norms is quite small. Thus, depending on the circumstances, a specific autonomy régime may be subject to international law of one or the other domain – or of none at all.

Our survey of international law regarding autonomy is still incomplete. Not all relevant parts of international law have been considered so far. On the one hand, the bilateral (or plurilateral) international instruments that address autonomy in a specific situation were ignored so far.[88] Here, a prominent example would be the complex of the Gruber De Gasperi Agreement.[89] However, it is not the goal of this study to recount the international legal details of all situations involving autonomy. In fact, much work in this regard has already been done by other authors.[90] The outcome of these efforts will be taken into account in the following. Moreover, in our two case studies, the international legal dimension (including the bilateral and plurilateral aspects) is again examined. On the other hand, another part of international law was

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[87] See for instance the act on the autonomy of the Åland islands (included in Hannum (ed.), *Documents on Autonomy and Minority Rights*, *supra* FN 22, p. 117-140), which contains 79 articles, some of which consist of several dozens of paragraphs (untypically, the Council of the League of Nations made detailed prescriptions in this case; see the Resolution of 24 June 1921 in Hannum (ed.), *Documents on Autonomy and Minority Rights*, *supra* FN 22, p. 141-143) or the acts examined in the case studies *infra* in chapters 2 and 3.

[88] "Particulate international law" (ERMACORA, 'Autonomie als innere Selbstbestimmung', *supra* FN 21, p. 287: "*partikuläre[s] Völkerrecht*" [translation by the author, brackets and emphasis added]).

[89] See the Agreement between Austria and Italy (Gruber De Gasperi Agreement), 1945, regarding the status of South Tyrol. For a useful introduction to this complex, see SÜDTIROLER BÜRGERNETZ, <http://www.provinz.bz.it/pariservertrag/vertrag/vertrag.asp> (Citizen network of South Tyrol).

[90] Most notably HANNUM, *Autonomy, Sovereignty, and Self-Determination: The Accomodation of Conflicting Rights*, 2nd edition, Philadelphia, University of Pennsylvania Press, 1996; LAPIDOTH, *Autonomy - Flexible Solutions to Ethnic Conflicts*, Washington, D. C., United States Institute of Peace Press, 1997; or WELHENGAMA, *Minorities' Claims: From Autonomy to Secession - International Law and State Practice*, Aldershot, Ashgate Publishing, 2000.

not yet duly considered: “the teachings of the most highly qualified publicists of the various nations”.[91] It is to such teachings about autonomy that this study now turns.

[91] Art. 38(1)d Statute of the International Court of Justice, 1945, annexed to the Charter of the United Nations (published in the annex of every Yearbook of the United Nations, e. g. 2005 Yearbook of the United Nations, 2008, annex II, p. 1611-1615).

1.3 Conceptions of autonomy

This section first examines the work of academics on autonomy (a). Then, an alternative, broader conception of autonomy is proposed (b).

a) International legal scholars and autonomy

International legal scholars are alike in maintaining that autonomy is a term that lacks precise contours. Walter Kemp, for instance, former senior advisor to the OSCE High Commissioner on National Minorities, points out that "the term is rather vague, means different things to different people and has only a tenuous definition under international law".[92] Kemp then cites Markku Suksi, Professor at the Åbo University in Finland and editor of a standard volume on autonomy: "The patterns that emerge from the autonomies, past and present, are quite disparate, and it is probably still possible to say that autonomy is not a legal term of art, because very little seems to follow from a reference to autonomy."[93] The dictum that autonomy is not a term of art goes back to Hurst Hannum and Richard Lillich's article in the American Journal of International Law in 1980.[94] Hannum, who is Professor at the Fletcher School at Tufts University, reiterates and elaborates this in his standard work on autonomy:

> *"'Autonomy' is not a term of art in international or constitutional law, and the present work does not seek to add yet another phrase to legal jargon. Personal and political autonomy is in some real sense the right to be different and to be left alone; to preserve, protect, and promote values which are beyond the legitimate reach of the rest of society.*[95]*"*

Abstaining from a definition, Hannum encircles the term autonomy. He emphasizes the exclusive aspects of autonomy, but in a broad and general way.

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[92] KEMP, 'Applying the Lund Recommendations: Challenges for the OSCE', 2000 (available at: <http://www.isn.ethz.ch/4isf>), p. 4 (published in his personal capacity, not as senior advisor to the High Commissioner).

[93] SUKSI, 'Introduction', *in* Suksi (ed.), *Autonomy: Implications and Applications*, The Hague, Kluwer, 1998, p. 1-5, at p. 1.

[94] HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7

[95] HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* FN 90, p. 4 [cited without references].

Ruth Lapidoth, Professor at the Hebrew University when she wrote her seminal work on autonomy, describes autonomy in an "eclectic"[96] way. She gives the following definition of territorial autonomy:

> *"A territorial political autonomy is an arrangement aimed at granting to a group that differs from the majority of the population in the state, but that constitutes the majority in a specific region, a means by which it can express its distinct identity."*[97]

This approach is less exclusive than Hannum's. Its key element is the "distinct identity" of a group, which is in need of a means of expression. Lapidoth goes beyond the exclusive, introverted perspective of Hannum and includes an extroverted component as well ("express its distinct identity"). Lapidoth, thus, uses a more holistic, organic approach. She adds two more elements: an "arrangement" and the majority-minority distinction. These elements point to the two dimensions that were emphasized at the beginning of this chapter: the arrangement points to the entwinement between autonomy and the State (the régime) and the majority-minority distinction points to the minority protecting aspects of autonomy régimes. With the distinction between majority and minority a functional element seemingly enters the term autonomy.

These additional dimensions are not reflected in the doctoral dissertation of Stefan Simon. He essentially works with a one-word definition:

> *"The term autonomy, which has been discussed little so far, is understood here as the granting of a right to self-arrangement in the domain of the various tasks of the State to a territorially or personally constituted entity. However, this beneficiary entity must not be independent in the sense of the international legal doctrines of sovereignty."*[98]

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[96] LAPIDOTH, *Autonomy*, *supra* FN 90, p. 33.

[97] LAPIDOTH, *Autonomy*, *supra* FN 90, p. 15.

[98] SIMON, *Autonomie im Völkerrecht - Ein Versuch zum Selbstbestimmungsrecht der Völker*, Baden-Baden, Nomos, 1998. p. 24: "*Der bisher wenig diskutierte Begriff der Autonomie wird hier als die Gewährung eines Selbstgestaltungsrechts im Bereich der verschiedenen Staatsaufgaben an eine territorial oder personal konstituierte Einheit verstanden. Diese begünstigte Einheit darf aber nicht im Sinne der völkerrechtlichen Souveränitätslehren unabhängig sein.*" [Translation by the author, emphasis added, cited without references].

Simon's definition is characterized by two elements: a limitation to the top (the autonomous entity may not be a State) and the replacement of the term autonomy by the term "self-arrangement" (the one-word; in German: "*Selbstgestaltungsrecht*"[99]). This "self-arrangement" reminds one of the notion of self-government which is used in international law.[100] Apart from that, one can probably no longer say that autonomy has been little discussed so far – and possibly could not say so before, either.[101]

Variety and context

The works of other scholars could be added. But this brief review already reveals two points. (i) Obviously, understandings of autonomy vary from scholar to scholar. A considerable range of concepts and definitions exists. One is therefore well advised to follow Matti Wibergs suggestion: "every writer should define what he, strictly speaking, means when he uses the notion [autonomy], and he should then remain consistent to this meaning."[102] (ii) It can be inferred from the different concepts of autonomy outlined above that the context in which an author works should be factored in. In other words, the concept of autonomy each author uses must be perceived

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[99] Emphasis added.

[100] It would probably be more logic to see autonomy as the *consequence* of a right to self-arrangement and not as the *granting* of such a right. For it is difficult to argue tenably that the procedure of giving the right ("the granting") is the autonomy. Besides, Simon's definition appears as restrictive, because it limits autonomy to the situation where a *right* is granted: a precariously granted "self-arrangement" (i. e. a "self-arrangement" which does not involve a right and which can be unilaterally revoked at any time) should probably also be considered as autonomy.

[101] See only e. g. DINSTEIN, 'Autonomy', *in* Dinstein (ed.), *Models of Autonomy*, New Brunswikc, Transaction Books, 1981, p. 291-305; HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7; or HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* FN 90 (first edition in 1990).

[102] WIBERG, 'Political Autonomy: Ambiguities and Clarifications', *in* Suksi (ed.), *Autonomy: Applications and Implications*, The Hague, Kluwer, 1998, p. 43-57, at p. 56 [brackets added]. The flexibility of the term autonomy may also have advantages. Thus Wiberg, after having pointed out that the Camp David Accords (Framework for peace in the Middle East agreed at Camp David (with annex), 1978, 1138 UNTS 39) could only be adopted, because the term autonomy (for the Palestinians in the Westbank and in Gaza) was left open and Israel and Egypt could each see their own ideas in the notion (all on p. 56), comes to the conclusion: "It [autonomy] is a wishing well ready to serve anyone." (P. 57 [brackets added]). (As to the different understandings of autonomy under the Camp David Accords see DINSTEIN, 'Autonomy', *supra* FN 101, p. 292.) Joseph Marko's view regarding the flexibility of the term autonomy is similar: "*Normative Prinzipien wie "internes Selbstbestimmungsrecht" und "Autonomie" brauchen daher sogar einen sehr hohen "Abstraktionsgrad", der den jeweiligen Akteuren einen grossen Interpretationsspielraum und verschiedene institutionelle Ausgestaltungsmöglichkeiten lässt. Im Mix der an sich widersprüchlichen Prinzipien von Minderheitenschutz und funktionaler Zweisprachigkeit ermöglichen es daher unterschiedliche Interpretationen das "Gesicht" zu wahren, Legitimation bei den eigenen Anhängern aufrechtzuerhalten und gegenseitiges Misstrauen abzubauen.*" (MARKO, 'Südtirol: Zur Frage des Exports einer Konfliktlösung', *in* Marko, Ortino, Palermo, Voltmer, and Woelk (eds), *Die Verfassung der Südtiroler Autonomie*, Baden-Baden, Nomos, 2005, p. 511-525, p. 522 [emphasis added]).

together with his or her aims and basic assumptions. Thus, Hannum and Lillich's article[103] – like other studies, too[104] – must be seen in the context of the Camp David Accords[105] and the reference there to "full autonomy"[106]. In their article (and the study to which the article makes reference[107]), Hannum and Lillich attempt to find out precisely what "full autonomy" means in international law by means of a comparison of 22 cases of autonomy.[108] Hence, it is not surprising that Hannum and Lillich do not provide a clear-cut, short definition of autonomy at the beginning of the article. In the end, they come to the conclusion:

> *"Although arriving at a firm definition that is appropriate in all cases is impossible, it is helpful to identify the minimum governmental powers that a territory would need to possess if it were to be considered fully autonomous and self-governing."*[109]

Then Hannum and Lillich spell out five elements that a full autonomy should fulfil. In a similar way, Lapidoth, after having analysed and compared a whole range of autonomy cases, identifies 16 factors that influence the success of an autonomy solution.[110] Obviously, Lapidoth is interested in what affects the success of autonomy arrangements. No wonder then that she has no difficulty in working with an "eclectic" description of autonomy.[111]

What do the variety of understandings (i) and the significance of context (ii)) imply for this study? They imply that it is imperative to flesh out this study's understanding of autonomy. This is done next. The two points also imply that we have to be aware of our context, too. Obviously, our aims and our idea of models of autonomy feed back into our conception of autonomy régimes. It is simple: if autonomy is understood

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[103] HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7.

[104] For instance, Dinstein (ed.), *Models of Autonomy*, New Brunswick, Transaction Books, 1981.

[105] Framework for peace in the Middle East agreed at Camp David (with annex), *supra* FN 102.

[106] Framework for peace in the Middle East agreed at Camp David (with annex), *supra* FN 102, under "West Bank and Gaza", para. 1. See HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 885.

[107] HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 859 (footnote 10).

[108] See HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 886. See the similar approach in HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* FN 90.

[109] HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 886.

[110] LAPIDOTH, *Autonomy*, *supra* FN 90, p. 199. Hannum and Lillich's elements and Lapidoth's factors are further analysed below.

[111] *Supra* FN 96.

narrowly as self-government (i. e. with an introverted, formal approach), the prospects for identifying "models" (in any sense of the term) in the case studies are poor. Therefore, we construe autonomy régimes in a broad sense.

b) On the trail of Ulysses, Aeneas, and the *Taucher*: a broad conception of autonomy régimes

Two aspects of autonomy have come up repeatedly: the entwinement between the State as a whole and the autonomy régime and minority protection. Two further thoughts lead the way. i) First, one must be aware that to establish an autonomy régime essentially comes down to fixing points of difference between the constituent groups of a State and points of similarity between them. The establishment of an autonomy régime requires an answer to the question: how much unity and how much diversity does and should exist in a State? Thus, establishing an autonomy régime virtually amounts to setting a position between the poles of unity and diversity. If the metaphor is excused, one could think of navigating, like Homer's Ulysses,[112] Vergil's Aeneas,[113] or Schiller's *Taucher,*[114] between Scylla and Charybdis. Charybdis, the water gorge that devours everything, represents unity; Scylla, the monster with many heads, stands for diversity. To approach – or swim to – one of the monsters too closely means inevitable defeat. You must find the right course between the two, being mindful of both monsters, which is a hard, but not impossible job.[115] Similarly, when an autonomy régime is established, both poles – unity and diversity – must be taken into account and be accommodated.

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[112] HOMER, *Odyssey*, around 800 BC, book XII, para. 20: "For on the one hand lay Scylla, and on the other mighty Charybdis in terrible wise sucked down the salt sea water." (original in ancient Greek, English translation (by Samuel Butcher) retrieved from: PROJECT GUTENBERG, *Odyssey,* <http://www.gutenberg.org/etext/1728>).

[113] VERGILIUS MARO, *Aeneis*, around 29 BC, book III, verses 424-428: "*At Scyllam caecis cohibet spelunca latebris / ora exsertantem et navis in saxa trahentem. / Prima hominis facies et pulchro pectore virgo / pube tenus, postrema immani corpore pistrix / delphinum caudas utero commissa luporum.*" and book III, verses 421-423: "*Atque imo barathri ter gurgite vastos / sorbet in abruptum fluctus rursusque sub auras / erigit alternos, et sidera verberat unda.*" (retrieved from PROJECT GUTENBERG, *Aeneis,* <http://www.gutenberg.org/etext/227> [emphasis added]).

[114] SCHILLER, *Der Taucher*, 1797, verses 127-132: "Thus shuddering methought - when a something crawled near, / And a hundred limbs it out-flung, / And at me it snapped; - in my mortal fear, / I left hold of the coral to which I had clung; / Then the whirlpool seized on me with maddened roar, / Yet 'twas well, for it brought me to light once more." (original in German, English translation retrieved from VIRGINIA COMMONWEALTH UNIVERSITY (DEPARTMENT OF FOREIGN LANGUAGES), *The Diver,* <http://www.fln.vcu.edu/schiller/taucher_e.html>).

[115] CHÂTILLON, *Alexandreis*, between 1176 and 1201, book V, verse 301: "*Incidis in Scillam cupiens uitare Caribdim.*" (retrieved from BIBLIOTHECA AUGUSTA, *Alexandreis,* <http://www.hs-augsburg.de/~harsch/Chronologia/Lspost12/Gualterus/gua_al00.html> [emphasis added]).

Based on this dualistic picture – a dichotomy between unity and diversity – one basic aspect of a conception of autonomy may be determined: autonomy implies the realization of diversity. Moreover, it may be deduced that autonomy is of a sliding scale-like nature. There may be more or less autonomy. But it is normally there (provided that one prefers, in the metaphor, to avoid jumping into Charybdis). A lesser degree of autonomy is realized, for instance, when private associations are the only means for a minority to be constituted; a larger degree of autonomy is realized, when it is possible for a minority to be constituted as a territorially based, official entity that counterbalances the State. Similarly, a minority's autonomy is larger, when its representation in the national parliament or government is guaranteed than when its only representation is a spokesperson with the central authorities.

ii) Second, for a minority three parameters seem to be most relevant: the identity, the voice, and the resources of a minority. Identity encompasses not only a spiritual dimension, but also the language and the institutions of a minority and a minority's powers of self-regulation. In other words, mostly the introverted aspects. In contrast, voice involves all extroverted aspects: the representation, participation, and cross-border contacts of a minority. With the resources of a minority an aspect is highlighted which is often overlooked: the means of a minority. With the parameter resources the question of financial leeway is addressed, i. e. the hows of a minority's financing. Of course, the three parameters cannot be separated strictly. They overlap at certain points.

Dawning

The conception of autonomy that is proposed here simply brings these two thoughts together: the idea of the sliding scale and the parameters are combined. In other words, the three parameters are seen as variables of diversity. Thus, the conception of autonomy used in this study is the following: an autonomy régime represents the constitution of diversity on the three levels of identity, voice, and resources of a minority in a State.

This conception of autonomy is based on a holistic understanding. It includes not just formal but also material aspects. It blurs the difference between the formal and the material by emphasizing the three parameters (identity, voice, and resources). The approach is more sociological than legal. It is a systemic, conceptual answer to the question what autonomy is. It is sympathetic to Charles Taylor's concept of group

recognition[116] as well as to communitarianism in general.[117] The conception of an autonomy régime proposed is not as far-fetched as it may seem at a first glance. A similar idea also underlies Hannum and Lillich's article, which is apparent in that they refer to autonomy as "general political or governmental autonomy"[118] or to the sliding scale-like nature of autonomy.[119] Moreover, the nucleus of our conception of an autonomy régime is seemingly also inherent in Lapidoth's approach ("a means by which it [a minority] can express its distinct identity"[120]).

[116] TAYLOR, *Multiculturalism and the Politics of Recognition: an Essay*, Gutmann (ed.), with comments by Gutmann, Rockefeller, Walzer, Wolf, Princeton, Princeton University Press, 1992 (see also the German translation TAYLOR, *Multikulturalismus und die Politik der Anerkennung*, Gutmann (ed.), Mit Kommentaren von Gutmann, Rockefeller, Walzer, Wolf und mit einem Beitrag von Habermas, Frankfurt am Main, Fischer, 1993). Recognition as well as related minority and group aspects were also treated by other authors, such as Kymlicka (see KYMLICKA, *States, Nations, and Cultures*, Assen, Van Gorcum, 1997, and the German translation: KYMLICKA, *Multikulturalismus und Demokratie - Über Minderheiten in Staaten und Nationen*, Kallscheuer (ed.), Hamburg, Rotbuch, 1999.

[117] For an introduction see Honneth (ed.), *Kommunitarismus - Eine Debatte über die moralischen Grundlagen moderner Gesellschaften*, 3rd edition, Frankfurt, Campus Verlag, 1994.

[118] HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 860: "The term 'autonomy,' as used in this article, should be understood to mean general political or governmental autonomy."

[119] HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 885: "Thus, autonomy is a relative term that describes the extent or degree of independence of a particular entity rather than defining a particular minimum level of independence […]."

[120] LAPIDOTH, *Autonomy*, *supra* FN 90, p. 15 (see *supra* p. 34) [brackets added].

1.4 Models of autonomy

The idea of models of autonomy is not new. Efforts to identify models of autonomy have been made before. Broadly, these efforts include horizontal approaches and in-depth studies. Indicator models also play a role. These efforts are discussed first (a), before this study's understanding of a model and its implications for autonomy are explained (b).

a) Previous efforts to create models of autonomy

The horizontal approach (i) and in-depth studies (ii) are most relevant for this chapter, while indicator models (iii) are primarily of methodological interest.

i) The horizontal approach

The horizontal approach to models of autonomy typically examines a more or less wide range of autonomy cases and attempts to identify common traits and structures. Horizontal studies derive generally valid principles from case studies. The studies by Hannum,[121] Lapidoth,[122] and Lauri Hannikainen[123] are considered here.[124]

Full autonomy

Hannum's "purpose is to identify what, if any, guidance may be found in international legal principles towards identifying a core of values which might be included in a right to autonomy".[125] He identifies four elements required for the status of full autonomy:[126]

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[121] HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* FN 90.

[122] LAPIDOTH, *Autonomy*, *supra* FN 90.

[123] HANNIKAINEN, 'Self-Determination and Autonomy in International Law', *in* Suksi (ed.), *Autonomy: Applications and Implications*, The Hague, Kluwer, 1998, p. 79-95.

[124] BENEDIKTER, *Autonomien der Welt: Eine Einführung in die Regionalautonomien der Welt mit vergleichender Analyse*, Bolzano, Athesia, 2007, is the latest horizontal study of "regional autonomy".

[125] HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* FN 90, p. 466-467.

[126] These are essentially the same elements as the five that Hannum and Lilllich made out in their article (HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 886-888; the

"1) There is a locally elected legislative body with some independent legislative authority, limited by a constituent document. Unless the exercise of this authority exceeds the local legislature's competence as defined in the constituent document, it should not be subject to veto by the principal/sovereign government. Local competence should generally include control or influence over primary and secondary education, the use of language, the structure of local government, and land use and planning.

2) There is a locally selected chief executive, who may be subject to approval by the central government; the executive may have responsibility for the administration and enforcement of state (national) as well as local laws. While the executive may be jointly responsible to the local and central authorities, this structural confusion is probably best avoided in circumstances where strong local identity is asserted.

3) There is an independent local judiciary with full responsibility for interpreting local laws. Disputes over the extent of local authority or the relationship between the autonomous and central governments may be within the original jurisdiction of the local courts, but final decisions are commonly within the competence of either the state judiciary or a joint dispute-settling body.

4) Areas of joint concern may be the subject of power-sharing arrangements between the autonomous and central governments, in which local flexibility is permitted within the broad policy parameters set by the central government. In addition to local implementation and administration of state norms, joint authority is frequently exercised over such matters as ports and communication facilities, police, and exploitation of natural resources."[127]

additional element in the article refers to the possibility of exclusive powers of the central authority (point 4, p. 887).

[127] HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* FN 90, p. 467-468 [emphasis added].

Factors of success

In her study, Lapidoth makes out factors that favour the success of a regime of autonomy. In a summed-up version, these factors are the following:[128]

> *"1. A regime of autonomy should be established with the consent of the population intended to benefit from it.* […] *However, sometimes a population that at first only reluctantly accepts a regime of autonomy, later comes to favor it* […].
>
> *2. The regime should be established with the consent, express or implied, of a foreign state to which the autonomous group may have an ethnic or other affiliation.* […]
>
> *3. The regime should be beneficial for both the state and the population of the autonomous region.*
>
> *4. The local population should be permitted to enjoy the formal or symbolic paraphernalia of self-determination, such as a flag, an anthem, and an officially recognized language.* […]
>
> *5. The division of powers should be defined as clearly as possible.* […]
>
> *6. If activities of the central government in spheres that are under its authority directly affect the autonomous region, the local authorities should, if possible, be consulted.* […]
>
> *7. An organ for cooperation between the central government and the local authorities should be established. Its composition, powers, responsibilities, and procedures should be established, as far as possible, in advance.* […]

[128] Lapidoth underlies each factor with the reasons she identified in her case studies. For the sake of brevity these reasons are omitted here. For the entire text see LAPIDOTH, *Autonomy*, *supra* FN 90, p. 199-201.

8. Modes and mechanisms for settling disputes between the center and the local authorities should be established, with a maximum of detail. […]

9. Under certain circumstances it may be preferable to establish the autonomy in stages, that is, to transfer the relevant powers (and perhaps also the territory involved) gradually. […]

10. The prospects for success are greater if both the central government and the autonomous authorities are based on democratic regimes. […]

11. Every regime of autonomy must include guarantees for the respect of human rights, including the principle of equality and non-discrimination among all the inhabitants. Similarly, a minority that lives within an ethnic group that has been granted autonomy should enjoy minority rights. […]

12. A rather similar stage of economic development and standard of living in the autonomous regions and in the state as a whole may enhance the chances of success. […]

13. If autonomy is established for a limited period, the procedure to be followed at the end of that period should be established. If possible, a list of tentative options to be considered at that stage should be drafted.

14. If the autonomy arrangement includes a commitment to certain rules of behavior, it may be helpful if those rules can be based on international norms […].

15. The most important and indispensable condition for a successful autonomy is a prevailing atmosphere of conciliation and goodwill. This condition must be generated by an energetic and sustained effort to explain and to engage in patient dialogue. […]

16. Autonomy should be established before the relations between the majority in the state and majority in the region deteriorate considerably. If there is hatred and frustration, it is too late, and autonomy will not be able to soothe the strained atmosphere."[129]

Nordic knowledge

Hannikainen, a Finnish Professor, conducts an analysis of the Nordic autonomies (the Åland islands, Faeroe islands, and Greenland) and comes to conclusions which are the following, in a summarized version:

"- The status of the autonomy should be inscribed in the constitution or another act which is above the ordinary laws of the State. It could also be based on an agreement between the State and the population of the region. It is naturally positive if the autonomy had its source in an international instrument. The jurisdiction of the autonomy should be determined in detail in law and there should be a legal procedure for solving jurisdictional disagreements. It would be preferable if the State were not entitled to abolish the autonomy unilaterally. […]

- The autonomous region should have a legislative body, being democratically elected by the inhabitants of the region and having certain independent legislative authority, and a regional government which has to enjoy the confidence of the regional legislative body.

- The following matters should be either within the exclusive jurisdiction of the organs of the autonomous regions, or these organs should have a substantial say concerning them: education and culture, language policy, social affairs, land policy, natural resources, protection of the environment, regional economic development and trade, health, zoning and transportation. […]

- The language of the autonomous region, if it is different from the dominant official language of the State, should have official status in the

[129] LAPIDOTH, *Autonomy*, *supra* FN 90, p. 199-201 [emphasis added].

region, perhaps together with the dominant official language of the State. […]

- It is inevitable in practice that there arise disagreements over the powers of the autonomous region between the State and the autonomous region. It would be preferable that such disagreements were not solved simply by the decision of the State organs. There should exist a special organ, composed of the representatives of the State and of the autonomous region, to settle disagreements. […]

- The autonomous region should have the possibility to be a party to the decision-making process at a national level in those (many) matters which affect its interests. For example, autonomous regions should have seats in the national Parliament. […]

- The local courts should preferably be a part of the autonomous machinery but should naturally enjoy in their work independence from the executive and legislative power. On the other hand, the highest judicial power is regularly in the hands of the State; a party to a case which has been settled by a local court of the autonomous region can on many occasions forward the case to a higher State court. […]

- It is a common saying that jurisdiction over taxation gives a strong base for the economic self-determination of an autonomous region. This is especially true for bigger regions. Municipal taxation is a clear case: it should always fall under the local jurisdiction. What is of paramount importance for autonomies – a basic requirement – is that their authorities have the power to dispose of the money received by the region – be it received through their own taxation or from the State. Because economic recession appears to be a phenomenon emerging from time to time in market economies, it may be safer for small autonomous regions to get a fixed annual sum from the State rather than to rely on its regional taxation, because economic recession tends to affect small entities more than bigger ones. […]

- The autonomous region should have the right to co-operate with regions and entities in neighbouring States especially in economic and cultural matters.

> *- It is understandable if the State wants to have a governor in the autonomous regions representing the State's interests. However, the governor should have only limited powers and should be nominated with the consent of the legislature or government of the region."*[130]

Experiences

What is to be made of these sets of experiences? Firstly, each study displays some characteristics. Hannum's study results in something like a model of autonomy. Yet, his constitutive elements of a full autonomy seem almost self-evident. They appear to be a democracy "in small" combined with some ideas of a vertical distribution of powers. It seems that the dissemination of democracy is the engine in Hannum's study.[131] Lapidoth, in contrast, introduces the element of the success of a regime of autonomy. Lapidoth focuses on how best to establish an autonomy. Her criterion for what is "best" seemingly is pragmatic: what has worked best so far? Hannikainen's suggestions somehow mirror the points elaborated above as to the Charter of Local Self-Government.[132] Secondly, the results of all three studies probably only apply to territorial autonomy régimes, but not to personal autonomy régimes. This limitation emerges from the selection of cases in all three studies: almost exclusively territorial autonomy régimes were examined. It is important to see, though, that the three studies are not the end of the developments. The experiences and results obtained from the studies were further developed and then crystallized in the Lund Recommendations on the Effective Participation of Minorities in Public Life.[133]

Recommendations from Lund

The Lund Recommendations were developed by an international group of experts (among them Hannum and Lapidoth[134]) upon the initiative of the OSCE High

[130] HANNIKAINEN, 'Self-Determination and Autonomy in International Law', *supra* FN 123, p. 91-93 [cited without references, emphasis added].

[131] HANNUM, *Autonomy, Sovereignty, and Self-Determination*, *supra* FN 90, p. 468: "The above summary of 'full autonomy' is applicable to Western-style democracies based on separation of powers, but this is evidently not the only appropriate model." (Hannum then goes on to say that notably for indigenous societies other systems may be appropriate.)

[132] COUNCIL OF EUROPE, European Charter of Local Self-Government, *supra* FN 64.

[133] OFFICE OF THE HIGH COMMISSIONER ON NATIONAL MINORITIES, The Lund Recommendations on the Effective Participation of Minorities in Public Life, 1999.

[134] For the other experts see OFFICE OF THE HIGH COMMISSIONER ON NATIONAL MINORITIES, The Lund Recommendations on the Effective Participation of Minorities in Public Life, *supra* FN 133, Introduction, p. 5.

Commissioner on National Minorities.[135] They may serve as guidelines for States on how to protect minorities effectively, with their aim always being the "inclusion"[136] of minorities. While all of the Lund Recommendations are relevant for the conception of models of autonomy (notably also those on "Participation and Decision making"[137]), those on self-governance are central:

> *"14) Effective participation of minorities in public life may call for non-territorial or territorial arrangements of self-governance or a combination thereof. States should devote adequate resources to such arrangements.*
>
> *15) It is essential to the success of such arrangements that governmental authorities and minorities recognize the need for central and uniform decisions in some areas of governance together with the advantages of diversity in others.*
>
> - *Functions that are generally exercised by the central authorities include defense, foreign affairs, immigration and customs, macroeconomic policy, and monetary affairs.*
>
> - *Other functions, such as those identified below, may be managed by minorities or territorial administrations or shared with the central authorities.*
>
> - *Functions may be allocated asymmetrically to respond to different minority situations within the same State.*

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[135] DRZEWICKI, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life - Five Years After and More Years Ahead', (2005) 12 IJMGR 125. For a short comment on the Lund Recommendations see MYNTTI, *A Commentary to the Lund Recommendations on the Effective Participation of National Minorities in Public Life*, Turku, Institute for Human Rights, Åbo Akademi University, 2001. See also the other recommendations regarding minorities under OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, <http://www.osce.org/hcnm/> (with the latest being The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, 2008).

[136] HENRARD, 'Lund Recommendations', *supra* FN 40, p. 134, with reference to PACKER, 'The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life', (2000) 4 *Helsinki Monitor* 39.

[137] OFFICE OF THE HIGH COMMISSIONER ON NATIONAL MINORITIES, The Lund Recommendations on the Effective Participation of Minorities in Public Life, *supra* FN 133, para. 6 ff.

16) Institutions of self-governance, whether non-territorial or territorial, must be based on democratic principles to ensure that they genuinely reflect the views of the affected population.

A. Non-Territorial Arrangements

17) Non-territorial forms of governance are useful for the maintenance and development of the identity and culture of national minorities.

18) The issues most susceptible to regulation by these arrangements include education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities.

- *Individuals and groups have the right to choose to use their names in the minority language and obtain official recognition of their names.*

- *Taking into account the responsibility of the governmental authorities to set educational standards, minority institutions can determine curricula for teaching of their minority languages, cultures, or both.*

- *Minorities can determine and enjoy their own symbols and other forms of cultural expression.*

B. Territorial Arrangements

19) All democracies have arrangements for governance at different territorial levels. Experience in Europe and elsewhere shows the value of shifting certain legislative and executive functions from the central to the regional level, beyond the mere decentralization of central government administration from the capital to regional or local offices. Drawing on the principle of subsidiarity, States should favourably consider such territorial devolution of powers, including specific functions of self-government, particularly where it would improve the opportunities of minorities to exercise authority over matters affecting them.

20) Appropriate local, regional, or autonomous administrations that correspond to the specific historical and territorial circumstances of national minorities may undertake a number of functions in order to respond more effectively to the concerns of these minorities.

- *Functions over which such administrations have successfully assumed primary or significant authority include education, culture, use of minority language, environment, local planning, natural resources, economic development, local policing functions, and housing, health, and other social services.*

- *Functions shared by central and regional authorities include taxation, administration of justice, tourism, and transport.*

21) Local, regional, and autonomous authorities must respect and ensure the human rights of all persons, including the rights of any minorities within their jurisdiction."[138]

Obviously, the Lund Recommendations altogether avoid the term autonomy. But they add an additional dimension that was not dealt with extensively in Hannum's, Lapidoth's, and Hannikainen's studies: non-territorial arrangements. Some of the recommendations in this regard imply a functional perception of personal autonomy ("useful for the maintenance and development of the identity and culture", para. 17). Apart from that, the Lund Recommendations reflect to a large extent the findings of the studies examined above.

ii) In-depth studies

In-depth studies of autonomy take a different approach than horizontal studies. They analyse a single case of autonomy. Typically, the analysis is conducted by one or several authors who are familiar with the autonomy, which is a tribute to the complexity of situations involving autonomy: when a detailed examination is to be conducted, the complex structure of autonomy régimes and their entwinement with the State must be unravelled. Such a difficult task can obviously be performed more easily

[138] OFFICE OF THE HIGH COMMISSIONER ON NATIONAL MINORITIES, The Lund Recommendations on the Effective Participation of Minorities in Public Life, *supra* FN 133, para. 14-21 [emphasis added].

by "local experts". In-depth studies, however, usually pursue similar aims as horizontal studies: mainly to extract principles that are generally applicable. An example for such an in-depth study is the case study of South Tyrol, in which several authors analyse all aspects of the autonomy of South Tyrol on more than 500 pages.[139] In the conclusive part of this study, Joseph Marko identifies three "*per se* conditions of success"[140] of the solution found in South Tyrol. These may be suitable for export. The first condition is the "mutual recognition as partners with equal rights and the relativization of the majority-/minority-position";[141] the second is the "effective participation through equal rights without the 'magic' of big numbers"[142]; and the third "openness, flexibility and duration/dynamics".[143]

iii) Indicator models

Indicator models do not deduce principles from existing cases. Rather, they identify variables (indicators) which are representative for the state of a system (for example the degree of integration in a State). Using these indicators, it is possible to measure

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[139] Marko, Ortino, Palermo, Voltmer, and Woelk (eds), *Die Verfassung der Südtiroler Autonomie*, Baden-Baden, Nomos, 2005. Other volumes combine shorter in-depth studies with a horizontal approach, for instance Suksi (ed.), *Autonomy: Implications and Applications*, The Hague, Kluwer, 1998; Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* Cambridge, Cambridge University Press, 2000; Skurbaty (ed.), *An Emerging Right to Autonomy? supra* FN 53; or Weller and Wolff (eds), *Autonomy, Self-governance and Conflict Resolution - Innovative approaches to institutional design in divided societies*, London/New York, Routledge, 2005.

[140] MARKO, 'Südtirol: Zur Frage des Exports einer Konfliktlösung', *supra* FN 102, p. 517: Drei "'*eigentliche' Erfolgsbedingungen*" [translation by the author, emphasis added].

[141] MARKO, 'Südtirol: Zur Frage des Exports einer Konfliktlösung', *supra* FN 102, p. 518: "*Wechselseitige Anerkennung als gleichberechtigte Partner und Relativierung der Mehrheit-/Minderheitenposition*" [translation by the author, emphasis added]. The relativization of the majority-/minority position is seen in a different light by KOSKENNIEMI, 'National Self-Determination Today: Problems of Legal Theory and Practice', *supra* FN 23. Koskenniemi calls the reversal of the majority-/minority position of two groups, which occurs when one switches from a higher to a lower level, the "'onion problem' of nationalism" (p. 260); Franck calls this phenomenon "the ripple effect of postmodern tribalism" (FRANCK, 'Postmodern Tribalism and the Right to Secession', *in* Brölmann, Lefeber, and Zieck (eds), *Peoples and Minorities in International Law*, Dordrecht, Martinus Nijhoff, 1993, p. 3-27, p. 19). It is indeed often the case that an ethnic conflict is not solved by the creation of a new autonomous or sovereign entity. Rather, the conflict is relocated to the lower level where it persists with reversed majority-/minority positions (see only the relationship between Serbs and Kosovars in Serbia as a whole, in Kosovo, and in Mitrovica).

[142] MARKO, 'Südtirol: Zur Frage des Exports einer Konfliktlösung', *supra* FN 102, p. 519: "*Effektive Partizipation durch Gleichberechtigung ohne 'Magie' der grossen Zahl*" [translation by the author, emphasis added].

[143] MARKO, 'Südtirol: Zur Frage des Exports einer Konfliktlösung', *supra* FN 102, p. 522: "*Offenheit, Flexibilität und Zeitdauer/Dynamik*" [translation by the author, emphasis added] (essentially, Marko here refers to the following aspects: an autonomy régime should be so flexible that it can be revised; and it is necessary to have a long-term perspective.).

the state of a system in what regards the indicators (in our example the degree of integration of groups). This is not only interesting for the system analysed itself, but also for comparison.[144] An example of a legal indicator model are the "Legal Indicators for Social Inclusion of New Minorities Generated by Migration"[145]. These indicators identify the legal provisions that are relevant for the integration of immigrant minorities. They then provide a tool by the aid of which the state of a legal order regarding the inclusion of these minorities can be assessed and then compared to other legal orders. Similarities exist between the indicator approach and the understanding of autonomy régimes proposed in this study. Notably the parameters and their sliding scale-like nature play a role in both approaches. However, the differences prevail. The conception of autonomy submitted here does not serve to measure the degree of autonomy in a given case or to enhance the comparability of autonomy systems. It helps identify what autonomy is in a specific case and thus contributes to the quest for models of autonomy. Moreover, the approach used in this study, puts emphasis on the unique nature of each autonomy régime, while in principle being open to a transfer and an export of experiences. This must be explained now.

b) Devising the idea of a model of autonomy

The idea of a model of autonomy builds on and expands the results of the above studies by emphasizing an aspect that has been neglected to a certain extent: the conflict resolution capacity of autonomy régimes.[146]

The form and the substance of the horizontal and the in-depth studies are taken into account by this study. It combines the form of both horizontal and in-depth approach: two in-depth studies of highly different autonomy régimes are conducted. One of the major challenges that this crossover approach poses is that thorough knowledge of two entirely different national legal orders is required. The substance of the above studies (in-depth and horizontal) is the knowledge basis upon which this study builds. Yet, this study differs markedly from the studies done so far. Previous studies all seem to

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[144] For an overview of social and legal indicators and indices, see FARKAS, 'Legal Indicators for Social Inclusion of New Minorities Generated by Immigration (LISI) - Review on Existing Indicators', 2002 (available at: <http://www.eurac.edu/Org/Minorities/LISI/Documents.htm>).

[145] MARKO, MEDDA-WINDISCHER, PEKARI, ROGERS, FARKAS, and KAPUY, *The LISI Indicators - Legal Indicators for Social Inclusion of New Minorities Generated by Migration*, Bolzano, Eurac Research, 2003. See also the recent study EUROPEAN COMMISSION, *The Fight Against Discrimination and the Promotion of Equality - How to Measure Progress Done*, Luxembourg, 2008.

[146] KEMPIN REUTER, 'Dealing With Claims of Ethnic Minorities in International law', (2009) 24 *Connecticut Journal of International Law* (2) 201-238, also focuses on minority conflicts and the role of international law (and *inter alia* autonomy) in solving such conflicts.

have worked with an approach of universal validity: they seemingly aimed at deducing principles from cases which are generally valid. Albeit in different settings, the previous studies all, in a way, strove for models of autonomy that are applicable in general.[147] The only distinction made was the distinction between territorial and non-territorial arrangements.[148] However, such an approach of universal validity comes at a price: the price of banality. Some of the conclusions reached in the studies, while of course accurate and virtually universally valid, are somehow obvious. This is the case, for instance, for the requirements that an autonomy "regime should be beneficial for both the state and the population of the autonomous region"[149] or that "the division of powers should be defined as clearly as possible"[150] – both considerations that could also have been reached based on simple common sense. With all due respect for the previous studies, one should be careful to avoid over-generalization. It is perhaps not always necessary to generalize all findings. Do we really need to find principles that are applicable to *all* cases of autonomy? Or should we not rather attempt to define concrete principles that are applicable to a clearly discernible, limited set of cases? This study undertakes the second alternative and thus attempts to avoid over-generalization. The starting point of this alternative is the idea of a model.

What is a model?

From the studies discussed above it does not become entirely clear what a model of autonomy is. Apparently, the general assumption is that the concept of a model is

[147] Marko, after having identified the necessity of a factor analysis to establish the elements of success of the autonomy arrangement in South Tyrol, finds such an analysis to be beyond the scope of his contribution. He then arrives at the conclusions described above (*supra* p. 50), by means of a general assessment of the situation (MARKO, 'Südtirol: Zur Frage des Exports einer Konfliktlösung', *supra* FN 102, p. 516: "*Ein empirischer Vergleich der Gemeinsamkeiten und Unterschiede des jeweiligen konkordanzdemokratischen Systems, der Akteure und ihrer Beziehungen in Südtirol und Bosnien-Herzegowina sowie die 'Bewertung' der Einflussfaktoren anhand der Innenperspektiven der jeweiligen Konfliktsituationen und aufgrund externer Vergleiche als Voraussetzung der Faktoranalyse ist an dieser Stelle nicht möglich. Dennoch habe ich aus verschiedenen Vorarbeiten die Überzeugung gewonnen, dass nicht nur einzelne inhaltliche Elemente, sondern die 'Grundidee' des Südtiroler Autonomiestatuts mit seinem Prozess der Implementierung 'verallgemeinerungsfähig' ist und somit 'Modellcharakter' hat.*" [cited without references, emphasis added]).

[148] OETER, 'Minderheiten zwischen Segregation, Integration und Assimilation - Zur Entstehung und Entwicklung des Modells der Kulturautonomie', *in* Blumenwith, Gornig, and Murswiek (eds), *Ein Jahrhundert Minderheiten- und Volkgruppenschutz*, Köln, Verlag Wissenschaft und Politik, 2001, p. 63-82, analyses cultural autonomy and implicitly grounds his article on two models: territorial and personal autonomy (p. 68-69). For a study of cultural autonomy with three cases (Kosovo, Kurdistan, and the Basque country), see ROACH, *Cultural Autonomy, Minority Rights and Globalization*, Aldershot, Ashgate, 2005.

[149] LAPIDOTH, *Autonomy*, *supra* FN 90, p. 199.

[150] LAPIDOTH, *Autonomy*, *supra* FN 90, p. 199.

self-explanatory.[151] In the book entitled "Models of Autonomy"[152] the concept of a model does not attract much attention.[153] In my view, the idea of a model of autonomy merits further reflection.[154] A short sketch of what could possibly constitute a model is therefore given.

The term model has many meanings, ranging from fashion models, design types, the subjects of works of artists, over logical constructs in mathematics to parts of theories that explain how the economy works. The New Shorter Oxford English Dictionary lists many sub-entries under the key word model. The most relevant part for our purposes defines a model as a "simplified description of a system, process, etc., put forward as a basis for theoretical or empirical understanding; a conceptual or mental representation of something".[155] Then, as an illustration, the dictionary cites a passage from "*Scientific American:* A model designed to forecast next week's weather ignores these variables."[156] A model may also be "[t]he design, pattern, or structural type of a material or immaterial thing", an "object of imitation", notably "a person or work

[151] The common saying is that no models of autonomy exist (see, for instance, HEINTZE, 'Territorial Autonomy and International Stability', *supra* FN 61, p. 62: "[…] there are no commonly accepted models of autonomy […]").

[152] Dinstein (ed.), *Models of Autonomy*, *supra* FN 104.

[153] Marko, concluding the volume on the autonomy of South Tyrol, reflects on the idea of a model. Yet, the reflections are limited to the questions whether it is possible at all to export an autonomy arrangement (the answer is in the affirmative in principle) and what the success of an autonomy arrangement means (a factor analysis would be necessary [see *supra* FN 147]) (MARKO, 'Südtirol: Zur Frage des Exports einer Konfliktlösung', *supra* FN 102, p. 514-517, in particular p. 515). CHIESI, 'Social Structure, Social Capital and Institutional Agreement: The Trentino-Alto Adige Model', *in* Skurbaty (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Leiden, Martinus Nijhoff, 2005, p. 103-112; and FOIGHEL, 'The Right of a People to Exercise Their Culture - A Scandinavian Model', *in* Skurbaty (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Leiden, Martinus Nijhoff, 2005, p. 231-239, for instance, use the term model with regard to autonomy without any discussion of the concept of a model (see the titles of the articles). See also TOGGENBURG, 'Europas Integration und Südtirols Autonomie: Konfrontation - Kohabitation - Kooperation?' *in* Marko, Ortino, Palermo, Voltmer, and Woelk (eds), *Die Verfassung der Südtiroler Autonomie*, Baden-Baden, Nomos, 2005, p. 448-492 (see the title of Toggenburg's last section: "*Südtirol – nunmehr tauglicher Modellfall?*", p. 489 [emphasis added]).

[154] The concept of a model is obviously more popular in political than in legal science. David Held's influential monograph on democracy, for instance, is based on the idea of a model: HELD, *Models of Democracy*, 3rd edition, Cambridge, Polity Press, 2006. Held's considerations are, however, most extensive on the subject of democracy and very brief regarding the idea of a model. Held only elaborates on the idea of a model on half a page (p. 6: "First, a word about the notion of 'models'. As I use the term here it refers to a theoretical construction designed to reveal and explain the chief elements of a democratic form and its underlying structure of relations. An aspect of public life or set of institutions can be properly understood only in terms of its connections with other social phenomena. Models are, accordingly, complex 'networks' of concepts and generalizations about aspects of the political realm and its key conditions of entrenchment, including economic and social conditions." [cited without references]).

[155] Brown (ed.), *The New Shorter Oxford English Dictionary*, *supra* FN 2, p. 1802.

[156] Brown (ed.), *The New Shorter Oxford English Dictionary*, *supra* FN 2, p. 1802 [emphasis in original].

proposed or adopted for imitation; an exemplar".[157] Three elements that are pertinent for this study emerge from these considerations: a theoretical construct that explains a real process, simplification, and an exemplary character. The weather illustration from Scientific American implies an additional element of a model: the element of forecast or prediction. In the mathematic, economic, and natural science senses of the term, a model normally serves to predict future developments (economic developments, the weather, the course of a chemical reaction, etc.) or at least enables logical deductions and explanations.[158]

To put it simply, a model may therefore be understood for the purposes of this study as a theoretical concept, an abstraction from reality which is simplified, has got exemplary character, and enables predictions. The conclusions from the studies indicated above (in particular the Lund Recommendations[159]) *prima facie* fulfil these elements: they present a theoretical concept, which is based on reality and which is simplified to a certain extent. They also allow predictions in the sense that they can be applied to other cases which – depending on the principles applied – increases the chances of success of an autonomy or grants effective participation to a minority. Moreover, these conclusions have a general, exemplary character.

Exemplary character

However, the exemplary character is a weak spot. If one designates something as having exemplary character, one must necessarily indicate a point of reference: *what* is it an example for? When we look at an autonomy régime that has been put into

[157] All citations in this sentence are from Brown (ed.), *The New Shorter Oxford English Dictionary*, *supra* FN 2, p. 1802 [brackets added].

[158] The New Shorter Oxford English Dictionary does not explicitly mention this element of prediction. It is evident, though, in the Brockhaus Encyclopedia entry on the term model: "[model in n]atural sciences: an image of nature which emphasizes those characteristics that are considered to be essential and which omits those aspects that are regarded as incidental. A model in this sense is a means of description of experienced reality, of formation of ideas of reality and the basis of *predictions* about the future behaviour of the domain of experience. It is the more realistic and closer to reality, the more consistently it allows to interpret the included domain of experience and the more exact its *predictions* prove to be; it is the more powerful, the bigger the described domain of experience is." [Translation by the author, brackets and emphasis added] Modern lexica, which are based on an open source, web community approach (like WIKIPEDIA, <http://www.wikipedia.org>) and the consistency of which is sometimes hard to gauge (partly because the content is constantly changing), contain various entries on the term model with thousands of words. Normally, the element of prediction is present in the entries on the natural scientific and economic senses of the term model.

[159] OFFICE OF THE HIGH COMMISSIONER ON NATIONAL MINORITIES, The Lund Recommendations on the Effective Participation of Minorities in Public Life, *supra* FN 133, and the conclusion in the studies examined on p. 40, p. 42, and p. 44.

practice (for instance the autonomy in South Tyrol, or the autonomy of the Sami in the Nordic countries), we may first ask whether it has got an exemplary character and what the principal traits of the autonomy régime are. Generally, this comes down to asking whether the autonomy régime was a success and what the main elements of the structure, which made this success possible, are. However, we should not stop here, but continue to ask: *for what* is the autonomy régime an example? What were the *problems* that the autonomy régime successfully solved? Only to the extent that an autonomy régime succeeded in solving one (or more) specific problem(s) this autonomy régime may be said to have exemplary character and, hence, to be a model.

This is the crucial point: an autonomy régime should only be called a model, if it has successfully addressed a problem. And it is only a model with regard to this problem. In other words, the duo of "problem-solution" essentially determines the model character of an autonomy régime. This model character cannot be established in general, i. e. dissociated from the duo "problem-solution".

Qualifications

This understanding of models of autonomy raises a number of issues that must be discussed. First, it must be pointed out that the success of an autonomy régime in the sense explained above is relative and depends on the perspective of the assessor. A problem, which an autonomy régime addresses, is hardly ever solved entirely. The problem might be on a good way to a solution and some elements of success may be visible. These are the issues of graduality and relativity which are inherent to the idea of a model proposed here. Graduality and relativity, it seems, can only be solved in a satisfactory manner, if at all, on a meta-level of philosophy. This task cannot be undertaken in this study. Nevertheless, graduality and relativity must be kept in mind, for they may lessen the value of the deductions and conclusions drawn from the cases in this study.

The problems which an autonomy régime addresses are manifold. Autonomy is not just about "easing ethnic tensions".[160] As is evidenced in the case studies in the following chapters, there are many reasons and motivations to introduce an autonomy

[160] LAPIDOTH, *Autonomy*, *supra* FN 90, p. 9; Lapidoth addresses self-determination, minority rights, and the rights of indigenous peoples, under the heading of autonomy as a means to ease ethnic tensions. She only marginally considers other reasons for the establishment of an autonomy (economic reasons and "regimes of internationalization" [both on p. 25]).

régime.[161] Many factors influence an autonomy régime and many problems need to be addressed. How can these problems, reasons, and factors be kept apart? What is the distinctive element? Even though it is sometimes difficult to distinguish causes from effects, one main distinction can be established *a priori*: between, on the one hand, problems which an autonomy régime addresses and which, as a consequence, determine and inform the shape of the solution (the autonomy), and, on the other hand, factors, reasons, motivations, etc., which only trigger the establishment of an autonomy régime, but which do not determine the autonomy régime. This distinction is important, because the latter (the trigger factors) are less relevant for the model character of an autonomy régime. However, to establish such a distinction is obviously an imprecise, qualitative process that, again, involves a certain amount of judging.

iii) The conception of autonomy proposed in this study construes autonomy as a régime that consists of legal rules. The two main features of such autonomy régimes, which are highlighted in this study, are the dimension of minority protection and the entwinement with the State. A third, functional dimension has now been added: an autonomy régime is perceived as the legal answer to the problems to be addressed. This said, it is evident that autonomy as a legal régime is not the only answer possible to a problem. Indeed, the multiplicity of problems (see *supra* ii) is mirrored by an abundance of instruments. Plenty of other instruments may contribute to the solution of the issues at hand, such as mediation, pressure by international actors, or decisions by international courts or organizations. These instruments are not excluded from this study, but they are not in the focus, either. To be clear, the focus of this study on autonomy régimes should not be misunderstood as disfavour for the other instruments. Rather, it should be seen as an attempt to highlight a so far neglected aspect of autonomy: the aspect of problem and conflict resolution. Maybe this attempt proves to be instructive beyond the subject of autonomy. For it seems that the functional, instrumental approach to law as such does not always receive enough attention.[162]

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[161] See also, for instance, HEINTZE, 'Territorial Autonomy and International Stability', *supra* FN 61, p. 51: "Other reasons, which led to autonomy, were geographical remoteness of a region, the special relationship of the local population to their land and its resources, the region's particular historical or cultural development or the existence of indigenous peoples who survived colonization."

[162] In a sense, this study follows Morten Kjaerum's view: "[…] turn 'autonomy' into a tool and concept that will be part of the solution, not part of the problem, to ethnically-based conflicts - the root of political malaise of the 21 century." (KJÆRUM, 'Prolegonemon', *in* Skurbaty (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Leiden, Martinus Nijhoff, 2005, p. xxiv-xxvi, p. xxvi). A functional understanding of autonomy manifests itself also in the utilization of the term "useful" in OFFICE OF THE HIGH COMMISSIONER ON NATIONAL MINORITIES, The Lund Recommendations on the Effective Participation of Minorities in Public Life, *supra* FN 133, recommendation 17 (see the quote *supra* p. 48); or in HANNUM and LILLICH, 'The Concept of Autonomy in International Law', *supra* FN 7, p. 883: "However, there are several

Causation

In our case, multiple problems are confronted by multiple solutions. Therefore, the typical issues of causation (or causality) arise. In the case studies, it may even become difficult to determine which element is a cause and which an effect.[163] However, this is a general problem, i. e. one that is not limited to this study. In medical science, for instance, a new medicament is tested on a representative group of people (in the clinical phase of the admission process) to determine causes and effects and exclude other factors than the medicament and the malady to be treated. Another example is the actual treatment of a patient, where differential diagnosis is used to determine the disease and the treatment. Indeed, causation is a problem that occurs in virtually all branches of science. It is a regular obstacle in weather forecasts, in global climate (and its changes), in processes of evolution, etc. Causation is a re-occurring problem with all complex systems in which so many components are important that they can neither be ignored nor aggregated.

Obviously, the general challenge that is posed by causation and that over-arches most disciplines is not solved here. Generations of philosophers have grappled with causation on a theoretical level. What we can do, though, is use the generally acknowledged ways of dealing with issues of causation, when examining autonomy régimes: a careful examination of the factors involved is performed; reasonable assumptions on the basis of previous research results are made; necessary simplifications are applied and probabilities taken into account. But unlike most natural scientists, we cannot conduct experiments and tests. We can only observe real life experiments (i. e. autonomy régimes) and, based on our observations, make

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entities that have been granted 'autonomy' not as a response to desires for political self-government, but rather as a means of guaranteeing to certain social or ethnic groups a degree of independence from governmental interference in matters of particular concern to these groups, *e. g.*, cultural autonomy or religious freedom." Interestingly, the Lund Recommendations implicitly adopt a functional perspective only concerning non-territorial autonomy, and Lillich and Hannum only regarding "cultural autonomy and religious freedom" (p. 883). To be clear, any legal approach undoubtedly is, at the core, a problem-oriented approach (else, it seems, no norms would be needed), in particular the legal approach to minorities. This is especially obvious in RAMCHARAN, 'Fact-finding into the Problems of Minorities', *in* Brölmann, Lefeber, and Zieck (eds), *Peoples and Minorities in International Law*, Dordrecht, Martinus Nijhoff, 1993, p. 239-251, who examines the issue of fact-finding regarding minorities' problems. It is merely submitted for the present purposes that the problem-solving function of autonomy régimes has not received enough attention so far.

[163] For a similar problem with secession and autonomy, see HILPOLD, 'Die Sezession - zum Versuch der Verrechtlichung eines faktischen Phänomens', (2008) 63 ZöR 137-138, who deals with the theory which argues that autonomy arrangements are a good basis for and thus a first step towards secession and comes to the conclusion that this theory "misinterpretes causalities" ("[m]*eines Erachtens werden mit diesen Theorien Kausalitäten fehlgedeutet* […]" [translation by the author, brackets and emphasis added]).

proposals. It must be born in mind, though, that like in any social science approach that copes with issues of causation (e. g. the legal way of judging the adequacy of a causal chain), an element of judgment is inherent in our approach and the proposals made in this study. Moreover, it is clear that some uncertainty remains.[164]

Model traits of autonomy régimes

By now it should be clear that this study does not endeavour to establish general *models* of autonomy. Indeed, the caveat made by many scholars that each autonomy arrangement has a unique character is heeded.[165] Evidently, though, this study is based on the belief that every autonomy régime offers some lessons. Mutual learning is always necessary.[166] The lessons that are proposed here are certainly not relevant to *all* other autonomy régimes. But even if the lessons that are proposed here prove instructive only for *one* other autonomy, it will have been well worth elaborating them. Remember also the promise of the functional focus employed here: over-generalization can be avoided by concentrating on the problem-solution capacity of an autonomy régime. If one wishes to pinpoint the focus, one could say that not models of autonomy régimes as such are elaborated in this study, but rather model *traits* of autonomy régimes.

Effective extrapolation is impossible

Given the circumstances, one step that must be taken in modelling efforts is obviously obstructed here: the step of effective extrapolation. This step would mean to apply any suggested model trait, which is deduced from a case study, to other cases in order to verify its accuracy. Evidently, such an effective transfer is beyond the scope of this study. Two points follow from this. First, another important consideration is hindered: the consideration on how similar the factual circumstances of another case would have to be to the circumstances of the case examined to justify the application of the model

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[164] For a good way of dealing with uncertainty, see COONEY and LANG, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade', (2007) 18 EJIL (3) 523-551 .

[165] See, for instance, HEINTZE, 'Territorial Autonomy and International Stability', *supra* FN 61, p. 48: "However, autonomy regulations are necessarily always a case-to-case solution […]."

[166] Similarly, FUKUYAMA, *State building: Governance and World Order in the Twenty-First Century*, London, Profile, 2005, who is positive as to the export of experiences made in development, albeit within a limited framework and with respect for local specifities. (See, in German, FUKUYAMA, *Staaten bauen: die neue Herausforderung internationaler Politik*, München, Propyläen, 2004, p. 127: "*Generelle Kenntnisse von ausländischen administrativen Praktiken müssen in einem weit reichenden Verständnis lokaler Hindernisse, Möglichkeiten, Sitten, Normen und Umstände kombiniert werden.*" [Emphasis added])

trait of an autonomy régime. Second, an extrapolation would be further complicated, as no two situations are identical in all aspects – in other words: the *cetera* are never *para* – and as similarity, again, is a question of degree.

One can thus conclude that research in a complex system is always complicated. After all, this is the reason why these systems are called *complex*. The researcher must cope with the interdependency of the elements involved, work with assumptions, and live with a considerable amount of uncertainty. Yet, despite all uncertainty, one thing is sure: the difficulty of the task should not *a priori* deter an attempt to perform the task. The attempt to identify model traits of autonomy régimes must therefore definitely be undertaken.

1.5 Concluding observations

This study chooses a functional approach to autonomy. Autonomy is construed as a régime which safeguards diversity in terms of identity, voice, and resources of a minority. Such an autonomy régime serves to protect minorities and is strongly entwined with the State as a whole (i. e. in a vertical as well as a horizontal dimension). It consists of legal rules, the main function of which is to address and solve a given set of conflicts and problems. From the logic of modelling, arguments of (over-)generalization and aggregation, and from reasoning on complex systems, arises the notion of a model trait of an autonomy régime: the archetypal couple of a problem and the corresponding instrument which, as a part of the autonomy régime, successfully solves the problem. Thus, a policy maker, upon encountering a problem that is similar to – or even better: the same as – a problem identified in the case studies, may consider applying the instrument which has a proven record of success according to the case studies performed.

This is the basic idea, which was explained in detail in this chapter. It is put to use in the following chapters where actual model traits are identified in the case studies. The idea is obviously based on a number of beliefs: that it is unnecessary to identify general principles that apply to all autonomies (that is general models of autonomy); that every existing case of autonomy is unique – to a certain extent, but not entirely; that the role of the law in conflict resolution and prevention has not received due attention so far; and that a functional perception of autonomy régimes may provide further insights.

Chapter 2 Of Uses and Abuses: The German Minority in Hungary

Chapter 2 – In which the basis of the autonomy régime proves to be quaky; in which it emerges that the constitution has made a false promise; in which minorities turn out to be symbionts as well as parasites; in which the Magyars abroad prove to be a boon to minorities in Hungary; in which it emerges that minorities sometimes run away; in which fear happens to have an unexpected, but welcome effect.

When you plan to arrive in Budapest late in the evening and to move into the apartment – which a friend of yours from back home recently rented for himself, without ever having been there yet, and which he now sublets to you for your research stay in Budapest – then, just remember one thing: your friend needs to give you not only the key to the apartment. He also needs to give you the code to the front door. Without this front door code, which in Budapest is specific to each apartment, you will not be able to enter the building. Then you might have to spend the night out on the street.

Of the entire apartment house in Jozsefváros, the eighth district of Budapest, only one old man finally opened the front door. He would not let me in, though. The old man did not speak a single word of English, nor did his wife, who had joined us at the front door. Despite my desperate gesturing, they did not manage to grasp the situation I was in – until the woman found out that I understood German. It turned out that the old man himself spoke an ancient German dialect. All of a sudden, we could understand each other, albeit with some difficulties. After briefly exchanging the stories of our lives – his of course considerably longer and more interesting than mine – the old man happily gave me their front door code and the situation was resolved, thanks to their kindness and our common language. This was my first encounter with a Hungarian German – but only the second contact with a minority issue after having arrived in Budapest on that evening.

* * *

The Hungarian German minority is a small minority that is scattered all across Hungary. The Hungarian Germans, like other minorities in Hungary, enjoy the benefits of a special autonomy régime that is based on an act of the Hungarian Parliament. This autonomy régime is the subject of this chapter. It is examined with the aim of identifying model traits. In a first section, a brief overview of the situation of the Hungarian German minority is given (section 2.1). Then, in section 2.2, the autonomy régime is studied in detail along the lines of identity, voice, and resources. The aspect of control over the autonomy régime is also given due attention. Thereafter, the main factors that have an impact on the autonomy régime are analysed (section 2.3). Four factors are most pertinent: a historical factor that is called the *angst* of registers here, the situation of the Hungarian diaspora, a phenomenon we call runaway integration, and international pressure resulting from Hungary's aspirations to join the European Union. Based on this analysis, two model traits of the autonomy régime are proposed: a *macro* and a *micro* model trait (section 2.4).

This chapter pursues two goals. On the one hand, the case study is a first attempt to identify model traits of an autonomy régime that is widely believed to be of exemplary character.[167] Thus, the case study also serves to corroborate the approach outlined in chapter 1. On the other hand, a first dimension of autonomy is examined: a cultural autonomy régime that is based on a personal approach.

[167] See for instance, HOFMANN, *Minderheitenschutz in Europa: völker- und staatsrechtliche Lage im Überblick*, Berlin, Mann, 1995, p. 176.

2.1 The basics

Hungary is homogeneous and, at the same time, heterogeneous. All non-Magyars in Hungary taken together amount to no more than a few per cent of the overall population of Hungary. This little part of the population is far from constituting a uniform block, though. It is made up of diverse groups, like Armenians, Chinese, Cubans, Hungarian Germans, Roma,[168] Slovenes, or Vietnamese. These groups differ in ethnicity, nationality, migratory background, etc. The Slovenes, for instance, had already lived in their territory, when the Magyars arrived there.[169] The Chinese, Cubans, and Vietnamese came to Hungary as "socialist guest workers" during the 1960s.[170] The differences manifest themselves in particular in the size of the groups. The data obtained from the census of 2001 is indicative in this regard (while the "true" size is uncertain to some degree): the Roma certainly constitute the most populous (205 720 persons according to the census) and the Hungarian Germans the second largest group (120 344 persons), while the Armenians are the smallest group (1 165

[168] As to the term "Roma", see the note *infra* FN 221.

[169] KÜPPER, *Das neue Minderheitenrecht in Ungarn*, München, Oldenbourg, 1998, p. 210: "[…] *der Besonderheit, dass die Slowenen die einzige autochthone Minderheit in dem Sinn sind, dass sie nicht irgendwann in den ungarischen Staat eingewandert sind, sondern bereits zur Zeit der Landnahme der magyarischen Stämme in dieser Gegend ansässig waren.*" [Emphasis added].

[170] KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 94: "[…] *Kubaner, Chinesen, Vietnamesen sind sog. 'sozialistische Gastarbeiter', die ab Mitte der 60er Jahre aufgrund von Verträgen mit den Heimatländern zur Behebung des Arbeitskräftemangels ins Land geholt worden sind.*" [Translation by the author, emphasis added].

persons).[171] However, each of these groups is undoubtedly tiny compared to the number of ethnic Hungarians living in Hungary (9 627 057 persons).[172]

Some common ground exists between Hungary's domestic minority groups and the Hungarian diaspora living in the countries adjacent to Hungary. The common ground is limited, though. The most important common aspect is that the Romanian, Serb, Slovak, etc. minorities living in Hungary are the mirror image of the ethnic Magyars living in Romania, Serbia, Slovakia, etc. The minority status of all these groups is a legacy of the treaty of Trianon, which was concluded on 4 June 1920 as a part of the post World War I settlement. As a result of the treaty of Trianon the kingdom of Hungary was cut up. Hungary lost about two thirds of its territory and population to the neighbouring States. About three million Magyars came to live as minorities in these neighbouring States – most of them in Romania and Czechoslovakia[173] – while some non-ethnic Magyars came (or rather stayed) under the rule of the Hungarian State. Whereas today the size of Hungary's minorities is established with some certainty, the exact number of ethnic Hungarians living presently abroad can only be estimated roughly. Seemingly, they still add up to 3 million persons.[174] Thus, they outnumber the minority groups living within Hungary by far – which is no surprise

[171] HUNGARIAN CENTRAL STATISTICAL OFFICE, *Population Census 2001,* <http://www.ksh.hu> (in the English section under "Population census", "Publications and data of the Population Census 2001", section 24 "Ethnic minorities"). The data obtained from the census 2001 can be structured and interpreted in different ways. That is why the size of the groups indicated in REPUBLIC OF HUNGARY, Second Report pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, 2004, ACFC/SR/II (2004)003, p. 163, is slightly different. Moreover, the accuracy of the census data is subject to disputes because of the ambiguity of the questions asked in the census, the possibility of multi-affiliations, and the basic problem of determining the ethnicity or the nationality of an individual as such (for the latter point see ASCHAUER, *Zur Produktion und Reproduktion einer Nationalität - Die Ungarndeutschen*, Stuttgart, Franz Steiner Verlag, 1992, p. 177 ff.). On the way the census 2001 was conducted, see GOVERNMENT OF HUNGARY, Comments on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Hungary, 2001, GVT/COM/INF/OP/I(2001)004, p. 3. In REPUBLIC OF HUNGARY, Third Report submitted in accordance with Article 15 of the Language Charter, 2005, MIN-LANG/PR (2005) 6, p. 7, the size of the groups as estimated by the minorities themselves is published. According to these estimates, the groups are much larger (for instance, the Roma 400 000 – 600 000, the Hungarian Germans 200 000 – 220 000, or the Armenians 3 500 – 10 000 persons). Note that the census 2001 gives no indication as to a Chinese, Cuban, or Vietnamese origin.

[172] HUNGARIAN CENTRAL STATISTICAL OFFICE, *Population Census 2001, supra* FN 171.

[173] KOVÁCS-BERTRAND, *Der ungarische Revisionismus nach dem ersten Weltkrieg - der publizistische Kampf gegen den Friedensvertrag von Trianon (1918-1931)*, München, Oldenbourg, 1997, p. 93.

[174] VOGEL, 'Sicherheitsdilemma und ethnische Konflikte aus ungarischer Sicht', *in* Seewann (ed.), *Minderheiten als Konfliktpotential in Ostmittel- und Südosteuropa*, München, Oldenbourg, 1995, p. 212-230, p. 219, indicates the "official number" of 2.7 million ethnic Hungarian living abroad and estimates of about 3.3 million. ZELLNER and DUNAY, *Ungarns Aussenpolitik 1990-1997: Zwischen Westintegration, Nachbarschafts- und Minderheitenpolitik*, Baden-Baden, Nomos, 1998, p. 19, indicate a number of about 3 million Hungarians living abroad.

given that the treaty of Trianon was designed to cut up the Hungarian kingdom, and not the States adjacent to Hungary.

This study focuses on Hungary's domestic minority groups. Despite all the differences among these domestic minorities, some similarities exist: the members of the groups are all scattered across the country and they are integrated to a large degree into the Hungarian society. Officially, Hungary goes even further in stating that "[a]ll minorities living in Hungary are characterized by being dispersed across the country, a dual identity, an advanced state of assimilation, loss of language and strong emotional and cultural ties with their native land, namely Hungary."[175] Despite these similarities, the differences between the minorities in Hungary remain a fact. These differences are particularly stark between the Roma and the other minorities. The Roma face other, more fundamental challenges. In the case of the Roma "social, vocational and educational problems are raised in a redoubled way."[176]

The Hungarian German minority

The focus of this chapter is on one minority: the Hungarian German minority.[177] The Roma are also taken into account, but only to a minor degree, that is to put the model traits of the autonomy régime in a reasonable perspective. The ancestors of the Hungarian Germans came to the Carpathian basin in several waves from the Middle Ages onward.[178] Maria Theresia (1740 - 1780), among others, brought Germans actively to her territory by means of a settlement policy. A settlement decree of the year 1755 illustrates this policy:

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[175] REPUBLIC OF HUNGARY, Report pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, 1999, ACFC/SR(1999)010, p. 37 [brackets added] (with this comment the Report does not refer to the Chinese, Cubans, or Vietnamese).

[176] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 95.

[177] The term "Hungarian German" is subject to considerable uncertainties (SEEWANN, 'Siebenbürger Schwabe, Ungarndeutscher, Donauschwabe?' *in* Seewann (ed.), *Minderheitenfragen in Südosteuropa*, München, Oldenbourg, 1992, p. 140-155, p. 140-142; Seewann distinguishes three historical types of Hungarian Germans).

[178] For more details on the history of the Hungarian Germans, see TILKOVSZKY, *Zeitgeschichte der Ungarndeutschen seit 1919 - mit einer Vorgeschichte*, Budapest, Corvina, 1991; ASCHAUER, *Die Ungarndeutschen*, *supra* FN 171, p. 55-106; KERNER, 'Blick in die Zukunft', *in* Zielbauer (ed.), *Beitrag der Ungarndeutschen zum Aufbau der Gemeinsamen Heimat*, Budapest, Landesselbstverwaltung der Ungarndeutschen, 1996, p. 290-294; MANHERZ, *Die Ungarndeutschen*, Budapest, Press Publica, 1998, p. 3 ff. For a short description SCHUTH-DEZSÖ SZABÓ, 'Kurze Geschichte der Deutschen in Ungarn', 2008 (available at: <http://www.ldu.hu/de/download_dokumente.php>).

> *"Firstly: those German families whishing to settle down are assigned a piece of land endowed with ample forests, salubrious waters, and spare, fertile fields and meadows and, that they may cultivate it forever and in full tranquillity, distinguished from the localities next to it with special landmarks, likewise they shall be entirely free from all* kaiserlich-königlich *duties, as well as military service for six full consecutive years, and, no less by* kaiserlich-königlich *authority, from all ground rents and land register duties also for three consecutive years."*[179]

During the second half of the 19th century about 1.9 million Hungarian Germans were under Austrian-Hungarian monarch rule. The number dropped as a result of the Trianon peace and the ensuing partition of Austria-Hungary to about 550 000 persons.[180] After World War II, the number of Hungarian Germans diminished further, because major parts of them were brought to the American occupation zone or to Russia.[181] In Hungary, the remaining Hungarian Germans have mainly lived in the so-called Swabian Turkey (in south-eastern Transdanubia with the counties of Baranya, Somogy, and Tolna), in western Hungary (county of Györ-Moson-Sopron), in Budapest, in the Transdanubian Mountains (Bakony in the county of Veszprém, in the Vértes mountains, in the mountains west of Budapest), and in the region between the Danube and the Tisza rivers (county of Bács-Kiskun). Like most of the other

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[179] Manherz (ed.), *Texte zur Geschichte der Deutschen in Ungarn*, Budapest, ELTE Germanistisches Institut, 1999, p. 38 : "*Erstens: Wird den sich ansässig machen wollenden Teutschen Familien ein mit genugsamen Waldungen, gesunden Wasser darin fruchtbaren Äckern und Wißmatten überflüssig Versehenes Stück Landes angewiesen und damit Sie solches für immer in Vollständiger Ruhe Bebauen mögen, von denen angränzenden Ortschaften mit Besonderen Marktsteinern unterschieden werden, desgleichen sollen Sie von allen allgemeinen kaysl. königl. Landesabgaben, wie auch Militärquartier und Vorspann durch Sechs ganze nacheinander folgende Jahr, wie nicht minder von seiten kaysl. Königl. Herrschaft, von allen Grund-zünß oder sonstigen Grund-Buchs Gaaben ebenfalls durch drei nacheinander folgender Jahr gänzlich frey seye."* [Translation by the author, all emphasis added] (in Manherz the whole settlement decree is made available in German). Germans also came to the Hungarian territory before, notably during the 12th and 13th centuries (SCHUTH-DEZSÖ SZABÓ, 'Geschichte der Ungarndeutschen*', supra* FN 178, p. 1; 'Ungarn', *Brockhaus - die Enzyklopädie*, vol. 22, 20th edition, Leipzig/Mannheim, F. A. Brockhaus, 1996, p. 589-599, p. 595). For an illustration, see KÖHEGYI, 'Die Magyarisierung der Gemeinde Madaras in Südungarn (Batschka)', *in* Seewann (ed.), *Minderheitenfragen in Südosteuropa*, München, Oldenbourg, 1992, p. 181-186.

[180] See Ammende (ed.), *Die Nationalitäten in den Staaten Europas - Sammlung von Lageberichten*, Wien/Leipzig, Wilhelm Braumüller, 1931, p. 332.

[181] The number of Hungarian Germans brought to the American occupation zone amounted to 135 000 and to Russia to 50 000 - 60 000 (SCHUTH-DEZSÖ SZABÓ, 'Geschichte der Ungarndeutschen*', supra* FN 178, p. 9 (citing a Hungarian study from the year 1982). As to the numbers see also TILKOVSZKY, *Zeitgeschichte der Ungarndeutschen seit 1919*, *supra* FN 178, p. 179-181. For further information on the forceful relocation in the wake of World War II (as a solution to prevent further minority conflicts in Eastern Europe) and the Paris Peace Agreements, which basically re-established the borders of the Trianon agreement, see VOGEL, 'Sicherheitsdilemma und ethnische Konflikte aus ungarischer Sicht', *supra* FN 174, p. 216.

Hungarian minorities, the Hungarian Germans are thus spread across most of the territory of Hungary.

The Hungarian German minority, like other minorities in Hungary, benefits from an autonomy régime. So, in fact, there are several autonomy régimes in Hungary (one for each minority). Based on the Hungarian constitution, the Hungarian parliament introduced these autonomy régimes in 1993. The main cornerstone of the autonomy régimes is a comprehensive legislative act, the Minority Act.[182] In 2005, the Hungarian parliament revised and amended the Minority Act.[183] The autonomy régime of the Hungarian German minority, which is alike to the other autonomy régimes, is the subject of our analysis.

[182] Act on the Rights of National and Ethnic Minorities, 1993, LXXVII (original version as of 1993) (in the following: original Minority Act).

[183] Act on the Rights of National and Ethnic Minorities, 1993, LXXVII (as amended per 25 November 2005; consolidated text) (in the following "Minority Act" refers to the amended act; only where necessary [for instance to explain an amendment], the term "amended Minority Act" is used). In this study, an (unofficial) English translation of the Minority Act is used (available at: <http://www.nemzetpolitika.gov.hu/index.php?main_category=4&lang=en>).

2.2 The autonomy régime of the Hungarian German minority

The autonomy régimes in Hungary are based on a "personal-cultural autonomy with some territorial aspects on the level of the settlement".[184] Since the régimes were originally established in 1993, they have attracted wide attention and praise: "In spite of proposals for improving its effectiveness, overall the Hungarian system constitutes one of the most advanced domestic patterns of minority rights protection currently available in eastern Europe, and is apparently inspiring provision in other countries as well […]."[185] Based among others on the Hungarian autonomy régimes, Georg Brunner even comes to the conclusion that "*personal autonomy as a solution for minority problems is to be endorsed generally and effectively.*"[186]

The Minority Act is based on art. 68 of the Constitution:

> *"(1) The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State.*
>
> *(2) The Republic of Hungary shall provide for the protection of national and ethnic minorities and ensure their collective participation in public affairs, the fostering of their cultures, the use of their native languages,*

[184] KALTENBACH, 'Das ungarische Minderheitengesetz - Zielsetzung und Aktzeptanz', *in* Seewann (ed.), *Minderheiten als Konfliktpotential in Ostmittel- und Südosteuropa*, München, Oldenbourg, 1995, p. 346-351, p. 349: "[…] *eine personelle-kulturelle Autonomie mit einigen territorialen Aspekten auf Siedlungsebene*." [Translation by the author, emphasis added]. Note that since the amendment in 2005, the territorial element is less obvious. See also PENTASSUGLIA, *Minorities*, *supra* FN 30, p. 235: "a sui generis combination of territorial and personal autonomy elements". EIDE, GRENI, and LUNDBERG, 'Cultural Autonomy', *supra* FN 5, p. 259, do not, however, emphasize the territorial element: "It is therefore a cultural, not a territorial, autonomy." In Nordquist's terms, one could call the autonomy régime an "organic autonomy": "A third type of autonomy consists of those cases which have developped through a long-term process within a modern constitutional framework of the central state. This development is based on a growing awareness of the political relevance of the region's specific identity and the need to create an institutional congruence between this identity and the local and national governmental structure. These autonomies, developped by peaceful means, are best described as *organic*." (NORDQUIST, 'Autonomy as a Conflict-Solving Mechanism - An Overview', *in* Suksi (ed.), *Autonomy: Applications and Implications*, The Hague, Kluwer, 1998, p. 59-77, p. 64).

[185] PENTASSUGLIA, *Minorities*, *supra* FN 30, p. 236.

[186] BRUNNER, *Nationalitätenprobleme und Minderheitenkonflikte in Osteuropa*, Gütersloh, Bertelsmann Stiftung, 1996, p. 149: "*Deshalb ist die Personalautonomie als Lösung für Minderheitenkonflikte generell und nachhaltig zu befürworten.*" [Translation by the author, emphasis in original].

education in their native languages and the use of names in their native languages.

(3) The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country.

(4) National and ethnic minorities shall have the right to form local and national bodies for self-government.

(5) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the rights of national and ethnic minorities." [187]

Enacting this constitutional provision, the Minority Act grants a series of individual rights to members of minorities,[188] as well as collective rights to the minorities as such.[189] From these collective rights emanates the backbone of the autonomy régime: a structure of minority self-governments. Under the topic of identity (a), we first examine this backbone of the autonomy régime, before addressing the issue of identification and the powers granted under the autonomy régime. The study then moves on to the financing of the autonomy régime (resources, b), to issues of participation and representation (voice, c), and, finally, to the subject of control (d).

a) The constitution of identity

i) The backbone: a three-tier system of minority self-government

Hungary is a "hypercentralized"[190] State. This is most evident in that the Hungarian legislature is a one-chamber parliament. But the Hungarian Republic is also

[187] The Constitution of the Republic of Hungary, 1949, Act XX, consolidated text (in the following: the Constitution).

[188] Chapter II Minority Act.

[189] Chapter III Minority Act.

[190] FÁBIÁN, 'Die Reform der zentralen Staatsverwaltung in Ungarn', (2007) 48 *Jahrbuch für Ostrecht* (2) 301: "*2006 wurde die zentrale Verwaltungsebene in Ungarn einer tief greifenden Reform unterzogen. Wegen der Hyperzentralisierung ist die Verwaltungsebene in Ungarn von noch grösserer praktischer Bedeutung als anderswo.*" [Translation by the author, emphasis added].

decentralized, if only to a lesser extent than elsewhere.[191] Based on the Act on Local Governments,[192] a structure of regular self-government entities was set up in Hungary. Self-government entities exist on the local and regional (county) level and in the capital. They are a counterbalance to the central authorities. As such, they are by definition anchored in the local or regional context. For the sake of avoidance of confusion, in this study, a terminology for these regular self-government entities is used that is different from the Hungarian terminology: the local self-government of a settlement is called the *municipality* and the regional self-government the *county*.[193] For now, the municipality is in the focus. It takes care of "local affairs";[194] is a legal entity; takes part in the sovereign power of the State (in the sense that it may act *iure imperii*); and levies local taxes. Its main organs are the directly elected municipal council (the "body of representatives"[195]) and its representative organ, the mayor, who is directly elected also and the executive of the municipality.[196]

So far, this structure does not have much to do with minorities. It is a regular self-government structure which includes representatives of minorities no more than representatives of anyone else. However, art. 5(1) Minority Act injects a minority dimension into this structure: "In the Republic of Hungary minorities have a right to establish local, regional and national self-governments." Based on this provision the minority self-government system – the autonomy régime – is erected, which is the "*Herzstück*"[197] of minority protection in Hungary. A minority may first establish local self-government organs, which then organically grow to the higher levels of the State

[191] KALTENBACH, 'Die Entwicklung der kommunalen Selbstverwaltung in Ungarn', (1990) 31 *Jahrbuch für Ostrecht* (1) 77-93, explains well the development of the idea of local self-government in Hungary. According to Kaltenbach, the strong central power in Hungary is a tradition from the time of the Habsburg monarchy (p. 83); despite some ups and downs (after World War II and during communism), strong central power was the rule and local self-government the exception. Only with the end of socialism local self-government was introduced to the unitary State (see p. 88 ff. on the proposal for a new system of self-government).

[192] Act on Local Governments, 1990, Act LXV.

[193] Normally, the local self-government entity is called "local self-government". However, this terminology risks creating confusion (it did create confusion in particular under the system before the amendment of the Minority Act, which is explained *infra* on p. 72), because the term used for the entity under the minority autonomy régime is similar ("local minority self-government"). In the interest of the reader a less confusing terminology is employed in this study.

[194] Art. 2(2) Act on Local Governments, *supra* FN 192: "Local public affairs are connected to providing the population with the services of public utilities, to the local exercise of public power in a self-governmental way, as well as to the local creation of the organizational, personal and material conditions thereof."

[195] Art. 9(1) Act on Local Governments, *supra* FN 192.

[196] COUNCIL OF EUROPE, *Structure and Operation of Local and Regional Democracy: Hungary*, Strasbourg, Council of Europe Publishing, 2004, p. 15.

[197] KÜPPER, *Autonomie im Einheitsstaat - Geschichte und Gegenwart der Selbstverwaltung in Ungarn*, Berlin, Duncker & Humblot, 2002, p. 336 [emphasis added].

(to the regional and national level). These minority self-governments exist in parallel to the municipality, the county, and the central State as such. And each minority may put up its *own* self-governments. Entities on the local, regional, and national level are thus multiplied. Of course, the self-government organs of a minority only supplement the municipality, the county and the central State. Their tasks are different. In particular on the local level, the minority self-government complements the municipality and performs only tasks of special relevance to the minority. Although being a legal entity (like the municipality),[198] the local minority self-government cannot act *iure imperii*,[199] nor can it levy any taxes.[200]

An example: Babarc

The structure of the autonomy régime and the complex mechanism of how the local minority self-government grows to the upper levels of the State is best explained with an example. Barbarc is a small town in southern Hungary in the county of Baranya.[201] According to the census 2001,[202] 791 persons lived in Babarc. For the proportion of Hungarian Germans, the census 2001 is indicative: 321 persons declared to have some sort of a German link.[203] When local minority self-government elections were held in autumn 2006, the members of the minority could request entry into the election list prior to the elections. One had to declare affiliation with the minority of which she (or he) intended to elect a representative and to possess Hungarian citizenship to be entered into the minority's election list. The election list was secret: only the number of persons entered into the list was made public. 177 persons were entered into the list of Hungarian German minority.[204] Immediately after the election the election list was destroyed. As more than 30 voters had been entered into the election list of the Hungarian Germans in Babarc, the election of the local Hungarian German self-government could validly take place.

Candidates for the local self-government of the Hungarian Germans in Babarc could only be fielded by private organizations of the Hungarian Germans, which according

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198 Art. 24/B(2) Minority Act.

199 KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 200.

200 The powers under the autonomy régime are explained in detail *infra* (section iii).

201 The municipality of Babarc only serves as an illustrative example here. Although the Hungarian German minority self-government exists in Babarc, the way of constituting it described here is fictitious. For more information on Babarc, see THE MUNICIPALITY OF BABARC, *Babarc,* <http://www.babarc.hu>.

202 HUNGARIAN CENTRAL STATISTICAL OFFICE, *Population Census 2001, supra* FN 171.

203 30 persons in Babarc indicated a link to the Roma.

204 See the information on THE MUNICIPALITY OF BABARC, *Babarc, supra* FN 201.

to the statutory purpose represent Hungarian Germans and which had existed for three years before the elections. Before the election, candidates for the Hungarian German self-government had to declare publicly that they are bound to represent the Hungarian Germans, whether they knew the Hungarian German language, culture, and traditions, and whether they had been members of any other minority self-government before or held office.[205] Accordingly, the 177 voters on the election list could elect the five members of the Hungarian German self-government of Babarc among the candidates fielded.[206]

The election of the Hungarian German self-government took place in October 2006 at the same time as the periodic election to the regular municipal council of Babarc (the assembly of the municipality). Of course, members of the Hungarian German minority in Babarc could also run for the municipal council of Babarc. Technically however, they would not represent the Hungarian Germans in the municipal council. They would have the same status as all other elected representatives in the municipal council. Naturally, this would not prevent a Hungarian German representative to stand for the minority and represent their interests in the municipal council. In fact, these representatives can form a committee of the municipal council which deals with the matters concerning the minority.[207]

The three original modes of constituting a minority self-government

Municipality and minority self-government were not always that strictly separated. On the contrary, before the amendment, i. e under the original Minority Act,[208] the two entities were closely intertwined. Three types of minority self-government existed then. Applied to our example, Babarc, the situation under the initial scheme was thus: (i) the Hungarian Germans could elect a separate local Hungarian German self-government in a similar way as under the current Minority Act. This was called the direct way of constituting a minority self-government. Because all local elections took place at the same date, the Hungarian Germans in Babarc, out of precaution, had

[205] OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'Detailed summary of new minority legislation in Hungary', 2005 (available at: <http://www.nekh.gov.hu/main.php?folderID=1414>), p. 3.

[206] On the amended system of electing minority self-governments: MAJTÉNYI, 'What has Happened to Our Model Child? The Creation and Evolution of the Hungarian Minority Act', *in* Bloed, Hofmann, Marko, James Mayall, Packer, and Weller (eds), *European Yearbook of Minority Issues*, vol. 5, Leiden, Martinus Nijhoff, 2007, p. 397-449, p. 409 ff.

[207] Art. 22(2) Act on Local Governments, *supra* FN 192. When no member of a given minority at all is elected as a representative to the municipal council, the candidate who received the most votes becomes spokesperson of the minority (art. 12(7) Act on Local Governments).

[208] *Supra* FN 182.

to proceed in this direct way in any case, because they did not know whether the other modes of constituting a minority self-government (ii and iii) would be successful (in other words, the Hungarian Germans always had to proceed in two ways, because they needed the directly elected, separate self-government [i] as a fall-back option). (ii) When more than 50% of the elected representatives of the municipal council of Babarc represented the Hungarian Germans, these representatives could declare Babarc a Hungarian German municipality. In this case, the municipality and the minority self-government were merged. Note, however, that despite the fusion it was important for Babarc to keep the minority tag, because only then the special privileges under the Minority Act were available. (iii) When less than 50%, but more than 30% of the representatives in the municipal council represented the Hungarian Germans, these representatives (and only these) could declare themselves as the Hungarian German self-government of Babarc. This was the indirect way of constituting a local minority self-government.[209]

Obviously, the amended way of constituting local minority self-governments is simpler. It always results in the same, separate local minority self-government, which co-exists with the municipality. Therefore, the respective powers can be attributed more clearly. The revised Minority Act also takes the fact that members of a minority, who are elected to the municipal council, *de facto* represent the interests of the minority better into account.

The upper levels of minority self-government

How does a minority self-government grow to the upper levels of the State? The five members of the Hungarian German self-government of Babarc (like all other members of local Hungarian German self-governments) serve as electors for the regional as well as the national self-governments of the Hungarian Germans. As the minimum number of ten local Hungarian German self-governments was reached in Babarc's county (Baranya), the electors elected a minority self-government on the county level with nine representatives. This medium level minority self-government was introduced by the amendment of the Minority Act in 2005. For the (re-)establishment of the national self-government of the Hungarian Germans,[210] only four local Hungarian German self-governments in the whole State must have issued from the last local elections.

[209] For a detailed description of the system before the amendment, see KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 181 ff.

[210] The "*Landesselbstverwaltung der Ungarndeutschen*" (see LANDESSELBSTVERWALTUNG DER UNGARNDEUTSCHEN, <http://www.ldu.hu> (National self-government of the Hungarian Germans)).

Thus, our five members of the Hungarian German self-government of Babarc, together with the members of all other Hungarian German local self-governments in Hungary, elected from among themselves the 53 members of the national self-government of the Hungarian Germans.

The last elections in autumn 2006, which were the fourth elections held since the introduction of the autonomy régime by the Minority Act in 1993, produced 378 local Hungarian German self-governments.[211] Altogether 45 992 Hungarian German voters had been entered into the local election lists.[212] Ten Hungarian German regional self-governments were constituted by the electors for the first time in March 2007.[213] Also in spring 2007, the national self-government was re-constituted. At the previous local elections, in 2002, only 340 Hungarian German local self-governments had been established. Also in 2002, in 34 of the municipalities concerned the representatives had declared the municipality to be a Hungarian German municipality (mode ii).[214]

What was explained by means of the German minority in Babarc above, is equally valid not only for the Hungarian Germans in other municipalities, but also *mutatis mutandis* for other minorities in Hungary. Thus almost 200 000 voters were entered into the election lists of thirteen minorities in the whole State for the autumn 2006 elections.[215] Thirteen minorities were operating a total of 2063 minority self-governments in summer 2008.[216] This is an astonishingly high number, especially when considering that 3 158 municipalities existed in 2002 in Hungary[217] and that in most municipalities the self-government of only one minority was established (i. e. in 1130 municipalities[218]). The minority self-governments on the regional level numbered

[211] UNGARNDEUTSCHES KULTUR- UND INFORMATIONSZENTRUM, 'Minderheitenwahlen (press release)', 8 March 2007 (available at: <http://www.zentrum.hu>).

[212] OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'Selection of news on national and ethnic minorities in Hungary: October 2006', 2006 (available at: <http://www.szmm.gov.hu/main.php?folderID=1414>), p. 1.

[213] UNGARNDEUTSCHES KULTUR- UND INFORMATIONSZENTRUM, 'Minderheitenwahlen (press release)', *supra* FN 211.

[214] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 10. As to the modes under the original Minority Act, see *supra* p. 72.

[215] OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'Selection of news on national and ethnic minorities in Hungary: October 2006', *supra* FN 212, p. 1.

[216] DEPARTMENT OF NATIONAL AND ETHNIC MINORITIES (HUNGARIAN GOVERNMENT), 'Selection of news on national and ethnic minorities in Hungary: February - June 2008', 2008 (available at: <http://www.nemzetpolitika.gov.hu/index.php?main_category=4&lang=en>), p. 4.

[217] COUNCIL OF EUROPE, *Structure and Operation of Local and Regional Democracy: Hungary*, *supra* FN 196, p. 7.

[218] OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'Selection of news on national and ethnic minorities in Hungary: October 2006', *supra* FN 212, p. 3.

57 in total.[219] Thirteen minorities established a national minority self-government. All things considered, thirteen minorities were surprisingly busy setting up their local, regional, and national self-governments under the Minority Act in 2006. But why exactly *thirteen* minorities? Why not more (or less)?

ii) Double identification: the group and the individual

It has become evident in the above examination that the autonomy régimes require a double identification. First, on the level of the group, because it must be clear who holds the collective rights and who has the right to set up minority self-governments; second, on the level of the individual, because it must be clear who belongs to a minority and who may participate in the election of minority self-governments. Perhaps surprisingly at first sight, the options chosen for the two levels of identification in Hungary differ. They are even inconsistent in certain aspects and to some degree contradictory.

The identity of the group

On the group level, the Hungarian Parliament basically hand-picked thirteen minorities to include them in the scope of the Minority Act. Thirteen minorities "qualify as autochthonous national or ethnic groups of Hungary"[220] under the Minority Act: Bulgarians, Roma,[221] Greeks, Croatians, Polish, Germans, Armenians, Romanians, Ruthenians, Serbians, Slovaks, Slovenians, and Ukrainians. Purportedly, the Hungarian legislature limited the autonomy régime *ab initio* to so-called traditional as opposed to "new" minorities ("autochthonous" in contrast to "allochthonous"). Only the officially recognized minorities may establish minority self-governments under the Minority Act. However, despite the list of privileged minorities, minority protection as such is not entirely exclusive in Hungary. The Minority Act not only lists the thirteen minorities, but also adds a general definition of the minority:

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[219] PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS (E. KÁLLAI), Annual Report 2007, 2008, J/5015, p. 39.

[220] Art. 61(1) Minority Act. For the difference between national and ethnic minorities, see ANDORKA, *Einführung in die soziologische Gesellschaftsanalyse: ein Studienbuch zur ungarischen Gesellschaft im europäischen Vergleich*, Opladen, Leske + Budrich, 2001, p. 300.

[221] The English translations of the Minority Act usually use the term "gypsy". The author prefers to use the term Roma, though, because "gypsy" (or the translated term) is in many lanuages, notably in German, a pejorative term. The author is, of course, aware that the two terms do not necessarily have the same scope (some gypsies do not consider themselves Roma). For lack of a more appropriate terminology, the term Roma, which seems to establish itself as an umbrella term in Europe, is nevertheless used.

> *"For the purposes of the present Act a national or ethnic minority (hereinafter 'minority') is an ethnic group which has been living on the territory of the Republic of Hungary for at least one century, which represents a numerical minority among the citizens of the state, the members of which are Hungarian citizens, and are distinguished from the rest of the citizens by their own language, culture and traditions, and at the same time demonstrate a sense of belonging together, which is aimed at the preservation of all these, and at the expression and the protection of the interests of their historical communities."*[222]

Based on this definition, two moderations of the exclusivity of minority protection (i-ii) flow from the Minority Act. (i) On the one hand, some of the collective rights contained in the Minority Act, notably those of chapter III, are available also to other minorities than the selected thirteen. The Minority Act is not entirely clear in this regard, though. It lists the thirteen minorities in art. 61(1), but at the same time claims more widely, right before the minority definition, that "[t]his Act applies to all persons of Hungarian citizenship residing in the territory of the Republic of Hungary, who consider themselves members of any national or ethnic minority and to the communities of these people."[223] From this, one may infer that the collective rights in chapter III Minority Act also apply to minorities other than the thirteen.[224] However, it is hard to see whether and where the collective rights contained in chapter III Minority Act go beyond the substance that is guaranteed by the individual rights in chapter II Minority Act or by human rights in general. The collective right to identity,[225] for instance, does not seem to go beyond a combination of the individual rights to identity[226] and to free association.[227] Thus the added value of the Minority Act for minorities other than the thirteen is probably purely symbolic. In any case, the collective right to set up minority self-governments (the core of the autonomy régimes) is certainly limited to the thirteen minorities listed in art. 61(1) Minority Act.

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[222] Art. 1(2) Minority Act [emphasis added].

[223] Art. 1(1) Minority Act [brackets added].

[224] So does KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 146-147. This interpretation has become more imperative, since art. 2 Minority Act, which declared the Act inapplicable to refugees, immigrants, foreign citizens settled in Hungary, or persons of no fixed abode, was repealed in the 2005 amendment.

[225] Art. 15 Minority Act.

[226] Art. 3(2) Minority Act.

[227] Art. 10 Minority Act (second sentence).

(ii) On the other hand, other minorities than the thirteen officially recognized may apply for official recognition as authochtonous ethnic or national minorities. The proceeding for this recognition is laid down in art. 61(2). It is similar to the case of an initiative:[228] 1000 voters have to submit their signatures and declarations of affiliation with the minority to the National Electoral Committee. After having requested the opinion of the President of the Hungarian Academy of Sciences, the Committee submits the request to the Hungarian Parliament. The Parliament then decides on the recognition according to the minority definition in art. 1(2) Minority Act.

Three Inconsistencies

The approach to group identification which consists in a catalogue of recognized minorities and an option of expanding it, when the minority definition is fulfilled, suffers from some inconsistencies. *First*, some of the recognized thirteen minorities seemingly do not themselves fulfil all the criteria of the definition or those implicit in the proceeding for recognition. It is, for instance, doubtful whether the Armenians could come up with 1000 voters[229] or whether they or the Greeks have lived on Hungarian territory for a century.[230] One could also object that the Ukrainian minority in Hungary was "created" especially for the purpose of implementing the bilateral agreement between Hungary and the Ukraine or that the Ruthenians merely speak an eastern Slovakian dialect, instead of their own proper language.[231]

These issues hint at the *second* inconsistency: the fact that intuition would hardly lead to the selection of these specific thirteen minorities. Differences persist within the German group in Hungary: different types of identity can be distinguished within the

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[228] OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'Selection of news on national and ethnic minorities in Hungary: January - April 2006', 2006 (available at: <http://www.szmm.gov.hu/main.php?folderID=1414>), p. 2, contains more details on the proceedings.

[229] Only slightly more than 1000 Armenians were counted in Hungary in the census 2001 (see *supra* p. 63).

[230] MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 405-406: "Most of the Greeks living in Hungary, for example are *not* descendants of the assimilated Greek minority that has lived in the country for a long time, but are former Greek Communist partisans and their descendants, who arrived in Hungary as the refugees of a lost civil war. Moreover, some of those having arrived in 1949 profess to be Agean Macedonians, and some of them have even considered establishing a minority self-government of their own. The Armenian minority is another case in point: most members are not descendants of the Armenians who lived in Hungary in the nineteenth century and have by now been almost completely assimilated. They are, rather descended from the Armenians who fled to Hungary from the Armenian pogroms of the Young Turks in 1916." [Emphasis in original].

[231] The two points are mentioned in SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *in* Seewann (ed.), *Minderheiten als Konfliktpotential in Ostmittel- und Südosteuropa*, München, Oldenbourg, 1995, p. 352-387, p. 381.

group of the "Germans".[232] Under the roof of the Roma community very different factions in terms of language, culture, and self-conception have to find a place. In fact, it was decided very late to extend the scope of the Minority Act to cover the Roma at all.[233] The Jewish communities were excluded from the scope of the Minority Act, when the act was drafted, at their own wish.[234] Indeed, a certain capriciousness prevailed at the "round table"[235] in 1992: according to Kaltenbach were included "traditional nationalities (Germans, Croats, Romanians, Serbs, Slovaks, Slovenes), Roma (in Hungary called gypsies), and 'new' minorities (Armenians, Bulgars, Greeks, Poles, Ruthenians, Ukrainians)."[236] He continues: "It is a jolly mix, that normally could not be assembled under a single hat, but at the time everything was a bit unusual."[237] However, this jolly mix resulted in the list of the thirteen official minorities.[238]

The capriciousness in the elaboration process points at the *third* inconsistency, which is perhaps rather a sign of relativity. When recognizing new minorities, the Hungarian Parliament takes the minority definition in art. 1(2) Minority Act as a yardstick. However, the criteria (history, presence during a century, language, etc.) are highly relative, as the above instances show. A further illustration is the request for

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[232] SEEWANN, 'Siebenbürger Schwabe, Ungarndeutscher, Donauschwabe?', *supra* FN 177, p. 151-153, makes out four different types of *Hungarian* Germans (see also SEEWANN, 'Die nationalen Minderheiten Ungarns', (1992) 41 *Südosteuropa* (5) 303). One could certainly add those German nationals (or even German speakers) who exercise their European right to free movement and come to Hungary, but who do not entertain any kind of link to the Hungarian Germans.

[233] CAHN, 'Smoke and Mirrors: Roma and Minority Policy in Hungary', (2000) *Roma Rights*, para. 4 (see *infra* FN 476).

[234] OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'News on minorities: January - April 2006*', supra* FN 228, p. 2 (referring to 2003, instead of 1993).

[235] KALTENBACH, 'Das ungarische Minderheitengesetz - Zielsetzung und Aktzeptanz', *supra* FN 184, p. 346: "*runder Tisch*" [translation by the author, emphasis added] (the "round table" was the meeting where the Minority Act was discussed with the minorities in 1992).

[236] KALTENBACH, 'Das ungarische Minderheitengesetz - Zielsetzung und Aktzeptanz', *supra* FN 184, p. 346: "[…] *Vertretern der traditionellen Nationalitäten (Deutschen, Kroaten, Rumänen, Serben, Slowaken, Slowenen), der Romas (in Ungarn Zigeuner genannt), und der 'neuen' Minderheiten (Armenier, Bulgaren, Griechen, Polen, Ruthenen, Ukrainer).*" [Translation by the author, emphasis added].

[237] KALTENBACH, 'Das ungarische Minderheitengesetz - Zielsetzung und Aktzeptanz', *supra* FN 184, p. 346: "*Es ist ein buntes Gemisch, das gewöhnlich gar nicht unter einen Hut gebracht werden könnte, aber zu dieser Zeit war alles ein wenig ungewöhnlich.*" [Translation by the author, emphasis added].

[238] The COUNCIL OF EUROPE, Language Charter, *supra* FN 28, only covers some of the minority languages in Hungary: Croat, German, Romanian, Slovakian, Serb, and Slovenian. In June 2008, the Hungarian Parliament decided to extend the application of the Language Charter to Romani and Beash (i. e. "Roma languages") (DEPARTMENT OF NATIONAL AND ETHNIC MINORITIES (HUNGARIAN GOVERNMENT), 'Selection of news on national and ethnic minorities in Hungary (February - June 2008)*', supra* FN 216, p. 1). This selectivity can also be interpreted as a sign of inconsistency.

recognition by a Hun minority in Hungary[239] – a minority which had never been heard of before.[240] In any case, the relative criteria translate into a considerable *de facto* discretion of the Parliament in adding additional minorities to the list of thirteen. Even though this discretion is tempered by the opinion of the Hungarian Academy of Sciences, in our view it cannot be tenably argued that a minority has a legal claim to recognition once the criteria are "fulfilled".[241]

A few tentative conclusions as to identification on the group level can be drawn. The symmetry of the autonomy régimes from which the thirteen Hungarian national minorities benefit, is not mirrored by a symmetry in the national minorities. In fact, the thirteen groups covered by the Minority Act are different in important aspects. Hence, it was imperative to include in the Minority Act some flexibility as to the design of the autonomy régimes. Apart from that, consistency in future recognitions of national minorities by the Parliament is not ascertained, because the criteria are relative and those who apply for recognition are not necessarily representative of a group. Overall though, identification of national minorities that are entitled to an autonomy régime is performed according to an objective method: the Parliament verifies whether some objective conditions are fulfilled. Although this objective method includes subjective elements (namely the discretion the Parliament enjoys and the request for recognition by the group), the bottom line is that the Parliament is the gatekeeper: it controls access to the autonomy régimes and retains a right to veto a specific group.

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[239] The Hungarian Parliament rejected the request in 2005 (KÜPPER, 'Chronik der Rechtsentwicklung', (2005) 14 WiRO (7) 219; for details on the proceeding in this case, which led to the introduction of the opinion of the Hungarian Academy of Sciences opinion: MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 407). In fact, the group consisted of "sun worshippers" who professed to be the Hun minority.

[240] In early 2006, recognition of further minorities, i. e. a Russian and a Bunievat minority, were also the subject of discussions (OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'News on minorities: January - April 2006', *supra* FN 228, p. 2.). Procedural questions as to the recognition of the jewish community as a minority under the Minority Act (despite the group's initial reluctance) were the subject of decisions by the Constitutional Court (see the discussion in MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 415 ff.).

[241] KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 91, argues that the Parliament is under a duty to recognize a minority, when the criteria are fulfilled. Küpper's argument is based on "comity towards minorities", "minority promotion", "legal security" and the "rule of law" ("*Minderheitenfreundlichkeit*", "*Minderheitenförderung*", "*Rechtssicherheit*", "*Rechtsstaatsgebot*" [translation by the author, emphasis added]).

The identity of the individual

Not only the groups, but also the individuals belonging to these groups must be identified for the purpose of the autonomy régimes in Hungary. The starting point of this identification is that every person in Hungary enjoys freedom of identity. According to the preamble of the Minority Act, the Hungarian Parliament:

> *"declares that it regards the right to national and ethnic identity as a universal human right, and the special individual and collective rights of national and ethnic minorities as fundamental freedoms that it will respect and enforce in the Republic of Hungary."*

This freedom of identity was clarified in art. 7(1) original Minority Act in the chapter on individual minority rights:

> *"The admission and acknowledgment of the fact that one belongs to a national or ethnic minority is the exclusive and inalienable right of the individual. No-one is obliged to make a statement concerning the issue of which minority one belongs to."*

Before the amendment to the Minority Act in 2005, this freedom of identity of the individual entailed an open election system. Everybody could vote in the elections to the self-governments of the thirteen minorities. No restrictions applied, except that only voters who were Hungarian citizens were admitted to the elections. In spite of this openness, the idea, of course, was that only those who have an affiliation to a minority vote for "their" minority. But no safeguards were put up in this regard. The election system was changed with the amendment of the Minority Act of 2005. Art 7(2) Minority Act now states (based on a caveat that was added to the second sentence of Art. 7(1) Minority Act):

> *"An Act or a legal provision concerning its implementation may require the individual's declaration with regard to the exercise of some minority right."*

After the amendment, the electoral system now works in the way described above.[242] The main feature of the amendment is the election list, in which the voter is entered upon request and upon declaration of affiliation with one of the thirteen minorities.[243] In addition, a voter may now explicitly only vote and run for one minority.[244] Freedom of identity is upheld in that no one is obliged to be entered into the list or to vote and that the election list must be destroyed after the election.[245]

Freedom of identity misunderstood

Why was freedom of identity restrained by the amendment? Why was the election list introduced?[246] The reason for the restrictions was a series of abuses of the freedom of identity and of the open electoral system. After the first elections to minority self-governments had been held in 1994, it became clear that certain individuals had made an abusive use of their freedom of identity. One occurrence of such an abuse was the "cuckoo problem":[247] some candidates were elected to self-governments of a minority to which they did not have the slightest connection. Of course, troubles with the other elected members of the concerned minority self-government as well as with the minority community as such ensued. Apparently, such abuses became more widespread in the following elections. The Advisory Committee on the Framework Convention notes:

> *"[A]t the most recent minority self-government elections, held at the same time as the municipal elections in October 2002, the abuses that had affected the previous elections were repeated and, in the opinion of the Government and minority representatives, were even more serious this time. It turned out that many candidates had stood in elections for a local self-government of a minority with which they had no link whatsoever. Such abuses led to the election of several of these candidates."*[248]

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[242] *Supra* p. 71.

[243] Art. 5(2) Minority Act.

[244] Art. 5(2) last sentence and (3) Minority Act (each voter can only be entered into *one* election list).

[245] MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 409.

[246] The question why an election list and not a proper register was introduced is dealt with *infra* in the section on factors having an impact on the autonomy régime (section 2.3 on p. 120).

[247] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 88.

[248] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Second Opinion on Hungary, 2004, ACFC/INF/OP/II(2004)003, para. 28 [brackets and emphasis added].

According to the Advisory Committee, the abuses concerned all minorities, but above all the German, Roma, Romanian, Slovenian and Serbian minorities.[249] An illustration of the abuses reported by observers in Budapest is the election of the wife of the mayor to the local Roma self-government in a smaller village, although she did not have any connection at all to the Roma.[250] As to the reasons for these abuses, the Advisory Committee notes:

> *"Most of them appear to have been committed for financial reasons, since local minority self-governments are organisations recognised by public law and managing public funds. It also seems that some people elected in this way have tried, by infiltrating a Roma self-government, to introduce segregation of persons belonging to that minority, particularly in the education field* [...]".[251]

These abuses, together with phenomena like the demand for recognition of non-existing minorities (such as the "Huns"), are described in Hungary as "ethnobusiness"[252] or as "ethno-corruption".[253] Undoubtedly, the abuses are serious. The Advisory Committee notes the admission of the Hungarian government that the abuses "are undermining the credibility and functioning of the whole system of minority self-government".[254]

Yet, ethnobusiness is not the end of the story. Other irregularities occur under the autonomy régimes as well. The circle of voters who participate in the elections to the minority self-governments is much larger than the circle of the members of the minorities. It seems that some two million voters took part in the 1994 and the 1998 elections to minority self-governments, whereas even the most progressive, aggregated estimates by the minorities themselves amount to only about a million members of

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[249] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Second Opinion on Hungary, *supra* FN 248, para. 29.

[250] In interviews with the author in Budapest in autumn 2006 [on file with the author]. For other abuses during the 1994 and 1998 elections, see KORHECZ, 'Democratic Legitimacy and Election Rules of National Ethnic Minority Bodies and Representatives - Reflections on Legal Solutions in Hungary and Slovenia', (2002) 9 IJMGR (2) 169-170.

[251] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Second Opinion on Hungary, *supra* FN 248, para. 29.

[252] MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 411.

[253] PAP, 'Ethnicization and European Identity Policy: Window-Shopping with Risks', (2003) 27 *Dialectical Anthropology* 229.

[254] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Second Opinion on Hungary, *supra* FN 248, para. 25.

minorities in Hungary.[255] These votes by non-affiliated ethnic Hungarians are claimed by the minorities as "sympathy votes"[256]. Indeed, the non-affiliated voters are encouraged to vote by the minorities.[257]

Persons not territory

One of the problems involved in the phenomenon of ethnobusiness – though by far not the only one – pertains to the fundamentals of the autonomy régime under the Minority Act. The autonomy régime is based on persons, not on territory. However, the borders in the head are as complex as the borders on the ground, perhaps even more. Identity is not a one- or two-dimensional trait of the individual. It is multi-dimensional. Many people entertain multiple links to different groups and minorities. And these links are not stable in all cases. On the contrary, individual identity is subject to dynamics. Hence, differences occur as to who belongs to a group and who does not, proof of which is the disagreement on the actual size of the minorities.[258] Another indicator of the multilayer nature of identity is the differentiation of the questions asked in the census 2001. It was attempted to capture ethnic identity by four questions: which is the nationality group you feel you are belonging to? Which is the nationality group the cultural values and traditions of which you feel affiliated to? Which language is your native language? Which language do you use in the family and among friends in general?[259] When one tries to answer these questions for her- or himself – entirely detached of the Hungarian context – one realizes that the answers are complicated. Moreover, it appears that the thirteen official national minorities are relatively crude as categories for individuals. Hence, rather than appearing as a well defined group, the national minorities serve as vessels that hold together very diverse individuals.

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[255] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 7.

[256] MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 400 (indicating the number of 1 777 299 voters in the first election and 2 657 722 in the second [with further reference]). See also KERNER, 'Blick in die Zukunft', *supra* FN 178, p. 292, with a similar indication.

[257] An illustration is the appeal published on the webpage of the national self-government of the Hungarian Germans before the 2006 elections: "Thus we encourage and beg of anyone to whom the future of our minority is dear to request entry into the election list and to participate in the election in autumn" ("*Deshalb ermutigen wir und bitten wir alle, denen die Zukunft unserer Volksgruppe am Herzen liegt, sich in das deutsche Wählerverzeichnis eintragen zu lassen und an den Wahlen im Oktober teilzunehmen*" [text published on the webpage of the national self-government of the Hungarian Germans, *supra* FN 210, on file with the author, translated by the author, emphasis added]). See also KERNER, 'Blick in die Zukunft', *supra* FN 178, p. 292.

[258] See *supra* FN 171.

[259] See the questions in REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 92.

To confront the abuses, the legislature in 2005 changed the basis of the autonomy régime on the individual level. It moved from a wholly open, subjective approach, based solely on a responsible decision of the individual, to a semi-open, quasi-objective approach. Each voter may still decide him- or herself whether he or she belongs to a minority (i. e. whether he or she votes in the self-government election). The only condition is a commitment to the minority, which is limited in time. This commitment is not subject to scrutiny and it is secret. Thus, the only objective element is the declaration of the commitment to the authorities. For candidates in a minority self-government election, the approach is more objective in that the candidates must be fielded by minority organizations and lay open their affiliation to the minority. The only other objective element in the entire approach is the requirement for the voter to be a Hungarian citizen – which is arguably a requirement that is foreign to the ideas of minority self-government and freedom of identity.[260]

In the absence of pertinent data, it is hard to assess whether the 2005 amendments to the autonomy régime prevented the abuses. One would expect at least a minimal impact, as the effort required to declare affiliation to a minority has a preventive effect. The number of sympathy votes for minorities certainly did decrease in the 2006 elections, with only a tenth of the voters of the first and the second elections enrolled in the minority election lists in 2006.[261] Conversely, the number of minority self-governments remained relatively stable.[262] But the problem of misuses seems to persist:

> *"However, the amended minority-related legal provisions did not prevent some citizens from abusing once again of the system, by having themselves registered as minority voters or issuing untruthful declarations as candidates.* […] *In some cases it also happened that even minority civil organisations fielded non-minority candidates in order to maximize the*

[260] See extensively on the criterion of citizenship with regard to minorities EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), Report on Non-Citizens and Minority Rights, 2006, CDL-AD(2007)001(study no. 294/2004), with the conclusion that States should not regard citizenship as a part of the minority definition, but rather as "a condition of access to certain minority rights." (Para. 144, first lemma).

[261] See the data *supra* p. 74.

[262] See, as an example, the number of Hungarian German self-governments, *supra* p. 74.

votes they can obtain during the election of the national self-government next spring."[263]

Seemingly, even an autonomy régime that is built on the quasi-objective identification of individuals has to settle with some abuses and uncertainties. However, one should bear in mind that the gravity and the *potential* of abuses under the current approach is relatively limited. The same cannot be said for the objective alternative which proposes to register the identity of persons in a permanent, open fashion. History clearly proves this point. It is therefore a blessing rather than a curse that an objective approach on the level of the individual is politically not viable in Hungary.[264] Hence, the mismatch between identification on the group level and identification on the individual level (objective and essentially subjective) is based on persuasive arguments.

iii) The powers under the autonomy régime

What can the self-government institutions of a minority in Hungary effectively do? What are these minority self-governments, which constitute the autonomy régime, good for? What powers do the local, regional, and national self-governments of the Hungarian Germans have? It is evident that the answers to these questions determine whether it is worth setting up such an autonomy régime for a minority. In this sense, the powers must bring to life the institutional structure. The primary domains of operation of the minority self-governments are culture and education and linked to these all matters related to the minority language. The powers of the local minority self-governments are enumerated in art. 25(1) Minority Act:

"Within its powers and within the framework of existing laws, the minority self-government shall define
a) the detailed regulations of its organisational structure and operational order within 3 months from its statutory assembly;
b) the name and the insignia of the local minority self-government, its

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[263] OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'Selection of news on national and ethnic minorities in Hungary: October 2006*', supra* FN 212, p. 3. The latest report by an international body does not allege any further concrete abuses, but recommends that "the Hungarian authorities continue to keep the minority self-government system under review in order to identify and address any new or remaining shortcomings […]." (EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, Fourth Report on Hungary, 2008, CRI (2003) 3, para. 56).

[264] This argument is further discussed on p. 143 ff.

medals/decorations as well as the requirements and regulations for the awarding of such medals/decorations;
c) the local feasts of the minority represented;
d) the full list of its opening assets; the rules governing the utilization of assets at its exclusive disposal;
e) the foundation, the take over and the administration of institutions;
f) the foundation of, and the participation in, business and other organisations;
g) the foundation of, and the affiliation to, associations of minority self-governments;
h) the announcement of calls for project proposals;
i) the establishment of scholarships;
j) the utilization of the assets of the municipal government that have been put separately at its disposal;
k) its budget, its annual accounts, and the utilization of resources put at its disposal by the municipal government, within the framework of the budgetary decree of the municipal government;
l) the initiative to declare its historical buildings and memorial sites as being protected by law;
m) its participation in the election of lay-assessors at local courts."

The powers contained in this list are limited. Many of them pertain to purely organisational matters, i. e. to powers that must be accorded for the sake of the autonomy régime itself. These powers alone cannot justify the setting up of an autonomy régime. The only substantive powers are the capacities to award medals/decorations, determine local feasts, set up and manage "institutions" (and businesses), call for project proposals, establish scholarships, participate in electing lay-assessors, and initiate the protection of sites. The powers of the national minority self-government are contained in art. 37(1) Minority Act:

"The national self-government – in accordance with the law – decides independently on
a) its name, the location of its headquarters, the detailed regulations concerning its form of organisation and operation within 3 months after the statutory assembly,
b) its budget, its closing balance sheet, the inventory of its assets;
c) the full list of its opening assets;
d) its insignia;
e) the nation-wide feasts of the minority represented by it;
f) its medals/decorations, and the requirements and regulations of awarding them;

g) the principles and the means governing the utilisation of the radio and television channels at its disposal;
h) the principles governing the utilisation of the public radio and television air time at its disposal;
i) the establishment, administration, operation and liquidation of institutions, particularly primary and secondary minority educational institutions, and further, on the establishment, administration, operation and take over of higher educational institutions or training courses to be offered in institutions of higher education,
j) the establishment of business or other organisations;
k) the administration of a theatre;
l) the establishment and administration of a museum/exhibition hall, and a public collection with a countrywide collection coverage;
m) the administration of a minority library;
n) the establishment and administration of an artistic or scientific institute, and a publishing house;
o) the establishment and operation of legal advisory services;
p) the announcement of calls for project proposals and the foundation of scholarships within the scope of its operation;
q) the conclusion of a public education agreement with the Minister of Education under the Act on Public Education;
r) the conclusion of a public education agreement with the municipal government under the Act on Public Education;
s) the publication of its press releases;
t) the compilation of the list of minority forenames and the requests related to forenames;
u) the performance of other duties which legally fall within its scope of powers and duties."

According to this list, the national minority self-government holds powers that are similar to the powers of the local minority self-government (relating to medals, feasts, etc.). But the national self-government is not just the extension of the local self-governments. Its powers go further: some of the powers regard radio and television (lit. g and h), others cultural institutions (theatre, museum, library, artistic and scientific institution, publishing house [lit. k, l, m, n]) and educational matters (lit. i, q, r).

The principles

The overarching principle of the two sets of powers is that the local minority self-government takes care of the local matters of a minority, whereas the national minority self-government is in charge of the countrywide affairs. The regional minority self-government, the creation of which was made possible by the amendment of the Minority Act in 2005, has got a lower profile: it may be involved in secondary and vocational education and minority dormitories.[265] Essentially, the regional minority self-government is in charge of educational tasks that can be solved more effectively on a cross-municipal level and in cooperation with the county.

Obviously, the powers listed in art. 25(1) and 37(1) Minority Act are in need of further elaboration. Thus, the Minority Act dedicates chapter VI to the "cultural and educational autonomy" (art. 42-50 Minority Act). A minority may be involved in two basic ways in culture and education: through the operation of its own institutions and through consent and participation in certain measures. The most advanced *modus operandi* consists in operating proper institutions. In order to operate a minority educational or cultural institution, the local minority self-government may found an institution or take over an existing institution.[266] These options can be traced back to a minority's collective right contained in art. 16 Minority Act to "cultivate and develop their historical traditions and language, as well as to preserve and enrich their intellectual and material culture." If this advanced way of handling educational and cultural matters is not an option due to local circumstances (e. g. a minority is too small in a municipality to run its own institution), the minority may still take influence in the spheres of culture and education by means of participatory rights.

Minority education

Minorities in Hungary participate in the educational system based on the collective right in art. 18(3) Minority Act:

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[265] See the details in art. 30/R Minority Act. The regional minority self-governments mainly serve as an interlocutor, when the administration on the regional level acts and minorities are concerned ('Identität wird komplizierter - Gespräch mit Otto Heinek', *Deutscher Kalender*, Budapest, Landesselbstverwaltung der Ungarndeutschen, 2006, p. 16-20, p. 18-19). For more information on the constitution of regional minority self-governments, see PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS (J. KALTENBACH), Annual Report 2005, 2006, section I.1.1.

[266] Art. 47(2) and 49(2) Minority Act.

> *"Minority communities have the right to*
> *a) initiate and take part in the creation of the necessary conditions for minority kindergarten, primary, secondary and higher education, and initiate and take part in the creation of the necessary conditions of complementary minority education through their national minority self-governments,*
> *b) establish their own educational, training, cultural and scientific institutional network at national level within the boundaries of existing laws."*

In educational matters, minorities predominantly partake in exercising their rights to consent and consultation according to the lesser advanced mode:

> *"The prevailing form of autonomy in education constitutes the exercise of the power of consent and consultation with respect to decisions that also pertain to the education of minorities. The majority of minority self-governments do not have their own educational institutions, rather they have the power to influence decisions, through exercising their right of consent and consultation, related to the education of minorities in institutions operated by local governments."*[267]

These rights are laid down in detail in the Act on Public Education.[268] They are intricately linked to the national education system, in which educational institutions (kindergartens, schools, etc.) are basically run on the local or regional level, based on the guidelines adopted by the central organs of the State. Minority self-governments are implicated in this system on the local, regional and national level. The details of this implication are complex.[269] Basically, a local minority self-government needs to be consulted in case a local educational institution provides minority education[270] and this education is concerned. Moreover, the agreement of the local minority self-government needs to be obtained in certain cases, such as for the appointment of the head of an educational institution, for the educational and pedagogical programme

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[267] REPUBLIC OF HUNGARY, First Report under the Framework Convention, *supra* FN 175, p. 79 (paraphrasing a study conducted by the minority ombudsperson in 1998).

[268] Act on Public Education, 1993, LXXIX.

[269] For the details of minority participation in the educational system, see KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 157 ff.

[270] See the definition of the term "minority public educational institution" in art. 6/A(1)3 Minority Act.

of the institution,[271] or for the establishment or closing down of such an institution.[272] In case the scope of a school is not just local, the agreement must be obtained from the national minority self-government.[273] The national minority self-government is also involved in the educational acts of the central institutions that concern minority education. Its right to consent is stipulated in art. 38(2) Minority Act. This right is exercised according to the Act on Public Education by the National Minority Committee,[274] in which the national self-government of a minority is represented by a delegate. Furthermore, the national minority self-government cooperates in the supervision of schools.[275]

The situation may, of course, arise that a minority self-government refuses consent to a measure. Plainly, this is the test case for the participatory right, for the consequence of withholding acquiescence determines the value and strength of the right. In case a minority self-government refuses agreement, when it is entitled to a right to consent (such as with the appointment of a head of an educational institution that provides minority education), a committee consisting of nine members – with three members each from the concerned minority self-government, the party that requested the consent, and the National Minority Committee – is in charge of taking the final decision voting with simple majority.[276] Accordingly, a minority self-government cannot permanently indefinitely a measure to which its consent is required. However, given that the majority of members of the committee that is in charge, when consent is refused, has got a minority background, it is at least ensured that reasonable concerns of a minority are taken into account. Ergo, the rights to consent and consultation are quite robust tools that provide minorities with a great deal of influence on educational issues that concern them.

The formal rights of minority self-governments are designed to protect the substance of minority education. This substance is contained mainly in art. 43 to 46 Minority Act. Here we find the obligation to educate members of a minority in their mother tongue or bilingually "according to local possibilities and demands"[277] and, most

[271] Both in Art. 102(10)e Act on Public Education, *supra* FN 268.

[272] Art. 102(10)a Act on Public Education, *supra* FN 268.

[273] Art. 102(10) Act on Public Education, *supra* FN 268.

[274] Art. 98(1) Act on Public Education, *supra* FN 268. For the right to consent of the Committee see art. 8/A(6), art. 8/B(1) and (7), art. 9(2), art. 93(1)a and b, and art. 94(4) Act on Public Education. On the Committee see also REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 30.

[275] Art. 38(1)e Minority Act.

[276] Art. 47/A Minority Act.

[277] Art. 43(3) Minority Act.

notably, the duty to organize minority classes at the request of eight parents of minority children.[278] The costs arising from these measures are to be born by the municipality or the State, as the case may be.[279] Moreover, all rules that implement minority education must take into account the cultural and educational interests of the minority concerned.[280] And it must be ensured that minority students "acquire knowledge on their people, particularly in the field of the history of their minority and its mother country, as well as its cultural traditions and values."[281] That this knowledge is made available in an adequate way is ensured by extensive State duties, such as the duties to train native teachers, employ guest teachers from the respective kin State, recognize qualifications obtained in a kin State, and provide the necessary textbooks.[282]

A Hungarian German school

The educational interests of a minority are respected in practice in the best way possible, when a minority operates its own schools. In this second *modus operandi*, a minority may take over or found a public education school in accordance with art. 47 Minority Act. Obviously, the management of a school by a minority may not have a negative impact on the education quality. Thus, the amended art. 47 Minority Act elaborates in detail the procedure to be followed in case a local minority self-government wants to take over the management of a local school, at which all students take part in minority education. The national self-government of the concerned minority is usually implicated in this procedure, at the core of which is a written transfer agreement. Needless to say that a minority must have a certain size to set up or manage its own school: enough pupils must be present in an area, teachers must be available, etc. Due to these prerequisites, only few minorities have so far managed to establish their own educational institutions. In 2004, only three minorities managed their own public schools: the Hungarian Germans, the Slovaks, and the Croatians altogether ran no more than a handful of public schools.[283] Yet, these schools seemingly perform better in minority education than the regular State

[278] Art. 43(4) Minority Act. According to KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 168, this right is in practice rarely implemented.

[279] Art. 44 Minority Act.

[280] Art. 45(1) Minority Act.

[281] Art. 45(3) Minority Act.

[282] Art. 46(2), (4), and (5) and art. 50 Minority Act.

[283] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 30, and REPUBLIC OF HUNGARY, Comments on the Second Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Hungary, 2005, GVT/COM/INF/OP/II(2004)003, p. 4.

schools.[284] Although the danger is more symbolic than real, it is important to note that schools that are run by a minority may not isolate themselves from the rest of the Hungarian society. They are under a duty to offer access also to students who are not members of the respective minority, while being able to allow preferential access to students who belong to the minority.[285] Moreover, the schools must always ensure that the Hungarian language is taught at school.[286]

An illustrative example for a school managed by a minority and for minority education in general is the Hungarian German Education Centre in Baja[287] in the county Bács-Kiskun in southern Hungary.[288] The centre in Baja is not an offspring of the Minority Act. It looks back on more than 50 years of German education in Hungary. However, the centre prospers under the Minority Act. It is run today by the foundation for the Hungarian German Education Centre, which was founded in 1998 by the municipality of Baja, the county of Bács-Kiskun, the Hungarian German national self-government, and the Hungarian German self-government of Baja. The centre offers education on all levels, from kindergarten to elementary and secondary school. Courses are held in German and Hungarian. Besides, a boarding school, a vocational institute, and a cultural department operate under the auspices of the centre. A particularly interesting feature is that the school not only runs a bilingual section on the secondary level, the passing of which constitutes the qualification for university in Hungary, but also a specific German-Hungarian division, the passing of which guarantees access to universities both in Hungary and Germany (i. e. it counts as Hungarian *and* German *Abitur*, based on agreements with Germany). In this second division, notably natural sciences (like mathematics and physics) are taught in German. The number of students attending the centre in Baja is significant: 248 children went to the centre's primary school in the year 2002/2003; 372 students attended the centre's secondary school in the year 2004/2005, of which 167 were part of the German-Hungarian division.

Although the kind of minority education offered at the centre in Baja is the most beneficial for the language and the identity of a minority, it remains the exception.

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[284] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 16.

[285] Art. 48(1) Minority Act.

[286] Art. 48(2) Minority Act.

[287] UNGARNDEUTSCHES BILDUNGSZENTRUM IN BAJA, <http://schulwebs1.dasan.de/udbz> (Hungarian German Education Centre in Baja). The information on the school which is used here stems from this website.

[288] Another example is the Valeria Koch school in Pécs. This school is run directly by the Hungarian German national self-government (see VALERIA KOCH SCHULE IN PÉCS, <http://www.dus.sulinet.hu> (Valeria Koch school in Pécs)).

More than 80 percent of the minority schools[289] offer only classes in which the minority language is taught as a foreign language.[290] As to German, more than seven times as many students attend primary schools in which German is taught as a foreign language than students who go to a primary school where bilingual or exclusively German courses are given.[291] Moreover, it must be noted that the link between the German (language) courses and the Hungarian German identity is not always given. In fact, only a fraction of the students attending German classes can be considered to have a Hungarian German identity.[292]

Space for culture

While education is the key for the future of a minority, it is not the only vector for a minority to convey its history and culture. Art. 16 Minority Act lays the foundation for a broader approach: "It is the right of minorities to cultivate and develop their historical traditions and language, as well as to preserve and to enrich their intellectual and material culture." Based on this collective right, minority self-governments have the right to determine feasts[293] and play a role in protecting their historical buildings and memorial sites.[294] The national minority self-government may support or administer a theatre, a museum, a library, an artistic or scientific institute, and a publishing house.[295] Evidently, like with education, a minority's own institutions are of paramount importance. That is why art. 49(2) expands on the right to establish, administer and take over cultural institutions. The takeover procedure is similar as with schools (based on an agreement to be concluded between the party handing over the institution [normally the municipality] and the minority self-government).[296] As in the domain of education, if a minority is unable or unwilling to run its own institutions, it may participate in the municipality's management of minority culture.[297]

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[289] According to the definition in art. 6/A(1)3 Minority Act.

[290] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 22.

[291] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 32 (the data concerns the year 2003/2004).

[292] See the note by the Hungarian German national self-government in REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 69 (compare with the statistics on the same page and on page 161 of the Second Report). For the further option of teaching a minority language in "supplementary minority education" (notably for numerically weak minorities such as the Greek, Polish, and Bulgarian minorities), see the same Second Report, p. 65, and REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 22.

[293] Art. 25(1)c and 37(1)e Minority Act.

[294] Art. 25(1)l Minority Act.

[295] Art. 37(1)k-n Minority Act.

[296] Art. 49/A-D Minority Act.

[297] Art. 49(1) Minority Act.

Like in the educational system, the State institutions are liable to perform duties to the benefit of minorities. Thus, for instance, the public library system must provide literature that is relevant to minorities, and if no public library exists in a municipality, the latter itself is held to offer access to minority literature.[298]

It comes as no surprise that the Hungarian German cultural life thrives under their autonomy régime, i. e. mostly under the rules that open up a cultural space for them. The Hungarian German self-governments support the popular *Schwabenbälle*, local music associations (like brass bands), theatre productions, literature competitions, etc.[299] The Hungarian German national self-government operates a cultural centre in Budapest, which it founded in 2003.[300] In the centre, the Hungarian German library[301] offers a large array of (Hungarian) German books. A Hungarian German theatre[302] exists independently in Szekszárd.[303]

Speaking identity

The languages of the minorities are the main reason why a minority system was established in Hungary in the first place. Language matters again reflect the exclusivity of the autonomy régimes erected under the Minority Act: are deemed as minority languages only the languages of the officially selected thirteen minorities.[304] The Minority Act dedicates a whole chapter to these minority languages.[305] Here, the Minority Act proclaims that everyone may at any time use her or his mother tongue.[306] Moreover, members of a minority may use the minority language in the institutions (the parliament, the municipality, etc.)[307] and announcements, forms, and signs are to be made available in the minority language "upon the well-founded request of the

[298] Art. 49/E(1) and (2) Minority Act.

[299] The yearly report of the Hungarian German national self-government provides a good overview of the cultural activities (for instance LANDESSELBSTVERWALTUNG DER UNGARNDEUTSCHEN, 'Jahresbericht', 2007 (available at: <http://www.ldu.hu/uberuns.html>)).

[300] UNGARNDEUTSCHES KULTUR- UND INFORMATIONSZENTRUM, <http://www.zentrum.hu> (Hungarian German culture and information centre).

[301] UNGARNDEUTSCHE BIBLIOTHEK, <http://www.bibliothek.hu> (Hungarian German library).

[302] UNGARNDEUTSCHE BÜHNE, <http://www.dbu.hu> (Hungarian German theatre).

[303] The theatre receives support from the Hungarian State under the Minority Act (see the data in REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, Annex 5).

[304] Art. 42 Minority Act.

[305] Chapter VII Minority Act, entitled "Language use" (art. 51-54).

[306] Art. 51(1) Minority Act.

[307] Art. 52 Minority Act.

local minority self-government".[308] Three points (i-iii) must be noted as to these language provisions.[309]

i) The lofty proclamation of the freedom to use one's mother tongue in art. 51 Minority Act is not the crux. The important provisions are elsewhere: in the legal acts that determine, when a minority language may be used. The acts that govern the use of language in proceedings are of particular significance in this regard. The relevant act, for instance, determines who must bear the costs incurred due to the use of a language other than Hungarian (for translation, etc.) in administrative procedures. In two cases the Hungarian State sustains the costs: when the language used is a minority language (and the person concerned is a Hungarian citizen)[310] and basically when the procedure is instigated officially (and the foreign person concerned does not speak Hungarian).[311]

ii) Such procedural language guarantees would undoubtedly be important for people who speak other languages than Hungarian (notably immigrants). However, for them these guarantees are not available. Basically, only members of the thirteen minorities benefit from them. These minority members, though, hardly need any kind of language guarantee for administrative proceedings, because they generally master Hungarian *and* their minority language. Moreover, the minority languages spoken in Hungary are often dialects, that differ from the written "official" language. For instance, the German spoken by the Hungarian Germans in Hungary constitutes a dialect (or in fact various dialects),[312] not unlike, for instance, Bavarian in Germany or Swiss German in Switzerland. This dialect is largely unsuitable for administrative contacts, because in these contacts communication often happens in writing. Thus, Hungarian Germans, like members of other minorities, tend to use Hungarian as the "functional first language"[313] in their contacts with authorities,[314] because they master Hungarian better

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[308] Art. 53(1) Minority Act.

[309] For a general assessment of the minority language situation in Hungary see ZAYZON, 'Die sprachlichen Rechte der Minderheiten in Ungarn', *in* Glatz (ed.), *Die Sprache und die kleinen Nationen Ostmitteleuropas*, Budapest, Europa Institut Budapest, 2003, p. 185-199; for a detailed analysis of the situation of the German language in Hungary, see DEMINGER, *Spracherhalt und Sprachverlust in einer Sprachinselsituation: Sprache und Identität bei der deutschen Minderheit in Ungarn*, Frankfurt am Main, Peter Lang, 2004.

[310] Art. 9(3) Act on the General Rules of Public Administration Procedure and Servicing, 2004, CXL (included in annex 4 to REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171).

[311] Art. 10 Act on the General Rules of Public Administration Procedure and Servicing, *supra* FN 310.

[312] ERB, 'Die sprachliche Situation der Ungarndeutschen um die Jahrtausendwende', *in* Glatz (ed.), *Die Sprache und die kleinen Nationen Ostmitteleuropas*, Begegnungen, vol. 21, Budapest, Europa Institut Budapest, 2003, p. 255-261, p. 259.

[313] ERB, 'Die sprachliche Situation der Ungarndeutschen um die Jahrtausendwende', *supra* FN 312, p. 258: "*funktionale Erstsprache*" (referring to the relationship between Hungarian and German for Hungarian Germans [translation by the author, emphasis added]).

than the standard, written version of their minority language.[315] Hence, while of course not being totally beside the point, procedural provisions regarding minority languages are certainly less important than the effective instruction of the minority languages in school.

iii) Minority languages are attractive in a larger perspective, though. To be able to speak and write a (standard) minority language has become an asset on the Hungarian labour market. Not only does the mastery of a minority language provide opportunities in a large foreign market in the kin State of a minority (such as with German for the labour market in Germany). Also in Hungary, minority language speakers are in demand owing to the affirmative action provision in art. 54 Minority Act[316] and to the lack of officials who are proficient in minority languages.[317] Thus, instruction of minority languages in school fulfils a broader function than just keeping the minority dialect alive.

Media

The media are primarily important for the internal cultural life of minorities and for their language. The State supports such internal media activities according to art. 18 Minority Act:

> *"(1) Public service television and radio stations ensure – within an independent organisational unit and with resources allocated for this*

[314] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 41 (citing a report by the minority ombudsperson [as to the minority ombudsperson, see *infra* p. 105) and p. 43 (stating that only Germans who moved to Hungary recently tend to use written German in their contacts with the administration). See also ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Opinion on Hungary, 2000, ACFC/INF/OP/I(2001)004, para. 35.

[315] Note, for instance, that many webpages of the Hungarian German local minority self-governments are only partly, or not at all, available in German.

[316] Art. 54 Minority Act: "The local authorities shall ensure that in the course of filling vacancies in local public services, and also in the course of hiring notaries and bailiffs, candidates speaking also the mother tongue of the given minority would be employed, provided that they meet the general professional requirements and that the numerical proportion of the given minority in the settlement justifies these measures."

[317] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 42 (with the outlook that the lack of qualified staff will not be overcome soon). Note the proposal to identify territories where the promotion of minority languages in the administration and in courts could be "feasible given the sufficiently high number of minority-language speakers living in those areas" in COMMITTEE OF EXPERTS ON THE LANGUAGE CHARTER, Second Report on the Application of the Charter by Hungary, 2004, ECRML (2004) 5, para. 101.

> *purpose alone, as provided for in a separate Act – that national and ethnic minority programmes are produced, broadcast and disseminated on a regular basis.*
> *(2) On territories inhabited by minorities, the government promotes – also through international contracts – the reception of radio and television programmes from the kin state."*

Moreover, the State assists minorities in their efforts in print media: "[t]he State supports […] the publication of books by minorities and the publication of their periodicals."[318]

Based on these provisions, minority television programmes are produced. For each of the thirteen minorities a minority programme of 26 minutes is broadcast on the Hungarian State television channels with Hungarian subtitle on a weekly basis.[319] For the Hungarian Germans the Hungarian State television produces this minority programme in its regional studio in Pécs. The main problem with these programmes seems to be that they are broadcast in the marginal hours.[320] However, the promotion of minority languages, at least in terms of standard language (as opposed to dialect), is probably better served by the reception of channels from the kin States of minorities. Such channels transmit a full television programme. Thus, for instance, in Budapest the German private television stations RTL and SAT 1 are available. Yet, some minorities, notably the Roma, do not benefit from this advantage for lack of a kin State. For them, the Hungarian minority programmes are the only option.

Each of the thirteen recognized minorities edits a newspaper. The Hungarian German newspaper is the *Neue Zeitung*, which appears on a weekly basis and is run by a foundation that is open to all self-governments and associations.[321] The newspaper is

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[318] Art. 50(2)b Minority Act [brackets added].

[319] DEPARTMENT OF NATIONAL AND ETHNIC MINORITIES (HUNGARIAN GOVERNMENT), 'Selection of news on national and ethnic minorities in Hungary: July - December 2008', 2008 (available at: <http://www.nemzetpolitika.gov.hu/index.php?main_category=4&lang=en>), p. 5. Hungarian Radio has transmitted programmes in minority languages for some time. Many local radio and television stations also broadcast programmes in minority languages (REPUBLIC OF HUNGARY, First Report under the Framework Convention, *supra* FN 175, p. 66-67).

[320] At least in 2004, the minority programmes were broadcast in the early afternoon and repeated on Saturday morning (REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 54-55). The framework for the minority programmes is set in the Act on Radio and Television Broadcasting, 1996, I, notably art. 26.

[321] NEUE ZEITUNG - UNGARNDEUTSCHES WOCHENBLATT, <http://www.neue-zeitung.hu> (see the information under the heading "*über uns*").

also supported by the Hungarian German national self-government. It is expressly intended for the Hungarian Germans in Hungary. Apart from newspapers, the minority self-governments also participate in other publications. Thus, the Hungarian German national self-government publishes every year a Hungarian German agenda.[322] Besides these publications that are specific to a minority, information on and for minorities is also sometimes published in the mainstream newspapers, e. g. in the Hungarian daily *Madyar Nemzet* with its monthly four page supplement on minorities.[323]

In Hungary, publications in German also exist independently from the minority self-governments in Hungary, notably newspapers. Their audience is broader than the Hungarian German minority. The popular weekly Pester Lloyd,[324] for instance, reports on all topics that conventional newspapers cover. The Pester Lloyd is not supported by the Hungarian German self-governments, the State, nor by any foundations. Its funding stems exclusively from ads and from vending the newspaper. It owes its existence to the considerable size of the German speaking population, in Hungary as well as beyond, in Central and Eastern Europe.

Besides these traditional ways of publication, the minorities in Hungary also make use of the new media. Over the past few years, many local and national minority self-governments have begun to run their own webpages. However, many of these webpages are exclusively available in Hungarian. Sometimes at least a part of a webpage is provided in the minority language. This state of the web is certainly due to the difficulties with writing in minority dialects and with standard language. Furthermore, it is evidence of the minorities' general preference for Hungarian in writing and of the prevalence of bilingualism.

All things considered, the thirteen official minorities, given their limited size, make quite a lively use of media, which is possible largely due to State support. However, these media activities largely feed (and create) internal needs of the minorities. The minority media activism does not reach the ethnic Hungarian majority. The average ethnic Hungarian is typically oblivious to the minorities: "[…] the general public, as far as it does not access minority media, is hardly informed by other media about the

[322] For instance: Heinek (ed.), *Deutscher Kalender*, Budapest, Landesselbstverwaltung der Ungarndeutschen, 2006.

[323] REPUBLIC OF HUNGARY, First Report under the Framework Convention, *supra* FN 175, p. 68.

[324] PESTER LLOYD - DIE DEUTSCHSPRACHIGE ZEITUNG UNGARNS, <http://www.pesterlloyd.net>.

cultural life within minority communities and events and problems affecting them."[325] The Council of Europe's European Commission Against Racism and Intolerance goes further and, in a general assessment, considers the entire current situation to amount to a "climate of increasing intolerance in Hungarian Society".[326] Apparently, it is almost impossible to gain media attention to minority issues, except for larger scandals which typically involve discrimination and violence against Roma.

b) Resources: financing the autonomy régime

How much does this comprehensive system of thirteen different autonomy régimes cost? How do the minorities finance their autonomy régime? Although minority protection should, of course, not be a question of money, the amount of funds needed to finance the Hungarian autonomy régimes determines to a large part whether it is worth setting up such autonomy régimes. From the points discussed in the previous sections, it has become evident that the minority self-governments largely feed on State resources. However, the self-governments do not have the power to levy taxes themselves. They cannot tap into the State's tax substratum nor can they determine their own revenue. In fact, minority self-governments would not technically be in a position to tax their members, because they do not know who their members are. In other words, the money basically flows from the taxpayer "upwards" to the Hungarian State and then a small part of it flows back down to the minority self-governments. An exception in this flow is, in a way, the one percent of the yearly income tax that each natural person may attribute to a charitable organisation (including minority self-governments).[327]

As to the resources of minority self-governments, art. 58(2) Minority Act determines:

> *"The assets and the incomes of minority self-governments are particularly:*
>
> *a) contributions from the state budget;*
> *b) contributions by municipal government;*
> *c) their own revenues;*
> *d) financial assistance;*

[325] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Opinion on Hungary, *supra* FN 314, para. 33.

[326] EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, Fourth Report on Hungary, *supra* FN 263, para. 170.

[327] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 47.

e) the gain from its property;
f) donations;
g) transferred financial assets."

The most important funding resource for minority self-governments are contributions from the State. The financing system was changed in 2007 from a pure lump sum contribution for each minority self-government unit (approximately 2560 Euro a year per self-government unit in 2006) to a combination of a performance based handout and a yearly lump sum payment (of about 2200 Euro a year).[328] The Hungarian Parliament decides every year on the overall sum available to support the minority self-governments in the budgetary act.[329] Besides these direct payments by the State, the Public Foundation for National and Ethnic Minorities[330] is an important source of funding. The foundation is also alimented by the State. Besides the Hungarian State, funding also stems from minorities' kin States[331] and the European Union. Before Hungary acceded to the European Union, minority self-governments could also apply for support from the European Union under the PHARE programme.[332]

As the funds from the central State are mostly insufficient to cover the costs of minority self-governments, supplementary support from municipalities is important for minority self-governments. Apart from logistic assistance,[333] subsidies from the municipality are also a possibility. Such subsidies are entirely in the discretion of the municipality, though (as long as subsidies are not granted for tasks that are transferred

[328] DEPARTMENT OF NATIONAL AND ETHNIC MINORITIES (HUNGARIAN GOVERNMENT), 'Selection of news on national and ethnic minorities in Hungary: September - December 2007', 2007 (available at: <http://www.nemzetpolitika.gov.hu/index.php?main_category=4&lang=en>), p. 1.

[329] The budgets of minority self-governments are part of the State budget, but they are separate from the central budget of the State (art. 60/B Minority Act).

[330] PUBLIC FOUNDATION FOR NATIONAL AND ETHNIC MINORITIES, <http://www.mnekk.hu/>. See art. 55/A and 55(1)d Minority Act.

[331] It is difficult to quantify the support from minorities' kin States, because kin States usually support many different projects and institutions, some of which only have an indirect link to the minorities in Hungary. An illustrative example is the German-speaking University in Budapest (ANDRÁSSY GYULA DEUTSCHSPRACHIGE UNIVERSITÄT BUDAPEST, <http://www.andrassyuni.hu>), which is *inter alia* supported by Austria, Germany, Switzerland, and some German *Länder*.

[332] The "Poland and Hungary: Assistance for Restructuring their Economies" programme (see REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 47).

[333] Art. 27 Minority Act: "(1) The municipal government is obliged to provide – in a way defined in its organisational and operational statute – for the local minority self-government the conditions needed for its operation as a body. The mayor's office ensures the implementation of the above.
(2) The conditions of the operation as a body, and the related tasks include particularly: a) the use of premises; b) the costs of mailing, delivery, typing and copying."

to the minority self-government).[334] As a consequence, this kind of support varies strongly from municipality to municipality and local minority self-governments depend to a large extent on the goodwill of the municipalities. This dependence is exacerbated by the way that the State contributions to minority self-governments are granted: they are first accorded to the concerned municipality which then hands them on, sometimes with delays.[335] This way of granting the funding is due to the budget of minority self-governments not being separate from, but linked to the municipal budget.[336] Hence, the financial autonomy of local minority self-governments is very limited in all respects.[337]

How much does it cost?

So, how much does an autonomy régime *à la Hongroise* effectively cost? As the above consideration imply, it is difficult to give a plain answer: the contributions by the municipalities are hard to quantify; the funding made available by the kin States and the European Union is difficult to measure (because it flows on different levels and into different projects). Some hard figures can be given nevertheless. The Hungarian State made a one-off payment to each minority, when the minority self-governments were established for the first time in 1994: 300 million Hungarian Forint (today about one million Euro) were distributed according to the size of the minorities.[338] The yearly lump sum payments, which are intended to cover the running costs of minority self-governments, in 2003, amounted to 1.263 billion Forint (today about 4.3 million Euro) for the local minority self-governments, and to 870 billion Forint (today about 3

[334] KÜPPER, *Autonomie im Einheitsstaat*, *supra* FN 197, p. 344.

[335] Art. 55(3) Minority Act. Technically, the municipality is obliged to transfer the funds within 8 days (art. 55(4) Minority Act).

[336] See art. 25(1)k and 26(2) Minority Act.

[337] See the general assessment in GÁL, 'Minoritätenprobleme in Ungarn und Rumänien', *in* Neuss, Jurczek, and Hilz (eds), *Transformationsprozesse im südlichen Mitteleuropa - Ungarn und Rumänien*, Tübingen, Europäisches Zentrum für Föderalismus-Forschung, 1999, p. 31-41, p. 40: "*Sorgen und Probleme gibt es bei der Unterbringung und Finanzierung der lokalen Selbstverwaltungen. Die Minderheiten fordern die Änderung, sowie Ergänzung des Gesetzes, um die Aufgaben der Minderheitenselbstverwaltungen besser zu definieren. Teilweise werden diese von der Gemeinde finanziert; viel hängt davon ab, wie es um deren Finanzen bestellt ist, wie gut oder wie schlecht die Rathäuser mit den Minderheitenvertretungen zusammenarbeiten. Die finanziellen Möglichkeiten und die Bereitschaft der einzelnen Gemeinden oder Kommunen zur Finanzierung und Unterbringung der örtlichen Minderheitenselbstverwaltungen ist sehr unterschiedlich. Der staatliche Beitrag reicht zur Bewältigung der Aufgaben nicht aus. Die Reform der Finanzierung bleibt eine zentrale Forderung der Minderheitenpolitik.*" [Emphasis added].

[338] The Roma received 60 million Forint; the Hungarian Germans, the Croats, Slovaks, Romanians 30 million Forint, and the other eight minorities 15 million Forint each. The amounts were determined by the Parliament in art. 63(4) Minority Act.

million Euro) for the national minority self-governments.[339] These costs are of particular interest to our concerns, because they are directly caused by the autonomy régimes. In other words, these costs do not arise under other labels, when no comparable autonomy régimes exist in a State. In the aggregate, the amount of funding appears rather limited, even if relative price levels are factored in.

Other funding must be distinguished from the above payments, because the funding, although being directly linked to minorities, is not necessarily typical for the Hungarian autonomy régimes. Costs for schools, for instance, arise in other States as well. Thus, the costs for a school run by a Hungarian German self-government cannot be allocated to the Hungarian German autonomy régime without further ado, because without the régime, the students would go to a regular State school. However, the subsidy that minority schools receive for minority students is more directly relevant for our purposes: apparently, in 2003, the State budget granted a supplementary payment of 66 000 Forint per minority student (today about 220 Euro) and of 44 000 Forint per minority kindergarten child (today about 150 Euro) to minority educational institutions.[340]

The funding that the Hungarian Public Foundation for National and Ethnic Minorities receives is also directly related to the autonomy régimes. In 2003, the foundation was funded with 663 million Forint (today about 2.2 million Euro).[341] Yet, the funds are awarded to project proposals, i. e. for specific initiatives that often have little to do with minority self-governments. In a more general sense, the work of many official State institutions is intended for minorities: the minority ombudsperson[342] or the department of ethnic and national minorities play important roles, from which minorities in Hungary greatly benefit. However, the expenses for these institutions can hardly be factored into an overall financial assessment in a reasonable way.

To sum up, the autonomy régimes of the minorities in Hungary are funded by many pots and financed through many channels. An autonomy régime in Hungary mainly functions owing to resources from the Hungarian State (lump sum payments and

[339] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 77-78. For an illustration of the budget of a national minority self-government, see LANDESSELBSTVERWALTUNG DER UNGARNDEUTSCHEN, 'Jahresbericht', *supra* FN 299, p. 38.

[340] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 70. For data for the 1990s, see KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 161. On the financing of schools, see Art. 47(12) and 49(2) Minority Act.

[341] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 31.

[342] As to the ombudsperson see *infra* p. 105.

project financing). Minority self-governments are in general not maintained by contributions from their members, but rather by taxpayers through the general tax system of the State. The amounts involved in financing the autonomy régimes seem, despite the uncertainties discussed, reasonable, though not negligible.

c) Voicing the needs

Some aspects of the voices of minorities under the autonomy régimes in Hungary were already dealt with: the presence of minorities in mainstream media was examined; the correlation between minority self-governments and the regular decentralized State entities (namely the municipality) was analysed; and the national minority self-governments were considered. The role of the latter is the subject of further analysis in this section (i); then the minority ombudsperson is discussed (ii) and the representation of minorities in the Parliament and in other institutions (iii); last, the role of the kin State is examined (iv).

i) National minority self-governments

The term "national self-government" is an oxymoron, because "self-government" actually refers to a decentralized unit of the State (such as the municipality). By definition, such a unit cannot be "national", else it would be central and thus belong to the central State itself (i. e. it would not be a self-government). The term has established itself nevertheless, because it serves a purpose. It generally indicates that national minority self-governments are somehow different from the State; and that the basis of the autonomy régimes are the *local* minority self-governments, which need a representation at the *national* level.

Undoubtedly, the national minority self-government is the most significant part of the voice of a minority in Hungary. The national self-government represents the whole minority in Hungary: "[t]he national self-government represents and protects the rights of the minority represented by it at a national level […]."[343] It is also the first interlocutor, when any State institution or any political actor wants to address a minority. By means of the appointment formula – the national self-government is elected by the members of the local minority self-governments acting as electors[344] –

[343] Art. 36 Minority Act [brackets added].

[344] Depending on the size of the minority, the national minority self-government consists of 11-53 members. The Hungarian German national minority self-government is composed of 53 members.

the national minority self-government bundles the local minority self-governments which are spread all across Hungary. However, the national self-government may not supervise or instruct the local or regional minority self-governments: no "subordination or superordination"[345] between minority self-governments exists.

Above all, national minority self-governments are the contact points for the Hungarian government and the Parliament to the minorities. In an established order – a "system of meetings"[346] – national minority self-governments are involved in government policies which concern the minorities. The Hungarian prime minister meets the presidents of the national minority self-governments every year. The responsible ministers meet up with the presidents every six months. National minority self-governments are also consulted, when Hungary reports to the international bodies in order to fulfil its international obligations (for example, with regard to the Framework Convention[347] and the Language Charter[348]).

Beyond being a contact point for the organs of the State, national minority self-governments also fulfil broader tasks. Their representatives are members of various bodies and committees, such as in the National Minority Committee[349] for purposes of education or in the board of trustees of the Public Foundation for National and Ethnic Minorities.[350] National minority self-governments hold important rights to consent in educational matters.[351] Here, they "have become real professional factors in formation of minority education and training".[352] National minority self-governments also participate in minority educational and cultural institutions or support local minority self-governments in establishing or taking over such institutions. Thus, the Hungarian German national self-government participates in various Hungarian German institutions,[353] which also enhance the visibility of the Hungarian German minority vis-à-vis the majority. In addition, national minority self-governments can petition the minority ombudsperson in order to draw attention to concrete grievances. However, probably the most important function of national minority self-governments is that they exercise influence on the day-to-day business of the State, in particular of

[345] Art. 24/D Minority Act.
[346] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 78.
[347] COUNCIL OF EUROPE, Framework Convention for the Protection of National Minorities, *supra* FN 29.
[348] COUNCIL OF EUROPE, Language Charter, *supra* FN 28.
[349] *Supra* FN 274.
[350] Art. 55/A(3)a Minority Act (see also *supra* FN 330).
[351] Art. 38(2) Minority Act.
[352] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 64.
[353] *Supra* FN 300 and 301.

the State administration. They make sure that, when acts are issued or enacted, the interests of the minority they represent are taken into account. Lobbying is thus the key function of national minority self-governments. Their efforts in lobbying make them the most significant part of the voice of minorities in Hungary.

ii) The minority ombudsperson

The minority ombudsperson's official title is the Parliamentary Commissioner for the National and Ethnic Minorities Rights.[354] As the designation indicates, the ombudsperson is nominated by the Parliament:

> *"(2) The National Assembly shall elect an Ombudsman for National and Ethnic Minority Rights. Before putting forward a proposal concerning the person of the Ombudsman for National and Ethnic Minority Rights, the President of the Republic shall seek the opinion of national minority self-governments, or in the absence of such a self-government, the view of the registered national organisation representing the interests of the given minority. The provisions of Act LIX of 1993 on the Ombudsman for Civil Rights shall apply to the Commissioner for National and Ethnic Minority Rights."*[355]

Like all ombudspersons, the minority ombudsperson holds little power: she (or he) cannot issue orders or decide cases in a legally binding way. Nor can he (or she) reject municipal acts that violate the rights of minorities.[356] However, it should not be deduced from this lack of formal powers that the minority ombudsperson is not important. On the contrary, she (or he) is very significant, notably as a moral, impartial, and independent authority. In the annual report, the minority ombudsperson raises and addresses publicly the most pressing challenges minorities face in Hungary.[357] Here, issues such as the reform of the Minority Act are discussed. In the annual report, the minority ombudsperson names persons with whom or locations

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[354] See PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS, <http://www.kisebbsegiombudsman.hu/>. Normally, the commissioner is referred to as "minority ombudsman". This study instead refers to the commissioner as the "minority ombudsperson".

[355] Art. 20(2) Minority Act.

[356] CAHN, 'Smoke and Mirrors: Roma and Minority Policy in Hungary', *supra* FN 233, para. 13.

[357] See, for instance, the PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS (E. KÁLLAI), Annual Report 2007, *supra* FN 219, or PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS (J. KALTENBACH), Annual Report 2005, *supra* FN 265.

where particularly harsh problems arise. Moreover, the minority ombudsperson also uses the annual reports to address thematic issues. An example is the part of the annual report 1998 on discrimination in employment.[358]

The minority ombudsperson treats specific cases, too. He (or she) receives petitions from individuals or acts *ex officio*, when a problem arises. Her (or his) main tools are mediation and informal reconciliation. However, a situation is only within the ambit of the minority ombudsperson's powers, when no other authority is in charge (i. e. the competence is of subsidiary nature). He (or she) may only act in a given case, when no other authority is competent or when no legal remedies are available.[359] Apart from this principle, the only limitation to the actions of the minority ombudsperson is that the ombudsperson only has "the authority to act on issues which fall within the scope of [the Minority Act]".[360] With this broad mandate, the minority ombudsperson, for instance, seized the Constitutional Court with the application to declare unconstitutional the amended quasi-objective system for the local minority self--governments elections. The minority ombudsperson argued in favour of a wholly objective system (and suffered defeat).[361] Moreover, she (or he) is actively involved in the legislative process, whenever minorities are concerned. And he (or she) sits in international bodies that deal with minority issues. Jenö Kaltenbach, for instance, was a member of the Council of Europe's European Commission Against Racism and Intolerance during his ombudsperson term of office until 2007.[362]

Without a doubt, the minority ombudsperson plays a central role for the autonomy régimes under the Minority Act. Figuratively, she (or he) is the beacon for Hungarian minorities. He (or she) attracts minority issues, represents minorities vis-à-vis the majority and, in informal ways, offers solutions. She (or he) accumulates knowledge and offers lessons to be learnt to all State organs. In this perspective, the minority ombudsperson is the guarantor of the autonomy régimes and the common voice of all minorities. He (or she), in a way, bundles up the different minorities and reduces them to a common denominator. However, she (or he) is not a mere representative of minority interests. The minority ombudsperson is not a lobbyist, for he (or she) is not

[358] PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS (J. KALTENBACH), Annual Report 1998, 1999, section 4.2.

[359] KÜPPER, *Autonomie im Einheitsstaat*, *supra* FN 197, p. 262.

[360] Art. 20(3) Minority Act [brackets added].

[361] See the comment on the case in MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 414-415.

[362] The office of Jenö Kaltenbach as a member of the European Commission against Racism and Intolerance ends on 1 January 2013 (while Ernö Kállai was elected as the new minority ombudsperson in 2007; see EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, <http://www.coe.int/ecri>).

bound to any specific interest, enjoys independence in all actions, and acts in the interest of general welfare as well.

iii) Representation in Parliament and in other institutions

The promise to grant the Hungarian minorities their own representatives in the Hungarian Parliament is as old as the Minority Act. The wording of art. 20(1) was the same in the original Minority Act of 1993 as in the amended version of 2005: "Minorities have the right – as determined in a separate Act – to be represented in the National Assembly." In fact, the promise is even older, for it was already made in 1990, when the Constitution was amended, although in less explicit terms. Thus, art. 68(3) Constitution states: "The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country."

However, the Parliament has not kept its word, for the promised separate Act has not been enacted. The Hungarian Constitutional Court already in 1994 held that this omission infringed the Constitution.[363] The failure to implement art. 20(1) by a separate act has been continuously criticized by international monitoring bodies.[364] The occasion of the latest amendment of the Minority Act in 2005 was not seized to implement minority representation in the Parliament. The issue is not entirely off the table, though: the Hungarian Constitutional Court in 2006 declared a popular initiative that intended to enforce parliamentary representation of minorities as inadmissible.[365] Parliamentary representation of minorities is thus still being under discussion.[366] Yet, the Hungarian Helsinki Committee is probably right in saying that "[t]his issue is

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[363] KÜPPER, *Die ungarische Verfassung nach zwei Jahrzehnten des Übergangs*, Frankfurt am Main, Peter Lang, 2007, p. 106, with the reference to the decision of the Constitutional Court. See also MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, footnote 7 on p. 400, referring to a decision by the Constitutional Court which confirms the violation of the Constitution by the omission to ensure minority representation.

[364] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Opinion on Hungary, *supra* FN 314, para. 48-49 (acknowledging the broad margin of discretion that international obligations leave to national authorities in this domain), and ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Second Opinion on Hungary, *supra* FN 248, para. 112.

[365] KÜPPER, 'Chronik der Rechtsentwicklung', (2006) 15 WiRO (10) 316-317 (the Constitutional Court's reasoning was that popular initiatives were inadmissible, when concerned with the composition of the highest State organs).

[366] EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, Fourth Report on Hungary, *supra* FN 263, para. 58.

absolutely off the agenda, there is no sign or remote possibility of considering it seriously."[367] Thus, the continuing efforts may well be mere window-dressing.

The issue of representation of minorities in the Hungarian Parliament is certainly not a question of solving "certain technical problems",[368] for feasibility studies which were conducted some time ago[369] clarified the options. The issue has a political and a constitutional dimension, though. The main reason for the failure to enact minority representation in the Parliament is the Parliament itself. It consists of only one chamber (the national assembly). The Hungarian voters directly elect representatives into this single chamber. During the *Wende*, the introduction of a second chamber in which the regions and minorities could have been represented was discussed.[370] But since the proposal was soon discarded, it has been clear ever since then that the parliamentary representation of minorities would have to be realized within this one-chamber parliamentary framework. This framework is further constricted by the political constellation: in Hungary, mostly two large parties compete for popular support. Elections are often a tight race. Any guarantee of fixed seats to minorities risks changing this delicate situation and granting minorities a disproportionate influence with the power to tip the balance. Hence, the political will to change the status quo and implement parliamentary representation of minorities can hardly be mustered.

The homogeneity and the "Republican" argument

For parliamentary representation of minorities it is important to keep in mind that the thirteen Hungarian minorities are not a homogeneous block. Minorities do not always agree amongst themselves on issues that concern minorities (i. e. themselves), let alone on broader issues that concern the Hungarian society as a whole. In the past, attempts

[367] HUNGARIAN HELSINKI COMMITTEE, 'Written Comments by the Hungarian Helsinki Committee regarding the Second Monitoring Cycle on Hungary under the Framework Convention for the Protection of National Minorities', 2004 (available at: <http://www.helsinki.hu/eng/indexm.html>), p. 10 [brackets added].

[368] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Second Opinion on Hungary, *supra* FN 248, para. 111.

[369] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 16.

[370] KÜPPER, *Die ungarische Verfassung nach zwei Jahrzehnten des Übergangs*, *supra* FN 363, p. 69. See also DIERINGER, 'Das politische System der Republik Ungarn', (2008) 56 *Südosteuropa* (2) 181. For a discussion of the second chamber of parliaments in federal States, see HANF, *Bundesstaat ohne Bundesrat? Die Mitwirkung der Glieder und die Rolle zweiter Kammern in evolutiven und devolutiven Bundesstaaten - eine rechtsvergleichende Untersuchung*, Baden-Baden, Nomos, 1999.

at creating a minority party that encompasses all thirteen minorities have failed.[371] And it seems that parties which focus on one particular minority are not very successful, either.[372] It appears that being "the national minority" does not pay off very much in political terms (except perhaps as a limited political capital to be thrown in with the large parties[373]).

Moreover, a basic issue comes up again in parliamentary representation: why should the thirteen officially recognized minorities benefit from preferential parliamentary representation? This is the same issue as with the Minority Act and the autonomy régimes as such: why these groups and not others? The question, however, becomes even more salient with representation in Parliament than with the Minority Act in general, because it concerns *the* institution of the whole Hungarian *demos* (the Parliament) and not just the autonomy régimes which are at least partly introverted. Of course, international monitoring bodies which are specialized on minority (and human) rights would prefer to see the parliamentary representation of minorities implemented. But possibly, these monitoring bodies fail to see the whole picture and do not sufficiently take into account the Republican nature of the State. In this framework, representation in the Parliament is granted by means of elections – in other words representation must be gained periodically – not by means of a guaranteed representation. The elections are open to all voters and parties, including minorities. Accordingly, members of minorities effectively do sit in the Parliament. They just do not hold their representative office *qua* their status as members of minorities, but *qua* members of a party. As such, they are of course subject to party constraints like all other members of Parliament. It follows that the lack of implementation in minority representation as such is not tragic, despite being unconstitutional.[374] This consideration probably explains the political inertia in the matter. A sound argument can therefore be made for the Hungarian Germans to refrain from pushing parliamentary representation as a top priority and from claiming this specific part of their voice. Perhaps the Hungarian *pouvoir constituant*, after all, just hiccupped when introducing the guarantee for minority representation – as it seems that the Parliament had hiccupped when it had introduced a preferential mandate of the local minority representative in the municipality in the amendment to the Minority Act in 2005. This

[371] REPUBLIC OF HUNGARY, First Report under the Framework Convention, *supra* FN 175, p. 103 (regarding the Minority Forum, a political party that ran for elections in 1998).

[372] REPUBLIC OF HUNGARY, First Report under the Framework Convention, *supra* FN 175, p. 103 (concerning Roma parties).

[373] Recently, the political parties seem to have discovered at last the electoral potential of the Roma issue.

[374] What is tragic in a broader perspective, though, is that a constitutional guarantee remains unimplemented for over a dozen years. Clearly, the general moral (and legal) authority of the Constitution is impaired by such unfulfilled promises. Apart from that, it seems that the mechanism for the implementation of constitutional law is deficient.

preferential local mandate, which would have come to bear subsidiarily (i. e. when no member at all of a minority would have been elected to the municipal council), was stricken down by the Constitutional Court for reasons of voter equality.[375]

iv) The kin State

The kin State (or parent State) of a minority is the State the population of which shares national or ethnic features with the minority of another State. The kin State often exercises a protective role for the minority concerned (Austria, for instance, protects the German speaking population of South Tyrol/Alto Adige in Italy).[376] For minorities in Hungary, too, the kin States play a crucial role. The kin State not only supports the minority's culture, but often also serves as an amplifier for the voice of the minority.

Relations between a minority and its kin State are addressed in art. 14 Minority Act for the individual level ("[p]ersons belonging to a minority have the right to maintain contacts with state and community institutions of their kin state and/or linguistic nations, and also with minorities living in other countries"[377]) and in art. 19 Minority Act for the collective level ("[m]inorities and their organisations have the right to establish and maintain extensive and direct international contacts"[378]). While the substance of the individual right is probably already contained in other rights (notably human rights), the collective right goes further. Art. 19 is startling, because foreign affairs are often the exclusive domain of the State (that is the central authorities of the State). Even in federal States, foreign affairs are usually the exclusive domain of the federal authorities and unsupervised transborder contacts are sometimes prohibited. Given that minority self-governments are officially recognized bodies, the collective right appears as far-reaching, despite the minority self-governments' lack of sovereign powers. Moreover, art. 19 also includes contacts between two groups that are both

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[375] OFFICE FOR NATIONAL AND ETHNIC MINORITIES, 'Selection of news on national and ethnic minorities in Hungary: October 2005', 2005 (available at: <http://www.szmm.gov.hu/main.php?folderID=1414>), p. 1, and MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 413 (on the decision by the Constitutional Court). On the fate of the preferential local mandate see also PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS (J. KALTENBACH), Annual Report 2005, *supra* FN 265, section I.1.2. For the representation of the minorities in other bodies, see *supra* section i).

[376] The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, *supra* FN 135, which were drafted by a committee of experts, deal extensively with minorities and kin States. On bilateral agreements which serve to protect minorities see LANTSCHNER, *Soft Jurisprudence im Minderheitenrecht – Standardsetzung und Konfliktbearbeitung durch Kontrollmechanismen bi- und multilateraler Instrumente*, Baden-Baden, Nomos, 2009 (forthcoming, on file with the author).

[377] Brackets added.

[378] Brackets added.

minorities in the respective State.[379] Yet, the right in art. 19 Minority Act is limited to "contacts". It obviously does not encompass the right of minority self-governments to act in the name of and on the account of the Hungarian State. The acts of minority self-governments do not bind the State under international law (except for the case where a specific authorization to act would be given).

Based on art. 19 Minority Act the local minority self-governments have developed close ties to their kin State. Many villages in which Hungarian Germans live, for instance, have partner villages in Germany. National minority self-governments, too, make use of art. 19. Seemingly, the main part of their activities is focused on developing and improving their bonds with the kin State.[380] In particular in the domain of education, support from the kin State is crucial: the kin State can arrange secondments for its own teachers and for teachers from Hungary. Thus, the shortage in teaching staff with the necessary skills to teach the standard minority language can be overcome. And the necessary teaching materials can be made available.[381]

Bilateral agreements

The kin States are also indirectly involved with the Hungarian autonomy régimes via bilateral agreements. The kin States of minorities in Hungary conclude such bilateral agreements with Hungary. These agreements are usually, but not always, based on reciprocity. They include provisions that concern both the minority in Hungary and the ethnic Hungarian minority in the contracting State. Based on these international legal contacts, bilateral committees regularly meet to discuss minority issues. An illustrative example is the bilateral cooperation between Germany and Hungary.[382] This collaboration is based on a "friendly cooperation and partnership agreement" concluded in 1992.[383] Subsequently, the German and the Hungarian government

[379] Some minorities make use of this possibility, notably the Slovaks (KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 150.

[380] REPUBLIC OF HUNGARY, First Report under the Framework Convention, *supra* FN 175, p. 106 (citing a survey conducted by the "Scientific Institute of Western-Hungary of the Regional Research Center of the Hungarian Academy of Sciences").

[381] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 67.

[382] Another, more recent product of bilateral cooperation is an agreement on minority protection between Hungary and Serbia [and Montenegro] (KÜPPER, 'Chronik der Rechtsentwicklung', (2005) 14 WiRO (6) 189). For more details on bilateral cooperation between Hungary and kin States, see VOGEL, 'Sicherheitsdilemma und ethnische Konflikte aus ungarischer Sicht', *supra* FN 174, p. 225-229.

[383] Vertrag zwischen der Bundesrepublik Deutschland und der Republik Ungarn über freundschaftliche Zusammenarbeit und Partnerschaft in Europa, 1992, BGBl. II 1992 p. 475-483 [original in German and Hungarian, translation by the author].

concluded an understanding on "cultural cooperation" in 1994,[384] which was based on the agreement of 1992. Even before that, based on the same agreement of 1992, the two governments issued a "common declaration on the promotion of the German minority and the instruction of German as a foreign language in the Republic of Hungary" in 1992.[385] This declaration predated the Minority Act. Regular meetings take place in this contractual framework. Based on the common declaration, the German government supports educational and cultural institutions (like the education centre in Baja and the German theatre in Szekszárd), makes available scholarships to teachers and students, and provides teaching materials.[386] But the German minority in Hungary does not only benefit from bilateral assistance from the German State. They also cooperate with the joint committee of the German *Länder*, the Hungarian Government and the German speaking countries[387] (i. e. other kin States) and with other German minorities abroad (for instance, the Hungarian Germans prepared educational materials together with the Italian province of South Tyrol/Alto Adige[388]).

The lack of a kin State

All things considered, the voices of the minorities in Hungary sound freely across borders. Their voices are heard by the kin States. Such a voice may trigger not only substantive support but eventually the engagement of the Hungarian State with the kin State. Through the amplifier of the kin State, the outer voice of a minority becomes more audible also within Hungary. Thus, the position of a minority toward the Hungarian State and the basis of the autonomy régimes as such are strengthened. But it is evident that the force of this feedback loop depends on the amplifier: the power, means, and influence of the kin State (which are particularly large in the case of Germany). No wonder then that the feedback loop is weak for the Roma who are not

[384] Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Ungarn über kulturelle Zusammenarbeit, 1994, BGBl. II 2000 p. 479-486 [original in German and Hungarian, translation by the author]. An agreement on cultural cooperation concluded on 6 July 1977 preceded the agreement of 1994.

[385] Gemeinsame Erklärung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Ungarn über die Förderung der deutschen Minderheit und des Unterrichts von Deutsch als Fremdsprache in der Republik Ungarn, 1992 [on file with the author, original in German and Hungarian, translation by the author].

[386] Gemeinsame Erklärung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Ungarn über die Förderung der deutschen Minderheit und des Unterrichts von Deutsch als Fremdsprache in der Republik Ungarn, *supra* FN 385, sections III.1, III.4, III.6, and III.7. For more details on the significance of the German State for the German minority in Hungary, see ASCHAUER, *Die Ungarndeutschen*, *supra* FN 171, p. 276.

[387] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 85.

[388] REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 85.

in a position to rely on any kin State at all. In their case, non-governmental organizations, such as the European Roma Rights Centre,[389] step in to fill the gap at least partially. Undoubtedly, other States with Roma minorities and the European inter- and supranational organizations, which proclaim moral values and would have the necessary leverage to enforce them, are under a duty to make a more credible effort regarding the situation of the Roma. They could help the Roma attain the same status as the other Hungarian minorities, which, owing to a large part to the assistance by their respective kin States, have a more secure, legally sustainable position. These non-Roma minorities depend less on the Hungarian State thanks to their kin State. It is this aspect – dependence and control – that is the subject of further reflection in the next section.

d) Controlling the autonomous

What kind of control does the Hungarian State retain over the autonomy régimes? What mechanisms are in place to ensure that minorities do not just run out of control and ultimately escape the Hungarian State? The last question may be hypothetical. But the control mechanisms are nevertheless of interest to this study. A distinction can be made between the control over the autonomy régimes as such and the control over day-to-day business.

Control over the autonomy régimes

The control over the autonomy régimes as such is exercised by the Hungarian Parliament. It introduced the Minority Act in 1993 and amended it in 2005. The Parliament decides in issues regarding the Minority Act with a two-thirds majority.[390] Within these formal confines, though, the Parliament is entirely free to decide on the fate of the autonomy régimes. In other words, the granting of the autonomy régimes was a unilateral act by the Hungarian legislature. The Parliament as a State institution is not bound to maintain the autonomy régimes in the future by any obligation towards the minorities in Hungary. The Parliament alone holds the veto over the autonomy régimes. Moreover, the Minority Act (and with it the autonomy régimes) effectively does appear as a "gift" from the ethnic Hungarian majority – despite the affirmation to

[389] EUROPEAN ROMA RIGHTS CENTRE, <http://www.errc.org>.

[390] Art. 68(5) Constitution: "A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the rights of national and ethnic minorities."

the contrary in the preamble of the Minority Act[391] – when the perspective of the Parliament as a body is given up and the members of the Parliament are focused on instead. For the Parliament is in the overwhelming majority (that is way beyond the two-thirds majority required by the Constitution to change the Minority Act) composed of ethnic Hungarians. What is more, the Hungarian minorities are not institutionally represented in the Parliament. Remember also that the *pouvoir constituant* (basically again the Parliament deciding with a two-third majority of its members[392]) has got the power to change the Constitution and rescind the minority guarantees contained in art. 68 Constitution.

However, this view of the autonomy régimes being a present by the ethnic Hungarians must be tempered in three regards (i-iii). (i) The Hungarian Parliament is, of course, not entirely free in choosing its course of action. The Hungarian State, and thus the Parliament, is legally bound by multilateral international obligations, such as the Framework Convention[393] and the founding treaties of the European Union.[394] Yet, these instruments do not imperatively require far-reaching autonomy régimes like those in place in Hungary to protect minorities. However, the bilateral obligations undertaken by the Hungarian State towards the kin States of Hungarian minorities go further. Thus, the leeway of the Parliament is limited, for instance, by the Hungarian-German international contractual framework[395] – if only for a limited period of time, for such agreements can be terminated. Nonetheless, agreements with kin States provide a more stable basis for autonomy régimes than a mere legislative act. For legal and political pressure would certainly be exerted via these agreements, if the Hungarian Parliament set out to abolish the autonomy régimes.

ii) The system of autonomy régimes in Hungary was not erected without the participation of the minorities in Hungary. On the contrary, the Minority Act was

[391] The preamble of the Minority Act *inter alia* states: "In their entirety these rights are neither a *gift* from the majority nor the privilege of the minority, nor is their basis the numerical proportion of the national and ethnic minorities within the majority nation, but the right to be different, which is based on the respect for the freedom of the individual and for social harmony." [Emphasis added].

[392] Art. 24(3) Constitution: "A majority of two-thirds of the votes of the Members of Parliament is required to amend the Constitution and for certain decisions specified therein."

[393] COUNCIL OF EUROPE, Framework Convention for the Protection of National Minorities, *supra* FN 29.

[394] Art. 6 Consolidated Version of the Treaty on European Union, 2006, Official Journal C 321 E/5 of 29 December 2006, lists the founding principles of the European Union: "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." Art. 2(1) Treaty on European Union [Lisbon Treaty], 2008, Official Journal C 115/13 of 9 May 2008, consolidated text, is more explicit in adding "respect for human rights, including the rights of persons belonging to minorities".

[395] *Supra* FN 383-385.

discussed in 1992 at the "round table"[396] at which the minorities and the Hungarian government sat. Here, the Hungarian minorities had a say over the introduction and the design of the autonomy régimes. This say echoed in the broad basis that the original Minority Act was built upon: 96.5% of the votes were in favour of the Minority Act, when the Parliament adopted it in 1993.[397] Overall, the minorities were treated as "equal negotiation partners"[398] in the elaboration of the Minority Act in 1993.[399] Subsequently, the amendment of the Minority Act in 2005 was also debated at a second "round table".[400] Despite these measures aimed at inclusion, the say minorities have in Hungary does not amount to control, because the inclusive measures in the elaboration of the Minority Act are merely consultatory. Besides, the "informal" representation of minorities in the Parliament (via members of the Parliament who are members of a minority) does not confer the minorities much control over the ultimate fate of the autonomy régimes.

iii) The third qualification of the view that the autonomy régimes are a revocable present by the Magyar majority originates in the Hungarian Constitution. In spite of the relative formal instability of the Constitution, an amendment to the Constitution is not easily passed. Such an amendment can meet strong obstacles. These obstacles are mainly political. The complete revision of the Constitution was, for instance, discussed during the 1990s, after the most pressing amendments to the socialist Constitution had been made.[401] However, after these amendments, the political will to enact further, more fundamental changes in the Constitution could not be mustered any more. As a consequence, Hungary's Constitution is today still largely the same document as during the Cold War. In a similar vein, changing the Constitution to abolish the constitutional minority guarantees could eventually prove more difficult than the formal rules imply.

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[396] *Supra* FN 235.

[397] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 372.

[398] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 372: "*gleichrangige Verhandlungspartner*" (citing a government declaration) [translation by the author, emphasis added].

[399] See also KOVÁCS, 'The Participation of Hungary's Linguistic or Ethnic Minorities in the Decision-making Procedure', *in* Varga (ed.), *International Law and Minority Protection - Rights of Minorities or Law of Minorities*, Budapest, Adadémiaa Kiadó, 2000, p. 119-127, p. 122.

[400] PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS (E. KÁLLAI), Annual Report 2007, *supra* FN 219, p. 35 (and the following pages on the role of the minorities' round table).

[401] KÜPPER, *Die ungarische Verfassung nach zwei Jahrzehnten des Übergangs*, *supra* FN 363, p. 41: "Eine weitere Folge des stückweisen Umschreibens der Verfassung ist, dass sie nicht aus einem Guss ist, sondern an vielen Stellen eine Art Flickenteppich mit zum Teil widersprüchlichen Regelungen und Wertungen. Dennoch ist weder als Krönung der Wende noch danach eine komplett neue Verfassung zu Stande gekommen, und Ungarn lebt heute noch mit einem Text, der 1989/90 als Provisorium gedacht war."

Day-to-day control

The court is in charge of ensuring compliance of the autonomy régimes with the law. The court, which in Hungary is charged with the jurisdiction in all legal domains (civil, administrative law, etc.) – that is why the term "the court" is always used in singular – sees to it that "the rights of the minority self-governments and the legal exercise of their powers are protected"[402] and that "the illegal decisions of minority self-governments" are "reviewed".[403] The court therefore performs the double task of the controller as well as the guardian of the autonomy régimes. Obviously, the court is an institution of the central State. As such, it cannot be considered to be part of the Hungarian autonomy régimes. It is rather an external controlling instrument. The autonomy régimes are thus not guaranteed by means of an innate mechanism, i. e. a mechanism that is part of the autonomy régimes themselves, but rather by means of an external organ. With this organ (the court) the central State retains further control over the autonomy régimes (whilst the court's decisions are, of course, not subject to individual scrutiny, for the court is independent).

There is an *ex officio* element in the legal control by the court. To initiate the legal review by the court is the task of the supervisory authority of the minority self-governments: "the head of the office of public administration of the capital city or the county".[404] She (or he) reviews measures by minority self-governments only from a legal perspective. In case he (or she) is of the opinion that the measures are illegal, he (or she) has the option to initiate the legal review by the court.[405] This supervisory trigger of legal control is, of course, most appropriate, when no concerned individual seizes the court in a given case.

The constitutional court also plays an important role in legal control, besides the ordinary court. Individuals, like everyone (*actio popularis*) have the option of petitioning the Constitutional Court for a review of the compatibility of a measure with the Constitution (notably art. 68).[406] The Constitutional Court, upon request by the government, as an *ultima ratio* also decides on the dissolution of the board of a

[402] Art. 24/C(1) Minority Act.
[403] Art. 24/C(2) Minority Act.
[404] Art. 60/H(1) Minority Act.
[405] Art. 60/J(2)a Minority Act.
[406] See KÜPPER, *Autonomie im Einheitsstaat*, *supra* FN 197, p. 257 ff.

minority self-government in case the minority self-government does not comply with the Constitution.[407]

In practice, the supervision over minority self-governments is not very effective. Legal action is rarely taken.[408] Apparently, litigation before the court is too costly and time consuming. Moreover, it sometimes takes years for the Constitutional Court to rule on a petition. For these reasons, soft mechanisms to guarantee the proper working of the autonomy régimes (like mediation by the minority ombudsperson or the national minority self-governments) are usually preferred. As a by-product of the use of such soft mechanisms, a part of the control over the autonomy régimes slips from the hands of the State. Yet, the grip of the State on the autonomy régimes remains firm for other reasons, among which is notably the minority self-governments' utter dependence on financial support by the State and on cooperation by the municipalities.

e) A symbiotic autonomy régime

In Hungary, the autonomy régimes under the Minority Act subsist owing to a symbiosis with the Hungarian State. On all levels of the State – local, regional, and national – the minority self-governments are closely intertwined with the (decentralized and central) organs of the State. Minority self-governments share tasks with these State organs, cooperate with them, and in a broad sense contribute to the public good. The intricate entwinement is not limited to the Minority Act, for it necessarily carries on trough other parts of State legislation. We mentioned the legislation on elections or on municipalities. Other legislation could be added (such as

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[407] Art. 60/K(2) Minority Act. For further details on the jurisdiction of the Hungarian Constitutional Court in general, see Brunner and Sólyom (eds), *Verfassungsgerichtsbarkeit in Ungarn: Analysen und Entscheidsammlung 1990-1993*, Baden-Baden, Nomos Verlagsgesellschaft, 1995; HALMAI, 'Bürgerliche und politische Rechte in der Verfassungsrechtsprechung Ungarns', *in* Frowein and Marauhn (eds), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Berlin, Springer, 1998, p. 125-130; and SÓLYOM, 'Anmerkungen zur Rezeption auf dem Gebiet der wirtschaftlichen und sozialen Rechte aus ungarischer Sicht', *in* Frowein and Marauhn (eds), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Berlin, Springer, 1998, p. 213-228.

[408] See CAHN, 'Smoke and Mirrors: Roma and Minority Policy in Hungary', *supra* FN 233, para. 13 ("Article 29 of the Minorities Act states that, in issues relating to local public education, media, culture and language, decisions can be made only with the agreement of the local minority self-government, but there is no effective legal recourse where a local government does not do this. Where local minority self-governments oppose the actions of local governments, they can appeal to the county administration (kozigazgatasi hivatal), like any citizen. However, according to the present division of powers, this office is largely ineffective at striking down local legislation. Another avenue of appeal leads through the office of the Parliamentary Commissioner for National and Ethnic Minorities - an office whose powers are limited and do not include over-ruling local ordinances. The National Minority Self-Government, meanwhile, can only 'comment' on legislation of relevance to the minority.")

provisions on the prevention and criminal prohibition of discrimination[409]). Yet, the symbiosis is not just mutual or neutral. It is virtually parasitic, too: the minority self-governments live off the State. Without the support of the State they would wither away. Theoretically, the State could get rid of the autonomy régimes. But (international) legal obstacles, political pressure, and the continuous, mutual benefits would eventually make it difficult to adopt such a decision.

The focus of the autonomy régimes under the Minority Act is local. The identity of the minorities in Hungary is rooted in the local circumstances. This is their frame of reference, in particular when members of a minority, which are usually scattered across most of the country, are condensed in a village. The national minority self-government thus appears as a representative of the locally anchored minority. In this role, the national minority self-government lobbies the State institutions in the interest of the minority it represents. With the amendment to the Minority Act in 2005, the autonomy régimes lost the local territorial dimension, though: the majoritarian representatives of a minority cannot formally take over a municipality any longer by declaring it a minority municipality. Thus they cannot fuse a concrete, local part of the autonomy régime with the decentralized State institution (the municipality) any longer. Now, the local minority self-government always remains separate from the municipality. Thus, according to the amendment, national minorities do not technically possess their own local territory any longer. From a substantive point of view, they still do possess it, though (when a majority of representatives of a minority is elected to the municipal council). Admittedly however, this option is available to any other intellectual, ideological, or political group, too.

Today, the autonomy régimes established in accordance with the amended Minority Act are of purely personal nature. The previous territorial dimension has been lost.[410] Despite this loss, the Hungarian autonomy régimes are undoubtedly still complicated.[411] They notably grapple with the issues raised by the freedom of identity. As truly personal autonomy régimes based on quasi-objective identification the Hungarian autonomy régimes face uncertainty on the level of the individual. Freedom

[409] Note the enforcement problems with non-discrimination provisions (HUNGARIAN HELSINKI COMMITTEE, 'Briefing Paper for UN Independent Expert on Minority Issues', 2006 (available at: <http://www.helsinki.hu/eng/indexm.html>), p. 4).

[410] KALTENBACH, 'Das ungarische Minderheitengesetz - Zielsetzung und Aktzeptanz', *supra* FN 184, p. 349: "[…] *eine personell-kulturelle Autonomie mit einigen territorialen Aspekten auf Siedlungsebene*." (as to the Minority Act before the amendment in 2005) [emphasis added].

[411] OETER, 'Zur Entstehung und Entwicklung des Modells der Kulturautonomie', *supra* FN 148, p. 77: "[…] *organisatorisch sehr viel anspruchsvoller*" (comparing the personal autonomy as it is realized in Hungary with the simpler version with only a national minority self-government) [emphasis added].

of identity turns the members of a minority, and thus the minority itself, into the large unknowns of the autonomy régime. This uncertainty by its nature opens the door for abuses. However, the Minority Act was designed to protect minorities. Minority protection is at the heart of an autonomy régime established in accordance with the Minority Act. Sadly, the abuses are a corollary of the Hungarian approach to minority protection. Yet, freedom of identity rightly prevails over the abuses, because freedom of identity is the long-term guarantee of minority protection. This study now turns to the causes of the freedom of identity and to the factors that impact on the autonomy régimes in Hungary – as a further step in the quest for models of autonomy.

2.3 Factors having an impact on the autonomy régime

Let us now turn from the question of what an autonomy régime in Hungary is like to the question of where the Hungarian autonomy régimes come from. What factors have an impact on the autonomy régimes? What shaped the Minority Act? What are the issues that the autonomy régimes are supposed to address? Among the many factors that play a role, four seem to be of cardinal importance. In the following, the focus is on these four factors: history (*angst* of registers, a), the diaspora (b), the phenomenon that is called runaway integration here (c), and membership in the European Union (d). The analysis of these factors is again illustrated by means of the example of the Hungarian German minority. A brief review concludes this section (e).

a) History: *angst* of registers

There is no doubt that the impact of history is immense.[412] The Hungarian State and the Hungarian minorities abroad are products of historical events, most notably of the conclusion of the treaty of Trianon.[413] The Hungarian autonomy régimes were not just established out of the blue, either. Minorities were the subject of discussion ever since the treaty of Trianon. Precursors of today's autonomy régimes in Hungary existed under the rule of socialism. Associations of nationalities existed at that time, although assimilation of these nationalities (read: minorities) in Hungary and elsewhere was the aim for a long time.[414] Hence, the situation of the minorities in Hungary, as in fact elsewhere, can only be understood in a historical perspective. Yet, the impact of the historical predecessors on the current autonomy régimes was relatively limited. Apparently, when the Minority Act was introduced in 1993, the intention was to make a clean cut and start afresh, leaving the associations of nationalities the simple option to dissolve or continue to exist.[415] Nonetheless, some historical dimensions did have concrete repercussions on the current autonomy régimes. The most significant among these dimensions is the *angst* of registers. This fear of registration is palpable in Hungary. At least for the Hungarian German minority, the fear is essentially rooted in

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[412] For the "culture of reminiscence" in Hungary regarding the times of World War II and communism, see UNGVÁRY, 'Der Umgang mit der kommunistischen Vergangenheit in der heutigen ungarischen Erinnerungskultur', (2008) 54 *Osteuropa - Recht* (1/2) 42-57.

[413] See *supra* p. 64.

[414] VOGEL, 'Sicherheitsdilemma und ethnische Konflikte aus ungarischer Sicht', *supra* FN 174 , p. 217-218; on the Hungarian policy of nationalities during the time of soclialism, see SITZLER, 'Ungarische Nationalitätenpolitik: Grundsätze, Institutionen und Funktion', (1985) 34 *Südosteuropa* (1) 24-32.

[415] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 382.

the phase that followed immediately after World War II. The following order gives an explanation for the *angst*:

> *"The ministry orders the following regarding the implementation of the resolution of the Allied Control Council of 20 November 1945 as to the relocation of the German population of Hungary to Germany on the basis of the Enabling Act XI: 1945 §15:*
>
> *§1: Is obliged to relocate to Germany the Hungarian citizen who avowed affiliation to the German people or mother tongue in the last census or who had his Magyarized name changed into a German sounding, moreover he who was a member of the* Volksbund *or an armed German formation (*SS*).*"[416]

Based on this decree, a declaration of the individual that had been made *bona fide* years before and in a different context served as a basis to determine the identity of individuals, on whom a collective blame was laid. The identification was given harshest consequences with the relocation of thousands of Hungarian Germans from Hungary to Germany (and elsewhere).[417] The initial intention behind the relocation might have been to make the nation-State viable[418] and to prevent further minority conflicts. Yet, if such an operation took place today, in the post-Kosovo age, it would be called ethnic cleansing. While these past wrongs have been officially recognized and some reparations were made, the reverberations of the relocations can still be felt today, more than 60 years later.[419] The "collective neurosis" of the Hungarian German

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[416] Decree no. 12330/1945 on the relocation of the German population of Hungary to Germany, in: WEIDLEIN, *Geschichte der Ungarndeutschen in Dokumenten, 1930-1950*, Schorndorf, 1958, p. 357: "*Das Ministerium ordnet bezüglich der Durchführung des Beschlusses des Allliierten Kontrollrates vom 20. November 1945 über die Umsiedlung der deutschen Bevölkerung Ungarns nach Deutschland auf Grund des Ermächtigungsgesetzes XI: 1945 §15 folgendes an: §1: Nach Deutschland umzusiedeln ist derjenige ungarische Staatsbürger verpflichtet, der sich bei der letzten Volkszählung zur deutschen Volkszugehörigkeit oder Muttersprache bekannt hat oder der seinen madjarisierten Namen wieder in einen deutsch klingenden ändern liess, ferner derjenige, der Mitglied des Volksbundes oder einer bewaffneten deutschen Formation (SS) war.*" [Translation by the author, all emphasis added].

[417] See *supra* FN 181.

[418] VOGEL, 'Sicherheitsdilemma und ethnische Konflikte aus ungarischer Sicht', *supra* FN 174, p. 216. For a comprehensive overview of ethnopolicy in Eastern and Southeastern Europe in the 20th century, see SEEWANN, 'Ethnopolitik im 20. Jahrhundert', *in* Seewann (ed.), *Ungarndeutsche und Ethnopolitik*, Budapest, Osiris, 2000, p. 13-33, p. 13-19.

[419] See the overview of the recognition of the wrongs and the reparations by the Hungarian State in LANDESSELBSTVERWALTUNG DER UNGARNDEUTSCHEN, 'Die Ungarndeutschen betreffenden wichtigsten Akte der Entschädigung*',* 2009 (available at: <http://www.ldu.hu/de/download_dokumente.php>). The issue

minority is only now fading away.[420] But the lingering effects, which are probably here to stay, are a general "timidness in constituting a social, ethnically defined group"[421] and a profound mistrust towards any kind of identity registration, a veritable *angst* of registers. Evidence of this fear provides the regular, anonymous census, for the conduct of which an inordinate amount of dialog and instruction is needed in order to convince people merely to indicate their minority identity.

Owing to this *angst* of registers, the minorities at the "round table" in 1993, when the future course of minority policy was debated, roundly rejected the objective system. They claimed that "historical reasons"[422] made the registration of minority affiliation impossible, thus proposing the principle of "ethnic anonymity"[423] as the basis for the Minority Act. This proposal was successful. Freedom of identity prevailed in the Minority Act of 1993. An entirely subjective approach was enacted. Every individual could decide freely on its affiliation with any minority. The decision was the individual's own, entirely private affair. Despite the widespread abuses that resulted from the electoral system based on the freedom of identity, the amendment to the Minority Act in 2005 changed little with regard to ethnic anonymity. Owing to the *angst* of registers only a quasi-objective approach was enacted in the revision. Only ethnic declaration is required to be entered into the election list. However, any ethnic

of the persons displaced after World War II is still very much alive in Germany (see only the BUND DER VERTRIEBENEN, <http://www.bund-der-vertriebenen.de> (League of the displaced), which represents according to its own indications about 15 million displaced Germans; see also the LANDMANNSCHAFT DER DEUTSCHEN AUS UNGARN, <http://www.ldu-online.de> (Fellowship of the Germans from Hungary)).

420 NELDE, 'Bilingualism among Ethnic Germans in Hungary', *in* Wolff (ed.), *German Minorities in Europe - Ethnic Identity and Cultural Belonging*, NewYork, Berghahn Books, 2000, p. 125-133, p. 127: "Similar to East-Belgium and the eastern part of France, the German minority in Hungary suffers from a collective neurosis and has not yet been able to overcome post-war repression of its cultural and linguistic life." On p. 132: "The consequences of the Third Reich have left deep marks on the ethnic group which are impossible to overcome within only a few generations." See also BAKKER, *Minority Conflicts in Slovakia and Hungary*, Capelle a/d IJssel, Labyrint Publication, 1997, p. 248, who notes a "political behaviour" that "is biased by the traumatic experiences of persecution and deportation in the aftermath to the Second World War."

421 SEEWANN, 'Siebenbürger Schwabe, Ungarndeutscher, Donauschwabe?', *supra* FN 177, p. 151: "[…] *Scheu, eine soziale, ethnisch definierte Gruppe zu bilden* […]" [translation by the author, emphasis added].

422 SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 359: "*Eine solche* [i. e. identity registration] *stösst bei der Minderheitenbevölkerung Ungarns bereits aus historischen Gründen auf entschiedene Ablehnung.*" [Translation by the author, brackets and emphasis added].

423 KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 131: "*Prinzip der 'ethnischen Anonymität'*" [translation by the author, emphasis added].

data from these declarations is destroyed after the election. Thus, the autonomy régimes in Hungary are essentially anonymous associations today.[424]

b) The diaspora

The minorities in Hungary are the diaspora of other nations: the Hungarian Germans are part of the German diaspora, the Romanian minority in Hungary is part of the Romanian diaspora, etc. As parts of the diaspora, the minorities in Hungary rely on support from their kin State and from civil society within their kin State. Thus, the kin States function as patrons of the minorities in Hungary. They also provide some guarantee for the autonomy régimes which the minorities were allowed to establish in Hungary.

Inversely, Hungary also has a diaspora. Since Hungary was dismembered with the treaty of Trianon,[425] Magyars have been spread all over the neighbouring countries and further. These Magyars number around three million people and constitute the Hungarian minorities in the neighbouring States. Hungary is their kin State. Like other kin States, Hungary goes to great lengths to take care of the ethnic Hungarians abroad. According to art. 6(3) Constitution, "[t]he Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary."[426] Hungary implemented this constitutional mandate by enacting the Status Act.[427] Based on this Status Act, ethnic Hungarians who live abroad can apply for a certificate. This certificate makes available certain benefits which Hungary grants (support for education and culture, facilitated access to the employment market in Hungary, etc).[428] The Status Act was vividly discussed. The neighbouring States of Hungary notably bemoaned a Hungarian intervention in their

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[424] See the Constitutional Court's refusal to declare the quasi-objective approach unconstitutional, discussed in MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 414-415 (application by the minority ombudsperson).

[425] See *supra* p. 64.

[426] Brackets added.

[427] Act on Hungarians Living in Neighbouring Countries, 2001, LXII (as amended per 23 June 2003, consolidated text) (in the following: Status Act). For an English version of the Status Act before the amendment, see CONSTANTIN, 'The Hungarian "Status Law" on Hungarians Living in Neighbouring Countries', *in* Bloed, Hofmann, Marko, Mayall, Packer, Weller, Lantschner, Malloy, Lloydd, and Toggenburg (eds), *European Yearbook of Minority Issues*, vol. 1, 2001/2, Leiden, Kluwer, 2003, p. 593-622.

[428] As to the benefits, see SCHÜSSELBAUER, 'Ungarns langer Weg zurück zur demokratischen Kultur', (2002) *Südosteuropa Mitteilungen* (5-6) 84 (before the amendment).

internal affairs.[429] Even after the turmoil around the Status Act abated, Hungary's co-nationals abroad continue to be the subject of debates. Their remote or simplified naturalization in Hungary, for instance, is a constant issue.[430]

Reasons for Hungary's engagement

The reasons why Hungary takes care of the Magyars abroad offensively are numerous. Among them is certainly the relative size of the diaspora. Remember that Hungary's population is constituted of roughly ten million people. Hence, the Magyars abroad, with about three million people, are comparatively numerous. Many of the Hungarians who live in Hungary are concerned with the fate of the Magyars abroad (by reason of kinship ties or simply sympathy). They are very aware of the sometimes difficult fate of their kinfolks. Of course, this part of the Hungarian population is mainly composed of voters. Political actors tap into this voting potential by actively seeking to improve the fate of Hungarians abroad. This explains why the Hungarian diaspora is a recurrent political topic. As a side effect, the issue of the Hungarians abroad naturally becomes politicized.

Another reason for the active engagement of the Hungarian State in diaspora matters is that the ethnic Magyars abroad pose a serious risk to the whole region of Eastern Europe.[431] This risk of conflict is in need of constant monitoring. Yet, the actions of the Hungarian State organs do not always have the effect of reducing tensions between the Magyars and the State, in which they live – quite to the contrary. The reason is that these measures are not necessarily *aimed* at reducing the tensions.

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[429] For historical details on the Hungarian Status Act, see ZELLNER and DUNAY, *Ungarns Aussenpolitik 1990-1997*, *supra* FN 174, p. 205 ff.; in general, see Kántor, Majtényi, Ieda, Vizi, and Halász (eds), *The Hungarian Status Law: Nation Building and/or Minority Protection*, Sapporo, Slavic Research Center, 2004. In 2003 the Status Act was amended and some of the controversial provisions were changed. Interestingly, the Status Act before the amendment in 2003 took a more restrictive approach to the identification of ethnic Hungarians than the Minority Act to the identification of members of a minority in Hungary. Not the freedom of identity approach was enacted, but private associations determined who was a Magyar and who was not for the purpose of receiving benefits from Hungary (PAP, 'Ethnicization and European Identity Policy', *supra* FN 253, p. 240). The amended Status Act handed over identification from private associations to the Hungarian embassies in the neigbouring countries (KÜPPER, 'Nach dem "Statusgesetz": Weitere Anläufe zur Lösung der Frage der "Ungarn jenseits der Grenze"', (2006) 54 *Südosteuropa* (1) 7.

[430] See KÜPPER, 'Nach dem "Statusgesetz": Weitere Anläufe zur Lösung der Frage der "Ungarn jenseits der Grenze"', *supra* FN 429, p. 11-21, for a detailed analysis of the popular initiative for remote naturalization of ethnic Hungarians abroad, which was not adopted by the Hungarian people due to a lack of participation, and for the respective Constitution Court decision (for the latter, see also the note in KÜPPER, 'Chronik der Rechtsentwicklung', (2004) 13 WiRO (6) 189). See also KÜPPER, 'Chronik der Rechtsentwicklung', (2005) 14 WiRO (5) 155, regarding the support for Hungarians abroad by means of a homeland fund.

[431] ZELLNER and DUNAY, *Ungarns Aussenpolitik 1990-1997*, *supra* FN 174, p. 19.

Reciprocity expectations and credibility

What is the correlation between the Magyars living abroad and the minorities in Hungary, like the Hungarian Germans? The correlation is by no means evident or intuitive. Yet, the situation of the ethnic Hungarians abroad was *the* driving force behind the establishment of the autonomy régimes in Hungary, from which minorities like the Hungarian Germans benefit. The argument was one of credibility and reciprocity. Hungary could only credibly claim a favourable treatment of ethnic Magyars from the neighbouring States, when it effectively treated the minorities within Hungary in an appropriate way. Then, however, Hungary would expect reciprocity according to a "tit for tat"[432] maxim.

One-sided expectancies of reciprocity were not officially admitted, though. The Hungarian government rejected the principle of reciprocity as a motivation behind the Minority Act in 1993.[433] Possibly, such an admission would have brought back the spectre of revisionism, which had been abandoned as an official policy but which used to be a powerful attitude towards the Trianon settlement during much of the twentieth century.[434] It was admitted, though, that the Minority Act was enacted speedily in "the national and international interest of Hungary."[435] And that any delay would certainly have meant "a loss of political prestige for the country."[436] Despite the official position towards reciprocity, it can be safely assumed that the Minority Act was adopted in 1993 "with an eye towards politics regarding ethnic Hungarians living in the neighbouring States."[437] The Minority Act at least fulfilled a "showcase function".[438]

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[432] ASCHAUER, *Die Ungarndeutschen*, *supra* FN 171, p. 226: "*wie du mir, so ich dir*" [translation by the author, emphasis added].

[433] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 356.

[434] VOGEL, 'Sicherheitsdilemma und ethnische Konflikte aus ungarischer Sicht', *supra* FN 174, p. 225. Note, however, that reciprocity in the sense described here was already an argument for the Hungarian policy of nationalities during the time of socialism (SEEWANN, 'Minderheitenfragen aus Budapester Sicht', (1984) 33 *Südosteuropa* (1) 10).

[435] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 356: "[…] *eine möglichst rasche Verabschiedung des Gesetzes liege im innen- wie im aussenpolitischen Interesse Ungarns."* (citing the official position of a parliamentary committee [translation from German to English by the author, emphasis added]).

[436] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 356: "[…] *jede weitere Verzögerung bedeutet einen politischen Prestigeverlust für das Land.*" (Citing the official position of a parliamentary committee [translation from German to English by the author, emphasis added]).

[437] MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 398.

Concrete proof of the principle of reciprocity at work is hard to find, though. The continuous propagation of news on the minorities within Hungary by the Hungarian government provides indirect evidence at best.[439] More obviously, representatives of the ethnic Magyars abroad attended the final discussion of the Minority Act in the Hungarian Parliament.[440] Seemingly, the Minority Act was also deliberately enacted right before the Council of Europe summit in Vienna on 8 - 9 October 1993, thus constituting a "Hungarian trump".[441] A further indication is also the constitutional recognition of minorities within Hungary as "a constituent part of the State"[442] and the concomitant discussions that arose, because Romania refused to recognise the ethnic Hungarians in Romania constitutionally as such a constituent part of the Romanian State.[443]

Without doubt, the reciprocity relation between the situation of the ethnic Magyars abroad and the autonomy régimes in Hungary can be apprehended in a negative light. In this perspective, the Hungarian Minority Act appears as a mere charade that serves both Hungary's foreign policy interests and the ethnically defined Hungarian nation. The Minority Act thus seems to be a mere façade erected for the sole purpose of appearance. This view is not compelling, though. The reciprocity expectations can, on the one hand, also be seen in a more positive light. Hungary's protective impulse for the ethnic Hungarians living abroad can be understood as an effort to build a cultural bridge towards the neighbouring States. Both States involved could potentially benefit from this bridge, notably in terms of economical ties.[444] Thus, reciprocity need not

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[438] KÜPPER, *Die ungarische Verfassung nach zwei Jahrzehnten des Übergangs*, *supra* FN 363, p. 105: "*Schaufensterfunktion des ungarischen Minderheitenrechts*" [translation by the author, emphasis added]. See also NELDE, 'Bilingualism among Ethnic Germans in Hungary', *supra* FN 420, p. 125-126: "Concern about the fate of the several million strong Hungarian diaspora in neighbouring countries like Serbia, Croatia, Slovenia, Austria, The Czech and Slovak Republics, Ukraine, the Russian Federation, and Romania has strongly sensitised the Hungarian State towards a fair treatment of its own minorities, not least since this can be seen as a precondition for ensuring a favourable attitude of the neigbouring countries towards the Hungarian diaspora." See also NOLTE, 'Die rechtliche Stellung der Minderheiten in Ungarn', *in* Frowein, Hofmann, and Oeter (eds), *Das Minderheitenrecht europäischer Staaten*, vol. 1, Berlin, Springer, 1993, p. 501-536, p. 534 ("*Vorbildwirkung*" [emphasis added]).

[439] See e. g. DEPARTMENT OF NATIONAL AND ETHNIC MINORITIES (HUNGARIAN GOVERNMENT), 'Selection of news on national and ethnic minorities in Hungary (July - December 2008)*', supra* FN 319.

[440] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 373.

[441] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 374.

[442] Art. 68(1) Constitution.

[443] VOGEL, 'Sicherheitsdilemma und ethnische Konflikte aus ungarischer Sicht', *supra* FN 174, p. 222-223.

[444] NELDE, 'Bilingualism among Ethnic Germans in Hungary', *supra* FN 420, p. 126: "Similar to Western Europe, Hungary has thus discovered the cultural wealth of its minority populations – a wealth on which it

have a negative connotation. On the other hand, although the Hungarian diaspora certainly is an important element, it is not the only factor that influences the autonomy régimes. Other factors, which are examined in this section, also have an impact. In our view, it would be an unwarranted reduction to relegate the Hungarian autonomy régimes to a mere foreign policy tool.

The trigger function

Given that the workings of reciprocity are secretive, it is not surprising that little concrete impact on the autonomy régimes can be identified. The only direct evidence in the Minority Act is in the preamble, which twice refers to the Hungarian nation, i. e. to *all* ethnic Magyars:

> *"In its concept of equality and solidarity as well as the principles of the active protection of minorities, the National Assembly is guided by respect for minorities, esteem for moral and historical values, and the consistent representation of the shared vital interests of the minorities and the Hungarian nation within the framework of recognised universal moral and legal norms.*
> *All these elements are special values, the preservation, the cultivation and the enrichment of which is not only a basic right of the national and ethnic minorities, but also the interest of the Hungarian nation, and ultimately that of the community of states and nations."*

Besides these general references, the provisions that grant free contact between minorities in Hungary and their kin States[445] are the only evidence of a cross border dimension of the Minority Act. Hence, it must be inferred that the situation of the Hungarian diaspora only played a trigger function for the autonomy régimes within Hungary. The diaspora issue propelled the adoption of the Minority Act forward. But it did not dictate a specific direction, apart from the general orientation towards minority protection. Hence, the diaspora issue was indeed a "weapon"[446] in the hands of the Hungarian minorities at the "round table". It was not a sharp weapon though,

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also hopes to capitalize economically and politically by bridging the gap to neighbouring states via promotion of minority languages and cultures."

[445] Art. 14 and 19 Minority Act (see *supra* p. 110 ff.).

[446] KALTENBACH, 'Das ungarische Minderheitengesetz - Zielsetzung und Aktzeptanz', p. 347: "*Die einzige 'Waffe' in der Hand des Rundtisches war während der Verhandlungen das besondere Verhältnis Ungarns zu seinen Nachbarn, aber auch zu Westeuropa*" [translation by the author, emphasis added].

but one that merely allowed to exert political pressure and to push the project as a whole forward. This finding is in line with the observation that the Minority Act would not constitute more than "reference stuff" with an "exemplary character"[447] for other States. Indeed, the drafters of the Minority Act seem to have been aware that the issues ethnic Hungarian abroad face are different from the *intra*-Hungarian minority issues and that different solutions are needed for the two situations. It is to those issues which the minorities within Hungary face that this study now turns.

c) Runaway integration

The minorities in Hungary are small and scattered all across the country. This is especially true, when the minorities are considered all together. Thousands of tiny minority dots then permeate the map of Hungary in a "jolly mix"[448]. But, not only all minorities together make for an image of dispersion; so does the individual minority. In our case, the Hungarian German minority has traditionally converged around various centres (like the city Pécs).[449] In these centres, the Hungarian Germans are not very numerous. Moreover, the Hungarian Germans are stretched across many different counties,[450] and only in very few Hungarian municipalities they constitute a majority. Thus, while some locations can be considered as traditionally Hungarian German, these locations are not Hungarian German territories. Properly speaking, there is no Hungarian German territory in Hungary. Hungarian Germans "settle in a non-compact way".[451]

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[447] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 356-357: "[z]*udem sollte der ungarische Kodex nach dem Willen seiner Schöpfer* […] *ein Modell und 'Referenzmaterial' für zukünftige Regelungen auf innerstaatlicher Ebene - besonders in den Nachbarländern mit ungarischer Minderheitenbevölkerung - wie auf gesamteuropäischer Ebene abgeben.*" And: "[…] *ein 'möglicher Beispielcharakter' wurde in der seriösen öffentlichen Diskussion natürlich nicht für die Gesamtheit des ungarischen Gesetzesentwurfs und seine Einzelbestimmungen beansprucht, sondern nur für die Prinzipien reklamiert, die der Normsetzung inhaltlich zugrunde liegen und die - zumindest intentional - das Verfahren ihrer Ausgestaltung bestimmt haben.*" [cited without references, translation by the author, brackets and emphasis added].

[448] *Supra* FN 237.

[449] For a detailed analysis of the dispersion of the Hungarian German minority, see FISCHER, 'Räumliche Aspekte des sozio-ökonomischen Wandels der ungarndeutschen Minderheit im 20. Jahrhundert', *in* Seewann (ed.), *Minderheitenfragen in Südosteuropa*, München, Oldenbourg, 1992, p. 237-264.

[450] See the counties listed *supra* p. 66.

[451] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 346: "*nicht kompakte*[…] *Siedlungsweise*" [translation by the author, brackets and emphasis added].

The thinly scattered Hungarian German minority in Hungary has been subject to a phenomenon that can be called a runaway integration. The Hungarian German identity is about to vanish, because the members of the minority integrate the longer the more into the Magyar society. Their integration is, of course, not something to be negative about. Yet, too much integration obviously threatens the very existence of the Hungarian German minority. This overdose of integration of the Hungarian Germans is generally evident in their "advanced state of assimilation".[452] More specifically, the Hungarian German language has been suffering badly due to too much integration. In the census 2001 the number of persons who indicated German as their native language decreased by almost ten percent compared to the census 1990.[453] Apparently, German as a first language is increasingly replaced by Hungarian.[454] The German language has moved away from the circle of the family into school.[455] More generally, children do not any longer learn the minority languages from relatives but in school.[456] Minority languages are hardly used in contacts with the municipalities or even the minority self-governments.[457] The weakening of minority languages in general is aggravated by the lack of prestige of these languages among large parts of the Hungarian population (although German might be an exception in this regard).[458]

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[452] *Supra* FN 175.

[453] See the data indicated in the REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 163.

[454] NELDE, 'Bilingualism among Ethnic Germans in Hungary', *supra* FN 420, p. 132: "Upward social mobility requires full command of the majority language so that the younger (urban) generation increasingly replaces German with Hungarian as their first language."

[455] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 8 (with an interpretation of the data of the census 2001).

[456] REPUBLIC OF HUNGARY, First Report under the Framework Convention, *supra* FN 175, p. 83 (as to the lack of students of the German language who speak the language as well as their grandparents) and p. 94 (as to the increasing role of educational institutions in teaching minority languages).

[457] REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 41 (citing a report by the minority ombudsperson).

[458] COMMITTEE OF EXPERTS ON THE LANGUAGE CHARTER, Second Report on the Application of the Charter by Hungary, *supra* FN 317, p. 31: "However, regional and minority languages in Hungary have been affected by a long assimilation process and amongst the minorities themselves, let alone the majority population, there is little awareness as to the importance of protecting and promoting regional and minority languages. The provision of educational opportunities, for example, may not succeed in saving minority languages in Hungary if the majority society relegates them to an inferior position, thus strengthening even among the speakers of the minority languages the perception that learning and using them in public is of little value. There is, as a consequence, an urgent need to raise awareness of the importance of maintaining minority languages and to attach a positive value to both bilingualism and the knowledge of a second language, including when that concerns regional or minority languages." (For the exception of German, see also p. 31). See also DEMINGER, *Sprache und Identität bei der deutschen Minderheit in Ungarn*, *supra* FN 309, for more details on the situation of the German language in Hungary.

Moreover, the integration process does not stop on this high level. To the contrary, integration seems to be rampant. In other words, the process of integration appears to have a dynamic, runaway character. Apparently, the current generation provides the last opportunity to stop the loss of language and culture.[459] Perhaps the complete assimilation of the minorities in Hungary is even inevitable.[460] There is, in any case, considerable worry that the process of integration could not be halted at all, even with robust measures.[461]

The reasons for the runaway integration are manifold. The process is clearly a delayed after effect of the paternalist assimilation policy under socialism.[462] But in the case of the Hungarian German minority events that date even further back than socialism are significant. The role of Germany and the Germans in World War II, the forced relocations thereafter, and the ensuing traumata still do have an influence. These circumstances were the causes for the enduring low social standing of the German identity during much of the twentieth century. They made the public assertion of a German identity socially unattractive. Apart from that, runaway integration is obviously also a consequence of (anthropo-)geography: the Hungarian German minority is subject to the phenomenon, because the group is so small and its members are dispersed across Hungary.

Runaway integration vs. a lack of integration: the Roma issue

Not all minorities in Hungary are subject to runaway integration, though. It is crucial to distinguish the Roma from the Hungarian German minority in this regard. The Roma minority faces fundamentally different challenges. These challenges are diametrically opposed to the runaway integration with which the Hungarian German minority grapples. The Roma face a *lack* of integration rather than a runaway

[459] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 376: "*Die jetzt aufwachsende Generation der Minderheitenbevölkerung sei die letzte, bei der der Prozess des Sprach- und Kulturverlustes noch aufgehalten werden könne.*" (citing the opposition party at the time when the Minority Act was enacted) [translation from German to English by the author, emphasis added].

[460] For KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 180, assimilation would be inevitable without the rights granted in the Minority Act.

[461] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 387, think that the minority population is the "biggest question mark" in this regard. ("*Das wohl grösste Fragezeichen stellt vielmehr die Minderheitenbevölkerung selbst dar.*" [Translation by the author, emphasis added]).

[462] KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 141: "*Angesichts der paternalistischen Politik des sozialistischen Systems, in dem die Interessen der Minderheiten 'von oben' vertreten und dementsprechend regimeorientiert und nicht klientelorientiert verwirklicht wurden* […]" [emphasis added].

integration. Their main problems are situated in four key domains: in education, where Roma children are, for instance, often segregated or treated as special cases;[463] in health care, where Roma fail to get adequate protection; in employment, where Roma struggle with absurdly high unemployment rates;[464] and in housing, where Roma are not provided with adequate accommodation.[465] Especially, Roma women and children face very adverse conditions in Hungary.[466] Thus, the situation of the Roma poses an integration problem rather than a problem that traditional minorities typically face.[467] Interestingly, the situation of the Roma, who are indeed commonly considered a traditional minority, is in many regards similar to the situation encountered by a minority that has recently immigrated to a Western State (i. e. a new minority).

The whole Roma issue is situated on a different scale than the issue of runaway integration. The challenges are much larger[468] and the problems are more serious from several perspectives. The most fundamental challenge is probably posed by the general mindset in the Hungarian society. This mindset, which is by the way not only common in Hungary but also elsewhere in Europe, is dominated by a general non-acceptance of the Roma: a "negative stigmatisation of the Roma".[469] Prejudices about the Roma are widespread in Hungary. The Roma are only tolerated – if at all – but certainly not respected. The attitude comes down to the fact that, as an expert observer put it off the record, no one in Hungary likes the Roma. The results are the persistent discrimination

[463] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Second Opinion on Hungary, *supra* FN 248, para. 90 ff.

[464] See REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 95. On Roma employment issues see, for instance, BODROGI and DANKA, 'Litigating Discrimination in Access to Employment in Hungary', (2006) 1 *Roma Rights* (as well as the whole volume 1 of 2006 of the *Roma Rights*). On discrimination of Roma in employment, see PARLIAMENTARY COMMISSIONER FOR THE NATIONAL AND ETHNIC MINORITIES RIGHTS (J. KALTENBACH), Annual Report 1998, *supra* FN 358, section 4.2.

[465] See UNITED NATIONS INDEPENDENT EXPERT ON MINORITY ISSUES, Report on Mission to Hungary, 2006, UN Doc. A/HRC/4/9/Add.2, in particular para. 58 ff., 61 ff., 73 ff., 79 ff. and the recommendations in para. 95, 96, 97, 98, 99. See also the conclusion of WALSH, 'Minority Self-Government in Hungary: Legislation and Practice', (2000) JEMIE 69. See also generally on the situation of the Roma: HUNGARIAN HELSINKI COMMITTEE, 'Written Comments by the Hungarian Helsinki Committee regarding the Second Monitoring Cycle on Hungary under the Framework Convention for the Protection of National Minorities', *supra* FN 367, p. 3-9.

[466] UNITED NATIONS INDEPENDENT EXPERT ON MINORITY ISSUES, Report on Mission to Hungary, *supra* FN 465, para. 93.

[467] KALTENBACH, 'Das ungarische Minderheitengesetz - Zielsetzung und Aktzeptanz', *supra* FN 184, p. 348. For more details on the general situation of the Roma, see Cahn (ed.), *Roma Rights: Race, Justice and Strategies for Equality*, New York, IDEA Press, 2002.

[468] See, for instance, ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Second Opinion on Hungary, *supra* FN 248, para. 13-15.

[469] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Opinion on Hungary, *supra* FN 314, para. 21.

of the Roma in most aspects of daily life and the suppression of the Roma identity. If the explosive potential is the yardstick, the relationship between the Roma and the Hungarian majority is the only true minority conflict in Hungary.[470]

Reflections in the autonomy régime

Runaway integration is the factor that had the most impact on the design of the autonomy régimes in Hungary. The whole Minority Act is a reflection of the runaway integration faced by minorities such as the Hungarian Germans. The reasons why the autonomy régimes were established were the "conservation and stabilization of identity".[471] The Minority Act "was meant to halt, or possibly reverse, this process of assimilation."[472] This aim is supported by the German-Hungarian bilateral framework: the common declaration between the German and the Hungarian governments declares that the common programme is aimed at "regaining the mother tongue".[473] The Minority Act repeatedly confirms the preservation and enrichment of the minority identity as a goal,[474] most prominently in art. 15, which declares "the preservation, fostering, strengthening, and passing on" of the identity a collective right. Accordingly, runaway integration and the circumstances that caused the phenomenon[475] informed the autonomy régimes, which were established by the

[470] BAKKER, *Minority Conflicts in Slovakia and Hungary*, *supra* FN 420, p. 250, does not consider the situation of the Hungarian German minority in Hungary as a conflict.

[471] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 375: "*Identitätswahrung und –festigung*" (citing Janós Wolfart, at the time director of the office for national and ethnic minorities) [translation from German to English by the author, emphasis added].

[472] MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 399. See also WALSH, 'Minority Self-Government in Hungary: Legislation and Practice', *supra* FN 465, p. 23: "A principle objective of the Act on Minorities is to identify and create conditions under which the assimilation process of national and ethnic minorities can be halted and made reversible. Indeed, one of the aims of the Act is not to preserve the linguistic and national entity of the minorities but in fact to re-teach it. In other words, its aim is to reverse the process of assimilation that has already occurred."

[473] Gemeinsame Erklärung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Ungarn über die Förderung der deutschen Minderheit und des Unterrichts von Deutsch als Fremdsprache in der Republik Ungarn, *supra* FN 385, para. 2.2: "*Rückgewinnung der Muttersprache*" [translation by the author, emphasis added].

[474] See only the preamble of the Minority Act which raises the issue twice: "[…] special values, the preservation, the cultivation and the enrichment of which is not only a basic right of the national and ethnic minorities […]"; "and to promote the preservation of their national or ethnic identities".

[475] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 355, point out that the Minority Act was supposed to be based on "the factual circumstances of minorities, their different situation" ("*Es* [the Minority Act] *sollte* […] *von der tatsächlichen Lage der Minderheiten, ihrer unterschiedlichen Situation ausgehen*" [citing the office for national and ethnic minorities; translation from German to English by the author, brackets and emphasis added]). Supposedly, the fact that minorities are dispersed is meant in this citation.

Minority Act: the local minority self-governments that are tied in with the regional and national minority self-governments; their powers in the cultural and educational domains that ultimately enable a minority to operate its own institutions; the financial support for the minority self-governments, etc. – all these aspects of the autonomy régimes must be considered as emanations of the advanced stage of integration of the minorities and the concomitant danger of identity loss. Inversely, it is obvious that the autonomy régimes were not at all tuned to the issue that the Roma face (the lack of integration). This is not surprising given the fact that, initially, the Minority Act would not cover the Roma at all. Indeed, the Roma had to pressure the legislature for them to be included in the scope of the Minority Act.[476]

d) Membership in the European Union

A fourth and last factor having a predominant impact on the autonomy régimes in Hungary is international political pressure. When the Soviet influence over the Central and Eastern European satellite States dissolved, these States strove for rapid integration into the Western alliances, foremost among which were the European Communities (later the European Union),[477] but also the Council of Europe and the North Atlantic Treaty Organisation. The accession process to the European Union is most interesting for this study. The desire of Hungary and the other newly liberated States to accede to the European Union, gave the latter a strong leverage over the developments in Central and Eastern Europe.[478] This political leverage was exercised by means of legal instruments.[479]

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[476] CAHN, 'Smoke and Mirrors: Roma and Minority Policy in Hungary', *supra* FN 233, para. 4: "Indeed, early drafts of the law envisioned protection only to 'national minorities' - to the exclusion of Roma - and Romani organisations had to lodge strenuous protest to be included in the law at all." The exclusion of the Roma from the scope of the Minority Act would have been in line with the previous "policy of nationalities", which did not recognize the Roma as a "nationality", but considered the Roma as a "social fringe group" (HEUBERGER, 'Die ungarische Nationalitätenpolitik von 1968-1991', *in* Seewann (ed.), *Minderheitenfragen in Südosteuropa*, München, Oldenbourg, 1992, p. 199-209, p. 199: "*Die Betonung liegt dabei auf 'Nationalitäten', da in Ungarn seit 1945 nur Deutsche, Slowaken, Rumänen und Südslawen (Serben, Kroaten, Slowenen, Bunjewatzen und Schokatzen, die in den Statistiken nicht immer aufgegliedert sind) als Minderheiten anerkannt werden. Juden und Zigeuner sind hierin nicht enthalten, da erstere sich als konfessionelle Minderheit fühlen und die Zigeuner als soziale Randgruppe, aber nicht als Minderheit anerkannt werden.*" [cited without references, translation by the author, emphasis added]).

[477] See the note on terminology *supra* FN 66.

[478] A broader illustration of the extent of the political leverage that the European Union and its member States have over States that aspire to association or accession is given for the case of the International Criminal Tribunal for the former Yugoslavia in DEL PONTE, *Madame Prosecutor: Confrontations with Humanity's worst Criminals and the Culture of Impunity*, New York, Other Press, 2009. The International Criminal Court presumably also depends on such leverage to make States comply with their obligations under the Rome

As the European Union is an exclusive club, States that wish to accede to it must fulfil a set of conditions. These conditions were laid down by the European Council in 1993. Labelled after the city where the European Council took place, the Copenhagen criteria for accession to the European Union include *inter alia* the "respect for and protection of minorities".[480] Thus, based on this political criterion and the Europe Agreement previously concluded with Hungary in 1991,[481] the European Commission also assessed Hungary's progress in terms of minority protection.[482] The Commission assessed Hungary on an on-going basis and issued a report every year. In 1998, the Commission issued the first progress report.[483] After five annual reports, the Commission in 2002 gave the green light by recommending the conclusion of accession negotiations with ten candidates, among them Hungary.[484]

In parallel to the European Union accession process, Hungary's status also developed in the Council of Europe. Hungary signed the Language Charter[485] on 5 November 1992 and the Framework Convention for the Protection of National Minorities[486] on 1 February 1995, i. e. right after the instruments were opened for signature. Hence, after the entry into force of the two instruments, which occurred only in 1998 due to the required number of ratifications, Hungary's efforts in terms of minority protection

Statute, despite the deterrent effect of the International Criminal Court (for the "deterrent effect", see ZELLWEGER and KOLLER, 'Non-State Actors, International Criminal Law and the Role of the International Criminal Court', *in* Breitenmoser, Ehrenzeller, Sassòli, Stoffel, and Wagner Pfeiffer (eds), *Human Rights, Democracy and the Rule of Law - Liber amicorum Luzius Wildhaber*, Zürich, Dike/Nomos, 2007, p. 1619-1634, p. 1631.

479 On the foreign influence on Hungary in the domain of minority protection, see also BAKKER, *Minority Conflicts in Slovakia and Hungary*, *supra* FN 420, p. 248 ff.

480 EUROPEAN COUNCIL, Presidency Conclusions of the Copenhagen European Council, *supra* FN 74, para. 7/A(iii).

481 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, 1991, Official Journal L 347/1 of 31 December 1993.

482 Note that the Europe Agreement was initially conceived as an alternative to, not as a step towards accession (GOVAERE, 'Pre-accession to the European Union', *in* European Commission for Democracy through Law (ed.), *Constitutional Implications for Accession to the European Union*, Science and technique of democracy, vol. 31, Strasbourg, Council of Europe Publishing, 2002, p. 35-52, p. 38).

483 EUROPEAN COMMISSION, Regular report on Hungary's progress towards accession, 1998.

484 See EUROPEAN COMMISSION, 'Towards the Enlarged Union - Commission recommends conclusion of negotiations with ten candidate countries (press release)', 9 October 2002 (available at: <http://ec.europa.eu/enlargement/archives/key_documents/reports_2002_en.htm>). After the recommendation, accession was implemented (see Documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, 2003, Official Journal L 236 of 23 September 2003).

485 COUNCIL OF EUROPE, Language Charter, *supra* FN 28.

486 COUNCIL OF EUROPE, Framework Convention for the Protection of National Minorities, *supra* FN 29.

were not only monitored by the European Commission but also by the supervisory bodies of the two conventions of the Council of Europe.

Monitoring procedures as legal channels for political leverage

The procedures of close monitoring by international bodies were the legal channels of the political leverage of the European Union over Hungary. While the Advisory Committee examined Hungary's compliance with the Framework Convention in detail (and it still does),[487] the European Commission's monitoring only highlighted the most salient issues. Hence, one could say that a kind of collaboration was established between the Commission and the Advisory Committee, with the Commission explicitly referring to the opinion of the Advisory Committee.[488] The Commission's political clout, which was considerable as the Commission was the organ that was directly relevant for Hungary's accession to the European Union, radiated towards the Advisory Committee. The Advisory Committee's non-binding opinions were propped up by this leverage of the Commission.

The progress reports of the European Commission on Hungary basically identified only one issue regarding the Copenhagen criteria of minority protection: the situation of the Roma.[489] The problems faced by the Roma were examined in each report – in later reports more extensively – and the measures adopted by the Hungarian government were scrutinized. Apart from the Roma issue though, the autonomy régimes established in Hungary and the situation of the other minorities apparently did not attract the attention of the Commission. The problems that were encountered, when the Minority Act was implemented (for instance the abuses that have occurred), were not intense enough to present an obstacle for accession. Neither was the situation of runaway integration as a whole perceived as a conflict that needed to be addressed by the Commission. Hence, runaway integration and the abuses were essentially left to the Advisory Committee on the Framework Convention to be dealt with. This approach of the Commission reflects the fundamental difference between the runaway integration of the non-Roma minorities and the lack of integration of the Roma. It is

[487] See the references that were made *supra* to the Reports and Opinions, which were issued in the framework of the two Council of Europe conventions.

[488] EUROPEAN COMMISSION, Regular report on Hungary's progress towards accession, 2002, SEC(2002) 1404, p. 32-33: "The Resolution adopted by the Committee of Ministers of the Council of Europe on the basis of the opinion on Hungary by the Advisory Committee on the Framework Convention largely endorsed the above assessment."

[489] The Hungarian policy towards the ethnic Magyars abroad also attracted the Commission's attention in 2002 (EUROPEAN COMMISSION, Regular report on Hungary's progress towards accession, *supra* FN 488, p. 30).

also a reflection of the difference in gravity in the two situations. However, even the Roma issue did not amount to a basic problem with the political accession criteria. The European Commission always considered the political Copenhagen criterion (i. e. also the condition of minority protection) to be fulfilled, although a proviso as to the unsatisfactory state of the Roma situation was made each year.[490] It seems that this proviso was getting a fraction softer with each report, in parallel with the slow efforts by the Hungarian government to develop a proper Roma policy. Yet, the Roma issue is still far from being solved today, despite pre-accession conditionality and the political leverage. Now, after accession, most of the leverage over the "internal" Roma issue has been lost.[491]

Ramifications for the autonomy régimes

It is difficult to assess the extent of the impact of international political pressure on the autonomy régimes. Clearly, the Minority Act was enacted with a view to comply with European standards, which would clearly be relevant for integration into the Western sphere of influence. This European aspiration of the Minority Act is proclaimed in the preamble: "In preparing this Act, the National Assembly of the Republic of Hungary is guided by the vision of the establishment of a Europe without frontiers […]". Although the Council of Europe's instruments were opened for signature late (the Language Charter in late 1992 and the Framework Convention in early 1995) and entered into force only in 1998, at least the Framework Convention had a considerable influence on the Minority Act which was enacted in 1993. More precisely, the precursors of the Framework Convention[492] and a draft of the Framework Convention notably served as a blue print for the Minority Act.[493]

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[490] See EUROPEAN COMMISSION, Regular report on Hungary's progress towards accession, *supra* FN 483, p. 12; EUROPEAN COMMISSION, Regular report on Hungary's progress towards accession, 1999, p. 16; EUROPEAN COMMISSION, Regular report on Hungary's progress towards accession, 2000, p. 21, EUROPEAN COMMISSION, Regular report on Hungary's progress towards accession, 2001, p. 24, and EUROPEAN COMMISSION, Regular report on Hungary's progress towards accession, *supra* FN 488, p. 33.

[491] Note, however, that the Roma also slowly move into the European institutions. For instance, Roma members of the European Parliament (such as Viktória Mohácsi) can work to keep the Roma issue on the table (see BRILL, 'Viktória Mohácsi - Europa-Abgeordnete und Kämpferin für Roma', Süddeutsche Zeitung, 20 May 2008).

[492] On the precursors of the Framework Convention, see COUNCIL OF EUROPE, Explanatory Report to the Framework Convention for the Protection of National Minorities, *supra* FN 39, para. 3-4.

[493] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 363.

Yet, the impact of international pressure was limited. The Copenhagen criterion of "respect of and protection of minorities" was general. The wording of the Framework Convention was not definitive yet. Other, more detailed soft law instruments on minority protection would be elaborated only later.[494] Moreover, even today, implementation of the Framework Convention would not require the establishment of autonomy régimes that are as extensive and far-reaching as those established in Hungary. The Framework Convention is a flexible instrument. The Advisory Committee does not ask from member States that they elaborate such a complex system of minority protection. That is why the Advisory Committee's recommendations on Hungary usually do not concern the legal framework, but rather its implementation – except for when the Roma issue is concerned, because here legal *and* implementation problems persist. Conversely, the European Commission's progress reports, as was generally the case at that time, focused more on the legal framework than on implementation (and thus also on the Roma issue).

The situation was thus in the early 1990s: it became clear that international pressure and Hungary's long-term foreign policy perspectives required that something be done regarding minority protection in Hungary. It was not entirely apparent what, though. No concrete, detailed directions were available. Hungary, therefore, entered "legally unchartered territory" and went "considerably beyond the minimal standard of universal as well as European minority rights protection".[495] Hence, European political pressure, which was moulded into the form of legal instruments – the typically European soft way of striving for hegemony – primarily had a trigger function for the autonomy régimes in Hungary. They prompted the Hungarian legislature to take action. Of course, the results of this action, the Hungarian autonomy régimes, match all the subjects that the Framework Convention addresses (like effective participation, representation, etc.). Yet, the impact comes to a halt here due to the general nature of the propellant force (political pressure) and the openness of the legal instrument.

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[494] Like the Recommendations elaborated on the initiative of the OSCE High Commissioner (see the OFFICE OF THE HIGH COMMISSIONER ON NATIONAL MINORITIES, The Lund Recommendations on the Effective Participation of Minorities in Public Life, *supra* FN 133, and the OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, *supra* FN 135).

[495] SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 355: "*juristisches Neuland*", and p. 355-356: "*erheblich über den Mindeststandard des universalen wie europäischen Minderheitenrechtsschutzes hinausgehen* […]" [translation by the author, emphasis added]. See also KALTENBACH, 'Das ungarische Minderheitengesetz - Zielsetzung und Aktzeptanz', *supra* FN 184, p. 347, who confirms the Hungarian aspiration to a "pioneer role" in the domain ("*Vorreiterrolle*" [translation by the author, emphasis added)

e) An answer to the question of diversity

Four clusters of factors were analysed in this section. Two of them proved to have had a trigger function for the autonomy régimes: the Hungarian diaspora and international pressure (mostly exercised by means of European Union accession conditionality). These factors only had a minor influence on the concrete ultimate shape of the autonomy régimes. But they were driving forces behind the Hungarian policy decision to set up autonomy régimes that serve to protect and promote minorities in Hungary. Two other factors had a deeper impact on the autonomy régimes. Firstly, the process of runaway assimilation, to which some of the dispersed minorities in Hungary are subject (*inter alia* the German minority), had a deep impact on the autonomy régimes as such. Secondly, an effect of history, the *angst* of registers, had an impact on a specific aspect of the autonomy régimes: it resulted in the choice of a subjective (or quasi-objective) approach to the identification of the members of minorities.

In the considerations above an important element was implied rather than addressed explicitly. Autonomy régimes such as those established in Hungary rely first and foremost on a conscious decision about the value of diversity. Thus, deciding to establish autonomy régimes for the minorities in Hungary meant to answer the question of diversity first. This question was less about keeping alive a culture as such. Remember that most of the cultures of the minorities in Hungary belong to larger cultural spaces, be they of the kin States or of kin minorities in other States. These larger cultural spaces were not at stake in the Hungarian question. The question was not about the extinction of a culture. This observation is important, because only in that case – the threat of extinction of a culture as a whole – the answer to the question of preservation and promotion measures would be obvious. Only then, measures seem absolutely imperative. But in the Hungarian case, the answer is less obvious, for here the decision is only about diversity and its value for the Hungarian State (and not about the survival of a culture as such). From this perspective, it is clear that to come to the Hungarian answer (i. e. the establishment of autonomy régimes) presupposes the insight by the majority that a pluralistic cultural basis of the State is a value as such. Moreover, the majority in a case such as Hungary must reach this insight by itself, because minorities that are subject to runaway integration are hardly in a position to impose any claims. It is evident, though, that the majority, in coming to its answer to the question of diversity, is not well advised to follow arguments claiming that a specific culture is not worth to be preserved and promoted, because it is backward, retro-oriented, folkloristic, or not modern. Sometimes a culture needs a period of

"existence in a museum"[496] to be revived and reinvigorated later, especially when it had been suppressed for a certain time.

[496] KÜPPER, *Das neue Minderheitenrecht in Ungarn*, *supra* FN 169, p. 157: "*musealeS Dasein*" [translation by the author, emphasis added].

2.4 Model traits of the autonomy régime

The model discussion was already led, when Hungary contemplated the introduction of the autonomy régimes with the Minority Act. So, why lead it again? The answer is simple: because the approach of this study is different. The model discussion in Hungary evolved around the question whether the Hungarian autonomy régimes would serve as a frame of reference for future projects in neighbouring States. Yet, it was clear in this discussion that the model character would not extend beyond the basic principles that underlie the autonomy régimes. The actual design of the autonomy régimes would not be part of the model, because the autonomy régimes were considered to be tuned to the Hungarian specifics. Thus, the message was in general terms that a high level of minority protection was desirable and that minority group rights were to be enforced seriously.[497]

The approach chosen in this study to the model issue is different. It is not satisfied with the simple conclusion that the big lines, i. e. group rights and autonomy, but not the details of the Hungarian autonomy régimes are fit for export. Instead, this study seeks to establish what kind of problems the autonomy régimes address and whether they are at least partly successful in that attempt. It is proposed that only within these parameters the possibility of model traits of autonomy régimes arises. Moreover, this study looks at the autonomy régimes from a neutral, scientific perspective. It ignores the political messages that the qualification of an autonomy régime as a model may convey. And it establishes the record of success of autonomy régimes. In accordance with this approach, two model traits may be suggested: a macro and a micro model trait.

A macro model trait

The factors that had the most impact on the design of the autonomy régimes in Hungary were undoubtedly the factual circumstances of the minorities in Hungary (dispersion, small communities) and the correlated phenomenon of runaway integration to which the minority under scrutiny here, the Hungarian German, is subject. The Hungarian legislature attempted to address the factual circumstances and to counter the runaway integration by creating the possibility for thirteen minorities to establish autonomy régimes. With these autonomy régimes, the minorities are

[497] See the citation *supra* FN 447, and SITZLER and SEEWANN, 'Das ungarische Minderheitengesetz - Vorbereitung, Inhalt, öffentliche Diskussion', *supra* FN 231, p. 356-357.

provided with their own organs – local, regional, and national minority self-governments – basically wherever their members are present. The tasks of these organs are flexible, depending on the overall and the local strength of the represented minority. The organs may eventually run educational and cultural institutions for their minority. Due to the advanced state of assimilation, the autonomy régimes, at least for now, depend on funding from the State and the kin States.

The autonomy régimes deliver some results in their "quixotic enterprise"[498] to stop runaway assimilation.[499] It seems at least that the identity of the German minority in Hungary is gaining momentum.[500] While runaway integration has possibly been halted,[501] it is certainly too early to declare the reversal of the process.[502] Experience shows that identity formation and strengthening takes longer than merely a dozen years. Certainly, the increased commitment to the identity of the Hungarian German minority, as with other minorities, in the census 2001 is a source of hope.[503] It is therefore safe to say that Hungary is on the right track to stop and reverse runaway integration.

Conversely, the autonomy régime did not contribute much to improve the integration of the Roma. This is not surprising, given that runaway integration and the lack of integration are two fundamentally different, perhaps even diametrically opposed

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[498] OETER, 'Zur Entstehung und Entwicklung des Modells der Kulturautonomie', *supra* FN 148, p. 63, describes the mission to stop assimilation as an "*Unternehmen mit quijotesken Zügen*" [translation by the author, emphasis added].

[499] ZAYZON, 'Die sprachlichen Rechte der Minderheiten in Ungarn', *supra* FN 309, p. 192-193, cites a government report for the county Békés, where minority identity seems to have been strengthened. Zayzon cautiously considers that these experiences might apply for the rest of Hungary as well. ERB, 'Die sprachliche Situation der Ungarndeutschen um die Jahrtausendwende', *supra* FN 312, p. 257-258, also lists some positive tendencies.

[500] CAHN, 'Smoke and Mirrors: Roma and Minority Policy in Hungary', *supra* FN 233, para. 5.

[501] BAKKER, *Minority Conflicts in Slovakia and Hungary*, *supra* FN 420, p. 344. See also KÜPPER, *Autonomie im Einheitsstaat*, *supra* FN 197, p. 346.

[502] See KALTENBACH, 'From Paper to Practice in Hungary: The Protection and Involvement of Minorities in Governance', *in* Bíró and Kovács (eds), *Diversity in Action: Local Public Management of Multi-Ethnic Communities in Central and Eastern Europe*, Budapest, Local Government and Public Service Reform Initiative (Open Society Institute), 2001, p. 171-203, p. 198, who, however, does not give the whole credit for the reinvigoration of the minorities in Hungary to the Minority Act, but sees also a spontaneous reaction by the minorities themselves.

[503] Concomitantly, though, the percentage of people who indicated a minority language as their native language decreased (data based on the census 1990 and 2001, contained in REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 163). See also REPUBLIC OF HUNGARY, Third Report under the Language Charter, *supra* FN 171, p. 8 (as to the German minority).

phenomena.[504] Of course, the Hungarian authorities – nudged by the European Commission and the international monitoring bodies – realized at the latest after the autonomy régimes had been set up that they had chosen the wrong approach to the challenges faced by the Roma. Thus, additional measures were enacted. A long-term programme of positive action, as part of a comprehensive Roma policy,[505] and the Act on Equal Treatment[506] were adopted to address the Roma issue.

While it is not the aim of this study to analyse the revamped approach to the Roma issue, the resulting fundamentally different autonomy régime of the Roma, and its Achilles heel (that is whether the anti-discrimination provisions are effectively implemented[507]) – because this would mean to embark on a different subject at the fringes of autonomy régimes – the following can be said nevertheless: an autonomy régime *à la Hongroise* is not the approach to be chosen in a situation of lack of

[504] The European Commission against Racism and Intolerance also distinguishes between the situation of the Roma and the other recognized minorities in Hungary (EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, Fourth Report on Hungary, *supra* FN 263, para. 169)

[505] See DEPARTMENT OF NATIONAL AND ETHNIC MINORITIES (HUNGARIAN GOVERNMENT), 'Selection of news on national and ethnic minorities in Hungary: March - May 2007', 2007 (available at: <http://www.nemzetpolitika.gov.hu/index.php?main_category=4&lang=en>), p. 3, regarding the council of Roma integration and the national action plan. See also DEPARTMENT OF NATIONAL AND ETHNIC MINORITIES (HUNGARIAN GOVERNMENT), 'Selection of news on national and ethnic minorities in Hungary (September - December 2007)', *supra* FN 328, p. 1-2. For a detailed description of the long-term policy, see GOVERNMENT OF HUNGARY, Comments on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Hungary, *supra* FN 171, p. 22.

[506] Act on Equal Treatment and Promotion of Equal Opportunities, 2003, CXXV. Among other measures this act introduces the possibility for associations to file complaints in cases where the victims of a discrimination cannot be identified (art. 13 ff.), the reversal of the burden of proof (art. 19), and an equal treatment authority for the implementation of the act (art. 13 ff.). For a brief resume of the act, see KÜPPER, 'Chronik der Rechtsentwicklung', (2004) 13 WiRO (4) 123.

[507] See only the note that Roma continue to emigrate from Hungary: DEPARTMENT OF NATIONAL AND ETHNIC MINORITIES (HUNGARIAN GOVERNMENT), 'Selection of news on national and ethnic minorities in Hungary: July - August 2007', 2007 (available at: <http://www.nemzetpolitika.gov.hu/index.php?main_category=4&lang=en>), p. 4. It seems that the Roma continue to be the subject of widespread discrimination in Hungary (as illustrations see HUNGARIAN HELSINKI COMMITTEE, 'Briefing Paper for UN Independent Expert on Minority Issues', *supra* FN 409, p. 1 ("[…] significant overrepresentation of the Roma in prisons […]"), or the two examples of violence against Roma cited in REPUBLIC OF HUNGARY, Second Report under the Framework Convention, *supra* FN 171, p. 159-161). The European Commission against Racism and Intolerance even notes in general the "current climate of increasing intolerance" in Hungary (EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, Fourth Report on Hungary, *supra* FN 263, para. 170. As an illustration for this increasing climate of intolerance, see 'Handgranaten-Angriff auf Roma in Ungarn', Neue Zürcher Zeitung Online, 19 November 2008 (citing the minority ombudsperson). According to KÜPPER, *Die ungarische Verfassung nach zwei Jahrzehnten des Übergangs, supra* FN 363, p. 107, all the measures Hungary has adopted so far to address the Roma issue have failed to better the situation of the Roma. NOVÁK, 'Racism in Hungary (Shadow Report)', 2007 (available at: <http://www.enar.org>), p. 7-8, describes the intolerance in Hungary towards the Roma and other vulnerable groups.

integration.[508] Regarding a lack of integration, a model trait of the Hungarian autonomy régimes cannot be confirmed. Mark the point well, though: the autonomy régime probably contributed to furthering the cause of the Roma by increasing their visibility, giving them a voice, and adding coherence in the ranks of the Roma themselves (although this contribution is subject to some doubts, for it might also be an effect of international pressure[509]). Yet, the point is that, in a situation where resources are limited, these resources, in order to address a lack of integration properly, would be more efficiently invested in strong anti-discrimination measures and positive action. Moreover, the application of the "wrong" measure (an autonomy régime to address a lack of integration) risks becoming apologetic. Thus, extra care must be taken that a wrong measure does not prevent the adoption of the proper, effective strategy. To sum it up plainly, it would be a better approach to create the basis on which the Roma enjoy equal opportunities than to grant them cultural and educational autonomy, which they do not really need.

Hence, only one macro model trait can be taken for granted: an autonomy régime as it has been established in Hungary is apt to address runaway integration. While such an autonomy régime might have some potential in other regards, the limits of that potential are revealed by the application of the autonomy régime to the Roma in Hungary.

A micro model trait

The analysis of the autonomy régime revealed that historical circumstances caused the minorities in Hungary to be cautious about identity registration. The purges that took place after World War II had a protracted impact on the collective conscience of the Hungarian Germans. The paternalistic, targeted top-down approach to nationalities under socialism did not help ease these misgivings. The Minority Act takes this wariness, the *angst* of registers, into account. An autonomy régime established in accordance with the Minority Act is not based on an identity register. Instead, members of minorities in Hungary declare their identity to the authorities each time minority self-governments are elected. Enjoying freedom of identity, an individual makes this declaration based solely on a personal decision. The conformity of this

[508] UNITED NATIONS INDEPENDENT EXPERT ON MINORITY ISSUES, Report on Mission to Hungary, *supra* FN 465, para. 42: "[…] the system was not intended as a vehicle for confronting urgent social and economic problems."

[509] See MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 406-407, for the discussion on whether it was a wise decision to include the Roma in the scope of the Minority Act, pointing *inter alia* to the diversity within the Roma minority (with further references).

decision with objective standards is not verified. Only those who run as candidates in the minority self-government elections must make their affiliation to the minority concerned public. The identity data obtained from the elections may not be used for purposes other than the elections and must be destroyed thereafter. We described this approach as quasi-objective, because it relies essentially on a personal decision of the individual, while creating an objective appearance through the declaration.

To a certain extent, this quasi-objective approach to identifying the members of a minority – and indirectly the minority itself – has been a success. One may presume that it has succeeded in capturing the essence of the Hungarian minorities for the purpose of minority self-government elections, while respecting the desire of minorities not to be registered. Evidence of this achievement is hard to come by, though. Even so, it is indicative that the participation level dropped significantly in 2006 in the first elections to minority self-governments in which the quasi-objective approach was implemented. In the elections before, the outright subjective approach according to which everyone could participate in the minority self-government elections without any identity declaration whatsoever was applied. The turnout then was significantly higher than it was in 2006 and it was obvious that a large group of people without any minority affiliation at all voted in the minority self-government elections.[510] One may interpret this development in the sense that the quasi-objective approach to identity defines the minority groups quite well. In this perspective, it constitutes a fortunate compromise between the needs to have certainty about a minority and the wish to stay anonymous. In the sense of our understanding of model traits of autonomy régimes, the approach, as an intrinsic feature of the autonomy régime, is the solution to an issue.

Admittedly, clarification is needed with respect to the abuses that had occurred under the subjective approach and that have continued to occur under the quasi-objective approach. As to these abuses, several points are important (i-iv). First (i), it is important to note that any system that relies on a subjective approach is by its nature vulnerable to abuses. This is the prize to pay for using dynamic variables that have little tangible manifestation in the real world. It is the prize to pay for using identity as a basis for an autonomy régime, instead of borders on the ground as is the case with a territorially based autonomy régime. However, territorial autonomy régimes *nota bene* grapple with other problems, such as the nature of borders. Thus, a territorial autonomy régime usually creates new minorities on both sides of the newly established territorial border.

[510] See *supra* p. 84.

(ii) The vulnerability to abuses is also the prize to pay for not using a truly objective approach. According to the objective approach, the identity of each individual is officially established by means of objective factors (language, parentage, etc.). However, such an objective approach raises other serious concerns. Above all, it would open the gates to abuses that are much more serious than those possible under the quasi-objective approach (while it remains of course uncertain whether such serious abuses will be committed). Remember only the "J"-stamp in the German passport during the Third Reich,[511] or the registration of Hutu and Tutsi identity in Rwandan passports by the Belgian authorities in the period between World War I and II.[512] Unsurprisingly, the current practice in China to register minorities also causes unease. The Roma in Italy understandably mistrust the recent unilateral measures by the Italian government, the official aim of which is to count the Roma in Italy.[513] Admittedly, data concerning the identity of individuals was not the *cause* of abuses that occurred in the past. The recent past in the Western Balkan, for instance, shows that severe abuses based on ethnic identity happen with or without identity registers. Yet, this is not the point.[514] Rather, the decisive point is that official identity data could possibly facilitate such abuses.[515] In our view, this hazard as such justifies the preference for the quasi-objective approach.[516]

(iii) It must be remembered that membership with a minority cannot be equated with citizenship of State, where an objective approach is commonly applied (in the naturalization procedure). Even if it could be equalled, the point not to be forgotten is that, in the case of naturalization, the objective approach is applied by the citizenry itself (i. e. through its representatives). Thus, if the parallel is upheld, it must be upheld

[511] See as an illustration KREISLER, 'Ein Brief nach Wien', Süddeutsche Zeitung, 1 October 1996, para. 4.

[512] SCHEU, 'Hundert Tage Hölle in Rwanda', Neue Zürcher Zeitung, 3 April 2009, para. 5.

[513] Reported in 'Viele Roma verlassen Italien', Neue Zürcher Zeitung Online, 23 October 2008. For the current situation of the Roma in Italy see HOHENDAL, 'Leben zwischen Abfallsäcken und Ratten', Neue Zürcher Zeitung Online, 30 June 2008.

[514] Contra: MAJTÉNYI, 'The Creation and Evolution of the Hungarian Minority Act', *supra* FN 206, p. 402.

[515] See BERGEM, 'Culture, Identity, and Distinction: Ethnic Minorities between Scylla and Charybdis', *in* Wolff (ed.), *German Minorities in Europe - Ethnic Identity and Cultural Belonging*, New York, Berghahn Books, 2000, p. 1-12, p. 6, with a similar conclusion as to the construction of identity: "However, this construction of collective identity as a perception of difference, which implies the duality of internal affiliation and external differentiation, is dangerously close to potentially aggressive friend-enemy dichotomies. The transition from the cultural differentiation of one's own/one's group's identity to the exclusion of another identity is a dynamic process. The borderline beyond which the image of the other turns into the image of the enemy, i. e. the point at which the construction of an identity is transformed into the creation of an enemy, cannot be determined precisely and, above all, not reliably."

[516] In a similar vein, it does not seem to be a sound idea to introduce the objective approach *ex post*, i. e. by bringing actions against allegedly false identity declarations. This idea could possibly only be applied to elected "false" minority representatives. Even in this case, it risks undermining the quasi-objective approach, turning it into an entirely objective approach.

consistently: the minority itself – not the majority or the State – would have to be entitled to determine whether an individual person is a member of the minority concerned.

(iv) The abuses that occur in Hungary as a result of the application of the quasi-objective approach are limited. They are most apparent with regard to the Roma. Remember, however, the reasoning with regard to the macro model trait: the conclusion was that the autonomy régime *à la Hongroise* was not up to address the issues faced by the Roma. Thus, the abuses of the autonomy régime are most egregious, where the application of the autonomy régime is the most ill-suited. Indeed, the abuses of the autonomy régime committed with regard to the Roma might be a further argument *against* the application of the autonomy régime to a minority which is in a similar situation as the Roma are in Hungary.

In brief, the upsides of the quasi-objective approach outweigh the downsides. This is especially, but not exclusively, true, when the micro model trait is seen in combination with the macro model trait: in case of a runaway integration of a minority which is addressed by means of an autonomy régime *à la Hongroise*, it seems imperative to use the quasi-objective approach. One is even tempted to ask whether the quasi-objective approach would also be an appropriate tool in general, that is outside the context of *angst* of registers, i. e. in situations where this fear is not as widespread as in Hungary or even where this fear is inexistent.

In conclusion, two model traits can be retained. They are model traits in the sense elaborated in chapter 1: principles of autonomy régimes that are based on successful problem-solution tandems. Thus, no panacea is suggested with the macro and the micro model trait, but rather a carefully framed, fine-tuned solution to a specific, conflict-like situation. Sceptics would probably argue that it was easy for Hungary to introduce autonomy régimes for the minorities within Hungary: the scattered minorities are not dangerous for the Hungarian State, for they are neither secessionist nor irredentist. Obviously, these critics would be right regarding the minorities. However, they would misunderstand the approach of this study. Secessionist or irredentist minorities would require a different approach, for they face and raise different issues. These issues were *not* discussed here. The right answer to the critics would therefore be: yes, it was safe and easy for Hungary to establish these autonomy régimes – that is why it would also be safe and easy for another State to introduce an analogous autonomy régime for a minority that is in a similar situation as the German minority in Hungary.

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Five minutes after having arrived at Budapest Eastern Railway Station on a late evening in autumn 2006, I made my first experience with a Hungarian minority issue. I took a cab to bring me to the Andrássy Gyula German-speaking University of Budapest, where I was meant to collect the keys to my apartment. The taxi driver took the back lanes through Jozsefváros, the eighth district of Budapest. Obviously, the driver knew the way well, for he was driving at a furious pace. He commented in a thick accent: "This is worst place in all Hungary." The explanation on my question why the driver considered Jozsefváros to be the worst place in Hungary was: "It is most dangerous. Muchest gypsies in all Hungary live here."

The whole tragedy of the situation of the Roma in Hungary is contained in the taxi driver's few words: the bad living conditions, the segregation, the prejudice. This chapter disclosed that the Roma issue, not the situation of the Hungarian German minority, raises the most pressing problems. Or as an interviewee once put it succinctly off the record: the problems of the Roma will only be solved, when the Roma have become the Hungarian Germans. Yet, in our view, the Roma issue, which is undoubtedly in urgent need of attention, should not distract from the qualities of the autonomy régime of the Hungarian German minority. This chapter tried to explore these qualities, while giving due attention to the Roma issue.

Chapter 3 The Freedom of the Turtle: French Polynesia

Chapter 3 – In which an island paradise turns out to be more than just that; in which a sea turtle happens to have trouble swimming; in which a false doppelgänger *and a nuclear bomb make an appearance; in which the French Republic is found to care about minorities after all; and in which model traits of an autonomy régime emerge in spite of the virtual absence of autonomy.*

Shipwrecked off the coast of the island of Huahine in French Polynesia, I had to prolong my stay in the Leeward Islands unexpectedly. It was April 1996 and my three-months round trip in the South Pacific was supposed to draw to a close slowly. Thus, the delay due to me being stranded in Huahine suited me well. I was not in a hurry to leave French Polynesia. While I was idling away the morning on the local market of the village of Fare on Huahine, a couple of youngsters struck up a conversation with me. A witty lad was quick to give an account of a spectacular event he had recently witnessed: he saw the mushroom. Evidently, he was not referring to a normal, edible mushroom. He was talking about the mushroom cloud of a nuclear bomb which he had witnessed from the shores of Huahine.

After having observed my futile attempts on the market of Fare at eating a raw banana plantain – a tough, banana-like vegetable that becomes edible only after at least five minutes of deep-frying – the boy had obviously decided that I was not very good with edibles. He apparently concluded that I would buy his mushroom story. Why, France was conducting nuclear tests in the islands of French Polynesia after all! However, these tests took place in Mururoa and Fangataufa, two atolls that are as far away from Huahine as Zurich from Oslo, or Manhattan from Florida: more than 1400 kilometres. It would have been impossible to see the nuclear cloud from Huahine. With the earth curving, the top of the mushroom cloud would have had to be at around 150 kilometres above the ground. Moreover, France had officially stopped atmospheric testing in September 1974, continuing exclusively with underground tests.[517] The boy was clearly pulling my leg. Yet, the episode proves a point, although the boy's story was

[517] BATAILLE and REVOL, Rapport sur les incidences environnementales et sanitaires des essais nucléaires effectuées par la France entre 1960 et 1996 et éléments de comparaison avec les essais des autres puissances nucléaires, 2001, no. 3571 (assemblée nationale), no. 207 (sénat), p. 56 and 57. (According to this report, France has never conducted any high altitude nuclear testing.)

far from true. The point is that during the mid-1990s people in French Polynesia had one thing on their mind: the nuclear tests France was conducting amidst *their* islands.

* * *

French Polynesia is a part of the French Republic, a former French colony that now enjoys territorial autonomy. The autonomy régime of French Polynesia is based on an act of the French Parliament. In this chapter, this autonomy régime is examined with a view to identify model traits. After an introduction to French Polynesia giving an overview of the geography and history of French Polynesia as well as the circumstances in general (section 3.1), the autonomy régime is analyzed in detail (section 3.2). This section is an echo of the approach elaborated in the first chapter: the identity, voice, and resources under the autonomy régime are thoroughly examined. Special attention is moreover given to the control mechanisms of the Republic. Then the factors that shape the autonomy régime are examined (section 3.3). The focus is put on the most important factors, which are scrutinized in clusters. In this section, the dynamics, the variables, and the unique elements of the autonomy régime become apparent. The final section (section 3.4) contains the outcome of the analysis: an attempt is made to put the finger on model traits of the autonomy régime of French Polynesia. Some concluding observations are included in this section.

This chapter fulfils two purposes. On the one hand, a second case study further illustrates how autonomy régimes work in practice. In the course of the study, one realizes more clearly that an autonomy régime is no simple thing. Indeed, it is just as complex as a State as a whole. On the other hand, a another attempt is made at identifying model traits of an autonomy régime. The analysis delivers two tentative model traits: a *macro* and a *micro* model trait. By means of the analysis, the case study in this chapter again corroborates the accuracy of the model considerations of chapter 1.

3.1 About the turtle

That Tahiti, the main island of French Polynesia, is actually a turtle is not evident on site. One needs to look at a map to find the turtle: the contours of Tahiti outline a turtle with its head pointing south-eastward.[518] The way this turtle grapples with *tiamaraa* is the subject of this chapter.[519] Certainly, the turtle strives for *tiamaraa*; but unfortunately no one really knows what it looks for: *tiamaraa* in Tahitian means freedom, autonomy, and independence, all at the same time.[520] In a sense, the whole struggle of the turtle is thus contained in the word *tiamaraa.*

On the back of the turtle lies Papeete, the main town of Tahiti and of French Polynesia as a whole. Papeete is certainly one of the remotest cities on the planet. It takes several hours of non-stop scheduled flight to the closest landmass: eight hours to Los Angeles, USA, six hours to Auckland, New Zealand, and ten hours to Santiago, Chile. But not only the distance, which separates Papeete from the continents, is huge. The extent of Papeete's realm is also huge: Papeete is the centre of French Polynesia which spans an enormous distance. If we imagined Papeete at the place of Paris, the outermost islands belonging to French Polynesia would be situated somewhere around Oslo, Bucharest, and Tunis, respectively.[521] It is a watery realm, though. In all directions, the South Pacific ocean extends thousands of kilometres from Papeete, featuring only the occasional, tiny island. While French Polynesia covers an exclusive economic zone of about half the size of the United States of America,[522] the roughly 150 islands taken together cover a minute territory, which extends over an area of a size similar to Rhode Island (the smallest US federal state), two thirds of the Palestinian autonomous territories, half of Corsica, or a tenth of the Netherlands. Covering about a quarter of this area, Tahiti is the biggest and the main island.

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[518] Consider the shape of the island on GOOGLE EARTH, <http://www.earth.google.com>.

[519] Of course, not just Tahiti grapples with *tiamaraa*, but all of French Polynesia. Tahiti is taken here as a *pars pro toto*.

[520] BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *in* LexisNexis (ed.), *Collectivités territoriales*, JurisClasseur (Fascicule 468, para. 1-83), Paris, LexisNexis, 2005, para. 83.

[521] The comparison is made in BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *supra* FN 520, para. 3.

[522] The exclusive economic zone of French Polynesia amounts to almost five million square kilometers (BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *supra* FN 520, para. 8).

More than a quarter of a million people live in French Polynesia[523] (just about as many as in Corsica; or about a quarter of the population of Rhode Island), approximately half of which live in the urban area of Papeete on the main island of Tahiti. Many of today's French Polynesians are *demi(e)s*:[524] they are neither purely French nor Polynesian, but, owing to blending since the 18th century (the "*francisation*"[525]), a mixture of both. That said, it is clear that Polynesians were there first: they constitute – in unofficial terminology[526] – several indigenous tribes of peoples that had inhabited the islands for roughly a millennium before the first Europeans arrived. No doubt, the Polynesian identity today is strong, despite all European influences.

Of heroes and villains

As anywhere, there are heroes and villains aplenty in the past (and the present) of French Polynesia.[527] After the "discovery" of Tahiti in 1767 by Samuel Wallis, the British consul and protestant missionary George Pritchard gained considerable influence over the local Polynesian queen Pomare IV. Tensions between the French and British empires mounted, when French Catholics were refused in 1835 the possibility to proselytize in Tahiti. With Pritchard being absent to Europe in 1842, French fleet commander Abel Aubert Du Petit-Thouars seized the moment and, in overstepping his mandate, persuaded queen Pomare IV (by means of an ultimatum) to sign a "treaty"[528] establishing a French protectorate over Tahiti.[529] When Pritchard was

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[523] Estimation of the office of statistics (available under INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, <http://www.insee.fr>, follow the thread: "thèmes", "territoires", "régions", "subdivisions, superficie et population des régions et départements de France et d'outre-mer"); see also BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *supra* FN 520, para. 6 (relying on the official census of 2002, according to which slightly less than a quarter of a million people live in French Polynesia).

[524] Also called "*méti*" (DOUMENGUE, 'Pluralité ethno-culturelle dans les territoires d'outre-mer français', *in* Bambridge, Doumengue, Ollivier, Simonin, and Wolton (eds), *La France et les Outre-mers, l'enjeu multiculturel*, Paris, Hermès, 2002, p. 141-156, p. 142 [emphasis added]). For more information on the roots of the French Polynesians of today and the *demi(e)s*, see PANOFF, *Tahiti métisse*, Paris, Denoël, 1989, p. 157 ff.

[525] ALDRICH, *Greater France: A History of French Overseas Expansion*, New York, St. Martin's Press, 1996, p. 93 [emphasis added].

[526] FRENCH REPUBLIC, Fourth Periodic Report of France under Art. 40 Civil Rights Covenant, 2007, UN Doc. CCPR/C/FRA/4, para. 365: "The indivisible nature of the Republic is reflected in that of the French people, which cannot include 'peoples' recognized as such."

[527] Only a very brief synopsis of the history of French Polynesia can be given here. On the history of French colonization see ALDRICH, *Greater France: A History of French Overseas Expansion* , *supra* FN 525, p. 266 ff. For a table of the history of French Polynesia until 1980, see PANOFF, *Tahiti métisse*, *supra* FN 524, p. 277-283.

[528] This sort of "treaty" raises many questions: KOSKENNIEMI, *The Gentle Civilizer of Nations - The Rise and Fall of International Law 1870 - 1960*, Cambridge, Cambridge University Press, 2002, p. 136.

back, he made queen Pomare IV hoist her own flag instead of the French. This led to Pritchard's expulsion by the French and three years of French warfare against queen Pomare IV and local rebel chiefs (in which Britain did not take an active stance).[530] Until 1880 France progressively extended its influence over the rest of the islands of what is today French Polynesia[531] and then annexed the islands in 1880, turning them into a colony (as the *Établissements français d'Océanie)*.[532]

Although French Polynesians were subject to Western influence (resulting *inter alia* in the conversion of the population to Catholicism), a Polynesian identity in the sense of a Western nationalism did not develop until after World War II. At that time, French Polynesians, who had fought alongside French metropolitan troops, returned to the islands and brought European ideas along.[533] Pouvana'a a Oopa Tetuaapua, a *demi,* soon became the "chorister of Tahitian nationalism".[534] Relying on the general change of attitude towards colonialism, Pouvana'a a Oopa organised political resistance against the French dominion. Among his most infamous deeds was the (alleged) order to set Papeete on fire after the referendum on the French constitution of the fifth Republic on 28 September 1958. This order, although it was never carried out, earned

[529] ALDRICH, *Greater France: A History of French Overseas Expansion* , *supra* FN 525, p. 70. See also MATSUDA, *Empire of Love: Histories of France and the Pacific*, Oxford, Oxford University Press, 2005, p. 94: "Official French narratives still maintain that the Maohi peoples of the Society Islands peacefully ceded their authority to France. This is correct if one dates local histories to the decision of King Pomare V to surrender his authority to Paris in exchange for limited sovereignty and a salary. Generally, however, such narratives elide the Franco-Tahitian War of 1843-1846, and the Leewards War throughout the 1880s and the 1890s when French protectorates were fiercely resisted by island monarchs, dozens of chiefs, and thousands of warriors throughout mutiple island groups." [cited without references]. For the provisions of the treaty see GILLE, 'L'évolution des institutions du territoire de 1842 à 1984', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 47-61, p. 49-51.

[530] GILLE, 'L'évolution des institutions du territoire de 1842 à 1984', *supra* FN 529, p. 48 (with more details on the annexation and the actions undertaken by the French king). On Britain's stance: DE DECKKER, 'Organisation de la Cité et relations avec la France dans l'Espace mental polynésiens', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 37-46, p. 48.

[531] See MATSUDA, *Empire of Love: Histories of France and the Pacific*, *supra* FN 529, p. 97-98, for the resistance of the islanders in the Marquesas islands and in the "Leewards War" (p. 98).

[532] See ALDRICH, *Greater France: A History of French Overseas Expansion* , *supra* FN 525, p. 212 ff., on the status of the indigenous under the *code de l'indigénat*. As to the régime of French Polynesia under colonial rule, see GILLE, 'L'évolution des institutions du territoire de 1842 à 1984', *supra* FN 529, p. 51-55.

[533] DE DECKKER, 'Organisation de la Cité et relations avec la France dans l'Espace mental polynésiens', *supra* FN 530, p. 40: "*S'ils ont combattu dans les armées françaises, au péril de leur vie, ils ont droit à devenir des citoyens et à bénéficier du suffrage.*" [Emphasis added].

[534] DE DECKKER, 'Organisation de la Cité et relations avec la France dans l'Espace mental polynésiens', *supra* FN 530, p. 40: "[…] *Pouvana'a Opu, un Demi, sera le chantre du nationalisme tahitien.*" [Translation by the author, emphasis added].

Pouvana'a a Oopa a sentence of eight years of imprisonment and fifteen years of banishment from French Polynesia – which did not prevent him from being elected as a member of the French senate after having been reprieved.[535]

Today, others have inherited Pritchard's, Du Petit-Thouars's, Pomare IV's, and Pouvana'a a Oopa's struggle. This French Polynesian struggle, much like life in *France métropole*, is still dominated by strong characters. Gaston Flosse, who is just about as controversial as Pouvana'a a Oopa once was, symbolizes France and the strong ties with the capital. Others, like Oscar Temaru, represent the opposite pole, tending towards a self-reliant French Polynesia. This polarization sometimes translates into revolution-like conditions, for instance after French President Jacques Chirac's decision in 1995 to resume nuclear testing on Mururoa (an island in an Eastern archipelago of French Polynesia), or during the political upheaval in 2004-2005, which is sometimes called "*l'imbroglio*"[536].

However, the regular tourist usually perceives little of these sometimes chaotic circumstances. Attracted by Paul Gaugin's popular paintings, she (or he) – typically a wealthy French who can afford the long and expensive journey – comes to French Polynesia to see breath-taking Bora–Bora in the society islands with its volcanic peak and tropical vegetation or the black beaches of Tahiti; to swim in the shallow turquoise lagoons; to spend a honeymoon in an ultra-expensive over water bungalow; to dive amidst the rich underwater wildlife in the coral reefs; and to buy the unique Tahiti black pearls. Having arrived in the middle of this "*paradis"*,[537] the average tourist remains unaware of the facts that French Polynesia is much more than just an island paradise or even that it stretches much further than the western Society Islands: In the northeast to the Marquesas Islands, in the east to the atolls of the Tuamotu archipelago (which includes the Gambier Islands and infamous Mururoa), and in the south to the Austral Islands.

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[535] REGNAULT, 'La Décentralisation outre-mer: un combat pour l'emancipation politique et économique', (1995) *Les cahiers d'outre-mer (revue de géographie de Bordeaux)* (191) 407.

[536] MOYRAND and TROIANIELLO, 'Aspects juridiques de la crise politique polynésienne', (2005) 11 Rev. jur. polynésienne 1 (with further reference).

[537] LEMOINE, 'Les intentions des auteurs du statut de 1984', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 63-68, p. 63 [emphasis added]. For a detailed analysis of the construction of the myth of the French Polynesian paradise see MATSUDA, *Empire of Love: Histories of France and the Pacific*, *supra* FN 529, p. 90-112: Matsuda argues that large parts of the history of Tahiti and the French Polynesian islands (in particular the time before French Polynesia became a protectorate) were re-written or deliberately forgotten. This process resulted in the "triumph of French paradise" (p. 100).

3.2 The autonomy régime of French Polynesia

a) The Republic and the autonomy régime

A preliminary outline of the autonomy régime of French Polynesia should not begin with what the régime is like, but rather with what it is *not* like. Unsurprisingly, the French Republic did not just carve out some free space for the Polynesians and left it to them how to deal with it. Even though Polynesia is far away from the metropole, France did not simply liberate the islands for good and entrust the inhabitants with self-government. Rather, the autonomy régime of French Polynesia keeps strong links to the structure of the French Republic. It is probably even best to see the autonomy régime in the mirror of the French Republic – ideally with two glances. A first look in the mirror of the Republic reveals that the autonomy régime is a replica in small of the Republic. Its institutions (and their mechanics) bear a strong resemblance to the State organs of mainland France. However, there are differences, most notably in the terminology used: special care has been taken not to assimilate the two entities entirely. No *Président* or *Parlement* were created, but rather a *président* (with a lower case "p") and an *assemblée*. Thus, it was deliberately avoided to give the impression that a sovereign State – a second French Republic – had been created in the South Pacific. A second glance in the mirror shows that the foundation of the Republic has strongly influenced the autonomy régime of French Polynesia. The autonomy régime in its details is informed by the characteristics of the Republic. This is most visible with the basic principle of *unité* and *indivisibilité* and the decentralized organization of the Republic.[538]

These preliminary observations not only hint at the typical links between autonomy régimes and the structure of the State as a whole within which the régime is established (vertical and horizontal links). Figuratively speaking, they also indicate the encirclement of the autonomy of French Polynesia. The place of the autonomy régime of French Polynesia in the Republic is not the same as the place of a constituent entity in a federal State. Such a constituent entity has normally transferred some of its powers to the top level (the level of the federal State), while keeping most of the control over the lower, communal level and remaining unhindered by the other constituent entities. In contrast, French Polynesia as a *collectivité territoriale* clearly remains an entity of a unitary State. From a substantive perspective, it is a sort of combination of the *région* and the *département* of France. Broadly speaking, the autonomy régime is surrounded by entities each of which meets its match: The 48

[538] More on this influence in section 3.3.

communes that are underneath it are subject to the rule of the Republic (and not the rule of French Polynesia[539]); the Republic is on top and keeps most of the control (in particular the ultimate veto over the existence of the autonomy régime); on the side, State organs and institutions on the same level (notably the State representative and the courts) are involved with the organs of the French Polynesian autonomy régime.[540]

The autonomy régime of French Polynesia is not only a testimony to the typical, close links that autonomy régimes entertain with the State as a whole, but also partly to the substance of minority (and indigenous people) protection. To be clear, the terms minority and indigenous people (or people in the sense of the principle of self-determination) are definitely *notiones non gratae* in France. There is only one people in France: "*La France est une République indivisible […]*".[541] This constitutional principle prevents France from recognizing "any category other than the French people"[542] (in particular national minorities as "sections of the French people"[543]) and hence from ratifying the Framework Convention for the Protection of

[539] "[…] *des communes de Polynésie française, lesquelles ne sont pas, au sens de l'article 74 de la Constitution, des institutions de la collectivité d'outre-mer que constitue la Polynésie française;*" (Constitutional Council of the French Republic, *Loi organique portant statut d'autonomie de la Polynésie française*, decision no. 2004-490 DC (2004), para. 15 [emphasis added]). See also art. 72(5) Constitution de la Cinquième République, 1958, as amended per 23 July 2008, consolidated text (in the following Constitution): "*Aucune collectivité territoriale ne peut exercer une tutelle sur une autre."* [Emphasis added]. (However, the *tutelle* of the State over the communes in French Polynesia, notably the *a priori* control of their acts, still applies until 2012 at the latest [see COINTAT, Rapport au Sénat sur le projet de loi organique tendant à renforcer la stabilité des institutions et de la transparence de la vie politique en Polynésie française, 2007, no. 69, p. 26]). Numerous links between the communes and French Polynesia exist nevertheless: French Polynesia can delegate competences to the communes (MOYRAND, *Droit institutionnel de la Polynésie française*, Paris, Harmattan, 2007, p. 277-282). The communes also have their proper competences (MOYRAND, *Droit institutionnel de la Polynésie française*, p. 299-301).

[540] This is the "[…] *contrôle de l'Etat sur ces institutions.*" (*Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 11 [emphasis added]).

[541] Art. 1 Constitution [brackets and emphasis added].

[542] State Council of the French Republic, *Avis portant sur la signature et ratification de la «Convention-cadre pour la protection des minorités nationales»*, no. 357 466 (1995), p. 1: "[…] *que la loi fondamentale refuse de reconnaître toute catégorie autre que le peuple français composé de tous les citoyens français «sans distinction d'origine, de race ou de religion.»*" [Emphasis added, emphasis within «» in original].

[543] *Avis portant sur la convention-cadre*, supra FN 542, p. 2: "*Si l'on donne une acception extensive à cette notion* [the notion of effective participation]*, cet article 15 est incompatible avec l'article 3 de la Constitution, qui exclut l'exercice de la souveraineté par une section du peuple français."* [Brackets and emphasis added]. See also AMIRAUX and LEGHMIZI, 'The Situation of Muslims in France', *in* Open Society Institute: EU Accession Monitoring Program (ed.), *Monitoring Minority Protection in EU Member States*, vol. 2, Budapest, Open Society Institute, 2002, p. 69-140, p. 71: "The concept of 'minority' is not seen as relevant in the French context." See also POLAKIEWICZ, 'Die rechtliche Stellung der Minderheiten in Frankreich', *in* Frowein, Hofmann, and Oeter (eds), *Das Minderheitenrecht europäischer Staaten*, vol. 1, Berlin, Springer, 1993, p. 126-159, p. 126: "*Das französische Recht kennt keinen Begriff der Minderheit*." [Emphasis added]. For more details on the non-recognition of minorities in France, see DESPEUX, *Die Anwendung des völkerrechtlichen Minderheitenrechts in Frankreich*, Frankfurt am Main, Peter Lang, 1999,

National Minorities.[544] The French Republic only recognizes overseas populations.[545] Thus, it is not surprising that the idea of minority protection is never explicitly referred to with regard to the autonomy régime of French Polynesia. However, minority protection is nevertheless present in this régime, as the analysis below will reveal.

The present autonomy régime in French Polynesia is based on an act passed by the French Parliament in 2004: *La loi organique du 24 février 2004 portant statut d'autonomie de la Polynésie française*.[546] This Statute 2004 is not the first act to establish an autonomy régime in French Polynesia. The acts of 1984[547] and 1996[548] were among its notable predecessors. Although most rules that constitute the autonomy régime of French Polynesia were introduced by the Statue 1984, this section focuses on the Statute 2004, because it is presently in force. The dynamics that led to the establishment of the current autonomy régime and the share that the previous acts have in these dynamics are examined in section 3.4.

The Statute 2004 is not the only source of the French Polynesian autonomy régime. Many attributes of the autonomy régime are laid down in title XII of the Constitution on territorial collectivities (art. 72-74). Art. 74 defines most of the characteristics that

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p. 180. On the controversy surrounding the term people in France, see BÉRINGER, 'Outre-mer: Droit commun', *in* LexisNexis (ed.), *Collectivités territoriales*, JurisClasseur (Fascicule 456, para. 1-109), Paris, LexisNexis, 2006, para. 73 ff.

[544] COUNCIL OF EUROPE, Framework Convention, *supra* FN 29. Interestingly, these considerations did not prevent the ratification of the COUNCIL OF EUROPE, Language Charter, *supra* FN 28. However, the obligation to allow the use of regional languages before courts (included in the Language Charter) was deemed incompatible with French as the language of the Republic (constitutionally guaranteed in art. 2(1) Constitution) (see State Council of the French Republic, *Avis portant sur la signature et ratification de la «Charte européenne des langues régionales ou minoritaires»*, no. 359 461 (1996)).

[545] Art. 72-3(1) Constitution: "*La République reconnaît, au sein du peuple français, les populations d'outre-mer, dans un idéal commun de liberté, d'égalité et de fraternité*." [Emphasis added]

[546] Statut d'autonomie de la Polynésie française, 2004, Organic Law no. 2004-192, JORF of 2 March 2004, p. 4183 (in the following: Statute 2004). According to the distinction made in art. 74(2) and (12) Constitution, not all basic provisions regarding the autonomy régime of French Polynesia are laid down in the Statute 2004. Concomitantly with the organic law a normal act (i. e. a non-organic law) was passed by the Parliament, which contains the non-organic provisions regarding the autonomy régime: Loi complétant le statut d'autonomie de la Polynésie française 2004, Law no. 2004-193, JORF of 2 March 2004, p. 4213 (see SCHOETTL, 'Un nouveau statut pour la Polynésie française après la révision constitutionnelle du 28 mars 2003', (2004) RFDA (2) 249, for the distinction between organic and non-organic law in the case of French Polynesia). Of course, other metropolitan acts may be relevant for the autonomy régime of French Polynesia, as shown *infra*.

[547] Statut du territoire de la Polynésie française, 1984, Law no. 84-820, JORF of 7 September 1984, p. 2831 (in the following: Statute 1984).

[548] Statut d'autonomie de la Polynésie française, 1996, Organic law n° 96-312, JORF of 13 April 1996, p. 5695 (in the following: Statute 1996).

distinguish French Polynesia as the only *collectivité d'outre-mer qui est "dotée[…] d'autonomie*"[549] from the other territorial collectivities of France (such as the *communes*, the *départements*, and the *régions*). Therefore, a French lawyer, when confronted with some of the issues raised in this chapter regarding the autonomy régime, would probably point to the Constitution and its compulsory prescriptions on how the autonomy régime is to be constructed. He (or she) would, for instance, see a justification of the exclusive State competences of art. 14 Statute 2004 in art. 73(4) Constitution,[550] which lists these competences.[551] Valid as this argument may be for innerstate relations, it is not sufficient for the purposes of this study. In the functional perspective employed here, the Constitution and the organic law,[552] which details the features of the autonomy régime of French Polynesia (the Statute 2004), must be considered as a whole. It does not matter *where* (in the Constitution or in the Statute 2004), but rather *that* a provision is laid down. The hierarchy of norms and sources, in other words, is of little importance to this study. It is, for instance, of little interest that the Constitution forces the Republic to be *indivisible*. Conversely, the principle as such and its effects are of high interest. This perspective is justified by this study's proper understanding of models of autonomy (and the focus on resolving conflicts through norms that is inherent in it). Therefore, if the authority of the French Constitution is partly neglected, it is not out of a lack of respect for it, but rather out of eagerness to put a previously unexplored approach to use. The method is moreover justified by the relativity of the distinction between the Constitution and organic laws: the French Constitution is a flexible instrument, which can be changed quite easily;[553] in fact, it is quite frequently changed.

The following examination of the autonomy régime is structured largely according to the conception of autonomy explained in chapter 1. Under the heading of the identity of French Polynesia (b) the inward-looking aspects of the autonomy régime are examined. The resources of French Polynesia are included in this part. Then the outward-looking aspects are analysed (as the voice of French Polynesia, c). Special attention is then given to the points where the French Republic and the autonomy régime of French Polynesia touch and interact. This part is mostly about the control and influence that the central institutions exercise over the autonomy régime of French Polynesia (the strings of the Republic, d).

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[549] Art. 74(7) Constitution.

[550] Together with art. 74(4) Constitution.

[551] See *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 25.

[552] *Loi organique* is translated in this study literally as "organic law" to reflect the original French term (although "institutional act" would be a more accurate translation).

[553] See art. 89 Constitution.

b) Pieces of a French Polynesian identity

Are considered, in turn, those that act to preserve and develop the French Polynesian identity (i), the direct manifestations of this identity in the Statute (ii), the powers of the actors (iii), and the way they are financed (iv).

i) The actors

Most prominent among the stuff out of which the French Polynesian autonomy is made is the president and the assembly: apart from the flag of French Polynesia[554] and the currency[555], the president and the assembly are the most visible signs of autonomy. One other actor that is typical of democratic entities exists, while another is conspicuous by its absence: there is an autonomous people (or rather a "population"[556] or "voters"[557]), but no autonomous court. The absence of the latter does not mean that no courts exist at all, but simply that the existing courts – and most prominently the administrative tribunal in Papeete – are organs of the State, not of French Polynesia. The institutions of the autonomy régime of French Polynesia are considered in turn[558] (whereas the institutions of the metropole in French Polynesia, *inter alia* the high commissioner and the judicial system, are the subjects of part d).

The executive

The executive of French Polynesia is similar to the executive of a State. It is composed of the government of French Polynesia and the president of French Polynesia, who is also the head of the government. The president nominates the ministers who together with her (or him) constitute the council of ministers. So far, this arrangement resembles a normal State, and more specifically the metropolitan institutions of the Republic, with the exception that no parallel distinction is made in French Polynesia between the Prime Minister and the President of the Republic.[559] However, the

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[554] "*La Polynésie française détermine librement les signes distinctifs permettant de marquer sa personnalité dans les manifestations publiques officielles aux côtés de l'emblème national et des signes de la République.*" (Art. 1(5) Statute 2004 [emphasis added]).

[555] See *infra* FN 625.

[556] Art. 72-3(1): "*La République reconnaît, au sein du peuple français, les populations d'outre-mer, dans un idéal commun de liberté, d'égalité et de fraternité*." [Emphasis added]

[557] Chapter VI Statute 2004: "*électeurs*" [emphasis added].

[558] The body of rules which governs the relationship between the organs of French Polynesia is dealt with in detail in MOYRAND, *Droit institutionnel de la Polynésie française*, *supra* FN 539, p. 85-198.

[559] MOYRAND, *Droit institutionnel de la Polynésie française*, *supra* FN 539, p. 86.

president is not directly elected by the people either, as it is the case for the French President since the constitutional revision of 1962.[560] On the contrary, she (or he) is elected by the assembly and her (or his) mandate in principle correlates with the mandate of the members of the assembly (mandate of five years)[561]. However, a quarter of the members of the assembly may launch a motion of no-confidence against her or his government and simultaneously propose a new president. If the absolute majority of the members of the assembly consent to this motion,[562] the government together with the president must step down and the proposed candidate is elected as the new president. This "weapon" of the assembly against the executive is not matched by the arsenal of the executive: the latter cannot dissolve the assembly single-handedly. The government may only ask the President of the Republic to dissolve the assembly.[563]

The government, of course, governs: "It conducts the politics"[564] of French Polynesia. For this purpose, it has the administration of French Polynesia at its disposal. The president, more specifically, represents French Polynesia, which is an important function, due to French Polynesia taking part in foreign relations. She (or he) promulgates the acts adopted in the assembly and holds the power to issue regulations, based on a similar distinction between executive and legislative power as in the metropole.[565] The president adopts implementing decisions, directs the administration, and nominates the officials of French Polynesia.[566]

The assembly

The assembly is the representative body of French Polynesia. It consists of 57 directly elected members, the majority of which (37) are elected in the most densely populated

[560] Révision constitutionnel relative à l'élection du Président de la République au suffrage universel, 1962, Law no. 62-1292, JORF of 7 November 1962, p. 10762 (promoted by General Charles de Gaulle).

[561] Art. 104(1) and art. 72 Statute 2004.

[562] Art. 156(4) Statute 2004. According to art. 156-1 a similar instrument ("*motion de renvoi*" [emphasis added]) is applied, in case the assembly rejects the annual budget. The president may then present a new budget proposal and concurrently invoke his or her responsibility. The budget is deemed to be adopted, if the assembly does not bring down the president with a motion of no-confidence combined with the adoption of its own budget.

[563] Art. 157-1(1) Statute 2004: "[*à*] *la demande du gouvernement de la Polynésie française* […]" [brackets and emphasis added].

[564] Art. 63(1) Statute 2004: *"Le gouvernement de la Polynésie française est l'executif de la Polynésie française dont il conduit la politique*." [Translation by the author, emphasis added].

[565] See art. 21 (1) Constitution. For the powers of the president see art. 64 Statute 2004.

[566] Art. 64 (4) and (5) Statute 2004.

area of French Polynesia, the Windward Islands (the Eastern part of the Society Islands, including Tahiti).[567] The party that was most successful in one of the six electoral constituencies used to benefit from an award of an additional third of the seats to be distributed in this constituency.[568] This rule was changed in 2007:[569] according to the revised art. 105, a second round of elections takes place, if no election list gained the absolute majority in the first round. Only the parties of those lists may take part in the second election that obtained 12.5% of the votes in the first round. Regardless of whether one or two rounds are necessary, parties that gain less than five percent of the votes are excluded from the distribution of seats and thus barred from the assembly.[570] All these provisions are intended to enhance the "*constitution d'une majorité cohérente et stable*",[571] and as such are not contrary to the principle of equality of voters.[572]

The assembly, which normally conducts its reunions at the "*chef-lieu*"[573] (Papeete), holds the residual powers: all powers that are not expressly attributed to the council of ministers or the president of French Polynesia belong to the assembly.[574] The assembly controls the president and the government (by means of the motion of no-confidence) and it votes on the budget of French Polynesia.[575] Its most prominent instrument are the "laws of the land" ("*«lois du pays»*"). Introduced by the Statute 2004, these "laws of the land" are very innovative for the French Republic; the innovation is such that it seems compulsory to put them in between guillemots whenever they are mentioned. This citation habit, which was introduced by the Statute 2004 and upheld throughout the act, is usually adhered to whenever a "law of the land" is mentioned.[576] The

[567] Art. 104(1) and (4) no. 1 Statute 2004.

[568] Art. 105 section I(2) Statute 2004 (before the partial amendment in 2007, see *infra* FN 569).

[569] By art. 3 Loi organique tendant à renforcer la stabilité des institutions et la transparence de la vie politique en Polynésie française, 2007, Organic Law no. 2007-1719, JORF of 8 December 2007, p. 19890.

[570] Art. 105 section II(1) Statute 2004.

[571] *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 84 [emphasis added].

[572] The electoral mode does not encroach in a disproportionate way on the "*pluralisme des courants d'idées et d'opinions*" (*Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 85 [emphasis added]; see also Constitutional Council of the French Republic, *Loi organique tendant à renforcer la stabilité des institutions et la transparence de la vie politique en Polynésie française*, decision no. 2007-559 DC (2007), para. 13).

[573] Art. 118(1) Statute 2004 [emphasis added].

[574] Art. 102(2) Statute 2004.

[575] Art. 102(3) and (4) Statute 2004.

[576] See for instance *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 47. Interestingly, though, the guillemets are omitted in the acts of the assembly of French Polynesia, which constitute "laws of the land", as well as in general on the homepage of the assembly of French Polynesia (see ASSEMBLÉE DE LA POLYNÉSIE FRANÇAISE, <http://www.assemblee.pf>, under "*textes*"

introduction of the "laws of the land" in the Statute 2004 kicked off quite a discussion in academia. The reason for the discussion is that passing laws (*lois*) in France is the prerogative of the national Parliament. France is an "*État monoconstitutionnel, et donc monolégislatif*".[577] Aware of the sensitivity of the subject, the Constitutional Council of the French Republic, seized with the Statute 2004, added that the "laws of the land" remained administrative acts.[578] To grant the French Polynesian assembly the power to adopt "laws", even if not laws in the proper sense of the term, certainly is an act of high symbolic value. But the qualification of an act as a "law of the land" entails also a legal consequence: the State Council of the French Republic (and not the administrative tribunal in Papeete) is directly and exclusively competent to review the "laws of the land" judicially.[579] Whether a proposed act would amount to a "law of the land" is determined by means of art. 140(1) Statute 2004: "laws of the land" are those acts that, while being in the domain of the law, are based either on a proper competence of French Polynesia or on the participation of French Polynesia in the competence of the State.[580] "Laws of the land" are thus subject to the division of competences (which is explained below).

A third actor is on the stage of the overseas collectivity of French Polynesia: the French citizen as a voter.[581] He (or she) participates in the autonomy régime actively or passively in the election of the members of the assembly. Moreover, a citizen who is otherwise not actively involved in the political process also participates in the substance of decisions. She (or he) may launch or sign a petition, which the president of the assembly reports to the assembly, if it pertains to a competence of the assembly and if a tenth of the voters of French Polynesia signed it.[582] Furthermore, he (or she)

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for the "laws of the land" so far adopted). Abstaining from stating an opinion on whether or not the guillemets should be used when referring to the "laws of the land", English inverted commas (not French guillemets) are used in this study to indicate that the term is translated litterally from French by the author.

577 GOHIN, 'Les lois du pays: contribution au désordre normatif français', (2006) RD publ. (1) 87-88 [emphasis added].

578 *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 75: *"[Q]ue la distinction formellement établie par la loi organique entre les actes prévus à l'art. 140, dénommés «lois du pays», et les «déliberations», n'a pas pour effet de retirer aux «lois du pays» leur caractère d'actes administratifs.*" [Brackets and emphasis added] See also the Constitutional Council's conclusion that the "laws of the land", as administrative acts, must respect the general principles of law and the international obligations that are applicable in French Polynesia (para. 90).

579 Regarding judicial control, see *infra* part d).

580 Art. 140(1) Statute 2004: "[…]*ceux qui, relevant du domaine de la loi, soit ressortissent à la compétence de la Polynésie française en application de l'article 13, soit sont pris au titre de la participation de la Polynésie française à l'exercice des compétences de l'Etat dans les conditions prévues aux articles 31 à 36*." [Emphasis added].

581 Art. 3(4) Constitution.

582 Art. 158 (1) and (2) Statute 2004.

may be asked in a local referendum to vote on a proposed act of the assembly or the government, which is based on their respective powers (and, of course, on the competences of French Polynesia). While it is in the discretion of the authorities (the assembly or the government, respectively) whether to ask the voters at all, the result of the referendum is binding.[583]

ii) identity *stricto sensu*

While the three players (president, assembly, voters) are the main institutional determinants, French Polynesian identity is about much more than just institutions: about language, culture, common history, etc. The Statute 2004 only marginally reflects these bonds that are supposed to bind together the three players. Section 7 Statute 2004 on "*identité culturelle*" contains only two articles: one on language (art. 57) and another on the establishment of an advisory body in real estate matters (art. 58). The constitution of the latter, the "*collège d'experts […] en matière foncière*",[584] comes as no surprise in light of the scarcity of land in French Polynesia (see *infra* section iii). As to the language, the Statute 2004 makes very little material concessions to the local distinctiveness despite exuberant claims to the value of the Tahitian language[585] as well as acknowledgments of the other three local dialects as languages of French Polynesia.[586] French is the only official language of French Polynesia. French is the only language to be spoken by and with the authorities.[587] The original Polynesian languages are restricted to the private sphere. At least, private individuals and companies may use them in agreements among themselves without risking their nullity.[588] Tahitian as the most widespread Polynesian language is taught on all school levels. But the language is only taught. Tahitian may not be used to teach other subjects (that is subjects beyond the Tahitian language course as such, such as

[583] See art. 159 section VI(1) Statute 2004: "*Le projet soumis à référendum local est adopté si la moitié au moins des électeurs inscrits a pris part au scrutin et s'il réunit la majorité des suffrages exprimés*." [Emphasis added] (Note the high threshold of participation needed for a valid adoption of the project: 50% of the voters of French Polynesia.) Since the revision of 2007 (Loi organique tendant à renforcer la stabilité des institutions et la transparence de la vie politique en Polynésie française, *supra* FN 569), it is also possible merely to consult the voters on decisions to be taken (contrary to the referendum, the result of the consultation vote is not binding on the authorities [see art. 159-1 Statute 2004]).

[584] Art. 58(1) Statute 2004 [emphasis added].

[585] Art. 57(2) Statute 2004: "*La langue tahitienne est un élément fondamental de l'identité culturelle: ciment de cohésion sociale, moyen de communication quotidien, elle est reconnue et doit être préservée, de même que les autres langues polynésiennes, aux côtés de la langue de la République, afin de garantir la diversité culturelle qui fait la richesse de la Polynésie française.*" [Emphasis added].

[586] Art. 57(3) Statute 2004.

[587] Art. 57(1) Statute 2004.

[588] Art. 57(3) Statute 2004.

mathematics, etc.).[589] The Constitutional Council further restricted the limited options available under the Statute 2004. The Council held that, based on art. 2(1) Constitution,[590] the teaching of Tahitian may never be obligatory, not for students, nor pupils, nor teachers.[591] Consequently, the original French Polynesian languages may only be taught in optional courses. There is no doubt that this is quite a thin cultural-legal bond around the three actors. Obviously, the authors of the Statute 2004 considered the speakers of local languages not to be in desperate need of empowerment, despite affirmations to the contrary (in art. 57(2) Statute 2004).

iii) Powers and preferences

What are the two main actors of the autonomy régime of French Polynesia, the assembly and the government, able to do? What are the competences of French Polynesia, as opposed to the competences of the metropolitan institutions? As may be expected, a core set of competences belongs to French Polynesia exclusively. This set is determined indirectly, because French Polynesia holds the residual competences (all those competences that are not explicitly attributed to the central institutions or the communes).[592] Hence, only the State competences are enumerated in art. 14(1) Statue 2004. This division of competences between French Polynesia and the State in principle seems rather conducive to French Polynesian autonomy. This first impression is deceptive, though. The competences reserved to the State are broad and important. According to the list in art. 14(1) Statute 2004, they encompass everything that relates to:[593] nationality, electoral rights, legal capacity of persons, marriage, heritage, etc. (no. 1); civil liberties and to the judicial system (no. 2); foreign policy (no. 3); defence matters (no. 4); entry and residence of foreigners (though not work permits, no. 5); security and public order, etc. (no. 6); money, credit, financial markets, etc. (no. 7); air connections (though only in part, no. 8); maritime police and security, etc. (no. 9); the communes (no. 10); civil and military service (no. 11); audiovisual

[589] Art. 57(4) Statute 2004. The assembly may replace Tahitian with one of the other local languages in certain schools (para. 5).

[590] Art. 2(1) Constitution: "*La langue de la République est le français.*" [Emphasis added].

[591] *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 69 and 70.

[592] Art. 13(1) Statute 2004. There are some doubts as to the basis of the "*clause générale de compétences*" of the local collectivities in general (see PASTOREL, 'Collectivité territoriale et clause générale de compétence', (2007) RD publ. (1) 53 ff.; or as to the proper competences of the territorial collectivities in France: JANICOT, 'Réflexions sur la notion de compétences propres appliquée aus collectivités territoriales en droit français', (2004) AJDA (29) 1574-1583).

[593] The numbers refer to the numbers used in the list in Art. 14(1) Statute 2004.

communication (no. 12); and university education, research, national titles and diplomas (no. 13).[594]

Spécialité législative

The exclusive competences of the State, broad as they are, are nevertheless subject to them being effectively and explicitly exercised by the State in French Polynesia. In other words, a general act which pertains to a domain where the State has got an exclusive competence and which is issued by the State (laws, regulations, etc.) only applies to French Polynesia, when it carries an explicit mention in this regard.[595] Such an act is to be applied in French Polynesia, only when the act itself expressly says so. Again, this principle of "*spécialité législative*"[596] is subject to a list of exceptions. This list pertains to acts that are traditionally considered as "*loi[s] de souveraineté*".[597] The exceptions are listed in art. 7(2) Statute 2004 and encompass the rules relating to the constitutional public powers (no. 1); national defence (no. 2); the public domain of the State (no. 3); nationality, state and capacity of persons (no. 4); and the agents of the State (no. 5). In all these domains, acts of the central institutions apply *eo ipso*, without the need of express mention. Once more, this arrangement seems to be to the advantage of French Polynesia, for this second list (in art. 7(2) Statute 2004) is quite short. And it could evidently be a boon for French Polynesian autonomy that with almost every act of the central institutions it must at least be considered whether or not it will apply in French Polynesia. However, the Constitutional Council again intervened to moderate the autonomy. The Council decided that the list in art. 7(2) Statute 2004 "must not be understood so as to exclude the other texts which, due to

[594] It is sometimes difficult to determine who is competent in a given case. The French State Council provides assistance by means of opinions under art. 174 and 175 Statute 2004. For a very useful overview of the opinions given by the State Council under this advisory procedure, which was introduced by the Statute 1996, see SEVERINO, 'La fonction consultative du Conseil d'Etat en matière de répartition de compétences entre l'état et la Polynésie française', (2003) AJDA (18) 927-931. According to Severino, the opinions of the State Council give rise to a "*véritable «jurisprudence»*" (p. 927 [emphasis added]).

[595] Art. 7 (1) Statute 2004.

[596] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, Paris, L'Harmattan, 2008, p. 36 [emphasis added]). It is important to note that the application of metropolitan legal rules can also be decided by decree (art. 74-I Constitution and art. 9(1) no. 1 Statute 2004; of course, only when in the domain of State competences). Extensively on the *"spécialité législative*": PERES, 'Application des lois et des règles en Polynésie française - répartition des compétences', (2002) 33 *Victoria University of Wellington Law Review* 182 ff, and MOYRAND, *Droit institutionnel de la Polynésie française*, *supra* FN 539, p. 320-326. As to the application of the *lois* in the departments: MICLO, *Le régime législatif des départements d'outre-mer et l'unité de la république*, Paris, Economica, 1982; and in overseas France in general: AUBY, *Droit des collectivités périphériques françaises*, Paris, Presses universitaires de France, 1992.

[597] Projet de loi organique portant statut d'autonomie de la Polynésie française (exposé des motifs), 2003, Annex au procès-verbal de la séance du Sénat (projet de loi no. 38) [brackets and emphasis added] (the term "*loi de souveraineté*" is used with regard to art. 7 Statute 2004).

their subject matter, are destined to rule the whole territory of the Republic."[598] This widening by the Council of the exception that State rules apply even without express mention, naturally, begs the question of the overall limits of the State powers and the remaining use of the list.[599] So far, one can only say that another limit to the State competences listed in art. 14(1) Statute 2004 (other than the limit constituted by the list itself) remains untouched by the ruling of the Constitutional Council. This other limit is the requirement of "*participation de la Polynésie française à l'exercice des compétences de l'État*",[600] which is further dealt with *infra,* in part c).

Explicit competences of French Polynesia

The Statute 2004 addresses the proper competences of French Polynesia, although the general clause in art. 13(1) grants French Polynesia all residual competences. In the 17 articles in section 2 of title III Statute 2004 (entitled "*compétences particulières de la Polynésie française*" [emphasis added]) the most sensitive competences of French Polynesia are dealt with. Their exact extent and the correlation with the State competences are clarified. Thus, French Polynesia may conclude conventions of decentralized cooperation (art. 17); sanction breaches of acts enacted by French Polynesian institutions (art. 20 and 21); create casinos (and other gambling services), audiovisual enterprises, and semi-public corporations (art. 24, 25, and 29), etc. Each of these competences is subject to some conditions laid down in the respective articles and to the proviso of national defence (reiterated in art. 27). Further competences may be found outside section 2 of title III Statute 2004. Art. 47, for instance, addresses the questions of what belongs to French Polynesia. Given the vast size of the South Pacific Ocean across which French Polynesia stretches, it is important that French Polynesia may, according to this article, regulate and exercise the right of exploitation of the exclusive economic zone.[601]

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[598] *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 18: "*cette énumération ne saurait être entendue comme excluant les autres textes qui, en raison de leur objet, sont nécessairement destinés à régir l'ensemble du territoire de la République*;" [translation by the author, emphasis added].

[599] Note that this modification by the Constitutional Council was inserted in art. 7(5) Statute 2004 in 2007 by the Loi organique tendant à renforcer la stabilité des institutions et la transparence de la vie politique en Polynésie française, *supra* FN 569.

[600] Section 3 of title III Statute 2004 [emphasis added].

[601] Art. 47(4): "*La Polynésie française réglemente et exerce le droit d'exploration et le droit d'exploitation des ressources naturelles biologiques et non biologiques des eaux intérieures, en particulier les rades et les lagons, du sol, du sous-sol et des eaux sur-jacentes de la mer territoriale et de la zone économique exclusive dans le respect des engagements internationaux.*" [Emphasis added].

Employment and land

Two among the proper competences of French Polynesia laid down in art. 15 ff. Statute 2004 catch the eye: the competences regarding local employment and real estate (art. 18 and 19 Statute 2004). These two competences authorize positive discrimination of the population of French Polynesia. This is unusual, because the supreme principle of *indivisibilité* of the Republic and the uniqueness of the French people[602] are normally opposed to this kind of preferential treatment. Hence the need for a special enabling provision in the Constitution.[603] Without this constitutional support, the Constitutional Council would have most likely struck down the two articles.

Art. 18 Statute 2004 concerns employment, which is as precarious in French Polynesia as anywhere. The employment situation in French Polynesia is exacerbated by the competitive advantage of mainland French citizens who enjoyed the more advanced educational services of the metropole. Due to this education gap measures that empower the local people prove necessary. Art. 18 allows French Polynesia to adopt local measures that favour the access of the people of French Polynesia to the labour market in the islands.[604] These measures may cover the public as well as the private (including self-employed) work sector. The crux in these privileges is the way the persons are singled out who benefit from them. One would expect that an ethnical approach would be taken to this question. However, it has been a traditional taboo to make distinctions within the French people based on the criteria of ethnicity or nationality. Moreover, with most French Polynesians being *demis*, such a distinction would be even harder to establish than it would be elsewhere. Citizenship as a criterion obviously drops out, too, because the persons aimed at are French citizens like the persons from the metropole. Lacking constitutional guidance, the authors of the Statute 2004 turned to residency as a criterion: only those may benefit from a preference measure who have been resident in French Polynesia for a sufficient period of time.[605]

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[602] See *supra* p. 157.

[603] Art. 74(10) Constitution: "[*D*]*es mesures justifiées par les nécessités locales peuvent être prises par la collectivité en faveur de sa population, en matière d'accès à l'emploi, de droit d'établissement pour l'exercice d'une activité professionnelle ou de protection du patrimoine foncier;*" [brackets and emphasis added].

[604] On the precursors of art. 18 Statute 2004, see MOYRAND, *Droit institutionnel de la Polynésie française*, *supra* FN 539, p. 297 (in particular footnote 304).

[605] Art. 18(1) Statute 2004: "*La Polynésie française peut prendre des mesures favorisant l'accès aux emplois salariés du secteur privé au bénéfice des personnes justifiant d'une durée suffisante de résidence sur son territoire ou des personnes justifiant d'une durée suffisante de mariage, de concubinage ou de pacte civil de solidarité avec ces dernières.*" [Emphasis added] Exception may be made for the duration of stays abroad for military service, studies, professional, family, and medical reasons (Art. 18(5) Statute 2004).

In addition, each specific preference measure must be based on "objective criteria in direct relation with the support or promotion of local employment."[606]

Art. 19 Statute 2004 addresses the land issue. Peoples that were subject to colonization regularly clash with their (former) "civilizers"[607] over the land issue. It poses the biggest challenge for any settlement with indigenous peoples, due to the indigenous peoples' frequent spiritual links with and collective approach to the land.[608] Matters get worse when land is both scarce and attractive.[609] In French Polynesia, this is the case: there is not only a very limited amount of land due to the topography of the islands; land is also a popular target of non-Polynesians (be they mainland French or foreigners), who are attracted by the beauty of the Pacific islands and whose economic powers outweighs the power of the locals by far. The late Marlon Brando's 99-years lease of the whole island of Tetiaroa is only the most striking example. The Statute 2004 addresses the land issue in a similar way as employment: with a system of preference that is based on residency.[610] According to art. 19(1) Statute 2004, French

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[606] Art. 18(4) Statute 2004: "[…] *justifiées par des critères objectifs en relation directe avec les nécessités du soutien ou de la promotion de l'emploi local.*" [Translation by the author, emphasis added].

[607] The expression is borrowed from KOSKENNIEMI, *The Gentle Civilizer of Nations*, *supra* FN 528.

[608] For French Polynesia, see BARÉ, *Le malentendu Pacifique*, Paris, Hachette, 1985, p. 63 ff., in particular p. 64: "*La proximité entre homme et terre était si grande qu'elle atteignait parfois l'identification*[.]" [Emphasis added]. For a profound analysis of the land situation in French Polynesia, see PANOFF, *Tahiti métisse*, *supra* FN 524, p. 127-138. Panoff *inter alia* states: "*Pendant plusieurs décennies ce fut, par exellence, le cadeau empoisonné que chaque administreur ou magistrat craignait de recevoir, et le casse-tête qui gâtait le farniente promis aux fonctionnaires envoyés à Papeete. Pour les gens du pays aussi le régime foncier était une source intarissable de soucis et de frustrations*." (P. 127 [emphasis added]). For a story illustrating the symbiosis between land and people in Polynesia, see DUPREL, *Verrücktes Paradis - Geschichten aus der Südsee*, Adliswil, Tanner, 1994 (first published: *Le paradis en folie*, Tahiti, Editions de Moorea, 1989), p. 117 – 158 ("*Das Rätsel von Vaiami*" ["The Riddle of Vaiami", translation by the author, emphasis added])

[609] See for instance Human Rights Committee, *Hopu and Bessert v. France*, 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev. 1, 1997 (1997). This is a dispute in which ordinary French Polynesians clashed with a company that is held by the territory of French Polynesia. The company intended to build a hotel complex in a site in which remains of pre-European origin were found (notably a burial ground) in Tahiti. Hopu and others protested against the use of the ancestral grounds by the company. The Human Rights Committee, after having refused to review the case under art. 27 International Covenant on Civil and Political Rights due to the French reservation in this regard, found a violation of the applicants' right to privacy and family (para. 10.3). (See the two dissenting opinions, the first dissenting with the refusal to consider art. 27 and the second with the extension of privacy and family to cover the facts of the case [both opinions are attached to the case].).

[610] The system of preferences established by the Statute 2004 is not without precursors: "*Dans son principe, l'idée de contrôle des transferts fonciers n'est guère nouvelle puisqu'elle remonte à 1845. En vertu d'un décret du 25 juin 1934, un tel contrôle a longuement eu cours en Polynésie française, d'abord mis en œuvre par le gouverneur puis par la Polynésie française. Mais alors qu'il fonctionnait depuis des décennies, ce régime d'autorisation préalable au transfert de propriété avait été remis en cause par le Conseil constitutionnel à l'occasion de l'examen de la loi organique relative au statut de 1996 (Cons. const., 9 avril 1996, n° 96-373 DC : Rec. Cons. const., p. 58). La révision constitutionnelle de mars 2003 restaure la*

Polynesia may subject transfers of real estate situated within its territory to a declaration.[611] Within two months after this declaration was made, French Polynesia may exercise a right of pre-emption, with a view to "preserve the belonging of real estate to the cultural patrimony of the population of French Polynesia and the cultural identity of the latter, and to safeguard or bring to bear the natural spaces."[612] Of course, compensation and expropriation principles apply, if the right of pre-emption is exercised. The right of is, however, excluded, when real estate is transferred to persons who have resided in French Polynesia for a sufficient period of time.[613] This is the element of (indirect) preference for French Polynesians.

Interestingly, the Constitutional Council, in the ruling on the Statute 2004, enhanced the grip of the local preference rules regarding real estate. The organic legislature wanted to extend the exception from the right to pre-emption to French citizens, persons born in French Polynesia, and those persons of whom one parent was born in French Polynesia.[614] The Council held that these three additional categories would be contrary to art. 72-3 and 74 Constitution, presumably because, according to these articles, the preferences may only be made available to the overseas population.[615] This part of the ruling of the Constitutional Council is interesting in three regards (i-iii). (i) The ruling guarantees that the local preference measures make sense. It would certainly not be sensible, in light of the land issue, to let all French citizens participate in the system of preference. On the contrary, this would severely undermine

possibilité d'un contrôle des transactions foncières en instituant un mécanisme de déclaration préalable." (MOYRAND, *Droit institutionnel de la Polynésie française*, *supra* FN 539, p. 298-299 [emphasis added]).

611 However, no declaration may be asked for in case of transfers between relatives in direct line or to the sideline of the fourth degree; also, a declaration is only required when the transfer takes place between living persons (art. 19(1) Statute 2004).

612 Art. 19(2) Statute 2004: "*préserver l'appartenance de la propriété foncière au patrimoine culturel de la population de la Polynésie française et l'identité de celle-ci, et de sauvegarder ou de mettre en valeur les espaces naturels*" [translation by the author, emphasis added].

613 Art. 19(3) Statute 2004: "*Les dispositions des deux premiers alinéas ne sont pas applicables aux transferts réalisés au profit des personnes: - justifiant d'une durée suffisante de résidence en Polynésie française, ou - justifiant d'une durée suffisante de mariage, de concubinage ou de pacte civil de solidarité avec une personne ayant l'une des qualités ci-dessus*." [Emphasis added] (note that, according to art. 19(5) Statute 2004 the same exceptions regarding the duration apply as in art. 18(5) Statute 2004). In the case of legal entities the corporate veil is pierced (i. e. the duration of the residence of the natural persons who control the entity is the relevant criterion, Art. 19(4) Statute 2004).

614 See the text of art. 19 as adopted by the national assembly, available under SERVICE PUBLIC DE LA POLYNÉSIE FRANÇAISE, <http://www.service-public.pf> (under "Statut de la Polynésie 2004", "Statut").

615 See *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 34 and 35 (the Constitutional Council's reasoning is short: it only points out that the three additional exceptions in the Statute 2004 would "disregard the notion of the population in the sense of art. 72-3 and 74 of the Constitution" ["*méconnaître la notion de population au sens des articles 72-3 et 74 de la Constitution*"; translation by the author, emphasis added])

the inherent logic of the preference, because mainland French citizens pose the most serious threat to Polynesians becoming owners of the land in French Polynesia. (ii) The ruling is instructive with regard to the French Parliament. Obviously, the French Parliament, when drafting the Statute 2004, did not exclusively have the best interests of the French Polynesians in mind. While prepared to offer some local preferences to French Polynesia, the Parliament sought to extend the benefits of that system to all French citizens. This approach would have meant that the one hand would have taken away what the other hand had given: with the additional exception proposed by the Parliament ("French citizens"), any perceivable local preference character of the system would have vanished. The system as such would have become nugatory. Moreover, the enabling provision of art. 74(10) Constitution would not have been necessary for such a system, as no distinction within the French people would have been made. Evidently, an act may distinguish between foreigners and French citizens, even if there is no express enabling provision in the Constitution (if one disregards the implications of the European market freedoms for a moment). (iii) The ruling also says something about the Constitutional Council. From other parts of the ruling on the Statute 2004, one could have gained the impression that the Council regularly applies the brake, when it comes to an extension of the autonomy (see the Council on the Tahitian language and on the application of acts of the central institutions in French Polynesia[616]). One could have also perceived these interventions as curtailing autonomy unnecessarily, because they were not imperatively mandated by the Constitution. However, with regard to the system of local preference regarding land, the Constitutional Council intervened to expand the autonomy of French Polynesia and guarantee its effectiveness. The Council did so by striking down a limit to the autonomy of French Polynesia, which was set by the Parliament. Therefore, the ruling of the Council as to the Statute 2004 must not overall be understood overall as unfavourable to autonomy. Furthermore, the Council does not seem to stick too closely to the principle of unity of the French people.

While the main components of the system of local preference are defined in the Statute 2004, important leeway is left to the organs of French Polynesia. Art. 18 and 19 Statute 2004 are implemented by "laws of the land". Hence, "laws of the land" may determine the periods of time spent abroad which are irrelevant in the calculation of the sufficient period of residence that entitles to the measures of local preference.[617] "Laws of the land" may also define generally how long a sufficient period of time is.[618] The government, furthermore, decides whether the right to pre-emption is

[616] See *supra* p. 165 and 166, respectively.

[617] Art. 19(5) Statute 2004.

[618] See art. 19(5) (and former art. 140(1) no. 12-13 Statute 2004; the list, of which no. 12-13 were parts, was deleted by the revision of 2007 [Loi organique tendant à renforcer la stabilité des institutions et la

exercised in a concrete case.[619] On the whole, the local preferences established by the Statute 2004 go far enough to justify their discussion under the heading of a "Polynesian citizenship"[620].

iv) Resources

What about "economic autonomy"?[621] The institutional setting outlined above begs the questions of how the system is financed and where the funds come from. French Polynesia enjoys "financial autonomy".[622] One may distinguish the proper resources of French Polynesia from those that are fed by others, notably the Republic. This distinction is based on the control over the resource.

French Polynesia has got its own financial resources: it has a "*compétence fiscale propre*".[623] It is put to work in French Polynesia's own tax code, according to which French Polynesia imposes a variety of taxes. Among these taxes the value added tax[624] contributes most to the revenues of French Polynesia: around 43 billion CFP[625]

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transparence de la vie politique en Polynésie française, *supra* FN 569] – the distribution of powers was not altered by this deletion, though): basically the assembly enacts the rules implementing the system of local preference.

619 Art. 91 no. 20 Statute 2004.

620 BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *supra* FN 520, para. 55: "*citoyenneté polynésienne*" [translation by the author, emphasis added].

621 BIGNON, Rapport à l'Assemblé Nationale sur le projet de loi organique portant statut d'autonomie de la Polynésie française, 2004, no. 1336, p. 15: *"Autonomie économique*" [emphasis added]. For an economic comparison of French Polynesia with other Pacific islands, see GILLE, 'La Polynésie française: un modèle de prospérité au sein du triangle polynésien', *in* Bambridge, Doumengue, Ollivier, Simonin, and Wolton (eds), *La France et les Outre-mers, l'enjeu multiculturel*, Paris, Hermès, 2002, p. 335-341. Gille notes the favourable situation of French Polynesia, with one positive aspect being that the Polynesians "*ne payent aucun impôt au budget de la République*" (p. 342 [emphasis added]).

622 Art. 129(1) Statute 2004: "*autonomie financière*" [emphasis added]. As to local financial autonomy in France, see PERETTI, 'Quelques réflexions sur la notion d'autonomie financière locale en Europe, et plus particulièrement sur l'autonomie fiscale locale', *in* Pauliat (ed.), *L'autonomie des collectivités territoriales en Europe - une source potentielle de conflits?* Limoges, pulim, 2004, p. 165-169.

623 Art. 199 undecies C Code général des impôts, 2008, consolidated text [emphasis added] (this is the *French* general tax code; in the article cited the code refers explicitly to French Polynesia; as to the method of codification see, for instance, SAGE, 'La méthode de codification à droit constant : sa mise en oeuvre dans l'élaboration du nouveau code de commerce et ses conséquences sur le droit applicable en Polynésie française', (2002) 33 *Victoria University of Wellington Law Review* 153-180).

624 Title IV Code des impôts, 2008, consolidated text.

625 Technically speaking, the overseas collectivities of France in the Pacific have their own money: the Pacific Franc (*Change Franc Pacifique*, CFP [or XFP, the international denomination]). However, the CFP is not freely floating, but fixed to the currency of France (since 1999 to the Euro at a fixed exchange rate of 1000 CFP to 8.38 Euros) and guaranteed by France. Money matters are handled collectively for all French

(approximately 350 million Euro) in 2007.[626] The direct taxes (*inter alia* an "*impôt sur les bénéfices des sociétés et autres personnes morales*", *"sur le revenu des capitaux mobilières*", and "*sur les transactions*", and an "*impôt foncier sur les propriétés baties*"[627]) supplied around 25 billion CFP (approximately 200 million Euro) in 2007.[628] A further important tranche is added by the customs duties levied by French Polynesia (around 27 billion CFP [approximately 220 million Euro][629])[630]. The introduction of the value added tax obviously shifted the financial focus of French Polynesia away from customs duties, which in 1994 still provided around 75% of the revenues.[631] Most of the revenue of French Polynesia is generated by the three main pillars of its economy: tourism, high-sea fishery, and farming of the famous Tahiti black pearl.[632]

The autonomy régime of French Polynesia is not only institutionally linked to the Republic, but also financially. It depends to a large extent on the contributions of the Republic. The moral foundation of these financial supplies is the nuclear debt: France operated a nuclear test centre (the *centre d'expérimentation nucléaire du Pacifique,* CEP) in Mururoa and Fangataufa until the 1990s.[633] Today, the financial implications of the centre are still large. On the basis of a "*pacte de progrès",*[634] which was agreed

collectivities in the Pacific by the *Institut d'émission d'outre-mer* (INSTITUT D'ÉMISSION D'OUTRE-MER, <http://www.ieom.fr>).

626 CONSEIL DES MINISTRES DE LA POLYNÉSIE FRANÇAISE, 'Communiqué de presse*',* 4 June 2008 (available at: <http://www.presidence.pf>), p. 5.

627 Title I chapter 1, chapter 2, chapter 3, and title II, chapter 2 Code des impôts, *supra* FN 624, respectively [emphasis added].

628 CONSEIL DES MINISTRES DE LA POLYNÉSIE FRANÇAISE, 'Communiqué de presse*', supra* FN 626, p. 5.

629 CONSEIL DES MINISTRES DE LA POLYNÉSIE FRANÇAISE, 'Communiqué de presse*', supra* FN 626, p. 5.

630 French Polynesia is able to levy its own customs duties owing to its special relationship with the European Union. France itself cannot impose customs duties any more, as the competence has shifted towards the European Union (under the common commercial policy).

631 POIRINE, 'Quel statut économique et social? - Bilan de dix ans de politique économique et sociale dans le cadre de l'autonomie interne', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 169-179, p. 169. See also the Loi d'orientation pour le développement économique, social et culturel de la Polynésie française, 1994, Law no. 94-99, JORF of 8 February 1994, p. 2144, annex, no. 6, in which the Republic vowed that it would help *"[a]ménager et moderniser la réglementation territoriale en matière de fiscalité par, notamment, l'introduction d'un système de taxe sur la valeur ajoutée*" [brackets and emphasis added].

632 BIGNON, Rapport à l'Assemblé Nationale sur le projet de loi organique portant statut d'autonomie de la Polynésie française, *supra* FN 621, p. 17.

633 See *infra* p. 209.

634 VERNAUDON, 'Le statut du territoire et le pacte de progrès', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 209-227, p. 209 [emphasis added].

upon by the elected French Polynesians and the French Government in 1993,[635] and the ensuing *loi d'orientation*,[636] the Republic concluded with French Polynesia several development contracts, which have now evolved into a "*dotation globale de développement économique*".[637] This is the "concrete financial translation of the autonomy":[638] French Polynesia can use these funds freely (without directions by the Republic). The transfer of these funds aims at a sound economic development of French Polynesia dissociated from the nuclear experiments. The aggregate financial involvement of the State in French Polynesia is hard to estimate.[639] In 2007, the State participated with more than 9 billion CFP (approximately 74 million Euro) in the budget of French Polynesia.[640] However, the weight of the State in French Polynesia is considerably larger. It can be gauged from the total amount of funds spent for French Polynesia in 2006: almost 160 billion CFP (approximately 1.3 billion Euro), including all financial means used for the exercise of the State competences (notably for the competences regarding education, national defence and security, the communes, as well as for the salaries of the State agents in general).[641] This comes down to over 620'000 CFP (approximately 5000 Euro) per resident.[642] To this sum an important amount of tax benefits granted by the State to those taxpayers who invest funds in French Polynesia must be added.[643] Furthermore, French Polynesia receives financing

[635] BIGNON, Rapport à l'Assemblé Nationale sur le projet de loi organique portant statut d'autonomie de la Polynésie française, *supra* FN 621, p. 15.

[636] Loi d'orientation pour le développement économique, social et culturel de la Polynésie française, *supra* FN 631.

[637] BIGNON, Rapport à l'Assemblé Nationale sur le projet de loi organique portant statut d'autonomie de la Polynésie française, *supra* FN 621, p. 15 [emphasis added].

[638] 'Interview accordé par M. Jacques Chirac, Président de la République', La dépêche de Tahiti, 22 July 2003: "*la traduction financière concrète de l'autonomie*" [translation by the author, emphasis added].

[639] COUR DES COMPTES DE LA RÉPUBLIQUE, Rapport public annuel 2007, 2007, online edition, p. 596: "*Les transferts directs et indirects de l'Etat au bénéfice de la Polynésie française prennent des formes très diverses qui rendent leur appréhension malaisée.*" [Emphasis added] The *Cour des comptes* mentions an aggregate sum of 600 million Euro for the year 2005 (p. 595, also for further explanations of how the budget of French Polynesia is composed).

[640] CONSEIL DES MINISTRES DE LA POLYNÉSIE FRANÇAISE, 'Communiqué de presse*', supra* FN 626, p. 5.

[641] HAUT COMMISSARIAT DE LA RÉPUBLIQUE EN POLYNÉSIE FRANÇAISE, '59,1 milliards de F CFP ont été dépensés par l'Etat en Polynésie française en 2006 (press release)*',* 7 August 2007 (available at: <http://www.polynesie-francaise.pref.gouv.fr/actualite/communiques/com-080807.asp>). The State, according to the *indemnité temporaire de retraite* programme (ITR)*,* allocates different pension supplements to civil servants in pension in overseas. This supplement was initially based on the difference in life costs and is particularly high for French Polynesia (an additional 75%).The ITR is to be phased out slowly in the coming years (DIDIER, 'Les polynésiens attendent plus des réponses aux questions économiques et sociales (entretien avec Yves Jégo, secrétaire d'Etat d'outre-mer)', La dépêche de Tahiti, 19 June 2008).

[642] HAUT COMMISSARIAT DE LA RÉPUBLIQUE EN POLYNÉSIE FRANÇAISE, '59,1 milliards de F CFP ont été dépensés par l'Etat en Polynésie française en 2006 (communiqué de presse)*', supra* FN 641.

[643] HAUT COMMISSARIAT DE LA RÉPUBLIQUE EN POLYNÉSIE FRANÇAISE, '59,1 milliards de F CFP ont été dépensés par l'Etat en Polynésie française en 2006 (communiqué de presse)*', supra* FN 641: in 2006, requests for tax deductions were made in a total amount of over 66 billion CFP (approximately 550 million

from sources of the European Union.[644] Altogether, "foreign" aid to French Polynesia is therefore very important.

c) Tones of a voice of French Polynesia

Four tones of the voice of French Polynesia can be distinguished in the autonomy régime. These tones are the outward-looking elements of the autonomy of French Polynesia. They essentially determine how loud the voice of French Polynesia is. They are: French Polynesia's participation in the State competences, the consultation of French Polynesia by the central institutions, the foreign policy powers of French Polynesia, and the representation of French Polynesia in the central institutions.

Participation in the State competences

The Statute 2004 contains an entire section about the participation of French Polynesia in the competences of the State. Art. 31(1) addresses French Polynesian participation, when the competences that art. 14 retains for the Republic are exercised. It was already pointed out that the list in art. 14 Statute 2004 is quite extensive and includes important domains such as national defence, security and public order, the communes, university, etc. However, art. 31 guarantees participation only in five relatively minor domains: private law regarding persons,[645] some policing functions,[646] (in principle) entry and residence of foreigners,[647] audiovisual communication,[648] and financial services provided by the postal institutions.[649] In these domains, probably because they are minor, the level of participation of French Polynesia is relatively high: the authorities of French Polynesia may adopt acts ("laws of the land" or regulations)

Euro). These requests concerned investments in French Polynesia only (such requests are based on a programme offered by the State to promote overseas investment; they are based on the Loi de programme pour l'outre-mer, 2003, Law no. 2003-660, JORF of 22 July 2003, p. 12320). According to the high commissioner about 50% of this sum can actually be deduced.

644 Such as the European Development Fund (see PRESIDENCE DE LA POLYNÉSIE FRANÇAISE, 'Signature de la convention de financement du 9ème FED – Moorea II et Punaauia III (press release)', 17 September 2008 (available at: <http://www.presidence.pf>, under "*actualités*").

645 Art. 31 no. 1 Statute 2004: "*Etat et capacité des personnes, autorité parentale, régimes matrimoniaux, successions et libéralités*" [emphasis added].

646 Art. 31 no. 2 Statute 2004: "*Recherche et constatation des infractions; dispositions de droit pénal en matière de jeux de hasard*" [emphasis added].

647 Art. 31 no. 3 Statute 2004: "*Entrée et séjour des étrangers, à l'exception de l'exercice du droit d'asile, de l'éloignement des étrangers et de la circulation des citoyens de l'Union européenne*" [emphasis added].

648 Art. 31 no. 4 Statute 2004.

649 Art. 31 no. 5 Statute 2004.

which are, according to art. 32, only subject to the approbation by the central institutions. Many of the other "exclusive" State domains according to art. 14 are addressed separately in art. 33 ff. Thus, French Polynesia may take part in the police mission of the State (art. 34) or in matters concerning university education (art. 37; mainly the University of French Polynesia, located in Papeete). Participation is formalized in agreements (*conventions*) between the State and French Polynesia, as for instance indicated in art. 37 para. II(3)[650] in university matters or in art. 168(2)[651] regarding aid by the State.

Consultation

Another, more general way for French Polynesia to make its voice heard exists in the process of consultation. Basically, consultation of French Polynesia, is to take place, whenever it is concerned: the opinion of the assembly of French Polynesia or the government of French Polynesia, must be asked, before provisions that are particular to French Polynesia are enacted.[652] Notably, the opinion of the assembly must be requested, when the statute of French Polynesia, the *loi organique*, is about to be changed. Furthermore, art. 97 specifies that the government of French Polynesia (the council of ministers) must be consulted on a number of questions. These are questions that relate to some of the more sensitive areas of State competences: civil security and catastrophes (art. 97(1) no. 1), entry and residence of foreigners (no. 3), or *inter alia* creation or elimination of communes (no. 4). Unsurprisingly, only consultation applies here. After all it is only consultation: the opinion voiced need not be taken into account. The same applies *a fortiori* to the wishes ("*voeux*"[653]) that the government of French Polynesia may utter in the domain of State competences.[654] Moreover, important limits are inherent in the process of consultation.[655]

[650] Art. 37 para. II(3) Statute 2004: "*La carte de l'enseignement universitaire et de la recherche, qui prévoit notamment la localisation des établissements d'enseignement universitaire ainsi que leur capacité d'accueil, fait l'objet d'une convention entre l'Etat et la Polynésie française.*" [Emphasis added]

[651] Art. 168(2) Statute 2004: "*Le haut-commissaire et le président de la Polynésie française signent, au nom, respectivement, de l'Etat et de la Polynésie française, les conventions mentionnées aux premier et deuxième alinéas de l'article 169 et à l'article 170.*" [Emphasis added]

[652] Art. 9, 9-1, and 10 Statute 2004

[653] Art. 98 Statute 2004 [emphasis added].

[654] Besides consultation, coordination between the authorities of French Polynesia and the Republic takes place in practice: PERES, 'Les enseignements de dix ans d'application du statut de 1984', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 121-128, p. 125-128 (for experiences made under the Statute 1984). On the "*commission paritaire de concertation*": FABERON, 'Le

Foreign policy powers

The autonomy régime of French Polynesia does not constitute a simple protectorate. One reason for this is that French Polynesia takes part in foreign policy. Here, the tone of the voice of French Polynesia is most audible, because even third countries, not just the Republic, can hear it.[656] One can distinguish three types of French Polynesian action that concern foreign policy (i-iii). According to the Statute, French Polynesia may take some actions on its own (i). These are the actions that could amount to a proper foreign policy of French Polynesia. French Polynesia may open representations at third States or international organizations;[657] the president of French Polynesia may negotiate administrative agreements with other State administrations;[658] and French Polynesia may become a member of international organizations of the Pacific.[659] However, there are clear limits to these proper foreign policy powers. Representations may not have a "diplomatic character".[660] The Constitutional Council clarified that the administrative agreements may not concern more than minor or technical aspects which must be dealt with due to the conclusion of previous international agreements by the Republic. According to the Council, these administrative agreements are also subject to all the formalities of "true" international agreements (see the next paragraph).[661] Moreover, French Polynesian membership in international organizations of the Pacific is subject to authorization by the Republic.[662] Ergo, the capacity of

schéma institutionnel du statut de 1984', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 77-89, p. 87 [emphasis added].

655 E. g. when new provisions are introduced by the Parliament in the discussion of the project of an act, these provisions are not the subject of the opinion of the assembly of French Polynesia, because the opinion was given before the changes are made. Thus, for instance, as to the significant art. 166(2) Statute 2004 (discussed *infra* p. 183), by means of which the Senate introduced a general de-blocking power of the high commissioner, the assembly of French Polynesia could not give its opinion (see BIGNON, Rapport à l'Assemblé Nationale sur le projet de loi organique tendant à renforcer la stabilité des institutions et de la transparence de la vie politique en Polynésie française, 2007, no. 417, p. 33).

656 See GOHIN, 'L'action internationale de l'Etat outre-mer', (2001) AJDA (5) 438-443, for the much more restricted, almost inexistant foreign policy powers of the French overseas departments.

657 See art. 15 Statute 2004 for the limits (in particular, France must have recognized the third State or be member of the international organization [if it is not an international organization of the Pacific]; the right to have a representation in principle also applies to territorial entities of third States).

658 Art. 16 Statute 2004.

659 Art. 42(1) Statute 2004.

660 *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 27: "*ne saurait* […] *conférer à ces représentations un caractère diplomatique*" [translation by the author, emphasis added].

661 *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 28.

662 Art. 42(1) Statute 2004.

French Polynesia to act in its own name in the international arena is very small.[663] This low level of foreign policy capacity by itself imposes the conclusion that French Polynesia lacks international legal personality.

French Polynesia may also act in the name and on behalf of the Republic (ii), in particular for the conclusion of international agreements. Naturally, authorization is required in every case. However, the need for authorization is not entirely evident in art. 39 Statute 2004: according to paragraph 1 the president of French Polynesia may negotiate international agreements that are situated within the sphere of competence of French Polynesia. The authorities of the Republic are merely informed of the intention of the president to negotiate. But they may also oppose the negotiations within a month after being informed (or just demand to be present at the negotiations).[664] In addition, as the Constitutional Council underlined, the authorisation to sign an agreement in the name of the Republic is needed in every single case (and, of course, the constitutional ratification procedure must be followed).[665] Accordingly, the procedure to be followed is altogether similar to the case, in which French Polynesia would like to negotiate an agreement at the basis of which is a *State* competence. Here, the authorities of the Republic may invest the president with the necessary powers to negotiate and sign an international agreement.[666] The main difference between the two cases (agreement based on a competence of French Polynesia or of the State, respectively) seems to be formal: in the first case, the initiative and the first steps are taken by the president of French Polynesia, whereas in the second case, the central authorities would have to go ahead. This distinction is most likely blurred, when the negotiation of a concrete agreement is on the table, not least because international agreements rarely fit into domestic categories based upon which competences are distributed within a State.[667]

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[663] Foreign policy powers of French Polynesia have not been without problems in the past. See DE DECKKER, 'Organisation de la Cité et relations avec la France dans l'Espace mental polynésiens', *supra* FN 530, p. 45: "*Rappelons ces moments ubuesques lors desquels le Président du Gouvernement* [of French Polynesia] *était accompagné par le Haut-Commissaire qui ne le lâchait pas d'un mètre dans les enceintes régionales comme à la Commission du Pacifique Sud, à titre d'exemple. Le relationnel extérieur relevait exclusivement de la compétence d'Etat.*" [Brackets and emphasis added].

[664] Art. 39(2) Statute 2004.

[665] Art. 39(3) Statute 2004 and *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 58.

[666] Art. 38(1) Statute 2004.

[667] Compare only with the complex case law (including the opinions) of the European Court of Justice pertaining to the power of the European Community to conclude international agreements (see e. g. the infamous European Court of Justice, *Opinion 1/94*, ECR I-05267 (1994), regarding the World Trade Organization Agreement).

French Polynesia may act together with the Republic (iii). This is the case, when the central authorities, based on a State competence, want to negotiate an international agreement, but refuse to let the president of French Polynesia conduct the negotiations. According to art. 38(2) Statute 2004 they may then invite the French Polynesian president to participate in the negotiations. Obviously, the inclusion of the president makes most sense, when an agreement pertains to French Polynesia (though this is not a *conditio sine qua non*). When the negotiations not only pertain to Polynesia, but relate to its sphere of competences, and the central authorities take the initiative to negotiate an agreement, the president of French Polynesia is necessarily associated with the negotiations.[668] The same applies to the negotiations between France and the European Union as to the relations between the latter and French Polynesia.[669]

Representation in the central institutions

The fourth and last tone of the voice of French Polynesia is again one that can only be heard within the Republic: it relates to the representation of French Polynesia in the metropole. French Polynesia is not only present in Paris via its delegation,[670] which *inter alia* interacts with the French minister who is in charge of overseas matters. French Polynesia's participation in the affairs of the Republic is also institutionally guaranteed: two deputies and two senators are elected in French Polynesia (to the national assembly and to the senate, respectively).[671] These members of the Parliament do not technically represent French Polynesia. They are not mandated by French Polynesia; nor do they receive instructions from the French Polynesian authorities. In the words of the Constitutional Council: "if the deputies and senators are elected in general elections, direct for the first, indirect for the second, each and everyone of them represents the whole Nation in the Parliament, and not the population of his [or her] electoral constituency."[672] No one would, of course, doubt that each member of the Parliament represents the whole nation. But certainly no one would doubt, either, that each member of the Parliament acts in accordance with her or his own interests,

[668] Art. 40 Statute 2004. GOESEL-LE BIHAN, 'Le Conseil constitutionnel et la conclusion des accords internationaux par les collectivités ultra-marines: un exemple de réserves contestables', (2006) RFDC (66) 376 (with further reference to GOESEL-LE BIHAN, 'La participation des départements et régions d'outre-mer à la conclusion des accord internationaux: essai d'analyse générale', (2006) RFDC (65) 3-11), aptly sums up the situation: French Polynesia can never conclude agreements; it can only negotiate.

[669] Art. 41 Statute 2004.

[670] See DÉLÉGATION DE LA POLYNÉSIE FRANÇAISE À PARIS, <http://www.polynesie-paris.com>.

[671] See art. 4 Statute 2004.

[672] *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 14: "*si députés et sénateurs sont élus au suffrage universel, direct pour les premiers, indirect pour les seconds, chacun d'eux représente au Parlement la Nation tout entière et non la population de sa circonscription d'élection.*" [Translation by the author, emphasis added, brackets in the English translation added].

which are *de facto* strongly determined by the interests of the citizens who elected the representative.[673] Hence, it is safe to assume that the four members of Parliament who are elected in French Polynesia take care of the interests of French Polynesia in the Parliament, at least when these interests are at stake.

The sum of the different forms of participation, the foreign policy powers, and the representation in the metropole undoubtedly amounts to a voice of French Polynesia. However, this voice is very often obliged to sing along the tune of the Republic: the important foreign policy powers remain with the Republic and the minor powers that are granted to French Polynesia are mostly subject to authorizations by the central authorities; in important matters, French Polynesia is only consulted and no guarantee is given that its opinion is taken into account; the Polynesian members of the Parliament are officially considered as representatives of the whole nation, not of French Polynesia. No wonder then that the voice of French Polynesia is not very loud nor that it often goes unheard. Moreover, the voice is partly controlled by the Republic. It is to this aspect (control) that this study now turns.

d) The strings of the Republic

Up to now it has certainly become apparent that the Republic retains a great deal of control over the autonomy régime of French Polynesia. We have already examined the competences which the State retains. These are mostly the *pouvoirs régaliens* which cannot be transferred according to French doctrine.[674] They are addressed in art. 14 Statute 2004 and supported by the exceptions to the principle of "*spécialité législative*" in art. 7(2).[675] The competences retained by the Republic accordingly relate to major domains, such as national defence (see the proviso in art. 27) or the communes (see title III section 4 Statute 2004). We have seen that the Republic also reserves the right to give the green light to most foreign policy moves of French Polynesia (bar the right to be represented at other States and at international organizations[676]). Furthermore, the provisions concerning the use of language (art. 57) and university education (art. 14(1) no. 13) can be seen under the aspect of control as well. With French being the only official language and with the Republic being in charge of university education to

[673] This consideration is even more evident in the case of the members of the assembly of French Polynesia (see *infra* section 3.3.

[674] ORAISON, 'Le nouveau statut d'autonomie renforcé de la Polynésie française', (2004) RFDA (3) 535 "[…] *qui ne sont pas transférables aux collectivités territoriales ultramarines parce que relevant des attributions régaliennes d'un Etat souverain et unitaire.*" (referring to art. 73 Constitution [emphasis added]).

[675] See *supra* p. 166.

[676] See art. 15 Statute 2004 and *supra* p. 177.

a large degree, further important parameters of the long-term identity of French Polynesia are under the control of the Republic. We have diagnosed the dependence of French Polynesia's finances on France, too. However, the Republic does not only keep a set of competences and the financial leverage. It also has some specific instruments at its disposal to control the workings of the autonomy régime of French Polynesia: the strings by means of which it budges the actors of French Polynesia; but which it could also cut and make them fall. Four of these strings attract particular attention: the veto over the autonomy régime, the high commissioner, the powers of the French President to dissolve the assembly of French Polynesia, and the courts.

The veto over the autonomy régime

The Republic holds the veto over the autonomy régime of French Polynesia as a whole. The autonomy régime is *not* based on an agreement between two parties on an equal footing. Instead, the French *pouvoir constituant* (by means of an amendment of the Constitution) and the organic legislature (by means of organic laws) established the autonomy régime of French Polynesia. This way of granting autonomy to French Polynesia is by large a unilateral process. And so would be the taking away of the régime.[677] Admittedly, the organs of French Polynesia have a say in this process based on the principles of participation.[678] The four members of Parliament who are elected in French Polynesia may also influence the development of the autonomy régime. However, the important point is that the central authorities, most notably the *pouvoir constituant*, decide over the fate of the French Polynesian autonomy. They have the proverbial last word. If they unilaterally decide to revoke the autonomy they have once granted, nobody can stop them. Hence, the fate of the autonomy of French Polynesia as a whole ultimately depends on the goodwill of the Republic. One does well to keep this possibility of revoking the autonomy régime of French Polynesia in mind, although the Republic has got more subtle ways of taking influence on the institutions of the autonomy régime at its disposal.

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[677] Of course, the progress that has been made in the series of statutes of French Polynesia must not be ignored. Undoubtedly, the autonomy régime of French Polynesia has gained in "*sécurité*" and "*solennité*" in the course of time (RONCIÈRE, 'Ouverture du Colloque par le Haut-Commissaire de la République en Polynésie française', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 9-13, p. 11 [emphasis added]).

[678] See *supra* section c) (and art. 9(1) no. 1 Statute 2004, which guarantees that the assembly of French Polynesia is consulted whenever acts introduce, change, or modify provisions that relate specifically to French Polynesia).

The high commissioner

The symbol of the influence of the Republic in French Polynesia is the high commissioner of the Republic. In many ways, he (or she) is the successor to the colonial governor.[679] Not unlike a prefect, she (or he) has got two main functions: taking care of everything that has to do with the State competences and overseeing the autonomous collectivity. Mainly in the first function, the high commissioner "represents the State and the French government and holds the powers of the Republic". He (or she) is "in charge of the national interest, of the respect of the law and international obligations, of the public order […]."[680] The second function is more interesting at this point. The high commissioner is in charge of ensuring both the legality of the acts of the institutions of French Polynesia and the observance of the division of competences.[681] In this function she (or he) brings acts that were enacted by the organs of French Polynesia to the administrative tribunal in Papeete or, as the case may be, to the State Council to have the legality of the acts reviewed.[682] Much like the prefects since the decentralization of the Republic, the high commissioner him- or herself does not have the power (any more) to verify officially the legality (let alone the adequacy) of these acts. He (or she) does not exercise a *tutelle* over French Polynesia, but only triggers the legal control by the courts.

Various other tools are at the disposal of the high commissioner, though. She (or he) has the right to be heard in the council of ministers[683] and in the assembly of French Polynesia.[684] He (or she) is informed of their agenda,[685] may override the agenda of the assembly in case the central authorities ask for the assembly's opinion,[686] and send back the "laws of the land" to the assembly for a mandatory re-reading.[687] More generally, the high commissioner performs the task of assuring that the institutions of French Polynesia are not blocked. Blockage is indeed a serious problem in French

[679] RAMBAUD and ROBLOT-TROIZIER, 'Le rôle du représentant de l'Etat en Polynésie française', (2008) RFDA (3) 603-605.

[680] Art. 3 Statute 2004: "*Le haut-commissaire de la République, représentant de l'Etat, représentant de chacun des membres du Gouvernement, est dépositaire des pouvoirs de la République. Il a la charge des intérêts nationaux, du respect des lois et des engagements internationaux, de l'ordre public et du contrôle administratif.*" [Translation by the author, emphasis added].

[681] Art. 166(1) Statute 2004.

[682] Art. 172 and 176 Statute 2004.

[683] Art. 84(3) and (4) Statute 2004.

[684] Art. 154(1) and (2) Statute 2004.

[685] Art. 84(1) and 153(3) Statute 2004.

[686] Art. 153(2) Statute 2004.

[687] Art. 143(3) and (4) Statute 2004.

Polynesia. It happened several times in the past years that the assembly, the president, and the president of the assembly were pitted against each other, which resulted in a deadlock of the institutions, because no one took the necessary decisions any longer (such as to convene the assembly).[688] The high commissioner was, therefore, given a general mandate (in the 2007 amendment of the Statute 2004[689]) to prevent this kind of situation and guarantee the well-functioning of the institutions:

> *"In order to guarantee the security of the population, the normal functioning of the public services, or to put an end to a grave and manifest violation of the provisions of this organic law relating to the functioning of the institutions and when these authorities have not taken the decisions which are imposed by their duty according to the law, the high commissioner of the Republic may, in case of urgency and after having put them in default without result, take the measures that are necessary. He* [sic] *informs the president of French Polynesia without delay."*[690]

The de-blocking capacity of art. 166(2) Statute 2004 is supplemented by other provisions that confer on the high commissioner the authority to intervene in case of blockage. When the regular session of the assembly cannot take place, for instance, because the president of the assembly fails to convene the session, the high commissioner ultimately calls the members to the session.[691] One is tempted to ask the question whether such powers of the State to intervene are necessary. Is it not a sign of paternalism to (re-)introduce these options of intervention, simply because the mechanisms of the autonomy régime are sometimes blocked? Arguably, the powers are limited. The high commissioner may only intervene when the situation is grave ("grave and manifest violation", "urgency"); and the situation must result from the

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[688] See *infra* section 3.3.

[689] Loi organique tendant à renforcer la stabilité des institutions et la transparence de la vie politique en Polynésie française, *supra* FN 569.

[690] Art. 166(2) Statute 2004: "*Afin d'assurer la sécurité de la population, le fonctionnement normal des services publics ou de mettre fin à une violation grave et manifeste des dispositions de la présente loi organique relatives au fonctionnement des institutions et lorsque ces autorités n'ont pas pris les décisions qui leur incombent de par la loi, le haut-commissaire de la République peut prendre, en cas d'urgence et après mise en demeure restée sans résultat, les mesures qui s'imposent. Il en informe sans délai le président de la Polynésie française.*" [Translation by the author, brackets and emphasis added].

[691] Art. 119(2) Statute 2004. Similarly, the high commissioner may intervene, when the president of the assembly fails to convene an extraordinary session of the assembly, which was duly requested (see art. 120 Statute 2004). Compare with the powers of the high commissioner in the budgetary procedure (art. 185(4) Statute 2004).

refusal of an actor to take a decision according to its duty.[692] Then, however, all means are basically at the disposal of the high commissioner ("necessary"). Admittedly, the aim of preventing blockages is served better by granting general de-blocking competences to the high commissioner than by further fine-tuning the Statute. After all, it is impossible to plug all loopholes. However, would it not have been better to let autonomy be autonomy, instead of blowing breaches in it? Should not the Republic have refrained from adding more strings? After all, the problems in French Polynesia rather point at a lack of political culture and trust and of a sense of responsibility. Is this lack not better addressed by political education, by adaptation of the actors as time passes, and maybe by conditioning financial aid on the smooth functioning of the institutions?

Dissolution of the French Polynesian assembly by the French President

Further controlling instruments of the Republic, which are not linked to the high commissioner, exist in the Statute 2004. Most prominent among them is the power of the President of the Republic to dissolve the assembly of French Polynesia.[693] This is a strong controlling tool. Two cases must be distinguished: when the President dissolves the assembly, because the institutions of French Polynesia are not functioning;[694] and when he does so at the request of the government of French Polynesia.[695] Basically, the first is a de-blocking power, similar to the power of the high commissioner. Reasonable (or not) as this may seem, the impossibility of the functioning of the institutions of French Polynesia is certainly quite a loose concept. Moreover, the non-functioning is the only condition mentioned in art. 157(1).[696] The second reason to dissolve the assembly (i. e. at the request of the government of French Polynesia) is

[692] The ruling of Constitutional Council (*Decision re "Loi organique tendant à renforcer la stabilité des institutions et la transparence de la vie politique en Polynésie française"*, *supra* FN 572, para. 18) clarifies that art. 166(2) Statute 2004 only applies, when a decision is not taken. In other words, both sets of condition (on the one hand, a threat to the security, to the normal function of the institutions, or to the provisions of the Statute as such; on the other hand, the refusal to take a decision) must be met for the high commissioner to be allowed to intervene.

[693] As to the power of the President to dissolve the assembly (also in other territorial collectivities): CAILLE, 'Le Conseil d'Etat et la crise politique en Polynésie française', (2005) RFDA (6) 1120.

[694] Art. 157 Statute 2004.

[695] Art. 157-1 Statute 2004; version "*à l'anglaise*" (GOHIN and JOYAU, 'L'évolution institutionnelle de la Polynésie française - Loi n° 2004-192 du 27 février 2004 portant statut d'autonomie de la Polynésie française', (2004) AJDA (23) 1251 [emphasis added]).

[696] Art. 157 (1) Statute 2004: "*Lorsque le fonctionnement des institutions de la Polynésie française se révèle impossible, l'assemblée de la Polynésie française peut être dissoute par décret motivé du Président de la République délibéré en conseil des ministres, après avis du président de l'assemblée de la Polynésie française et du président de la Polynésie française.*" [Emphasis added]

the counterpart of the motion of no-confidence of the assembly of French Polynesia.[697] It is the only possibility for the government of French Polynesia to dissolve the assembly. However, the dissolution is in the discretion of the President of the Republic.[698] In contrast to the dissolution in case of non-functioning of the institutions, the President need not state any reasons nor ask the opinion of the assembly of French Polynesia. Hence, French President Jacques Chirac granted the dissolution of the assembly in spring 2004 at the simple request of Gaston Flosse, who was president of French Polynesia at the time. Some authors called the decree of 2 April 2004, which enacted the decision to dissolve the assembly, a "*dissolution de complaisance*".[699]

The courts

The courts are the last aspect of control by the Republic. The judiciary system belongs to the *pouvoirs régaliens* of the Republic. This is by no means self-evident, for in other States (notably federal States) parts of the judiciary system (though not the whole) are left to the constituent entities. In France, the courts are part and parcel of the Republic.[700] Thus the civil, penal, and administrative jurisdiction is always performed by a State organ (as opposed to an organ of a territorial collectivity).[701] This monopoly of jurisdiction is important, because it means that the legal review of acts of French Polynesia ("laws of the lands", decisions, etc.) is always in the hands of State organs, albeit independent State organs.

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[697] *Supra* p. 161.

[698] Art. 157-1 Statute 2004: "*A la demande du gouvernement de la Polynésie française, il peut être décidé, par décret du Président de la République délibéré en conseil des ministres, de procéder au renouvellement de l'assemblée de la Polynésie française avant le terme du mandat fixé à l'article 104.*" [Emphasis added]

[699] THIELLAY, 'Le statut de la Polynésie française à l'épreuve d'un an de crise', (2005) AJDA (16) 869 [emphasis added].

[700] On the judicial system in French Polynesia, see MICHAUX, 'L'organisation judiciaire en Polynésie française', (2001) 32 *Victoria University of Wellington Law Review* 729-740. That the judicial system is part of the Republic does not mean that it is not adapted to the local needs. Michaux describes two particular features of the French Polynesian judicial system: the "travelling judge" ("*justice forain*" p. 732 [emphasis added]) and the "Compulsory Reconciliation Commission in Real Estate matters" ("*Commission de Conciliation Obligatoire en Matière Foncière*", p. 738 [emphasis added]). For the problems of the judicial system in French Polynesia (with the request for a "*Bateau-Justice"*): BAUDRAND, 'Rapport rédigé le 14 mars 1963 par le Président du Tribunal supérieur d'Appel de Papeete, adressé au garde des sceaux', 1963 (available at: <http://www.ca-papeete.justice.fr>).

[701] For a good, yearly overview of case law regarding French Polynesia, see UNIVERSITÉ DE POLYNÉSIE FRANÇAISE, Rev. jur. polynésienne, <http://www.upf.pf>, for instance, JOYAU and MOYRAND, 'Chronique de jurisprudence relative à la Polynésie française', (2002) 8 Rev. jur. Polynésienne 209-230.

For the structure of the autonomy régime the administrative jurisdiction is of particular significance. Normally, the administrative tribunal in Papeete, which is part of the Republic's judicial system, is competent to review the legality of acts and decisions passed by the organs of French Polynesia.[702] Among others, the high commissioner prompts the tribunal to review the acts and decisions which he (or she) considers to be illegal.[703] However, for the review of some acts the State Council, which is the highest administrative court of the Republic, must be directly and exclusively addressed. Broadly said, the jurisdiction of the State Council covers the acts and decisions of greater importance.[704] These include notably the "laws of the land".[705] The State Council reviews their legality based on the constitution, organic laws, international obligations, and the general legal principles.[706] The State Council is also competent for incidental control, in case the legality of a "law of the land" is at stake in a proceedings before a lower court.[707] Then this (lower) court asks a "*question préjudicielle"*[708] to the State Council, much like the national courts request preliminary rulings from the European Court of Justice. Apart from the "laws of the land", the State Council reviews the legality of other important acts according to specific provisions of the Statute 2004: the election of the president of French Polynesia by the assembly;[709] acts regarding the constitution of the government;[710] the election of the assembly;[711] the internal rules of procedure of the assembly;[712] the local referendum and consultation;[713] acts that compromise the functioning or the integrity of an installation concerning national defence;[714] and, incidentally, acts when the application of the

[702] See also art. 175(1) Statute 2004 for the possibility to ask the administrative tribunal an opinion.

[703] Art. 172(1) Statute 2004. According to art. 171 section II Statute 2004 a number of acts and decisions must be transferred to the high commissioner.

[704] For a list of all the decisions handed down by the State Council, which concern French Polynesia and New Caledonia (until spring 2007), see MOYRAND, *Droit institutionnel de la Polynésie française*, *supra* FN 539, p. 365-366.

[705] Art. 176 section I Statute 2004 (also for the persons entitled to bring a case to the State Council).

[706] Art. 176 section III(1) Statute 2004.

[707] Art. 179 Statute 2004.

[708] *Decision re "Loi organique portant statut d'autonomie de la Polynésie française"*, *supra* FN 539, para. 112 [emphasis added].

[709] Art. 70(2) Statute 2004.

[710] Art. 82 Statute 2004.

[711] Art. 116 Statute 2004.

[712] Art. 123 Statute 2004.

[713] Art. 159 section XV and art. 159-1 last para. Statute 2004.

[714] Art. 172(7) Statute 2004: "*Si le haut-commissaire estime qu'un acte pris par les institutions de la Polynésie française, soumis ou non à l'obligation de transmission, est de nature à compromettre de manière grave le fonctionnement ou l'intégrité d'une installation ou d'un ouvrage intéressant la défense nationale, il peut en demander l'annulation pour ce seul motif. Il défère l'acte en cause dans les deux mois suivant sa transmission, ou sa publication ou sa notification, au Conseil d'Etat statuant au contentieux.*" [Emphasis added] (of course, the nuclear test site in Mururoa was such an "*installation*").

division of competences between the State, French Polynesia, and the communes, or between the organs of French Polynesia is contested.[715]

The jurisdiction of the State Council, in particular for "laws of the land", is a tribute to the special status of the autonomy régime of French Polynesia.[716] In a sense, the jurisdiction of the State Council regarding French Polynesia is similar to the jurisdiction of a constitutional court in a federal State. However, why is the State Council, instead of the French Constitutional Council, competent to review the acts mentioned? The issue is particularly salient, because in the case of the autonomy régime of New Caledonia the jurisdiction was conferred on the Constitutional Council.[717] The question remains open. One can only point out two facts. First, the difference in jurisdiction between the State Council and the Constitutional Council is not purely academic. It is real, because the Constitutional Council reviews only the constitutionality of an act (and not the broader legality, which includes *inter alia* the general legal principles).[718] Secondly, the jurisdiction of the Constitutional Council is not totally excluded in what regards French Polynesia. Of course, it reviews the constitutionality of the organic laws modifying the autonomy statute of French Polynesia (e. g. the Statute 2004).[719] But the Constitutional Council also has jurisdiction in a special case: when an act (*loi*) of the French Parliament (which applies in French Polynesia), does not respect the division of competences between the Republic and French Polynesia as it is established in the Statute 2004. In other words,

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[715] Art. 174 Statute 2004. (See also the request for an opinion from the administrative tribunal in art. 175 Statute 2004.) On this procedure which ends with an "*avis*" of the State Council, see SEVERINO, 'La fonction consultative du Conseil d'Etat en matière de répartition de compétences entre l'état et la Polynésie française', *supra* FN 594 (in particular p. 927 ff. on the opinions given by the State Council).

[716] The jurisdiction of the State Council over the "laws of the land" was also, at least partly, introduced due to a general lack of acceptance of the jurisdiction of the administrative tribunal in Papeete over the deliberations of the assembly (and the lack of respect for the autonomy of French Polynesia by the tribunal in the decisions taken in these matters). See FLOSSE, 'Pour une réforme du statut de 1984', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 229-233, p. 229; Faberon in TEPARI, PEAUCELLIER, FABERON, DROLLET, CHAUCHAT, VERNAUDON, POUPET, LEONTIEFF, and DE GOUTTES, 'Débats (sur le futur du statut)', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 235-244, p. 236; or SEVERINO, 'La fonction consultative du Conseil d'Etat en matière de répartition de compétences entre l'état et la Polynésie française', *supra* FN 594, p. 926.

[717] The correlation between French Polynesia and New Caledonia is discussed *infra* p. 214.

[718] The difference is well explained with all details in NEUFFER, 'Le contrôle des lois du pays de la Polynésie française', (2006) *La Semaine Juridique Administrations et Collectivités territoriales* (23) 768-772. Neuffer comes to the conclusion that the control of the "laws of the land" by the State Council constitutes a mix of, on the one hand, the constitutional control of *lois* by the Constitutional Council and, on the other hand, the standard administrative control of acts by the State Council (p. 772).

[719] As to organic laws in general, see VILLIERS, *Droit public général*, Paris, LexisNexis, 2006, p. 84-85.

when the French legislature encroaches on the competences of French Polynesia, the Constitutional Council can be seized. This faculty belongs to the president or the assembly of French Polynesia, the French Prime Minister, or the presidents of the National Assembly or the Senate, respectively. If the Constitutional Council confirms the encroachment, French Polynesia may pass acts that do not respect the act (*loi)* of the French Parliament. This jurisdiction of the Constitutional Council is a unique example of parity: without it, French Polynesia would not have any means of protecting its competences according to the Statue, while the Republic can always defend itself against incursions by French Polynesia (via the jurisdiction of the State Council for acts of French Polynesia). Moreover, it is evident why the Constitutional Council has jurisdiction in this case: because the State Council never has jurisdiction to review the constitutionality of *lois*. After all this is the purpose for which the Constitutional Council was created. One should not be misled, though. The protection of French Polynesia granted by the jurisdiction of the Constitutional Council is relative. The French Parliament, even in case of a ruling of the Constitutional Council which confirms the violation of the division of competences (as established in the Statute 2004) by a *loi*, remains free to change the Statute 2004. To do so, the Parliament must only dress as organic legislature.

e) A modest autonomy régime

The autonomy of French Polynesia proves to be rather modest in terms of identity, voice, as well as resources. The autonomy régime of the Statute 2004 depends and relies to a large extent on the Republic. The latter performs important tasks (such as in defence and security, public order, education, or jurisdictional matters) and invests significant financial resources in French Polynesia. It also pulls important strings: French Polynesia has little say in the fate of the autonomy régime, not least when it comes to the ultimate veto over the existence of the régime as such. The Republic, represented by the high commissioner, is also very much present in the daily life of the institutions of French Polynesia.

The autonomy régime of French Polynesia is a complex system. It has many facets and properties. It is certainly not an absolute entity, for it maintains many links with the State. The structure of the Republic is imprinted in the autonomy régime. This mark is not only evident in that the autonomy régime resembles in many aspects the other, regular French territorial entities (the *département* and the *région*) or the central institutions of the Republic. The constitutional concepts of the French Republic also determine the design of the autonomy régime of French Polynesia. Thus, the constitutional concept of *pouvoirs régaliens*, in the French logic, prohibits the transfer of certain competences to territorial entities. Hence, the constitution sets concrete limits to an autonomy régime in France. In this regard, however, it is important not to

make these constitutional concepts an absolute. They are subject to interpretation and change like any other concept. After all, constitutional concepts can also be seen as part of an autonomy régime. In this light, they are amenable to negotiation.

Aspects of minority protection can be detected in the autonomy régime of French Polynesia. They not only manifest themselves in the autonomy régime as such, which provides additional space for a *population* which is different in many regards from the mainland inhabitants of France. Minority protection can also be sensed in the nucleus of affirmative action, which consists in the (potential) privileged access of French Polynesians to employment and real estate according to the Statute 2004. Thus, the inherency of minority protection to autonomy régimes is confirmed, even though, in France, few are ready to admit it.[720] In our view, the presence of minority protection in the autonomy régime of French Polynesia is evidence of the exchangeability of constitutional conceits.

It might be true that the autonomy of French Polynesia is relatively modest compared with other régimes. However, all too often "much" autonomy is a synonym for "good" autonomy. Yet, it is not the purpose of this study to judge on the extent or scope of an autonomy régime. Our approach is different. The extent of autonomy in a specific régime is irrelevant for the model question. The modesty of an autonomy régime might, indeed, prove particularly instructive, when it comes to analysing model traits in terms of problems and solutions – not least because autonomies the extent of which is small are often overlooked.

[720] See the similar conclusion of HOFFMEISTER, 'Grundlagen und Vorgaben für den Schutz der Minderheiten im EU-Primärrecht', (2008) 68 ZaöRV (1) 181: "*Aus diesem kursorischen Überblick über die beiden schwierigsten Fälle* [i. e. Greece and France] *ergibt sich, dass der Minderheitenschutz selbst den Verfassungstraditionen dieser beiden Mitgliedsstaaten nicht fremd ist.*" [Brackets and emphasis added]. DESPEUX, *Die Anwendung des völkerrechtlichen Minderheitenrechts in Frankreich*, *supra* FN 543, p. 191, concludes that minorities exist *de facto* in France (without considering overseas populations in detail though [see p. 209]). See also BUI-XUAN, 'De la difficulté d'édifier un statut sur mesure: le nouveau statut de la Polynésie', (2005) *Les Petites Affiches, La Loi* (36), para. 3 (just after footnote 15), on the population of French Polynesia: "*Sur cette base, c'est bien une communauté infra-nationale - une minorité culturelle - à l'identité spécifique qui est juridiquement reconnue, une communauté infra-nationale composée d'un « noyau dur » constitué par les autochtones, auquel s'agrègent les personnes qui souhaitent vivre de façon durable dans l'archipel. Le principe d'unicité du peuple français est ainsi considérablement assoupli.*" [Emphasis added].

3.3 Factors having an impact on the autonomy régime

Thus far, this study mainly examined the Statute 2004. The distinctive legal features of the autonomy régime were discussed. Now, the analysis focuses on the factors that determine the autonomy régime. Which elements have an impact on the autonomy régime? What made the autonomy régime become what it is now? What influences the autonomy régime and what are the manifestations of such influences in the régime? The examination of these questions establishes the basis for the consideration of possible model traits in the following section. Emphasis is placed on the factors that are *specific* to the autonomy régime of French Polynesia. Hence, it is for instance taken for granted (and thus not further discussed) that the autonomy régime, which is based on an organic law, depends on political bargaining in the French Parliament like any other (organic) law. In establishing the factors that determine the autonomy régime, emphasis is put on practice under and the actual workings of the autonomy régime.

Five clusters of factors can be identified (while some of the factors overlap): decolonization, international law, decentralization, and the evolution of the autonomy régime (section a), the *unité* and *indivisibilité* of the Republic (b), politics and persons (c), *la bombe* (d), and New Caledonia (e).

a) Decolonization, international law, decentralization, and the evolution of the autonomy régime

In this first cluster, several factors are considered together, because they are inextricably linked: colonization and its counteraction (decolonization), the international legal principle of self-determination, the option of secession, the evolution of the autonomy régime of French Polynesia in a series of autonomy statutes, and the decentralization of the Republic. These factors are analysed in loose turn.

(De)colonization

There is no doubt that the colonization has left deep traces in French Polynesia. Indeed, it is hard to understand the autonomy régime without a colonial perspective.[721] The principle of *spécialité législative*,[722] for instance, was inherited from the time of the colonies. As, according to this principle, French acts do not apply *eo ipso* in French Polynesia, but their application can be extended to French Polynesia by French decree, it becomes very hard to determine the applicable law in the first place (notably, when French Polynesia is not competent to legislate in a given case). Sometimes one has to go back to colonial times to find a decree which extends the application of a provision, in order to be able to determine the rules that are relevant today. Needless to say that legal certainty is encumbered by such a system.[723]

Beyond this fragmentation of the legal order stemming from the colonial past, there can be no doubt that the colonization of French Polynesia by France is very much present in the minds of the people of French Polynesia. Most of the public debate in French Polynesia is concerned with the relationship with France. Most newspaper articles, scientific papers, or books relate in one form or another to the metropole. Much of the debate in some way evolves around the colonial past. Hence, any discussion of the autonomy régime of French Polynesia that does not take into account the colonial past (and present) remains incomplete.[724]

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[721] CADOUX, 'L'accès de la Polynésie française à l'autonomie interne', (1989) RD publ. (2) 348: "*Mais un bref retour en arrière est nécessaire si l'on veut apprécier, par-delà le texte juridique, l'évolution profonde qui s'est produite en Polynésie au cours de ces quelques 150 années qui explique la succession de statuts plus ou moins précaires et toujours contestés.*" [Emphasis added].

[722] See *supra* p. 166.

[723] For a good example of the complexity of such situations, see SCHOETTL, 'Quelle est la nature juridique du renvoi au décret en Conseil des ministres figurant à l'article L. 9 du Code électoral, dans sa rédaction applicable en Nouvelle-Calédonie, en Polynésie française et à Wallis-et-Futuna?' (2006) *Les Petites Affiches, La Loi* (228) 20-22. The article discusses a decision of the Constitutional Council. The issue to be decided essentially was whether some changes made by decree to the French act on elections could be extended to the overseas territories by decree of the French Council of Ministers. Schoettl comments: "*La complexité relative de cette affaire tient à ce qu'on se trouve ici à la confluence de trois singularités du droit public français : la frontière loi/règlement, l'exercice du pouvoir réglementaire en conseil des ministres et l'existence de collectivités d'Outre-mer régies par le principe de spécialité législative. Ces particularités peuvent être sources d'erreurs lorsqu'on entend prendre des mesures d'application générale par des voies expédientes.*" (P. 22 [emphasis added]). Compare also with the problems created by the principle of *spécialité législative* in VÉROT, 'Les conflits de lois entre droit métropolitain et droit local', (2005) RFDA (6) 1129.

[724] REGNAULT, *Tahiti malade: malade des ses politiques*, Moorea, Les Editions de Tahiti, 2007, p. 11: "*Pour parler sérieusement de la politique du Pays* [French Polynesia]*, il faut se pencher sur son Histoire, sur les conséquences de la colonisation et de la présence du CEP* [Centre d'Expérimentation nucléaire du

The official French approach does not reflect the significance of (de)colonization.[725] France had French Polynesia removed from the UN list of territories to be decolonized in 1946.[726] Later on, after the voters of French Polynesia had decided to remain part of the Fifth Republic by accepting the constitution of the Fifth Republic in the referendum of 28 September 1958,[727] decolonization has been pushed off the official agenda. France voted against the UN General Assembly Decolonization Declaration.[728] Decolonization is apparently considered, especially by the authorities in Paris, as not being an issue with regard to French Polynesia. "«*Reconnaissance» des faits coloniaux"*[729] by Paris with regard to French Polynesia is still outstanding.

Secession

Despite the official indifference towards decolonization the story does not end there. There are two further dimensions to be considered. On the one hand, French law does not prevent French Polynesia from pushing the cause of decolonization to the ultimate consequence: independence. French Polynesia could become independent from France, if only it so wished: according to the "*doctrine Capitant"*,[730] the wish of the concerned overseas population can trigger the secession of the territory, which the

Pacifique]*, sur l'action de l'État, sur son économie artificielle, sur sa société trop inégalitaire et sur les égoismes qui la rongent*." [Brackets and emphasis added]. For a detailed history of French colonization, see ALDRICH, *Greater France: A History of French Overseas Expansion* , *supra* FN 525.

[725] On decolonization in general: LUCHAIRE, *Droit d'outre-mer et de coopération*, 2nd edition, Paris, Presses universitaires de France, 1966, p. 39 ff (in particular p. 39-41 on the reasons for decolonization).

[726] REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 59.

[727] The decision of any overseas territory to reject the Constitution in the referendum was regarded as a decision to sever the links with the Republic and to become independent (AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 14). The French Polynesian population voted in favour of remaining with the Republic (64%) and the territorial assembly of French Polynesia subsequently decided to maintain the status of overseas territory of France (REGNAULT, 'Autonomie ou indépendance en Polynésie française - vrai ou faux débat', (2002) *Revue juridique et politique, indépendance et coopération* (1) 68). On the legal regime applicable in the French overseas territories after the referendum, see LUCHAIRE, *Droit d'outre-mer et de coopération*, *supra* FN 725, p. 241-311.

[728] UN GENERAL ASSEMBLY, Declaration on the granting of independence to colonial countries and peoples, 1960, Resolution 1514 (XV), GAOR 15th session supp. 16, 66; see ROSSKOPF, *Theorie des Selbstbestimmungsrechts und Minderheitenrechts*, *supra* FN 13, p. 155.

[729] REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 60 [emphasis added].

[730] See, among others, PALAYRET, 'Overseas France and Minority and Indigenous Rights: Dream or Reality', (2004) 10 IJMGR 227. Extensively on the right to secession (including the creation of the *doctrine Capitant*, which was conceived by the French lawyer René Capitant): MOYRAND, *Droit institutionnel de la Polynésie française*, *supra* FN 539, p. 67 ff.

population inhabits, from France.[731] But the prerequisite is that the majority of the inhabitants of French Polynesia voice their will to secede. Thus, while the ultimate decision is entrusted to the central authorities (acquiescence by the French Parliament by means of a *loi* is needed[732]), external self-determination is not in principle excluded.[733] On the other hand, the indifference of the metropole towards decolonization should not mislead one into assuming that no evolution has taken place in French Polynesia. The status of French Polynesia has indeed evolved.

Evolution of the autonomy régime

Successive constitutional amendments and statutes expanded the autonomy of French Polynesia. Before the Fourth Republic came into being, French Polynesia had been a colony. Establishing the *Union française*, the constitution of the Fourth Republic of 27 October 1946[734] also changed the status of French Polynesia from a colony to a territory, granting all its inhabitants French citizenship.[735] In 1957, the Fourth Republic granted French Polynesia an autonomy statute, which was far-reaching but short-lived: only a year later, after the acceptance of the constitution of the Fifth Republic of 1958 in French Polynesia, the autonomy régime was revoked by government decree (because of the turmoil in French Polynesia after the referendum) and a strict *tutelle* was established. It took until 1977 to enact another autonomy statute under the Fifth

[731] On secession from the French Republic in general see JAN, *Institutions administratives*, Paris, LexisNexis, 2005, p. 44-45, or LUCHAIRE, *Le statut constitutionnel de la France d'outre-mer*, Paris, Economica, 1992, p. 55.

[732] A controversy subsists whether the Constitution must be changed before a secession (as a condition of a secession) or after (see MOYRAND, *Droit institutionnel de la Polynésie française*, *supra* FN 539, p. 77-78.

[733] French constitutional law prevents France from unilaterally severing the ties with an overseas territory (AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 15-16 [with reference to the relevant decisions of the Constitutional Council]). However, it is always possible to change the Constitution. For a change of status from one type of territorial collectivity to another (with consulation of the population concerned), see art. 72-4 Constitution. For further information on the principle of self-determination and French constitutional law, see TURPIN, 'Rapport introductif - Territoires d'outre-mer et Constitution', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 19-33, p. 23. For a comprehensive analysis of all international legal aspects of secession, see Kohen (ed.), *Secession - International Law Perspectives*, Cambridge, Cambridge University Press, 2006, in particular TOMUSCHAT, 'Secession and Self-Determination', *in* Kohen (ed.), *Secession - International Law Perspectives*, Cambridge, Cambridge University Press, 2006, p. 23-45.

[734] Constitution de la Quatrième République, 1946. Note that the preamble referred to peoples: "*La France forme avec les peuples d'outre-mer une Union fondée sur l'égalité des droits et des devoirs, sans distinction de race ni de religion*." [Emphasis added]

[735] Except for the members of the chinese community (GILLE, 'L'évolution des institutions du territoire de 1842 à 1984', *supra* FN 529, p. 56). The chinese community counted around 8000 members, when all of them were collectively naturalized in 1964 (PANOFF, *Tahiti métisse*, *supra* FN 524, p. 155; regarding the chinese community in general see p. 139-155).

Republic: the Statute 1977.[736] With this act an "*autonomie de gestion*"[737] was granted to the territorial assembly and the government council of French Polynesia. However, the key competences were held by the high commissioner (the former governor): she (or he) directed the services of the State as well as of the territory, presided the government council, and ensured the legality of the acts (by means of a *tutelle a priori)*.[738] At the beginning of the 1980s, an institutional revolution took place: the decentralization of the Republic.[739] This was President François Mitterand's "*grand affaire du septennat*"[740]. The reorganization of the Republic in terms of decentralization was applied in the Statute 1984:[741] the powers of the high commissioner were curtailed (while the State retained key competences [*inter alia* in security, public order, jurisdiction, and most of foreign relations matters]) and the competences of French Polynesia concomitantly expanded; the *tutelle* was abolished and the legal review of the acts of French Polynesia was henceforth performed by the administrative jurisdiction (the administrative tribunal).[742] Furthermore, the Statute 1984 introduced the president of French Polynesia and his government as a relatively strong executive with similar powers (though not yet as far-reaching) as under the Statute 2004.

While the Statute 1996[743] enacted smaller changes (clarification of the competences and terminology),[744] a project to amend the constitutional provisions dealing with

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[736] Loi relative à l'Organisation de la Polynésie française, 1977, Law no. 77-772, JORF of 13 July 1977, p. 3703.

[737] GILLE, 'L'évolution des institutions du territoire de 1842 à 1984', *supra* FN 529, p. 59.

[738] GILLE, 'L'évolution des institutions du territoire de 1842 à 1984', *supra* FN 529, p. 59.

[739] Centralist and decentralist forces have been pushing and pulling the Republic ever since it first came into being. Generally, the Jacobins tended towards more centralism, the Girondists towards more decentralization (DEBBASCH, *Droit constitutionnel*, 5th edition, Paris, LexisNexis, 2005, p. 87: "*Les Jacobins-Montagnards sont les partisans de Paris et de la centralisation.*" *"Les Girondins* [...] *sont plus favorables à la décentralisation et aux départements.*" [Emphasis added] See also VILLIERS, *Droit public général*, *supra* FN 719, p. 195).

[740] REGNAULT, 'La Décentralisation outre-mer: un combat pour l'emancipation politique et économique', *supra* FN 535, p. 413. According to Jan (JAN, *Institutions administratives*, *supra* FN 731, p. 28-29) the decentralization reform abrogated the administrative *tutelle* (p. 28), transferred the model of the institution of the commune to the department and the region, and transferred a large amount of competences to the territorial entities. According to Michalon (MICHALON, 'Décentralisation et valeurs républicaines: l'éternel dilemme', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 129-142, p. 132 ff.), the idea of decentralization was to achieve more democracy through proximity. For the difference between *décentralization*, *déconcentration*, and *délocalisation*, see FAURE, 'Décentralisation, Déconcentration, Délocalisation', *in* LexisNexis (ed.), *Collectivités territoriales*, JurisClasseur (Fascicule 10, no. 1-136), Paris, LexisNexis, 2002.

[741] Statute 1984, *supra* FN 547.

[742] See FABERON, 'Le schéma institutionnel du statut de 1984', *supra* FN 654, p. 80.

[743] Statute 1996, *supra* FN 548.

French Polynesia proposed fundamental changes in 1999. Apart from preferential treatment for Polynesians and foreign relations powers of French Polynesia, the constitutional project provided that French Polynesia would be able to adopt acts that would be subject only to the jurisdiction of the Constitutional Council.[745] As the Constitutional Council's only yardstick is the Constitution, a large leeway would have resulted for the French Polynesian assembly. The project was stillborn, though. It was not adopted owing to external circumstances.[746] The constitutional amendment of 2003,[747] which again concerned decentralization in the whole Republic (not just overseas) like the first stage in the 1980s,[748] overtook the 1999 project and created the basis for the adoption of the Statute 2004.[749] In enacting most of the substance of the constitutional project 1999, the Statute 2004, based on the amended art. 74 Constitution, considerably expanded the autonomy of French Polynesia (*inter alia* by introducing the preferential treatment for Polynesians and further foreign relations powers of French Polynesia). However, in one point the organic legislature could not go as far as it could have, if the constitutional project of 1999 would have been adopted: the Statute 2004 could merely enable the assembly of French Polynesia to adopt "laws of the land" that are subject to the judicial review of the *State Council* with its broad jurisdiction, whereas the constitutional project of 1999 would have entrusted the Constitutional Council, which has a narrow jurisdiction, with the review. Besides, the Statute 2004 substantially bolstered the position of the president of French

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[744] LUCHAIRE, 'L'autonomie de la Polynésie française devant le Conseil constitutionnel', (1996) RD publ. (4) 953-990, contains a detailed discussion of the amendments introduced by the Statute 1996; see in particular p. 961 ff. for the decisions of the Constitutional Council regarding the Statute 1996.

[745] See BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *supra* FN 520, para. 18.

[746] See BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *supra* FN 520, para. 18 "*Un projet de loi constitutionnelle relatif à la Polynésie française* […] *a été voté en termes identiques par l'Assemblée nationale le 10 juin 1999 et par le Sénat le 12 octobre 1999 qui s'apprêtaient à se réunir en Congrès le 12 janvier 2000* […]*, lorsque le Président de la République a décidé d'abroger le décret de convocation du Congrès pour des raisons bien étrangères à la Polynésie française et à la Nouvelle-Calédonie. En effet, cette révision constitutionnelle était organisée le même jour que celle relative au Conseil supérieur de la magistrature.*" [Emphasis added]

[747] Loi constitutionnelle relative à l'organisation décentralisée de la République, 2003, constitutional amendment no. 2003-276, JORF of 29 March 2003, p. 5568.

[748] This second stage of decentralization (the Loi constitutionnelle relative à l'organisation décentralisée de la République, *supra* FN 747) was, however, highly relevant for all overseas collectivities of France. With the introduction of several status options for these collectivities, the constitutional amendment notably put an end to the "*règle de l'uniformité dans l'organisation administrative de la France ultramarin*e" (ORAISON, 'Quelques réflexions générales sur l'article 73 de la Constitution de la Ve République, corrigé et complété par la loi constitutionnelle du 28 mars 2003', (2003) RFDA (4) 685 [emphasis added].

[749] The Loi constitutionnelle relative à l'organisation décentralisée de la République, *supra* FN 747, notably introduced art. 74 Constitution, based on which the Statute 2004 was enacted. Criticism was fierce, when the constitutional amendment established the basis in art. 74(10) to introduce the system of preferences. See for instance KADA, 'L'Acte II de la décentralisation et le principe d'égalité', (2005) RD publ. (5) 1296: "*C'est là une disposition fondamentalement contraire au principe républicain d'égalité et qui accentue encore davantage la différenciation entre collectivités territoriales*" [emphasis added].

Polynesia. The Statute 2004 introduced the president as an independent actor with his own domain of power, while under the Statute 1996 she (or he) was simply the head of the government.[750] Finally the amendment of 2007 made minor adjustments: it abolished the majoritarian prime in the election of the assembly, changed the motion of no-confidence into a constructive instrument (a new president must simultaneously be proposed), and enhanced the control mechanisms.

It is clear that this process of gradual expansion of the autonomy of French Polynesia, this evolution of the autonomy régime, must also be seen in the light of decolonization. Taking a *de facto* point of view, one is almost compelled to argue that decolonization has indeed been taking place with regard to French Polynesia. Admittedly though, decolonization of French Polynesia has been *limited* and *unusual*. It has been *limited*, because, despite the series of statutes, the autonomy of French Polynesia is still very much restricted. Decolonization has obviously not progressed as far as elsewhere nor as far as some of the persons involved wish. The emancipation of French Polynesia has been *unusual*, because it has been a purely internal (i. e. inner-French) process, while the normal process of decolonization is based on international law and guided by international, notably UN institutions. Decolonization has been *unusual* also, because other French, non-overseas institutions were enmeshed in it: the process of decentralization, which heavily influenced the autonomy régime of French Polynesia, was implemented in parallel in the whole Republic. In other words, it has not been a process that pertained exclusively to former colonies. Rather, decolonization has been mixed up with decentralization. But the limited extent of and the unusual elements in the decolonization of French Polynesia should not lead to the conclusion that French Polynesia has not been decolonized at all. To refuse to see the successive autonomy régimes of French Polynesia in the light of (de)colonization is overly formalistic.

The role of international law

What has been the role of international law in this whole process? The principle of self-determination certainly has been playing an important role. Beyond its role as the motor of decolonization in general and as its main source of legitimacy, the principle of self-determination would naturally constitute the legal basis for an eventual secession of French Polynesia from France. But more concretely than such an eventuality, the principle of self-determination served as a trigger and a foundation for

[750] See the heading of chapter 1 (title II) Statute 1996: "*Du gouvernement de la Polynésie française et de son président*", compared to chapter 1 (title IV) Statute 2004): "*Le président et le gouvernement de la Polynésie française*" [emphasis added].

the autonomy régime of French Polynesia. The preamble of the Constitution underlines this inspiration:

> *"By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development."*[751]

Apart from self-determination, no significant role of international law with regard to the autonomy régime of French Polynesia can be discerned. Minorities are considered not to exist in France.[752] Thus, the international principles on minority protection are hardly ever referred to in the context of French Polynesia. Neither is French Polynesia ever seen in the context of the rights of indigenous peoples (although France consented to the UN Declaration of the Rights of Indigenous Peoples[753]). The principles of local self-government may play a (limited) role in the decentralized organization of the Republic, including French Polynesia. But beyond this general influence which is equally present in all territorial entities in the Republic, no specific impact on French Polynesia's autonomy régime can be perceived.

Is the impact of decolonization and of the principle of self-determination reflected in the Statute 2004? Although these factors have accompanied and influenced the evolution of the autonomy régime of French Polynesia, no trace of them can be found in the Statute 2004 itself (nor in the previous statutes). Only the process of decentralization has imprinted its mark on the autonomy régime – a mark which is notably visible in the resemblance between the institutions and mechanisms of French Polynesia and the ones of the standard territorial collectivities of the Republic (the department and the region). To see the other factors at work (decolonization and self-determination) one must look at the evolution of the autonomy régime and its context.

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[751] Preamble of the Constitution [English version available at CONSTITUTIONAL COUNCIL, <http://www.conseil-constitutionnel.fr>, emphasis added].

[752] See *Avis portant sur la convention-cadre*, supra FN 542.

[753] UN GENERAL ASSEMBLY, United Nations Declaration on the Rights of Indigenous Peoples, *supra* FN 11.

b) *Unité* and *indivisibilité* of the Republic

Apart from the decentralized organization of the Republic, which moulds French Polynesia into a *collectivité territoriale*, other constitutional concepts inform the autonomy régime of French Polynesia. Most prominent among them is the *unité* and *indivisibilité* of the French Republic (art. 1 Constitution[754]), which is in a sense the counterpart of decentralization. Based on an "in or out"-approach, respect of the *indivisibilité* is required from all entities of the Republic – among them also French Polynesia because of the choice to remain part of the Republic in 1958. The concept of *unité* and *indivisibilité* of the Republic is often imparted a quasi-sacred status and absoluteness. It embodies centralism and as such organically results in control mechanisms of the central institutions, such as the ultimate veto of the organic legislature over the autonomy statute of French Polynesia, and in the rejection of the existence of minorities or peoples in the Republic. However, like the decentralized organisation, the *unité* and *indivisibilité* of the Republic is subject to dynamics and change. The concept hardly constitutes a guideline that is independent of constitutional circumstances. Much of the rhetoric of absoluteness appears as litany and the concept imprints its mark on the autonomy régime under false pretexts. This must be elaborated briefly.

As a consequence of the *unité* and *indivisibilité* of the Republic a specific set of powers can only be held and exercised by the Republic itself (not by the territorial entities): the *pouvoirs régaliens*. According to art. 73(4) Constitution,[755] the sovereign (or regal) powers pertain to more obvious (such as national defence or the currency) and less obvious domains (such as the judicial system, foreign policy, penal law, or security and public order). Via art. 74(4) Constitution the Statute 2004 (in art. 14(1)) reserves these *pouvoir régaliens* to the State. The autonomy régime of French Polynesia, thus, respects these powers and bears their mark. What is perturbing about the *pouvoirs régaliens*, though, is that they are often considered to be immutable, because they form part of the core of the unitary State.[756]

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[754] See *supra* p. 157.

[755] Art. 73(4) Constitution: "*Ces règles ne peuvent porter sur la nationalité, les droits civiques, les garanties des libertés publiques, l'état et la capacité des personnes, l'organisation de la justice, le droit pénal, la procédure pénale, la politique étrangère, la défense, la sécurité et l'ordre publics, la monnaie, le crédit et les changes, ainsi que le droit électoral. Cette énumération pourra être précisée et complétée par une loi organique.*" [Emphasis added].

[756] See e. g. the citation from ORAISON, 'Le nouveau statut d'autonomie renforcé de la Polynésie française', *supra* FN 674. See also TURPIN, 'Territoires d'outre-mer et Constitution', *supra* FN 733, p. 26, with regard to the Statute 1984: "[…] *sans doute est-on allé, en effet, aussi loin qu'il était possible de le faire dans le cadre*

However, the *pouvoirs régaliens* are neither immutable nor absolute in any sense. French Polynesia participates, for instance, in the functions of the police according to art. 34 Statute 2004, i. e. in security and public order functions. The *charactère unitaire et indivisible* of the Republic did not prevent the *pouvoir constituant* from adopting a further step of decentralization in 2003, nor the organic legislature from amending the Statute 1984, which then became the Statute 2004 (providing broader competences for French Polynesia). The Statute 2004 itself describes the autonomy régime as having an evolving character[757] – and so the basis of the régime has evolved, as it was described in the previous section. Undoubtedly then, the arguments, which are advanced after every amendment of the autonomy statute of French Polynesia, that the unitary character of the Republic permits only to go this far and no further should be seen in their context. They are not more than a reference to the present state of the Constitution. They should not distract from the fact that the only relevant benchmark for how far an autonomy régime can be developed within the framework of the Republic is the Constitution. Thus, the degree of emancipation of French Polynesia is contingent only on the will of the *pouvoir constituant*. It does not depend upon an absolute (for independent from the Constitution) concept of *unité* and *indivisibilité* of the Republic.[758] Thus, the only reason why the responsibility for the judicial system, university, public security and order, etc. cannot be transferred to French Polynesia is the Constitution and – in the ultimate consequence – the lack of will of those who make the Constitution (the *pouvoir constituant*).

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de notre État de droit […]" [emphasis added], and p. 33: "[…] *le caractère unitaire de l'État* […] *les* [i. e. *les peuples d'outre-mer*] *confine à une décentralisation administrative, dont le statut de 1984* […] *constitue sans aucun doute, dans les limites posées par l'article 74 de la Constitution, l'exemple le plus poussé possible.*" [Brackets and emphasis added]. See also BUI-XUAN, 'De la difficulté d'édifier un statut sur mesure: le nouveau statut de la Polynésie', *supra* FN 720, first page of the article: "[…] *le nouveau statut tente d'aller le plus loin possible dans ce qu'autorise le cadre d'un État unitaire.*" [Emphasis added]. In a similar sense as to the Statue 1984 MOYRAND, 'De l'autonomie interne administrative à l'autonomie politique', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 143-167, p. 147: "*D'ailleurs tous les auteurs reconnaissent qu'entre le régime de la décentralisation et l'accession à l'indépendance, le droit positif français ne fait aucune place à un régime intermédiaire «conférant aux autorités locales une latitude d'action et des compétences d'une ampleur évoquant assez nettement la situation des entités membres d'un ensemble fédéral»*". [Emphasis added, emphasis in «» in original, cited without references].

[757] Art. 1(4) Statute 2004: "*La République* […] *favorise l'évolution de cette autonomie* […]". [Emphasis added].

[758] The "unitary nature" of the Republic should therefore not be a determining factor for the decision in a given case (as in VÉROT, 'Les conflits de lois entre droit métropolitain et droit local', *supra* FN 723, p. 1134: "[…] *et c'est la Constitution et la nature fédérale ou unitaire de l'Etat qui déterminent la réponse à y apporter*." [Emphasis added]).

Add to the conception of *indivisibilité* as an absolute yardstick the fact that the legal order of the metropole is elastic due to the principle of *spécialité législative*,[759] which selectively extends to and withholds from French Polynesia both legal bliss and woes, and one has lifted the façade of constitutional conceits and pretexts of a system only to find, with a critical gaze, behind it lurking the old colonial attitude and a considerable amount of paternalism – a hegemonial stance that prefers the interests of the Republic over the interests of a people half way around the globe. However, the fact must be added to this perception that the Republic does not permeate French Polynesia with the doctrine of *unité* and *indivisibilité* merely for the sake of imperialism: faced with the problem of parallelism and the risks of proliferation and escalation of autonomy demands, the *pouvoir constituant* is certainly also a prisoner of him- or herself. This aspect is discussed *infra* in section e).

c) Politics and persons

The political mechanics in the French Parliament and Government that led to the creation of the Statute 2004 are not the subject of the analysis here, nor are the policies conceived by the government and assembly of French Polynesia under the autonomy régime. It is of little interest to the purposes of this study whether the actors implement a liberal, conservative, socialist, or other policy. The focus is on substantive factors and their influences on the autonomy régime of French Polynesia, instead of party politics or opinions of political actors. Accordingly, only the political performance under the autonomy régime and the impact of this performance on the régime are the subjects of this section. Three elements attract the attention: the rift dividing political actors in French Polynesia, the figures acting under the autonomy régime, and the style of politics in French Polynesia. In the last element, an aspect that is seemingly extrinsic to politics comes up: the special geography of French Polynesia.

The rift

A rift crosses the political landscape of French Polynesia. It divides the political actors in two camps: those who favour independence of French Polynesia and those who prefer an autonomous status within the French Republic. This is not surprising. In most decolonization situations the question of independence is subject to fierce disputes. What is extraordinary, though, is the depth of the rift between the two camps and the role this rift plays. The question of independence or autonomy can be traced in almost any issue in French Polynesia. Every action, policy, behaviour etc. is assessed

[759] See *supra* p. 166.

in light of the issue of independence.[760] The attitude towards independence is practically the only yardstick that serves to position political parties.[761] Political programmes are heavily impregnated with the issue. The two main parties of French Polynesia are split over independence: one is pro independence, the other contra. A "third way" is attempted only occasionally, timidly, and largely unsuccessfully. The schism between independence and autonomy is reinforced by the tendencies to see issues in the light of the Republic and to position oneself vis-à-vis the metropole. Thus, approval of the way the Republic attempts to tackle an issue is considered to be an autonomous attitude; disapproval of the same as an independent attitude. In many ways, the schism between independence and autonomy substitutes the difference between left and right political parties, which is common elsewhere. In fact, the political spectrum of the metropole never caught on in French Polynesia. The main parties of French Polynesia are only loosely associated with the parties in the metropole.[762]

While a deep rift in a society is never something to be welcomed (because it tends to obstruct reasonable solutions), the schism in French Polynesia is especially worrisome. It creates the impression that French Polynesia is in an either-or, black-or-white situation, which in truth is not the case. Moreover, the schism unnecessarily charges up the atmosphere, resulting in a difficult situation for all actors involved: for local politicians, who are forced to avow their allegiance, for national politicians, who may want to avoid paternalism, and officials, who have to abstain from any partiality or bias.[763]

The political figures

Heads and heroes clearly matter in history – even if the discussion on what propels them (the right time and place or the proper qualities) is endless. French Polynesia is no exception. Heroes rise and fall, only to rise again: like Pouvana'a a Oopa Tetuaapua who long fought for independence, lost the referendum of 1958, only to rise again

[760] The rift is also apparent in terminological matters: supporters of independence usually refer to *Tahiti nui*, those of autonomy to *Polynésie française*, but both mean the same territory. (By using the term French Polynesia this study does not side with any faction.).

[761] On the political landscape of French Polynesia, see AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 7 (under the heading "*avertissement"* [emphasis added]).

[762] REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 56 (for the relationship between Tavini, a French Polynesian political party favouring independence, and the French *parti socialiste*).

[763] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 163 ff., accuses the Republic of partiality in favour of the supporters of autonomy.

posthumously in mythical transfiguration as a hero. Today, Gaston Flosse, polarizes the opinions in French Polynesia like no one else. Flosse is currently member of the French Senate and looks back on a long public career. He held many political offices, including the presidency of French Polynesia and a ministry in the French government when Jacques Chirac was President. His eminent position forces French Polynesian politicians either to side with him and his pro-French, anti-independence approach or against him.

The rise of strong persons as such is not particularly odd for decolonization situations. Yet, the alleged reason why Flosse came to such fame is noteworthy: close friendship links Gaston Flosse to the former French President Jacques Chirac.[764] Such links typically give rise to all sorts of envies, hostilities, and defamation. Assertions based on them must be treated with greatest caution. Nevertheless, the way the relationship between Paris and Tahiti worked at the time when Flosse was president of French Polynesia and Chirac President of the Republic certainly raises eyebrows: the amendment of the Statute 1996 in 2004 took place in half-secrecy;[765] the amendment of the organic law was declared urgent without any apparent reason;[766] the members of the French Parliament had very little time to prepare the discussion and deliberate the proposed amendments;[767] aiming at enhanced stability, the amendment introduced a strong "*présidentialisation*"[768] by broadening the powers of the president of French Polynesia (at the time Gaston Flosse); it changed the electoral rules with the purpose of strengthening the position of the majority (at the time Flosse's party) priming the party that wins the elections with a third of the assembly seats;[769] and after the amendment of the Statute 1996, with the resulting Statute 2004 being called a "*statut fait «sur mesure» pour Gaston Flosse*",[770] President Chirac dissolved the assembly of French Polynesia upon demand of the government of French Polynesia – i. e. Gaston Flosse's demand.

[764] See SAUX, 'Polynésie - le système Flosse', Le Monde, 23 May 2004, claiming that Jacques Chirac is the godfather of one of the sons of Gaston Flosse. See also AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 175: "*En 1986, Jacques Chirac déclare que Flosse est pour lui «beaucoup plus qu'un ministre, plus qu'un président du gouvernement, c'est un frère».*" (citing an article in *Le Monde* of 25 October 1986) [emphasis added, emphasis between «» in original].

[765] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 81.

[766] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 81.

[767] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 83 (note the period of one day for the rapporteur to prepare the report on the proposed organic law).

[768] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 73 (with further references) [emphasis added].

[769] See art. 105 section I(2) (before the amendment of 2007). See also BUI-XUAN, 'De la difficulté d'édifier un statut sur mesure: le nouveau statut de la Polynésie', *supra* FN 720, right before footnote 26: "*Ce correctif majoritaire, « cousu main » pour le parti de Gaston Flosse* […]" [emphasis added].

[770] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 84.

However, the "*dissolution de complaisance*"[771] and the *présidentialisation* as such were not received enthusiastically by the voters of French Polynesia. In the assembly elections following the dissolution on 23 May 2004, the voters, despite the amended electoral system, did not grant Flosse's party a majority any longer. A coalition of parties, among which those aspiring to independence, came to government. A prolonged period of instability[772] ("*l'imbroglio*"[773]) followed: the election was contested before the State Council, partial re-elections followed, the assembly and the port of Papeete were obstructed, several motions of no-confidence were adopted, various changes of government took place, and an avalanche of judicial proceedings was set off.[774] In short, the *imbroglio* made it clear that the 2004 stability reform, if anything, enhanced the *in*stability of the autonomy régime. Consequently, the post-Flosse/Chirac reform of the autonomy régime of 2007 returned to the *status quo ante* regarding the "stability amendments": it rescinded the changes in the electoral system and introduced mechanisms to balance the powers of the president of French Polynesia.[775]

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[771] THIELLAY, 'Le statut de la Polynésie française à l'épreuve d'un an de crise', *supra* FN 699, p. 869 [emphasis added].

[772] COINTAT, Rapport au Sénat sur le projet de loi organique tendant à renforcer la stabilité des institutions et de la transparence de la vie politique en Polynésie française, *supra* FN 539, p. 18.

[773] MOYRAND and TROIANIELLO, 'Aspects juridiques de la crise politique polynésienne', *supra* FN 536, p. 1 [emphasis added].

[774] See the useful overview of the events in THIELLAY, 'Le statut de la Polynésie française à l'épreuve d'un an de crise', *supra* FN 699, p. 869 ff. For the cases brought to the State Council, see CAILLE, 'Le Conseil d'Etat et la crise politique en Polynésie française', *supra* FN 693; and GUILLAMONT, 'Le Conseil d'Etat et le principe constitutionnel de laïcité - à propos de l'arrêt du 16 mars 2005, Ministre de l'outre mer c/ gouvernement de la Polynésie française', (2005) RFDC (63) 631-638.

[775] It can only be concluded here briefly that electoral acts should not be tampered with. This is because the election mode necessarily has an influence on the outcome of elections. Any mode (dis)favours smaller or bigger parties (by means of quotas, primes, delineation of electoral districts, etc.). Thus the electoral mode should *not* have been changed (neither in 2004, nor in 2007), not even to achieve a stable majority. If no stable majority comes out of an election, this does not mean that the electoral mode (and hence the electoral act) is flawed. Instead, it means that a society is divided. This situation is to be accepted. It must be reflected appropriately in the institutions, not disguised behind a façade. The right answer to this situation is not an amendment of the election mode. On the contrary, such a change tends to be counterproductive. In particular in French Polynesia, where the State enacts the mode of the election in French Polynesia, any amendment necessarily creates the appearance of favouritism, i. e. the impression that the Republic favours one party over the other. Instead, the answer is that the parties negotiate and work together to constitute a stable government. This is the consequence of a tight outcome of an election. Any other solution would amount to winner-takes-it-all majoritarianism, which is *passé*. Indeed, the wrong prospect of being *the* winner, in a situation where by nature there can only be *all losers* or *all winners*, is one of the core reasons for the instabilities after the election of 23 May 2004. Thus, in my view, propositions to amend the electoral system (such as in JORRY, LEAU and NEUFFER, 'La crise de l'élection des représentants à l'assemblé de la Polynésie française: du Taui au Taahuri', (2004) *La Semaine Juridique Administrations et Collectivités territoriales* (51) 1616 ff.) as a means to achieve a stable situation are based on a wrong approach.

The *présidentialisation* is nothing unusual in the French Republic. Strong characters have always dominated French politics.[776] Remember only the times of Charles de Gaulle. The constitutional system of the metropole as such also sometimes has the effect of accumulating power, for instance, when no *cohabitation* of the Government with the President exists and the President, thus, enjoys large discretion and leeway. This is currently the case for President Nicolas Sarkozy. Given the workings of the Republic as a whole and assuming that institutional parallelism is not as such undesirable, no principled argument can be made against a strong executive in French Polynesia. However, besides the tampering with electoral rules, the workings under the executive in French Polynesia raise questions that go beyond the issue of a strong executive. Like the manipulation of the election rules, they are subject to severe criticism. Certain excesses of the pro-autonomy (and hence pro-France) clique in French Polynesia have occurred. An instructive example is a passage from the report of the *Cour des comptes*, which is part of the independent financial jurisdiction of the Republic: "The personal interests of certain agents of the collectivity finally led to the use of public funds for private ends."[777] Others could be cited.[778] It remains difficult to assess the extent of the misuses and of the support they enjoyed by the central organs. The analysis of the report of the *cour des comptes*, however, strongly implies that the authorities in Paris knew of the excesses. Hence, it seems that they at least tolerated the misuses. While pointing the finger is not the task of this study, it must be noted that the practice and support of favouritism harms the long-term development of French Polynesia – regardless of whether this development would ultimately lead to

[776] ARDANT, *Institutions politiques et droit constitutionnel*, 18th edition, Paris, LGDJ, 2006, p. 368: "*En même temps, les Français ont du mal à se faire à un Gouvernement anonyme, ils se prennent difficilement de la tradition du pouvoir personnalisé. Dans les temps de crise, ils s'en remettent volontiers à un chef, à un sauveur.*" [Emphasis added].

[777] COUR DES COMPTES DE LA RÉPUBLIQUE, Rapport public annuel 2007, *supra* FN 639, p. 606: "*Les intérêts personnels de certains agents de la collectivité ont enfin pu conduire à l'utilisation de moyens publics à des fins privées."* (the report relates to the years 1996-2006, i. e. mainly the years that Gaston Flosse was president of French Polynesia) [translation by the author, emphasis added].

[778] The COUR DES COMPTES DE LA RÉPUBLIQUE, Rapport public annuel 2007, *supra* FN 639, emphasizes other serious shortcomings: the size of the team of the president ("[u]*n cabinet pléthorique (626 agents) s'est progressivement constitué en une sorte d'administration parallèle. Au-delà de la quarantaine de proches collaborateurs du président, investis de missions relevant habituellement d'un cabinet, près de 600 agents avaient été recrutés sur des contrats dit « de cabinet », faisant l'objet de procédures de recrutement simplifiées, échappant au contrôle de légalité comme à celui exercé par l'assemblée délibérante sur les créations de postes budgétaires.*" [P. 599]); the establishment of a police force, initially without legal basis, involving serious financial consequences ("*le groupement d'intervention pour la Polynésie*" [p. 600]); the opacity of the administration and its management ("[u]*ne organisation favorisant l'opacité de la gestion*" [p. 602]; "[p]*ar ailleurs, en l'absence de dossiers techniques et de critères d'attribution, les motifs des choix opérés par le président pour l'octroi des subventions d'investissement aux communes restent obscurs.*" [P. 603]; "[…] *les règles de mise en concurrence, notamment le respect de l'égalité des chances des candidats à concourir, ont été contournées à de nombreuses reprises lors des appels d'offres pour les opérations d'investissement.*" [P. 605]); and a general lack of internal and external control (p. 610 ff.) [all emphasis and brackets added].

independence or not. It runs counter to the idea of impartiality of the State. It means falling back to colonial practices by degrading French Polynesia to the personal playground of the presidents.[779]

The style of politics

The last factor under scrutiny in this section is the style of politics practiced in French Polynesia. This style *inter alia* includes the tendency of local politicians to blame the State for any kind of trouble that is encountered and to call for its help whenever possible. While these habits easily fit in with a general tendency of local politicians anywhere to shift the blame "upwards", another phenomenon seems unparalleled. Al Wardi calls it "*nomadisme politique*".[780] With this term the continuous shifting of some members of the assembly of French Polynesia is referred to. A significant number of local politicians seem unwilling to stick to a political line. They switch political parties from one moment to the other. Their allegiances are very fragile. The consequences of such opportunistic attitudes can be serious. When the majority that the government holds in the assembly is thin, only one or two of the 57 members of the assembly have to change their mind to bust the majority and bring down the government. If this happens once, it is not a problem. However, repeated occurrences can be a source of worry. Essentially, this is what happened in the "*imbroglio*"[781] crisis in 2004, when several successive motions of no-confidence were adopted. The *nomadisme politique* is one of the main reasons for the political instability that followed the elections of 23 May 2004. This style today, too, prevails, if to a minor degree. The use of the motion of no-confidence due to shifting majorities is still common.[782]

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[779] REGNAULT, 'La Décentralisation outre-mer: un combat pour l'emancipation politique et économique', *supra* FN 535, p. 419, criticizes that the relationship between the State and French Polynesia has always been "personalized" ("*personalisées"* [translation by the author, emphasis added]).

[780] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 20 [emphasis added].

[781] MOYRAND and TROIANIELLO, 'Aspects juridiques de la crise politique polynésienne', *supra* FN 536, p. 1 [emphasis added].

[782] Gaston Flosse was elected president of French Polynesia on 23 February 2008 with 29 votes against 27 (ASSEMBLÉ DE LA POLYNÉSIE FRANÇAISE, 'Monsieur Gaston Flosse, élu président de la Polynésie française (press release)', 23 February 2008 (available at: <http://www.assemblee.pf>). On 15 April 2008, he was brought down by a motion of no-confidence and Gaston Tong Sang elected with 29 votes against 27 (ASSEMBLÉ DE LA POLYNÉSIE FRANÇAISE, 'Motion de défiance adoptée, Gaston Tong Sang, élu président du Gouvernement de la Polynésie française (press release)', 15 April 2008 (available at: <http://www.assemblee.pf>)).

The cries of treachery that accompany the switching of sides of a politician should not be heeded light-heartedly; nor should the opportunism of French Polynesian political actors be ascribed without further ado to a lack of democratic culture.[783] One should remember that members of parliament also occasionally switch sides in crucial moments in other, more settled democracies than French Polynesia, such as the United States. In fact, to exploit a situation where one can tip the scales, is part of the democratic game: it is a result of a rational calculation of a political actor. These general considerations aside, the good aspects for French Polynesia are not to be overlooked, either. The *nomadisme politique* indicates that the rift between the partisans of independence and those of autonomy does not run as deep and wide as some politicians may believe. How else can you explain that a member of the assembly can cross the rift several times? Seen in this light, it appears that the antagonism of independence vs. autonomy is not so deeply rooted after all. Is it just another phantasm devised by political actors to polarize voters and tie them securely to their camps? Probable as this is, it is clear that the ideological debate of independence should not be at the centre of attention, when one attempts to find reasonable policy solutions.

However, the bad aspects of *nomadisme politique* are not to be neglected, either. The switching of political sides easily amounts to selling a party out. Suspicions then come up: is not corruption involved? Al Wardi at least (as one of the only writers) does not hesitate to discuss corruption, if only to indicate that the political milieu of French Polynesia fulfils all the conditions that normally lead to corruption.[784] While one must be careful not to raise the subject of corruption without having substantive evidence, one is bound to admit that it would come as no surprise, if, in the fragile political environment of French Polynesia, it became public one day that money was involved in the switching of sides. But for the time being, one must stick to the concrete insufficiencies revealed by the *cour des comptes*.[785]

Another facet of the French Polynesian political landscape, which is based more on facts than speculation, is liable to explain partly the *nomadisme politique*. Members of the assembly of French Polynesia frequently hold another office besides their representative task in the assembly: they are also mayors of a commune.[786] As such, they are deeply rooted in the local circumstances. They entertain close links to the local population and to "their" voters. Unsurprisingly, these voters tend to judge the

[783] See REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 16.
[784] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 97-98.
[785] See *supra* FN 777 and 778.
[786] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 60.

performance of their mayor/member of assembly by how well the commune fares (and notably how much funding the mayor is able to attract and distribute). But can you reproach this sort of conduct to a person, who lives on an island, that is separated from the seat of the assembly by a stretch of up to a thousand kilometres of ocean? To a mayor who is elected by no more than a few hundred (if at all) voters living in almost total isolation – voters who have sometimes never even been to the main island, who have probably never even heard of democracy? Clearly, the special geography of French Polynesia must be taken into account in the assessment of the *nomadisme politique* (as in fact of the whole autonomy régime). Hence, in light of geography, the right answer to the phenomenon of *nomadisme politique* may well be the empowerment of local entities (i. e. the communes). As a matter of fact, one could not conceive of a geographical setting that would be better suited for a system built on local power than a collection of widely dispersed, largely isolated islands. Such a situation may well constitute the archetype of situations of local self-government. Perhaps empowering the communes would look awry compared to the situation in the rest of the Republic. But maybe the French constitutional designers should finally acknowledge more openly that the situation *is* different in French Polynesia after all.

Reflections of politics and persons

Three factors were analysed in this section: the autonomy-independence rift, eminent individuals (including the play of private and political ties between actors in French Polynesia and in the metropole), and the particular style of politics prevailing in French Polynesia. The examination of the third factor hinted at a larger influence in the background: the special geography of French Polynesia. Does the autonomy régime somehow reflect these factors?

It is surprising that the Statute 2004 hardly takes the geographical factor into account. The only elements to be made out are the division of French Polynesia into six electoral constituencies for the purpose of assembly elections[787] and the system that grants preference to French Polynesians in acquiring land.[788] These elements aside, the organic legislature imposed the structure of the Republic's territorial collectivities on French Polynesia, regardless of the unique geographical setting.

[787] See art. 104(3) Statute 2004 and *supra* p. 161.
[788] See art. 19 Statute 2004 and *supra* p. 169.

The Statute 2004 as a whole may be seen as an emanation of the rift that divides political actors in French Polynesia into those who favour independence and those who disfavour it. The autonomy régime as such can thus be seen as a product of this antagonism. This general stamp aside, it is impossible to attribute single provisions of the Statute 2004 to the antagonism. One could perhaps think of art. 1(4) Statute 2004 which commits the Republic to favouring the evolution of the autonomy. But little can be deduced from this general provision.

The analysis of the personal factor was conducted by means of the most recent example. With Flosse being teamed up with President Jacques Chirac, the amendments to the Statute 2004 must be assessed in the light of these ties. However, the amendments that simply expanded the autonomy (like the introduction of the "laws of the land" or the system of preferences) must be distinguished from those that were tailored to the needs of a strong president (the *présidentialisation*).

The particular style that prevails in the politics of French Polynesia, notably the frequent switching of sides and the resulting volatility of majorities, is taken into account by the autonomy régime in some ways. The changes made to the Statute 1996 (the election system with the majority prime of one third of the seats of the assembly) were designed to enhance the political stability – which essentially meant to prop up Flosse's party. However, the plan backfired when the amendments were implemented and serious instability ensued. Consequently, the amendments of the electoral system were repealed (in the amendment of 2007). The constructive motion of no-confidence (simultaneous proposition of a new president), which was also introduced in 2007, also includes an element that is supposed to enhance stability. However, the constructive nature of the motion as such does not prevent the pendulum motion of political actors (the *nomadisme*). Hence, a more promising approach probably would be to take the roots of the phenomenon into account, when designing the system. Maybe ever more detailed statutory provisions which are supposed to decrease the impact of side-switching are not the right key. Maybe acknowledging the fact that politicians in French Polynesia are locally anchored and see the political arena of Papeete as a means to bolster their local community could be more constructive. According to this logic, more power should be allocated to the local level (i. e. the island, or the archipelago) as opposed to French Polynesia as a whole.

d) *La bombe*

The factor that has probably influenced French Polynesia and the autonomy régime in the profoundest way is *la bombe*: the nuclear tests France carried out in French Polynesia.[789] In the early 1960s, France was fighting a civil war in Algeria. Algeria was also the place where the French nuclear tests were conducted at that time. Because of the war, the Republic moved the location of these nuclear tests away from Algeria[790] and brought them to French Polynesia. The *Centre d'Expérimentation nucléaire du Pacifique* (CEP) was installed in Mururoa and Fangataufa, two coral islands about 1200 kilometres away from Tahiti. Before 1975, the nuclear tests were conducted above ground,[791] from then on subterraneously. After the moratorium of 1992, French President Jacques Chirac decided to conduct a last series of nuclear tests in Mururoa and then stopped the tests definitely in 1996. Altogether, 193 nuclear tests were conducted in Mururoa and Fangataufa, of which 46 were atmospheric tests.[792]

After the arrival of the nuclear test facilities, everything changed in French Polynesia.[793] From the beginning, the nuclear tests in French Polynesia were accompanied by serious protests, notably by New Zealand and Australia, but also by civil society and most eminently by the non-governmental organization Greenpeace. At the height of the predicament, French agents sank the *Rainbow Warrior*, the ship of Greenpeace which was about to set sails for Mururoa, in the port of Auckland, New Zealand, in 1985. French relations with New Zealand and Australia have never fully recovered from this blow.

The consequences of the installation of the CEP in French Polynesia were not just serious in terms of international protest. They were profound in French Polynesia, too. Along with the nuclear tests centre came the French army and hordes of French civil servants. They brought their way of life, their expectancies, and their salaries to the islands. A process of deep cultural transformation began, which ultimately wrenched

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[789] On military bases and nuclear testing in colonies in general see ALDRICH and CONNELL, *The Last Colonies*, Cambridge, Cambridge University Press, 1998, p. 169-196.

[790] LEMOINE, 'Les intentions des auteurs du statut de 1984', *supra* FN 537, p. 66-67: "*Comme nous quittions l'Algérie, il y avait la nécessité de trouver un lieu où nous pourrions continuer les expériences atomiques."* [Emphasis added].

[791] DE DECKKER, 'Organisation de la Cité et relations avec la France dans l'Espace mental polynésiens', *supra* FN 530, p. 43.

[792] '«Dix millions d'euros pour les victimes des essais nucléaires» (interview with Defence minister Hervé Morin)', Le Figaro Online, 24 March 2009 (see the graphics at the end of the article).

[793] For further information on the establishment of the test centre, see REGNAULT, *La bombe française dans le Pacifique. L'implantation: 1957-1964*, Papeete, Scoop, 1993.

French Polynesia into "modernity". Within a short time, Papeete had transformed into a French city in the middle of the South Pacific[794] – albeit only "a bad copy of a French provincial capital".[795]

Dependency on financial aid

The dependence of French Polynesia on the financial transfers from the Republic is the most obvious consequence of the arrival of the CEP, apart from the health impact of the nuclear tests on the personnel involved and the population.[796] President Charles de Gaulle had apparently indicated that with the advent of the nuclear test centre to Polynesia the financial worries of Polynesians were over.[797] This has proven to be true in a positive, but also in a negative sense. During the years that followed the establishment of the CEP, the French Republic pumped so much money into French Polynesia that a phenomenon called "*l'assistanat*"[798] developed. The term refers to the dependence of French Polynesia and its population on financial aid from the Republic. It concerns virtually all aspects of life in French Polynesia. As indirect manifestations of the *assistanat* (and of the nuclear tests) Regnault *inter alia* notes: "a social cleavage"[799] (caused by the uneven distribution of the financial proceeds from the tests), "a high level of living costs", "an expensive public administration", "dependence of the private sector on the public powers" with the concomitant effect of "slowing down the dynamic of enterprises", an "excessive and unjustified activism of some labour unions", a "collective psychology" that has been "conditioned by pompous years and easy money", and "expectations of the youth" that are inconsistent "with the reality of today's world".[800] Arguably, these are all problems that must be

[794] DE DECKKER, 'Organisation de la Cité et relations avec la France dans l'Espace mental polynésiens', *supra* FN 530, p. 42.

[795] DUPREL, *Verrücktes Paradies*, *supra* FN 608, p. 9: "*Papeete – dieser schlechten Kopie einer französischen Provinzhauptstadt*" [translation by the author, emphasis added].

[796] See BATAILLE and REVOL, Rapport sur les incidences environnementales et sanitaires des essais nucléaires effectuées par la France entre 1960 et 1996 et éléments de comparaison avec les essais des autres puissances nucléaires, *supra* FN 517, p. 105 ff. After the health impact of the nuclear tests was officially ignored for a long time, the attitude of the French government seems to change these days. Reparations for damages suffered from the nuclear tests appear to become a real possibility, at least for the military personnel (see '«Dix millions d'euros pour les victimes des essais nucléaires» (interview with Defence minister Hervé Morin)'), *supra* FN 792.

[797] See REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 35.

[798] See, for instance, SARKOZY, 'Discours du Président de la République*',* 26 May 2008 (available at: <http://www.presidence.pf>).

[799] See REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 35: "*une fraction sociale*" [translation by the author, emphasis added,].

[800] See REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, all citations on page 36: "*un niveau élevé des coûts de la vie*", "*une fonction publique très coûteuse*", "*dépendance du secteur privé à l'égard des*

typically confronted by any State in stage of development and by the foreign aid. It is obvious, though, that the problems are magnified by a large factor in French Polynesia. The urgency of the dependence from France is, moreover, increased by the fact that the prosivions of aid is no longer guaranteed now that the nuclear tests were stopped for good. The *realpolitische* deal ("nuclear tests against financial support") has been replaces by a moral issue: financial support in the post-nuclear phase of French Polynesia is now granted by the Republic out of moral debt felt by French political actors. The financial payments made are often called la "*rente atomique*".[801] *La rente* takes the shape of various conventions between French Polynesia and the State, such as the "progress pact"[802] on the basis of which the State continues to support French Polynesia. However, despite affirmations to the contrary,[803] the perpetuity of the financial aid is by no means guaranteed; in the words of the *Cour des comptes*: "[t]he financial equilibrium of the overseas collectivity thus depends strongly on the evolution of the aid by the State. However, its progression is not assured."[804] From this lack of long-term commitment result the uncertainty that prevails today in French Polynesia and the fear that the Republic could eventually drop French Polynesia.[805]

Echoes in the autonomy régime

The autonomy régime of French Polynesia reflects this nuclear and financial setting. However, the reflection in the Statute 2004 is relatively dim compared to the significance of the nuclear question and its implications for French Polynesia. Only a few provisions of the Statute 2004 hint at the defence interest of the French Republic. Thus, art. 27(1) Statute 2004 commands the subordination of the exercise of

pouvoirs publics [*qui*] *a pour effet de ralentir le dynamisme des entreprises*", "*activisme démesuré et injustifié de certains syndicats*", "[une] *psychologie collective* […] *conditionnée par les années fastes et l'argent facile*", "*attentes* [des jeunes] […] *généralement pas en adéquation avec la réalité du monde d'aujourd'hui*" [translation by the author, brackets and emphasis added,]. As a further indirect consequence one might add that in French Polynesia no income tax on private incomes is levied (see the Code des impôts, *supra* FN 624).

801 For instance, POIRINE, 'Quel statut économique et social?', *supra* FN 631, p. 171 [emphasis added].

802 VERNAUDON, 'Le statut du territoire et le pacte de progrès', *supra* FN 634.

803 SARKOZY, 'Discours du Président de la République*',* supra FN 798: "*Je serai clair, comme durant la campagne: les engagements à l'égard des Polynésiens en reconnaissance de la contribution du Territoire à la Défense au nom de la Solidarité nationale doivent être tenus*." [Emphasis added].

804 COUR DES COMPTES DE LA RÉPUBLIQUE, Rapport public annuel 2007, *supra* FN 639, p. 597: "*L'équilibre financier de la collectivité d'outre-mer dépend donc fortement de l'évolution des concours de l'Etat. Or, leur progression n'est pas assurée*." [Translation by the author, brackets and emphasis added,].

805 This is the fear of "*largage*" (AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 105 [emphasis added]).

competences by French Polynesia to national defence;[806] and art. 188 Statute 2004 reserves the exercise of the standard powers of French Polynesia in what concerns Mururoa and Fangataufa (where the CEP was located) to a French organic law.[807] French Polynesia's financial dependence from the metropole is, however, strikingly absent from the Statute 2004. The weakly worded art. 169 Statute 2004 defers all questions of support to later conventions between the State and French Polynesia. Thus any credible long-term commitment on this level is basically avoided. The extent of the financial dependency is only apparent in the financial instruments.[808]

One needs to look at the broader picture, beyond the Statute 2004, to detect the full implications of the nuclear issue. Again, the gradual development of the autonomy régime in the series of statutes is indicative. Despite the progressive proposal of 1957, it took more than a decade after the arrival of *la bombe* to establish a first, unassertive autonomy régime in 1977. During this time, the French national defence interest in French Polynesia was particularly high.[809] The economic situation of French Polynesia, which was relatively critical before the advent of the nuclear test site, began to ease off during the late 1960s and the early 1970s (i. e. in parallel with the progression of the nuclear tests).[810] After the positive experiences with the Statute 1977, a more ambitious autonomy régime, based on the Statute 1984, was established. Tellingly, only 48 hours after the decision to stop the nuclear tests, the French Parliament discussed a new, slightly expanded autonomy régime for French Polynesia (the Statute 1996).[811] In 2004, a further step was taken with the Statute 2004. This new stage was opened in the post-nuclear time, when the immediate nuclear imperative had been replaced by a moral obligation to support French Polynesia.

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[806] Art. 27(1) Statute 2004: "*La Polynésie française exerce ses compétences dans le respect des sujétions imposées par la défense nationale*." [Emphasis added].

[807] Art. 188 Statute 2004: "*Une loi organique fixera la date d'entrée en vigueur des deuxième, troisième et quatrième alinéas de l'article 47, à l'exception de la zone économique exclusive, en ce qui concerne les lagons et atolls de Mururoa et Fangataufa*." [Emphasis added].

[808] See art. 169(1) Statute 2004: "*A la demande de la Polynésie française et par conventions, l'Etat peut apporter, dans le cadre des lois de finances, son concours financier et technique aux investissements économiques et sociaux, notamment aux programmes de formation et de promotion.*" [Emphasis added].

[809] LEMOINE, 'Les intentions des auteurs du statut de 1984', *supra* FN 537, p. 66-67: "*Comme nous quittions l'Algérie, il y avait la nécessité de trouver un lieu où nous pourrions continuer les expériences atomiques. À partir de là, 1962, c'était la fin de tout perspective de libéralisation et encore plus d'autonomie.*" [Emphasis added].

[810] GILLE, 'L'évolution des institutions du territoire de 1842 à 1984', *supra* FN 529, p. 59.

[811] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 105.

The gratification logic

The nuclear imperative points at further influences on the autonomy régime of French Polynesia. The autonomy régime is, to a certain extent, granted as a reward for the services rendered by French Polynesia to the cause of national defence. It is subject to a gratification logic, which is used in a similar way in raising children ("behave well, then you get the sweets"). This gratification logic, together with the financial dependence from the Republic, prove a point. It is no greater commitment by the Republic to grant French Polynesia the option to secede[812] than the commitment by a parent to grant its child the possibility to leave. Thus, the argument that French Polynesia, as long as it chooses to remain with the Republic, must accept the limits of the autonomy imposed by the unitary nature of the Republic should not be given too much weight in any discussions about the autonomy régime.

Apart from that, it appears that a further factor informs the autonomy régime: the economic circumstances prevailing at the time, when the autonomy régime is established. It seems that the demands for more autonomy correlate with the economic situation: the better the latter, the more confident are the demands.[813] True as this may be, one would also expect that the intensity of the autonomy claims would vary according to the source of the economic well-being. Is the source extraneous to the autonomous territory, one would expect the claimants not to push their demands too far (i. e. they would avoid striving for more autonomy or even secession), because then the financial source would dry up. This correlation is largely corroborated by the French Polynesian autonomy régime and the behaviour of the actors involved in it.

To sum it up, *la bombe* has plainly had a profound influence on the autonomy régime of French Polynesia. Moreover, the advent of the nuclear test facilities to French Polynesia uprooted the established social order and led to major dependence on financial transfers from the metropole. As such, the nuclear issue must manifestly be factored in. However, the uniqueness of the factor should also be taken into account: French Polynesia is one of the few, if not the only, autonomy régime that had to cope with the presence of nuclear test facilities. Thus, the factor distorts the picture. Yet,

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[812] See *supra* p. 213, for the discussion of secession.

[813] GILLE, 'L'évolution des institutions du territoire de 1842 à 1984', *supra* FN 529, p. 59, seems to imply this. See, however, Horrowitz's finding that "backward" groups are more often prone to strive for secession than "advanced" groups (HOROWITZ, *Ethnic Groups in Conflict*, 2nd edition, Berkeley, University of California Press, 2000, p. 233 ff.; with a thorough discussion of the relationship between "backward" and "advanced" groups).

this diagnosis must be distinguished strictly from the moral and political question whether the nuclear advent has been a boon or a curse to French Polynesia.[814]

e) The false *doppelgänger*: New Caledonia

New Caledonia is the virtual *doppelgänger* of French Polynesia. It is another vestige of the French colonial empire in the South Pacific; the situation is as complex as in French Polynesia. Yet, the *doppelgänger* is false: even though many similarities between French Polynesia and New Caledonia exist, the differences are evident. These differences must be examined briefly, before we enter into our main interest in New Caledonia: the correlations between New Caledonia and French Polynesia.

Differences

The context in New Caledonia is not the same as in French Polynesia. Unlike French Polynesia with its many, widely scattered archipelagoes, one large island is the centre of New Caledonia: *Grande Terre* with the main city Nouméa. *Grand Terre* is about fifteen times as big as Tahiti, which is quite a difference for Pacific islands. It is 4600 kilometres to the west of Tahiti. *Grand Terre* has some commodities (nickel).[815] New Caledonians are mostly Melanesians, who must be distinguished from Polynesians: their ethnicity and culture are different. During the 1980ies serious ethnic tensions shook New Caledonia. These tensions were of a magnitude that French Polynesia has not seen in the recent past.

The New Caledonian autonomy régime is similar to the French Polynesian, at least on the face of it. It is based on an organic law adopted by the French Parliament,[816] "laws of the land" can be passed by the assembly in New Caledonia,[817] and France retains similar *pouvoirs régaliens* as in French Polynesia.[818] Yet, a second sight reveals major differences. The most basic difference pertains to the foundations of the autonomy

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[814] Regnault clearly argues in favour of the latter: "*Elle* [l'autonomie] *souffre d'un défaut majeur. Quand elle a été conçue à partir de 1976, elle a était intimement liée à la question nucléaire.*" (REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 42 [emphasis added, boldface in original removed, brackets added].

[815] LEMOINE, 'Les intentions des auteurs du statut de 1984', *supra* FN 537, p. 65.

[816] Loi organique relative à la Nouvelle Calédonie, 1999, Organic Law no. 99-209, JORF of 21 March 1999, p. 4197 (in the following: Statute of New Caledonia).

[817] Art. 99 ff. Statute of New Caledonia.

[818] Art. 21 ff. Statute of New Caledonia.

régime of New Caledonia. The régime is based on a political deal (the Nouméa Accords of 5 May 1998) which was struck between the two major political forces in New Caledonia, co-signed by the French Prime Minister, and approved in a referendum in New Caledonia.[819] In a unique move, the French *pouvoir constituant* incorporated the substance of the Nouméa Accords in the Constitution (in title XIII "Transitional provisions pertaining to New Caledonia")[820] and passed the Statute of New Caledonia as an organic law.

Further differences to the autonomy régime of French Polynesia appear in the Statute of New Caledonia itself. The "laws of the land", which are adopted by the congress of New Caledonia (the assembly), are only subject to the control of the French Constitutional Council[821] (in contrast to the French Polynesian "laws of the land", the legality of which the State Council reviews).[822] The autonomy régime of New Caledonia features an additional layer of constituent entities: the provinces.[823] The customary law of New Caledonia is integrated in the autonomy régime, notably with a customary senate, which functions as a sort of second assembly chamber,[824] and with a customary order regarding civil status and property.[825] The makeup of the executive is inclusive and reflects consensualism,[826] compared to the dominant president in French Polynesia. A citizenship of New Caledonia, which supplements French citizenship, serves to determine the franchise, based on a ten years residence in New Caledonia.[827] Most importantly, the Statue of New Caledonia determines a time frame for a

[819] BRARD, 'Nouvelle Calédonie et Polynésie française: les "lois du pays": de la spécialité législative aus partage du pouvoir législatif', (2001) *Les Petites Affiches, La Loi* (112) 4.

[820] Title XIII Constitution: "*Dispositions transitoires relative à la Nouvelle-Calédonie*" [emphasis added]. The Constitution was amended by the Loi constitutionnelle relative à la Nouvelle Calédonie, 1998, constitutional amendment no. 98-610, JORF of 21 July 1998, p. 11143.

[821] Art. 104-105 Statute of New Caledonia.

[822] This constitutional control is the reason why Benedikter treats the autonomy régime of New Caledonia as a true autonomy for the purpose of his study (but not French Polynesia; BENEDIKTER, *Autonomien der Welt*, *supra* FN 124, p. 244-248).

[823] Title IV Statute of New Caledonia.

[824] Chapter IV of title III Statute of New Caledonia.

[825] Art. 7-19 Statute of New Caledonia.

[826] See the rules on the election by the congress in art. 110 Statute of New Caledonia. See also FABERON, 'Nouvelle Calédonie et Polynésie française: des autonomies différentes', (2006) 68 RFDC 696: "[…] *la Nouvelle Calédonie relève d'une conception beaucoup plus sophistiquée* [than French Polynesia] *de discriminations favorables aux minorités*", and p. 699: "[a]*insi, indépendantistes et non-indépendantistes doivent gouverner ensemble le pays*" [brackets and emphasis added].

[827] Art. 4 and 188 Statute of New Caledonia. According to JAN, *Institutions administratives*, *supra* FN 731, p. 231, the residence criterion avoids other issues: "[f]*açon habille d'éviter de porter le débat sur la question de peuple, des autochtones et des colons*." [Brackets and emphasis added].

self-determination referendum to be held in New Caledonia (with the earliest date being in 2014[828]) and the franchise for this referendum.[829]

Obviously, the autonomy régime of New Caledonia is further developed in terms of diversity than the régime of French Polynesia. New Caledonia enjoys a greater degree of autonomy, which tends towards federalism[830] with a "*souveraineté partagée*".[831] The basis of the autonomy régime is more solid than in French Polynesia – although not as solid as it may seem, because the Nouméa Accords are more of a political than legal nature. The institutional arrangement of New Caledonia embodies a consensus-oriented balance between the different factions of the population of New Caledonia.

Correlations between New Caledonia and French Polynesia

What is of more interest than the autonomy régime of New Caledonia as such are the close links to and the strong influence on the autonomy régime of French Polynesia. This correlation exists despite the immense distance separating the two territories. French Polynesia is tied to New Caledonia more closely than to any other overseas collectivity. Institutional links exist between the two overseas territories. The *Institution d'émission d'outre-mer*, for instance, manages the common currency (the FCP) from its seat in Papeete for both collectivities.[832] The Universities of French Polynesia and New Caledonia were a single institution with the administrative seat in Papeete until 31 May 1999.[833] Only in the year 2000 a separate *chambre territoriale des comptes* was created for French Polynesia. Before, the *chambre* in Nouméa had been competent for both New Caledonia and French Polynesia.[834] These institutional ties are underscored by academics who often deal with New Caledonia and French

[828] Art. 217(1) Statute of New Caledonia.

[829] Art. 218 Statute of New Caledonia.

[830] FABERON, 'Nouvelle Calédonie et Polynésie française: des autonomies différentes', *supra* FN 826, p. 696 ("*une logique fédérale"* [emphasis added]). Sometimes even the autonomy régime of French Polynesia is considered as a "*structure de type fédérale*" (DE LISLE, 'Réflexions sur les évolutions constitutionnelles des outre-mers français', (2002) AJDA (20) 1275 [emphasis added]).

[831] Faberon and Agniel (eds), *La souveraineté partagée en Nouvelle-Calédonie et en droit comparé*, Paris, Documentation française, 2000.

[832] See *supra* FN 625.

[833] COMITÉ NATIONAL D'ÉVALUATION, Rapport sur l'histoire de l'Université de la Nouvelle-Calédonie, 1999, no. 36, p. 1 (on 31 May 1999 the university was split into two separate institutions).

[834] COINTAT, Rapport au Sénat sur le projet de loi organique tendant à renforcer la stabilité des institutions et de la transparence de la vie politique en Polynésie française, *supra* FN 539, p. 23, and COUR DES COMPTES DE LA RÉPUBLIQUE, Rapport public annuel 2007, *supra* FN 639, p. 594.

Polynesia together and compare the two autonomy régimes.[835] The two autonomies are sometimes seen as twins (or *doppelgänger* like here), if only "fraternal twins"[836] (or false *doppelgänger)*. The French legislature also sometimes treats the two autonomy régimes in one go.[837]

The correlation between French Polynesia and New Caledonia is most evident in the influence that the autonomy régime of New Caledonia exerts on its counterpart in French Polynesia. The larger autonomy of New Caledonia and its more advanced mechanisms are eyed vigilantly by French Polynesians. Many Polynesians tend to see New Caledonia as a pilot project for French Polynesia. This perspective causes some to lean back and enjoy their "wait and see"-position, while others try to force their claims based on analogy. Either way, the cross-references and -demands are numerous. The negotiation of "Tahiti Nui Accords" similar to the Nouméa Accords is on many minds.[838] The "Caledonian example" is frequently discussed.[839] It is not by accident that the (failed) project for a constitutional amendment of 1999 would have allowed to transpose some of the accomplishments of the settlement for New Caledonia to French Polynesia (notably the control of the "laws of the land" by the Constitutional Council and most of the substance of the New Caledonian citizenship).[840] The tight correlation between New Caledonia and French Polynesia complicates the daily work of politicians (notably the French ministers who have to have an eye on both cases),

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[835] So do, for instance, BRARD, 'Nouvelle Calédonie et Polynésie française: "les lois du pays"', *supra* FN 819, or FABERON, 'Nouvelle Calédonie et Polynésie française: des autonomies différentes', *supra* FN 826.

[836] LEMOINE, FABERON, VERNAUDON, and DE GOUTTES, 'Débats (sur le passé du statut)', *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 69-74, p. 69 (Faberon asking the former minister Lemoine: "*mais pourquoi donc, alors que vous-mêmes avez si bien expliqué entre Polynésie et Calédonie, la différence entre une terre de douceur et une terre de douleur et la différence de vos expériences, pourquoi donc les deux statuts de 1984 étaient-ils jumeaux?*"; Lemoine answering: "*Je crois chère collègue que les statuts étaient précisement des faux jumeaux. Parce que les données étaient fondamentalement différentes.*" [Translation of the term *faux jumeaux* by the author, emphasis added].

[837] See, for instance, BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *supra* FN 520, para. 18, regarding the constitutional amendment of 1999.

[838] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 50: "*Dans la foulée, les élus indépendantistes réclament des accords comparables à ceux de Nouméa qu'ils nomment les «Accords des Tahiti Nui»*." [Translation by the author, emphasis added].

[839] See, for instance, REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 62, who discusses "*les perspectives ouvertes par l'exemple calédonien*" [emphasis added]. See also ALDRICH and CONNELL, *France's overseas frontier : départements et territoires d'outre-mer*, Cambridge, Cambridge University Press, 1996, p. 233, who refer to "the New Caledonian 'Contagion'" in general; or DE LISLE, 'Réflexions sur les évolutions constitutionnelles des outre-mers français', *supra* FN 830, p. 1275, who makes out a "*«calédonisation« des territoires d'outre-mer*" [emphasis added].

[840] BÉRINGER, 'Collectivités d'outre-mer: Polynésie française', *supra* FN 520, para. 18.

because one step in one territory naturally implies a similar step in the other territory.[841] Thus the strong correlation sometimes amounts to a political constraint.

The logic of parallelism

Apparently, the autonomy régime of New Caledonia is a factor that affects the autonomy régime of French Polynesia. Admittedly, this equation also works in the opposite direction: the more limited extent of the autonomy of French Polynesia possibly serves as a mitigating argument for moderates in New Caledonia, as well. Overall, a logic of parallelism[842] seems to be at work here. However, New Caledonia is not the only precedent considered by French Polynesians. The status of the Cook Islands, a neighbouring archipelago of French Polynesia, within New Zealand for instance inspires French Polynesians, too, if to a minor degree. Moreover, the exact influence of the factor New Caledonia is difficult to pinpoint. The "laws of the land" of French Polynesia and the system of preferences, which is similar to the New Caledonian citizenship, may be products of crossover influences.[843] But even these products are not exactly the same, with the French Polynesian "laws of the land" being subject to the control by the State Council and French Polynesian "citizenship" not including any special voting rights. Thus, only a general similarity of the two autonomy régimes remains. This similarity, however, goes far beyond the likeness of the French Polynesian régime to autonomy régimes of other States. Both autonomy régimes – the New Caledonian and the French Polynesian – bear the imprint of the Republic.

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[841] LEMOINE, 'Les intentions des auteurs du statut de 1984', *supra* FN 537, p. 66: "*En Polynésie, il fallait donc avoir une approche différente mais je savais aussi qu'à Nouméa comme à Papeete on suivait de près quelles étaient les propositions, quelles étaient les offres. Et quand quelqu'un découvrait qu'il y avait un petit quelque chose d'intéressant qu'on pouvait peut-être récupérer et réinsérer, bien entendu on me le faisait savoir.*" [Emphasis added].

[842] Or a "fear of proliferation" (OFFE, 'Political Liberalism, Group Rights, and the Politics of Fear and Trust', (2001) 53 *Studies in East European Thought* 181).

[843] LE GUILCHER, 'Le statut juridique des "lois du pays" polynésiennes: entre continuité et originalité', (2006) RFDA (6) 1104.

f) A complex situation

The analysis of the factors that influence the autonomy régime of French Polynesia is a testimony of the complexity of the situation. A multitude of factors is at work in the autonomy régime of French Polynesia. Autocatalytic and crossover influences are frequent. An attempt was made to deal with this complexity by grouping the factors into clusters. As with any method that involves aggregation, some aspects were shrouded. The aspects of geography ("remoteness of the markets"), in particular human geography ("small population"[844]), social factors (like education[845]), history, or the communes of French Polynesia, could have been examined more extensively. Weaker factors, like the European Union with which French Polynesia is associated,[846] were not treated in detail.

An interim conclusion can be drawn nevertheless from the examination conducted in this chapter. Strong push and pull factors are at work within French Polynesia and within the Republic. The autonomy régime is not just about powers in the metropole that exert a centripetal force on French Polynesia, crafting the autonomy régime the way they want and refusing to let go, and powers in French Polynesia that apply centrifugal pressure, pushing for ever more autonomy and trying to break free. The autonomy régime is not a deal concluded between two homogeneous blocks, one in Papeete and the other in Paris. The situation is more complex. Centrifugal and centripetal forces are at work within both entities: in Paris, those forces that want to keep French Polynesia within the Republic and forge unity contrasting with those forces that emphasize self-determination or simply see no point in further supporting a remnant of the colonial past; in Papeete, those forces that prefer remaining with the

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[844] REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 36: "*éloignement des marchés, faible population*" [translation by the author, emphasis added]

[845] See BUILLARD, 'La jeunesse polynésienne et le développement de la Polynésie française', (2005) 11 Rev. jur. Polynésienne 67-80.

[846] According to Annex II EC Treaty (Treaty Establishing the European Community, 2006, Official Journal C 321 E/37 of 29 December 2006, consolidated text), French Polynesia has the status of an associated territory of the European Community, the aim of which is to promote "social and economic development" and to "establish close economic ties" to the Community (art. 182(2) EC Treaty; see also part 4 EC Treaty in general for the status). Therefore, only parts of the *acquis communautaire* apply in French Polynesia. French Polynesia may, for instance, "levy customs duties which meet the needs of [its] development and industrialisation or produce revenues for their budgets" (art. 184.3(1) EC Treaty; the Community is normally competent to levy customs duties based on the common commercial policy); and it basically has the option to introduce a system of preference for local workers and land owners based on the residence criterion (see art. 186 EC Treaty; such systems are subject to strict limitations in the Community). Apart from these options, the Council adopts provisions regarding the associated States and territories unanimously (art. 187 EC Treaty). Thus, France has the option to veto any decision in the Council. On the implications of the association status: CHAUCHAT, 'Territoires d'outre-mer, République, Europe. Quelle autonomie interne?' *in* Faberon (ed.), *Le Statut du Territoire de Polynésie française: 1984-1994, Bilan de dix ans d'application, Actes du colloque de Papeete*, Paris, Economica/Presses universitaires d'Aix Marseille, 1996, p. 191-207.

Republic and insist on *la rente nucléaire* contrasting with those forces that want to seek their own fortune in independence and condemn *l'assistanat*. Combine these heterogeneous bundles of forces with shifting political majorities, and you arrive at an autonomy régime that is subject to a process of continuous deconstruction and reconstruction – which may be one possible explanation for the partial lack of internal political stability in French Polynesia.

3.4 Model traits of the autonomy régime

French Polynesia has been a *laboratoire* in many senses: not only a *laboratoire* for nuclear tests, but also, more positively, for constitutional experiments[847] in which the elasticity of the unitary State has been tested. French Polynesia has not been the only laboratory in the Pacific, though. A long tradition of – peaceful – experiments has benefited from the isolation of the Pacific islands. As an example, think only of the sociologists and botanists who draw benefits from the seclusion of islands in the Pacific (such as Papua New Guinea). These islands are their only "natural experiments", with other experimentation being restricted by moral, ethical, environmental, or practical constraints. Even astronomers have taken advantage of the amenities of Pacific islands (in Hawai'i). This study, too, has benefited from the secluded archipelagoes of French Polynesia, which prove to be invaluable for the study of autonomy régimes.

One result of the analysis conducted is that French Polynesia is no longer a secluded collection of archipelagoes. Our analysis showed that the autonomy régime of French Polynesia is subject to multi-sourced influences and distortions, the most forceful of which are exogenous. So, how can this assortment of minute islands, which is traumatized by a series of nuclear tests, dependent on French aid, and subject to the postcolonial logic of the unitary Republic, be of any interest to the purposes of this study? How could its tiny bit of autonomy contribute to the purpose of creating models of autonomy?

It is not the goal of this study to judge on the extent of autonomy. The study does not strive for the perfect degree of autonomy. Neither does it side with one party claiming more or the other party claiming less autonomy. Nor does it strive for universally applicable, general models of autonomy. Instead, this study attempts to learn from the autonomy régime of French Polynesia. It does so by identifying model traits, duets of problem-solution which might be fit for export. The analysis revealed that the autonomy régime is an amalgam of problems, factors, influences, and attempts at solutions. While it is obviously no straightforward task to disentangle these components – in fact, the suspicion lasts that it might well be impossible – some proposals can nevertheless be made. Two model traits are suggested.

[847] A "*laboratoire constitutionnel*" (JAN, *Institutions administratives*, *supra* FN 731, p. 223 [emphasis added]).

A macro model trait

The first is a *macro* model trait, as it relates to the autonomy régime of French Polynesia as a whole. The autonomy régime of French Polynesia is embedded in a relatively rigid constitutional framework. This framework consists of strong, traditional principles, like the *unité* and *indivisibilité* of the Republic. These principles are designed to hold the Republic together. They appear in concrete manifestations in the autonomy régime (for instance, in the *pouvoirs régaliens* retained by the central organs of the Republic). Although far from being absolute, these principles erect formal and substantive limits to the options of autonomy régimes. A psychological dimension is connected to this set-up: the unease which is caused, because the autonomy régime of French Polynesia could invite other factions or groups of the Republic to claim similar benefits. This unease is based on the snowball effect of autonomy, which alleges that autonomy is of a rampant nature. Offe calls this unease the "fear of proliferation".[848] This fear is especially understandable for the French Republic, as many other parts of the French people are claiming their share (e. g. the Corsicans or the Basques). These other French groups might not be able to rely on strong engines to propel their claims like French Polynesia with the principle of self-determination and the legitimacy of decolonization. However, they may always clamour for equal treatment. Against this background of equal treatment, an asymmetric approach (in the sense of: "French Polynesia is unique and must be treated differently") may appear at least as morally flimsy as the logic of parallelism (in the sense of: "we Corsicans are the same and must be treated in the same way").

Against this complex of legal principles, endowed with a life of their own and many psychological facets, the autonomy régime of French Polynesia displays a remarkable feature: it evolves in stages. It creeps back and forth in a sort of *Krebsgang*, adapts to changing circumstances, then takes another step with a bit more autonomy. These testing motions are apparent in the ups and downs of the autonomy régime (from the proposal 1957, over the Statutes 1977, 1984, 1996, the constitutional project 1999, the Statute 2004, to the amendment 2007, and, virtually, even to the pilot régime of New Caledonia). All along this way, the extent of the autonomy régime has been gradually growing, while also being occasionally re-dimensioned. This sideways movement allows all the involved actors to acquaint themselves with an advanced régime, get accustomed to the new situation, and explore the régime's workings, mechanisms, and external effects. It also assists the learning process which is necessary to handle complex democratic systems responsibly.

[848] OFFE, 'Political Liberalism, Group Rights, and the Politics of Fear and Trust', *supra* FN 842, p. 181.

In short, in an amalgam of strong unitarian and nationalist traditions, habits of centralist legislation, and worries about claims based on parallelism, it seems a good idea to meet claims for autonomy by establishing an autonomy régime with special characteristics: the extent of the autonomy is initially limited; the control over the fate of the régime is held by the centre for the beginning; the régime is flexible in that it allows for progressive adaptation with the continuous negotiation of new stages. The ideal approach would certainly encompass a long-term perspective, which spans several decades and fixes points in time to review the régime (like the Nouméa Accords).

A micro model trait

The second model trait is a *micro* trait, because it concerns a specific aspect of the autonomy régime of French Polynesia. Our examination revealed that the geographical setting is important in French Polynesia. The thousands of islands are scattered across an expanse of ocean roughly the size of Europe. Most of the islands are tiny, with the biggest being Tahiti, the size of which amounts to about a tenth of the size of Big Island of Hawai'i. The islands are as remote from the continents as it gets. As a consequence of this extraordinary geographical setting, land is extremely scarce in French Polynesia. Moreover, the land carries the stain of the colonial past, in which outlanders basically came to French Polynesia and seized parts of the land. This situation is exacerbated by the economic gap between French (and other) mainlanders and the native population of French Polynesia.

In this situation, the autonomy régime of French Polynesia comes up with a special concept of local citizenship (without using this term, though) which supplements national citizenship. According to this concept, transfers of land among private individuals are subject to a residence condition. Only if the recipient has resided for a certain time period in French Polynesia, the transfer can take place without restriction. If she or he does not fulfil this residence criterion, the public authorities may step in at the place of the recipient. If properly implemented, this local citizenship is a serious obstacle to the sell-out of the homeland.

Arguably, this French Polynesian citizenship, which was introduced by the Statute 2004, has not been implemented so far.[849] It might therefore be primarily of political significance and address a popular mindset, rather than being a concrete reality.

[849] AL WARDI, *Tahiti nui ou les dérives de l'autonomie*, *supra* FN 596, p. 84.

However, this psychological aspect does not impair the significance of local citizenship. Sometimes a possibility that could be activated if needed is already enough to address a problem.

Admittedly, the geographical setting of French Polynesia is special, probably even unique. But it is equally true that land is scarce elsewhere, in fact probably almost everywhere. Of course, this does not mean that it is a good idea to introduce "land citizenship" everywhere.[850] Yet, the point is not that local citizenship is a silver bullet, but rather that it might be a good tool to use in the specific set of circumstances described above. Indeed, one may think of other topics, which local citizenship might be apt to address. For instance, preference in employment may be based on local citizenship. This is another facet of French Polynesian citizenship, which, among other measures, pursues the goal of narrowing the gap between mainlanders and islanders (the "*océanisation des cadres*"[851]). Or, like in New Caledonia, local citizenship may open access to local votes and referenda. Thus, local citizenship may be the core of a system of preferences which addresses local problems.

A long-term approach

These thoughts on model traits of the autonomy régime of French Polynesia are not meant to indicate that everything is to the best in French Polynesia. On the contrary, the examination revealed that serious shortcomings persist. These failings could probably be remedied with a more honest, long-term approach to the autonomy régime of French Polynesia. Such an approach would have to be based on an agreement, not unlike the Nouméa Accords, between the Republic and French Polynesia. The agreement would recognize the colonial facts and the debt owed by the Republic due to the nuclear tests; it would be a solid foundation for the relationship between French Polynesia and the Republic which would be supported by all interested actors and which would be removed from the grasp of daily politics (even though being subject to periodical revision); it would hand over responsibility to Polynesians for their cause, thus creating ownership, without being subject to overly strict and formalist Republican conceptions. (Thus, it would, for instance, allow for empowerment of the "natural" constituent entity: the island). And it would set the amount of aid provided by the Republic (in numbers, decreasing as time progresses), a clear time frame for

[850] Supranational organisations, like the European Union, may restrict the possibility for States to rely on residence as a criterion for distinction. However, the "upper level" (i. e. the European Union) could still empower the "lower level" (the State) to use the residence criterion in specific cases.

[851] REGNAULT, *Tahiti malade: malade des ses politiques*, *supra* FN 724, p. 25 [emphasis added].

this aid (with a date for the end of the aid), and the conditions attached to this aid (most importantly regarding financial and democratic governance and human rights) together with a monitoring procedure, which involves the Republic solely on the monitoring level, but not on the level of the actual task performance. This seems to be the most appropriate way of leading French Polynesia out of the development trap (*l'assistanat*), removing it from the grasp of favouritism and paternalism, and bridging the cleavage between partisans of autonomy and of independence. The hope would be that all French Polynesians could rally behind such a project.

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Having a lad pull my leg with a mushroom cloud story was not the only aspect of my stay in Huahine in April 1996 that is of interest to this study. I had not come to Huahine voluntarily. I had been shipwrecked off the coast of the island. The accident had happened on my way back from Bora-Bora to Tahiti on board the speedboat ferry *Ono Ono*. The *Ono Ono* was a hydrofoil construction equipped with modern, on the edge technology. Technically, the boat could cover the 250 kilometres between Bora-Bora and Tahiti in a couple of hours, while the passenger could comfortably watch a live European football game on the on-board television.

Alas, the Pacific Ocean is not the *Lac Léman*. The sea between Bora-Bora and Tahiti is open. Wave heights of a couple of metres are frequent. Hence, the ride aboard any boat tends to get a bit rocky. In the particular case of the *Ono Ono*, the ride was very bumpy and not a single passenger on board was thinking of watching the football game. The *Ono Ono* has literally *porté son affectation sur*[852] every single passenger. When some of the windows of the *Ono Ono* finally gave in under the shock of the boat's crashing against the waves, the *Ono Ono* sought emergency shelter in the nearby harbour of Huahine.

The irony of the story is hard to miss. Somebody had the laudable idea of bringing the scattered Society Islands closer together by means of a speedboat. Yet, the idea failed to take into account a crucial local factor: the sea. The means applied were hardly tuned to the local circumstances. Hydrofoil boats are notorious for being unfit for turbulent seas. Hence, the project failed.[853] No one would, of course, go as far as suggesting that the same experience has been made with the autonomy régime of French Polynesia. But the episode certainly is a strong reminder to those who think that the values, structures, and unitarian ideas of the Republic can be transposed from Europe to French Polynesia without further ado. A bit more local circumspection could not only have been appropriate in the case of the *Ono Ono*, but also in other cases. This chapter bears testimony to the limits of transfers of speedboats and autonomy régimes – but also to their potential.

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[852] *Ono Ono* is Polynesian and means *porter son affectation sur quelqu'un* (my thanks to Thierry Catteau for this translation).

[853] Today, the *Ono Ono* only circulates between Tahiti and Moorea. The passage between Tahiti and Moorea is quite sheltered and takes only 20 minutes.

Perspectives

Peter Sloterdijk's sarcastic idea of the Pneumatic Parliament, which was discussed in the introduction to this study, is to spread democracy by dropping inflatable parliamentary buildings from airplanes. According to the leaflet distributed at the exhibition of the Pneumatic Parliament in the museum of modern and contemporary art in Bolzano in summer 2008, the Pneumatic Parliament is an installation which could "with regard to the global democracy deficit" "offer a contribution to spreading the political culture of the West".[854] In the same leaflet one finds a small drawing in which people – apparently inhabitants of the desert for they wear turbans and ride camels – stream towards the Pneumatic Parliament that has just been dropped from the sky. They seem to be full of excitement, for some of them raise their hands in joy and one is seemingly worshipping, for he humbly bows in the style of Muslim prayer before the Pneumatic Parliament.

The hope expressed at the beginning of this study was that, at the end of our efforts to devise models of autonomy, we would not find a Pneumatic *Autonomy*. We tried to avoid Sloterdijk's ironic pitfall by using a functional approach that marries the specific with the general. Reducing autonomy régimes to their capacity to solve problems and address issues, our proposal is to treat a specific trait of an autonomy régime as a model trait, if it has a proven track record of addressing the issue concerned or solving the problem at hand properly. We tested this approach in two case studies: the autonomy régimes of French Polynesia in the South Pacific and of the German minority in Hungary. In both cases, the autonomy régimes were first examined in detail, mostly from a legal perspective. Then, the factors that have an impact on the autonomy régime were analysed.

Four model traits of the examined autonomy régimes

Four model traits are proposed. Two *macro* and two *micro* model traits – respectively relating to the autonomy régime as a whole or to a part of it – result from the study of the two autonomy régimes. Each of these model traits is embedded in a complex framework which shall not be explained in full detail again.[855] Here, we can only sketch the model traits. The macro model trait identified for French Polynesia relates to the rigid setting of the French unitary State which is influenced by the belief that

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[854] INTERNATIONAL SOCIETY OF DEVELOPMENT AND DEMOCRACY EQUIPMENT, *Instant Democracy: The Pneumatic Parliament*, *supra* FN 1 [original in German, translation by the author].

[855] *Supra* chapter 2, p. 140 ff., and chapter 3, p. 221 ff.

autonomy claims might eventually snowball and multiply. The push and pull factors at work in both French Polynesia and in Paris are harmonized by the endeavour to proceed in steps and stages. Like in a *Krebsgang*, the autonomy régime is expanded or contracted, in keeping with experience. Usually, with each stage the local leeway under the autonomy régime is expanded. All sides, especially the French "unitarians" are thus given time to adapt.

The macro model trait which results from the autonomy régime of the German minority in Hungary concerns the phenomenon of runaway integration to which the German minority is subject. Runaway integration means that the identity and culture of the German minority is being progressively absorbed by Hungarian mainstream identity and culture. The special educational and cultural autonomy régime with minority self-governments on all levels of the State, based on a personal approach (as opposed to a territorial approach), proved particularly apt in alleviating runaway integration. The autonomy régime may even be able to *reverse* runaway integration. The capacity of the autonomy régime is limited, though. In contrast to the German minority, the Roma minority in Hungary to which the same autonomy régime was applied benefitted little from the régime – which is not suprising, given that the Roma minority faces an entirely different issue than the German minority: a *lack* of integration. The autonomy régime *à la Hongroise* contributed little to nothing to address this lack of integration of the Roma.

Two micro model traits of the autonomy régimes examined are proposed. The micro model trait of the autonomy régime of French Polynesia concerns the system of preferences established for inhabitants of French Polynesia. According to this affirmative action system, islanders are preferred in certain regards over non-islanders, including French citizens from the mainland. Preference notably concerns the land issue, which is particularly salient due to the scarcity of land in French Polynesia and due to the special relationship of (indigenous) inhabitants to their land. The system of preference grants a right of pre-emption, which can be exercised by French Polynesia, basically whenever real estate is transferred to a non-islander.

The micro model trait of the autonomy régime of the German minority in Hungary concerns the quasi-objective approach to the membership of the minority. Based on freedom of identity and with the necessary respect for the *angst* of registers, which prevails in Hungary (and elsewhere) due to past experiences, in particular in the aftermath of World War II, each Hungarian citizen decides her- or himself upon its affiliation with the minority. Whenever elections for local minority self-governments take place, each individual who wishes to vote in the upcoming elections, declares its affiliation to a minority in order to be registered in the election list of the concerned

minority. This declaration is secret (except for candidates) and non-permanent (i. e. it is destroyed after the election). No objective verification of minority affiliation takes place. This way of determining the membership of the minority at the occasion of elections proved to delineate the minority quite well, while respecting the aversion to registers. Admittedly, some abuses occur. But the abuses were much more widespread under the previous approach, which had refrained from asking for a declaration of minority affiliation.

Sloterdijk's ironic pitfall

Arguably, we got caught in Sloterdijk's ironic pitfall despite all our balancing efforts: the models of autonomy régimes might be perceived as just another way of masking an export of Western policy. The land issue in French Polynesia, for instance, goes back to the very arrival of Europeans in French Polynesia. At the origin of the land issue is the incompatibility between the collective, spiritual land concept of Polynesians and the individual, absolute real estate ownership concept of Westerners. This incompatibility has created misunderstandings, deceptions, and conflicts for almost 250 years. It could appear as naïve to assume that this complex incompatibility could be solved by a simple system of land preference, and as even more naïve to propose this system for export.

Yet, this objection is taken into account in the concept of model traits of autonomy régimes. The model traits are only proposed within a carefully established framework. For instance, the personal approach to autonomy régimes (as opposed to a territorial approach) coupled with minority self-governments having competences in the domain of culture and education constitutes a model only for the case of a dispersed minority subject to runaway integration. Hence, it is, for instance, conceivable that the Romansh minority in Switzerland, which also suffers from runaway integration and is intertwined with the German speaking majority in the canton *Graubünden*, could greatly profit from an autonomy régime *à la Hongroise* (even if the beneficial effects of the federal structure of the Swiss State were factored in). But, for instance, the Serbian minority in Kosovo – or, for that matter, the Kosovar minority within Serbia – obviously faces other challenges than runaway integration. The Hungarian autonomy régime should therefore not be applied without modification to the case of the Serbian or the Kosovar minority. This is *not* to say, though, that an autonomy régime based on a personal approach would not have some merits, when applied in cases such as

Kosovo.[856] But it *is* to say that the study conducted here has not confirmed this broader dimension of the personal approach to autonomy régimes. Finally, even sceptics should learn from this study that little is gained by the common, roundabout reference to "models of autonomy". Such a reference, in fact, amounts to nothing more than to inflating a Pneumatic Autonomy.

The final argument

In the introduction to this study an argument was announced: it claims that an autonomy arrangement should be designed in a way so as to address the specific issues a minority faces. By now, the argumentation should be evident, because accepting the argument essentially amounts to agreement with the conception of models of autonomy proposed in this study. Let us nevertheless look again at the argument from a different angle. It maintains that a minority faces a certain set of issues and challenges. These issues and challenges should be taken into account and be addressed by the specific design of the autonomy régime which is established for the benefit of the minority. Evidently, one could object that this is painfully obvious. For what other reason would an autonomy régime be established, if not to address the underlying issues? Why would the autonomy régime not be designed and implemented in a way that the issues concerned are addressed? Sadly, the case studies showed that the argument was anything else but obvious. In Hungary, a wrong approach was applied to the Roma minority: the same autonomy régime was made available to them as to the German minority, although the two minorities face diametrically opposed challenges (a lack of integration vs. runaway integration). In French Polynesia, the autonomy régime has long failed to take into account the local circumstances which raise specific issues. The land issue in French Polynesia has already been mentioned. The special geography of French Polynesia which would be an ideal setting for local empowerment is still not sufficiently taken into account.

The argument essentially is a call to autonomy régime designers to take into account minority issues. But it is also a call for effective participation of minorities, because effective participation in the design of autonomy régimes ensures that these régimes are tuned to minority issues. The call would have had to be made with particular force in the two cases examined here, because in both cases unitary, centralized States decreed the autonomy régimes unilaterally, with little to no effective participation of

[856] A personal approach would notably have the potential to overcome the most virulent problem of the territorial approach, that is the creation of new minorities with the establishment of new borders (while a personal approach of course would raise other problems in terms of abuses and horizontally shared sovereignty).

the minority concerned. This is the main reason why the autonomy régimes failed to address some crucial issues. As many other unitary States with unilateral tendencies towards the minorities living on "their" territorium exist, the call should not be treated lightly and is indeed worth spreading. Quite possibly moreover, unitary States are not the only entities that should hear the call.

The manifold reasons why the essence of our argument has not been properly taken into account either by France or Hungary were discussed in this study. The French autonomy régime designer – the French legislature – has been overly eager to take account of fears of a snowball effect of autonomy and of potential claims based on a logic of parallelism (for instance, by Corsica). Thus, the French legislature hid for a long time behind legal conceits such as the principles of *unité* and *indivisibilité*, the uniform structure of the French Republic, or the traditional blindness of the French law for ethnic difference. In Hungary, the autonomy régime designer – also the legislature – decided to apply the same autonomy régime to the Roma as to the German minority, despite the evident differences. It took the legislature *ten* years to reconsider its decision. It comes as no surprise that these ten years were most precious to the Roma, because it was the period of Hungary's accession to the European Union. During this period, the European Union via accession conditionality had a potential grip on minority issues in Hungary. The European Union would then have had the unique occasion to act as a Roma kin State and to throw its weight behind the Roma. As so often before, the Roma were in the end forgotten. The conditionality grip was lost with Hungary's accession to the European Union and the Roma issue still awaits a proper solution (now mostly for lack of proper implementation).

In conclusion, the hope is that people stream towards the model traits of autonomy régimes that this study proposes. However, the hope is that people approach the submitted models of autonomy in a different manner than they would advance toward a Pneumatic Autonomy or than they indeed approach the Pneumatic Parliament in the sarcastic drawing of Sloterdijk's project. A deliberate effort was made to avoid inflating a Pneumatic Autonomy and to steer clear of any sarcasm or irony in our endeavours. Thus, hopefully some régime designers, policy officers, or researchers find a clue in this study on how to proceed when designing autonomy régimes.