HUMAN AND MINORITY RIGHTS PROTECTION BY MULTIPLE DIVERSITY GOVERNANCE

History, Law, Ideology and Politics in European Perspective

EDITED BY JOSEPH MARKO
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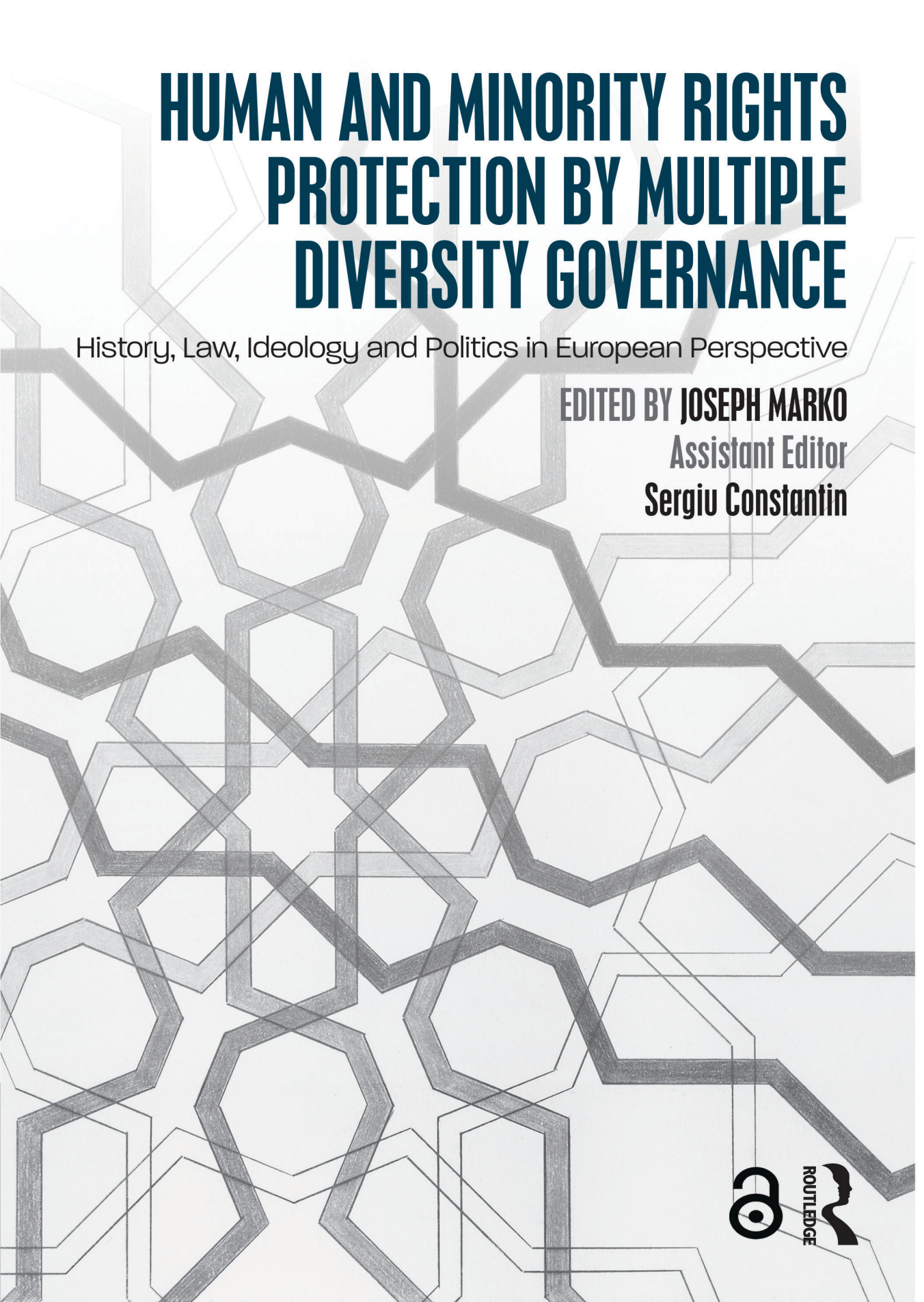

ROUTLEDGE

Human and Minority Rights Protection by Multiple Diversity Governance

Human and Minority Rights Protection by Multiple Diversity Governance provides a comprehensive overview and critical analysis of minority protection through national constitutional law and international law in Europe. Using a critical theoretical and methodological approach, this textbook:

- provides a historical analysis of state formation and nation building in Europe with context of religious wars and political revolutions, including the (re-)conceptualisation of basic concepts and terms such as territoriality, sovereignty, state, nation and citizenship;
- deconstructs all primordial theories of ethnicity and provides a sociologically informed political theory for how to reconcile the functional prerequisites for political unity, legal equality and social cohesion with the preservation of cultural diversity;
- examines the liberal and nationalist ideological framing of minority protection in liberal-democratic regimes, including the case law of the European Court of Human Rights and the European Court of Justice;
- analyses the ongoing trend of re-nationalisation in all parts of Europe and the number of legal instruments and mechanisms from voting rights to proportional representation in state bodies, forms of cultural and territorial autonomy and federalism.

This textbook will be essential reading for students, scholars and practitioners interested in European politics, human and minority rights, constitutional and international law, governance and nationalism.

Joseph Marko is Professor of Comparative Public Law and Political Science at the Institute for Public Law and Political Science of the Karl Franzens University of Graz, Austria, and a former international judge at the Constitutional Court of Bosnia and Herzegovina. Since 1998, he is also the Director of the Institute for Minority Rights at Eurac Research, Bolzano/Bozen, Italy.

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"Liberal values in Europe, as elsewhere, are coming under serious threat, driven by identity politics designed to exploit societal schisms. The historical link between liberalism and diversity in Europe, and the extent to which one can negotiate and accommodate, if not facilitate the other, holds the key to sustainable, coherent and peaceful societies. In this book a collection of scholars based around the Institute for Minority Rights at Eurac Research tackle this vital question through a multifaceted approach that provides insights into the nuances of how law, ideology and politics impact, and are impacted by this challenge. The book will provide rich material to those seeking to understand these paradigms and the existential questions they pose to the liberal state in Europe."

– Joshua Castellino, Executive Director, Minority Rights Group International and Professor of Law, UK

"Joseph Marko and his colleagues are to be congratulated for having produced a book that deals with one of the most pressing topics of our time in a comprehensive and masterly manner. This volume informs and elucidates in equal measure. It will be of help to anyone with an interest in identifying and understanding the reasons for the ethnonationalist turn in European politics."

– Karl Cordell, Plymouth University, UK

"This volume provides an extremely comprehensive insight into the theory and practice of how modern states have dealt with diversity. It offers an interdisciplinary and sophisticated case for taking diversity and its recognition seriously. Thus, while providing a wide overview over the existing literature in multiple disciplines, it also makes a serious contribution to ongoing debates on how to tackle diversity, resulting in a timely study on minorities, nationalism and diversity."

– Florian Bieber, University of Graz, Austria

"Issues regarding group accommodation and minority protection have been recurrent problems in Europe and beyond, often caused by unsubstantiated conventional wisdom and untenable identity markers. Drawing on long practice in the field, this book breaks out of the conceptual identity traps and provides a refreshingly new and thoroughly argued way to institutionalize multiple diversity governance."

– Asbjørn Eide, University of Oslo, Norway; former Chairman of the United Nations Working Group on the Rights of Minorities (1995–2004) and former President of the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities (2003–2006)

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Contents

Figures

Tables

Boxes

Abbreviations

ACFC	Advisory Committee on the Framework Convention for the Protection of National Minorities
ASC	Autonomy Statute of Catalonia
BHV	Brussels-Halle-Vilvoorde
CECL	Committee of Experts of the European Charter for Regional or Minority Languages
CoE	Council of Europe
CSCE	Conference on Security and Cooperation in Europe
EC	European Community
ECHR	European Convention on Human Rights (European Convention for the Protection of Human Rights and Fundamental Freedoms)
ECJ	European Court of Justice
EComHR	European Commission of Human Rights
ECRML	European Charter for Regional or Minority Languages
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
ETA	Euskadi Ta Askatasuna
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
FCNM	Framework Convention for the Protection of National Minorities
FRA	Fundamental Rights Agency of the European Union
GG	German Basic Law
GsC	German-speaking Community in Belgium
HCNM	High Commissioner on National Minorities
HCCJ	High Court of Cassation and Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IGO	international governmental organisation
ILO	International Labour Organisation
INGO	international non-governmental organisation
MVS	Majority vote system
OECD	Organisation for Economic Co-operation and Development
OSCE	Organisation for Security and Cooperation in Europe
SSR	Soviet Socialist Republic
TA	Territorial autonomy
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDRM	United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities
UNHRC	United Nations Human Rights Council
UNHRCom	United Nations Human Rights Committee
USSR	Union of Socialist Soviet Republics

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Preface

This book is the result of 25 years of work in several positions and roles as a university professor, international judge of the Constitutional Court of Bosnia and Herzegovina, politico-legal advisor to two High Representatives in Bosnia and Herzegovina, as well as the United Nations Secretary-General's Special Adviser, facilitating the negotiations for the reunification of Cyprus, and collaboration with the Council of Europe and the Organisation for Security and Cooperation in Europe.

With my research focus and practical experience in the field of the protection of human and minority rights, the regulation of ethnic conflict and constitutional engineering in divided societies in the Balkans and beyond, it became more and more clear that there are several gaps and shortcomings which have hitherto hampered effective minority protection in theory and in practice. These are, as far as theory is concerned, the continuing specialisation of academic disciplines and the thus growing institutional, theoretical and methodological separation within the field of law, but even more so between lawyers and social scientists. In all these academic disciplines, national minority protection had not been at the centre of research until the end of the Cold War in 1989. With the ensuing violent conflicts in the Caucasus and the Balkans, however, the 'nationality question' which had been so prominent before the breakdown of the multi-ethnic empires of Eastern, Southeastern and Central Europe before the First World War and between the two World Wars, became centre stage again. With the refugee crises following from wars in the Middle East and Central Asia and ongoing labour migration, the integration of new minorities became a top priority for the European Union. At the same time, however, it became more and more evident that the old legal and political concepts and instruments no longer adequately deal with these new problems. As long as minorities are seen in light of European history a 'problem' for national security, governability and/or the social cohesion of society, the claim for effective minority protection as a democratic minimum will always remain reactive and defensive.

Thus, following from this insight, the motivation for writing this book was to identify the 'deep structure' of the resentment, fear and hatred against minorities of all kinds, not necessarily in the attitudes of populations but in parts of the intellectual and political elites, and

to deconstruct the way of thinking inherent in the anti-pluralist nation-cum-state paradigm underlying the left and right-wing populist movements all over Europe. However, it is not sufficient to criticise the ideological and theoretical underpinnings of these movements. In line with the saying that only good theory makes best practice, this book gives evidence that there is a theoretical and practical alternative, which I have termed 'multiple diversity governance', based on an ethical position of 'cosmopolitan pluralism', and demonstrates how it is possible to combine, through institutional arrangements, legal equality with cultural diversity in different ways. This book, therefore, presents not only the summary conclusions of 25 years of research and practice but also serves as the impetus for new and even more necessary interdisciplinary basic research, as well as the development of new policy proposals. In this spirit, I hope that the book will attract the attention not only of academic circles in the field of law, history and the social sciences but also of those practitioners in international organisations, national governments and non-governmental organisations who constantly fight for the improvement of the life chances of those belonging to minorities. As can be seen from the structure of the book with summary conclusions, learning outcomes and control questions, the book will, last but not least, be useful for graduate students in searching for a PhD topic.

It goes without saying that the continuous debate with and advice of many colleagues in academia, international organisations and civil society enormously helped to recognise the challenges and to develop the ideas elaborated in this book. Among those colleagues and friends whom I would like to thank for their consistently inspiring advice over the past decades are, in particular, the members of the scientific board of the Institute for Minority Rights, Eurac Research, in the autonomous province of South Tyrol, Italy, Rainer Bauböck, Joshua Castellino, Ilze Brands-Kehris, Rainer Hofmann, Petra Roter, Sia Spiliopoulou Åkermark, Bruno de Witte, Ricard Zapata-Barrero, and all those whom I had the honour and pleasure to collaborate with in other positions such as Dino Abazović, Nedim Ademović, Stefano Bianchini, Florian Bieber, Sumantra Bose, Alexander Bröstl, Vojin Dimitrijević, Asbjørn Eide, Espen Eide, Yash Ghai, Constance Grewe, Pavel Holländer, Michael Keating, Antti Korkeakivi, Josip Kregar, John McGarry, Kerem Öktem, Angelika Nussberger, Stefan Oeter, Francesco Palermo, Patricia Popelier, Levente Salat, Dagmar Schiek, Ivan Šimonović, Christian Schwarz-Schilling, Allan Tarr, Roberto Toniatti, Marc Weller, Robert Williams, Jens Woelk, Alfonso Zardi, Mitja Žagar and Jan Zielonka.

Last, but not least, I have to thank the researchers at the Institute for Minority Rights Institute, Eurac Research, whose scientific director I became 20 years ago, and my colleagues at the University of Graz: without their support this book would not have seen the light of the day. There are the outstanding contributions of Günther Rautz, Sergiu Constantin, Andrea Carlà, Hedwig Unger, Benedikt Harzl, Verena Wisthaler, Edith Marko-Stöckl, Roberta Medda-Windischer, Alexandra Tomaselli and Filippo Ferraro who co-authored several sections of Chapters 3, 6, 7 and 9. My special thanks go to my colleague Christoph Bezemek at the Institute for Public Law and Political Sciences of Graz University for his stimulating comments on earlier drafts of Chapters 3, 4, 5 and 10. Many thanks also go to Johanna Mitterhofer for her tireless efforts in the editing process. It goes without saying that all remaining errors remain mine.

I would like to thank in particular Sarah Green, Sophie Iddamalgoda and Andrew Taylor for all the patience they showed during the process of the production of this book and their excellent editorial support.

The drawing of Adriana Czernin at the front cover of the book, inspired by the tableau with the wooden ornaments of the minbar of the Ibn Tulun Mosque in Cairo, with the octogonal geometric design endlessly diverging and merging without repetition, graphically represents the central concept which constitutes the `whole´ of the model of multiple diversity governance: the dynamic equilibrium, characterised by selfhood, not sameness, seen through the lens of a holistic approach.

Joseph Marko
Graz/Bozen-Bolzano, August 2018

Introduction

1

Joseph Marko

1.1 Minority protection: a paradox?

Any overview and *critical* analysis of minority protection through national constitutional law and international law in the European context – as the first part of the title of this book indicates – cannot be limited to a chronological description of the development of legal standard setting and a legal-dogmatic analysis of respective case law of courts or reports of other monitoring mechanisms. Instead, we must raise the *two fundamental questions* from the very beginning:

- Why *should* we protect minorities at all?
- And, if we should, is it *possible* to *effectively* protect them?

Neither question has been answered affirmatively in either theory or practice in the past without reservations.

John Stuart Mill famously argued in his *Considerations of Representative Government*, published in 1861, that 'Free institutions are next to impossible in a country made up of different nationalities' (Mill ([1861] 1991) and US Supreme Court Justice Sandra O'Connor stated in her reasoning in *Shaw v. Reno* (1993) – a voting rights case from North Carolina concerning giving a second African American candidate a chance to win a seat in the House of Representatives through redrawing the boundaries of electoral districts – that 'Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters' (*Shaw v. Reno* 1993). Moreover, since the year 2000, we can observe three processes of *renationalisation* all over Europe.

First, there has been a resurgence of *massive violent conflict* since the collapse of communist regimes in Central and Eastern Europe in 1989 and the following break-up of the communist multinational federations of Yugoslavia in 1991 and the Soviet Union in 1993. Against the expectations of Western political regime transition theories that liberalism would replace communism as legitimising ideology for the new democracies (Fukuyama 1992), the

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'velvet divorce' of Czechoslovakia and nation building under liberal-democratic auspices in Poland, the Czech Republic and Hungary remained an exception to the rule in the 1990s. In general, *ethno-nationalism* became the driving force for what has been called 'nationalizing nationalism' or 'transborder homeland nationalism' by Rogers Brubaker (1996) in the transition processes all over Eastern and South-eastern Europe. This led in effect to further deterioration of the relationships between the respective state-forming nation and national minorities, despite the fact that minority protection had explicitly been established as one of the so-called political Copenhagen conditionality criteria for accession to the European Union (EU) in addition to democracy, the rule of law and the protection of human rights in 1993 (Kochenov 2008; Agarin and Cordell 2016). Moreover, also the relations between the newly established Russian Federation and the EU have dramatically deteriorated under Putin's leadership since 2010, in particular with the annexation of Crimea by Russia in 2014 – the first violent change of international borders in Europe after 1945 – and, at the time of writing this book, a continuing protracted violent conflict in Eastern Ukraine (Toal 2017).

Second, in Western Europe, particularly in Great Britain, Spain and Belgium, a *national paradox* can be observed whereby sub-national, regional political parties mobilise against the dominant nation. The leaders of the Scottish National Party, the Catalan *Convergència i Unió* and the Flemish Nationalist Party no longer accept that Scotland, Catalonia or Flanders are simply called regions, minority nations or – even worse – national minorities. What they claim instead is their recognition as equal – though 'stateless' – nations (Keating 2001a) or even a right to external, national self-determination through secession (Medda-Windischer and Popelier 2016; Devine 2017).

Third, all over Europe we face the rise of right-wing populist and extremist parties (Bar-On 2013; Pirro 2015; Akkerman 2016; Heinisch and Mazzolini 2016) pretending to protect the national cultures of European countries against the population flows of global migration and the challenges stemming from the need for *immigrant integration* into European societies. Since many of the migrants coming to Europe over the past three or four decades and their second- or third-generation descendants – so-called new minorities (Medda-Windischer 2009, 2017) – have a Muslim background, discrimination against them has amounted to outright Islamophobia in and beyond electoral campaigns (European Monitoring Centre on Racism and Xenophobia 2006; Fundamental Rights Agency of the European Union 2017a). This has been exacerbated by several terrorist attacks in Europe in the past two decades, leading to a securitisation of the necessity of immigrant integration in public debate, so that even the most high-ranking politicians in Europe, such as Angela Merkel, Nicolas Sarkozy and David Cameron, publicly declared in 2010 and 2011 that 'multiculturalism is dead' (Bloemrad 2011).

With this background in European public discourse and empirical studies on the alleged failure of multiculturalism, politicians as well as researchers (Brubaker 2004: 116–131) not only describe, but also claim the need for a *return to assimilation* as the only viable theoretical concept to defend national identities and social cohesion against the 'balkanization' of European societies (Rodríguez-García 2010: 255). Advocates of a more 'assertive liberal' approach argue that 'multicultural policy is not a cure-all', but that 'policies must protect the majority culture' instead (Joppke 2012: 1). Many European countries have therefore changed their immigration and integration policies and legislation, adopting mandatory

language tests and so-called integration courses for permanent residence permits and citizenship, thereby focusing not only on the knowledge of institutions and national languages which are instrumental for integration into the educational system and the labour market, but also cultural practices in line with the (social) norms and values of the host societies (see, in particular, Fundamental Rights Agency of the European Union 2017b: 51–4). In this way the legal obligation is placed on immigrants to take up host-country values and cultural practices and to actively demonstrate their desire to belong to the majority population (Marko and Medda-Windischer 2018).

In conclusion, over the centuries and up to the present day, old, autochthonous national minorities and indigenous peoples as well as new minorities stemming from immigration have been perceived and declared a problem or even a *danger* for physical *security*, social *cohesion,* the *governability* and the political *unity* of sovereign states. But if there are only 'problems with minorities' (Jackson-Preece 2005a: 5–7), why then protect minorities at all?

Why should we protect pre-modern lifestyles and cultures, as if they were so-called tribal communities or collective forms of self-government, established by (constitutional) law either as territorial or cultural (i.e. functional) autonomies, which do not necessarily guarantee individual rights for *everybody irrespective* of their linguistic or religious identity? Is it not unfair or even a violation of constitutionally guaranteed individual rights if you have to declare your language affiliation before you can exercise voting rights or get a job in the public service system, such as is the case under the Autonomy Statute of South Tyrol in Italy? And is not the fact of granting rights to collective entities and not to individuals by definition an aberration from the very idea of human rights as personal rights?

Hence, if seen from such a *classic liberal* as well as *liberal-egalitarian ideological perspective*, minority rights can indeed at best be justified as compensation for past injustice which shall, however, no longer be upheld when the injustice done by state action is corrected. Thus, affirmative action in American constitutional terminology and positive measures according to EU law should remain temporary measures. And these liberal ideological perspectives even seem to *prohibit* the *recognition* of *groups* with different identities and sociocultural practices as possible rights holders when any claim for *permanent* protection and promotion of their cultures and lifestyles is declared unjustified. Thus, even under the auspices of liberal-democratic regimes, the need for minority protection remains, ideologically and legally speaking, contested by the argument that the *prohibition of discrimination* is *sufficient* to guarantee equal human rights to every person without distinction. Any claim for protection and thus preservation of religiously or linguistically defined diverse groupings and their members is then declared an anti-liberal, conservative ideology of culturalism against the seemingly natural historical development of modernisation, including secularisation and individualisation.

With regard to the second fundamental question – how *effective* minority protection can be when based on these ideological underpinnings – the answer must be negative. Minorities are and will always be seen as a *problem*, because they do not fit into the legal categories, constitutional principles and institutional mechanisms of European national states created over the past centuries in the processes of state formation and nation building. Even in the best case, minority rights will be understood by nationalists as

well as liberals as being *granted* in the form of an exemption from the rule or norm, implying that a state and nation and their so-called authentic culture are naturally *the* norm. Therefore, minority protection and promotion is seen as a generous toleration of others and their alleged difference.

1.2 From minority protection to multiple diversity governance: the main hypotheses of the book

Having said this, the 'minority rights response' (Jackson-Preece 2005a: 174–81) claiming tolerance and legal protection for members of minorities – not the groups themselves – will always remain *reactive* and *defensive* as follows from the normative prescriptions of the ideologies of both liberalism and nationalism. Their fusion in the nineteenth century and the creation of a *monist nation-cum-state paradigm*, based on a 'meta-ideology of identitarianism' (Malešević 2006: 4–6, 202–3) following from the 'trinity of community, culture, and identity' (Wimmer 2013: 17), *frame* our understanding of all the central *concepts* of modern nation states and societies, such as territoriality, sovereignty, state, nation, people, legitimacy and the feeling of belonging, to this day. And it is this nation-cum-state paradigm which makes us perceive minorities as dangerous for the security, social cohesion, governability and political unity of peoples and states with the political conclusion that all forms of otherness be it in terms of language, religion, culture or social practices are *essential* differences which should be kept at bay. For intellectual and political advocates of identitarianism with the ideals or goals of either proletarian unity, the *Volksgemeinschaft* or national identity, the *significant* Other – the 'stranger' famously characterised by Georg Simmel (1908: 509–12) – cannot belong to Us and must either assimilate; that is, identify with our values, norms, and habits or be excluded from the 'imagined community' (Anderson 2006) as a danger for the respective collective goal. Therefore, both assimilation and exclusion will lead to the elimination of all forms of diversities (i.e. pluralism).

Hence, it is, first and foremost, a historical–sociological analysis of the twin processes of state formation and nation building in Europe which must open our eyes to the deep structures of the monist-identitarian nation-cum-state paradigm. But, as is highlighted by the historical record in Chapter 3, neither the French *civic* state-nation model based on the republican-universalist ideology of 'state neutrality' and 'cultural indifference' nor the German model of an *ethnic* nation-state, which transforms cultural diversity into ethnic difference through legal institutionalisation and thereby creates the categorical majority/minority division, can help us to overcome the Scylla of assimilation of others who do not adhere to the same religion or speak the same language or the Charybdis of physical extinction and/or territorial or institutional separation of others through genocide, ethnic cleansing, forced population transfers, ethnic segregation and other forms of discrimination as the perennial 'dark side' of modern European history (Mann 2005). Hence, the concepts and principles for conflict regulation, developed at the structural junctures of European history, such as the model of *cuius regio, eius religio* after the Augsburg Peace Treaty of 1555, the model of *laïcité* (i.e. strict separation of state and religion), developed after the French Revolution, and Marx's and Engels' notion of the *nation state* as a capitalist-bourgeois

phenomenon which will *wither away* with the development of socialism and communism, remain trapped in the identitarian nation-cum-state paradigm.

The *central argument* of this book, therefore, postulates that not *minorities are the problem* endangering national states and societies, but *exactly the other way round*. The modern national states and their positive law, 'embedded' in the ideologies of nationalism and liberalism, 'create' minorities by law and/or practice and endanger them in their rights to physical and psychological *existence*, diverse and multiple *identities*, institutional *equality* and effective political *participation*. It is precisely the meta-ideology of identitarianism and consequently thinking in terms of indivisible identities – be it the identity of *the* individual or *the* sovereign state or nation – as well as the *reifications* or even *naturalisations* of mental concepts, normative principles and social relations, which have led in the past to the *elimination* of all forms of *pluralism* in the practice of both 'models' of national states developed in the processes of state formation and nation building in Europe.

The paradigmatic thesis underlying this book is therefore that we have to *deconstruct* the *framing of minority protection through the monist-identitarian nation-cum-state paradigm*. This can only be achieved through a *social constructivist* epistemological *perspective* and an *interdisciplinary* methodological *approach* by historical, sociological and legal research, as well as a critical analysis of the ideological presumptions underlying political and legal deliberations and decision-making processes. And it is the *synthetic* (*re-*)*integration* of the results of these multidisciplinary analyses under the rubric of 'functional interdependence' (Marko and Handstanger 2009) which makes our approach *inter*disciplinary.

First, we *deconstruct* the belief in identity as intrinsic property of individuals or territories or in naturally existing communities like tribes, peoples or races, but also modern national states, as if they are natural givens. We show how these concepts and categories have been constructed and reconstructed in the processes of state formation and nation building over the centuries for the purposes of social and political ordering, which requires trying to reconcile the goals of political *unity* with legal *equality* and cultural *diversity*. Thus, *not fictions*, but the *systemic* analysis of *structures* and *functions* (see Chapter 2, section 2.2) must provide the analytical frame for the understanding of the processes of constitution, 'structuration' (Giddens 1986) and legitimation of social, political and legal order on the basis of normative principles such as sovereignty or autonomy of both individuals as well as collective entities. In this respect, we also have to recognise the mutually constitutive interplay or – in Anthony Giddens' terminology – the 'duality' of agency and structures whereby ideas, principles and values become institutionalised and stabilised in some sort of dynamic equilibrium in the permanent processes of functional *differentiation*, cultural *segmentation* and socioeconomic *stratification*, possibly leading to disintegration and, therefore, the need to pursue policies for *social* and *system integration*, which can never be fully achieved in social reality, but are necessary as a regulative idea for individual action orientation as well as collective decision making.

The second major thesis underlying the structure of this book is the assertion that it is necessary to *take ideology seriously* (Malešević 2006) at the *interface* of *law* and *politics* and not to conceive of it simply as 'false consciousness' or instrument of manipulation. As we demonstrate in Chapter 4, based on the critical analysis of paradigmatic case law in the field of minority protection, the *presuppositions* of different variants of the *ideologies* of liberalism,

nationalism, racism and multicultural pluralism *predetermine* the *results* of *judgments* of national and supranational courts in Europe. For instance, the ideological dichotomisation of individual versus collective rights determines the outcome of a dispute whether also representative organisations of minority communities can have legal standing before courts or not. Thus, positive law will always be undergirded by ideological assumptions because positive law is nothing other than the dried ink of decision-making processes following from political norm contestations.

The third major thesis of this book thus postulates that the *generation* of *interpersonal solidarity* and *trust* need *not* necessarily remain *restricted* to persons enjoying the same legal and political status as citizens of a particular national state which is, moreover, based on belonging to an allegedly common cultural community of shared culture and values, as the ideologies of nationalism and liberalism would have us believe.

This enables us to understand the Europe-wide ongoing 'multi-culturalism-is-dead' public discourses and quests for assimilation or exclusion of others and the norm contestations in minority rights jurisprudence, which we analyse in detail in Chapters 6 through 9, as a conflict between adherents of the *meta-ideology* of *monistic identitarianism* against what we term the *cosmopolitan-pluralist* approach. Such an approach, as we demonstrate in the final chapter, Chapter 10, requires to replace the deep structure of monist-identitarianism in the nation-cum-state paradigm through the *identity/diversity – equality – participation nexus* as deep structure for all normative principles and institutional arrangements to protect, preserve and promote cultural, social, and political pluralism. In this regard, the principle of human dignity serves as axiomatic anchor in the necessary but situationally dependent triangulation of the principles of freedom, equality and diversity at the micro level of intersubjective social relations in connection with the institutional accommodation of autonomy, integration and unity at the macro level against the dual dangers of assimilation or separation, exclusion and, in the worst case, physical extinction.

In conclusion, as long as the ideologically constructed dichotomy of equality equals *identity* as *sameness* versus *difference* – which forms the *structural content* of the ideologies of racism, nationalism and liberalism – is not transformed into a *triadic* structure of identity, equality *and* diversity without the alleged predetermination for conflict or cooperation, and only when we no longer believe in the allegedly *natural* character of social relationships will we be able to imagine institutional arrangements of *equality* on the basis of different forms of *diversity* and thereby various forms of *pluralism* as the new essential task of constructive institutional and constitutional engineering.

These theses form the theoretical framework for a new approach which is termed *multiple diversity governance* and should replace the nation-cum-state paradigm. The characterisation as multiple diversity governance highlights at least three theoretical innovations of this book:

1) the opposition against the identitarian, monist nation-cum-state paradigm and ensuing elimination of all forms of multiple identities against which we insist on the fact that multiple identities are in social reality the rule and not exception as we demonstrate in Chapter 5, section 5.2;
2) the complexity of the *interrelationship* between the *socioeconomic* and *cultural dimensions* of social and political systems is frequently reduced in scholarly literature to a simple

dichotomy between 'class' in the sense of Marxist ideology or 'ethnic group' (Max Weber) as if one phenomenon could be explained by the existence of the other. Instead, we will show their 'functional interdependence' possibly leading to severely divided societies if these two dimensions of social systems, namely the socioeconomic stratification and their symbolic, cultural translation into ethnic groups through social 'closure' (Weber 2013) overlap and mutually reinforce each other; and

3) the need for further development of the concept of 'diversity management' from a tool for recruitment of employees in multinational business corporations as a possible resource for business innovation to a *comprehensive political* and *legal theory* under the conditions of globalisation in the twenty-first century *how to reconcile* the need for *political unity* with *legal equality* and the preservation and fostering of *cultural diversity* of and between groups and nation states.

This theoretical framework should not remain 'pure theory' of law and politics however, but will be used – as mentioned above – in Chapters 6 through 9 as a basis for the critical analysis of the development of legal standard setting and case law on minority protection in Europe, both at the national as well as supra- and international level within the respective legal frameworks of the European Union and the Council of Europe (CoE), but also the United Nations (UN).

1.3 The structure of the book

Chapter 2 gives an overview of the basic theoretical and methodological issues of law, sociology and political sciences and their interrelationships in order to provide the conceptual and terminological toolbox for our *critical, interdisciplinary inquiries*.

Chapter 3 provides a *historical*, *sociological* and *ideological analysis* of both the historical contingencies, as well as normative and institutional path dependencies created through the twin processes of state formation and nation building in Europe since the end of the medieval age.

Following the seminal work of Theodor Schieder (1992) and Ernest Gellner (1997), who demonstrated that there were three geographical areas and three historical phases of these twin processes in European history, in section 3.2. we reconstruct these historical processes and their results in the form of two – normatively and empirically opposing – models of national states: the French *civic* state-nation leading to assimilation, and the German *ethnic* nation state model leading to all the forms of extinction of people and separation and/or exclusion of peoples, territories and/or institutions.

As we show through a careful textual and contextual analysis of the writings of political philosophers and revolutionary documents, the *meaning* of the concepts of sovereignty and property which had been developed in the medieval age – not least through the rediscovery and reception of Roman law – was transformed in the (re-)construction of the old and new concepts of territory, sovereignty, state, people and nation and through their further reification and naturalisation. Through such a naturalist fallacy, based on the conflation of epistemology with ontology, the process of the social construction of categories and concepts becomes invisible and could be (mis-)used by the intellectual and political advocates of the

ideologies of liberalism and nationalism for the political mobilisation of people, as well as legitimation of the exercise of political power. As we demonstrate, the fusion of these two ideologies into the nation-cum-state paradigm in the nineteenth century remains based not only on this fallacy, but also on other fallacies and paradoxes which continue to haunt all efforts for minority protection, even under democratic auspices, such as the liberal-democratic paradox, the Böckenförde paradox and the Arendt paradox.

Chapter 4 thus provides the necessary ideological and empirical analyses for the deconstruction of these fallacies and paradoxes following from the monist-identitarian nation-cum-state paradigm. In sections 4.2 and 4.3 we provide the background information on the *structures* of the ideologies of racism, nationalism and liberalism and then we critically discuss scientific theories about nations and nationalism, as well as the intersections between the ideologies for racism and nationalism and the social categories of ethnicity and culture. Thereby we can demonstrate, firstly, the *conflation* – of particular analytical importance for this book – of the theoretical concepts of *diversity* and *difference* as well as *culture* with *ethnicity* as if the latter were the personal property of individuals or groups and not simply a legal category with the purpose to serve as point of reference for the legal construction of anti-discrimination rules and minority rights; and, secondly, the *ideological* fallacies in terms of *monocausal reductionism* such as the hypothesis following from Samuel Huntington's approach (Huntington 1993) that ethnic difference is the root cause of violent conflict, as well as *dichotomisations*, not only of civic versus ethnic, but also universal versus particular, public versus private or culture versus politics.

In particular, section 4.3 is dedicated to the reconstruction of various forms and combinations of the political philosophies or ideologies of racism, nationalism, liberalism, communitarianism and pluralism in order to show how the different ideals and normative principles of these philosophies and ideologies predetermine – as hidden assumptions – the understanding for the justification of political claims as legitimate rights in political deliberations and legal adjudication of apex courts in Europe and Northern America. These conundrums of the liberal-democratic state are, first, the myth of cultural *neutrality*, the '*identity fiction*' that the majority *is* constituting *the* nation and the *majority principle* for collective decision making; second, the debate as to whether there is a democratic right to secession or not, based on different conceptualisations of individual and collective *self-determination*; and, third, the alleged dichotomy of *formal versus substantive equality* disguising the underlying, much more problematic 'dilemma of difference' (Minow 1990). Section 4.4. identifies and explicates the remaining *civic-ethnic-national oxymoron* of all political theories and the case law discussed.

In Chapter 5 we give evidence derived from relational sociology and social psychology as to why we insist on the 'social fact' (Searle 2010) that multiple identities and a plurality of social relationships are normal in 'social reality' (Berger and Luckmann 1966) and not the allegedly indivisible identities of *the* individual, state and nation as the ideologies of liberalism and nationalism would have us believe.

In section 5.2. we summarise the tools from relational sociology and social psychology for the deconstruction of the monist-identitarian nation-cum-state paradigm. These are, first, *social identity theory*, which explains how multiple identities and social roles are created in the processes of categorisation and identification through depersonalisation

and self and other stereotyping; second, the concept of *institutionalisation* as a dynamic process of social organisation helps us to overcome the dichotomy between (individual) agency and (collective) structure and to explain why and how group formation is a process of *social closure;* and, third, the processes of *social integration* through group formation and *system integration* which determine the 'structuration' of societies so that we can distinguish three ideal types of societies: multicultural, pluri-ethnic, and deeply divided societies. In conclusion, we present *three different meanings of the concept of ethnicity* in social theory and public discourses.

In section 5.3. we show the necessity of the translation of the results of relational sociological theory and social psychology into a critical reflection of the legal-dogmatic doctrines of constitutional and international law such as the 'hierarchy of norms' (Adolph Merkl) and the monism/dualism theories of the relationship between national and international law. In section 5.3.1. we deconstruct the false dichotomy of individual versus collective rights on the basis of our approach of the multi-perspectivity, multidimensionality and multifunctionality of law (see below). In the following section, section 5.3.2, we then develop a theoretical model of social and system integration by law through norm contestation in a norm-generative cycle overcoming the legal-dogmatic doctrines referred to above.

In conclusion, compared to primordial or functionalist-instrumental theories of ethnicity and nationalism (Smith 2010), our *social constructivist, pluralist approach* is – from an epistemological perspective – based on *multi-perspectivity*. This is the idea that different situations and contexts will lead to different interpretations and thus conceptualisations of social and legal categories, rather than adhering to given, fixed identities and the respective socio-political – only seemingly indivisible – entities such as the individual, state or nation, community or society. In other words, different names designate the same situation, if seen from a different perspective. From this, it follows that not entities but *social relations* and the *processes* of their change form the smallest units of analysis. Hence, social relations and legal norms are necessarily *multi-functional* which also reflects their *multi-dimensionality* as regards their ontological status (Searle 2010). These insights are combined with Antje Wiener's 'theory of contestation' (Wiener 2014). Wiener rightly argues that there is no neat distinction between law making, implementation and adjudication, but only a permanent process of *norm contestation* whereby cultural validation through the creation of specific 'meaning-in-action' is as important as legal and social validation of norms. Thus, the ideological construction of a dichotomy of universalism versus particularism—whereby the latter is equated with relativism leading to the reproach of cultural relativism against normative theories of multiculturalism—is simply wrong, based on the *confusion* of *relativism* and *relativity.*

This position must serve not only as the ethical standard for the institutional design of social and system integration on the basis of the institutionalisation of the two basic functions of multiple diversity governance, namely autonomy *and* integration, but also for limits of tolerance in hard cases of judicial adjudication of human and minority rights (Xanthaki 2010: 40). This is crucial when balancing the need for the protection of individual human rights not only against the values of the respective majority, but also to protect minorities within minorities – with the individual person always being the smallest minority.

Therefore, different sociocultural, socioeconomic and political structures require different legal and political instruments on a *continuum between* the *two ideal-typical functional poles* of autonomy and integration, and thus a mix of legal and institutional mechanisms in the form of *differentiated rights*. Against the ideologically constructed dichotomy of individual versus collective rights, these are thus individual and group-related rights to:

- *existence* against genocide or ethnic cleansing, but also other forms of expulsion from territory frequently euphemistically called voluntary population transfer; to social and economic subsistence rights; and, in light of Arendt's paradox, a right to have rights without belonging to a pre-political community in terms of the Böckenförde paradox;
- *multiple and diverse identities* against the 'dilemma of difference' (Martha Minow) through either forced assimilation or allegedly natural assimilation processes following from industrialisation and urbanisation;
- *institutional equality* before and through law; and
- *differentiated rights to effective political participation* in decision-making processes in different situations and at different territorial levels.

Based on these fundamental functional prerequisites and the concept of differentiated individual and group-related rights, the structure of the respective Chapters 6 to 9 is dedicated to the critical analysis of legal standard setting and the case law of European courts at the national, supra- and international level. It goes without saying that the critical analysis of the case law, structured along these lines, is not restricted to an analysis of whether the decisions of these courts are correct from a legal-dogmatic perspective in light of the national or supranational textual prescriptions. The critical analysis of the judgments of these courts thus involves a discourse analysis of their reasoning (see Chapter 2, section 2.2) in order to bring the ideological assumptions to the fore and to evaluate them in light of the political theories and sociology elaborated in Chapters 4 and 5. At the end of Chapter 9 we have collected enough results to test the initial hypothesis of the 'renationalisation' of Europe and whether we indeed are witnessing the generation of a new 'political cleavage' between denationalisation and renationalisation of European societies and legal systems (Beck 2002: 97).

The final chapter, Chapter 10, is dedicated to sketch out an alternative to the monist-identitarian nation-cum-state paradigm which we term the model of multiple diversity governance. Again, in section 10.2 we undertake a critical *ideological analysis* of the fault lines between *liberalism* and *cosmopolitanism/universalism* on the one hand, and liberalism and *communitarianism/particularism* on the other, to identify the remnants of the nation-cum-state paradigm, also in philosophical debates about cosmopolitanism such as the Böckenförde paradox and the dichotomy between individual and group rights. This enables us, in section 10.3, firstly, to overcome the false dichotomies of universalism versus particularism and (moral) relativism and to demonstrate the *indivisibility* of *human and minority rights* also against all reproaches of Eurocentrism and finally to develop a theory of 'cosmopolitan constitutional pluralism.' In section 10.4, we analyse case law of national and supranational apex courts to demonstrate the generation of a new/old cleavage between nationalist and

cosmopolitan interpretations of human rights the latter of which we term 'cosmopolitan constitutional law-in-the-making.' In section 10.5, we show how the *triangulation* of the *normative principles* of *dignity, equality and diversity* can be translated into *institutional arrangements* of *autonomy, subsidiarity, integration, multicultural federalism* and *power sharing* as possible yardsticks for future efforts of constitution engineering in pluriethnic or ethnically divided societies.

The interdisciplinary approach 2

Law, sociology and political sciences

Joseph Marko

In this chapter we provide an overview on how lawyers think and work in practice, as well as what can be called background knowledge in sociology and political sciences, in order to clarify the meaning of basic terms and theoretical concepts of our interdisciplinary approach. In the first section about law in practice we discuss the basic institutional structures of any legal system and how lawyers interpret and apply legal texts in the meaning of positive (i.e. man-made) law in their everyday practice as judges, civil servants or attorneys. In the second section we give – from the epistemological and methodological perspective of social constructivism – a simplified overview of basic concepts, definitions and terms that we use in this book, such as system, structure, function, institution, human agency, personality, role behaviour, discourse analysis and deconstruction.

2.1 Law in practice: thinking like a lawyer

First, and above all, when we speak of a *multilevel legal system*, which is combined with the idea of different legal sources of positive law such as international treaties, constitutions, laws – or more technically speaking, parliamentary statutes – but also judgments of courts and administrative legal acts, we must distinguish between *national* legal systems and *international law*.

The former are mainly state-centred legal systems because all legal acts created by the state institutions form the corpus or body of positive law, which is seen as both *legitimate* and *authoritative* in the sense that the rights and obligations it contains will be enforced by the responsible state institutions, also against the will of those affected if necessary.

To give first an example which is not related to minority protection at all, but will be familiar to any reader of this book: if a speed limit prescribed in a traffic regulation requires you to drive no faster than 40 miles per hour and you violate this speed limit and are sanctioned by the police with a fine, you cannot claim that this fine is illegitimate and you therefore have a right to violent resistance against police action. The only possibility you

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have in a political system governed by *rule of law* (i.e. a state in which law is supposed to limit the exercise *of* political power and is not – only – an instrument *for* the exercise of power) is to file an appeal against the fine. Two possibilities follow: first, reasoning in terms of factual evidence that the police made a mistake since you were driving at only 35 miles per hour or, second, that the speed limit in the legal form of an ordinance or by-law was not *legally valid* since it violated a parliamentary statute which had been adopted according to the constitutionally foreseen procedures and so must be deemed legally valid in itself. What you will request from the administrative institution or court responsible to decide on an appeal is thus an administrative or judicial review based on either of these two possibilities. So you or the attorney representing you in the legal dispute will attack the fine – technically speaking the individual administrative act – and claim that the imposition of the fine is wrong since it was based on incorrect factual evidence, or you and your attorney will argue that the by-law (i.e. the speed limit) in itself violates valid law.

Any system of appeals must have an end, otherwise legal disputes could go on forever with no final, authoritative decision, thereby destroying the *belief* in the *legitimacy of law* as an effective instrument for dispute settlement or dispute prevention. This supposition is thus organisationally translated in most countries into a hierarchy of courts with a final court of appeals (i.e. a supreme court for criminal, civil, and administrative matters). From a comparative perspective, there is a variety of similar institutions in European countries fulfilling this function as final courts of appeal for different areas of law in the respective national legal systems.

Before we can demonstrate the logic for the organisational differentiation into a variety of organisational hierarchies – technically speaking called instances, whereby in most common law and civil law systems you will have a court of first instance and a court of second instance as a court of appeal before you end up in a supreme court as the final court of appeal – we must also refer to the theoretical concept of a *hierarchy of laws*. This concept was used for the establishment of a permanent procedure of judicial review of parliamentary acts in the famous case of the US Supreme Court in *Marbury v. Madison* as a common law precedent in 1803 (Box 2.1).

Box 2.1 US Supreme Court, *Marbury v. Madison*, 5 US (1803)

In this case, Chief Justice Marshall in writing the opinion of the Court had to decide whether a particular statute violated the Constitution in spite of the fact that the text of Article VI, section 2 of the Constitution read: 'This Constitution, and the Laws of the United States … shall be the supreme Law of the Land…' Any *literal* interpretation of this text must come to the conclusion that both classes of law, namely the Laws of the United States and the Constitution, must have the same normative rank, so that judicial review of parliamentary statutes in light of the normative stipulations of the Constitution is prohibited. However, Chief Justice Marshall did not make recourse to a literal interpretation by reasoning that a doctrine that courts must close their eyes on the constitution, and see only the law if both the Constitution and the law have to be applied in a

> case at hand, 'would subvert the very foundation of all written constitutions …. It would be giving to the legislature a practical and real omnipotence …'. And his reasoning – by making use of a *functional* or *purposive* interpretation with regard to the purpose of a Constitution for the entire political system – goes on: if that would be true, 'then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable'. Hence, 'all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void' (Sullivan and Gunther 2010: 8).

Without explicitly referring to a legal theory about a hierarchy of laws in his reasoning, Chief Justice Marshall first made recourse to a *teleological or functional or purposive interpretation* (these are the synonymous terms used in American and European textbooks of constitutional law) instead of the more obvious *literal* one following from the text. He essentially asked 'what is the purpose of a written constitution?', in particular in comparison with the English/British common law system. English constitutional law – based on the constitutional doctrine of parliamentary sovereignty – does not recognise different normative ranks of parliamentary acts as is the case in almost all other constitutional systems of liberal democracies. In the latter, there exist ordinary laws adopted with simple majority vote by parliament or – because of their importance in regulating the organisation of state institutions and the exercise of their powers, including the relationship between individuals and the state; that is, human and citizens' rights – those adopted with a qualified or super majority which are considered to form constitutional law in rank above 'ordinary' laws. Incidentally, this is a significant explanation for why the British national legal system has found it so difficult to this day to accept judgments of supranational courts such as the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ). For more on this dualist conception of two layers of basic and subordinate or constitutional and ordinary law from a comparative common law perspective, see Gardbaum (2012: 172–3) and Michelman (2012: 304–11).

Marbury v. Madison highlights that different methods of interpretation can lead to opposite results, so the question for the judge was whether the literal or the functional interpretation was the correct method to achieve the correct result. Thus, in order to *legitimise* his *choice* of a functional *interpretation*, Marshall made use of a rhetorical figure or *topos*, namely the *argumentum ad absurdum,* arguing that written constitutions 'are absurd attempts' if laws can violate the Constitution. The Constitution is thus not only part of the 'supreme Law of the Land', in the terminology of the US Constitution, but is, in Marshall´s words, even 'paramount' in constituting the legal-dogmatic foundation for all law making, implementation and adjudication and, in particular, for the practice of judicial review of parliamentary acts by courts.

The Viennese school of legal positivism (Klecatsky *et al.* [1968] 2010) further elaborated the problem of judicial review into a comprehensive legal theory of a *hierarchy of norms* (*Stufenbau der Rechtsordnung*). According to this theory, all legal acts of the legislature, executive and judiciary form a hierarchy; that is, they form different levels of normative rank with the constitution at the top of the legal pyramid, as we can conclude from *Marbury v. Madison*.

Two consequences should follow from this theoretical model: first, when viewing the pyramid *top down*, any legal act shall be based on a higher-ranking act so that lower ranking acts substantively and procedurally *operationalise* the higher, more general and abstract legal acts to make them better applicable to concrete situations or disputes. Second, viewing the pyramid from the *bottom up*, in *case of conflict* between the regulations at different levels, the *higher-ranking acts are superior* in order to guarantee the unity of the entire legal system. Thus a supremacy clause, as it is known in American constitutional law, is the linchpin of a constitution which prevents the legal system from falling apart.

The second historical achievement of the Viennese school, in particular of Hans Kelsen, is the establishment of an *organisationally separate, specialised constitutional court* with a monopoly over judicial review, in contrast to the *American decentralised system* (Stone Sweet 2012). This system is based on a *diffuse judicial review* procedure whereby every judge, even at the district level, can make a decision on the conformity of laws to be applied with the constitution and may *set aside* the law he or she finds in violation of the constitution. According to the *Austrian centralised system* developed by the Viennese school, only the constitutional court can decide on the conformity of laws with the constitution so that other courts – depending on their rank in the hierarchy – must either close their eyes, according to the words of Chief Justice Marshall, or would have to submit the case to the constitutional court to review the law which they have to apply in the case at hand before they can make a decision on the merits of the case. Depending on the decision of the constitutional court on the non/conformity of the law with the constitution, they have then to decide on the merits. In contrast to the American decentralised system, the decision of the constitutional court that a law or parts of it are in violation of the constitution leads to a *formal invalidation* of this law or its parts. This system was introduced in the Austrian and the Czechoslovak constitutions adopted immediately after the First World War, but only the Austrian constitutional court became operative. From a functionalist perspective, *constitutional adjudication* is thus characterised by two main functions: first, judicial review of all sub-constitutional legal acts for their conformity with the constitution and, second, the judicial enforcement of the protection of human rights enjoying constitutional rank.

It goes without saying that different national legal systems in Europe have different constitutionally entrenched systems of how to *organise appeals procedures* for different areas of law. Again, Austria must serve as illustrative example for one of the *two poles on a theoretical continuum*. Owing to the historical institutional background established under the Habsburg monarchy, there are three supreme courts today. The supreme court for criminal and civil affairs, the administrative court – having been until recently the only administrative court serving as first and final court of appeal in administrative procedures on top of a hierarchy of administrative institutions with appellate function – and the (federal) constitutional court responsible for constitutional adjudication. The opposite pole on the continuum is represented by Switzerland where there is only the (federal) supreme court as an institution, but it is internally differentiated into departments which serve as courts of last instance for criminal and civil affairs, administrative matters and constitutional adjudication, including human rights protection. However, following Jean Jacques Rousseau's conception of *the* law as 'general will' of the people (more detail in Chapter 3), all courts, including the Swiss supreme court, are not competent to review whether federal laws are in conformity with

the Swiss constitution (see Article 190 of the Swiss constitution; Häfelin *et al.* 2016: 654–56) in the Swiss system of diffuse judicial review.

In summarising the *functional* and *organisational structures* of a national multilevel legal system we must highlight the following.

State-centred positive law is subdivided into various areas of law, mainly civil law, criminal law and public law, which are again subdivided, but also sometimes overlap with other fields, such as property law, tort law, family law, labour law, administrative law, constitutional law and (private and public) business law. State-centred law means that all other societal organisations or communities and their legal regulations (such as churches or chambers of commerce) have either been suppressed or have become incorporated into state law, in the formation of what Max Weber has defined as a modern state (Box 2.2).

Box 2.2 Max Weber's definition of a modern state and ideal types of legitimation

Max Weber defines in *Economy and Society*, Vol. 1:

> The primary formal characteristics of the modern state are as follows: It possesses an administrative and legal order subject to change by legislation, to which the organized activities of the administrative staff, which are controlled by regulations, are oriented. This system of order claims binding authority, not only over the members of the state, the citizens, … but also to a very large extent over all action taking place in the area of its jurisdiction. It is thus a compulsory organization with a territorial basis. Furthermore, today, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it. … The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous operation.
>
> Weber [1922] 2013: 56)

As Max Weber states in his essay 'Politics as a Vocation':

> In asking for the 'legitimations' of this obedience, one meets with these three 'pure' types: 'traditional', 'charismatic', and 'legal'.
>
> First, the authority of the 'eternal yesterday' …. This is 'traditional' domination exercised by the patriarch and the patrimonial prince of yore.
>
> There is the authority of the extraordinary and personal *gift of grace* (charisma), the absolute personal devotion and personal confidence in revelation, heroism, or other qualities of individual leadership. This is 'charismatic' domination, as exercised by the prophet or -in the field of politics – by the elected war lord, the plebiscitarian ruler, the great demagogue, or the political party leader.
>
> Finally, there is domination by virtue of 'legality', by virtue of the belief in the validity of legal statute and functional 'competence' based on rationally created rules.
>
> (Weber [1921] in Gerth and Mills 1958: 78–9, 82–3, emphasis in the original)

As can be seen from this quote, Weber also deploys a methodological tool for possible empirical explanations of *legitimation* in the *exercise of power* which he designates as pure or ideal types. This tool is indispensable for his approach of *verstehende* sociology:

> An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct (*Gedankenbild*). In its conceptual purity, this mental construct (*Gedankenbild*) cannot be found empirically anywhere in reality. It is a utopia. Historical research faces the task of determining in each individual case, the extent to which this ideal-construct approximates to or diverges from reality …
>
> This procedure can be indispensable for heuristic as well as expository purposes …. It is no 'hypothesis' but it offers guidance to the construction of hypotheses.
>
> (Weber 1949: 90, emphasis in the original)

Legal pluralism (Turner 2011: 151–74) in terms of a *horizontal relationship* between state law and other forms of law, adopted and administered by non-state actors, must, however, not lead to the conclusion that state law can simply be set aside or invalidated by these other forms of law. It is the claim of *internal sovereignty* inherent in the concept of the modern state, as a result of the historical processes of state formation and nation building in Europe (Chapter 3), which immediately turns this relationship into a *vertical* one, with the state claiming supremacy of its law over any other law in case of conflict. Therefore, legal pluralism with *autonomous* organisational *structures* and *regulatory power* and only very abstract supervision by state authorities has survived in continental Europe only in the relationship between states and churches to some extent (Robbers 2005), and is now revived as a political and legal issue in the debates about immigrant integration, in particular of Muslims, which is discussed in more detail in Chapter 7, sections 7.3 and 7.5.

The same questions and *problems* of *sovereignty* and *hierarchy* arise also in the *relationship* between *national legal systems* and the law created by national states and between them in order to regulate their external relations as *public international law* (Cassese 2005; Klabbers 2017). The main instruments of public international law are *international treaties* concluded either on a bilateral or a multilateral basis between states. International law, however, also comes into being through state practice, which is then called *customary law* as the second major source of international law. Also in the relationship between international law and national law the problem of *conflict of laws* is raised, with the question whether international law or national law ultimately enjoys supremacy. The concept or legal doctrine of *ius cogens* (Cassese 2005: 198–212) gives international law priority over national law in case of conflict. In particular, human rights are seen by European states as so fundamental that they often claim priority for human rights in international dealings.

A question that is not only theoretically but also practically very important when dealing with the international human and minority rights treaties, is *why* and *how international law can be enforced*. Sovereign states, when they conclude treaties and/or become (founding)

members of an international organisation, are bound by the content of international law. However, this does not mean that international law can automatically be enforced on their territories. This theoretically complex and practically important problem of the binding force of international legal instruments despite state sovereignty must be discussed in light of two legal concepts mentioned above. Legal *validity* and *applicability* are very often confused in theory and practice, but must be tested separately before a state authority can make a binding decision for other state authorities or individual persons.

Within the overall theoretical framework of (state-centred) legal positivism, legal *validity* simply defines by whom, how and when a law or – more abstractly the norm – has entered into force so that everybody affected by its regulations has to obey them. To put it differently: nobody needs to obey the law or can be sanctioned for disobeying if the law is not valid. To make use of the earlier example for the purpose of illustration: if the constitutional court decides that the speed limit regulated in a by-law has been adopted by an authority which is not competent (i.e. not allowed to regulate speed limits) then the speed limit is not valid and you cannot be sanctioned with a fine.

The question of *applicability* of laws is again linked with language and the hierarchy of norms; what is, for instance, the meaning of rather vague language which you will quite frequently find in constitutional texts or international treaties such as 'due process' under the Fourteenth Amendment of the US Constitution or 'fair trial' under Article 6 of the European Convention on Human Rights (ECHR)? Only through numerous court decisions and thereby only incrementally and slowly will the meaning of these phrases be authoritatively specified and, even then, not only ordinary people, but also legal specialists can never be sure how to make use of these phrases in court litigation to win a case. Thus, the question of applicability again raises the problem of interpretation and which methods to use.

Generally speaking – as far as treaty-making powers of states are concerned – you will find the most important rules laid down in the *Vienna Convention on the Law of Treaties,* a multilateral international treaty which entered into force in 1980 (i.e. it became a binding instrument for the state parties which signed and ratified the treaty). The term *ratification* signals that an international treaty – when concluded between the state parties – does not automatically become part of the law of the land (i.e. the national legal system) in the meaning that it is legally valid on the territory of the respective state and has to be applied by its authorities. Ratification therefore requires that the national parliament has to give its consent to the text of a treaty signed by the responsible executive authority. It is through this *transposition* of international law into national law that the rules of an international treaty become valid for application by the competent state authorities. Thus, state sovereignty is 'formally' upheld since it is the national parliament which governs the entry into force of international law in the territory of the respective state.

With regard to the applicability of treaties, in terms of harmonisation of their rules with those of the national legal system, the same linguistic problems in terms of vagueness might occur. These problems will then more or less be resolved by the respective national legislation and the adoption of by-laws by executive authorities. Otherwise it will again be the task of supreme or constitutional courts to decide whether rules in terms of rights and obligations stemming from international treaties have supremacy over conflicting national law or not.

Again for the purpose of illustration, Article 7 of the so-called State Treaty 1955, concluded between Austria and the Allied Powers of the Second World War, guarantees minority rights for the Slovene and Croat minorities living in Austria. The Austrian parliament, however, for reasons which need not be discussed in this introduction, only adopted a minority law in 1976 and several law suits were brought before the Austrian constitutional court in the interim, since the minority rights guaranteed by the State Treaty were not effectively enforced due to a lack of harmonisation between the text of the international treaty and national law. Whereas the Austrian government thus contested the applicability of the rules of the State Treaty as such, the Court held that the individual rights following from the State Treaty have 'direct effect'; that is, they are applicable without need for further specification through other legal acts by the national legislature or executive.

Both legal concepts of *supremacy* and *direct effect* bring us finally to a short characterisation of the position of European Union (EU) law vis-à-vis the national legal systems of the member states (Cuthbert 2012). First, the law of the European Communities, as they were initially called following the Rome Treaty of 1958, came into being through international treaties between the original six states, which wanted to organise a new form of international cooperation with the establishment of supranational authorities, namely the European Commission, the European Parliament, and the ECJ. From a legal perspective, *supranational* means first and above all that these European institutions were given the authority by the treaties to make law in those areas where the member states had delegated their competences to the European institutions, such as, for instance, to guarantee the free movement of goods, capital, workers, and services which became later known as the four freedoms forming the back-bone for an internal market as goal of economic integration.

Summarising all of the legal processes for the creation of EU law, we can differentiate between two forms of EU law. So-called *primary law* is composed of all the international treaties and treaty amendments to date and *secondary law* is adopted by the EU institutions in the form of regulations and directives, which again specify the rules of EU primary law. What makes EU law different from both international law as well as national (constitutional) law and thereby constitutes its unique position as supranational (i.e. binding on state authorities of the member states within the EU legal framework) are the two major legal doctrines established in a series of cases by the ECJ. First is the doctrine that all EU law (i.e. not only primary, but also secondary law) enjoys *supremacy over all national law* of the member states, including their constitutional law, which has, of course, been contested by legal scholars as well as national constitutional courts with reference to the still existing sovereignty of the member states; however, without any major constitutional or political crisis as yet. The second doctrine developed by the ECJ is the *direct effect* of all EU law, meaning that – unlike in case of international law – there is no need to ratify (i.e. transpose primary or secondary law into the national legal systems of the member states) with one exception: directives have the same legal character as framework laws in federal systems (Chapter 9). They contain only guidelines – directives – for specification by other authorities, meaning that they are usually transposed into national law by adoption of a parliamentary statute. If the national parliament does not transpose directives on time and if the directive confers individual rights, the ECJ case law again determines that they have direct effect – as did the Austrian constitutional

court in the example above – so that national authorities must follow the rules of the directive and must set aside possibly conflicting national law in cases before them.

Finally, in order to avoid misunderstandings between different legal systems, we must also clarify the meaning of normativity or *normative force* from a legal-theoretical and not political or sociological point of view. By making use of the method of construction of ideal types (Box 2.2) we will find legal texts in civil law countries (for a general introduction see Merryman and Pérez-Perdomo 2007) which contain phrases with different normative character thereby constituting four ideal types of normativity, namely:

1) *programme norms* in the form of statements about historical facts or future goals for economy and society at large;
2) *government goals or directives* (in German, *Staatsziele*), which contain so-called objectives but rather abstract normative guidelines for all state action, such as the need for environmental protection, to be considered by all executive and judicial authorities in their decision-making processes;
3) *institutional guarantees* (in German, *institutionelle Garantien*) following from the content of individual rights, such as the guarantee of protection of the individual right to property, which implicitly requires that the legal institution of private property as such is recognised by the national constitution; and
4) *subjective rights* or obligations defining *specific rules* for behaviour of physical or legal persons. This final type is a specific concept of civil law systems in contrast to common law which does not differentiate between *objective law* in the meaning that normative prescriptions are valid only for governmental authorities on the one hand, and *subjective rights* on the other, which give physical or legal persons thereby standing before courts, in particular when such a subjective right is violated by unjustified interference of governmental authorities.

From a comparative perspective we can see that this legal-theoretical conceptualisation of normative force in civil law countries has a rough equivalent in the British and American distinctions (see, in particular, Gardbaum 2012: 181–85; Jacobsohn 2012: 779–83) between *concepts* containing ideas and values, *principles* or *standards* which do not contain specific rights and obligations, but need further specification that is basically achieved by the case law of courts and, finally, *rules* in a narrow sense conferring specific rights and duties that can be more or less directly applied. These processes are – incorrectly – most often perceived as 'mechanical subsumption' of norms to facts (Schauer 2012: 151–70, 190–202). As a matter of fact, these conceptualisations of normative force in both common law and civil law jurisdictions are again intimately linked with the question of vagueness of language so that 'all adjudication requires making choices among the levels of generality … and all such choices are inherently non-neutral' (Jacobsohn 2012: 781). It is thus the political discretion left by the constitution to the legislative power of the respective country as well as the *margin of appreciation* doctrine of the ECtHR, which brings us back to the process of judicial review by national courts as well as supranational courts such as the ECJ and the ECtHR.

Both the terms *legislative discretion* and *margin of appreciation* must be understood in the context of judicial review. What standard of review do supreme or constitutional courts as

well as supranational courts apply when they exercise *judicial review of legislation*? There are again broad similarities between American and Canadian as well as European courts.

In plain language, courts can – again as poles on a continuum – either exercise a standard of review which leaves much political discretion in policy regulation through legislation so that only a minimum standard is applied. In American constitutional law this is called the *mere rationalit*y test, whereas European courts – based on the same idea – will strike down individual legal acts only if they are arbitrarily applied in specific cases or if laws and by-laws infringe the constitution without any possibility of finding a reasonable justification for the interference. The other pole of the continuum is represented by the *strict scrutiny* test of the US Supreme Court, which finds its European equivalent in the so-called *proportionality test*, which can best be described as structured *judicial balancing* according to three criteria (for more information see Schlink 2012: 718–37; Barak 2012: 738–55).

Any interference with human rights requires a consideration of the following criteria in the following order, as can be seen from a textbook of German constitutional law written by an American law professor (Currie 1994: 307–10):

- whether the interference by law or administrative decision into guaranteed human rights is *adapted* (in German, *'geeignet'*) to the attainment of a legitimate purpose such as those explicitly enumerated in the ECHR, such as national security, prevention of disorder and crime or the protection of rights of others. Thus, the first step requires a decision whether there is rational fit between legitimate means and ends;
- whether the interference is *necessary* (in German, *erforderlich*) at all to achieve that end (i.e. whether the least burdensome means have been applied in achieving the desired goal); and, finally,
- whether the interference is *proportional* in the *narrow sense* so that a balance is achieved between the gravity of the interference into the subjective right and the importance of the legitimate public goal pursued).

Frequently, the last two steps are taken together in the reasoning of judgments.

The standard of review developed by the ECtHR works in a similar way derived from the limitations outlined in the wording of the respective second paragraphs in Articles 8 to 11 of the ECHR (Harris *et al*. 2014: 10–14). In summary, a state may restrict the protected right to the extent that it is '*necessary in a democratic society*' for the enumerated public interest purposes. This first requires a reflection on the meaning of 'democratic society', which the ECtHR understands as an essential element that *ideological* and *cultural pluralism* have to be maintained. The term 'necessary' has been interpreted in the meaning that the restriction must be 'proportionate to the legitimate aim pursued' and therefore requires the judges of the ECtHR to apply roughly the same criteria of the proportionality principle as elaborated above.

The *margin of appreciation* doctrine derives from the supranational character of the ECtHR. The margin of appreciation granted to national authorities cannot be summarised in a generalised rule but develops over time and case by case. Frequently, the ECtHR – in a very similar way to the US Supreme Court – grants a wide margin of appreciation by making use of a very broad understanding of the means-and-ends test when the area of social and

economic relations is affected, whereas the ECtHR makes use of the proportionality test in cases of ethnic discrimination and thus grants only a very narrow margin of appreciation to national authorities. As we can see from these comparisons, judicial review procedures in common law and civil law systems have become more and more similar.

Finally, and technically speaking, the judgments of the ECJ, the ECtHR or national constitutional and supreme courts are binding only for the parties of the dispute (i.e. *inter partes*). Owing to the fact that judgments of high courts regulate with final authority not only unique legal disputes between two parties, but frequently disputes which are likely to reoccur many hundreds of times, their judgments gain importance as *precedent*. Hence, within common law systems with the legal doctrine of precedent or *stare decisis*, similar cases should be decided in a similar manner (McLeod 2013: 121–3). Judgments of Continental European high courts will also – in practice – affect all future cases with analogous facts. This means that they have legally binding effect not only *inter partes* in the single case, but *erga omnes* (i.e. for all possible future parties of judicial disputes).

2.2 Theoretical approaches and methods in sociology and political sciences

After this overview on how lawyers think and work in practice, in particular from a legal-dogmatic perspective, we now turn to the two other fields we mentioned in the introductory chapter. The first is the analysis of fundamental *values and normative principles* as *functional reference* for political decision making, which is covered by the academic disciplines of political philosophy, legal philosophy, political theory and the history of ideas. The second is the field of *empirical analysis* of the *effects* of law (i.e. rule-making, rule-application and rule-adjudication), in particular covered by the academic discipline of sociology of law.

Most confusions and intercultural misunderstandings between scholars in different academic disciplines of the social sciences, humanities and law result from the fact that they very often use the same terms such as state or institution to mean different specific things. Thus, when sociologists, political scientists or lawyers use the term ethnic group, this can be seen – throughout this book – as a *linguistic abbreviation* or shorthand term for the complicated cognitive and emotional assumptions and empirically observable processes underlying the verb to act and its implicit conceptualisations of human behaviour as communication or (inter-)action. Of course, only physical persons can act so that the terms used such as group, community or civil society and states as main actors or agents, for instance, in international law – not only when concluding international treaties, but also when waging wars – are only shorthand terms which must not be used as if groups, communities or states can act like physical persons.

Lawyers will immediately recognise that these *epistemological*, *ontological* and *methodological* considerations above are in line with what they call legal persons, though these do not really exist as thing-like natural objects or subjects for law, but are merely – in the terminology of Hans Kelsen – 'legal fictions' (Kelsen [1934] 2008: 126, 135; Kelsen [1921] 2010: 1223). However, such legal fictions are not simply 'ghostly objects in space' (Kymlicka 2002: 225), but they are necessary *mental concepts* for the *social construction* of the 'social

world' (Berger and Luckmann 1966; Searle 2010), of which law and legal institutions are generally part. Since sociologists and political scientists want to study phenomena which exist outside of their mental universes, the *contextual constructivist approach* presented here (see Giddens and Sutton 2017: 43, and below) recognises that there is an empirical reality which can be observed and analysed by anthropologists or sociologists. Thus, whenever people perceive mental concepts such as money or the state *as if* they are real (objects) to orient their interactions in time and space, the consequences following from *communication* and *interaction* in terms of possibilities and restraints, termed the *duality* of social, cultural, economic or political *structures* (see below), are no less real than the existence of physical objects such as mountains or rivers in the human environment (for a short overview on the intellectual history of the concepts mentioned in italics see Giddens and Sutton 2017: 144, 37, 25; Welch 2013: 189, 194).

In oversimplifying these linguistic, epistemological and methodological caveats we can see that terminological confusion by giving seemingly similar things which are nevertheless different the same name very often rests on different epistemological theories about the *ontological status* of the phenomena we observe, such as physical objects, but also patterns of recurring human behaviour. In this respect we can basically differentiate two more or less opposite *epistemological positions* when we try to answer the question: what is the so-called nature of things or processes under observation? A general overview on these different 'ways of knowing' is given by Moses and Knutsen 2012.

- *Positivists* or *naturalists* take facts that we can observe with our human senses to be real. To see a physical object in the world around us then means it must exist independent of the subjective consciousness of an observer.
- The opposite theory of *interpretivism* or *constructivism* will insist that we can understand and/or explain and thus react to things in the world only through interpretation (i.e. by comparing observed facts in light of – previously – imagined mental concepts or models). Therefore we cannot simply recognise existing facts as such; what we see as *phenomena* can be recognised only when these phenomena fit into categories such as, for example, man or woman, and role models of behaviour when we speak about institutions (Box 2.3).

Box 2.3 Phenomenology and the meaning of the concepts of social significance

According to the phenomenological approach developed by Alfred Schütz, *social meaning* (in German, *Sinn)* is always intersubjective, constituted by Ego and Alter, thereby forming structures of the 'social world' (in German, *Lebenswelt*) through subjective cognitive experience, subjective meaning and significance by interpretation of this experience and, finally, intersubjective communication. A precondition for this approach is the possibility of finding either an overlapping consensus for the respective systems of significance or that the differences in significance are irrelevant for the goal

to be achieved in a given situation – what Schütz calls 'neutralisation of differences'. The actor is thus no longer the single, isolated Self, but is representing a social role. *Significance* and salience or 'relevance' in Schütz's terminology become important when mutual expectations founded on categorisations and identifications are problematised so that the social world we are embedded in can no longer be taken for granted. One can thereby distinguish 'thematic' relevance (i.e. which part of social reality should become the focus of communication); 'interpretative' relevance (i.e. the choice between different approaches or strategies for resolving the problem); and 'motivational' relevance, when meaning is problematised as either motif or explanatory factor of action (Schütz [1932] 2004).

Based on this phenomenological approach, social constructivists insist that unlike physical objects of the material natural world, the social world is *socially constructed* through human *interaction* (Heller [1934] 1983; Berger and Luckmann 1966) so that – against what had been proclaimed in classic, liberal ideology and earlier rational choice theories – individual human beings do not simply exist with pre-given identities, interests and preferences, nor can they be reduced to the idea that every rational person will only want utility maximisation for himself and nothing else, as older theories of economics presumed with the infamous model of a *Homo economicus*.

In conclusion, for our purposes, *social constructivism* as a theoretical and methodological approach continuously applied throughout this textbook is based on what John Searle calls 'collective intentionality' and 'assignment of status functions' through speech acts as 'declarations', thereby creating 'human institutional ontology' (Searle 2010:59, 69). Through such speech acts, human beings are able to *make themselves believe* that something *is* the case thereby giving imaginations in the form of legal fictions a being of their own. This is achieved through three analytically distinct forms of *plausibility* (following and extending Rüsen 2013: 58–62) in the *construction* of *categories* and *concepts* as can be seen, for instance, in the next chapter by using the historical–sociological approach for the interpretative re-construction of the processes of state- and nation-building in Europe.

- *Empirical* plausibility requires that statements about what has happened, why, when, and how can be based on *factual evidence* generated through critical testing of historical sources; that is, of the *fit between* the *text* of a historical document and its social, cultural and political *context* in the tradition of the classic historiographic method of Leopold von Ranke (1790–1866) following his maxim to generate knowledge 'as it really happened' (in German: *wie es eigentlich gewesen war*; Moses and Knutsen 2012: 119–130). This was and is quite often (mis-)understood as *objectivity* or *impartiality* of scientific research in a reductionist and oversimplified way. Therefore, we must bring to light also two other forms of plausibility which bridge the gap between and the dichotomisation of the ontological realms of so-called factual, empirical reality and pure normativity which haunts legal philosophy and theory to this day. These additional forms of plausibility and their triadic structure including empirical plausibility are:

- *theoretical* plausibility following from the possible *generalisation* of contextual, particular empirical facts beyond the respective subjective meaning given them by actors thereby generating intersubjective knowledge about historical events which is nevertheless independent of the subjective intent of actors. Theoretical plausibility hence refers to the *explanatory* power of interpretative statements about empirical historical facts because of possible structural alternatives for action-orientation and is the only way to discover, describe and explain what are called unintended consequences. At the same time, the choice between facts and their structural alternatives either through actors or past interpreters contains an evaluative and thus a normative element requiring, finally,
- *normative* plausibility through the critical reflection of the epistemological *perspectives* and assignment of ontological *status functions* in light of the discursive process of argumentative *justification* through which past events are interpretatively (re-)presented.

In conclusion, *interpretation* is always embedded in a *sociocultural context* following from *ideas, values, normative principles* and *rules* and their differences requiring choices between alternatives for action-orientation. Hence, in opposition to Ranke's maxim referred to above, these *meaning-generative* perspectives always have an *evaluative* and thus *normative* content which must critically be reflected to enable intersubjectively generated objectivity (i.e. mutual understanding *and* recognition of, for instance, what a people *conceptually* is *by definition* and who the people *empirically* are in a *given situation*). Seen from this perspective, legal persons can have agency: they are able to act as subjects in linguistic homology with natural persons, for instance by concluding contracts (in reality through persons acting in their capacity as legal representatives) or to have standing before courts. The same holds true, of course, for the organisation of state activities through what constitutional lawyers more technically speaking call organs of state powers (i.e. the legislature, executive and judiciary). Hence, what sociologists designate in a more abstract way as systems and institutions will be referred to by lawyers as states, the parliament, political parties or national communities or ethnic groups or minorities. Against the dichotomisation of facticity or reality and normativity, we postulate their *functional interdependence* (Marko and Handstanger 2009), and therefore clarify the need for *triadic structures* and the method of *triangulation* for our interdisciplinary approach.

However, in order to avoid misunderstanding: *positivism* in the social sciences and the methodological quest for *explanation* of processes through empirical testing of hypotheses postulating causes and consequences, and *social constructivism* with its priority for a hermeneutic *understanding* through interpretation, are *not necessarily mutually excluding* (for a short overview on the respective intellectual histories of these methodological approaches and their possible complementarity see Welch 2013: 49–50). Instead, our approach in this textbook is based on two premises:

- First, emphasis on interpretative *understanding as necessary, but not exclusive part* of any, including causal, *explanation*; in particular, in the phase of problem exploration and the construction of conceptual schemes as *analytical framework* for the elaboration of

hypotheses as we see from Box 2.2. above with regard to the function of Max Weber's ideal types.

- Second, the fact that social scientists are part of the world which they want to analyse and understand and/or explain must lead to the conclusion that there is *no strict division possible* between a *participant's* and an allegedly neutral *observer's perspective*.

In a nutshell, social constructivists thus maintain in the tradition of Weber's *verstehende Soziologie* (interpretive sociology; for a short overview on the intellectual history of this approach see Welch 2013: 45–52) and Alfred Schütz's phenomenology, the priority of the hermeneutic mechanisms of understanding the *meaning* of interaction (i.e. individual behaviour as well as institutionalised forms of collective decision-making) by *interpretation* of the underlying motivations, interests and *situational contexts* from a participant observer's perspective.

Moreover, for the purpose of understanding two of the central concepts of this book, namely *social* and *system integration*, the terms and concepts of interaction and collective action lead us to the *second major dividing line* in social science theories and methodologies, namely the views on how it is possible to explain human action and the consequences of communication and interaction between not only individual *persons*, but also persons and *groups* of people or *institutions*, through what is known as interplay between *agency*, this means the capability to act, and *structure* in terms of relations between institutions and other such collectivities (for an overview on the intellectual history of the structure/agency dichotomy see Giddens and Sutton 2017: 23–26). However, according to Anthony Giddens' theory of 'structuration' (Giddens 1986), the theoretical-methodological dichotomy of structure and agency in older social theory can be *overcome* by the theorem of a 'duality of structures' as both enabling *and* restraining *medium* in processes of interaction and as an *outcome* of the production and reproduction of social practices and thereby the creation and change of social order. Hence, both the 'dualism' of agency and structure, as well as the 'duality of structures', serve as *analytical framework* to understand and explain empirical processes of social and system integration as interplay between the micro-level of individuals, the meso-level of groups, and the macro-level of social systems or societies as a whole.

In conclusion, there are analysts adhering in the tradition of Max Weber to what is called *methodological individualism*, strictly requiring the explanation of the behaviour of individuals as – in the end – only possible explanatory factor of causal analysis (Héritier 2008); whereas *neo-institutionalist* approaches insist on the possibility that collective action and decision making (March and Olsen 1984, Powell and DiMaggio 1991) cannot be explained by the reduction of explanatory factors to motifs and interests guiding the behaviour of individual persons. Processes of institutionalisation of behaviour and actions of institutions – by analogy acting like physical persons as 'agents' as, for instance, bearers of group rights according to legal theories – provide an additional, even necessary explanatory factor which is independent of individual behaviour in the sense that the sum or aggregation of individual behaviour is not sufficient to explain the dependent variable (i.e. the consequence/s of interaction).

As regards *neo-institutional approaches*, we can distinguish three variants. These are:

- *rational choice theories* of neo-institutionalism, which postulate that institutions provide incentives to which rational actors with pre-given, fixed interests only respond for utility maximisation pursuing their self-interest;

- the *sociological* neo-institutional approach of this textbook is based on a social *ontology* which insists that neither individual nor collective identities and interests exist as properties of persons, groups or territories, but that they are embedded in a collectively shared *system of meaning*; that is, a system of 'culture' (Keating 2008b). What this neo-institutional approach then differentiates from methodological individualism is the presupposition that *culture* is generally composed of discursive meanings which determine the *significance* of substantive topical issues in human communication **like, for instance,** *the value of a currency* as medium of exchange and circulated throughout society as a whole (Walch 2013: 191). Hence, culture shapes the identity and preferences of actors in the sense that reflexive (i.e. self-conscious) human agents *create* and *recreate* institutions and structures through their various forms of culturally *preformed, but not pre-determined* communication and interaction. Consequently, not only *political* culture as a separate sphere of society as older social theories postulated but also culture in general prestructures individual and collective actors and their interests in how they perceive the social world. But this world and therefore culture and structures do not exist as such, but are in turn formed by human agents who construct and reproduce culture and structures through their daily practices in the form of more and more frequent repetition ('habitualisation', in the terminology of Weber) of behaviour, leading to reciprocally recognised ('typified') patterned behaviour constituting 'social norms' and thus 'social roles' (Mouzelis 1991: 72) for their action-orientation.
- The dualism of structure and agency and the duality of structures can be translated – so our proposition – into what was termed by James G. March and Johan P. Olsen the 'logic of appropriateness' against the 'logic of consequentialism' of rational choice theories (March and Olsen 1984). Whereas the latter logic is based on the assumption that individuals and institutions such as governments act on the basis of *predetermined interests* in some sort of *strategic power play* and zero-sum game, the former logic takes *values* and *normative principles* such as human rights *seriously* and tries to figure out how actors adapt to these values and principles by transforming their attitudes and beliefs in order to comply with these principles and norms. Again, these logics need not be mutually exclusive in practice but can be understood and analysed as changing phases of political and legal processes of rule transfer, rule adoption, rule implementation and norm socialisation, possibly leading to political and social change. This change of phases and thus cyclical process has, for instance, been theoretically elaborated as 'spiral theory' and empirically tested for the analysis of human rights compliance (Risse *et al.* 2013). Thus, with regard to Giddens' theory of structuration, it becomes clear that the *analytical* perspectives of a dualism of agency and structure and the duality of structures and the analogous logics of consequentialism for the former and appropriateness for the latter do not simply disappear at the empirical level. Reflexive agents will always have the possibility to strategically behave against rules which they are supposed to comply with (Mouzelis 1991: 27–30);
- the approach of *historical* ***institutionalism*** (Steinmo 2008) focuses on the effects of institutions over time. The basic assumption of this approach is the idea that early decisions of actors are 'locked in' and create some sort of *'path dependence'* for future developments so that individuals are not able to simply 'opt out' of social structures and

cultures. The method for the analysis of such path dependencies is then called 'process-tracing' by analysing and comparing case studies.

In line with the elaboration of these approaches and methods, we can now summarise the most basic *conceptions, definitions* and *terms* used thus far such as system, structure, function, institution, personality, role behaviour and discourse.

2.2.1 System

Social systems (Parsons [1951] 1991) or political systems (Easton 1965) are conceived by macro-sociologists and political scientists as basic and largest units of analysis. Systems are thought of being in themselves composed of sub-systems, institutions and structures as sub-categories to be analysed either in relation to their contribution for the functioning or change of the system as a whole or as units of analysis on their own.

2.2.2 Functions

Talcott Parsons' original 'structural-functional' systems theory is based on the idea that any given social system needs functionally differentiated and thus specialised institutions and structures for its survival as a whole against challenges coming from its environment. Therefore he postulated the necessity of four primary functions to be fulfilled by specialised institutions which he called 'adaptation', 'goal-attainment', 'integration' and 'latency pattern maintenance'. In an essentialising way, the structures and institutions created to perform these functions have been labelled the 'economic', 'political', 'social' and 'cultural' sub-systems. This theory was criticised from the beginning as *conservative* theory which cannot explain the dynamic aspects (i.e. social, cultural and political change). Robert Merton thus tried to dynamise this theoretical approach by putting strong emphasis on the idea of 'functional equivalents' that can and do provide for alternatives (Merton 1968). Niklas Luhmann finally turned the relationship between structure and function upside down by declaring that *functions* must be the *primary unit of analysis* and no longer institutions or structures so that the search for functional equivalents becomes the vantage point of analysis (Luhmann [1964] 1975), in particular for studies in comparative politics and comparative constitutional law (Marko 1995:25–36; Michelman 2012: 314–16).

2.2.3 Structures

In analogy to the proverbial skeleton in anatomy, the term structure will represent the combined elements of institutions and their relationships. Sometimes, the *systemic* or *holistic perspective* is given priority by analysing how institutions and their relationships contribute to the functioning of the system as a whole, sometimes the focus of analysis will be institutions and their relations (i.e. causal relationships between them).

2.2.4 Institutions

This term represents more or less formally entrenched *organisations* following from a process of transformation of individual motifs and interests into socially and/or legally binding *rules* and *roles* through what will be called objectivation. Thus, institutions as elements of the social world are created through interactions based on mutual expectations, perceptions and dispositions of physical persons with regard to motifs, interests, attitudes or values not only of themselves but also of others. If interactions are repeated, we will then conceptually identify them as empirically observable regular patterns of behaviour. However, only when habits are *objectified* through mutually accepted typification (i.e. transformed into *social norms* which exert pressure on the individual person to behave according to these norms independent of or even against his or her own will) can we speak – because of what John Searle calls 'collective intentionality' as assignment of 'status functions' in the social order – of institutions in the sociological sense. But also in the legal sense the institution of citizenship, for instance, is then nothing else but a specific bundle of legal statuses irrespective of an emotional attachment of belonging or a priori identification with a religious or linguistic community.

2.2.5 Social roles

Hence, the *smallest units of analysis* in sociology are not individual human beings as such, but the socially constructed *roles* and *rules* which they perform and comply with in interactions in a given situative or institutional context. The physical person of both law and sociology is thus not to be confused with individuals in the meaning of biology, but designated as 'personality' in terms of a bundle of socially and legally defined statuses and roles which are created by the processes of 'socialisation' and 'internalisation' (Heller [1934] 1983; Berger and Luckmann 1966) in the interplay between biological and psychological properties of persons on the one hand, and macro-sociological and micro-sociological systems, structures and institutions on the other, thereby creating an objectified overall framework of power structures in the meaning of Anthony Giddens' theory of structuration.

2.2.6 Social and system integration

The categorical analytical distinction between social and system integration, originally developed by David Lockwood (1964: 244–57), follows the epistemological and methodological approaches above and helps to create a framework for understanding the interplay of causal and functional analysis of processes of integration for the survival of systems irrespective whether these are seen in practice as persons, groups, communities or states. The analysis of social integration is focused on the strategic behaviour of actors in terms of empirical causes and consequences, whereas the analysis of system integration is focused on the functioning of the system, composed of institutions and their relations, as a whole. This begs, of course, the question which role groups or classes (here not in the Marxist but the sociological sense) as entities in-between individual actors and systems play for social

and system integration. Hence, processes of *social closure*, in the terminology of Max Weber, in the formation of bounded groups and the transformation of cooperation or coexistence into antagonism and conflictual behaviour – which we will characterise as processes of *ethnification* of territories, institutions and culture in the following chapters – play a decisive role for the empirical, causal analysis of political and legal processes, whereas the institutional analysis always implies a functional analysis.

Moreover, we have to bear in mind how the perennial processes of social and political ordering work from a functional and structural systems theoretical *perspective*, requiring us to reconcile the mutually constitutive facts of *multiple* (i.e. social, economic, cultural and political) *diversities* with all possible and necessary forms of unity, to paraphrase Arendt's definition of politics (Box 2.4).

Box 2.4 Hannah Arendt, *Was ist Politik?* (*What is Politics?*), Fragment I

1. *Politics is based on the fact of a plurality of human beings …*
2. *Politics is about the coming together in commonality of those who are different. Politically people organise themselves according to certain essential commonalities in an absolute chaos, or coming out of an absolute chaos of differences …*

   …
5. *Philosophy will never be able to identify the location where politics comes into being. There are two good reasons for that. The first one is:*
   1. *Zoon politikon: as if there is something political in Man which belongs to his essence. This is, however, wrong: Man is apolitical. Politics is created in between human beings. Therefore, there is no political substance. Politics comes into being in between and is established as reference. …*

(Arendt [1950] 1993: 9–12, translation by the author)

As can be seen from Arendt's *relational* and *process-oriented* approach, cultural, social, and political order as de-essentialised task and definition of *politics* as *organisation of diversities* can never be seen as pre-given or static. Instead, they are necessarily *permanent processes of functional differentiation, cultural segmentation and socio-economic stratification on the one hand*, to be reconciled with the need for *social, political and legal integration* on the other.

The functional-structural requirements for these processes of ordering must analytically be differentiated into the following elements (Marko 1995: 162–164):

- the *definition* of unity as problem of *construction*;
- the *normative assignment* of individuals and groupings to the constructed unity / entity as problem of *ordering*;
- the *justification* of the exercise of power as problem of *legitimation*;
- the *incorporation* of individuals and groupings into political decision-making processes as problem of *integration*; and

- the *maintenance* of the *distinction* between *person and institution* as problems of *autonomy*.

In conclusion, the *autonomy* of actors *and* institutions and the *integration* of societies as social systems are the axiomatic ideal types and poles for all political processes (Marko 1995). If the autonomy of actors and institutions is lost, then the formation of intermediary powers as structural level or layer in-between the individual and the system is no longer possible and all political pluralism will be abolished. Seen the other way round, the claim for full integration or social cohesion of societies can never fully be accomplished without triggering politically totalising tendencies, as we learn from the role which the concept of sovereignty played in the historical processes of state formation and nation building in Europe in Chapter 3. Thus, the theoretical concepts and empirical goals of *integration* or *social cohesion* must *always* remain *relative* and a Kantian *Realutopie* (regulative idea) for action-orientation, which can, however, never be achieved in empirical reality without destroying a pluralist form of democracy.

2.2.7 Discourse, discourse analysis and deconstruction

Finally, with regard to the conceptualisation of what we call a *deconstructive* and *neo-institutionalist* approach necessary for a political theory of multiple diversity governance in the framework of an interdisciplinary approach of law and politics, one can cite Michel Foucault (1972; 1978), who introduced the concept of 'discourse' and the method of 'deconstruction'. In line with the older social constructivist approaches, but at the same time extending them, Foucault postulates that human beings do not construct or create and recreate the social world through their interaction as much as through their 'discourse' (through the *routine use* of their *everyday language*). Discourse then maintains systems of thought composed of terms, concepts, ideas, beliefs, but also values and norms which systematically (re-)construct the subjects and the worlds of which they speak. Hence, discourses serve what Parsons calls the function of 'latency pattern maintenance' or Giddens' theory of structuration insofar as discourses not only help to preserve social structures, but also legitimate power relations. For the constructivist tradition, then, knowledge is not a subjective opinion and thus epistemologically or morally relative, but an intersubjective object, a *phenomenon* in the meaning thing-for-us or knowledge-in-context, always socially situated and with social consequences. Since *discourse* is a system of meaning derived from language, not only representing general world views as such, but also specific positions with regard to problems and disputes in a given situation intimately combined with normative claims, *discourse analysis* and the method of *deconstruction* can serve as an analytical tool to excavate the hidden meanings or presuppositions in deliberations or texts.

2.2.8 Reification and naturalisation

Following from our social constructivist and interpretative approach, the *conflation* of *epistemology* and *ontology* can clearly be disentangled by analysing the processes of reification

(Latin: *res*, thing) and possibly further naturalisation of social, political, and legal categories and relationships into ideological dogmas. The process of reification is giving mental concepts such as state, society, people, nation and so on an only seemingly objective reality *as if* independent of human action. As Michael Walzer has pointedly stated: 'The state is invisible; it must be personified before it can be seen, symbolised before it can be loved, imagined before it can be conceived' (Walzer 1967: 194). Indeed, this is the process which Hans Vaihinger termed personificatory fictions *practically necessary* for and in the creation of the social ontology of mental concepts (Vaihinger 1925: 27–8). But this must not lead to the reification of this process. There is obviously a tendency following from ancient Greek language and philosophy still alive in today's European languages (Behr 2014), to reify categories, relations and processes. But as long as we remain aware of this tendency and understand that these reified terms have no objective existence of their own, but simply represent intersubjectively recognised constructions despite of their use as shorthand description, this will not pose a problem. However, the process of naturalisation tries to purport the idea that mentally constructed categories and concepts indeed have a life of their own like material things in the world so that they and their relations seem to be predetermined by natural laws in analogy to, for instance, the law of gravity in physics. This process of naturalisation of social categories and relations – which we will term 'naturalist fallacy' throughout this book – must be seen as the constitutive element in the formation of ideological dogmas in the form of truth claims with the political function to immunise these dogmas against critique as we elaborate in more detail in Chapters 3 and 4.

Questions

1. What is the meaning of the rule of law?
2. Which relationship between laws does the procedure of judicial review imply?
3. What does a teleological or functional interpretation of legal texts require?
4. What are the basic assumptions of social constructivism?
5. How do human agency and social structure fit together?

3 The historical-sociological foundations

State formation and nation building in Europe and the construction of the identitarian nation-cum-state paradigm

Joseph Marko, Edith Marko-Stöckl, Benedikt Harzl and Hedwig Unger

3.1 Introduction: are minorities dangerous for modern national states?

State formation *and* nation building have been political processes in the transformation of the medieval European political landscape of empires, kingdoms, principalities, cities and leagues of cities into a pluriverse of modern national states, meaning that modernity and this pluriverse of national states have become synonymous for our understanding of the structure of today's geopolitical world. However, as seen in our social-constructivist epistemological and interpretative methodological perspective (see Chapter 2, section 2.2), this picture of the world is based on the *hegemonic frame* of what we call the monist-identitarian *nation-cum-state paradigm* not only in the social sciences and humanities, but also through the spread of its underlying ideas, normative principles and institutional models all over the world, in the pursuit of colonialism and imperialism by European powers since the sixteenth century.

As we learn from this chapter, despite the nation-cum-state paradigm, there is, however, not one, singular model of the national state because most historiographical studies of modern state formation and nation building in Europe or theories of nationalism end up in the conceptual *dichotomy* of *civic* state-nations versus *ethnic* nation-states. Throughout this book we therefore use the formulation national state as the generic term. Hence, there are two ideal types or models whose ideological premises and normative prescriptions follow from the interplay of *historical processes* and the *constructive (re-)interpretation* of basic

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concepts and terms for *social* and *political ordering* of philosophers and jurists from sixteenth- to the nineteenth-century Western and Central Europe. We have the French, civic-universalist model of indifference vis-à-vis cultural diversity and the German ethno-nationalist and particularistic model characterised by the notion that cultural diversity is synonymous with quasi-natural ethnic difference. This dichotomy is in itself a paradox because – as we demonstrate through the historical-sociological analysis – both models and their conceptual underpinnings signify the same purported need for one, singular collective identity as precondition for the *definition* of political unity. This also reveals the problem of how to *institutionalise* unity by *normative assignment* of individuals and groupings of people in these *systems* (see Chapter 2, section 2.2) in line with their ideational concepts, normative principles and institutional arrangements, which developed throughout centuries. Hence, both models are based on what Siniša Malešević has labelled a 'meta-ideology of identitarianism' (Malešević 2006: 4–6, 202–3), which gives us the key for the *deconstruction* of the *civic–ethnic dichotomy* and the explanation for why both models end up in empirical practice in the *elimination* of not only cultural but also social and political *pluralism*. As we see throughout this book, whatever the properties attributed to minorities and their individual members as a category, they are by definition always weaker in terms of power relations and will be faced either with the demand to assimilate into mainstream society or the so-called state-forming nation, or they will be excluded by physical extinction (genocide, ethnic cleansing), territorial separation, institutional segregation and other forms of legal discrimination, socioeconomic deprivation and/or cultural marginalisation. Additionally, as we argued in the introductory chapter and demonstrate below with the *Peuple Corse* decision of the French *Conseil Constitutionnel*, the constitutive principles of these models of national states and their translation into institutional mechanisms frame our thinking in terms of political theory, (comparative) politics, international relations and public and international law to this day – and not only with regard to minority protection (Loughlin 2003, 2010; Koskenniemi 2005; Ruggie 1998a, 1998b).

It is thus necessary to first provide for a historical-sociological analysis of what we will refer to as the twin processes of modern state formation and nation building, in light of the constitutive (i.e. foundational) mental concepts and normative principles such as territoriality, sovereignty, state, people, nation, belonging through membership and legitimacy of the exercise of force since the sixteenth century. As we try to demonstrate through a careful textual and contextual analysis of historical developments and their *interpretative reconstruction* in the writings of jurists and philosophers such as Jean Bodin, Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Johann Gottfried Herder or Friedrich Schleiermacher, as well as revolutionary-turned-constitutional documents from the sixteenth to the nineteenth centuries, the vantage point for the construction of the hegemonic nation-cum-state paradigm lies in the *transformation of* the *meaning* of older terms and concepts stemming from medieval canon law and the reception of Roman law from the eleventh to the thirteenth centuries (Berman 1983). Moreover, the processes of the *reification* and *naturalisation* (see Chapter 2, section 2.2) of these terms and concepts by the mentioned jurists and philosophers is leading to the development of the ideologies of liberalism and nationalism and their fusion in the nation-cum-state paradigm in the nineteenth century. Seen from this perspective, history and historical events cannot be perceived as linear, evolutionary processes, as they were perceived by romantic philosophers in the nineteenth century and modernisation theorists

in the social sciences in the twentieth century, in line with liberal ideology, as if the model of the liberal, secular (i.e. modern) national state were the 'end of history' (Fukuyama 1992). Rather we see modern history and historical events as *permanent processes* of *integration and disintegration* of states and their societies – by themselves national and liberal mental concepts as we demonstrate below – and therefore successful or failing processes of the *institutionalisation of social relationships* (see Chapter 2, section 2.2).

Hence, the two processes of state formation and nation building are in empirical reality intimately interwoven, but must – for analytical purposes – be distinguished in order to be able to *understand* the *transformation* of social and political ordering from the medieval European political landscape referred to in the beginning to modern national states (see Max Weber's definition in Chapter 2, Box 2.2). This analytical distinction is necessary, because it is exactly the question and problem of the legal and empirical *institutionalisation* of the *relationship* between the *concepts* of *state* and *nation* and the different possible *combinations* which – defined as civic or ethnic model – determines the conceptual as well as the legal-institutional *path-dependencies* concerning the question whether or not European countries and their constitutional systems recognise the so-called existence of ethnic or national minorities and whether or how to protect them.

How such a path dependency of legal and political problems following from the transformation of the meaning of the concept of sovereignty for the legitimisation of the exercise of political power and, as a consequence, the possible internal differentiation of the state organisation, can develop over the centuries is well illustrated by the *Peuple Corse* decision of the French *Conseil Constitutionnel* of 1991 (Box 3.1).

Box 3.1 French Constitutional Council, *Peuple Corse* decision (1991)

According to Article 72 of the French Constitution, the island of Corsica was declared a distinct '*collectivité territoriale*' by a bill in 1991 and this draft autonomy statute did foresee a Corsican Assembly, an Executive Council as well as an organisationally combined Economic, Social and Cultural Council of Corsica. Article 1 of the draft autonomy statute then declared: 'The French Republic guarantees to the historical and cultural community which constitutes the people of Corsica as part of the French people the rights to preserve her cultural identity and the protection of her special economic and social specificities …'

In an ex-ante judicial review procedure according to Article 61 of the French Constitution, 60 representatives of the French National Assembly submitted a claim to the French Constitutional Council to declare this provision in violation of Articles 2 and 3 of the French Constitution. In the reasoning of their motion they argued that Article 2 prescribes the indivisibility of the Republic and the equality of all citizens before the law without distinction of origin, race or religion. Moreover, Article 3 declares that national sovereignty belongs to the people so that 'no section of the people, nor any individual, may abrogate to themselves or to him or herself the exercise thereof'. The Constitutional Council followed this line of argument by declaring that all French constitutional texts, in particular the Preamble of the Constitution of 1946, which had been

affirmed by the valid Constitution of 1958, recognise only a French people, composed of all French citizens without distinction of origin, race or religion. In conclusion, the reference to a 'Corsican people as part of the French people' was declared unconstitutional (France, Constitutional Council, Decision of 9 May 1991, translation by the author).

Also the following examples demonstrate the *legal* and *political problems* and the underlying *conceptual challenges* posed for minority protection following from the *traditional understanding* in legal and political discourses, framed by the identitarian nation-cum-state paradigm, so that groupings of people which are, in particular in terms of religion and language, seen as *culturally different* from the rest of the population and living on the territory of a given national state allegedly pose a *threat* to *security*, political *unity*, *governability* and the *social cohesion* of a given state and society.

As former United Nations (UN) Secretary-General Boutros Boutros-Ghali stated: 'If every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being would become even more difficult to achieve' (UN Secretary-General 1992: para 17–18). So when may a group make a legitimate claim to self-determination through formation of a politically independent (i.e. sovereign) state? Classic international law – as we learn from the exemplary case of the Åland Islands below (section 3.3) and in more detail in Chapter 4 – refuses this right to ethnic or national minorities since the right to self-determination, as we can see from the text of Article 1 of the UN Charter and Articles 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), is literally granted only to 'peoples' (Box. 3.2).

Box 3.2 The right to self-determination, UN Charter (1945), Article 1(2); ICCPR and ICESCR (1966), Article 1

Article 1(2) Charter of the United Nations, 1945:

…

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

…

Identical texts of Articles 1 of ICCPR and ICESCR, 1966:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic

cooperation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

But when may a group legitimately claim to form a people in the meaning of international law documents and not (only) a minority, for there is neither a definition of the concept of peoples nor of the term minority (see Alfredsson 2007: para. 18–22)?

Second, although she puts these statements into inverted commas, why should there be a 'problem of minorities' or 'diversity dilemma', as stated by Jackson-Preece (2005a: 5–7)? Is it really true that the desire for freedom and for social belonging are both 'essential' human characteristics, but necessarily 'mutually incommensurate' so that 'religious, racial, linguistic and ethnic diversity' is 'a potential source of insecurity and conflict', explaining the 'tendency towards suspicion and fear of those who are different'?

Third, why have all efforts failed so far on the international level to adopt a universally accepted legal definition of the term minority so that the first Organisation for Security and Cooperation in Europe (OSCE) High Commissioner on National Minorities Max van der Stoel made the following declaration: 'Even though I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one' (Van der Stoel 1993). But can you effectively protect something that you cannot define? Or more technically speaking in legalese, the language of lawyers: if you are not able to establish whether the person(s) in front of you fall within the personal scope of minority protection rules such as Article 27 ICCPR (Box 3.3); that is, whether they belong to a minority group or not, you must not apply the rule!

Box 3.3 Rights of ethnic, religious or linguistic minorities, ICCPR (1996), Article 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 practise their own religion, or to use their own language.

As can be seen from these examples of questions and problems raised with regard to minority protection in both international and national constitutional law, we tend to fall prey to 'language games' (Wittgenstein) based on power relations dominated by victorious parties. These parties are privy to redrawing the territorial boundaries after more or less violent conflict and/or remain trapped in ideologically predetermined fallacies and paradoxes following from the monist-identitarian nation-cum-state paradigm.

These fallacies and paradoxes are:

- the *naturalist* fallacy: this is based on the conflation of epistemology and ontology and often expressed in anthropomorphic metaphors like Thomas Hobbes' 'Leviathan', insofar as conceptual schemes (i.e. analytical categories and their possible relations) are given a *reified* ontological status as if naturally existing like material objects or things (Latin: *res*) in the outside world, independent of the meaning given to them by actors in social relationships (see Chapter 2, section 2.2); and
- the *ideological* fallacy: this leads to *monocausal explanations* such as the hypothesis that ethnic difference were the root-cause of violent conflict (Huntington 1993), as well as to *dichotomisations* not only of civic versus ethnic but also of universal versus particular, public versus private or culture versus politics.

Moreover, there are four *paradoxes* which haunt all efforts for effective human and minority rights protection even under the conditions of *liberal democratic political regimes*:

- John Locke's *liberal paradox* why individual freedom from domination can only be guaranteed by subjection to a heteronomous social order;
- Ivor Jennings' *democratic paradox* that 'the people cannot decide until someone decides who are the people' (Jennings 1956: 56);
- Hannah Arendt's *paradox* of the need for 'having a right to have rights' (Arendt [1951] 2017: 388) since (universal) human rights can effectively be enforced only by those same (particularist) national states which are – in the classic liberal philosophical tradition – seen not only as the guarantor, but also as the main perpetrator in violations of human rights (see Chapter 6);
- Ernst-Wolfgang *Böckenförde's paradox* (Böckenförde 1991: 112) by postulating that the modern, secular state cannot provide the necessary trust, solidarity and social cohesion on which its existence seems to depend.

Hence, in order to demonstrate the social and political relevance of these fallacies and paradoxes, in section 3.2 and its sub-sections, we carry out a historical-sociological analysis through the careful textual and contextual investigation of historical developments and their *interpretative reconstruction* in the writings of jurists and philosophers how the meaning of terms, designating *categories and concepts* necessary for the *ordering of social and political relations* (see Chapter 2, section 2.2), has been transformed over the centuries. Section 3.3 deals with the fate of minorities between the two world wars. Section 3.4 gives an introductory overview to legal standard setting and the monitoring mechanisms in human and minority rights law at the international level since 1945. Section 3.5 of this chapter then draws conclusions to summarise and to provide learning outcomes.

3.2 The processes of state formation and nation building and the construction of the identitarian nation-cum-state paradigm

The *historical background* for the development of the modern state must be traced back to the revolutions in law (to paraphrase by inversion Berman's book title), politics, and religion

through the break between Western (in the following Roman Catholic) and Eastern (in the following Orthodox) Christianity in 1054, which coincided with the successful attempt in the West to make the Bishop of Rome the sole head of the church. In parallel, the effort to emancipate the Roman Catholic clergy from the control of emperors, kings and feudal lords culminated in what Harold Berman terms the papal revolution, through the Gregorian reformation and the struggle of investiture (1075–122). In practice, throughout the medieval ages there was a continuous fight for political superiority between the two respective office holders over who has the right to invest whom in office (Berman 1983: 92–5).

Nevertheless, the theoretical and practical problem of *legitimisation* of the vertical exercise of power vis-à-vis subordinate classes of persons did not exist in the medieval Western order because of the conceptualisation of a *dual unity* of Christianity (Latin: *respublica Christiana*) following from the religio-political theory of the two swords handed over by God to the Catholic pope and the emperor of the Holy Roman Empire. The 'belief' – in the meaning of Max Weber's terminology – in this theory and the overarching normative principle of Divine grace for the 'rule' of both pope and emperor created an *identification* of *religion* and *politics* for the purpose of legitimation of power.

Hence, the terms and concepts of national states or international relations as we understand it today did not exist in medieval times. Nor was there any clearcut (functional) differentiation between politics and culture, public and private, or civic and ethnic to hint at the hypothesis about the fallacies and paradoxes of the identitarian nation-cum-state paradigm. The major political (sub-)units of the *respublica Christiana* – referred to at the beginning of the introduction to this chapter – were known as *civitates, principes, regni, gentes*, cities, associations of trades like the Hanse in Northern Europe, and even universities organised along the lines of *nations* (Box 3.4).

Box 3.4 The etymological origin of the term 'nation'

Originally, the Latin term *nationes* was used at the medieval universities to organise their students. The university of Bologna divided her students into two categories for the first time in 1180. They were designated either as belonging to the *natio citramontana* (coming from this side of the Alps – Italy; i.e. today's Italy) and the *natio ultramontana* (from beyond the Alps). Both *nationes* were further divided into *subnationes*, such as coming from Lombardy, Sicily or Tuscany, in the case of the *citramontana*, and 13 *ultramontanes*, basically divided along the existing kingdoms and other political units beyond the Alps (Le Goff 2014: 238).

As a result, the medieval system and processes of not only political but at the same time also economic or cultural governance in the modern sense, comprised a 'patchwork of overlapping and incomplete rights in which different juridical instances were geographically interwoven and stratified, and plural allegiances, asymmetrical suzerainties and anomalous enclaves abounded' (Ruggie 1998b: 146; Tilly 1975). Thus, for the purposes of our

problem-oriented perspective, only the problem whether violent resistance against a tyrant is allowed remained from ancient Greek political philosophy and Christian political theology, but not the problem of legitimation of the exercise of power *as such*.

Nevertheless, the papal revolution and the struggle of investiture laid the foundation for what can be called the structural differentiation between the Catholic Church as political and legal entity and secular politics. The following centuries then – as we will demonstrate through the reconstruction of the narrative below on the historical events in Western Europe – are characterised by more and more *territorial concentration*, *hierarchisation,* and *monopolisation* in the *exercise of political power* through centralisation of public administration and judicialisation under the overall umbrella of the institution of kingships, having been more or less emancipated from the political influence of the Catholic Church.

The *Protestant* reformation and the quick success of the religious doctrines of Martin Luther (1483–1546) and John Calvin (1509–1564) became the second revolutionary situation at the turn of the so-called medieval ages to modern times. This resulted in that not only kings and princes but also broad masses of the people became their followers and adherents to Protestantism in Central and Western Europe as well as the Nordic countries of Scandinavia.

It is this historical background in which rebellious pamphleteers in the long struggle of the provinces of the Netherlands were justifying claims for political independence against what they called the Spanish Habsburg tyranny (1568–1648). Jurists and political philosophers also critically reflected in their writings the religious civil wars devastating Western and Central European lands in the sixteenth and seventeenth centuries, as well as the political revolutions in England in 1648–89, in France in 1789 and the Declaration of Independence of the American colonies in 1776. Thereby, they not only reconstructed these historical events but also gave new *meaning* and thereby *empirical and normative plausibility* to constitutive normative principles such as *sovereignty*, *liberty* or *equality*. As we finally learn from this section, the *names* and *mental concepts* of *territory*, *sovereignty*, *state*, *society*, *community*, *people*, *nation*, *person* and *identity* stand for the construction of legal, political, social, and cultural *unity* in the meaning of a functionally differentiated and self-reproducing (independent) system, depending on the constellation of agency and structure of and within this system in the historical and the political *context and problem* as conceived by the respective authors of these writings or documents. Moreover, the processes of *reification* and *naturalisation* of these categories and their subsumed relationships are the vantage point for the construction and establishment of the identitarian nation-cum-state paradigm and the paradoxes which determine political and legal theories to this day (for all the theoretical and methodological concepts highlighted in italics, see Chapter 2, section 2.2).

In the following sub-section we analyse from a *comparative* perspective the – by no means – unilinear processes of state formation and nation building in Europe since the medieval ages. Thereby, we follow Schieder's and Gellner's comparative frame in distinguishing three European macro-regions and three time periods in Europe itself (Schieder 1992; Gellner 1997) with the establishment of different legal-institutional models of national states and their export to Eastern and Southeastern Europe and other parts of the world.

3.2.1 Western Europe

England, France, the Nordic states (today's Denmark, Norway, Finland, Sweden) and Spain had developed into *central, unitary states* by constraining the role of the intermediary regional and feudal elites by the late medieval ages or at the beginning of the modern times. But it was not only the will, the skills and fortunes of dynasties and outstanding political rulers and military leaders which paved the way towards territorially contiguous and bureaucratically centralised states. Another important factor in this process was *religion*: be it the Protestant reformation, as in England, France and the Northern States, the containment of papal influence (England and France) or, as in the case of Spain, the Catholic Reconquista of Muslim-dominated *al-Andalus*, having covered almost all of the territory of the Spanish peninsula in the early medieval ages, and the Catholic institution of the Inquisition against religious heretics. Hence, religious divisions played a decisive role in these processes of (modern) state formation and nation building from the very beginning.

3.2.1.1 Spain: Muslims and Jews – the 'other'

The marriage of Isabella of Castile and Fernando of Aragon in 1469 is traditionally seen as the birthday of modern Spain. In reality, Castile, which spread over two-thirds of the entire territory of modern Spain, had already been highly centralised by this time, whereas Aragon constituted a kind of federation with Catalonia and other regions. These regions and their nobilities were not ready to give in easily to any centralising efforts, thus constituting a highly complicated situation for any state, to say nothing of nation-building efforts. Fernando and Isabella (as well as their successors) found another, highly effective instrument for the state- and nation-building process: religious Catholic uniformity. Thus, immediately after the end of the occupation of Granada, the last Muslim statelet (*reconquista)* on Iberian soil, all Jews (Sephards) were expelled from Spain (numbers differ between 50,000–200,000). Many of these Jews fled to the Balkans, where they lived quite a safe life under Ottoman rule with the *millet* system (see Box 3.7, sub-section 3.2.3) until the Second World War, when great parts of the Jewish community were killed in the Holocaust.

Box 3.5 Pogroms against Jews in the medieval age

Spain was not the first country to expel Jews. In 1182, the city of Paris had expelled its Jews. In 1290, England expelled almost its entire Jewish population, some 16,000 persons. The English example was followed by France in 1306. In Central Europe, expulsions of Jews took place in Silesia (1159), Hungary (1349–60) and 'Austria' (1421) (Le Goff 2014: 121–3).

Moreover, the Muslims who had originally been granted religious tolerance immediately after the conquest of Granada in 1492 had to emigrate or convert to Catholicism and

became labelled the *moriscos*. These ethnic cleansings, to use the twentieth-century term and its evaluative meaning in hindsight, were seen as necessary prerequisite for the *unity and security* of the monarchy. So it is no wonder that the first pan-Spanish institution, the Catholic Inquisition, was founded to persecute alleged heretics, especially Jews who had converted in previous times, called *conversos* or *christianos nuevos*. Religious intolerance had become the base of modern Spain, intermingled with – in today's terminology – *racist elements* with the demand for *limpieza de sangre* (purity of blood; Barton 2009: 108–11). Although Spain was a constitutionally very complex, regionally diversified state, it developed into an absolutist and highly centralised bureaucratic state until the end of the sixteenth century.

3.2.1.2 Religious division and violent conflict in France and England

Through – from today's and a systems-theoretical perspective (see Chapter 2, section 2.2) – external warfare, such as the Hundred Years' War with the English kingdom in the fourteenth and fifteenth centuries and the internal, but no less violent, 'feudal competition' (Marko 1995) between the kings and princes of different political entities on today's territory of France, such as the kingdoms of Bretagne or Burgundy, the king of the *Ile de France* (the territory around Paris) was able to territorially expand his realm and to become the embodiment of the *symbolic identification* of *person* and *office* as well as French *identity* in *difference* to the other nobles. This was strongly fostered by the *religious* and *political* fact that the French kings, since 1516, were the de facto heads of the Gallican church, thereby drastically reducing the tutelage by the Roman Catholic papacy.

State formation in the first half of the sixteenth century in France was boosted by a massive reorganisation of the *administrative apparatus* and the emergence of a *professional bureaucracy* under the French kings' efforts to establish *absolutist rule*. Very soon, however, the *centralising process* suffered a deep setback by the outbreak of the *religious wars* (with the St Bartholomew's day massacre of Protestants in 1572) which lasted for decades.

But it was not only the sweeping spread of Protestantism among the nobility, following the religious dogmas of John Calvin (1509–1564) and named *Huguenots*, literally meaning conspirators, that caused a deep division of France. *Religious aspects* had mingled with *economic implications* and the aspirations of noble families who were fighting for political influence or even domination over one another. Thus, the processes of bureaucratisation and centralisation driven by the crown was going hand in hand with the fight over access to and control of economic resources, which must sociologically be seen as political and economic penetration of society at large and the gradual abolishment of the feudal powers of the nobility. Taken altogether, this evoked deep resentments of many noble families, having turned or turning now to Protestantism. The religious civil war was officially ended with the Edict of Nantes (1598) which granted the Huguenot minority, in today's terms, religious tolerance.

Most importantly from our methodological interpretative approach, however, the religious wars were also a struggle over the political and legal *status of the king* in relationship to his subjects, now split into Catholics and Protestants. According to Jean Bodin's (1530–1596) *Les Six Livres de la République* ([1583] 1961), the kingdom – divided and endangered as it was by the religious wars as well as feudal competition – could only be preserved by

strengthening royal power. Therefore he reconstructs the *concept of sovereignty* as central element of a normative framework for the *justification of royal absolutism* with the function to (re)establish peace among the warrying parties and their claims to be in the possession of the (religious) truth after Huguenot writers had argued to have a *natural right to violent resistance against tyrants* such as the French king (Loughlin 2010: 65).

In contrast to Bodin's writings just a decade before in his *Method for the Easy Comprehension of History* (Bodin [1566] 1945), where his idea of the monarch is far removed from that of a sovereign, who is 'above the law' (*legibus solutus)*, but rather similar to the medieval idea of the king as bound by law, by custom and by the will of the estates (Berman 1983: 9) and, in reaction to the St Bartholomew's day massacre, Bodin gives – despite his theoretical argument that the sovereign remains bound by Divine and natural law (Bodin [1576] 1992: 8, 13) – his conception of sovereignty now an *exclusivist* and thereby *absolutist* meaning, by introducing the notion of the *indivisibility* of sovereignty as the essential element of this concept and comes to the conclusion that mixing must lead to 'anarchy' and thus 'armed conflict' which is even worse than 'tyranny':

> To combine monarchy with democracy and with aristocracy is impossible and contradictory, and cannot even be imagined. For if sovereignty is indivisible, as we have shown, how could it be shared by a prince, the nobles, and the people at the same time? The first prerogative of sovereignty is to give the law to subjects. But who will be the subjects and who will obey if they also have the power to make law? And who will be able to make a law if he is himself constrained to receive it from those to whom he gives it? … But if both parties refuse to take commands, and no one obeys or commands, it will be not commonwealth but anarchy, which is worse than the cruellest tyranny … This makes it clear that, where the rights of sovereignty are divided between a prince and his subjects, a state of confusion must result in which the issue of ultimate control will be decided by force of arms until supreme power is in one man, in a few, or in the entire body of citizens.
>
> (Bodin [1576] 1992: 92–105)

In spite of Bodin's original conceptual distinction between person and office, the sovereign king had to be seen to embody the state. The famous alleged dictum of Louis XIV (1643–1715) – *'L'état, c'est moi'* (which, actually, he never said; see Schulze 2004: 64) – was thus not only symbolically programmatic. Since the last flare-up of aristocratic rebellion during Louis XIV's reign, the so-called *Fronde*, the aristocracy had given up any claims for power that could have endangered *royal absolutism*. Moreover, Louis XIV's final centralising administrative measures, the creation of a new corps of officials (such as the *intendants/ commissaires départis*) assured the total *bureaucratic control* of the territory and people (see in general also Berman 1983: 464–73). Thus, Louis XIV could finally erase any form of power of the nobility and downgrade their social status into courtiers, who almost exclusively fought for royal affection and the appropriate hierarchy of status among them, but *within* the royal court system. The other factor possibly challenging absolute royal power, the Protestant Huguenots, lost their toleration and were suppressed after the revocation of the Edict of Nantes in 1685.

During the *Ancien Regime,* the *symbolic identity* of state and king was differentiated by intellectuals from another perspective which had been more prominent in Bodin's earlier writing, insofar as they began to redefine the native population into a French nation. In particular the French philosopher *Charles de Montesquieu* (1689–1755) developed the notion of emotional attachment to one's 'homeland' in *The Spirit of Laws* (1748), to what comes close to what can be called *national patriotism*. What Montesquieu saw as the foundation of government, he called 'virtue': 'love of the laws and the homeland' and the 'spirit of laws' to be derived in large part from the country's national character (Summers 2007: 97).

But Protestantism and religious secession from the Roman Catholic papacy also played a decisive role for state formation and nation building in England. The English kingdom was *territorially* extended and *bureaucratically centralised* immediately after the Norman conquest in 1066 (see, in general, Berman 1983: 440–56). After the end of the Hundred Years' War between the English and French kingdoms in the fourteenth and fifteenth centuries, the internal Wars of the Roses (1455–85) and the creation of the house of Tudor, it was the *break* with the *Roman Catholic papacy* (1534) under the reign of King Henry VIII (1509–1547) and the foundation of the Anglican Church as the Established Church which must be seen as the most important factor for *state formation*. With Queen Elizabeth I (1559–1603) symbolising the identification of Protestantism and Englishness, a first step towards the development of a sense of national identity was made, not only among the nobility but also the growing mercantile middle class, known as the Commons.

Adrian Hastings (1997) claims that the English case demonstrates a *continuity of meaning* for the term nation from the fourteenth century onwards, which cannot be deconstructed as simple invention by intellectuals and leaders. In his view, medieval nations lacked a theory of nationalism, but displayed a clear feeling of belonging and thus a collective sense of nationhood, in particular in situations of violent conflict. This does not mean that this psychological process was only directed against external enemies, as the internal rebellions in Cornwall, Yorkshire and elsewhere in the fifteenth and sixteenth centuries show, so that the concept of nationhood can certainly not mean that the people of such a nation did possess shared values or interests. Nevertheless, seen from this perennialist perspective in theories of nationalism, nationhood is conceived as a universal phenomenon in the meaning of 'emotional kinship ties' and 'ethnic sentiments', respectively (Smith 2010: 91, 108).

As we can see from the historical events outlined above, both processes – state formation and (proto)nation building in the form of a development of national consciousness, not only among the political and religious elites, but also the growing middle class – went hand in hand in England, so that it is not possible to empirically or conceptually disentangle state formation from nation building or to answer the question of which process came first and which factor – kingdom and bureaucracy as political factors or religion as a cultural factor – was cause and consequence before the English revolutions in the seventeenth century and the reconceptualisation of legitimate authority by giving the term 'people' a specific meaning. This chicken-and-egg dilemma, as well as the distinction between culture and politics is created only by theories of nationalism and liberalism when transformed into ideologies (as we see in sub-section 3.2.1.3).

Moreover, the processes of state formation and nation building in England had also gone hand in hand early on with demands for *political participation* in the fight for *parliamentary*

rights. After the death of Elizabeth I, the struggles between Catholics, Anglicans and Puritans, a dissident Protestant denomination, became increasingly intermingled with the fight between the claims for royal absolutism and parliamentary rights, which culminated in the execution of King Charles I in 1649. A republican interlude and a so-called Protectorate under Oliver Cromwell (1648–1660) ended with the restoration of the Stuart dynasty. However, attempts of strengthening royal absolutism and re-Catholicising England by the Stuart kings led to the end of the dynasty. Parliament offered the Crown to the king's son-in-law and Governor of the Protestant Netherlands, William of Orange and his wife Mary. By accepting the Bill of Rights in 1689, not only was the first modern *human rights catalogue* enacted but William and Mary also acknowledged *parliamentary supremacy.* These events thus came to be called the Glorious Revolution (1689), so that – as another example of path dependency over the centuries – in constitutional doctrine to this day parliament, not the people, is considered to form the – anthropomorphically conceptualised – body empowered with sovereignty. The British government had to learn this from the Supreme Court in 2017 when Prime Minister Theresa May and her government tried to exclude the British parliament from the negotiation process to leave the European Union (EU), colloquially referred to as Brexit (United Kingdom, Supreme Court, Judgment of 24 January 2017: para. 43).

In particular, two political philosophers made sense of these historical events by their interpretative explanation and reconstruction of conceptual schemes, so that their writings influenced not only later events (as is the case in particular for John Locke and the US Declaration of Independence in 1776) but remain highly salient to this day.

In analogy to the reaction of Jean Bodin to the religious wars that had ravaged France more than half a century earlier, *Thomas Hobbes* (1588–1679) was also influenced by the English Civil War and revolution of the 1640s.

Under this impression and against the authorities of Aristotle, but also of Hugo Grotius (1583–1645) in his *De jure Belli ac Pacis* (*The Rights of War and Peace*; Grotius 1625] 2005) – who had proclaimed a natural sociability of human beings – Hobbes constructed a state of nature as *bellum omnia contra omnes* (war of every man against every man; see extract below) in which individuals – regardless of their 'natural rights' to life and property – live in constant fear for their life and possessions as long as there is no powerful institution established which secures peace which Hobbes – through a process of personification as can be seen from the frontispiece in Figure 3.1 shown overleaf – names the 'great Leviathan':

> If any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end, which is principally their own conservation, and sometimes their delectation only, endeavour to destroy, or subdue one another. … In such condition, there is no place for industry, because the fruit of it is uncertain… no arts, no letters, no society; and which is worst of all, continual fear; and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short. … To this war of every man, against every man, this is also consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power; there is no law: where is no law, no justice. Force and fraud, are in war the two cardinal virtues …
>
> (Hobbes [1651] 1996: ch. XIII)

Figure 3.1 Frontispiece of *Leviathan* (1651) by Thomas Hobbes (1588–1679)

Consequently, his justificatory argument for the establishment of the Great Leviathan to be endowed again with sovereignty in order to be able to live peacefully together:

> The only way to erect such a common power; as may be able to defend them from the invasion of foreigners, and the injuries of one another … is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: …. This is more than consent, or concord; it is a real unity of them all, in one and the same person, made by the covenant of every man with every man, in such manner; as if every man should say to every man, "I authorise and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorise all his actions in like manner." This done, the multitude so united in one person, is called a COMMONWEALTH, in Latin *CIVITAS*. This is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that immortal God, to which we owe under the immortal god, our peace and defence. … And he that carrieth this person, is called SOVEREIGN, and said to have sovereign power; and everybody besides, his SUBJECT.
>
> (Hobbes [1651] 1996: ch. XVII, pos. 2285–2301, emphasis in the original)

And Hobbes justifies his *absolutistic* concept of sovereignty according to which people have to relinquish their natural *rights* in exchange for peace and defence with the same argument we learned from Bodin:

> So that it appeareth plainly, to my understanding … that the sovereign power … is as great, as possibly men can be imagined to make it. And though of so unlimited power; men may fancy many evil consequences, yet the consequences of the want of it, which is perpetual war of every man against his neighbour, are much worse.
>
> (Hobbes [1651] 1996: ch. XX, pos. 2799)

In striking contrast to this absolutistic concept of sovereignty, a generation and a revolution later, *John Locke* (1632–1704), called the philosopher of the Glorious Revolution of 1689, reconstructed the events described above and created the justificatory conceptual frame for the *power sharing regime* established by the legal institution of a so-called *king-in-parliament* through the Glorious Revolution. He thereby follows neither Hobbes nor Bodin, but the tradition of natural law philosophy developed by the writings of the Calvinist *monarchomachi*, who had argued for the first time for the defence of religious freedom as individual natural right during the uprising in the provinces of the Netherlands against the rule of Spanish King Phillip II, as well as Johannes Althusius and Hugo Grotius (Loughlin 2010: 70–1; Forst 2014: 214–26; Skinner 1978: 337–8).

In his *Two Treatises of Government*, Locke ([1689] 1988) presents the contours of a *liberal* and *democratic* theory of government which is based on the concepts of individual freedoms to be guaranteed by the *rule of law*, including the separation of powers between the legislature and executive, and the *representation* of the interests of those governed.

John Milton's (1608–1674) justification of the execution of Charles I in 'The Tenure of Kings and Magistrates' (Milton [1649] 1962) was already based on the notion of natural birth rights of every individual and the legitimation of the exercise of power delegated as trust from the people to the magistrates, including kings:

> It being thus manifest that the power of Kings and Magistrates is nothing else, but what is only derivative, transferr'd and committed to them in trust from the People, to the Common good of them all, in whom the power yet remains fundamentally, and cannot be tak'n from them without a violation of their natural birthright.
>
> (Milton [1649] 1962: 202)

Also, for Locke, legitimate government can thus no longer be exercised based on the divine rights of kings, but is constructed as a *legal trust* instituted for the benefit of those governed and founded on their *consent*. Contrary to Hobbes' conception of a state of nature as factual *bellum omnia contra omnes* requiring individuals to relinquish their natural rights to the Leviathan for the purpose of establishing peace, he lays the foundation for the *liberal paradox* of why (positive) law is no longer to be conceived as constraint for individual freedom but on its enlargement, so that an absolute monarchy is by definition a contradiction to any political system based on rule of law.

The *liberal paradox* is pointedly addressed by Locke:

> If man in the state of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others …. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have in mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name – property.
>
> (Locke [1689] 1986: ch. IX, para. 123).

But it is the following conceptual distinction between and *transformation of* natural liberty in the state of nature into a self-chosen freedom under government and thereby also the transition from *natural* law to *positive* law which is decisive for Locke's resolution of the liberal paradox. Those who are governed by rule of law have voluntarily consented to live under such a political regime. Insofar, *law* is *not* a *constraint*, *but* provides the *institutional framework* for the *realisation* of *individual freedom*:

> For law, in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under that law. Could they be happier without it, the law, as a useless thing, would of itself vanish; …. So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom.
>
> (Locke [1689] 1986: ch. VI, para. 57)

Hence, in contrast to Hobbes who required to relinquish all natural rights of persons in the state of Nature in exchange for peace through the Great Leviathan, Locke makes clear that it is not natural *rights* but natural *powers* which have to be given up for the establishment of civil society, so that an absolute monarchy is in contravention with a civil society or commonwealth based on *rule of law* requiring a *system of appellate jurisdiction* to defend the people's birth rights, as Milton called them:

> … there, and there only, is political society where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. …
>
> Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them and punish offenders, are in civil society with one another; ….
>
> (Locke [1689] 1986: ch. VII, para. 87)

What are now the consequences for today's understanding of the *problem* of *legitimation of power* following from the religious civil wars in France and England and the political revolutions of 1648–1689?

First, the *vertical dimension* of *legitimation* is turned upside down. The doctrine of divine rights of kings no longer, in the final analysis, legitimises the exercise of absolute power, but the consent of the governed expressed in the will to establish a civil society in the form of rule of (positive) law for the protection of individual freedoms. This comes in stark contrast to the law of nature and the need for relinquishment of natural rights in exchange for peace through tolerance never guaranteed and secure, but only granted by an absolutist ruler who can arbitrarily relinquish it anytime as we have seen from the revocation of the Edict of Nantes.

Second, this transformation of the vertical dimension of the doctrine of legitimation brings to the fore the *horizontal dimension* – addressed by Locke no longer as 'multitude', but in a reified way as 'people' or 'community' or 'civil society' – of what is called social and system integration of society in today's sociological terminology (see Chapter 2, section 2.2 and Chapter 5, section 5.2).

This begs, of course, the question – empirically speaking – *who are those* people who have in mind to unite into a civil society to erect a legislative power and to live under a *common* law and a common *judge*? In short, who have conferred trust to the government of law, a century later conceptualised and established as constitution and a system of constitutionalism after the American and French revolutions, not necessarily in opposition, but also in the framework of English 'common law' (Allan 2013)?

Are these persons, forming by contract a civil society simply an aggregation of people, and is thus the term 'people' frequently used throughout the text of the Two Treatises, simply a generic term referring to the individual members of the already established commonwealth? Or does the term people refer to another form of commonality, as can be seen from the next passage?

> Though in a constituted commonwealth standing upon its own basis and acting according to its own nature – that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.
>
> (Locke [1689] 1986: ch. XIII, para.149)

All of a sudden, not only the protection of life, liberty and estate of *individuals*, but the preservation of the *community* established by the creation of the – synonymously called – civil or political *society* comes into play so that the term 'people' and the plural 'peoples' now represents a reified *collectivity*, which is equipped with supreme power. This is, of course, no invention by Locke, but can be traced back to natural law theories. What is illustrative here for our purposes in Locke's text is the *distinction* between the *liberal paradox* on the one hand, and the *democratic paradox* on the other. Thus, liberalism, the rule of law and democracy are not identical from the beginning.

So what is and why is there a *democratic paradox*? Who are the people constituting themselves as political society and their legislature 'antecedent to all positive law' and in possession of the 'right' to remove the executive by force?

> … because the constitution of the legislative being the original and supreme act of the society, *antecedent to all positive laws in it*, and depending wholly on the people, no inferior power can alter it. … what if the executive power, being possessed of the force of the commonwealth, shall make use of that force to hinder the meeting and acting of the legislative, when the original constitution or the public exigencies require it? I say, using force upon the people without authority, and contrary to the trust put in him that does so, is a state of war with the people … the people have a right to remove it by force. In all states and conditions the true remedy of force without authority is to oppose force to it. The use of force without authority always puts him that uses it into a state of war as the aggressor, and renders him liable to be treated accordingly.
>
> (Locke [1689] 1986: para. 155–7)

Hence, Locke conceptually transforms the *right to resistance against tyranny*, previously anchored in natural law, into a *democratic right to (internal) collective self-government* and – when combined with the notion of external sovereignty – *self-determination* which will – as we can see in particular in Chapter 4 – haunt all legal and political debates to this day as to whether there is a justifiable 'right to secession'. This can be either so-called remedial secession following from gross violations of universal human rights under public international law or from the existence of a pre-positive community of people in possession of the then also natural right to collective self-government (i.e. democracy) and thus an absolute right to national self-determination by creation of an independent sovereign state, as was claimed in the nineteenth and twentieth centuries and is shown in sub-section 3.2.1.3 and in Chapter 4.

That the systems-theoretical approach of interpretation is not ex post facto read into these processes can be seen from another passage in Locke's Second Treatise on the differentiation of powers in the commonwealth, in addition to the legislative and executive powers.

> There is another power in every commonwealth which one may call natural, because it is that which answers to the power of every man naturally had before he entered into society. For though in a commonwealth the members of it are distinct persons, still, in reference to one another, and, as such, are governed by the laws of the society, yet, in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of Nature with the rest of mankind, so that the controversies that happen between any man of society with those that are out of it are managed by the public, and an injury done to a member of their body engages the whole in the reparation of it. So that under this consideration the whole community is one body in the state of Nature in respect of all other states or persons out of its community.
>
> This, therefore, contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth, and may be called federative if any one pleases. So the thing be understood, I am indifferent as to the name.
>
> (Locke [1689] 1986: ch. XII, para. 145–6)

Here, Locke conceives of the creation of a delimited *system*. He differentiates the commonwealth, which term is synonymous with society and community, from 'the rest of mankind' and, correspondingly, the members of the commonwealth from the now *externalised* other 'states' and 'persons' of this 'rest'. Moreover, he monopolises the 'power of war and peace' in what we can call from this text *interstate* relations for the 'one body in the state of Nature', thus conceptualising in analogy interstate relations as anarchy.

Second, however, this still leaves open the question who *are – empirically* speaking – those people, so that Ivor Jennings pinpointedly articulated the *democratic paradox* following from historical experience of all uprisings and revolutions: 'The people cannot decide until someone decides who are the people' (Jennings 1956: 56). Locke's statement of 'the constitution is antecedent to all positive law' is thus conceptually intimately interwoven with the – established in the context of the French Revolution 1789 – conundrum or chicken-and-egg problem of a *pouvoir constituant* in distinction to the *pouvoir constitué,* vested in the reified conception of the factual existence of one and the same people. In similarity to Jenning's paradox, this is referred to as the 'paradox of constitutionalism' by Martin Loughlin and Neil Walker, following Joseph de Maistre's (1753–1821) observation 'that the people "are a sovereign that cannot exercise sovereignty"; the power they possess, it would appear, can only be exercised through constitutional forms already established' (Loughlin and Walker 2008: 1).

It is thus Locke's linguistic and conceptual *ambiguity* following from different meanings of the term people that can help us to clarify the epistemological and ontological consequences following from a reification or even naturalisation of the category of people.

On the one hand, his phrase 'antecedent before all positive law' illustrates the process of *naturalisation* of the concept of *the* people with the possible consequence to create thereby the ideological ground for the *Böckenförde paradox* based on the belief in the necessary *empirical* existence of a pre-political community based on religion or language to provide the moral and emotional bonds for social cohesion. The same holds true for the chicken-and-egg problem for theories of nationalism following from Friedrich Meinecke's (1908) categorical distinction between *Staatsnation* (state nation or political nation) und *Kulturnation* (cultural nation), thereby laying the ground for the civic–ethnic distinction: who or what comes first and who or what constitutes whom? Is it the 'commonwealth' (i.e. the institution of the 'state') the concrete 'people' in terms of mutual allegiance based on subjection to *common* law or is it a particular, more or less closed community delineated along religious or linguistic lines to be called 'ethnic group' (Weber 2013: 385–98; see our critical ideological analysis in Chapter 4, section 4.2)?

On the other hand, in contrast to Bodin and Hobbes as well as the later French conceptual development, as we see in sub-section 3.2.1.3, the synonymous terms community and people are reified as can be seen from the phrase 'to act as one body', but not *naturalised* by Locke: on the contrary, he upholds with a methodologically individualistically conceived 'consent of every individual' and the conceptual category of the 'majority' as representative of 'the whole' a strong empirical connotation which prevents him to follow the holistic and monistic-*identitarian* spin of Bodin and Hobbes:

> For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority. … And therefore

> we see that in assemblies empowered to act by positive laws … the act of the majority passes for the act of the whole, and of course determines as having, by the law of nature and reason, the power of the whole. …]And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority ….
>
> (Locke [1689] 1986: ch. VIII, para. 96–7)

Hence, following from our deconstructivist approach, the question can be raised with regard to the *horizontal dimension* of *social and system integration*; where does *trust* – no longer conceived now as a legal institution as it was by Locke, but a sociopsychological category like *solidarity* – come from?

As we can see from the epistemological and ontological conceptions and models discussed so far, the original Christian theological concept of human beings as equals in God's image following from the text of Genesis 1:26 of the Old Testament – 'Let us make man in our own image' – becomes secularised in two ways.

On the one hand, the religious concept is – going hand in hand with the development of natural sciences in the sixteenth and seventeenth centuries – translated into an *anthropocentric* ontological concept of human nature, which is classified either as eternal, violent conflict by Hobbes' state of nature or – in complete opposition – human sociability by Grotius (Loughlin 2010: 74–5) thereby following Aristotle. However, since the community of Christians as God-given unity does no longer exist, the *commonality* of all human beings as part of humanity or humankind is now found in their again God-given ratio as still theologically inspired natural law theories assert. Trust and solidarity are then according to, in a second step, secularised natural law theories perceived as human attributes, not yet restricted to the legal status as subjects, let alone citizens of the particular (i.e. territorially and jurisdictionally delimited) commonwealth as Arendt's conceptualisation of the 'right to have rights' quoted in Chapter 6, section 6.4 invokes.

On the other hand, Locke's reflections allow also for a different conceptualisation, pointing at a model of *integration through law*, which we fully develop in Chapter 5, section 5.3: the original *contract* as a mutual agreement to take on obligations following from the established legal system, give the understanding of common law in the English tradition (Berman 1983: 445–56) an additional layer of meaning: It is the commonality of *mutually recognised legal obligations* why individuals in the state of nature relinquish their powers or, better said, exchange it for the protection of their rights against an unjust government violating these rights. This is the source for the creation of the mutual trust and solidarity necessary for social and system integration, which can never be fully achieved, but remains – following Kant's notion of a regulative idea – a *permanent political goal* and *process*:

> … For laws not being made for themselves, but to be, by their execution, the bonds of society to keep every part of the body politic in its due place and function.
>
> (Locke [1689] 1986: ch. XIX, para. 219)

However, it is no wonder that Locke himself remains ambiguous on these issues. Grotius had – under the given personal and historical circumstances – boldly stated that laws of

nature following as a matter of logical entailment due to human reason exist 'even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God, or that human affairs are of no concern to him' (Grotius [1625] 2005: 184). In contrast, Locke argued in *A Letter Concerning Toleration* written in 1685 (published 1689) under the impression of the revocation of the Edict of Nantes in his exile in the Netherlands:

> No-one should be tolerated who denies the existence of God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold on an atheist: this all dissolves in the presence of the thought that there is no God. And atheists can't claim on religious grounds that they should be tolerated!
>
> (Locke [1689] 2017: 21)

Locke's 'fear' (Forst 2014: 324) was and remained, however, not limited to him and his time, but predetermines public debates to this day, as can be seen from the *Böckenförde paradox* addressed in the introductory section of this chapter that the modern, secular state cannot provide the necessary resources for social cohesion, on which its existence depends.

In conclusion, it was *Protestantism* combined with *recurrent wars* that permitted a sense of English and then British national identity to emerge alongside and not necessarily in competition with the older, emotional attachments to England, Wales or Scotland, or the county or village in France (Colley 2009: 18). At the same time, there were *organised groups* – not simply an aggregation of individuals adhering to a specific religious denomination (for the sociological theories of identity and group formation, see Chapter 4) such as the Puritans, who had shaped English politics during the reign of Oliver Cromwell – who found themselves in the position of *religious* minorities and mainly emigrated to North America where they founded the 13 colonies which finally seceded in 1776 and became the nucleus of the United States of America.

3.2.1.3 The American and French political and legal revolutions

As can be seen from the wording of the 1776 Declaration of Independence, the authors closely followed Milton's and Locke's theories:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter it or to abolish it, and to institute new Government, laying its foundations on such principles and organizing its powers in such form as to them shall seem most likely to affect their safety and Happiness ….
>
> (US Declaration of Independence 1776)

The text of the Declaration then continues that the colonies' experience under the 'present [British] King, is a History of repeated Injuries and Usurpations, all having in direct Object the

Establishment of an absolute Tyranny over these States'. In conclusion, the 'Representatives of the UNITED STATES OF AMERICA', assembled in General Congress, 'do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES' (ibid., emphasis in the original).

Hence, the term 'people', as in Milton's and Locke's reconstruction of the English revolutions, is again used as a *conceptual scheme* for *political and legal legitimation*. However, it is again in the historical context of tyranny, exercised by the British king, that the representatives of the colonists, 'in the Name, and by authority of the good People of these Colonies', declare *secession*:

> In every stage of Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may defy a Tyrant, is unfit to the Ruler of a free People. Nor have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and Consanguinity ….
>
> (ibid.)

Unlike later invocations of a right to the self-determination of peoples in the nineteenth and twentieth centuries, as we shall see below in the next sub-sections and Chapter 4, section 4.3, the US Declaration of Independence does *not* argue that the colonies should be *independent* simply *because* they represented a *people*, nor that nations were sovereign and the basis for states. Hence, this archetypical declaration of independence must not be read as an exemplification of an (ethno-)national right to self-determination as this is the case with regard to later ideologies and theories of nationalism.

Thus, we have to turn back again to the other conceptual line of argumentation following from the original French context and Bodin's conceptualisation of sovereignty to discover the conceptual vantage point for the fusion of liberalism with nationalism transformed from theoretical conceptualisation into ideology when turned into claims of absolute truth.

Jean-Jacques Rousseau (1712–78) developed a theory of *government by the people* in his *The Social Contract* published in 1762 (Rousseau [1762]1980). However, in stark contrast to John Locke's pluralist conception, his notion of *people* – as can be seen from the following quotation – becomes a much more reified being conceived as a *collectivist* sovereign *entity*, *with* a general will (*volonté générale*) of its own, and the *right* to establish, change or abolish institutions as desired.

> This act of association creates a moral and collective body composed of as many members as there are voters in the assembly, and by this same act that body acquires

> its *unity*, its common *ego*, its life and its will …. Those who are associated in it take collectively the name *people*, and call themselves individually *citizens*, in so far as they share in sovereign power, and *subjects*, in so far as they put themselves under the laws of the state.
>
> (Rousseau [1762]1980: bk I, ch. 6, 61–2, emphasis in the original)

Moreover, he proposes a *civil religion* to instil people with a *sense of patriotism* (on the modern concept of constitutional patriotism, see Chapter 4, section 4.4), which, as he assumed, could come into conflict with individual aspirations and interests. Hence, any deviation from such a 'civil religion' had to be declared a crime to be punished by exclusion from the collective body:

> There is thus a profession of faith which is purely civil … not strictly as religious dogmas, but as sentiments of sociability, without which it is impossible to be either a good citizen or a loyal subject. Without being able to oblige anyone to believe these articles, the sovereign can banish from the state anyone who does not believe them; banish him not for impiety but as an unsocial being, as one unable sincerely to love law and justice, or to sacrifice, if need be, his life to his duty.
>
> (Rousseau [1762]1980: bk IV, ch. 8)

As a consequence, the *natural rights* of persons as liberal birth rights and the people as a theoretical element of democratic government are transformed along the lines of argumentation of Bodin and Hobbes (on the differences and similarities between Rousseau and Hobbes, see Daly 2015: 471–2). The people is conceived as a *corporate* body with its own, collective will (*volonté générale*) which is different from the aggregated will of the individuals (*volonté des tous*) so that the rights of persons can only be enjoyed when exercising the 'civil' *duty of absolute loyalty* to the state which is the main *structural component* of the *ideology* of *nationalism*. The *liberal paradox* is thus pinpointedly reformulated by Rousseau in the following way:

> The social contract, in order not to be an empty formula, must tacitly include the agreement which alone authorises all others that whoever refuses to comply with the general will can be forced by the entire body to follow it; which means nothing else, but to *force him to be free*; ….
>
> (Rousseau [1762]1980: bk I, ch. 7, emphasis added)

And it was then with the *French Revolution* and the speeches and writings of their proponents in which Rousseau's reified concept of a collective body with a *volonté générale* became naturalised and politically executed, thus giving birth to the modern French nation and the model of *democratic* government along anti-pluralist lines by conferring the notion and concept of sovereignty to the nation as *indivisible* entity underlying the structuration of state institutions as can be seen from the historical context and the interpretative explanation given by Abbé Sieyès (1748–1836).

Owing to the financial crisis of the state, the *États généraux* (General Estates) were summoned, for the first time since 1614, and elected in 1789. Before the elections, Abbé Sieyès

published the famous pamphlet *Qu'est-ce que le tiers état?*, declaring that only the *Third Estate* constituted the Nation, so that only the Third Estate is legitimised to exercise state power.

> … There are three questions which we have to ask of ourselves:
>
> 1. What is the Third Estate? – *Everything*.
> 2. What, until now, has it been in the existing political order? – *Nothing*.
> 3. What does it want to be? – *Something*.
>
> The Third Estate thus encompasses everything pertaining to the Nation, and everyone outside the Third Estate cannot be considered to be a member of the Nation. What is the Third Estate? EVERYTHING …
>
> What is a nation? It is a body of associates living under a *common* law, represented by the same *legislature*, etc. ….
>
> Freedom does not derive from privilege but from the rights of the citizen, rights which belong to all ….
>
> The Third Estate is always identical to the idea of a nation …
>
> (Sieyès [1789] 2003: 97–104, emphasis in the original)

But a deep contradiction in his argument can be seen from the fact that he then presents as the representatives of the Nation as a whole only those social classes of the Third Estate whose wealth frees them from daily labour and gives them sufficient leisure to be able to participate in public affairs (Sewell 1994: 152). According to the electoral laws thus, only taxpayers of at least 25 years of age were eligible to vote (Price 2014: 112).

The text of The French Declaration of the Rights of Man and the Citizen (1789) is strongly influenced by the text of the American Declaration of Independence and John Locke's writings, owing to the participation of the American ambassador in Paris Thomas Jefferson in its creation. The provisions of its articles therefore amalgamate English and French thinking and provide the conceptual ground not only for the revolutionary break with monarchic absolutism in France but also for the fusion of *liberalism and nationalism* as *foundation for liberal-democratic government*.

The mutually constitutive 'duality' (Giddens 1986) of *individualistic liberalism* and *civic nationalism* (for this characterisation of different forms of the ideologies of liberalism and nationalism, see Chapter 4, section 4.3) can best be seen from the text of The French Declaration of the Rights of Man and the Citizen (1789) itself.

> Article I – Men are born and remain free and equal in rights. Social distinctions can be founded only in the common good.
>
> Article II – The goal of any political association is the conversation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression.
>
> Article III – The principle of any sovereignty resides essentially in the Nation. No body, no individual can exert authority which does not emanate expressly from it.
>
> Article IV – Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure

> other members of society the enjoyment of these same rights. These borders can be determined only by law.
>
> …
>
> Article VI – The law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation. It must be the same for all, either that it protects, or that it punishes. All the citizens, being equal in its eyes, are equally admissible to all public dignities, places and employments, according to their capacity and without distinction other than that of their virtues and of their talents.
>
> …
>
> Article XVI – Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution.
>
> (French Declaration of the Rights of Men 1789)

The following conclusions can be drawn: First, as can be seen from the text of Article I and Article VI of the Declaration with a striking distinction from the wording of the US Declaration of Independence ('men are born *and remain free*'), the revolutionary reconceptualisations of the doctrines for the legitimation of power are based on a *mutually constitutive duality* of the *individual* and – hereby following Rousseau – the body of the *indivisible nation* as axiomatic anchor for the principle of sovereignty and thus the exercise of any legitimate power. The concept of popular sovereignty replacing the doctrine of the divine rights of kings is thus not only complemented, but transformed into national sovereignty. It is this constitutional doctrine and not only the politically and legally revolutionary abolishment of the old feudal and *corporate* and *hierarchic classifications* (nobility, clergy and common people; i.e. the three Estates) of the population which has the anti-pluralist effects described in the next paragraphs.

Second, seeing the law as the expression of the general will of the people in Rousseauan terminology (see Article VI of the Declaration) also requires the *secular* equality of citizens before the (positive) law against any religious legitimation of the equality principle – as had been the case in natural law terms by conceiving human beings as equals in God's image. This aspect becomes most pertinent for, in terms of a path dependency, the further development of political decision making and its translation into constitutional doctrine, as we have demonstrated above with the *Peuple Corse* Decision of the French *Conseil Constitutionnel*: the secularised *constitutive principle of individual equality before the law* requires that difference between citizens – as we can see from Article I and VI of the Declaration – can only be legitimated on the basis of individual virtue or talent. Hence, *cultural* markers of individuals – not only in the meaning of religion, but also language, as we learn immediately from sub-section 3.2.2 as well as Chapter 7, section 7.2 – have to be socially, politically, and legally irrelevant at best or will be suppressed by force of law embodying the general will, according to Rousseau's conception.

Third, following the conceptualisations in the development from Bodin to Sieyès, the nation is not simply an aggregation of individuals, but is a collective entity in its own right and the only one equipped with sovereignty, as can be seen from the text of Article III. Hence, Bodin's conception of the indivisibility of the *concept* of sovereignty – taken over by

Rousseau (bk II, ch. 2) – is conferred on and thereby naturalised as *indivisible nation*, in historical reality however providing the additional normative principle of *national sovereignty* in contrast to *popular sovereignty* for the legitimation of *repression* of both socioeconomic as well as cultural and political forms of *pluralist organisation* of society through intermediary corporations *in between* – to take up and paraphrase Arendt's definition of politics quoted in Chapter 2, Box 2.4 – the individual and the nation.

This *anti-groupist stance* came, in the course of the revolution, immediately to the fore with the *Loi Le Chapelier*, adopted by the Constituent Assembly in 1791 and prohibiting – in the spirit of the abolition of feudal corporations as *pouvoirs intermediares* (intermediary powers) – the creation of associations of workers to defend their economic interests. Even workers' assembling to demonstrate for higher wages was declared a criminal act.

And with regard to *language* as a means of communication, but also social identity formation, as is analysed in detail in Chapter 7, sections 7.2 and 7.3, *the* nation was to be French.

In the sixteenth century, the French language became compulsory for all legal acts. In reality, however, other vernaculars *(patois)*, more than 30, were spoken throughout the kingdom, with only three million out of a total of 25 million inhabitants using the French language of the Ile de France and the centre of power as their mother tongue. Hence, it was the French Revolution that institutionalised French as the de facto *official language* of state *and* society, although initially the revolutionaries had declared freedom of language for all citizens. However, a representative at the National Convention, *Bertrand Barère de Vieuzac*, declared: 'Federalism and superstition speak Breton; emigration and hatred of the Republic speak German; counter-revolution speaks Italian, and fanaticism speaks Basque. Let us destroy these instruments of damage and error' (cit. in May 2012: 168).

Two language laws, based on a '*Report on the necessity and means to annihilate the patois and to universalise the use of the French language*' delivered in a speech to the National Convention by *Abbé Grégoire* in June 1794, finally imposed the use of French only in public education and public life so that the regional, linguistic minorities, whose languages were not mutually comprehensible with French, were exposed to assimilative pressures. Thus, within years, the French *language* became the *symbol* of *national unity* (May 2012: 165–73). Nevertheless, far into the nineteenth century, about a quarter of the French population did not speak the official language, French remained a foreign language to them. The official pressure – especially through compulsory public schooling and army service as Eugen Weber demonstrated in his seminal study how *peasants* were *transformed into Frenchmen* – continued and ensured that the languages, now downgraded to the status of dialects, increasingly vanished (Weber 1976: 67–9).

In conclusion, the French model of a *civic state nation* based on the republican Jacobin ideology can be summarised best as trinitarian structure of constitutive principles:

- the alleged *cultural indifference* or *neutrality* of state institutions, legally entrenched by the constitutional principle of *strict individual equality of citizens before the law* irrespective of cultural markers;
- the constitutional principle of *laïcité* as a form of assertive secularism (Kuru 2009) requiring, in principle, not only the separation of state and church, but also the separation of public space and religion (see in detail Chapter 7, section 7.3); and

- the constitutional principle of *national sovereignty* based on older notions of the indivisibility of territory and the indivisibility of absolute sovereignty of the monarch translated by the Jacobin revolutionaries into the concept of the indivisibility of the nation (see also Daly 2015).

3.2.2 Central Europe

Although the Holy Roman Empire had stretched out over large parts of Central Europe, this macro-region never reached a degree of territorial contiguity and bureaucratic centralisation as the Western European states did until the end of the eighteenth century.

The Holy Roman Empire of the German Nation (or, as it was referred to in Latin since 1474, *Sacrum Romanum Imperium Nationis Teutonicae*) was *territorially fragmented* into approximately 150 bigger or smaller kingdoms and other principalities, statelets and cities (secular or ecclesiastical). A further barrier to any centralisation efforts constituted the fact that the Emperor was to be elected by seven of the most influential princes and bishops (German: *Kurfürsten* – electors) who jealously tried to secure their powers and influence (for a detailed comparison from a historical-sociological perspective, see Axtmann 2003).

The Empire was even further weakened by the triumph of the *Protestant reformation*. Martin Luther's (1483–1546) influence within the Holy Roman Empire was tremendous. Within a short time, large groupings of the population, as well as many dukes and princes, became adherents of the new faith. The new belief had dramatically spread and merged with social and political unrest. The emergence of the new monetary capitalist system further ignited the collapse of the whole feudal system with the strict status hierarchy of social strata, who revolted against their overlords. With the Catholic emperor not ready to give in to the religious demands of the princes such as the creation of a reformed state church, *civil* war was inevitable (1546).

The war was ended by the *Augsburg Peace Treaty* of 1555. Under the principle *cuius regio, eius religio* (he who is in possession of the territory, determines the religion), the princes, dukes and other rulers of every single sub-unit of the Holy Roman Empire were allowed to decide on the religious denomination (Catholic or Protestant) for themselves and their populations. Those subjects who decided to refuse to convert to the religion of the prince were allowed to emigrate to a territory with the denomination of their choice. However, this must not be misunderstood as amounting to a justiciable right, but was granted in the form of benign tolerance, as can also be seen from the Latin terminology as *beneficium emigrandi*.

Soon after the Augsburg peace treaty, however, the Habsburg emperors of the Holy Roman Empire started the process called *Counter-Reformation*, their crusade to re-Catholicise the Protestants in their territories (especially in Bohemia and the Habsburg hereditary lands (in German, *Erblande*). This policy culminated in one of the most brutal wars, the Thirty Years War (1618–48), which almost totally devastated vast parts of today's Germany (see overleaf Figure 3.2; Box 3.6). This war between the Catholic emperor and the Protestant princes and dukes – ostensibly having started on religious contestations – finally developed into a European war over hegemony with the participation of foreign powers like Sweden and France.

Box 3.6 The consequences of the Thirty Years War

The Thirty Years War (1618–48) had started in Bohemia as a conflict between the Habsburg Catholic emperor and the Protestant (both Lutheran and Hussite) Bohemian subjects. Very soon, it turned into a European war, with the participation of the German nobility, France, Sweden and Denmark fighting not only for their religion but for political hegemony in Europe. The war losses – especially in some parts of the so-called Holy Roman Empire of the German Nation, such as Silesia, the Palatinate, Thuringia or Mecklenburg – were tremendous: 50–100 per cent (!) of the population in those regions were killed or died of starvation.

Figure 3.2 The brutality of the Thirty Years War illustrated by the French artist Jacques Callot (1592–1635). *The miseries of war*, no. 11: 'The Hanging' (1633)

The Peace of Westphalia (1648), ending this war through a series of treaties concluded by the warring parties in Münster and Osnabrück, brought the de jure independence of the Dutch Republic from Habsburg-dominated Spain and of Switzerland. The treaties also had far-reaching consequences for the status of – in today's understanding of international law – external and internal sovereignty for the Imperial Estates of the Holy Roman Empire, by confirming not only their old prerogatives, liberties and privileges, but also a *superioritas territorialis* in all matters spiritual and secular (Art. VIII: para. 1 in Müller 1969). They were also allowed to form alliances among themselves and with foreign powers to ensure their own preservation and security, as long as they were not directed against the emperor, the empire or the peace treaty (Art. VIII: para. 2). These treaties created what became called the Westphalian order of international relations based on the concept of coexisting, only in theory of course, equal states in order to preserve peace through a 'balance of power' among them (Kissinger 2014).

This *supremacy of the ius territorialis* was later naturalised into the concept of territory as one of the three constitutive elements for the determination of the de facto existence of an independent state next to people and power in Georg Jellinek's seminal publication *Allgemeine Staatslehre* (*Theory of State and Law*; Jellinek 1900; see also Loughlin 2009) and remains valid according to international law to this day. The supremacy of this *ius territorialis* was, however, not identical with Bodin's or Hobbes' concept of sovereignty.

The Imperial Estates were seen from now on as independent actors in international law, but the rule of non-intervention in internal affairs remained guaranteed only as long as territorial laws did not contradict imperial legislation, which was controlled by two supreme courts: the Imperial Aulic Council and the Imperial Cameral Court, thereby establishing an institutional barrier against the appropriation of full sovereignty by the Estates (Axtmann 2003). Interestingly for our purposes of investigating the history of power sharing mechanisms in contrast to the conceptualisation of indivisibility and sovereignty is the fact that the permanent Imperial Diet (German: *Immerwährender Reichstag*) legally institutionalised a specific procedure for the management of religious division. In cases where either the Protestant or Catholic members of the Diet asserted that policy decisions would involve religious matters, the Diet could split itself into two *corpora*, a Catholic and Protestant *corpus*, the so-called *itio in partes*. Decisions could then no longer be taken through simple majority vote, but required a negotiated search for a compromise (Art V: para. 52), in other words, it provided absolute veto power on an ethnic basis in today's terminology and understanding. This procedure was used, however, only eight times during its 158 years of existence (Axtmann 2003).

Moreover, the peace treaties of Westphalia were the first official documents to legally grant (permanent) religious tolerance in great parts of the Holy Roman Empire and thereby going beyond the Augsburg Peace Treaty's formula of *cuius regio, eius religio* with its *beneficium*; in reality, however, involuntary choice between assimilation or emigration. Now the princes and dukes of all the sub-units of the Empire, with the exception of the Habsburg hereditary lands, were no longer allowed to coerce their Christian subjects to change their denomination. Religious liberty and freedom of conscience was thus no longer perceived as a God-given birth right following from natural law theories, as was the case in Western Europe, but as a state-granted subjective right to *freedom of religion*, not including, however, the right to worship religion publicly or on the territory of the respective other denomination. In the Habsburg lands, religious tolerance for Protestants was not granted until 1781. Thus, until the second half of the eighteenth century, Protestants were expelled from the Alpine lands (e.g. by Empress Maria Theresia of Habsburg to the region of Sibiu in today's Romania; Evans and Wilson 2012).

As a general consequence of the *deep structure* of the *tension* between the claim for religious and thus political truth and – created by the religious wars – the need to restore peace and security, as figuratively represented in the famous fresco of *buon governo* (good government) in the town hall of Siena (shown overleaf Figure 3.3; Skinner 2002: 39–117), the results of the Westphalian peace treaties led to a *structural dualism* of territorialisation and nationalisation of religion on the one hand and a secularisation of state *and* society through privatisation of religion on the other (see, in general, Bader 2007). The vantage point for the creation of the modern public – private distinction is therefore the *toleration* of different beliefs on the same territory as long as they remain *haereticus quietus* (i.e. silent), which was

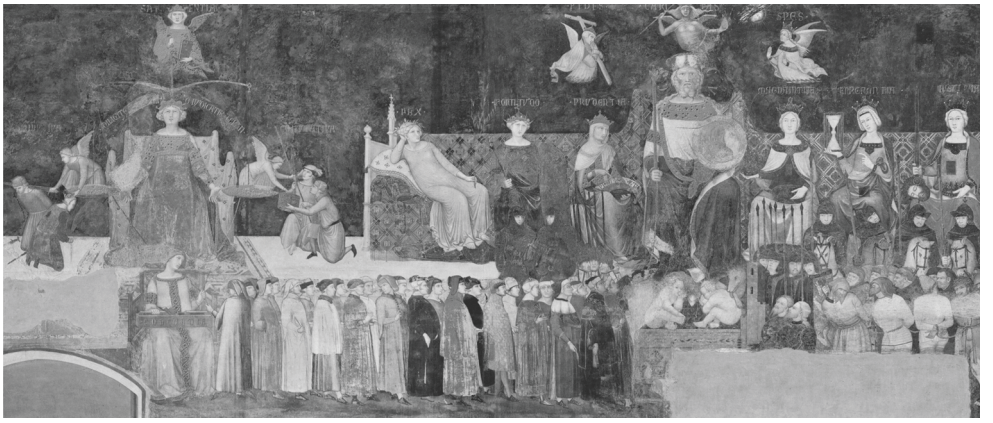

Figure 3.3 Fresco of *Buon Governo* (1339) by the Italian painter Ambrogio Lorenzetti (c. 1290–1348)

further developed to the rule of *exercitium religionis privatum* after 1648 (Forst 2014: 174), thus reducing the (public) exercise of religion in community with others to the freedom of thought and conscience restricted to the individual, intrinsic and thus private domain, as can be seen to this day from the text of Article 9 of the European Convention of Human Rights.

Second, in stark contrast to the French development described above with the revocation of the Edict of Nantes by Louis XIV in 1685, but also the natural rights tradition of individual religious freedom, the *legal recognition* of religious groupings was no longer denied, but in the years to come, international treaties to protect religious groupings were concluded between warring states. Hence, the expulsion or suppression of religious groupings and their associative or even corporative organisations was replaced by a system of legally binding acts (Ruiz-Vieytez 1999: 18–19), thereby creating a system of external protection by the religious kin state so that toleration was transformed into religious freedom as an *internationally* guaranteed right with a *collective* dimension which could no longer simply be revoked by an absolutist monarch.

- In 1660, Sweden acknowledged the rights of the Catholic inhabitants of Livonia, which was annexed by Sweden from Poland (Treaty of Olivia).
- In the treaties of Nijmegen (1678) and Ryswick (1697) with France, the United Provinces (Dutch Republic) recognised the freedom of worship for the Catholics of the southern regions of the Low Countries (today's Belgium).
- In 1742, the Holy Roman Empire and Prussia signed the Treaty of Breslau, ending the Austrian War of Succession. With the Austrian land of Silesia annexed to Prussia, this treaty guaranteed freedom of worship to the Catholic inhabitants of this territory.
- The treaties following the first division of Poland (1773) between Austria, Prussia and the Russian Empire guaranteed the freedom of worship to the Polish Catholics who now came under Prussian rule. At the same time they granted religious freedom to the Christian-Orthodox population in the now annexed province of Galicia in today's Ukraine.

In conclusion, the Holy Roman Empire, until its end in 1806, when it collapsed under the boots of Napoleon's armies, remained – if seen from the political aspirations and trends in Western Europe to establish monarchic absolutism – unsuccessful in state formation, not to mention nation building. It remained a constitutionally complicated aggregation of de facto more or less politically independent territories held together by the crown of the Holy Roman Empire. In the non-Habsburg parts of the Holy Roman Empire, the Reformation under the Protestant princes had generated strong *Landeskirchen* (established churches) which constituted a decisive obstacle to any state or nation building efforts of the Empire. At the same time, the Empire never could reach a likewise degree of independence from the Catholic Church as did the rulers of France, England or Spain.

By the end of the eighteenth century, the *fight against Napoleon* had created strong feelings of so-called patriotism throughout Europe, be it in Spain or in the lands of today's Germany or Italy. The foundation for the idea of one, single German people based on one common language had been laid by Luther's translation of the New Testament into German, wherein he used and mixed the vocabulary of different vernaculars in terms of language standardisation (Burke 2013: 26). Similarly, Primož Trubar (1508–1586) had – in the Lutheran tradition – laid the foundation for the standardisation of the Slovene language through his translation of the New Testament. The idea that one language constitutes a people spread among the German romantic philosophers and writers who had more or less turned away from the cosmopolitan ideas of Enlightenment in the wake of the French Revolution. Being German was defined by them on the basis of the allegedly same language thereby providing the ground for the national and political identitarianism and racialisation of this concept in the nineteenth century. In practice, however, there were and remain various and partly mutually incomprehensible linguistic variations of German, from the North and East Sea as far as today's Romania, the Ukraine and Former Yugoslavia, which were at that time mostly parts of the Habsburg monarchy.

This process of *reinterpretation away* from the *cosmopolitan frame* of *Enlightenment philosophy* via Romanticism *towards nationalist* and *racist ideology* was prophetically highlighted by the Austrian playwright Franz Grillparzer (1791–1872) in an epigram written in 1849: '*Von der Humanität durch Nationalität zur Bestialität*' ('From humanity through nationality to bestiality'; Grillparzer 1960: 500).

The identitarian core of the doctrine of *nationalism* – with remnants of the cosmopolitan frame still visible – was developed by *Johann Gottfried Herder* (1744–1803):

> In spite of the different species of the human genus on Earth: nevertheless, it is everywhere one and the same human genus …. In short, there are neither four or five races, nor excluding varieties on earth. … No people can have an idea without having a word for it … Pure reason without language is a utopia on Earth … because the intellect of a people and its character is imprinted on them. … Nature brings up families; thus, the most natural state is one people with a single national character … Nothing else obviously contradicts the purpose of governments but the unnatural extension of states, the wild mixing of human species and nations under one sceptre ….
>
> (Herder [1790] 2016: 93–4, 273, 284, 315–6, translation by the author)

In brief, as can be seen from the quotations from Herder's *Ideas on the Philosophy of the History of Mankind* (1784–1791), his *reified social categories* form the equation of one language equals one people equals one state as model for social and political ordering:

- humankind as a whole remains a meaningful social category, unlike 'pure reason' denounced as 'utopia'; and it is *not* split up in *races*, *but* different *peoples;*
- the *uniqueness of peoples* and their single national characters stem from their respective *languages*;
- in conclusion, 'one people' shall form its 'own state' since this is 'natural', whereas the mixing of nations is declared 'unnatural'.

In his *Addresses to the German Nation* of 1808, published during the occupation of Prussia by the Napoleonic army, the German philosopher Johann Gottlieb Fichte (1762–1814) also located the essence of a German nation in the German language, thus taking over Herder's ideas of a collective identity through language. But whereas the use of the term 'natural' by Herder is ambiguous and can be understood as more or less synonymous with empirical in the tradition of Montesquieu's *De L'Esprit des Loix* (1748), Fichte then drives the ideological process of reification into naturalisation by transforming the meaning of the commonality of language into a social entity as 'One and indivisible Whole'. Thus, the nation becomes the *only possible point of reference* for social and political *ordering*, whereas Herder defended the overarching category of humankind in his rejection of the category of races.

> What speaks the same language, this is held together with lots of invisible bonds by nature itself long before any human art; it can make oneself understood among others and is always able to communicate better and better, it belongs together, and naturally is One and an indivisible Whole.
>
> (Fichte [1808] 1929: Address No. 13, translation by the author)

Finally, he combines the naturalised category of nation with a *right to collective self-determination,* thus bringing to the fore the concept of *national self-determination* of peoples which, however, in stark contrast to the doctrines developed through the revolutions in England and France, must not be confused with the normative principle of *popular sovereignty* for the legitimation of the exercise of power *within* the nation-state in the form of *democratic* government.

> Insofar as it is beyond doubt true that where a separate language can be found, also a separate nation exists, which has the right to take independent charge of its affairs and to govern itself ….
>
> (Fichte [1808] 1929: Address No. 12, translation by the author)

Finally, for our purpose of demonstrating the processes of naturalisation and racialisation in political thought, we can see how Friedrich Schleiermacher (1768–1834) paved the way for a *racist turn* in the interpretation and conceptualisation of relationships between peoples in a 'Patriotic Prayer' of 1803, long before social Darwinism and racist anti-Semitism became

fully fledged ideologies and instruments of political propaganda in the second half of the nineteenth century:

> Each people which has developed itself to a certain level, is dishonoured if it incorporates alien elements even if they are good *per se* ….
>
> (Schleiermacher 1834: 75, translation and emphasis by the author)

Hence, besides the German language, which was seen as the 'spirit of the people' (*Volksgeist*; Hutchinson 2013: 81), for some intellectuals, the idea of an original, authentic descent of the Germans, to be kept free of foreign admixtures, became seen as the second constitutive marker of the German nation, thereby inserting a racist factor into the original cultural concept (Benner 2013) as we outline in more detail in Chapter 4, section 4.2. Moreover, all intellectual and political elites understood France as a model. Only a nation, to be territorially and politically united into a German nation-state like the French state-nation, would be strong enough to defend itself against military aggression. However, the different designation as state-nation and nation-state was conceptualised only by later theories of nationalism in the twentieth century (Smith 2010; see Chapter 4, section 4.2) in order to postulate that in the French case the state created the nation, whereas in the German case – in the absence of prior political and legal unification into a central state – these theories argue that the nation created its state. As can be imagined, this conceptualisation of historical events ends up in the famous chicken-and-egg problem, which remains unresolved to this day in scholarly literature.

In conclusion, the German model of an *ethnic nation-state* is based on the recognition and legal *institutionalisation* of *ethnic differences* in terms of belonging to linguistic or religious communities conceived as *socially closed* and *culturally homogenous* (i.e. ethnic groups; see Chapter 4 for the sociological analysis underlying this definition of ethnicity following from Weber's concept of social closure). Again, this model is based on a triadic structure.

1) The founding principle is the *nationality principle* requiring the (allegedly natural) right to national self-determination based on the Herderian equation of one language as the objective basis for the definition of one people with a right to form its own national state.
2) As a consequence, the concept of *equality* no longer relates to abstract citizens, but only to the *members of* the so defined ethnic *group*.
3) This has the consequence that cultural diversity in terms of language or religion is categorically redefined into ethnic difference providing the ground for the *categorical distinction* between the *majority* population and ethnic *minorities*, again with the effect that a democratic national state is conceived as ethnically neutral.

But a united German nation-state was not on the political agenda after the defeat of Napoleon (see, in general, Breuilly 2013: 149–74). The Congress of Vienna (1814–15), which settled the issues arising from the French Revolution and the Napoleonic wars, particularly by redrawing Europe's territorial and political map, did not bring about a (united) German state after the dissolution of the Holy Roman Empire in 1806. Only a very loose German confederation (*Deutscher Bund*) was founded, consisting of 38 states and statelets including

parts of the newly created Habsburg Empire following the dissolution of the Holy Roman Empire. It took another half century before a united *German nation-state* was *founded* under the leadership of Prussia by von Bismarck in 1871.

Nevertheless, an earlier failed attempt to found a German nation-state in the wake of the bourgeois revolutions of 1848 all over Europe must be highlighted because of a single letter. This letter was written by the historian František Palacky, who was invited to participate in the German National Assembly in the Frankfurt Paulskirche with 500 deputies, having been elected directly by popular vote. This letter is extremely significant for our purposes because of the *structural alternative* for state formation and nation building which comes to the fore at this juncture of European history (on national movements in the Habsburg empires, see Hroch 2013: 175–98).

In his *Psaní do Frankfurtu* ('A Letter to Frankfurt', 1848) Palacky refused to take part in the assembly with the following arguments (Palacky [1848] 2007), which are quoted in some length to make his concepts and principles clearly visible in contrast to the French, British and German conceptualisations of people, state and nation on the basis of indivisibility and thus against 'unnatural mixing' (Herder).

Palacky's arguments seem to be at once backward looking with his reference to 'historical rights', but at the same time decidedly imbued with *cosmopolitan thinking* against the predominant nationalist ideology which leads him to prophetically defend the Austrian Empire as a multi-ethnic empire.

> If it is now demanded that, going beyond the hitherto existing union of princes, the people of Bohemia should join together with the German people, then this is a new demand lacking any basis in historical right, to which I for my part do not regard myself as justified in acceding, so long as I do not receive for it an explicit and complete mandate. …
>
> The second reason which prevents me from taking part in your deliberations is the circumstance that, judging by everything that has so far been published about your purposes and views, you will of necessity intend to weaken Austria as an independent empire, even to make it impossible – a state whose maintenance, integrity and strengthening is and must be a high and important affair not only of my people, but of the whole of Europe, nay, of humanity and civilisation itself. …
>
> You know that the south-east of Europe along the frontiers of the Russian Empire is inhabited by several peoples significantly different in origin, language, history and culture – Slavs, Wallachians, Magyars, and Germans, not to mention the Greeks, Turks and Schkipetars – of whom none is strong enough by itself to put up a successful resistance in the future against the overpowering neighbour in the East; they can do that only when a single and firm bond unites them all with one another. The true life blood of this necessary union of peoples is the Danube: its central power, therefore, must not be too far distant from this stream if it wants to be and to remain at all effective. Truly, if the Austrian Empire had not already existed for a long time, then one would have to hurry in the interest of Europe and the interest of humanity to create it. …
>
> (Palacky [1848] 2007: 327)

In 1870–71, Bismarck finally took advantage of the wave of German nationalist feeling caused by the successful war against France, thus overcoming the factionalism of the south German states, which had so far blocked the creation of a united German nation-state. Under his inspiration, the German Empire was founded, called the second German Empire after the Holy Roman Empire of the German Nation, excluding, however, the Habsburg-ruled German speaking provinces of the meanwhile transformed Austro-Hungarian Empire (*kleindeutsche Lösung*/Lesser Germany) (Weichlein 2011: 281–306) and – not to forget – the German speaking parts of Switzerland, having been recognised as independent state since 1648.

Almost concurrently with the efforts for the foundation of the German nation-state, *Italy's Risorgimento movement* (1859–66) took place. Renaissance humanists (Dante Alighieri, 1265–1321) had defined the image of an Italian nation in linguistic, cultural terms (*italianità)* in previous centuries. Niccolò Machiavelli (1469–1527) with his political approach can be seen as an exception to this cultural approach. In his *Il Principe* (*The Prince*; Machiavelli [1532] 1998), he calls for a *strong leader* who would be able to *free Italy* from foreign occupation.

The Italian peninsula had been a mere geographic term for centuries, as Prince Metternich, the Chancellor of the Habsburg Empire until 1848, denounced the concept of the Italian nationalists in the first half of the nineteenth century. After the heydays of the Renaissance city states like Florence, Venice and others and their enigmatic rulers such as the Medici (see, in particular, Skinner 1978: vol. 2, 69–188 and Burckhardt 2010), these regions had become prey of the European powers (France, Habsburg, Spain). As elsewhere in Central Europe, it was the French Revolution and the Napoleonic era which provoked Italian intellectuals (in particular Giuseppe Mazzini, see Bayly and Biagini 2008) to focus on the creation of a unified Italian nation-state. Since the Congress of Vienna and the restoration of the Habsburg and Bourbon princes in the Italian principalities (such as Lombardy, Venetia, Tuscany, Naples, Sicily) a number of local and regional upheavals of the *Carbonari*, a small secret society, occurred throughout Italy, aiming at uniting the Italian peninsula and expelling the foreign occupants. After the defeat of the liberal-revolutionary demands in 1848, Piedmont-Sardinia with its Prime Minister Cavour took over the leadership of the Italian *unification process* and succeeded with his clever diplomacy and military alliances. This unification process (with the exception of a small papal enclave in Rome) was supported by plebiscites, initiated by local leaders in Tuscany, Parma and Modena in 1860. In the same year, Giuseppe Garibaldi and his thousand volunteers (*i Mille)* conquered Sicily and the Italian south for the *Italian kingdom* finally founded in 1861 (Riall 2009: 1–52).

Whereas the process of state building, the *risorgimento*, was basically concluded in 1866 and 1870 by the inclusion of Venetia and Rome, the process of *nation building* took much more time, especially among the uneducated lower socioeconomic strata of the south. When in 1860 the population was called to vote in a referendum for the foundation of the kingdom of Italy, Sicilian peasants had suspected *Italia* being the name of the king of Sardinia's wife (Reinhardt 2011: 7). 'We have made Italy, now we have to make Italians' – the famous *bonmot* by D'Azeglio in the first session of the newly elected Italian parliament – clearly expressed the situation in the newly founded nation-state (Hobsbawm 1992: 44).

3.2.3 Eastern and Southeastern Europe

The French Revolution, as well as German Romanticism, had great influence on the Balkans. Both Johann Gottfried Herder and Johann Wolfgang Goethe, who had translated old Serbian folk songs into German, encouraged Vuk Karadžić (1787–1864) in his efforts of modernisation of the liturgical Church Slav language into a Serbian language as standard for communication and thus basis for Serb state and nation building (Banac 1988: 80–2). The title of an essay published by him in 1836 – *Srbi svi i svuda* (Serbs all and everywhere) – marks the revolutionary *shift from* previous *religious identity formation*, when being Serb had been identified with Orthodox Christianity in both the Ottoman and Habsburg empires, to *language as marker for future state- and nation building*: With this title he claimed that – from a linguistic perspective – all Štokavian speakers, and thus also the majority of (Catholic) Croats, were Serbs regardless of religion (Lampe 2000: 61). The ideological appeal of this phrase for the political mobilisation of ethnic sentiments – again used in the wars in Bosnia and Herzegovina between 1992 and 1995 – is the overlapping, mutually destructive force for what is typologically distinguished by Michael Mann as 'state creating' and 'state subverting' nationalisms (Mann 1993: 730–2), in our example one of the important causal factors leading to the collapse of both the Ottoman and Habsburg empires, but also the failures to create an all-Yugoslav nation and state in both the nineteenth and twentieth centuries (Ramet 2006).

The German model of the ethnic nation-state thus laid seed throughout large parts of Central, East and Southeast Europe during the nineteenth century with the effect that myths of common ancestry, language, culture, and history created by linguists and historians were turned into politically decisive and divisive factors, as can be seen from a passage of a draft plan with the title *Načertanije* written by Ilija Garašanin (1812–1874), which laid out the Serbian principality's long term foreign policy objectives when he still was a Minister of the Interior between 1844–1852 and Serbia was still an Ottoman tributary. This plan – kept secret until 1906 – became and still is seen as a 'blueprint for a Greater Serbia' (Judah 2000: 56–8), not the least because of the goals and methods emulated by Slobodan Milošević in the course of the break-up of communist Yugoslavia between 1988 and 1991 when the myth of *Kosovo polje* as the cradle of Serbdom had played an important role for the political mobilisation of people.

> [The Serbs are] the true heirs of our great forefathers, and they are engaged in nothing new but the restoration of their ancient homeland. Our present will not be without a tie with our past, but it will bring into being a connected, coherent, and congruous whole, and for this Serbdom, its nationality and its political existence as a state, stands under the protection of sacred historic right. Our aspiration cannot be accused of being something new, unfounded, out of revolution and rebellion, but everyone must admit that it is politically necessary, that it is founded upon the distant past, and that it has its root in the past political and national life of the Serbs, a root which is only bringing forth new branches and beginning to flourish anew.
>
> (Načertanije, cit. in Judah 2000: 58)

From a comparative perspective, *religion* had been the decisive marker in the *Ottoman* occupied and ruled *territories* of Eastern and Southeastern Europe to differentiate and classify peoples into categories and which became legally institutionalised in the *millet* system (Box 3.7). In this regard, Islam, as represented by the Ottoman authorities, was religiously much more tolerant vis-à-vis peoples of the Book (i.e. Jews and Christian denominations) than the Christian denominations had ever been against Jews and Muslims. As mentioned above, most of the Spanish Jews expelled from their homes by the *Reconquista* had fled to the Ottoman empire.

Box 3.7 The Ottoman *millet* system

The so-called *millet* system (the word *millet* meaning nation) of the Ottoman Empire classified the population along religious lines (Greek Orthodox, Gregorian Armenian, Jewish, Armenian United, Roman Catholic, Protestant) and granted those non-Muslims, legally called *dhimmis*, self-government in religious affairs, nevertheless insisting on the social, economic and political dominance of Muslims (Masters 2009: 383–4). Obviously this meant that, for example, Christians were second-class citizens who had to carry special burdens (taxes) and had to suffer from de jure discrimination in today's understanding. In particular, they were prohibited from acquiring real estate.

On the other hand, it was the economic deprivation and social discrimination – not only in today's understanding – which must be seen as main reason for the voluntary conversion of great parts of the population to Islam such as in Bosnia or Albania in the course of the conquest of the Balkan peninsula by Ottoman armies, which was stopped twice only before the walls of Vienna in 1529 and 1687. Also, the great population displacements and dislocations in the Balkans since the sixteenth century mainly occurred due to the flight of the Christian Orthodox population who did not want to live under the so-called Ottoman yoke. These Orthodox Christians were openly welcomed by the Habsburg emperors, who resettled these populations to establish and defend the military border (*vojna krajina*) between the Habsburg and Ottoman empires that reached from today's Croatia and Serbia into Romania (in general, see van Meurs *et al.* 2010).

Of the three multi-ethnic empires, the Ottoman empire was the first to crumble into a plurality of small national states, both for national political as well as socioeconomic reasons (Quaetaert 2005). With the weakening of the Ottoman central administration since the end of the eighteenth century, local governors increasingly suppressed the Christian population of the region. Since 1800, social unrest, starting in the region of Belgrade, escalated and – with the spread of nationalist ideology – was very soon transformed into claims for political independence. But the first to gain full political independence from the Ottoman empire were the Greeks in 1832, who had traditionally held high administrative posts at the Sublime Porte and therefore made up a well-educated stratum, at the same time, however,

susceptible to nationalist slogans coming from the West. A decisive step for Greek nation building was the success of the vernacular language *demotike.* The diacritical significance of language (May 2012: 136) and new collective identity created became symbolised by their new self-identification as *Hellenes* – instead of *Romainoi*, a term having been used for self-identification with the east Roman empire of Byzantium in the centuries before.

In the years to come, the Balkans became of increasing political interest for the so-called European Great Powers (Kissinger 2014), fearing Russia's growing influence on the Orthodox population of the region by triggering the *pan-Slavic movement*, and thereby her move into the Balkans and towards the Dardanelles. Muslims increasingly became a target in the Russian Empire, as they were perceived as mainly loyal to the Sultan and Caliph. Thus, between 1860 and 1864, around 400,000 of the 500,000 Muslims living in the Western Caucasus were expelled by the Czarist regime (Ther 2011: 62).

The brutal crash of the rebellious Bulgarians by the Ottoman authorities, Russia's war against the Ottoman Empire (1877–78), ongoing social unrest, especially in Bosnia, with ethno-religious overtones, finally gave the European Great Powers the *justification to intervene* with the claim to protect the Christian subjects of the Ottoman empire in the Balkans. At the Berlin Congress in 1878, the Ottoman empire had to concede that a plurality of her European territories became *fully independent: Romania*, *Serbia* and *Montenegro*. *Bulgaria* achieved this status only in 1908. All these newly founded states had to guarantee the protection of their religious and national minorities. They even had to incorporate these clauses into their constitutional laws. A special case was *Bosnia and Herzegovina*, with its almost tripartite composition of Muslims, Orthodox 'Serbs' and Catholic 'Croats' and the growing tensions and conflicts between these three ethno-religious groups since the early 1870s. In order to establish peace between the warring groups, Bosnia and Herzegovina was – as foreseen by the Berlin Congress – occupied by Austria-Hungary and finally annexed in 1907. When the Ottoman forces in 1903 brutally suppressed the so-called Ilinden uprising of the Christian population in today's *Macedonia*, the great powers tried to protect the Christians by dispatching an international police force (Glenny 2012: 207–8).

By the end of the nineteenth and the beginning of the twentieth century, *mass killings* and *expulsion* of entire populations became an 'instrument' of politics in the Balkans, used by both the Ottomans as well as the newly founded states. Thus, during the *two Balkan wars* (1912–13) the newly founded Balkan states brutally ravaged the Muslim population in those last Ottoman held territories of Europe under the pretext of protecting the Christians living under Ottoman rule (i.e. in today's Kosovo and Macedonia), before they finally turned against each other over the spoils.

Ethno-religious atrocities culminated in the first case of *genocide* (an international criminal law term that was only established after the Second World War with the Genocide Convention 1948, see Chapter 6, section 6.2) that took place on Turkish soil. The main victim of the combination of ethno-religious fears and hate in the crumbling Ottoman empire were the *Armenians* (Box 3.8 overleaf). In the 1890s, the Ottoman authorities had incited the (Muslim) Kurds against the (Christian) Armenians, with around 200,000 Armenians being killed. But this was only a prelude to the genocide of 1915–16, when 90 per cent of up to 1.5 million Armenians living on Turkish soil were brutally killed or died in so-called death marches to the desert, or were lucky in being able to flee the country (Bell-Fialkoff 1999: 24–5).

Box 3.8 The genocide against the Armenian population during and after the First World War

Figure 3.4 Armenian genocide
Source: *Ambassador Morgenthau's Story* by Henry Morgenthau Sr (Doubleday, 1918, p. 314)

To this day, Turkey denies that these events constitute a genocide. The official Turkish version speaks of accidental deaths that occurred during a resettlement of the Armenians from the war zones. In 1985, the Armenian genocide was the first to be mentioned in an official UN document. In 1987, the European Parliament recognised the Armenian genocide. More than 20 states (e.g. Sweden, Switzerland, Argentina, Russia, France, the Netherlands) have officially recognised the massacres and deportations of 1915–17 as genocide according to the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948). A law penalising the denial of the Armenian genocide by one to ten years of prison did not pass the French Senate until 2012. In contrast, the mentioning of the Armenian genocide was sanctioned under Article 301 of the Turkish Criminal Code until 2005.

3.3 Minorities between the two World Wars: trapped between the claim to self-determination and actual deportation

The *end of the First World War* and the *Paris peace treaties* entailed a radical redesign of the European map. In January 1918, US President Woodrow Wilson had given his famous

Fourteen Points Speech before the Congress, representing his peace programme. All over the world, 60 million booklets and pamphlets were distributed, featuring Wilson's ideas. But the term self-determination – the battle cry of all suppressed nations – cannot be found in those 14 points. In point X, dealing with Austria-Hungary, Wilson only stated that the nations should be granted 'the freest opportunity of autonomous development' (cit. in Link 1984a: 537). Only in his speech to a Joint Session of the Congress on 11 February 1918, do we find the famous phrase:

> Peoples are not to be handed about from one sovereignty to another by an international conference … National aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase.
>
> (cit. in Link 1984b: 321)

With the collapse of the multi-ethnic empires of Russia, Austria-Hungary and Turkey, many small nations hoped that *national self-determination* would mean the establishment of their own, independent national states. Although the Paris peace treaties entailed the creation of a number of such new national states – in theory by one or two or even three so-called state-forming nations, the latter two therefore classified as bi- or multi-national – throughout Europe from Finland, via the Baltics, to Czechoslovakia, Hungary and the Kingdom of Serbs-Croats-Slovenes, the intermingled settlement of numerous different linguistic and religious groupings within the respective name-giving *majority population* prevented the creation of linguistically or religiously homogenous national states. Moreover, the new borderlines were mainly drawn according to the strategic wishes of the victorious war powers and only rarely according to the settlement lines (if such existed) of the aspiring nations. Thus, after the dissolution of the Ottoman and Habsburg empires, large portions of populations found themselves again as so-called *national minorities* in newly founded national states.

In addition, the victorious powers created an *international legal framework for the protection of minorities* (see Thornberry 1991: 38–54), based on four kinds of legally binding documents:

- the Paris peace treaties;
- parallel treaties between the Allied Powers and Poland, Czechoslovakia, Yugoslavia, Romania and Greece;
- special treaties on specific territories concerning the minorities living in the Free City of Danzig, the Åland Islands in Finland, Upper Silesia and the Memel region in Eastern Prussia; and
- unilateral declarations by Albania (1921), Lithuania (1922), Estonia and Latvia (1923) and Iraq (1932) (Ther 2011: 89–91).

Under these treaties and documents, members of recognised minorities were granted a number of rights, such as full *equality* in civil and political rights, the right to basic *education* in their *mother tongue*, freedom of teaching in the minority language and financial support for the *maintenance* of their own *culture* and *language*. Most of these treaties had the force of constitutional law in the respective states.

Whereas all of those minority rights had been imposed by the Paris peace treaties on the new states of Central East and Southeast Europe, only *France* as a victorious power vehemently tried to prevent minority rights clauses in the Paris treaties. But not only that! In Alsace, regained by France in 1918 after it had been lost to Germany in the war of 1871, around 150,000 persons who were thought of as Germans by France had to leave Alsace under the policy of *purification/épuration* (cleansing) and *tirage* (selection) (Ther 2011: 87–8). In a twofold manner against France's own founding constitutional principles, individuals had no chance to decide on their nationality, because it was the state who decided for them.

In general, the number of people in a minority position within a state drastically decreased after the First World War. In 1918, only one in four inhabitants of a state had to be considered a member of a linguistic or religious minority, whereas the ratio was one in two before 1914 (Ruiz-Vieytez 1999: 28–9). Nevertheless, in the interwar period, 35 million people belonging to a national minority lived in Europe, with 25 million of them living in Central and Eastern Europe. Although the peace treaties of the Paris suburbs included clauses guaranteeing the rights of minorities living in the Kingdom of Serbs-Croats-Slovenes, Romania, Czechoslovakia and Poland, in most cases the situation of these new and old minorities did not improve much in comparison to the so-called *Völkerkerker* (prison of peoples) as nationalist propaganda had denounced the Habsburg multi-ethnic empire. Most newly founded states regarded the minorities living within their borders as danger for the cultural homogeneity and the territorial integrity of the state. This negative attitude towards minorities was further worsened by the revisionist concepts of the defeated states. The 'nationalising nationalisms' (Brubaker 1996: 4–6) of victorious states like Poland, Czechoslovakia and Romania collided with the 'homeland nationalisms' (Zimmer 2013: 434) of the defeated states like Germany and Hungary. Thus, more than 600,000 ethnic Germans emigrated from Poland, 425,000 ethnic Hungarians from Czechoslovakia, Romania and the Kingdom of Serbs-Croats-Slovenes (renamed as Yugoslavia in 1927). Nevertheless, a million Germans remained in Poland.

The creation of the *League of Nations*, to prevent any future wars through *collective security, disarmament and peaceful settlement of international disputes*, had been the core element of Wilson's 14 points (Box 3.9). After its foundation on 25 January 1919 in Paris as part of the peace treaties, 44 states signed and ratified its Covenant – but not the United States, a strong blow, not only to Wilson personally, but even more so for the political significance of the League itself.

Box 3.9 US President Woodrow Wilson's conceptualisation of the League of Nations, 1918

Woodrow Wilson's 14 points

XIV. A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.

The League of Nations system included also an international minority protection mechanism *recognising groups* as possible victims. Member states, as well as representatives of minorities, could lodge complaints against breaches of these internationally guaranteed provisions before the League institutions. Such petitions had to pass an examination by the League Secretariat for admissibility. Petitions could not be submitted in form of a request for secession, or couched in violent language, and they could not be anonymous, but had to require the correction of the situation in view of the protection of minorities according to the treaty requirements. If the petition was accepted, it was passed to a committee of the Council of the League which would conduct an investigation and ascertain the response of the accused state. If this proved unsatisfactory, the matter was placed on the Council agenda for the adoption of recommendations. This political system was complemented with the judicial protection mechanism in the form of the Permanent Court of International Justice, however with the provision that minorities themselves had no *locus standi* themselves before the Court (Thornberry 1991: 45).

A first important test case came immediately after the First World War with the dispute between Finland and Sweden concerning the legal status of the Åland Islands, inhabited by Swedish speakers. When Finnish nationalists had declared the independence of Finland in October 1917, which was recognised by the Bolsheviks in January 1918, the Åland Islanders declared their wish for union with Sweden through several unofficial plebiscites. In 1920, the dispute was brought before the League of Nations Council, which appointed a Commission of Jurists to explore the underlying legal problems. The Commission stated in its report that, first, a right to self-determination is not 'a positive rule of the Law of Nations' and second that 'positive international law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish', adding, however, that 'the formation, transformation and dismemberment of States as a result of revolutions and wars creates situations of fact which, to a large extent, cannot be met by the application of normal rules of positive law …. Under such circumstances, the principle of self-determination of peoples may come into play' (International Commission of Jurists 1920: 5–6).

A Commission of Rapporteurs, appointed the same year after the Commission of Jurists had delivered its report, found that Finland was definitively constituted as a state, thereby ruling out any application of external self-determination. Since they considered that the Åland Islands form a part of Finland, they concluded that the Åland Islanders were not a people, but a minority without a right to external self-determination:

> To concede to minorities, either of language or of religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life. It would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity.
>
> (League of Nations 1921: 28)

However at the same time, the Commission of Rapporteurs also addressed the question of oppression by a government and concluded that oppression would indeed be a factor

allowing a minority to secede, but only as a 'last resort when the state lacks either the will or the power to enact and apply just and effective guarantees' (ibid.) for religious, linguistic, and social freedom. Finland had offered guarantees in the form of the Law of Autonomy of 7 May 1920, so that the Commission made only additional recommendations with regard to Swedish as language of instruction in education, ownership of property by the inhabitants of the Åland Islands, and the appointment of a Governor only after approval by the local General Council. The report of the Commission of Rapporteurs was accepted by the League of Nations Council, which adopted a resolution on 24 June 1921 recognising Finland's sovereignty over the Islands. Finland also entered into an international obligation to the League of Nations to respect the t*erritorial autonomy* of the Islands (Musgrave 1997: 32–7).

Hence, instead of drawing conclusions only in a *formalistic-reductionist* way on the basis of terminology (i.e. playing what we have called a language game; Wittgenstein), with the categorical differentiation of people and minority, the Commission of Rapporteurs, through a *functional interpretation* (see Chapter 2, section 2.1), opened the way to reconcile the seemingly antagonistic principles of state sovereignty and self-determination of peoples by reference to the human rights aspect of democratic governance, thereby *deconstructing* the alleged *dichotomy* and problem through a transformation into a triadic structure (for a further discussion of the distinction between *national* and *political* self-determination and the concept of remedial secession, see Chapter 4, section 4.3).

As the further events between the two World Wars prove, however, the *implementation* of minority protection laws brought a mixed record at best. On the one hand, protection meant, in fact, *assimilation* or even *forced population transfer*, as we learn below; on the other hand, protection was effective to preserve collective identity and brought even territorial autonomy for the Åland Islands, so that this legal approach was taken up again after Second World War in South Tyrol (see Chapter 9, section 9.4).

Thus, in the 1920s, the League settled several disputes relating to national minorities, such as Upper Silesia, the Free City of Danzig and the Memel Region. In Upper Silesia, which had been divided between Poland and Germany after a plebiscite (1921), the minorities were 'granted' the right to emigrate to their respective kin state, what about half of the minority members did in actual fact (Ther 2011: 91).

The League of Nations and its High Commissioner for Refugees Fridtjof Nansen initiated the Greek-Turkish population transfer of 1923, ending the bloody war between the two states that had been started by Greece in 1919 to enforce the *megali idea*, the dream of a Greater Greece, after Turkey had forced approximately 200,000 Greeks to flee their Anatolian homes in May of 1914. Greece's political and strategic miscalculation ended fatally in 1922. Tens of thousands of Greek Christians were massacred by the victorious Turkish troops and hundreds of thousands fled. Brokered by the international powers and the League of Nations, Turkey and Greece agreed on the so-called population transfer, not only from today's moral and legal perspective, the diplomatic euphemism for ethnic cleansing on a grand scale. Lord Curzon, a participant at the Conference prophetically qualified this forced population transfer as a 'thoroughly bad and vicious solution, for which the world will pay a heavy penalty for a hundred years to come' (cit. in de Zayas 2010: 9).

The treaty was signed in Lausanne in 1923 by the two warring states and registered in the League of Nations Treaty Series; 1.1 million Anatolian Greeks who had survived the

massacres were transferred to Greece and around 380,000 Muslims had to migrate from Greek soil to Turkey. On both sides, individual persons had no choice to opt for the state and the citizenship of the state they and their ancestors had lived in for centuries, even millennia – their fate was decided far away in Lausanne (Hirschon 2003). Only some 300,000 Greeks living in and around Constantinople were allowed to stay. Especially Greece, a small state, could not cope with more than a million immigrants from Turkey. Their misery deterred the League of Nations and Western politics to negotiate further population transfers.

The League's importance and influence dramatically weakened with the rise of Fascism and Nazism in Italy and Germany. Its demise finally became evident when Italy (member of the League of Nations) attacked Abyssinia (also member of the League and part of today's Ethiopia) in 1935. The League's members (foremost Great Britain and France) did not take any strong measures, especially not military ones, and even the sanctions imposed by the League were not strictly observed. Facing Hitler's rise and Germany's growing military strength, the concept of collective security was abandoned for appeasement policy. Thus, the Munich Agreement of 1938 was not only understood as appeasement with Hitler at that time, it was also perceived by Western politicians as a solution to another minority problem. The Sudetenland, since 1918 belonging to Czechoslovakia but mostly inhabited by Germans, was conceded by the Munich Agreement to the Third Reich. Immediately after the German invasion, more than 200,000 Czechs left the Sudetenland, certainly not voluntarily. The same idea prevailed in the South Tyrol Option Agreement between Hitler and Mussolini in 1939: the German minority of that Italian region that had been ceded from Austria to Italy in 1919 was given the choice either to emigrate to Germany or to become Italianised (Lantschner 2008: 6–9). Only after the end of the Second World War was the League formally liquidated in April 1946, after it had practically ceased to exist in 1938.

The newly founded *Soviet Union* pursued a different policy towards its ethno-national minorities (see Weeks 2013: 204–11). In 1917, Lenin had demanded the right to national self-determination as a war tool against the axis powers. With the victory of the Bolsheviks in the Russian Revolution (1917) and the ensuing civil war and the formation of the Union of Socialist Soviet Republics (USSR) in 1924, it became relatively easy for minorities to be granted a *territorial autonomy status in* the 15 Soviet Republics which were conceived as ethnic nation-states of the name-giving nations. The USSR constitutional system followed Lenin's and Stalin's theories on self-determination (for an incisive analysis see in particular Bowring, 2008: 13–20) and thus also how to resolve the *nationality question* in multi-ethnic empires. Stalin had explicitly rejected the ideas and concept of *cultural autonomy* developed by the Austromarxist thinkers and political leaders Karl Renner and Otto Bauer (Müller 2013: 54–60), which Stalin had studied himself in Vienna in 1913. They had developed this concept of cultural or personal autonomy; that is, legal institutions established without reference to territory for the enjoyment of self-government in the spheres of culture and education because of the lack of territorially concentrated religious or linguistic minorities on the territory of the former Habsburg Empire.

In his book, *Marxism and the National Question* (Stalin 1913), driven by prior thoughts of Lenin, Stalin maintained that socialism would make nationalism obsolete in the long run. Accordingly, the victorious end of class struggle would remove the support base of nationalism in Soviet society. Thus, it was assumed that nations would first grow closer (*sblizhenie*),

and eventually merge (*slianiie*). Given this background, the ruling Communists could logically assume that one could freely accelerate this process by granting all national groups full rights to develop their own culture or language and even the right to secession, as it was – at least formally – reserved for Soviet Socialist Republics (SSRs) in accordance with Article 72 of the Soviet Constitution (Cornell 2002: 62). Hence, the typical hierarchical mode of Soviet political thought first required the ethno-federal system to be constructed in a *Matryoshka* doll-like way. While the status of *SSRs* was reserved for 'basic nations' (Mirsky 1997: 5), the *Autonomous Soviet Socialist Republics* were one level below the SSR, yet, the fact that they had almost equal rights as the SSR (Harzl 2016) sweetened their failure to be legally considered as being on institutional eye level with the SSRs. Finally, autonomous *okrugs* and *oblasts* were established for nationalities at the end of the ethno-territorial hierarchy. Notably, Nagorno-Karabakh was designated as an autonomous oblast *only*, since it was widely believed by the Soviet ruling elites that the SSR Armenia already provided for a sufficiently robust administrative unit and, thereby, ethno-national representation for the Armenian people. And, finally, some nationalities like Poles and various indigenous peoples were not given any territorial-administrative unit whatsoever, thereby confirming once more the hierarchical and arbitrary nature of this system.

Second, the two models of territorial and cultural autonomy do not, however, necessarily exclude each other, as can be seen from the further institutional arrangements under the Soviet constitution of 1924. Also, under the model of territorial autonomy, minorities living within the autonomous districts and regions of the Soviet Republics were allowed to run schools in their languages and to found cultural organisations. But under the slogan *korenizatsiya* (meaning nativisation or indigenisation), the communist political leaders tried to imbue the supranational ideology of Bolshevism in the peoples. Other than in Western Europe, national minorities were – at that time – not conceived as a threat to the Soviet Union (Martin 2001: 74–5). The Soviet authorities invested enormous efforts in fostering native culture, the consciousness of nationalities and their identity formation and language promotion through the preferential treatment of territorially based nationalities and the educational and occupational interests of these ethnic middle classes (Zaslavsky 1993: 37). While in the British or French empires, local chieftains in the colonies were given a modest share of power *on the ground*, following the principle of 'divide and rule' of local population, they never made it into the ruling elites of London or Paris. In the Soviet Union, much in contrast to this form of Western colonialism, ethnic elites made their way even into the *politburo* (Mirsky 1997: 58). Joseph Stalin, Eduard Shevardnadze, Anastas Mikoyan and Lavrenti Beriya are some famous, and obviously infamous, examples in this regard.

In the 1930s, this policy changed dramatically. Since 1932, all passports had to indicate the *narodnost*, the nationality in terms of ethnic belonging of its holder. The elites of the nationalities, which had been sponsored before, were now persecuted under Stalin's new policy. Very often, social unrest collided with the imposition of ethnic categories from above. The first class in Marxist terminology to suffer from this new policy were Polish and Ukrainian farmers, who protested against the collectivisation of their lands. Thus, thousands of Poles and Ukrainians were deported to Siberia in the following years. Especially during the Second World War nationalities with a kin state fell victim to this policy for fear of encirclement. Several hundred thousand Poles, Germans, Estonians, Lets,

Lithuanians, Bulgarians, Persians and members of Turk peoples were dislocated by force, mostly to Siberia. In total, 2.5 million people were deported only because of their ethnicity (Ther 2011: 129–31).

In the course of the Second World War, the new great powers (USA, Russia and Britain) agreed on 'disentanglement' (Churchill) of ethnically conceived settlement patterns, thus planning massive shifts of state borders, since national minorities were seen as an eternal threat to peace. Thus, in 1944, the British Ministry of Foreign Affairs elaborated a plan to transfer all Germans from Poland and the Czech lands to Germany based on *Churchill's dictum*: 'There will be no mixture of populations to cause endless trouble. … A clear sweep will be made' (cit. in Ther 2011: 170). Thus, in the last days of the war and immediately afterwards, millions of Germans fled or were forced to leave the eastern parts of Germany, which were transferred to Poland because of the simultaneous westward shift of Russian and Polish borders. The Germans living in Czechoslovakia were facing the same fate. In 1946 and 1947, further treaties on so-called populations transfers were concluded between Hungary and Slovakia, Hungary and Yugoslavia, and Italy and Yugoslavia.

3.4 Legal standard setting and monitoring of human and minority rights law after 1945

We can best summarise the *multifunctionality* and *multidimensionality* of human and minority rights in the processes of legal standard setting since the First World War by following a seminal article of Sia Spiliopoulou Åkermark on 'Shifts in the Multiple Justifications of Minority Protection' (Spiliopoulou Åkermark 2010). In this article, Spiliopoulou Åkermark identifies *four basic functions* and thus *justificatory* grounds of minority protection against the ideological challenges of liberalism and nationalism since the beginning of the twentieth century. These are:

- peace and security;
- effective protection of human rights based on the value of human dignity;
- protection of culture(s) and cultural diversity; and
- democratic participation and political pluralism.

As we learned from our historical-sociological analysis of state formation and nation building in the previous sections, *peace and security* were the primary motivation for the entrenchment of minority protection provisions in the peace treaties, special minority treaties and through unilateral declarations of states as part of the admission process to the League of Nations after the First World War (see also Thornberry 1991). With the establishment of the system of the League of Nations as basically an *international system* of collective security with various procedures, including a permanent international court, for peaceful settlement of disputes and the amendments or adoptions of *new national constitutions and laws*, we can see the following *legal structuration* of minority protection: both the *territorial* and *personal* scope of application of minority protection norms were *limited* to either special territories or specific groups as we learned, for instance, from the example of the Åland Islands. At the

same time, minority protection was not limited to *individual rights* for citizens. *Group-related rights* were also recognised for the survival of language and religion and thus the culture of groups, as can be seen from the famous Advisory Opinion of the Permanent Court of International Justice of the League of Nations on 'Minority Schools in Albania' against the abolition of *private* minority schools. After the Albanian government had argued that they would create a 'privilege' in favour of minorities which runs 'counter to the meaning and spirit of the treaties for the protection of minorities, an essential characteristic of which is the full and complete equality of all nationals of the State, whether belonging to the majority or minority' (at para. 38), the Court held:

> [79] The Court therefore finds that paragraph 1 of Article 5 of the Declaration of October 2nd, 1921, ensures for Albanian nationals belonging to racial, linguistic or religious minorities the right to maintain, manage and control at their own expense or to establish in the future charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.
>
> (Permanent Court of International Justice, Advisory Opinion No. 26, 1935)

However, this structure of human and minority rights conceived of as complementary instruments dramatically changed with the period after the Second World War.

3.4.1 The period between 1945 and 1989

After the Second World War, we can observe an almost complete first *'swing of the pendulum'* (Marko 2012: 276–80) at the *international level* from the group-oriented rights approach to an *anti-discrimination approach* based on human rights irrespective of 'belonging to the majority or minority' as the Albanian government had argued above. After the experience with the more and more ineffective minority protection system of the League of Nations and the mass atrocities committed by the totalitarian regimes during the Second World War, group rights had become an anathema. They were seen as cause of irredentist conflicts between the two world wars, characteristic for totalitarian ideologies, and a trigger for claims to secession and an Anschluss to the respective kin state (Marko 1995: 199–214). Therefore, group rights or, synonymously, *collective rights* were considered *irreconcilable* with *individual human rights* and their foundation in human dignity for a *democratic liberal* political system (see also Chapter 6, section 6.1).

This liberal-individualistic approach can best be observed in the fundamental legal standard setting document of the UN at the global level; that is, the Universal Declaration of Human Rights (UDHR) of 1948 and, on a European level, with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950. Despite many efforts, especially from European states, it was not possible to include a provision concerning minority rights in the UDHR 1948 (Eide 2014: 52). Neither was it acceptable for the majority of the contracting European states in 1950 to insert a specific minority protection provision into the ECHR. This is the reason why Article 14 ECHR still serves

as a subsidiary non-discrimination principle in the enjoyment of all fundamental liberal and political rights established by the ECHR and its Additional Protocols to this very day (Marko 2012a: 277).

This strong liberal-individualistic stance at the international level was, however, not followed at the *national level*, in particular with regard to *bilateral treaties* as an important tool of minority protection. The so-called South Tyrol dispute between Italy and Austria resulted in 1946 in the Gruber-de Gaspari Agreement, named after the two foreign ministers, to bring about a system of *territorial self-government* for the German and Ladin speaking inhabitants of the region of Trentino-Alto Adige, similar to the territorial autonomy regime for the Åland Islands (see also Chapter 9, section 9.4 for the legal-institutional arrangement of these territorial autonomy regimes). Also in the aftermath of the Second World War, the dispute over the protection of the respective minorities on both sides of the Danish and German border was settled in a bilateral agreement through the so-called Bonn-Copenhagen Declarations of 1955 (Malloy 2011). Moreover, the concept of territorial autonomy was not only realised in Western European liberal democracies, but – having been part of Stalin's conceptualisation for the solution of the nationality question from the very beginning – was also constitutionally implemented immediately after 1945 in communist ruled Yugoslavia with the establishment of the autonomous provinces of Kosovo and Vojvodina (see Marko 1999: 15–25) and in communist-ruled Romania with the autonomous province of Transylvania. Thus, as Sujit Choudhry correctly observes, the ideological dichotomisation of individual and group rights is much more discussed in or even created by debates in political theory several decades later (see Chapters 4 and 5) in spite of constitutional arrangements at the national level having been established both in liberal-democratic as well as communist regimes much earlier (Choudhry 2012: 1101).

By the late 1960s, issues of *minority protection* received increasing attention and in the 1970s the problems faced by *indigenous peoples* became another major preoccupation in the human rights field. Therefore, 'two rather different tracks' (Eide 2014: 51) emerged within the United Nations.

Tracing back the standard setting process in the field of *minority rights* on the *global level* leads to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, established by the UN Commission on Human Rights in 1947. First, the Sub-Commission made an effort in clearing its twofold mandate, which ended up in substantial contributions to the drafting of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly in 1965 and opened for signature in 1966. Second, the Sub-Commission tried to pursue the issue of minority protection against the reluctance of the majority of governments of the UN member states. Therefore, it took the initial steps in drafting the text that eventually became the crucial Article 27 of the International Covenant on Civil and Political Rights (ICCPR). Article 27 ICCPR reads:

> In those States *where* 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.
>
> (ICCPR 1966: Art. 27, emphasis added)

The Sub-Commission had to be very cautious in its endeavour and avoided requiring that positive or special measures be taken by governments (Eide 2014: 53). Moreover, Article 27 ICCPR must be understood as a *political compromise* between individual human rights and the minority protection approach, and thus the French and German models of national states, as can be seen from the first *caveat* in the text (i.e. 'where … minorities exist'). In accordance with the text of the provision, France, as we learned, still upholds a reservation concerning this provision with the effect that Article 27 ICCPR shall not be applicable.

Aware of the modest content of Article 27 ICCPR, the Sub-Commission continued its effort to promote minority rights and elected its Italian member Francesco Capotorti to study the implications of Article 27, which led to an in-depth study and recommendations including a *definition* of the concept of *minority* in 1977. Nevertheless, due to the international political climate during the Cold War era, many of these recommendations, as well as the definition of minority, remained strongly contested. Almost 20 years later, in 1994, and in the context of its monitoring of the ICCPR, the UN Human Rights Committee adopted General *Comment No. 23 on its interpretation of Article 27*, which clarified many aspects; for example the fact that non-citizens could also count as minorities under Article 27 ICCPR (Eide 2014: 54).

The contested issue of defining minorities caused diverse debates during the 1980s. Due in part to the escalation of several ethnic conflicts in the late 1980s, the Sub-Commission reinforced its efforts to promote peaceful and constructive approaches to situations involving minorities and to prepare a declaration, with Asbjørn Eide entrusted to deliver the report. In 1992, the General Assembly finally adopted the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDRM) without a definition of minorities, however, since this issue remained contested. As a consequence of the 1993 Eide report, a Working Group on Minorities was established within the Sub-Commission in 1995 which was replaced in 2007 by the Forum on Minority Issues, a platform for promoting dialogue and cooperation on minority issues. In 2005, the Commission on Human Rights had decided to establish an independent expert on minority issues with the task of promoting the implementation of the UNDRM, which has since been renamed the Special Rapporteur on Minority Issues.

The other track in the human rights' standard-setting process after 1945 concerned the effort to improve the situation of *indigenous peoples* (Kymlicka 2007: 32–5; Eide 2014). Before the Second World War, the International Labour Organisation (ILO) had started to investigate the discrimination of persons of indigenous origin and consequently adopted the ILO Convention No. 107 on Indigenous and Tribal Populations in 1957, aimed at facilitating a better *integration* of indigenous persons in the labour market. In 1989, this Convention was revised by the ILO Convention No. 169 on Indigenous and Tribal Peoples, replacing the rather *assimilationist* approach of 1957 by strengthening the right of indigenous peoples to choose to *integrate* and to *maintain* their cultural and political *diversity*. The ILO Convention No. 169 remains the most important operative international law instrument guaranteeing the rights of indigenous peoples since it has been ratified by a high number of states.

Within the UN, the process of awareness raising of indigenous rights was launched around 1970 when, due to growing capacities of organisations representing indigenous peoples, initiatives from outside the UN system and inside, through the UN Secretariat and expert

bodies, started to focus on the special needs and rights of indigenous peoples. Additionally, the violent period in Latin America from around the mid-1960s to the 1990s helped to raise international concern on the issue. Parallel to the study on the rights of minorities based on Article 27 ICCPR, the Commission on Human Rights authorised the Sub-Commission to prepare a separate report dealing with the human rights situation of indigenous populations. An important international non-governmental organisation conference on discrimination against indigenous populations in the Americas was held in Geneva in September 1977 and was attended by more than a hundred indigenous representatives. Many of the concerns that were listed in the final declaration of the Conference were subsequently addressed by the Working Group on Indigenous Populations, set up in 1982 by the Sub-Commission. Under the presidency of Asbjørn Eide, the Working Group transformed itself to the first international forum to which the indigenous people had access: and they made plenty of use of it (Eide 2014: 55). In 1984, the Working Group decided to initiate the drafting process of a declaration. Yet, this standard-setting process took more than 20 years of debate with the final adoption of UN Declaration on the Rights of Indigenous Peoples (UNDRIP) by the General Assembly in 2007. The issue of the right to self-determination (Art. 3), despite the fact that the right of self-determination of peoples is prominently anchored in both Article 1 of the ICCPR and Article 1 of the 1966 ICESCR, met unexpected opposition, particularly from some African states. Ultimately, the representatives of indigenous peoples had to make the concession that any interpretation of their right to self-determination allowing for secession was ruled out ('principle of territorial integrity', Art. 46.1 UNDRIP). In addition, even demands for autonomy under the heading of self-determination (Art. 3 and 4 UNDRIP) have to respect the political unity of the state. Despite these changes, the UNDRIP remains a 'historic document' (ibid.) justifying claims for far-reaching autonomy, control over lands used by indigenous peoples, a right to veto harmful development projects and to make claims for restitution and compensation. Although UNDRIP was not unanimously adopted, the four states that voted against it – Australia, Canada, New Zealand and the United States – have since stated that they do recognise the Declaration. Despite its legally non-binding character, UNDRIP sets important international standards for the treatment of indigenous peoples, indicating the direction in which the UN's member states committed themselves to move.

Assessing UNDRIP from a human rights perspective may highlight its substantial contribution to this field. In fact, it has been argued that UNDRIP has not only brought a major success for the rights of indigenous peoples but has also pushed forward the standards of international human rights law in general, especially with regard to *group rights* (Xanthaki 2014: 69). Apart from the above-mentioned right to self-determination which is, however, focused on the internal aspect (i.e. denying a right to secession), UNDRIP fosters and clarifies the status of *group-related* and, in a narrower sense, *collective rights* (see Chapter 5, section 5.3) within international law, linking land rights and cultural rights with participation and consultation rights; for example the free, prior and informed consent of indigenous peoples in development projects (Xanthaki 2014: 73–4; see also Chapter 6, section 6.3).

In conclusion, the development of human rights standards on a global level since 1945 has led to *three categories of rights*: individual human rights, minority rights as allegedly special rights for members of minority groups and indigenous peoples' rights. Starting from the concept of human rights as *individual rights* laid down in the UDHR (cf. the two basic

principles of Art. 1 and Art. 2 UDHR 1948) and constituting the foundation of the human rights system, it was later accepted to adopt rights specific to persons belonging to national or ethnic, religious or linguistic minorities. These rights are now laid down in Article 27 ICCPR, 1966 (cf. also the corresponding Art. 30 of the UN Convention on the Rights of the Child, 1989) and the legally non-binding UN Minority Declaration of 1992 (see above). They shall make it possible for *persons belonging to minorities* to enjoy their culture, to use their language and/or to practice their religion (Art. 27 ICCPR), as well as to effectively participate in cultural, religious, social, economic and public life and in decisions concerning them (Minority Declaration Art. 2.2 and 2.3). They were and still are understood from a liberal-individualistic ideological perspective as special individual rights. Yet, in order to respect those individual rights, states have some duties vis-à-vis *minorities* which can only be fulfilled if their *group-related* dimension is recognised (elaborated in more detail in Chapter 5, section 5.3). Hence, not only individuals but also groups and their culture or lifestyle can become the object of a state duty to protect, or they can have standing before courts if they are legally institutionalised and have the status of legal persons; for instance, with regard to language rights, freedom of religion, or political representation.

As mentioned above, the main sources of indigenous peoples' rights on the global level are the ILO Convention No. 169 (1989) and the UNDRIP (2007). This means that indigenous people have the right to full and effective enjoyment of all human rights and fundamental freedoms as enshrined in the UN Charter, the UDHR and international human rights law, including the minority rights described above. Hence, what is *specific* with indigenous peoples' rights is best explained with the fundamental assumption that indigenous peoples strive for a high degree of *autonomous development* within their states and are closely attached to their homelands, whereas *minority groups* are more concerned with their *effective participation* in society at large. As a consequence, the provisions regarding *indigenous peoples* seek to allocate legal authority to these peoples, enabling them to make their own decisions, especially concerning their lands and natural resources (cf. e.g. ILO Convention No. 169 Art. 7, 8 and 13–19; UNDRIP Articles 4, 23, 35–41), whereas the minority instruments 'aim at ensuring a space for pluralism in togetherness' (Eide 2014: 58). In effect, minority instruments are to this day recognised more as *individual* rights of persons belonging to minorities, whereas those concerning indigenous people are seen as referring to rights of *peoples* as *group rights* (Eide 2014: 58; Xanthaki 2014: 73).

3.4.2 The period after 1989

Whereas at the global level the appearance of indigenous peoples' rights may be qualified as a vehicle for the promotion of group-related rights, at the European level it was the breakdown of the communist regimes in Central, Eastern and Southeastern Europe in 1989 and the violent ethnic conflicts in former Yugoslavia which brought a second swing of the pendulum from the *individualistic human rights* and *anti-discrimination approach* consolidated in the ECHR *back* to the *minority protection paradigm*. This can be seen from two important international documents with chapters on national minorities, both adopted in 1990, namely the Document of the Copenhagen Meeting of the Conference on the Human Dimension

and the Charter of Paris of the Conference on Security and Cooperation in Europe (CSCE), later renamed into Organisation for Security and Cooperation in Europe (OSCE). *Cultural diversity*, as such, became recognised as a basic value of democratic societies and *replaced* the adaptation and *assimilation approach*, which had served until then as the underlying premise of minority protection. At the same time, the preamble to the chapters dedicated to national minorities of the Copenhagen meeting describes the respect for minority rights as an essential factor for peace, justice, stability and democracy, covering all four basic functions identified by Sia Spiliopoulou Åkermark (2010). Moreover, *human and minority rights* were no longer seen as opposing approaches but as part of an *all-embracing human rights regime*. Finally, the provisions require states to take *positive action measures* to promote and protect the different ethnic, cultural, linguistic and religious identity of minorities instead of merely abstaining from discrimination.

In 1992, the CSCE, shortly afterwards renamed the OSCE, established the High Commissioner on National Minorities (HCNM) as a conflict prevention mechanism to interfere through quiet diplomacy before a minority issue might turn into violent conflict (for the difficult, but not impossible task to evaluate quiet diplomacy, see Kemp 2001; Parzymies 2007). Moreover, since 1996, the HCNM issued a series of guidelines or recommendations thereby serving as a 'normative intermediary' (Spiliopoulou Åkermark 2010: 10) because these – like all other OSCE instruments – legally non-binding guidelines *summarise the normative state of affairs* taken over from the monitoring activities of the HCNM itself, but also other international mechanisms. Last, but not least, through the interpretative tool of explanatory notes attached to these guidelines and recommendations, they also serve as a tool for what we call *norm socialisation* by trying to spread information on minority protection issues and the value of cultural diversity throughout governments, civil services and civil society in order to create an atmosphere for the *logic of appropriateness* regarding human and minority rights (see Chapter 5, section 5.3). The HCNM guidelines and recommendations cover a wide range of topical areas not only with regard to conflict and conflict prevention issues in the narrow sense such as the Recommendations on Policing in Multi-Ethnic Societies, 2006, or the continuing problem of so-called kin-state support (the Bolzano Recommendations on Inter-State Relations, 2008). Meanwhile, all these recommendations and guidelines taken together cover a broad range of minority protection issues: the Hague Recommendations Regarding the Education Rights of National Minorities (1996); the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998; see Ulasiuk *et al*. 2018); the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999); Guidelines on the use of Minority Languages in the Broadcast Media (2003); the Ljubljana Guidelines on Integration of Diverse Societies (2012), and the Graz Recommendations on Access to Justice and National Minorities (2017).

Within the Council of Europe, the Parliamentary Assembly took the lead in 1993 and adopted Recommendation 1201 on an additional protocol on the rights of minorities to the ECHR (reprinted in Benoît-Rohmer 1996: 111–17). This document included a definition of the concept of national minority in Article 1 and could have brought a judicial enforcement mechanism with the ECtHR. However, a backlash followed. No additional protocol was adopted by the responsible committee of ministers, due to strong ideologically motivated political resistance of several unitary states within the Council of Europe (CoE). Instead,

the European Charter for Regional and Minority Languages (ECRML) and the Framework Convention for the Protection of National Minorities (FCNM) were – as the title Framework Convention indicates – adopted as a substitute to an additional protocol to the ECHR (Marko 2012: 278). Both instruments entered into force as legally binding documents in 1998.

Critics of these instruments argued from the very beginning that the problem of definition of the term national minority had again been left unresolved and that the vague language and programme-type provisions (see Chapter 2, section 2.1) did not really impose legally binding obligations on the ratifying states parties. Moreover, the monitoring system – structured as a process of cyclical state reports to be delivered and finally evaluated by the Committee of Ministers of the CoE, albeit with the support of an independent expert committee in between, the so-called Advisory Committee under the FCNM – was seen as an ineffective, politically biased mechanism in contrast to the judicial review mechanism by the ECtHR originally foreseen by the additional protocol. Moreover, the language of the provisions of the FCNM are a *political compromise* between two competing ideological perspectives: on the one hand, still in line with what we called the 'swing of the pendulum' towards a *liberal-multicultural perspective*, the text of the preamble declares that it 'is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society' so that member states of the CoE shall be seen as 'being resolved to protect within their respective territories the existence of national minorities' and therefore obliged to 'create appropriate conditions' enabling each person belonging to a national minority 'to express, preserve and develop' his or her 'ethnic, cultural, linguistic and religious identity'. On the other hand, one can again find the traditional elements of the *nation-cum-state paradigm* in more or less clear language such as, for instance, in Article 11 paragraph 3 with regard to the display of 'traditional local names, street names and other topographical indications intended for the public also in the minority language'. Following from the language of this norm, their display can be restricted even threefold: monolingual or bilingual indications might only be implemented, first, in 'areas traditionally inhabited', second, 'in substantial numbers' and, third, 'when there is a sufficient demand for such indications'. The general limitation spelled out in Article 20 is even more specific: 'any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities' (emphasis added). Despite the reference in the explanatory report to the FCNM that the phrase 'persons belonging to the majority' in Article 20 shall indicate 'situations where persons belonging to national minorities are in a minority nationally but form the majority in one area of the State', the structural problem is raised – when seen in combination with the very same concept 'rights of others' as a possible limitation of human rights guaranteed by Articles 8 through 11 ECHR – as to whether only minorities in a majority position shall be restricted or whether the phrase 'rights of others' can serve as a general justificatory ground to counteract the promotion or even protection of all minority rights as we see through our analyses of case law in Chapters 7 through 9.

Finally, one might wonder about the role of the EU in minority protection since it has not been mentioned so far in this overview. In light of the 'multiculturalism is dead' discourse and the continuing trends of renationalisation in Europe (see Chapter 1), the concept and value of cultural diversity as precondition for effective minority protection, let alone multiple diversity governance (see Chapter 10) is more and more contested, even as a basis of

European integration. As a matter of fact, the European Community was not established with the Rome Treaties in 1958 to protect and promote national minorities or cultural diversity; however, one of the motifs was to tame and to overcome the ideologies of ethnonationalism and racism (see Chapter 4, section 4.2), which led to the Second World War (see Craig and de Búrca 2015: 1–4). The national expropriation of the production of coal and steel – necessary for being able to wage war – through supranationalisation and the economic integration of nation states so that they become not only economically, but also politically interdependent, were the initial guiding ideas and concepts for European integration. With the creation of the single market and many more legislative competences taken over by the European institutions on the basis of the creative jurisprudence of the European Court of Justice and, finally, the establishment of the EU as a political entity by the 1993 Maastricht Treaty, two interdependent central questions were raised again: what about the 'democratic legitimacy' of EU institutions (see, above all, Kraus 2008: 13–36)? How can there be democratic legitimacy without a collective European identity embodied in a European *demos*, this being the question famously raised in the so-called Maastricht judgment of the German Constitutional Court (see Craig and de Búrca 2015: 283).

This naturally raises the question of whether we shall conceive of European integration a new form in the creation of a polity, or whether the process of European integration can only be understood in the terms and concepts of state formation and nation building in Europe, which we have critically analysed in the previous sections of this chapter. The motto of the EU, 'United in Diversity', which first came into use in 2000, thus perfectly exemplifies the old dilemmas of polity building. While unity in the European historical tradition of both models of national states stands for cultural homogeneity or, at best, benign neglect of cultural diversity, all main treaties and declarations of the EU since the 1970s have paid tribute to diversity (see Kraus 2014: 490–5). Many hopes of ideologically centre-left intellectuals and politicians were focused on the recognition of diversity as precondition of economic growth and thus political stability so that nationalist differences could be transcended and transformed with the further development of a 'post-nationalistic framework of a 'community' of Europeans' (Kraus 2014: 490).

Nevertheless, the different texts of different provisions of different EU treaties still expresses the *structural dualism* of the old and purportedly new model, which can be traced back to the 'Declaration on European Identity', which the European Council laid down in its Copenhagen summit in 1993. Article 3 of the Treaty on European Union (TEU), in the wording of the 2009 Lisbon Treaty, inter alia, reads: 'It [the Union] shall promote economic, social and territorial cohesion, and solidarity among member states. It shall respect its rich *cultural and linguistic diversity*, and shall ensure that Europe's cultural heritage is safeguarded and enhanced' (emphasis added). Hence, when Article 4 TEU, which requires the EU to 'respect the *equality* of Member States before the Treaties as well as their *national identities*' (emphasis added) is read in conjunction with Article 167 of the Treaty on the Functioning of the European Union, which postulates that 'the Union shall contribute to the flowering of the cultures of the Member States, while respecting their national *and regional diversity* and at the same time bringing the common cultural heritage to the fore' (emphasis added), the *Eurosceptic political elites* of member states see these two goals as a pledge to *safeguard the national identities* of the member states in a transnational or even supranational institutional

framework, whereas for political elites and intellectuals inspired by the ideology of multiculturalism, diversity shall not only remain a value to be protected *above* the member states, but shall also become a value for and therefore *within* the member states themselves.

But what does this mean in practice for effective minority protection or multiple diversity governance by EU institutions? In the 1960s, the European Community/EU's legal standard setting process had decisively been further developed by the ECJ in its creative interpretation of the so-called four freedoms of movement of goods, workers, capital and services as an instrument of (negative) market integration into a general human rights approach (see Craig and de Búrca 2015: 380–90). With the case law of the ECJ and the EU anti-discrimination directives adopted in the 1990s and early 2000s, in particular Council Directive 2000/43/EC, which implements the principle of equal treatment between persons irrespective of race or ethnicity, a strong *overall anti-discrimination approach* of the EU (see Craig and de Búrca 2015: 892–961) beyond their legal and political function as instrument to foster (negative) market integration came into being. Moreover, the EU has a variety of *policy tools* available to contribute to the integration of persons belonging to minorities. This can most coherently be seen in the EU Framework for National Roma Integration Strategies, adopted in 2011, which focuses on education, employment, access to health care and housing, or from the Communication of the EU Commission on 'A Common Agenda for Integration, Framework for the Integration of Third-Country Nationals in the European Union' of 2005. Nevertheless, as has been demonstrated by Tawhida Ahmed (2011) and Gabriel Toggenburg (2015), due to the lack of an explicit legislative competence, the European Community/EU's contribution to *effective minority protection* remained rather weak.

3.4.3 How effective is standard setting and monitoring of minority rights instruments?

An *assessment of the activities* of the HCNM and the monitoring mechanisms of the FCNM and the ECRML after almost two decades reveals the following picture. As of 2018, only four of the 47 CoE member states have not signed the FCNM (France, Turkey, Andorra and Monaco). Furthermore, Belgium, Greece, Iceland and Luxembourg have signed, but not ratified, the FCNM. Kosovo is subject to a specific monitoring arrangement in conformity with the 2004 Agreement between UN Mission in Kosovo and the CoE. Hence, the FCNM has been ratified in total by 39 states. The Language Charter has been ratified by 25 states, whereas 33 states have signed it. By October 2018, the Committee of Experts under the Language Charter had adopted more than 100 so-called Evaluation Reports, assessing the Periodical Reports submitted by the states in a three-year-cycle (after the ratification of the Charter). Some countries have already participated in seven monitoring cycles. Under the FCNM it is the Advisory Committee, a body of independent experts, which assesses the States' Reports and issues *country-specific* opinions thereby preparing recommendations for the final resolutions of the Council of Ministers. By October 2018, the fourth monitoring cycle was well underway and the Advisory Committee had adopted more than 140 country-specific opinions. In addition, the Advisory Committee established working groups to elaborate *thematic commentaries*, which are not submitted to the Committee of Ministers for

approval – in contrast to its opinions (Kicker and Möstl 2012: 117). By October 2018, the Advisory Committee had issued four thematic commentaries with the aim of improving the implementation standards of the FCNM: Commentary No. 1 on Education (2008), Commentary No. 2 on Participation (2008), Commentary No. 3 on Language Rights (2012) and Commentary No. 4 on the Scope of Application of the FCNM (2016). Like the OSCE HCNM, the AC FCNM thus also serves as a normative intermediary.

All these opinions and thematic commentaries of the Advisory Committee, together with the resolutions of the Council of Ministers, offer a 'massive amount of text' (Marko 2012a: 279) which has been characterised in legal scholarship in analogy to the concept of soft law as 'soft jurisprudence' (Lantschner 2009). From a jurisprudential point of view, three normative levels can be found in the country-specific opinions of the Advisory Committee, which must be differentiated. First, there are specifications in terms of strict legal rules – especially with reference to the case law of the ECtHR – transforming the more abstract terminology of the FCNM provisions into what can be characterised as minimum standards and hard law. If these standards are violated by state parties, this will lead to a clear statement by the Advisory Committee that the respective state has violated its legal duties as detailed in the FCNM. Second, there are specifications which can be classified as 'emerging standards' because of the implementation practices of a growing number of member states. Third, there are particularly far-reaching provisions for the protection of minorities developed by some countries, which the Advisory Committee qualified as 'best practices' and encouraged other states to adopt them as well, but which are not considered to be legal obligations under international law arising from the FCNM (Marko 2010b: 92).

As we can see from the developments presented above, standard setting and the implementation of human and minority rights law is carried out by *different actors* and making use of *legal* or *political measures* at the global and European levels. First, and above all, the member states of the UN, the OSCE or the CoE are engaged in standard setting through their own national legislation. In addition, these international organisations contribute to standard setting by adopting legally binding international treaties or other, non-legally binding, forms of documents. Finally, the determination of standards is essentially facilitated when the different treaties and conventions establish special institutions for the monitoring of standards and eventually the review of legal duties arising from the treaties and conventions (Hofmann 2017: 14). The following typology of review mechanisms may help to differentiate between the various standard setting and monitoring institutions.

As could be seen from the description above of the different *institutions* and *instruments* at the global and European levels, we can distinguish between *two typical institutional arrangements* concerning the monitoring of the implementation of minority rights. At one end of a scale we find *independent courts*, which render legally binding judgments for the parties involved in the case at hand. At the other end, we find *political monitoring mechanisms* with opinions on states and their societies under review and, in between, hybrid mixes of judicial review and political monitoring.

Independent courts composed of professional judges with legally guaranteed impartiality are said to have the highest degree of authority and, owing to the legally binding effect of their judgments, also the highest degree of effectiveness regarding the protection of legally guaranteed rights. This is the case with the ECtHR, solely composed of full-time judges

and entitled to pronounce binding judgments for the contracting states and the individuals submitting cases to it, after the former European Commission on Human Rights, serving as some sort of first instance body and composed of part-time experts, was abolished with the implementation of Protocol No. 11 of 1998. Thereby, the court creates 'hard jurisprudence based on hard law' (Lantschner 2009). However, since those judgments are based on litigation in individual cases, a certain number of cases is necessary in order to determine a foreseeable standard of interpretation of the rather vague language also used in the provisions of the ECHR. The meaning and therefore normative consequences of a provision guaranteeing freedom of home, religion, expression, and association (Art. 8 through 11 ECHR) can be – and were – rather contested before it became settled jurisprudence. We therefore analyse paradigmatic individual judgments and the reasoning of the majority of judges, but also concurring or dissenting opinions (see Chapter 2, section 2.1) in Chapters 6 through 9 in detail, in order to make visible the ongoing processes of norm contestation in such cases (see Chapter 5, section 5.3). Moreover, as we demonstrate in particular in Chapters 7 and 8, litigation in individual cases, and even in settled jurisprudence, does not necessarily contribute to the transformation of structural disadvantages, nor does it effectively prevent structural discrimination following from the mutual enforcement of socioeconomic stratification and the ethnic inferiorisation of minority groups.

The next category are *quasi-judicial bodies* (i.e. bodies composed of independent experts monitoring the states' duties arising from particular treaties). Examples for such quasi-judicial bodies can be found at the global level. Within the UN, the two most important human rights treaties, the two international covenants, each have their own monitoring bodies: the Human Rights Committee (UNHRCom) oversees the implementation of the ICCPR, whereas the implementation of the ICESCR is overseen by the Committee on Economic, Social and Cultural Rights (Klabbers 2017: 124). Both bodies can entertain individual complaints (in cases where the state has also ratified the First Optional Protocol to the ICCPR and the recently adopted Optional Protocol to the ICESCR), but they lack the power to make binding decisions. Instead of making judgments like a court, they issue opinions in individual cases, which are considered to be non-binding. They are not composed of independent judges but of independent human rights experts, elected by states parties to the treaties. Therefore, the lack of 'authority' stemming from fully independent judges and legally binding case law is to a great extent compensated by the personal expertise and political courage of the members of these bodies (Klabbers 2017: 124). In effect, the consideration of individual complaints under the Optional Protocol is just one of several tasks: additionally, the UNHRCom for instance, which is composed of 18 independent experts, examines reports submitted by state parties leading to concluding observations, adopts general comments on specific articles of the Covenant, clearing thereby the scope and meaning of all states parties' obligations and assesses interstate complaints (Joseph and Castan 2014: 13–26). All these functions are thus also part of the UNHRCom's contribution to standard setting.

Another example of a quasi-judicial body is the previously mentioned Advisory Committee under the FCNM, a multidisciplinary expert body whose 18 independent experts are nominated by the states parties, but elected by the Parliamentary Assembly of the Council of Europe. It supports the Committee of Ministers, which is the *political monitoring organ* charged with the supervision of the implementation of the FCNM in a specific member

state. The country-specific opinions of the Advisory Committee contain an assessment of the practical situation of national minorities with regard to the articles of the convention as well as recommendations for improvement. The Advisory Committee's opinions are then directed to the governments concerned, who can react to them. Subsequently, the governments' responses and the opinions are forwarded to the Committee of Ministers which enacts adequate 'conclusions and recommendations' for the particular state (Marko 2010b: 89). The Advisory Committee is not able to entertain individual complaints and its opinions are not binding. Owing to the sheer numbers of country-specific opinions and their comparative character, they nevertheless serve as a serious source for the determination of European standards and can be qualified as 'soft jurisprudence based on hard law' (Lantschner 2009) since the FCNM is, of course, a legally binding international treaty. Additionally, the Advisory Committee's published thematic commentaries also contribute to the standard setting process.

The other pole on our scale between judicial and political monitoring institutions would be *political monitoring organs* whose members are not independent but politically bound representatives of states. In the human rights field at the global level, the UN Human Rights Council (UNHRC) should be mentioned. It is not a quasi-judicial treaty body, but a UN intergovernmental body whose 47 members are representatives of the UN member states, elected by the UN General Assembly for a term of three years. It was set up in 2006 to substitute the famous UN Commission on Human Rights (not to be confused with the UN Human Rights Committee), which had lost its reputation and moral authority over time because of the inclusion of states with questionable human rights records. Although some of the old problems seem to reappear (Klabbers 2017: 124), the UNHRC is responsible for promoting and protecting human rights around the world. It closely works together with the Office of the UN High Commissioner for Human Rights. The General Assembly mandated the UNHRC to undertake a universal periodic review of the fulfilment of each state's human rights obligations and commitments. Therefore, a special Universal Periodic Review Working Group examines the human rights records of all member states in regular sessions. This monitoring mechanism is – comparable with the review mechanisms of the UN Human Rights Committee or the ACFC – also based on information prepared by the state concerned (state reports) and complemented by information contained in the reports of treaty bodies as well as by information provided by other relevant stakeholders, including non-governmental organisations. The final outcomes of the sessions of the working group are adopted as recommendations by the plenary of the UNHRC. The objectives of the Universal Periodic Review are, inter alia, the improvement of the human rights situation on the ground, the fulfilment of the state's human rights obligations, the assessment of positive developments and challenges and the sharing of best practice among states. The recommendations of the Universal Periodic Review of the UNHRC contribute to global standard setting in human rights.

When we come to the question of whether *judicial* or *political* mechanisms are more effective in the protection of minorities, we can again draw the conclusion that this question – when posed as a dichotomy – is simply flawed. As we can see from the overview of judicial and political mechanisms, both have their advantages but also disadvantages. Individual litigation before courts such as the ECtHR cannot effectively tackle structural problems

stemming from historical constitutional traditions, political attitudes and social practices of the (majority) people. It is thus no surprise that Article 20 FCNM explicitly requires that 'any person belonging to a national minority shall respect the national legislation and the *rights of others, in particular those of persons belonging to the majority* or to other national minorities' (emphasis added). The ECtHR (which does not rule on the basis of the FCNM) must respect that administrative or judicial decisions based on national legislation enjoy *prima facie* democratic legitimacy and therefore – following from the 'margin-of-appreciation' doctrine (see Chapter 2, section 2.1) developed in its jurisprudence – grants national constitutional traditions more or less broad discretionary power. Hence, the development of the jurisprudence of the ECtHR concerning the application of the margin-of-appreciation doctrine (Agha 2017) is in itself an *empirical* standard of review of how *effective* minority protection by legally binding judgments can be, as can be seen from the detailed analyses of its case law in the following chapters.

Quite contrary to traditional legal textbook wisdom, the *vague terminology* of the FCNM and the *political* monitoring mechanism – although criticised in the beginning as a 'paper tiger' (Marko 2010b: 89) – can be qualified today as an advantage that has allowed many states with quite different constitutional traditions to engage in minority protection under the umbrella of the FCNM and has helped to overcome political deadlocks in legal standard setting. Furthermore, the Advisory Committee understood its role from the very beginning as a facilitator and mediator for a substantial and sustainable dialogue between national governments, all kinds of minorities and the CoE. This continuing and transparent *transnational, international and intercultural dialogue* is essential for a possible change of attitudes among majority populations in terms of the acceptance of *cultural diversity* (Marko 2012a: 279).

3.5 Summary conclusions and learning outcomes

The reconstruction of the interplay between historical events and their *interpretative explanation* in the writings of political philosophers and jurists, together with the texts of revolutionary documents such as the US Declaration of Independence and the French Declaration of the Rights of Man and the Citizen outlined in the previous section, brought about:

- first, an understanding of how these philosophers themselves had *deconstructed* and *reconstructed theoretical concepts* and thereby transformed the *meaning of terms* originally stemming from ancient and medieval political philosophy and Christian theology, as we see, for instance, from Bodin's line of argumentation against the seemingly theoretical impossibility of 'mixed government' following from the logical necessity of the 'indivisibility' of sovereignty as 'supreme' power;
- second, how they thereby *constructed social* and *political categories* such as sovereignty, state, people, nation, subject, citizen or human being, individual or member of on the basis of certain epistemological perspectives and ontological stances and imbued them thereby with *empirical and normative plausibility* which frame our world views and thus our understanding of structures and institutions within and between the pluriverse of national states as Herderian legacy to this day;

- third, *understanding* through the analysis of the processes of reification and naturalisation of these categories and normative principles created in their argumentation *why and how* the fallacies and paradoxes – summarised in the introductory section of this chapter – follow from the meta-ideology of identitarianism as core element of the nation-cum-state paradigm stemming from the fusion of specific forms of the ideologies of liberalism and nationalism, which frames our thinking on minority protection to this day, as shown in detail in Chapter 4.

What are now the vantage points for the *construction* of the nation-cum-state paradigm and thus the *transformation of history into ideology*, in particular the ideologies of liberalism and nationalism and their fusion in the nineteenth century, as we stated above with the dichotomic distinctions of public/private, politics/culture, and civic/ethnic?

The chief characteristic of modern public authority is the creation and establishment of *territorially* and *jurisdictionally delimited* political and legal *systems* called sovereign states. As we learn from the analysis of Locke's argumentation, this happened by *differentiation* in the form of *symbolic boundary drawing* (see also Chapter 5), with the effect of externalisation, leading to the concept of *external sovereignty* on the one hand, and simultaneous integration of all social relationships within the imagined system under the superiority of one institution following from the concept of *internal sovereignty* of the state, on the other. This is seen to embody (i.e. represent), as body politic, the whole in the metaphors and concepts used by Bodin, Hobbes, Locke, Rousseau and Sieyès, but also Fichte and Schleiermacher, and finally summarised in Weber's famous definition of the modern state (see Chapter 2, Box 2.2) at the beginning of the twentieth century. Hence, following from our social-constructivist and interpretative approach, the *names* and *mental concepts* of territory, sovereignty, state, society, community, people, nation, person and identity stand for the *construction* and *definition* of legal, political, social and cultural *unity*. Moreover, the processes of reification and naturalisation of these categories and their subsumed relationships, which end up in the notion that unity requires indivisibility in terms of uniformity or homogeneity, are also the vantage points for the construction and establishment of the identitarian nation-cum-state paradigm and the paradoxes which determine political and legal theories to this day.

The historical developments in Western and Central Europe between the sixteenth and eighteenth centuries did not allow for only the *vertical* reintegration of relations between sovereign ruler and subjects in terms of the transformation of crude power into legitimate authority, but also for the *horizontal* reintegration of the religious factions through the model of coexistence of religions and their followers conceived as *organised religious units*, as was the case in many cities with mixed populations throughout Western and Central Europe until the beginning of the Counter Reformation and long afterwards. As we see from the events of the American and French revolutions, this model of coexistence became institutionally and constitutionally translated into the principles of *strict separation* of organised *church(es)* and *state* according to the first of the 10 Amendments of the US Constitution in 1791 and the *principle of laïcité* (i.e. the separation of religion and politics by prohibition to exercise religion in the public sphere according to French legislation and case law, analysed in detail in Chapter 7, section 7.3). But even the possibility of coexistence, let alone the cooperation of communities – forged by the bond of the commonality of religious belief – as well as the

limits of tolerance of others, as can be seen in the different positions of Grotius and Locke, remains contested to this day in the debates about the justifications for and against national self-determination or immigrant integration versus assimilation, as discussed in detail in the following chapters.

In conclusion, both the French model of the civic-republican state-nation, characterised by its foundational concept of cultural indifference, and the German model of the ethno-national nation-state, characterised by the legal institutionalisation of the concept of ethnic difference, are based on the meta-ideology of identitarianism with the consequence of eliminating cultural and even political pluralism. The French model in actual practice requires cultural assimilation in exchange for social-upward mobility, and the German model led, under different historical circumstances in different countries, to genocide, ethnic cleansing, territorial separation, institutional segregation or other forms of discrimination, as we learned in this chapter from the events in Eastern and Southeastern Europe before and after the First World War. The creation of the League of Nations after the First World War and the UN after the Second World War and the processes of legal standard setting and monitoring of minority issues at the international, global and European levels demonstrated a swing of the pendulum from minority protection to human rights and back after the end of the Cold War in 1989, thereby mirroring the conceptual dichotomy between so-called individual versus collective or group rights, framed through the development of the ideologies of liberalism and nationalism. Whereas the OSCE documents and the CoE treaties and their treaty bodies have embraced the concept of group-related rights, especially in the 1990s in their standard setting, and even more so monitoring activities, the EU remains politically fixated on the individual human rights and anti-discrimination approach. Nevertheless, the EU anti-discrimination directives also provide a strong potential for minority protection, having led, as we shall see in the next chapters, to surprising judgments of the ECJ, in particular with regard to language rights.

But it is the individualist English tradition of natural law and unalienable birth rights or human rights and the idea of a fiduciary power conceived by Milton, Locke and the US Founding Fathers and legally translated as trust, not (yet) reified as emotional bond of solidarity, which enables to uphold the distinction between person and institution as problem of *autonomy* against all the totalising tendencies following from the identitarian conception of sovereignty as indivisibility, the legacy of Bodin's definitions ever since. Thus, only a theory of *integration through law* following from the English tradition in contrast to the civic–ethnic dichotomy of the French and German models of national states can help to develop *legally institutionalised structures* of social, political and cultural *pluralism*.

At first glance, Locke's conception of 'freedom under government' seems to resolve not only the *liberal* but also the *democratic paradox*, which does not require from individuals to give up their natural rights. This allows *(natural) power* to be transformed into (*positive*) *law* which is thus – so the magic formula – at the same time *restricted* through the right of appeal against the encroachment of individual, *human rights*, now legally institutionalised in and through positive law. However, as we see from the constitutional paradox of the necessary ubiquitousness of constitutive and constituted power – which is either a logical *contradictio in adjecto* or an ontological conundrum – and the problem of who or what represents the will of the people, neither the liberal nor the democratic paradoxes have been resolved

with the Rousseauan fiction of an identitarian general will or Locke's identification of the majority decision with the 'power of the whole'. As we show in detail in Chapter 4, they haunt us to this day as the *myth* of the *neutrality* of national states or the 'colour-blindness' (Kennedy 2013a) of positive law and because of an *identity fiction*, whereby the dominant ethnic majority declares itself to be *the* nation. Moreover, Locke's transformation of 'natural liberty' into 'freedom under government' is also the vantage point for *Arendt's paradox* of the necessity of a 'right to have rights' despite the conceptually necessary universality of human rights which can, however, legally, let alone effectively, be guaranteed only by the particular legal and political systems of national states (see Chapter 6, section 6.4) even if they are willing to subject themselves to an international human rights treaty and a 'supranational' court like is the case with the ECtHR. And 'Locke's fear' of atheists, providing the ground for the *Böckenförde paradox* by postulating that the modern, secular state cannot provide for the necessary trust, solidarity and social cohesion on which its existence seems to depend, was recently reconstructed by Rosenfeld (2011: 773) from a comparative constitutional law perspective in all but name when asking the question and raising the problem of a possible clash between competing 'national' and 'constitutional identities' and a possible 'transnational constitutional identity' of the EU.

Nevertheless, Locke's reflections point the way how to overcome the ideological frame of the nation-cum-state paradigm. The original contract as 'mutual agreement' to take over obligations following from the established legal system give the understanding of common law in the English tradition an additional layer of meaning. It is the *commonality of mutually recognised legal obligations* why individuals in the state of nature relinquish their (natural) *powers* or, better said, exchange it for the protection of their legally institutionalised *rights* in positive law against unjust government actions violating these rights. This conception is therefore source for the idea, how mutual trust and solidarity can be created in terms of *integration through law* necessary for social and system integration which can, however, never be fully accomplished in empirical reality, but remains a permanent process. Sociability and equality can therefore never be intrinsic properties of human beings, nor should they be naturalised into values, which are given and cannot be negotiated as advocates of the ideologies of liberal nationalism and representatives of primordial theories of nationalism (see Chapter 4, section 4.2) claim. On the contrary, from our social-constructivist perspective, social norms *and* political values, before they are translated from public discourse into legally binding law either by legislation or adjudication by courts, thereby specifying their meaning for a specific context, as we see from the following chapters with regard to the rights of existence, identity in diversity, equality and effective participation for minorities in Chapters 6 through 9, do not simply exist, but are permanently contested in all phases of the norm cycle from legislation, to implementation and adjudication. This leads quite often to legislative amendments, keeping the norm cycle in perpetual motion (see Chapter 5, section 5.3).

In conclusion, the historical development of state formation and nation building in Europe before and since the French Revolution can indeed be interpreted as a dynamic and historical process in three stages as: (1) difference as inequality, politically and legally institutionalised by feudal monarchies; (2) equality as identity through the formation of allegedly culturally homogenous national states in the nineteenth and twentieth centuries; and (3) equality as difference, to be seen as challenge for the future development of multicultural societies

within and beyond national states (Rosenfeld 2012: 73). However, this challenge requires more effort to overcome the monist-identitarian nation-cum-state paradigm with its dichotomies of civic–ethnic, public–private, politics–culture and universalist–particularist/relativist, to be able to navigate through the Scylla of assimilation and Charybdis of extinction, territorial separation, institutional segregation and various forms of discrimination for all categories of minorities (i.e. old, national minorities and new minorities stemming from immigration) and indigenous peoples. Hence, as we demonstrate in this chapter, minorities are not dangerous or a problem as such for security, unity, governability and social cohesion, but it is the frame of the monist-identitarian nation-cum-state paradigm, which remains a threat to minorities as can also be seen from the sections about minority protection between the two world wars and legal standard setting after 1945.

This leads us to the next chapters, where we try to further deconstruct the nation-cum-state paradigm through an interdisciplinary approach, analysing the interconnectedness of law, ideology and sociology in the processes of social identity and group formation through institutionalisation in terms of social integration in interaction with system integration.

Questions

1. What is the historical-sociological approach in contrast to the classic historiographic method of Leopold von Ranke?
2. Which fallacies and paradoxes of European state formation and nation building frame effective minority protection to this day?
3. Which ideological path dependencies determine the argumentation and decision making in the case law of courts to this day?
4. Do feelings of solidarity between citizens necessarily require a pre-existing linguistic or religious community?
5. How do you assess the structural dualism of the state-cum-nation paradigm and the value of cultural diversity in the process of legal standard setting after 1945?

Law and ideology

4

The ideological conundrums of the liberal-democratic state

Joseph Marko

4.1 Introduction: the ideological framing of law

In the previous chapter we tried to demonstrate how political philosophers and jurists between the sixteenth and nineteenth centuries, in need of social and political *categories*, normative *principles* and theoretical *institutional* models for social and political ordering after religious wars and political revolutions, *(re)constructed* the *meanings* of basic *terms* and *concepts*, such as sovereignty, territory, state, people, nation, community, belonging, and legitimacy. In order to overcome religious dogmas and metaphysics in line with the development of natural sciences, these categories, principles and models led, however, to *reifications* or even *naturalisations* of social *relations* and *processes*. Moreover, the reification and naturalisation of basic concepts and terms have to be seen as the *vantage point* for the creation of the modern *ideologies* of liberalism, nationalism, and racism, as well as the fusion of the ideologies of liberalism and nationalism in the nineteenth century, which finally led to the monist-identitarian *nation-cum-state paradigm* which *frames our understanding* of social and political *relations* between and within national states to this day.

However, as we try to demonstrate throughout this book, the nation-cum-state paradigm, as the dominant framework and thus deep structure of all of the variations of ideologies and theories of ethnic versus civic nationalism or individualistic versus communitarian liberalism, is based on a ' "meta-theory" of identitarianism' (Malešević 2006: 4) with the consequence of the elimination of all forms of pluralism. Thus, the accommodation of *political unity* and *legal equality with cultural diversity*, in short effective minority protection through multiple diversity governance, must remain impossible as long as the nation-cum-state paradigm with its naturalisations and ideological dichotomisations of state–society, civic–ethnic, politics–culture, public–private, universal–particular, individual rights–collective rights, and human rights–minority rights are not overcome.

A particularly well-suited example to study this way of *ideological framing* in judicial adjudication is the Opinion of Advocate General Kokott delivered in the European Court of Justice (ECJ) case, *Achbita v. G4S Secure Solutions* (2017).

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In a request for a preliminary ruling by the ECJ, the question was raised whether a private employer was permitted to prohibit a female employee of Muslim faith from wearing a headscarf in the workplace, and whether the employer was permitted to dismiss her if she refused to remove the headscarf at work. Instead of clarifying whether the facts of the case allowed for the conclusion of possible direct or indirect discrimination from the point of view of European Union (EU) law, Advocate General Kokott immediately politically framed possible legal interpretations of EU law texts in the opening paragraphs of her Opinion in the following way:

> 2. There is no need to highlight here the social sensitivity inherent in this issue, particularly in the current political and social context in which Europe is confronted with an arguably unprecedented influx of third-country migrants and the question of how best to *integrate* persons from a migrant background is the subject of intense debate in all quarters.
> 3. Ultimately, the legal issues surrounding the Islamic headscarf are symbolic of the more fundamental question of how much *difference* and *diversity* an open and pluralistic European society must *tolerate* within its borders and, conversely, how much *assimilation* it is permitted to require from certain minorities.
>
> (ECJ, *Achbita v. G4S Secure Solutions*, Opinion of Advocate General Kokott delivered on 31 May 2016, emphasis added)

The quotation of these initial paragraphs in the introduction to the case demonstrates Kokott's *liberal-nationalist bias* when she first frames the individual case as a fundamental European policy decision to be made (by whom?) and, second, changes the meaning of the term integration in paragraph 2 by reframing it as a decision to be made by her in the name of European society between toleration and assimilation, both of them not rights in the ordinary meaning of legal terminology, but duties to be requested from society or certain minorities (i.e. obviously only a certain religious minority).

Her interpretation of the term and concept of religion will thus come as no surprise. In paragraph 50, she makes the distinction between 'discrimination based on *a* religion' and 'discrimination based on religion *per se*', but concludes that 'even from this point of view' the issue of this case 'does not support the assumption of direct religious discrimination'. But why? This is outlined in the following paragraphs:

> 51. It must be borne in mind, after all, that a company rule such as that operated by G4S is not limited to a ban on the wearing of visible signs of *religious* beliefs, but, at one and the same time, also explicitly prohibits the wearing of visible signs of political or philosophical beliefs. The company rule is therefore an expression of a general company policy which applies *without distinction* and is *neutral from the point of view of religion or ideology.*
>
> …
>
> 53. In the present case, therefore, this leaves only a difference in treatment between employees who wish to give active expression to a particular belief – be it religious, political or philosophical – and their colleagues who do not feel the same compulsion.
>
> (ibid., emphasis added)

What we see from the quote in paragraph 51 is the myth of neutrality that is so characteristic of liberal nationalism as we demonstrate in the next section. However, what is even more important is the process of ideologically inspired reductionism and individualisation of the concept of religion, which is – as Advocate General Kokott correctly invokes in paragraph 35 – composed of not only a *forum internum*, but also a *forum externum*. In paragraph 53, however, she reduces the positive freedom of religion of Ms Achbita (i.e. the right to manifest her religious belief in private *and in public* according to Article 9 of the European Convention on Human Rights; ECHR; which is part of EU primary law), completely to the *forum internum* (i.e. in the meaning of freedom of conscience separately enumerated in Article 9), as can be seen from her indicative comparison that manifestation of her religion also at the work place is a mere 'compulsion' which her colleagues 'do not feel'. This ideologically inspired reductionist interpretation of freedom of religion to freedom of conscience becomes more clear in paragraph 116 of the opinion in her comparison of purportedly immutable personal characteristics with religion:

> 116. However, unlike sex, skin colour, ethnic origin, sexual orientation, age or a person's disability, the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one, moreover, over which employees concerned can choose to exert an influence. While an employee cannot 'leave' his sex, skin colour, ethnicity, sexual orientation, age or disability 'at the door' upon entering his employer's premises, he may be expected to moderate the exercise of his religion in the workplace, be this in relation to religious practices, religiously motivated behaviour or (as in the present case) his clothing.
>
> (ibid: para. 116)

Hence, what we can see from the quotation of paragraph 116 above is not only the racialisation of the category ethnicity when conceived of as 'unalterable fact', but also the *individualisation* and *subjectification* of religion which is so characteristic for *liberal-individualistic ideology* that frames the entire reasoning in this case. From a comparative perspective, we must make the reader aware that General Advocate General Sharpston framed and argued her Opinion in the almost identical issue in the ECJ case, *Bougnaoui v. Micropole SA*, delivered on 13 July 2016, in a much more minority-friendly way, by explicitly refusing to reduce freedom of religion to the choice for the woman affected to take the job, or leave it, when balancing the freedom to carry on business against the positive freedom of religion (para. 119). Nor did the ECJ follow the Opinions of Advocate Generals Kokott and Sharpston (elaborated in more detail in Chapter 7, section 7.3.2).

This chapter is thus dedicated to the *deconstruction* of the nation-cum-state paradigm and its ideological presumptions, hidden in the reasoning of various parties of judgments of apex courts. In order to be able to identify these hidden ideological presumptions, we provide in section 4.2 a short overview on the 'family resemblance' (Wittgenstein) of race, ethnicity and culture, and give an exemplary critical analysis of the process of trivialisation of race in a judgment of the European Court of Human Rights (ECtHR). Section 4.3 is then dedicated to an analysis of the fault lines of liberalism and nationalism and the three

conundrums of the liberal-democratic state. These are, first, the nationalist identity fiction and the myth of neutrality; second, the question whether the concept of autonomy or sovereignty-as-indivisibility shall inform the legal interpretation of the principle of collective self-determination. The resulting alternatives will be called *political* self-determination in opposition to differentialist, *national* self-determination underlying all political claims for unilateral secession, as is demonstrated through a case study on Catalonia. Third, the ideologically predetermined dichotomy of formal versus substantive equality ignores the epistemological and ontological 'dilemmas of difference.' Section 4.4, finally, demonstrates that these three conundrums remain trapped in the confusion of diversity and difference as could above be seen from the reasoning of Advocate General Kokott, and the remaining oxymoron of the nexus between ethnic–civic–national concepts. Section 4.5 summarises conclusions and learning outcomes.

4.2 The family resemblance of race, ethnicity, nation and culture: the ideologies of racism and nationalism

A comparison of the functional-structural elements of classic racist ideology developed in the nineteenth century and todays neo-racist ideology of the French Nouvelle Droite and other right-wing populist or extremist parties in Europe, postulating a choice between cultural assimilation into or exclusion from European national states (see Chapter 1) in order to protect their national identities in terms of values and sociocultural habits, raises the question, what are the relationships between the conceptualisations and categories of race, ethnicity, nation, and culture? Can the biologically determined definition of race simply be substituted by ethnicity as a belief in common descent in terms of common origin? Can such a conceptualisation again simply be substituted by a belief in the commonality of cultural markers, such as religion or language to objectively prove the purported common origin? And can the belief in a common culture be substituted by feelings of constitutional patriotism as a bond – represented by the rope binding together the citizens in the fresco of *buon governo* in Siena (see Chapter 3, Figure 3.3) – creating a non-ethnic political community which, despite the Böckenförde paradox, can provide for trust and solidarity – in short, social cohesion?

When we first look into the writings of classic (i.e. biological) racism, as exemplified by Count Gobineau (1853), Houston St Chamberlain (1905) and Arthur Rosenberg (1924), we can identify three *structural components* that are essential for the construction of the ideology of racism (on the history of the European ideology of racism, see Hertz 1915 and Mosse 1996).

1) *Biological determinism*: in the pseudoscience of phrenology, developed as early as the nineteenth century, the empirical observation of different appearances of the human body, such as the colour of the skin, the shape of the skull or ears, and the *biological hereditariness* of these markers were singled out for the purpose of combining them with the assumption that these seemingly natural markers also *predetermine social behaviour.* On that basis, it was postulated that *different* human

races exist, combined with the conclusion that different individual behaviour can now be explained by belonging to certain races and because of their alleged characteristics (see, however, Herder's rejection of this ideological construction in Chapter 3, section 3.2 on the basis of a cosmopolitan perspective, and Hertz 1915). The truth claim that the category of race cannot be criticised because of its natural existence and thus allegedly explanatory power, reveals its ideological character.

2) *Hierarchisation*: based on this concept of biological determinism, the alleged *natural inequality* in the capabilities of members of races, which are sociologically conceived not as categories but as bounded groups (see Chapter 5, section 5.2) and therefore existing in empirical reality, is translated into allegedly naturally given *status hierarchies*, which cannot be overcome by human action, so that even individual assimilation, the functional equivalent of baptism, is declared impossible – as we can see from Spanish history (see Chapter 3, section 3.2) or from Nazi ideology.
3) *Mixophobia*: against the social Darwinist conception that – based on biological traits – long-term adaptation to environmental challenges results in the survival of the fittest as a developmental gain in the human race, Count Gobineau declared the 'mixing' of races to be a 'degeneration', a 'developmental' loss that would inevitably end up in the extinction of the 'best' race(s) in the hierarchy (Gobineau 1853). This view had – as we learned in Chapter 3, section 3.2 – been anticipated in the 'patriotic prayer' of Schleiermacher in 1803: 'Each people which has developed itself to a certain level is dishonoured if it incorporates alien elements, even if they are good *per se*'.

(Schleiermacher 1834: 75, translation and emphasis by the author)

As a consequence, *mixing of peoples* was declared a deadly sin against nature and became legally entrenched in the form of social and political institutional segregation and justification for the extinction of people, as we can see from the so-called Nuremberg race laws (officially the Law for the Protection of German Blood and German Honour and the *Reich* Citizenship Law of the Nazi regime; Box 4.1).

Box 4.1 The Nuremberg race laws

Law for the Protection of German Blood and German Honour

Moved by the understanding that the purity of German blood is the essential condition for the continued existence of the German people and inspired by the inflexible determination to ensure the existence of the German nation for all time, the Reichstag has unanimously adopted the following law, which is promulgated herewith:

Article 1

1. Marriages between Jews and subjects of the state of German or related blood are forbidden. Marriages nevertheless concluded are invalid, even if concluded abroad to circumvent this law. …

Article 2

Extramarital relations between Jews and subjects of the state of German or related blood are forbidden.

Article 3

Jews may not employ in their households female subjects of the state of German or related blood who are under 45 years old.

…

Article 5

1. Any person who violates the prohibition under Article 1 will be punished with a prison sentence.
2. A male who violates the prohibition under Article 2 will be punished with a jail term or with a prison sentence.

Article 6

The Reich Minister of the Interior, in coordination with the Deputy of the Führer and the Reich Minister of Justice, will issue the legal and administrative orders required to implement and complete this law.

Reich Citizenship Law

Article 1

1. A subject of the state is a person who enjoys the protection of the German Reich and who in consequence has specific obligations toward it.
2. The status of subject of the state is acquired in accordance with the Provisions of the Reich and the Reich citizenship law.

Article 2

1. A Reich citizen is a subject of the state who is of German or related blood, and proves by his conduct that he is willing and fit to faithfully serve the German people and Reich. …
2. The Reich citizen is the sole bearer of full political rights in accordance with the law.

Article 3

The Reich Minister of the Interior, in coordination with the Deputy of the Führer, will issue the legal and administrative orders required to implement and complete this law.

(*Reichsgesetzblatt* I 1935: 1146, translation by the author)

But it is not only classic racism that we need to critically analyse in our context. There are also new right-wing extremist parties which came into existence after the Second World War and which advocate an ideological worldview that is, as they claim, no longer racist, but pluralist and therefore democratic.

The global student movement during the 1960s and the new left ideologies have also triggered an ideological movement and the formation of international networks of intellectuals and the formation of new political parties in reaction to neo-Marxist thinking and socialist politics, which can be summarised as the New Right throughout Europe (Decker 2013; Bar-On 2013). The Front National under the leadership of Jean-Marie Le Pen in France, the National Front in the United Kingdom, the former Vlaams Blok in Belgium, die Republikaner in Germany, the Lega Nord in Italy and the Austrian Freedom Party exemplify this new European network of right-wing populist or extremist parties, notwithstanding the fact that these parties try to conceal their neo-racist approach through the use of labels such as ethnopluralism or even multiculturalism, as we show in the citations below.

However, when compared with the structural backbones of the old, biological racism, the same structural components of what we label ethnicised racism will not only be found in the writings of the intellectual advocates of the French *Nouvelle Droite* (de Benoist 1993–4: 173–210), but also in other academic writings, as well as in party programmes and policy prescriptions of all right-wing populist and extremist parties.

Again, these comprise three elements:

1) *Ethnic determinism*: no longer are biological markers considered the essential characteristics for race. *Cultural pluralism*, *conceived* of as a *difference* between allegedly homogenous languages or common histories, is now taken for granted as the natural factor that *constitutes and places groups* in *antagonistic opposition* to each other. The process of *naturalisation of diversity* can clearly be followed in the argumentation of Samuel Huntington, in which he opposes civilisations to one another, as if they were placed by the natural relations of us versus them, with the consequence that this ethnic difference is then seen as the essential root cause of conflict between different civilisations (Huntington 1993: 29). 'In class and ideological conflicts', he argues, 'the key question was "Which side are you on?" and people could and did choose and change sides. In conflicts between civilizations, the question is: "What are you?" That is a *given that cannot be changed*' (ibid: 35–6). It is exactly this determinism, imposed on cultural diversity where even assimilation is ruled out, that turns this theory of international relations into a neo-racist approach.
2) *Ethnic pluralism*: in contrast to classic racism, individuals or groups are no longer conceived of as being unequal as such. Nevertheless, ethnicity is seen, for instance in the earlier publications of Anthony Smith, as an original trait of people, so that ethnic groups form the 'everlasting kernel and basis of states' (Smith 1991: 20–39). Hence, the pluriversity of groups – against the universalist idea of humankind as it had been 'imagined' by Enlightenment philosophy – is seen as the 'essence' of life, which cannot be overcome according to the argumentation of, for instance, the chief ideologue of the French *Nouvelle Droite*, Alain de Benoist, or the German anthropologist Irenäus Eibl-Eibesfeldt. Life is naturalised by Eibl-Eibesfeldt when he declares that life is not only

'secured by biodiversity with regard to plants and animals, but also at the level of human beings through the diversity of cultures and races'. He goes on to state, 'in spite of the fact that the relations between cultures are characterised by more and more openness, this must not lead to the dissolution of cultural diversity into a uniform cultural mish-mash' (Eibl-Eibesfeldt 1994: 53–4; translation by the author; critical analysis in Marko 1995: 74–80). Similarly, Alain de Benoist argues that the New Right is the advocate of ethnic pluralism insofar as it defends the recognition of individual and ethnic diversity. In the end, however, not only did people become, once again, a naturalised entity with a collective identity, but also the world was conceived of as a 'heterogeneous world composed of homogeneous peoples' (de Benoist 1986: 117). What then are the political consequences of such a concept of pluralism, in which the preservation of ethnicised diversity through *ideologically constructed* social closure and group antagonism (see Chapter 5, section 5.2) is again declared to be natural?

3) Exactly the same *mixophobia* as in the case of the old biological racism. Thus, for Eibl-Eibesfeldt, mish-mash becomes 'ethnosuicidal' (Eibl-Eibesfeldt 1991: 124–36) and, for Benoist, 'ethnopluralism' is defined as the protection of 'ethnic purity' against immigration and 'mixing', which – in his opinion – must also be in the interest of 'aliens', which otherwise would lose their identity like autochthonous peoples. 'Others' keep their 'authentic identity' only by staying in their home country. Consequently, according to de Benoist, territorial separation is 'true antiracism'.

But why and how is it possible to simply exchange the meaning of the terms race with those of ethnicity and, in the end, even culture, so that de Benoist can paradoxically declare that multiculturalism is 'true antiracism'? Any understanding of this process of substitution of terms without changing their *structural meaning* must again start with the critical analysis of the *process* of reification and naturalisation of the terms ethnicity and culture. And the reductionisms and dichotomisations going on in this overall process of *ideologisation* require further analysis of the history of the combinations of the conceptualisations of state and nation. Only then will we be able to understand the only seemingly paradoxical 'family resemblance' (Wittgenstein) of racism, nationalism *and* liberalism, which comes to the fore in de Benoit's statement (for a short description of the concept of family resemblance 'to denote concepts that overlap in usage while there is no single essence that unites all these usages', see Haugaard 2010: 424).

At the beginning of the twentieth century, Friedrich Meinecke ([1908] 1970) became highly influential with his categorical distinction between *Staatsnation* (state-nation or political nation) und *Kulturnation* (cultural nation). He argued in the tradition of the German romantic philosophy of Herder and Fichte (see Chapter 3, section 3.2) that a cultural nation is based on *objective criteria*, which were seen in the alleged commonality of a people based on language, religion, culture or history. In contrast, the state-nation was – in the tradition of contractarian Enlightenment philosophies – conceived of as the result of individual and collective self-determination, based on the individual's free will and *subjective commitment* to the nation, as was expressed by Ernest Renan in his famous lecture 'What is a Nation?': 'A nation's existence is, if you will pardon the metaphor, a daily plebiscite, just as an individual's existence is a perpetual affirmation of life' (Renan 1882, quoted after Christie 1998: 47).

Hans Kohn ([1944] 2005), however, gave this distinction a normative spin and dichotomised the concepts by distinguishing between Western patriotism or *civic nationalism*, as 'liberal, voluntarist, universalist and inclusive', and 'oriental' *ethnic nationalism*, conceived as 'illiberal, ascriptive, particularist, and exclusive'. Western nationalism was thereby seen as a 'rational' form, in the sense that the nation was conceived of as a free association of the people living on a delimited territory, whereas Eastern societies were seen as lagging behind in political and social development, remaining trapped in traditional ties of kinship and unequal status of different layers of society, structured by feudal relationships instead of freely consented contractual obligations. Only several decades later did this become heavily criticised as orientalism (Said [1978] 2003).

From today's perspective (i.e. after the constructivist turn in the social sciences; see Chapter 2, section 2.2), these theories can be classified as *primordial* theories of nation building. An important legacy of these early theories remains the fact that *civic* and *ethnic* forms of *nations* and *nationalisms* are conceived as a binary dichotomy of ideal types, despite the fact that Meinecke himself had declared that:

> a cultural nation can be a political nation as well, and we often do not know whether political ties or the ties of religion and church are the stronger in holding it together. As a result, it is difficult to distinguish cultural and political nations from each other on the basis of either internal or external structure.
>
> (Meinecke 1908: 11)

This quote must thus serve as an important warning against the pitfalls of 'normative' or 'methodological nationalism' (Bosniak 2006; Özkirimli 2010) through the conflation of epistemology and ontology, not only for the study of nationalisms. Do we have to construct ideal types in the meaning of Max Weber (see Chapter 2, Box 2.2) as extreme poles for the conceptualisation of dichotomies, so that the phenomena and elements chosen to construct these ideal types must be understood as mutually exclusive from the very beginning, with the consequence that the construction of a continuum between these two extreme poles can only lead to the hybrid mixing of more or less ethnicity, what is thereafter labelled as 'thick', 'thinner' or 'thin' forms of nationalism or patriotism (Kostakopoulous 2006), as we show below in the analysis of political-philosophical literature?

Hence, when intellectuals and political leaders must answer the question 'Who are we?' (Huntington 2004) in order to trigger emotional attachment for their specific nationalist programmes, requiring a search for the purportedly authentic origins and descent of the autochthonous population, this does not depend on philosophical premises about the nature of human beings and their relations in the state of nature as *bellum omnia contra omnes*, or their alleged sociability, but follows from the three core elements of the monist-identitarian nation-cum-state paradigm, namely the theorem of the indivisibility of identity, sovereignty and unity. In this context, the search for *authenticity* by historians and politicians will then lead to the idea that it is necessary to identify the *pure* origin in terms of ancestry or territory, irrespective of how culturally intermingled territories or people are (not only) today. Hence, the structural content of the ideology of *ethnic nationalism* does have the *same social*

and *political consequences* as *biological and ethnicised racism*, namely mixophobia, which will lead to claims of either assimilation, institutional segregation or territorial separation and thereby the exclusion of others, who do not – because of their purported different biological or cultural markers – belong to the authentic, original 'we', as we saw from the comparative histories of state formation and nation building in Europe in Chapter 3.

Concerning the family resemblance between both forms of *racism* and *ethno-nationalism*, we can identify the same *structural characteristics* once again:

1) Based on the confusion of epistemology and ontology, the *naturalisation of cultural diversity* by categorically redefining it into *ethnic difference* when belonging to a group or the possession of a territory is made a precondition for the social and political recognition of collective identity, legal equality, and effective participation so that:
2) *identity formation* shall be one-dimensional, all-encompassing not allowing for multiple identities and requiring absolute loyalty towards state and nation, as can be seen from the English saying: 'my country, right or wrong'.
3) *Exclusivism*, following from the same naturalist fallacies and ideological premises for mixophobia, possibly ending up in ethnic cleansing, territorial separation and institutional segregation as a form of allegedly ethnic discrimination with, however, strong racist underpinnings, as we learn from the case law of the ECtHR in Chapter 8 such as *D.H. v. Czech Republic* (2007) and *Oršuš v. Croatia* (2010), but also *Yordanova v. Bulgaria* (2012), analysed below as paradigmatic examples.

Much better than by any textbook definition, the ideology of ethno-nationalism is summarised in the 'Seven Rules of Nationalism' (Box 4.2).

Box 4.2 The seven rules of nationalism: a beginner's guide to ethnic politics

1) If an area was ours for 500 years and yours for 50 years, it should belong to us – you are merely occupiers.
2) If an area was yours for 500 years and ours for 50 years, it should belong to us – borders must not be changed.
3) If an area belonged to us 500 years ago but never since then, it should belong to us – it is the Cradle of our Nation.
4) If a majority of our people live there, it must belong to us – they must enjoy the right of self-determination.
5) If a minority of our people live there, it must belong to us – they must be protected against your oppression.
6) All of the above rules apply to us but not to you.
7) Our dream of greatness is Historical Necessity, yours is Fascism.

(Kaufman 2001: v)

The example of ideological framing in the interpretation of the legal concepts of direct and indirect discrimination under EU law in the Introduction of the Opinion of Advocate General Kokott in the ECJ case, *Achbita v. G4S Secure Solutions* (2017) in the previous section demonstrated the *process of naturalisation* of the legal *categories* of *race* and *ethnicity* in order to be able to distinguish it from the legal category of religion. She thereby *reinterpreted* and *delegitimised* the claim of the applicant to have a guaranteed right of positive freedom of religion under EU law – also in labour relations – by representing religion as a mere subjective feeling like any other. Therefore this example is, on the hand, a good demonstration for the legacy of *substantialist thinking* which dominates the *methods of legal interpretation* in positive law to this day. On the other hand, the *reference* to the *legal category* of *ethnicity* as a discrimination ground in cases concerning direct or indirect discrimination is a *litigation strategy* to *deny* or to *belittle* the *legal relevance* of *racial prejudices* of the population in general or even of the authorities when handing down administrative or judicial decisions, so that the phenomena of *structural discrimination* and/or *institutional racism* cannot be effectively fought against.

Sociological literature (Morris 2005; Kennedy-Dubourdieu 2006; Schiek and Chege 2009; Short and Wilton 2016) provides a sufficient number of case studies on these two interrelated phenomena. A particularly demonstrative example was the British case *Appiah and Wabwire* in 2002, which shows how ethnic stigmatisation based on, maybe even subconscious, bias works (Solanke 2009). Two black teenagers had been involved in a fight with white boys in their school and were excluded after investigations by the headmaster. Their appeals against exclusion before the county court and appeals court were unsuccessful. Despite finding before the appeals court, contrary to the conclusions of the school headmaster that the two black teenagers had not provoked the fight and that exclusions for black students in that school were running at a disproportionately high level, the judge reasoned that school teachers have no 'racist intent' and thus the exclusions had been 'reasonable … on the evidence available' and recommended starting a Saturday school to raise achievement rates among black pupils. However, a government report in 2006 finally acknowledged the problem of institutional racism in the British educational system. This report made clear that racism against black youth stems from longstanding social conditioning involving negative images of black men in particular, stereotyping them as threatening. This conditioning is then enforced by media reports of black street culture so that school staff are encouraged to expect black pupils to be more aggressive. The report compared this with other youth subcultures, such as 'goths', who are seen as strange and different, but do not meet with the same hostility from teachers. Thus, the report concludes that the significant difference between white and black pupils with regard to exclusion rates is caused by systematic discrimination in the application of disciplinary and exclusion policies (Bull 2006).

Institutional racism based on generalised prejudices and thus the stigmatisation of groups and their members can therefore not be seen as isolated individual behaviour. The sociocultural status of persons in a given society is defined by the relative, mutual acceptance of social actors based on cultural value judgements. Consequently, in an ideal world, status groups would be based on relations of mutual respect and acknowledgement between groups and their members. In stark contrast, the existence of *status hierarchies* in sociocultural terms (i.e. the ethnic stratification of society), with the domination of society by one or several cultural

groups to which others are subordinate, is based on negative value judgements regarding the *perception* of groups and their members as *superior* or *inferior,* which we classified above as one of the three structural elements of the ideology of racism. This perceptive stigmatisation leads to feelings of mistrust or even hatred, with the consequence that others are not deemed to be equal members of society. Hence, supremacy and, correspondingly, subordination are produced and reproduced by *norms* and *institutional mechanisms*, which do not simply discriminate against individual persons, but fix their sociocultural status as members of groups in these ascribed relations of supremacy or subordination and thereby structurally advantage or disadvantage (i.e. discriminate against them).

Hence, theoretically speaking, institutional racism and structural discrimination are consequences of the ethnic stratification of society, which has nothing to do with the talents or merits of individuals or the socioeconomic stratification of society. But empirical case studies in all European countries reveal that there is a *statistically relevant correlation* between the ethnic and socioeconomic stratification of societies: no other minority in Europe is more affected by the *structural interdependence* of *ethnicity* and *poverty* than the Roma and Sinti (see in particular Fundamental Rights Agency of the European Union 2016). Their fate is the best demonstration for a vicious circle of how poverty becomes entrenched over generations and is thereby structurally fixed. This starts in the preschool and primary school enrolment. Roma children are not registered at all or – as the case ECtHR *D.H. v. Czech Republic* (2007) revealed as the tip of the iceberg in virtually all European countries and discussed in more detail in Chapter 8, section 8.2 – they are enrolled in separate primary schools for children with learning difficulties in drastically overproportionate numbers because they are usually not able to follow the teaching in the official language and are therefore wrongly perceived of as suffering from an intrinsic learning deficit (see also Chapter 7, section 7.1). Thereby they are discriminated against vis-à-vis equal opportunities for educational attainment, as higher drop-out rates in primary and secondary education prove. The systemic and continued discrimination in educational attainment then leads to their exclusion from the formal labour market or – due to their lacking formal education – they have to accept the lowest paid jobs at the bottom of the hierarchy. Without adequate income they are, finally, not in a position to improve their housing situation or the educational opportunities of their children, which closes the *intergenerational vicious circle*. Hence, ethnic discrimination and socioeconomic inequality have a systemic relationship: each reflects and accentuates the other. Discrimination based on ethnicity is thus 'both the cause and effect of socio-economic exclusion' (Goodwin 2009: 137–40).

Another example can be given with the case ECtHR *Yordanova v. Bulgaria* (2012). It is necessary to recapitulate the factual background of this case in more detail in order to be able to carry out a critical ideological analysis of the arguments of the respondent government, but also the reasoning of the judgment of the court. The starting point is the attempted eviction of a number of Roma families who had built homes several decades ago on state owned land in a neighbourhood of Sofia without any authorisation and lived there – in the wording of the court – 'isolated from the rest of society, without sewage or plumbing and using water from public fountains'. They had never sought to legalise their buildings due to this 'isolation' and their 'poverty'. After the breakdown of communism in Bulgaria and legislative reforms, the land 'occupied by the applicants' became the property of the

Sofia municipality. Until 2005, the state and municipal authorities had never taken steps to remove the applicants and their families. In September 2005, almost all of the inhabitants of the Roma settlement, including the applicants, were requested by the district mayor to leave their homes within seven days after a private investor had become involved in urban reconstruction plans. The applicants contended that 'the real aim pursued by the authorities was to free the terrain so that it could be leased or sold to a private entrepreneur for development and to "rid" the district of an unwanted Roma "ghetto". Those were illegitimate aims' (ECtHR, *Yordanova v. Bulgaria*, 2012: para. 86).

On appeal granted by the Sofia City Court and thus staying the proceedings, a committee representing the Roma residents signed an agreement with the municipal authorities which detailed that the municipality would offer alternative housing. On the merits of the case, the court, however, ruled that the removal order was lawful, which was upheld also by the Supreme Administrative Court in June 2006 on the simple grounds that 'the applicants had not shown a valid legal ground for occupying the land'. The application against the Republic of Bulgaria was lodged with the ECtHR immediately afterwards, claiming a *violation of Article 8 ECHR*, the 'right to a home' in this case *in conjunction with Article 14*, the legal guarantee that the rights and freedoms under the ECHR can be enjoyed without discrimination on any ground, particularly relevant for this case, with regard to 'national or social origin' and 'association with a national minority.' Following from this, attempts to remove the applicants failed, nor was a viable resettlement plan ever elaborated by the municipal authorities. Quite contrary, the mayor publicly announced that 'the municipality could not give them priority over other people who had been on the waiting list for many years'. In September 2010, the ECtHR declared the case partly admissible.

In the following proceedings, the government – in the summary given by the Court – responded against the claims of the applicants that it would rely on private complaints in terms that disclosed clear racist prejudice in the following way:

> [T]he decision to remove the applicants' houses was motivated solely by the need to enforce the law on illegal constructions and put an end to a situation which posed a sanitary risk and disfigured the city landscape. … The applicants were not entitled to privileged treatment because of their ethnic origin or traditional lifestyle. They were not being treated in a discriminatory manner, measures against illegal occupation being undertaken regardless of the ethnicity of the persons concerned. … Moreover, the one-sided presentation of the problems of the Roma population in Bulgaria by their self-appointed representatives seeking popularity stirred tension and provoked reactions from other ethnic groups. The Government were against such attempts to incite ethnic hatred. The reality was that there were two sides in the dispute: the lawful residents of the neighbourhood and the applicants, who occupied municipal land without title and 'whose way of life is in contradiction with public norms and rules and in this sense generates tensions in society'.
>
> (ECtHR, *Yordanova v. Bulgaria*, 2012: para. 97)

How do you assess these submissions by both the applicants and the government? Is relocation to alternative housing after more than 30 years undisturbed living in a ghetto in abject

poverty *unjustifiable privileged treatment* because of the claimants ethnic origin? Are the racist prejudices of the neighbours of the Roma settlement rebutted by the government? Are the Roma residents' representatives who are declared self-appointed by the government illegal or not acting in the interests of the residents? Do they provoke tensions or incite ethnic hatred when they negotiate and conclude an agreement with the municipal authorities for alternative housing? Who are 'the lawful residents' in actual fact in opposition to 'the other side of the dispute whose way of life is in contradiction with public norms and rules'? Are they simply lawful citizens and nothing else?

The Court, in its final conclusions ruled that:

> there would be a violation of Article 8 in the event of enforcement of the deficient order of 17 September 2005 since it was based on legislation which did not require the examination of proportionality … and also involved a failure to consider the question of necessity in a democratic society.
>
> (ECtHR, *Yordanova v. Bulgaria*, 2012: paras 144–49)

Concerning a violation of Article 14 ECHR in conjunction with Article 8 the Court ruled, however, that 'no separate issues' had arisen under Article 14, the non-discrimination clause, because the applicants' complaint that the removal order was based on racist attitudes against them was an issue of 'whether a hypothetical future enforcement of the removal order would be discriminatory. The Court cannot speculate about the timing and modalities of any such enforcement and assess the Article 14 issue on the basis of a hypothetical scenario'.

How do you assess this outcome? Is this reasoning jurisprudential art and wisdom to find a Solomonic compromise? Or is this reasoning simply a circumvention of the question which racial prejudices and motivations, following in particular from the submissions of the government, did in fact play a strong role decrying that positive measures on behalf of a minority are – by definition – reverse discrimination against the ethnic Bulgarian majority population? Is the seemingly ethnically neutral argument of the Court, thereby obviously following the litigation strategy of the government, that 'plans to transfer the land to a private investor for development purposes' so as to establish 'modern dwellings meeting the relevant architectural and technical requirements … a legitimate aim in the interests of economic well-being and the protection of the health and the rights of others' not simply a *trivialisation* of *(structural) racial discrimination* which has been going on for decades when you compare the different reasonings of the Court specifying the meaning of the 'right to home' (Article 8 ECHR) and the prohibition to discriminate in this right (Article 14 ECHR) with the application of these interpretative reconstructions to the determined facts of the case?

In the section of the judgment under the proportionality test in the narrow meaning (see Chapter 2, section 2.1), the Court critically assesses the government's submission by declaring that:

> … in the present case the authorities have refused to consider approaches specially tailored to the needs of the Roma community on the ground that such an attitude would amount to *discrimination* against the majority population. In this connection, in

> the Court's view, there would be a contradiction between, on the one hand, adopting national and regional programmes on Roma inclusion, based on the understanding that the applicants are part of an *underprivileged community* whose problems are specific and must be addressed accordingly, and, on the other hand, maintaining, in submissions to the Court, as the respondent Government did in this case, that so doing would amount to *'privileged' treatment* and would *discriminate* against the majority population …
>
> (ECtHR, *Yordanova v. Bulgaria*, 2012: para. 128, emphasis added)

And, the reasoning goes on:

> The latter argument fails to recognise the applicants' situation as an *outcast community* and one of the *socially disadvantaged groups* …. Such social groups, regardless of the ethnic origin of their members, may need assistance in order to be able effectively to enjoy the same rights as the majority population …
>
> (ECtHR, *Yordanova v. Bulgaria*, 2012: para. 129, emphasis added)

Hence, in light of the Court's wording above concerning the 'situation as an outcast community', how do you now assess the conclusions drawn in the following paragraph 130?

> The above does *not mean* that the authorities have an *obligation* under the Convention to *provide housing* to the applicants. Article 8 does not in terms give a right to be provided with a home … and, accordingly, any positive obligation to house the homeless must be limited …. However, obligation to secure shelter to *particularly vulnerable individuals* may flow from Article 8 of the Convention *in exceptional cases*…
>
> (ECtHR, *Yordanova v. Bulgaria*, 2012: para. 130, emphasis added)

What are the underlying ideological and political assumptions *in your opinion* that the Court, on the one hand, qualifies the applicants' situation euphemistically first as that of an 'underprivileged', but then even 'outcast community' and, on the other, denies not only a 'right to be provided with' an alternative 'home' since they shall be evicted from their – disputably – 'illegal' homes? Why does the majority opinion also change its assessment from the *group-related perspective* ('outcast community', 'socially disadvantaged group', 'majority population') to the denial of a positive state obligation to secure 'shelter', not even to members of the affected group/community, but only to 'particularly vulnerable *individuals*' and even then only 'in exceptional cases'?

In conclusion, not only from this case, we agree with Sandra Fredman's (2016) analysis that *race discrimination* in Europe can be seen to operate along *four dimensions* identified above: first, there is a vicious cycle of disadvantage; second, stigma and prejudice in the arguments of authorities; third, the lack of voice and exclusion from political and social decision-making processes; and, finally, lack of any effort for structural change on the side of state authorities. Hence, the judgments and reasoning in *Yordanova* (2012) and the ECtHR case *Ciorcan v. Romania* (2015), returning to a focus on subjective intent in police violence, must be called a 'serious regression' (Fredman 2016: 287) in the development of minority protection.

The ideological and legal battles concerning this issue bring us to the next section, namely the question whether this *trivialisation* of racist attitudes in the case above through the reference to ethnicity and only seemingly neutral public norms and rules in contradiction with the ways of life not only of Roma and Sinti, is *deeply rooted* in the fault lines of the combination of the ideologies of *liberalism* and *nationalism*.

4.3 Fault lines of liberalism and nationalism: the conundrums of the liberal-democratic state

Whereas, in the American context, *race* and *ethnicity* increasingly became *homologous concepts* as a consequence of the Civil Rights Movement in the 1940s and 50s (Glazer and Moynihan 1975; Fenton 2010: 25–36) without much critical reflection, *European concepts* of *ethnicity* are – due to Europe's experiences with National Socialism and the Holocaust – no longer connected to the classic, biological concept of race, but frequently based on a combination of *ethnicity* with the concept of *culture*, as we saw in connection with the neo-racist approach of the French *Nouvelle Droite*. In other words, authenticity need not necessarily be linked to the alleged purity of biological descent, but can also be combined with the notion of origin in terms of culture, implying that some sort of *primordial* or *perennial* cultural homogeneity must have existed 'from the beginning' (Smith 2010: 47–65).

Andreas Wimmer has referred to this as the as the 'Herderian legacy' (Wimmer 2013: 16–21; see also Chapter 3, section 3.2) of the equation of (collective) *identity* with *culture* and *political community* stemming from the idea that a homogenous culture based on one language expresses the identity of a given community of peoples. This legacy can, however, also be found in the *modernist theories* of nations and nationalism of Clifford Geertz and Ernest Gellner as well as in Anthony Smith's *ethno-symbolist theory* (Smith 2010). He declares that 'ethnies' must not be confused with 'nations' and states (ibid: 10), so that the latter combination in the form of a national state does not require 'cultural homogeneity', but only 'a measure of national unity' (ibid: 17–18). But he insists that nations must be 'located in the framework of earlier communities, especially ethnic communities', obviously referring to the title of his earlier book on the *Ethnic Origins of Nations* (Smith 1986). Such 'ethnies' are, according to his definition, based on 'cultural materials' in combination with 'emotional kinship ties and ethnic sentiments' (ibid: 85, 108), so that 'the nation is inconceivable outside a world of ethnicity and particular nations are unlikely to emerge except on the basis of prior ethnic ties' (ibid: 93). Insofar as these latter phrases shall not be misunderstood as 'essences' (ibid: 22), his ethno-symbolist theory begs, however, the question as to what the precise *relationship* between *culture and ethnicity* should be: are the terms 'ethnicity' and 'culture' synonymous, as the Herderian legacy in the primordial theories of nationalism and ethnicity (Fenton 2010: 71–87) seems to imply? Or must ethnicity and culture be kept apart as theoretical constructs in order to avoid the naturalist fallacy of the ideologies of racism and ethno-nationalism and the primordial theories of nationalism? Is thus the *combination* of *liberalism* and *nationalism* and therefore a 'non-ethnic' concept of culture (Wimmer 2013: 61) underlying theories of *liberal* or *civic nationalism* and *civic republicanism* the *alternative* against

all those ideological pitfalls of the 'fateful triangle' (Hall 2017) of the categories of race, ethnicity and nation?

However, as we try to show in the next subsections, the combination of liberalism and nationalism does not help to overcome either the Böckenförde or the Jennings paradoxes as long as the ethnic – civic, culture – politics, and private – public dichotomies are not overcome. To transform these dichotomies simply into a continuum with these categories as extreme poles on the respective ends so that 'thick' ethnicity, nationalism or patriotism will become 'thin' and 'thinner' (Kostakopoulou 2006) will not only end up in three conundrums of the liberal-democratic state, but also remain trapped in the dichotomisation of individual versus group rights.

4.3.1 The nexus of the identity fiction, the majority principle and the myth of neutrality

The first conundrum follows in the form of the intractably interwoven nexus of what we call the 'identity fiction' with the majority principle and what Kymlicka has termed the 'myth' of liberal neutrality (Kymlicka 2002: 343–47) underlying the Böckenförde paradox. Thus, what makes the difference between ethnic or civic in the meaning of (only) political community for the problem of social cohesion and/or political unity?

Liberal nationalists refer to theories of civic nationalism and the concept of nationality as a feeling or sentiment of belonging and solidarity in terms of attachment to the nation in the tradition of John Stuart Mill (Mill [1861] 1991) and Ernest Renan ([1882] 1992) and insist that all persons must be protected by the liberal state against discrimination. Hence, nationality shall be understood as a *political community*, again based on a *commonality of language, culture and collective identity*, not, however, in ethnic terms as a thick community of culture, but simply forming a societal culture. Such a *thin conception* of nationhood would not violate *state neutrality*, but provide the necessary *trust* and *solidarity* for social cohesion and political unity (Tamir 1993: 90; Miller 1995: ch. 4; Miller 2005: 119). Consequently, in their conceptualisation of rights, liberal nationalists argue, in a similar way to individualistic liberals and liberal egalitarians, that the prohibition of discrimination by state authorities as well as private actors – what is called in technical language horizontal effect as was the case in ECJ, *Achbita v. G4S Secure Solutions* (2017) in the introduction – is sufficient so that there is *no need for minority rights* as special rights.

Liberal egalitarians, such as Brian Barry (2001), but also *neo-conservatives*, such as Arthur Schlesinger (1992), have – in reproach of the communitarian critique of *individualistic liberalism* (see Avineri and de-Shalit 1992) and their requested 'politics of recognition' (Taylor 1994) argued, that all *group-related rights* and affirmative action *policies* (see also Chapters 7 and 8) are inherently *unfair* and thus 'reverse discrimination.' Their critique can be summarised in three major lines of argumentation:

1) The affirmative action policies *privilege* only certain groups and their in any event most affluent members who had, however, never been themselves victims of past *de jure* discrimination.

2) These policies are leading to *societal fragmentation* and *political conflict* and are therefore *dangerous* for political unity and social cohesion. Barry sees the problem as one whereby *multicultural*, defined as *group-differentiated*, policies 'rewards the groups that can most *effectively mobilise to make claims* … or *reward ethnocultural political entrepreneurs* who can exploit its potential for their own ends' (Barry 2001: 21, emphasis added).
3) Such 'sectarian' policies would lead to *cultural essentialism* and in the end to *cultural relativism* when excusing illiberal practices such as forced marriages or female genital mutilation. According to Schlesinger, the recognition of ethnic diversity is dangerous as it would result in an America which is no longer composed of individuals 'making their own unhampered choices', but in an America composed of ethnic groups, thereby leading to 'replacing assimilation by fragmentation', and 'integration by separatism' (Schlesinger 1992: 16–17).

In conclusion, *assimilation* would remain the *only choice* to avoid fragmentation and separatism or, as the second best option, *cultural diversity* must remain a *private affair.* And he claims that it is exactly the *duty* of the *liberal state* to *remain neutral* vis-à-vis cultural diversity in the same way it is neutral vis-à-vis religious denominations. Simultaneously, liberals and neo-conservatives claim that a universalist (i.e. individualistic) *anti-discrimination approach* should be applied by the liberal state in order to protect the 'dissenters' within communities against illiberal 'internal restrictions' and duties imposed by community leaders. As can be seen from Chapter 3, section 3.2, this is in line with the French Jacobin *civic-republican tradition* of nation building or all of the legal discourse in the United States about an allegedly *colourblind constitution* (Kennedy 2013a), which is based on a strict *state versus private* sphere dichotomy.

Will Kymlicka, however, is certainly right that we will not get anywhere near solving the problem of social cohesion and political unity under liberal-democratic auspices when the *dichotomy* between *liberalism* and *communitarianism* is upheld as a debate between, on the one hand, a sovereigntist, *libertarian concept of society*, based on the view that individuals can 'opt out' of social practices and groupings (i.e. 'cultural structures') whenever they want, and, on the other, the communitarian *social thesis* approach, whereby individual self-determination can only be exercised within social roles defined by community practices (Kymlicka 2002: 221–5, 244, 252). Therefore, in line with Kymlicka's seminal distinction between 'external pressures' and 'internal restrictions' (ibid: 341), the question is raised as to how the liberal neutral state can *reasonably accommodate cultural diversity* without simply relying on a market and economy geared process, as this is postulated by advocates of *muscular liberalism* in debates about the 'backlash of multiculturalism' (see Chapter 1) and their quest not to protect minorities, but the majority culture:

- *Policy is not a cure-all*. Although promoting social cohesion is a worthy goal, policy may not be the most efficient means to get there; integration may be best left to labour markets, educational systems, and other institutions not specific to immigrants.
- *Policies must protect the majority culture*. States should practice 'gentle pluralism', in which those minority accommodations that are *constitutionally required* do not come (or are not

> perceived to come) at the *cost of the majority* – this is what inflames populism (Joppke 2012: 1, emphasis added).

However, does this position of a liberalism by 'toleration of diversity' within the limits defined by the majority and its values, traditions, and language, in short, of the 'majority culture', which had also been used by Advocate General Kokott as ideological frame, not lead to full assimilation instead of integration by the market, as Joppke claims above? And if such a need for 'structural assimilation' into status positions of state and society with simultaneous cultural pluralism upheld in the private sphere (Esser 2001: 64–8) is asserted, how voluntary or coercive then is (only) *structural* assimilation? And is his categorical distinction between structural and cultural assimilation then nothing but superficial? To make matters even more complicated, Rainer Bauböck has argued in a rejoinder to Will Kymlicka's article 'Solidarity in Diverse Societies' that there is not only a dilemma, but 'a progressive's trilemma' which liberal nationalism does not resolve: 'the trilemma is between openness for immigration, multicultural inclusion and social redistribution' in terms of necessary tradeoffs in practice in the implementation of these concepts and principles, even if 'claims to admission are based on *needs* rather than *belonging*' and a 'positive feedback loop between the horns of the trilemma' would require more openness for immigration to be able to maintain welfare states in rapidly ageing European societies (Bauböck 2016: 4–6, emphasis added).

Thus, liberal-individualistic, liberal-egalitarian and liberal-nationalist ideological positions tend to allow – based on the public–private dichotomy – for *individual* voluntary cultural assimilation, but *deny* at the same time that the liberal state must recognise a right to *preservation* of *language* and *culture of minorities* (Patten 2014: 29, 187). Consequently, does this mean that we could conceive of an 'ethnicity without groups' (Brubaker 2004) and a 'Multiculturalism without Culture' (Phillips 2007)? However, as both Brubaker (2004: 79) and Phillips make clear:

> *culture matters*, as part of the *way we give meaning to our world*, as an important element in self-ascribed identity, and as one of the mechanisms through which social hierarchies are sustained. Material inequality – measured in terms of income, education employment, housing, and so on – continues to have a recognisable group quality … As part of the way that people give meaning to their world, culture will always be inescapable.
> (Phillips 2007: 15, emphasis added)

In other words, Phillips' definition of a *multiculturalism* that she wants to defend dispenses not with culture, but 'with reified notions of culture or homogenized conceptions of cultural group' (ibid: 179), despite the book title being confusing at first glance. However, agreement with the diagnosis does not mean that we must follow her proposed therapy. Her concept of multiculturalism shall again be 'grounded in the rights of individuals rather than those of groups'. In her approach, 'cultures have no rights to respect, funding, or survival – only … individuals do' and she does 'not see cultures as all-inclusive ways of life that can be categorised according to their core beliefs or traditions', so that she rejects to 'see multiculturalism as a way of distributing power and authority between different cultural groups' (ibid: 162). Her definition of multiculturalism then is by no means different

from the liberal-egalitarian position of Brian Barry. Like liberal-individualistic or egalitarian as well as French civic-republican positions against affirmative action (Gilbert and Keane 2016), she reduces cultural diversity to the problem of socioeconomic inequality as a single explanatory factor. Therefore, she is obliged to declare anti-discrimination laws and policies a cure-all, in the words of Joppke, cited above. However, this overlooks or ignores all forms of structural discrimination that follow from the racialisation of persons *irrespective* of their socioeconomic status, as we showed in the previous section. Hence, our main argument – in line with our neo-institutional sociological theory (see Chapter 2, section 2.2) – is that neither *culture* nor *socioeconomic structure* can be reduced to monocausal explanatory theories, as if either culture or socioeconomic inequality alone could explain each and every aspect of the behaviour of individuals and groupings.

The dichotomisation between individual and group rights and thus the anti-discrimination and minority rights approach became also a hotly contested debate between *multiculturalists* and *interculturalists* (see Modood 2018).

Ricard Zapata-Barrero has recently summarised his conceptualisations of interculturalism in what he now calls a 'post-multicultural era' (Zapata-Barrero 2017). He thereby identifies three historical and political dimensions, which he calls the 'tradition/stability/diversity nexus', a 'cohesion/social inclusion/diversity nexus' and an 'innovation/development/diversity nexus', which form an 'intercultural triangle' of 'interculturalism as a comprehensive approach'. Each of these dimensions is again characterised by what he calls policy drivers: The first tradition/stability nexus is seen as a designated 'set of established values and beliefs transmitted from generation to generation' and has to be interpreted 'as jeopardised by diversity dynamics'. Intercultural policies shall then be understood as trying to achieve a 'dynamic equilibrium' between the 'survival of the national identity and respect for the rights of minorities'. The cohesion/social inclusion nexus shall be interpreted as an 'intercultural strategy and policy mechanism for generating trust and mutual understanding and for breaking down prejudices, stereotypes and the misconceptions of others' to avoid the segregation of people, especially in neighbourhoods and cities. The innovation/development nexus finally sees intercultural policies 'as an instrument for promoting development in a diverse society' which is 'creativity based' and which shall demonstrate that 'in a problem-solving situation, heterogeneous groups have better tools to provide a variety of responses than homogenous ones'. Taking all of this together, his intercultural approach shall provide the ground for 'considering people not only as agents of rights but also agents of development' in terms of Amartya Sen's 'capability approach' (Zapata-Barrero 2016). He concludes, that his intercultural approach is different from multicultural approaches, in the following respects: First, 'the European view of interculturalism can be seen as a policy rebellion of cities against the state domination of policy in recent decades'. Second, interculturalism must be seen as a 'contacts-based policy paradigm' in contrast to the 'rights-based (multiculturalism) and the duties-based (national civic) approaches to integration'. Third, it:

> is an evidence-based policy … much closer to an engineering model …. This origin provides interculturalism with two main strengths: *proximity*, as it primarily promotes face-to-face relations and develops most of its policies at the micro-level, … and

> *pragmatism*, because action and practice prevail over any preconception of ideal justice or equality.
>
> (Zapata-Barrero 2017: 13–14; emphasis in the original)

Finally, with regard to interculturalism, it is said that:

> it can attract many types of governments and political parties and show how it is non-ideological. This means that the [intercultural policy paradigm], when incorporated as a city project for managing diversity, 'resists' ideological variations in political governments, and is colour-blind from an ideological point of view.
>
> (ibid.)

Zapata-Barrero's effort to translate Quebec's approach of interculturalism (Bouchard 2016) into a European context certainly is an important step in overcoming the ideological fallacy of the dichotomisation between different strands of the ideologies of liberalism and nationalism and their relationship to different stages or phases in the development of the ideology of multiculturalism. However, by declaring that his approach of interculturalism is, through means of a 'mainstreaming policy' as the main instrument, the one and only '*non-ideological*' approach towards 'managing diversity', to be made use of by all actors in society in order to be able to overcome the 'immigrant/citizenship divide', *resembles* very much the ideological *myth of neutrality*, whereas his determination to stress tradition, stability and social cohesion in *defence* of the *majority culture* comes close to the *liberal-nationalist* ideology. Without a discussion about the necessary legal instruments and their combination in terms of institutional arrangements, the notion of a 'dynamic equilibrium' or 'mainstreaming policy' can neither explain what or who are the more powerful political driving forces in practical situations. Nor can it offer a normative orientation towards whether, or under which circumstances, anxieties of the majority population are legitimate and have to be respected, so that immigration shall be restricted and immigrant integration made more difficult, or whether anxieties of the majority are based on xenophobic prejudices and therefore must not be seen as legitimate. Additionally, a mainstreaming policy cannot be a cure-all for structural disadvantages amounting to structural discrimination.

In comparison, we therefore have to discuss Tariq Modood's approach and effort to *deconstruct* the *dichotomy* of *multiculturalism* versus *interculturalism*, which denies the dichotomy of individual versus group rights, whereby he summarises the *structural* components of a theory of multiculturalism in and from a European context. Against 'the classic idea of equal citizenship in liberalism to be the right to assimilate to the majority or dominant culture in the public sphere, with toleration of difference in the private sphere' and the liberal concept of non-discrimination on the basis of equality in terms of 'sameness' leading to 'two classes of citizenship', he argues that multiculturalism is *not* based on *toleration* of diversity, *but requires*:

> the *right to have one's difference recognised and supported* in both the *public and private* sphere. So *no group, no minority* can be told … do not make demands on mainstream

> public institutions. The multicultural response is that this is not equality. … It follows then that *multicultural equality is more than individual rights* and more than what we might call colour-blind equality, equality as sameness.
>
> (Modood 2016: 481, emphasis added)

Hence, Modood's conceptualisation of (European) multiculturalism requires the recognition of groups and their cultural diversities and their accommodation, *not only* at the level of *individual rights*, but also at the level of *group equality*, without however promoting the idea of social closure in terms of a culturalist concept of groups (for the sociological background, see Chapter 5, section 5.2). Instead, he claims that multiculturalism requires:

- first, in terms of anti-discrimination law, the 'effective' protection of members of minority groups from 'racism, including cultural racism and Islamophobia – not protection from majority culture' per se;
- second, there should be 'no insistence on assimilation, nor should there be any hindrance against uncoercive social processes of assimilation or self-chosen assimilation';
- third – in stark contrast to Bouchard's interculturalism – there should be multicultural accommodation of minorities recognised as groups within shared public institutions; so that
- the 'last "right of minorities" is that they should be able to make claims on national and civic identity … as part of multicultural citizenship' (Modood 2016: 481–2).

Finally, we must also present Will Kymlicka's *liberal-multicultural approach*. He argues *against* the *liberal nationalists* that there are 'compelling interests' related to culture and identity which are fully consistent with liberal principles of freedom and equality and which justify granting *special rights to minorities* (Kymlicka 2002: 339–40). He then distinguishes, however, between 'good' and 'bad' minority rights, so that he calls his position a *liberal cultural position*, which defends these 'good' minority rights. In line with communitarian thinking he argues that the language and culture in which people are born and raised are not voluntarily chosen circumstances and having to abandon them as a precondition for being allowed to assimilate into mainstream society has been, and often still is, a very difficult and costly process for national minorities and immigrants alike. Thus, it must be seen as unfair to bear these burdens and costs when members of the majority do not face the same problem, whereby, for instance, an official language for the administration and in public education is constitutionally entrenched based on the argument that it is simply an instrument for the proper functioning of the respective liberal-democratic state. Hence, *permanent language rights* for national minorities, *land rights* for indigenous peoples or *special representation rights* in parliament or the executive should be seen as *fair compensation*. Despite of his critique of Kymlicka, Alan Patten also comes to the same conclusion in his defence of 'strong cultural rights' for minorities (Patten 2014: 183–4). He does, however, like Phillips, deny a right to preservation of their language or culture (ibid: 29, 187). Translated into legal conceptualisation, as we see in more detail in Chapter 8, section 8.3, this means – in contrast to Kymlicka's advocacy of *permanent* cultural, social and political rights *of* minorities to guarantee 'full and effective equality', to

use the terminology of Article 14 FCNM – that affirmative action policies *on behalf of* minorities are always conceived of as *temporary measures* in order to achieve *equal opportunities*. Moreover, according to Kymlicka, minority rights do not place minorities in a position to dominate other groups but place groups on an equal footing. 'Minority rights are thus compatible with liberal culturalism *if* they protect the *freedom of individuals within the group* and *promote* the *relations of equality (non-dominance)* between groups' (Kymlicka 2002: 342, emphasis added).

So what? Have we come full circle now in light of Kymlicka's distinction between good and bad minority rights and the reproach of liberals, conservatives and civic nationalists alike that all minority rights will lead to cultural essentialism, moral relativism, societal fragmentation and eternal conflict – requiring from minorities either assimilation or that they accept, as in the tradition of Greek tragedies the, however, no longer personified Moira but abstract *fate* of exclusion and discrimination in its various forms? Thus, do we have to address the same question, posed at the very beginning of this book, namely why *should* we protect minorities at all and if we should, how *can* we *effectively protect* them?

However, as we have tried to demonstrate in this section, *none* of the ideological varieties of liberalism, conservativism or nationalism discussed so far, be it liberal culturalism, interculturalism, liberal nationalism or civic republicanism, can resolve the Böckenförde paradox and its problem of what will create trust and solidarity to achieve or maintain social cohesion and political unity. They all remain trapped in the *persistent inherent ideological biases* following from the nation-cum-state paradigm of denying or at least ignoring the phenomenon of cultural groupings in a minority position and the dichotomy of 'good', because liberal, rational, inclusive nationalism of the majority population and culture and 'bad', because illiberal, irrational, exclusive nationalism of all minority groups and cultures in the tradition of Kohn.

Hence, simply redefining a so-called common language, culture, and their values into a societal culture (Patten 2014: 64, 206–8), which others have to accept for instrumental purposes, has rightly been labelled by Kymlicka as the myth of the liberal, national states neutrality (Kymlicka 2002: 343–7). Even if the language of the majority of the population is not legally declared to be the official language of the state, owing to the normative power of the overwhelming numbers of individuals being part of the majority population and its culture, individuals with the wrong mother tongue and/or other sociocultural practices will be put under pressure to use the majority language and to give up their different social practices if they do not want to risk discrimination, deprivation and/or marginalisation in almost all spheres of life. Most liberals as well as liberal nationalists, however, *naturalise* the *instrumental function* of language *as if* a natural preponderance of the majority population and its culture were offering equal or 'fair opportunities' (Patten 2014: 155) in everybodys rational interest, so that they can defend the purported neutral functioning of liberal democracy and the rule of law. However, as Kymlicka rightly argues, the policies supported by those liberals and liberal nationalists will be a *politics of benign neglect* at best (Kymlicka 2002: 343), not recognising the assimilative forces following from such an approach both under the French and German models of the national state, as we learned in Chapter 3. Likewise, Tariq Modood argues against theories and policies of *interculturalism* along the same lines, when by the mere fact of what he calls

'sociological privilege', members of the majority culture will 'enjoy advantages of identification, access, discursive and other capabilities – in short, a certain kind of cultural capital or cultural power – over those who are less steeped in the majority and therefore the national culture' (Modood 2014: 7). Hence, the problem of liberal or civic nationalism 'in a nutshell', as Ronald Beiner defined it, is 'how to privilege the majority cultural identity in defining civic membership without consigning cultural minorities to second-class citizenship?' (Beiner 1999: 9; Bosniak 2006: 122–40).

Second, in the actual practice of both models of national states, we can observe an additional phenomenon that has to be called the *identity fiction* (Marko 2008b), when the culture of the respective *majority* population (which can also be a minority at the national level, but a majority at a sub-national territorial level) is taken for the *whole* culture of the state or territory over which it claims to have *absolute* jurisdictional power. This identity fiction is thus the consequence of *all forms of nationalism* as *ideology* following from the *equation* of the normative principle of *sovereignty-as-indivisibility* with the mental concept of the *nation,* as we learned from Abbé Sieyès rhetorical question in Chapter 3, section 3.2. This problem will be *aggravated*, in particular, in situations of simultaneous and thus *competing nation-building processes*, as we learned, for instance, from the example of the newly independent Republic of Macedonia (Figure 4.1) between 1991 and 2000, with the conclusion of the Ohrid Agreement to prevent civil war at the end of the hostilities.

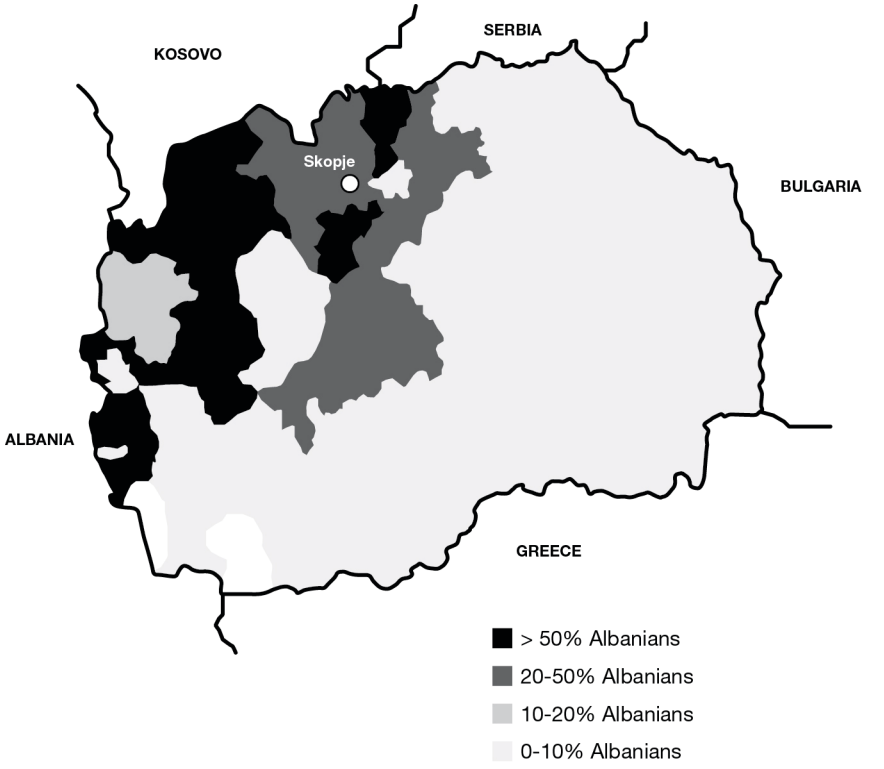

Figure 4.1 Distribution of the Albanian population in Macedonia

The two competing nation-building processes between the majority nation and the minority nation, whose political leaders never accepted the constitutional status of a national minority, and the spiral into violent conflict, were based on the *power asymmetry* following from an *identity fiction,* according to which Macedonian Slavic-speaking people called themselves 'Macedonians', but never Albanian-speaking Macedonian citizens (Marko 2006b).

Hence, the nation-building efforts of the majority population through the instruments of state and law result in discrimination and/or exclusion for minority groups and will frequently result in ethno-nationalist claims of the minority groups themselves (i.e. what Brubaker has labelled 'the nationalism of national minorities'; Brubaker 1996: 4–6), often ending with a spiral of competing claims and – worse – violent conflict (Marko 2012a), which we also analyse in the next subsection in the case of Catalonia between 2010 and 2017.

Against the normative, dichotomic conception of ethnic nationalism as a bad form versus civic nationalism as a good form, in the tradition of Kohn, with the latter purportedly providing for social cohesion and political unity because of its purported inclusiveness and neutrality for the functioning of democracy and rule of law, we can recognise the intimately interwoven *nexus* in the concepts and principles of *ethnic*, *civic* and *national* when the latter two terms and concepts are simply equated with political communities, but remain based on the *absolutist* and therefore *exclusivist* sovereignty-as-indivisibility doctrine. Therefore, the identity fiction in combination with this sovereignty doctrine is also an essential element of another conundrum of liberal-democratic states: what shall be the guiding concepts and principles for the interpretation of claims for individual, but also collective self-determination? The principle of *sovereignty* and the respective billiard ball model of society or the principle of *autonomy,* requiring the recognition of the interdependence of social and political relations? Is there a *democratic right to national self-determination*, including unilateral secession, as many liberal nationalists claim?

4.3.2 Sovereignty or autonomy? Two forms of collective self-determination

As can be seen from the new secessionist movements in Scotland, Catalonia and Flanders, nationalism has not only been the legitimising ideology in minority conflicts after the collapse of communist regimes and states in Eastern and Southeastern Europe in 1989 (Lantschner *et al.* 2008, 2012; Agarin and Cordell 2016: 33–56). Also constitutional reform in Belgium, devolution in the United Kingdom and asymmetric regionalism in Spain (Gamper 2004; Palermo *et al.* 2009; Joppke and Seidle 2012; Benz and Knüpling 2012) were politically driven by *civic-nationalist* political parties, so that a *national paradox* had become visible by the end of the 1990s, namely a 'renaissance of ethnicity' – no longer in the primordialist definition of older theories of nationalism (see above), but in sociological terms of social closure and structural polarisation of societies (see in detail in Chapter 5, section 5.2) – against the 'old' national states (Marko 1995). The leaders of the Scottish National Party, the Catalan *Convergència i Unió* and the Flemish Nationalist Party no longer accept that Scotland, Catalonia or Flanders are simply regions, having more or less autonomy within their respective national states (Gagnon and

Tully 2001; Daftary and Troebst 2003; Noel 2005; Keating 2008a; McGarry *et al*. 2008; Tierney 2008; Martiniello 2012; Nagel 2013; Medda-Windischer and Popelier 2016). Symbolically speaking, they understand themselves to be 'stateless nations' (Keating 2001a, 2001b), with a right to *national self-determination* for the formation of a newly independent state.

It is quite obvious from these new separatist movements and parties in Western Europe that their claims to separation and independence are not based on 'just-cause-theories of secession' (Norman 2006: 183), in terms of 'remedial' secession (for an overview, see Roepstorff 2013 and for a critical review, Harzl 2018) because of previous occupation, as had been the case for the Baltic countries in 1939, or on grave violations of human rights, for instance through an attempted ethnic cleansing as had occurred in Kosovo in 1998–99 (Weller 2009). So do Scots, Catalans or the Flemish nevertheless have a right to national self-determination, including secession, in terms of public international law or national constitutional law (see also Mancini 2012), based on the principle of democracy, including a quasi-natural *democratic right to secession*?

In the comparable case of Quebec, the Canadian Supreme Court ruled in *Reference re Secession of Quebec* (1998), that *neither* from the perspective of public international law *nor* national constitutional law does Quebec have a *right to unilateral secession*:

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.
>
> (Canada, Supreme Court, *Reference re Secession of Quebec*, Judgment of 20 August 1998)

Moreover, the Court ruled, also under Canadian constitutional law, that such a right to unilateral secession does not exist, so that the question of *independence* has to be resolved by *political negotiations* within the *framework* of the limits set by *constitutional principles*. In conclusion, the Court argued that *in case a referendum* should decide *in favour of independence*, the rest of Canada 'would have no basis to deny the right of the government of Quebec to pursue secession'. At the same time, however, Quebec could not, despite a referendum result with a 'clear majority', invoke a right to self-determination in order to dictate the terms of a proposed secession to the other parties of the federation. The 'democratic vote, however strong a majority', would have *no legal effect on its own* and *cannot push aside the other constitutional principles*, in particular federalism, democracy, the rule of law, and the protection of minorities.

Hence, the Canadian Supreme Court has denied – in line with the principle of territorial integrity under public international law – the applicability of what Wayne Norman calls 'democratic choice-theories' (Norman 2006: 183); that is, the right of any geographically defined group to unilaterally secede if the majority of its members choose to, and irrespective of the fact regarding whether such groups perceive themselves as nations or not.

However, are the political actions carried out by the *secessionist movement in Catalonia*, such as the mass demonstrations in the streets of Barcelona over the last couple of years organised by civil society organisations or political parties and the legal acts adopted in parliament, by definition 'illegal'? And when *seen* from a *conflict management perspective*, can legal

prohibitions effectively stop separatist movements from pursuing their goals? As we can see from the decades-long political history of nationalist movements in Quebec, Scotland, Catalonia or Flanders, the answer is quite obviously 'No'.

Moreover, in a democratic system, *the pursuit of secession without violence is protected* by the *human right guarantees* of freedom of expression and freedom of association, in accordance with Articles 10 and 11 of the ECHR. As the ECtHR ruled in 1976:

> Freedom of expression constitutes one of the essential foundations of [a 'democratic'] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.
>
> (ECtHR, *Handyside v. UK*, 1976)

But is it not true that the claim to secession is more than simply 'disturbing' or 'shocking' and thus falls under the restrictions of paragraph 2 of Article 10 ECHR? Should not the survival of a state justify restrictions on freedom of speech or freedom of association insofar as a threat to the existence of a state may fall under the scope of 'national security', which is explicitly enumerated in paragraph 2 as one of the exemptions justifying the interference of a government into these freedoms?

The ECtHR did not follow such a 'militant democracy' doctrine (Loewenthal 1937: 417; Müller 2012: 1253–69) in the case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (2001), and declared the non-registration of the respective Macedonian association to be a violation of Article 11:

> 97. The Court reiterates, however, that the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country's territorial integrity and national security.
>
> Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.
>
> (ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria,* 2001)

Hence, irrespective of this jurisprudence of the ECtHR, do we finally end up in a *sovereignty fallacy* in both the legal and political discourse when we must – following the strictly

legal-positivist prescriptions for legal interpretation – come to the conclusion that the *enforcement* of unilateral secession *by legal means* through a sub-state government must be seen as *unconstitutional*, if there is no explicit clause in positive law allowing for secession from a given state, as this was the case – in the Leninist tradition (see Chapter 3, section 3.3) – in the former Soviet Union and Yugoslavia? On the other hand, a claim to secession and even an *outright declaration of independence* – as declared by the advisory opinion of the International Court of Justice (ICJ) in the case of Kosovo (ICJ, Advisory Opinion of 22 July 2010: 403) – are both *protected* by *human rights law* and under *public international law*, so that there are *no legal means* to *stop political mobilisation* for secession by political actors. Thus arises the political pressure for governments to provide for fair negotiations even in the worst case scenarios of secessionist claims, so that, as Norman finally concludes (Norman 2006: 188–91), it would be better to have a legal framework in place 'for democratic rule-of-law reasons'. He thus advocates the insertion of a secession mechanism clause into constitutions, in particular into those of 'multi-national federations'.

The perennial question of the *interrelationship* between *law and politics*, which comes to the fore in the *sovereignty fallacy*, thus seems to vindicate the suspicion of all liberalist and nationalist critics that any form of cultural or territorial *autonomy* for minorities or sub-state nations will become a *self-fulfilling prophecy* and will quasi-automatically lead to *unilateral secession*. Does the political mobilisation in Catalonia for secession between 2010 and 2017 provide evidence for this suspicion (for a similar analysis on the Basque Country and Scotland, see Shikova 2016)?

According to Rosenfeld's assessment, the Spanish Constitution of 1978 for a multi-ethnic polity 'found an ingenious solution that sought to bridge over contentious disputes over national identity – or more precisely, between national and sub-national identities – through masterful use of open-endedness and ambiguity' (Rosenfeld 2012a: 764). It is true that the Spanish Constitution provides for a 'top-down approach' for the establishment of autonomous communities with different, but in any case significant, regional self-government powers, created in the two decades following the adoption of the constitution, so that Spain can be called a *de facto* asymmetrically federated state. The general political compromise of 1978, supported by all of the political parties in parliament, including the nationalists from Catalonia, can be seen from the text of Article 2 of the Spanish Constitution, which distinguishes between a 'Spanish nation' on whose indissoluble unity the constitution shall be based, and 'the right to autonomy of the nationalities and the regions of which it is composed'. Article 3 declares Castilian to be the 'official language of the state' so that 'all Spaniards have the duty to know it and the right to use it'. Other 'Spanish languages' shall also be 'official in the respective Autonomous Communities in accordance with their Statutes'. When all of the provisions of the Spanish Constitution are taken together, they provide for maximum flexibility for the establishment of autonomous communities and regions, no matter if, when, and how they will be established (Alcoz 2009: 49–56).

Thus, after the creation of Catalonia (1979), the Basque Country (1979) and Galicia (1981) as first-level self-governing territorial communities with a high degree of autonomy in terms of competences for self-government and redistribution of taxes in terms of fiscal equalisation, and the creation of other autonomous communities with a lower degree of autonomy in subsequent years, the adoption of several political agreements between the nationwide

political parties, to make devolution more symmetrical throughout Spain and to transfer new competences to the regions until the beginning of the 1990s, led to the *paradoxical consequence* of granting more 'diversity' through the devolution of powers to the regional level, but simultaneously also to the requirement of *more homogeneity* (Alcoz 2009: 57–62). Moreover, the overall political approach in the bilateral devolution of powers (i.e. negotiated between each single region and the Spanish government) had the counterproductive effect of triggering a strong *centrifugal effect* as the autonomous communities began to compete for a maximisation of powers to be devolved to the regional level. It may thus come as no surprise that the nationalist parties in Catalonia, the Basque Country and Galicia signed a declaration in 1998, asserting their recognition of Spain – in contrast to the legal-positivist doctrine of an ordinary meaning of the wording of Article 2 of the Spanish Constitution – as a multinational state on the basis of the 'sovereignty' of its 'component nations', which should have a 'confederal' organisation. In 2004, the Basque parliament then adopted a new draft statute, the so-called *Plan Ibarrexte*, which was rejected by the Spanish parliament as – in the sense of the ordinary meaning doctrine – obviously contrary to Article 2 of the Spanish Constitution. Thereafter, the Spanish Constitutional Court also declared the attempt to hold a 'sovereignty-association' referendum in line with the *Plan Ibarrexte* to be unconstitutional in September 2008.

It must be seen in this political context that an initiative was made in Catalonia in 2005 to reform the Autonomy Statute, with very strong insistence coming from all of the Catalan political parties, for more autonomy from the Spanish central government, in particular with regard to certain fiscal redistribution mechanisms, which were seen as being unfavourable and unfair to Catalonia, as compared with the Basque Country and Navarre, which enjoyed much greater fiscal autonomy (Boylan 2015; Moreno 2017: 225), but also because of the central government's resistance to making Catalan the preferential official language in public education (Climent-Ferrando and Trivino 2015: 163; see also Chapter 7, section 7.6.). The Catalan parliament adopted a draft proposal for a new Autonomy Statute, referring to a 'Catalan nation' in its preamble. After negotiations in the Spanish parliament, a new compromise was reached. The final text of the preamble of the statute stated that the Catalan parliament had indeed proclaimed Catalonia to be a nation, and that this declaration was to be taken as acknowledgement of Catalonia as a nationality, with regard to Article 2 of the Spanish Constitution (Ferreres Comella 2014: 575). However, this attempt to keep the two conflicting interpretations of the nature of the Spanish state and the Constitution of 1978 in a state of creative ambiguity – either seen as a union of nations with a right to self-determination or as an integral union based on the equation of one nation in possession of its state and what we called identity fiction above – utterly failed due to the crosscutting ideological cleavage at the central level between Socialists and Conservatives. The main opposition party at the time of the adoption of the new Autonomy Statute in the Spanish parliament, the (conservative) Partido Popular under the leadership of Mariano Rajoy, had not only voted against the compromise, but had challenged the constitutionality of the statute by submitting a constitutional complaint to the Spanish Constitutional Court. In its judgment of 2010, the Court upheld many of the provisions of the Statute that the Partido Popular had contested, but it insisted on a 'strictly legal interpretation', following from Articles 1 and 2 of the Constitution that 'Catalonia is not a nation' since 'only Spain' is

'the' nation (Ferreres Comella 2014: 575), and declared the respective preambular provision unconstitutional (for a comprehensive analysis of this judgment see also Pons Parea 2013). After the judgment of the Court became public, huge demonstrations followed in protest against it, accompanied by claims that the new Autonomy Statute had to be considered a new constitutional pact between Catalonia and Spain, so that no Spanish court could be empowered to invalidate what the Catalan people had adopted in a referendum in June 2006, with a voter turnout of 49 per cent and 74 per cent of the votes cast in its favour. After Rajoy became Prime Minister following the general elections in 2011, he also bluntly refused to negotiate a new fiscal pact with the Catalan government in 2012 requiring a higher return of tax revenues back into the Catalan region under the fiscal equalisation mechanism. These events were used as evidence by the Catalan nationalist parties to construct a political narrative that the political agreement underlying the Spanish Constitution of 1978 had been violated by the Spanish government. On 11 September 2012, on the occasion of the celebration of Catalonia's National Day, a large demonstration of more than one million people took to the streets of Barcelona, supplying evidence of the ongoing bifurcation in public opinion between supporters for the right to national self-determination and those basically satisfied with the *status quo*. This was irrespective of the fact that the percentage of persons declaring themselves to have dual identity as both Spanish and Catalan (only) dropped from 78 per cent in 1985 to 62 per cent in 2013. Nevertheless, the percentage of persons with exclusive Catalan identity had (statistically speaking) risen significantly from 9 per cent to 31 per cent (Moreno 2017: 231).

Following its obviously large political support, the Catalan government called for early elections in November 2012, with the result that the political parties with a secessionist political platform won a narrow majority and were able to pass a parliamentary Declaration of Sovereignty on 23 January 2013. This declaration postulated in its preamble that 'the Catalan people *is* a sovereign legal and political subject' (emphasis added) with 'a right to decide'. This declaration was again contested by the Spanish government before the Constitutional Court, which suspended it, meaning that the Catalan governmental authorities could not make it operational. However, before the Court could render its judgment on the merits, the Catalan government announced that it would hold a referendum on 9 November 2014 with regard to whether Catalonia should become an independent state. Thereafter, the Catalan parliament requested the Spanish parliament to transfer the power to hold a referendum on the future status of Catalonia to the Catalan governmental authorities. Before this request was discussed in the Spanish parliament, the Constitutional Court rendered its judgment on 25 March 2014. Following its own case law, the Court declared the preambular provision that the Catalan people 'is' sovereign unconstitutional, in light of the wording of Articles 1 and 2 of the Spanish Constitution, with the obvious conclusion, which follows from the conceptualisation of sovereignty-as-indivisibility in the tradition of Bodin, Rousseau and Sieyès (see Chapter 3, section 3.2), that 'two sovereignties cannot legally coexist'. Consequently, the Court also declared 'that a region cannot unilaterally call a referendum for self-determination to decide on its integration in Spain' (Ferreres Comella 2014: 580). However, in attempting to provide a way for a *political compromise* solution, the Court also declared that no provision of the Spanish Constitution is 'immune' to amendment, so that even Article 2 of the Spanish Constitution could be amended. In conclusion, the proclaimed 'right to decide', if

exercised within the framework of the Constitution, the Court argued, is not constitutionally objectionable since Spain cannot be considered to be a 'militant democracy' when all political programmes can be defended in public (on the concept of militant democracy see also Chapter 9, section 9.2).

However, as the critics argued, if the Court was ready to accept a 'right to decide' in terms of a right to self-determination, why did it strike down the 'principle' of sovereignty (of the Catalan people)? Taking into account the request of the Catalan parliament to the Spanish parliament to transfer the power to hold a referendum to the Catalan authorities, this could have been interpreted as an expression to start a process of negotiations for becoming independent, with the conclusion that the Catalan people are *not yet* sovereign (Ferreres Comella 2014: 583). As Ferreres Comella convincingly argues, the Court's judgment must be seen as a call to the political players to enter into a dialogue to find a political solution, as the Court finally also invokes the 'principles of institutional cooperation and loyalty to the Constitution' and holds that the Spanish parliament 'should take into account' a region's proposal to change the Constitution (ibid: 585).

In the final analysis, as can be seen from both the judgment of the Canadian Supreme Court and the judgment of the Spanish Constitutional Court, the political Gordian knot, resulting from the *centrifugal tendencies* of *civic-nationalist-inspired* secessionism (Jeram 2014), cannot be cut by judicial fiat. It will remain the burden of the political branches of government, thus the legislative and executive powers, to negotiate a political solution to a deep constitutional crisis. This statement does not mean, however, that either ethno- or civic-nationalist mobilisations are events which cannot be foreseen and therefore *politically* prevented.

As can be seen from this long story, having used the sequencing of events as an underrated explanatory method for the analysis of the *construction of claims* competing for (political) *legitimacy in terms of legality or constitutionality*, both sides – the Spanish conservative government under Prime Minister Rajoy and the Catalan civic-nationalists – complemented each other in making their different interpretations of the nature of the Spanish state incompatible. On the one hand, the Partido Popular under the leadership of Rajoy, was obviously unwilling to accept the logic of devolution, triggered by the establishment of autonomous communities with the right to self-government, as shared sovereignty in contrast to a mere decentralisation of administrative power. On the other hand, the secessionist movement was driven by its own civic-nationalist ideology to claim independence for the *whole territory* and *for everyone* in it (i.e. including immigrants). *Both* political and conceptual *approaches* were thus based on the *sovereigntist interpretation* of the concept of *autonomy* and remained *trapped* in the predicament of *inclusion versus exclusion*, following from the dilemma of a politics of difference. The central government and the Spanish Constitutional Court, by refusing the right to effective equality when resorting to the *exclusionary function* of the Jacobin conceptualisation that only one nation can be sovereign as a political community under one constitution, so that no other nation can exist under the same constitution, thereby remained trapped in an identity fiction (i.e. in the natural fallacy of conceiving of *national identity as sameness*; Rosenfeld 2012b: 757). The secessionist movement in Catalonia, driven by its civic-nationalist interpretation of autonomy as a unilateral (i.e. sovereign) *exclusive right to decide* against the will not only of the central governmental authorities, but also a 'clear

majority' of the population (in the wording of the Canadian Supreme Court in *re: secession Quebec*) transformed *cultural diversity in Catalonia*, including its immigrant residents, with *more or less* dual identities by *reification and polarisation* into *exclusive* (i.e. Catalan or Spanish only) *national identities in antagonism to each other*, as the opinion polls referred to above have demonstrated.

Hence, to return to our initial question: are centralist policymakers *confirmed* by the Catalan example in their *fears* that devolution to regional units and the establishment of *autonom*ous regimes constitutes the *first step to secession*? The answer, following from our empirical political and sociological analysis, is no! The spiral of *political* escalation with increasing demands for more autonomy and finally secession in Catalonia was driven by the *same* sovereigntist interpretation of the concept of autonomy, leading not only to mutually exclusive (i.e. antagonistic) claims but also to more and more social closure in the construction of exclusive national identities and their polarisation, in short what we called the *ethnification of territory* in the introduction to this chapter, and to a *configuration* of society into an *antagonistic us versus them* structure (for more detail, see Chapter 5, section 5.2). Therefore, from our sociologically informed reconceptualisation of ethnicity, *not granting autonomy* by effective institutional equality as such is in the final analysis *the root cause* of the claim to secession, but the other way round. The *rejection* of the claim for *effective* and *equal autonomy* and the insistence of the central government on 'symmetry' and thus paradoxically 'homogeneity within diversity', without understanding the centrifugal tendencies which it had created, triggered the spiral of conflict, which could not simply be stopped by judicial fiat on the basis of a 'strictly legal interpretation' of constitutional texts. Thus, there was a misunderstanding of the *functional interdependence* of law and politics (see Chapter 2, section 2.2) by not taking into account that the concept of self-determination oscillates between *two different conceptualisations* of the connection of state and political unity in Western political thought (see Chapter 3, section 3.3), which can be summarised as, on the one hand, the *concept of autonomy, subsidiarity and equal participation*, what we call *political self-determination*, which provides for political and cultural pluralism, in short 'multicultural federalism' (McGarry and O'Leary 2015: 20–6; see also Chapter 10, section 10.5), and what we term the *differentialist* conception of *national self-determination* on the other, with the consequence of elimination of all forms of pluralism, not only cultural pluralism.

It is therefore the exclusivity of the national state – within the double meaning of the superiority of one's own people and the exclusion of others – which makes it this natural and inseparable whole. Based on such an essentialised or even naturalised exclusivity of the nation, the *differentialist* concept of *national* self-determination, like the concept of sovereignty, is then understood as a natural right to be and to remain different, in isolation and autarchy. Given this naturalist fallacy and the ideological confusion of the liberal with the democratic paradox (see Chapter 3, section 3.2), such a differentialist concept of national self-determination seems to be a right per se, which – owing to its nature – seems to need no further justification. However, such a differentialist concept, requiring exclusion, is irreconcilable with the equality not only of individuals, but also of groupings as an essential marker of democratic pluralism in the case law and language of the ECtHR, in particular, in its reasoning in interpretation of the phrase necessary in a democratic society, in accordance with paragraphs 2 of Articles 9, 10, and 11 of the ECHR (see in detail Chapters 6 and 7).

In conclusion, as long as the exclusive sovereignty of states and the exclusivity of nations/peoples are seen through the lens of the nationality principle (i.e. the formula one people equals one nation equals one state in the nation-cum-state paradigm) as two sides of the same coin, the ideologically constructed *dichotomy* in public international law of either the *sovereignty of states* or the *self-determination of peoples* cannot be overcome for purposes of effective conflict management. Thus, only when we replace the concept of sovereignty with the concept of autonomy and thereby triangulate the meaning of sovereignty and self-determination of peoples with the concept and principle of human and minority rights as institutions (see Chapter 5, section 5.3), to bridge the gap between law and politics created by positivist theory and methodology, can we construct a concept of *political self-determination* that allows for the formation of unity based on equality and the inclusion of diversity, as we learned from the historical example of territorial autonomy for the Åland Islands in Chapter 3, section 3.3.

The reference to the missing understanding of effective institutional equality above leads us to the third conundrum of liberal-democratic states, which follows from the dichotomisation of the concepts of formal and substantive equality without taking notice of the epistemological and ontological 'dilemma of difference' (Minow 1990).

4.3.3 The dichotomy of formal versus substantive equality and the dilemma of difference

To make a long ideological history short, there are *two ideal types* in the conception of the principle of equality. These are *formal equality* of individuals *before the law*, one of the cornerstones of classic political liberalism, and *substantive equality through law*, which is – in the European context – much more an element of a social-democratic ideological orientation. As we demonstrate in detail in Chapters 7 and 8, through an analysis of the development of the case law of the ECtHR, the concept of substantive equality as a political and legal concept cannot be dissociated from a comparison of the status of groups when a claim of discrimination against members of a minority has to be assessed. Hence, in terms of minority protection, both concepts mark a stark difference, as Modood also argues, in defence of a multiculturalist perspective against the quest for the normative precedence of the majority culture (Modood 2016: 482).

The concept of *formal equality* requires individual equality before the law and shall protect *individual members* of minority groups against discrimination by public authorities, be it de jure or de facto, which leads to the doctrinal distinction between *direct* and *indirect* discrimination in European law (see Chapter 8). But it will *not protect* against *discrimination* by *individuals* or other *societal groups* in the private or public sphere, since this concept is limited, in accordance with the constitutional doctrine in many democratic countries, to the requirement of *state action*, so that it does not have *horizontal effect* (i.e. its application between private parties is denied). Hence, this concept does not help against *factual, societal inequalities* in the political, economic, social or cultural sphere when members of minority groups, due to their not necessarily voluntary, but ascribed, belonging to a minority group, are not in a position to have equal opportunities (Young 2007b and Chapter 7, section 7.5), for instance,

in education or the labour market, as indicated above with regard to the concept of structural discrimination.

Therefore, the concept of *substantive equality* requires the state not only to refrain from discriminatory acts, but to interfere in economic and social systems through *affirmative action* or *positive measures* (Rosenfeld 1991; EU 2010b; Marko 2013b; EU 2017: 53–73), with the goal of either removing the factual barriers to equal opportunities, or even guaranteeing 'full and effective equality', as prescribed by Article 4 FCNM. A broad range of legal instruments, from so-called special rights – or in common law terminology, 'privileges' or 'exemptions' – to quota systems for members of minority groups, can be adopted to achieve these aforementioned goals (see in detail Chapter 8, section 8.3).

However, depending on the respective ideological position even among liberals, both formal and substantive equality are highly contested. Critics of a strictly individualistic liberalism will always claim that the principle of *non-discrimination* against individuals is a *necessary*, but by *no means sufficient*, legal instrument for the protection of members of minorities against the assimilative forces stemming from the processes of industrialisation, urbanisation and nation building – in short, 'modernisation' (Gellner 1999). Thus, in their view, affirmative action measures, including special rights in the form of group-related rights can remedy these factual, societal disadvantages. Quite to the contrary, for advocates of a strictly individualistic liberalism, *affirmative action* measures as purportedly *special* rights for members of minority groups are *unjustified* privileges and thus *by definition reverse discrimination*, in addition to being an aberration into collectivism. The legitimacy of collective rights or group rights is thus strictly denied as we have shown above. Hence, the creation of this dichotomy of formal *versus* substantive equality is not only the result of an age-old ideological debate, insofar as liberalism and socialism see themselves as opposing world views, but it likewise remains trapped in a liberal individualist or egalitarian *versus* communitarian framework (Avineri and de-Shalit 1992; Bell 1993; Forst 2002; von Seters 2006).

However, when *formal* and *substantive* equality are seen as *opposing principles*, which have to be, at best, carefully balanced against each other by courts in the light of the legislative history of the respective country and the factual context of the case concerned, is this necessarily the end of legal wisdom (i.e. *jurisprudentia* in the original meaning of the term)?

Martha Minow (1990: 20–1) has clearly emphasised the problem that all liberal, communitarian, civic-nationalist, and multicultural approaches face. This is the 'dilemma of difference', which recognises that cognitive problems in *processes of categorisation* are always based on *asymmetric power relations*:

> When does treating people differently emphasize their differences and stigmatize or hinder them on that basis? And when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis? … The stigma of difference may be created both by ignoring and by focusing on it. Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual's ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. The problems of

> inequality can be exacerbated by treating members of minority groups the same as members of the majority and by treating the two groups differently. The dilemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation. Governmental neutrality may be the best way to assure equality, yet governmental neutrality may also freeze in place the past consequences of difference … These controversies enact the political dramas of a diverse society committed to equality and pluralism.
>
> (Minow 1990: 20–1)

Hence, is there no way out of this dilemma, owing to the ideologically determined dichotomy of formal and substantive equality?

Minow points in the direction of what can be called the *quest for 'institutional equality'* (Marko 1995: 186), as the concept that has to complement the liberal-bourgeois understanding of formal equality, as well as the *liberal-egalitarian or* – from a European perspective – *social-democratic* understanding of substantive equality in order to achieve 'full and effective equality' (Article 4 FCNM), when she states:

> We typically adopt an unstated point of reference when assessing others. It is from the point of reference of this norm that we determine who is different and who is normal. The hearing-impaired student is different in comparison to the norm of the hearing student – yet the hearing student differs from the hearing-impaired student as much as she differs from him. … Unstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others.
>
> (Minow 1990: 50–1)

At this point, we can thus incorporate the observations and arguments developed above in the sub-section discussing liberal-nationalist conceptions and the 'myth' of neutrality: it is exactly the identity fiction that makes the state-forming population and its culture (i.e., shared understandings and values) the very often unstated norm, based on power relations and/or the magic of the greater number, which will conceal their 'dominant ethnicity' (Kaufmann and Haklai 2008: 743–67) by 'embodying' the nationalist claims of the majority population's political leaders. Hence, whenever minority claims and rights are discussed, the *right of the majority* is frequently taken as the unstated point of reference! But even when 'the majority' is made visible as a point of legal reference, as can be seen from the text of Article 20 of the FCNM, the need for justification remains on the side of the minority:

> In the exercise of the rights and freedoms flowing from the principles enshrined in the present framework Convention, any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities.
>
> (CoE 1995: Article 20)

By constructing such a general limitation on the exercise of minority rights on behalf of persons belonging to the majority, it seems – regardless of the position concerning formal or substantive equality – simply not necessary to justify the claims of a majority, since the majority seems – by definition – always to be right.

In conclusion, the 'dilemma of difference' in the reasoning of liberal-individualistic as well as liberal-egalitarian and civic republicans based on the dichotomisation of formal versus substantial equality is based on the following philosophical-ideological assumptions:

- The *individual* is taken for the *primary unit* of reference for the construction of social and political order.
- In line with a *billiard table model of societies* and contractarian theories, individuals exercise a free choice in entering social relations.
- These assumptions require the *strict separation* between the state, society and market.
- Individual rights are *negative rights* in terms of *freedom from interference* either by the state authorities or private persons, thereby assuming a strict *public–private dichotomy*.
- Therefore, the one and only duty of state authorities is to *refrain from discrimination against individuals* in following the concept of (formal) equality before the law requiring the *equal application* of the general rules of law, leading to *decontextualisation*. This means that:
- Equality is thus always made an abstraction from specific situations through generalisation whereby *rational* as legally *relevant* behaviour is then always measured against an abstract person, the average individual, so that the necessary other for comparison is an artificial, imputed conflict relation or situation.

As a consequence, this leads to a *formalistic* application of general rules *irrespective* of any cultural or social *differentiation* in the concrete situation under scrutiny as we show in the analysis of case law in Chapter 8 in detail. This libertarian conception of equality before the law can then be declared neutral insofar as all personal or situational distinctions are treated equally by state authorities by either equal indifference vis-à-vis distinctions (called 'benign neglect' by Kymlicka, see above) or when state authorities equally prohibit the exercise of liberal freedoms (i.e. irrespective of factual distinctions), what we call 'negative equality', as we show in detail from the case law of the ECtHR in Chapter 7, section 7.3 following from its interpretation of 'freedom of religion' (Article 9 ECHR) concerning the public manifestation of Christian and Muslim religious symbols.

Hence, libertarians as well as civic-republican theorists will *combine* positive *individual freedoms* with *negative equality* for minority languages or religions ending up in a single duty not to differentiate irrespective of any factual differences. They will reject a duty to differentiate through a contextual analysis of the factual situation and thus refuse to take cultural diversity seriously. Granting exceptions from general rules and thereby conferring legal relevance on cultural diversity in adjudication is seen by them as an unjustifiable privilege. Even more so, they deny a duty to protect collective identities of groupings and thus the notion of any group-relatedness of rights.

In contrast, liberal egalitarians will recognise the fact of socioeconomic inequalities and they argue for the need for redistribution to provide for equal opportunities in access

to labour markets, public education and social services. Moreover, they are ready to recognise symbolic, cultural differences, but only if they can – in their view – be seen as the consequence of socioeconomic disadvantages: Hence, liberal egalitarians recognise the need to take the situational context into account and, as a consequence, a duty to differentiate. Moreover, they will recognise structural socioeconomic inequalities in horizontal relations between private actors and they are even ready to grant positive measures, but only on a temporary basis until equal opportunities are achieved. This holds true also for the civic-republican variety of liberalism insofar as they are ready to provide for temporary positive measures to fight socioeconomic deprivation, but only an a strictly territorially delimited basis as if there were no groups living territorially concentrated *and* culturally marginalised in those areas, as we could see from the example of the French banlieues. Insofar, the pluralism of cultures and groups shall be made invisible.

In conclusion, liberal egalitarians, civic republicans and interculturalists strictly reject general exceptions for culture on the basis of what Brubaker calls 'strongly groupist' affiliation in legal terms of membership and even more so the notion of group rights for the preservation or promotion of cultural diversity as collectivist ideology.

4.4 The remaining civic–ethnic–national oxymoron

However, as we tried to show above in the critical ideological analysis, none of these philosophies and ideologies does overcome the civic–ethnic, public–private and political–cultural dichotomies. Is it then necessary to achieve the acclaimed non-ethnic public culture by further diluting liberal culturalism into the concepts of *republican* or *constitutional patriotism*?

Patriotism can be defined as a commitment and loyalty to a *patria* (i.e. *respublica* in the original Greek and Latin) meaning a territorially restricted political entity based on the values of liberty and justice, but, lest we forget, for *citizens*, not all people. When one of the advocates of republican patriotism argues, however, that 'a purely political republic would be able to command the philosopher's consent, but would generate no attachment, no love, no commitment' so that 'to generate and sustain these sorts of passions one needs to appeal to the common culture, to shared memories' (Viroli 1995: 13), we – all of a sudden – end up once again in a discussion about the relationship between purely political unity, cultural facts and ethnic sentiments, which have characterised, in particular, perennialist and ethnosymbolist theories of nationalism.

The concept of *constitutional patriotism*, originally elaborated by Dolf Sternberger (1990) and further developed by Jürgen Habermas (1995, 2001), is seen by the latter as the *reconciliation* between *universalism* and *particularism*, insofar as a 'constitutional culture' shall bridge the gap between *universalist values* and *particular cultural contexts*. Constitutional patriotism is thus seen as a '*post-national*', *inclusive theory* in terms of a 'transformative' conception, which is not to be identified with liberal or civic nationalism but, at the same time, is also more than a simple *modus vivendi* or coexistence approach (Müller 2007: 71, 83). Thus, according to Habermas, all notions of 'cultural homogeneity' are simply:

> superfluous to the extent that public, discursively structured processes of opinion- and will-formation make a reasonable political understanding possible, even among strangers. Thanks to its procedural properties, the democratic process has its own mechanisms for securing legitimacy; it can, when necessary, fill the gaps that open in social integration, and can respond to the changed cultural composition of a population by generating a common political culture.
>
> (Habermas 2001: 73–4)

So is constitutional patriotism the theory which can reconcile political unity with legal equality and cultural diversity? As the discussion of *constitutional patriotism* à la Habermas (Müller 2007) reveals, deliberative communicative action, and thus *legitimation by democratic procedure* including the judicialisation of politics is, however, based on the *substantial* premise that not only abstract citizens, but real people must mutually recognise themselves as free and equal human beings, thereby forming the basis of a *liberal political culture* to carry out a 'deliberative' process of will formation and decision making in line with Habermas' theory of communicative action (Habermas 1986, 1988) and Patten's conceptualisation of 'basic liberal proceduralism or full proceduralism' (Patten 2014: 155). However, there are not simply situations and contexts in which a 'discourse free from domination' (in German, *herrschaftsfreier Diskurs*) can happen. Deliberations and procedures, having to guarantee 'fair opportunities' (Patten 2014: 123–7), always take place within institutional arrangements. But the *foundational principles* for the *organisation* of such institutions will again be hotly *contested*. As Margaret Canovan convincingly underlines, 'liberal polities do not exist by nature' and even the concept of a 'minimal state' requires much more than liberal justice theory suggests – namely, 'impartial laws, which are, moreover, fairly administered, a strong government to maintain internal order and external defence and, last but not least, against the dichotomy of public versus private based on a binary code of inclusion/exclusion, a public culture of impartiality, which restrains both rulers and majority populations from using their positions in their own interests' (Canovan 1996: 38–9). It is only then that 'political trust' (Levi and Stoker 2000; Lenard 2011), as the necessary functional prerequisite of social solidarity and effective government, will follow.

Moreover, Canovan convincingly describes how Janus headed the concept of patriotism can be: 'Patriotism in a given historical context serves universal and emancipatory goals, but can also be messianic and militant through its "teaching mission" to "free" the unenlightened crowds held in feudal or colonial, imperial subjugation' (Canovan 1996: 89–90). And 'constitutional patriotism', founded on the idea of communication and participation in political deliberation and law-making, may create political 'solidarity' by 'acting together', but 'political participation can and will also wake the sleeping dogs of ethnomobilisation' (ibid: 94–5) possibly ending up in a spiral of violence.

But what Canovan then proposes as an *alternative* is *disappointing at best*: a 'modus vivendi pluralism' (Levy 2007: 173), in the form of 'accommodation', based on the common law principle of equity, or simply a pragmatic 'muddling through' (Canovan 1996: 133–4). 'Muddling through' or taking recourse to a theory of constitutional patriotism is, however, certainly not a viable strategy for reconstruction and reconciliation in ethnically divided societies, such as,

for instance, Bosnia and Herzegovina (Marko 2013a), because the most important problem is not even addressed: What are the normative principles and institutional arrangements for a 'strong and equitable state', not only as preconditions for functioning democracy and the rule of law, but also in order to keep ethnic violence at bay?

In conclusion, all of the ideologies of racism and theories of nationalism and liberalism, in combination with the conundrums of the liberal-democratic state, such as the myth of neutrality, identity fictions, the majority principle, the contest over the interpretation of the principle of collective self-determination according to the concept of 'sovereignty-as-indivisibility', and the dichotomy of formal versus substantive equality, ignoring the epistemological and ontological 'dilemmas of difference', do not offer convincing arguments on how to reconcile political *unity* with legal *equality* and cultural *diversity* but always end up, in the tradition of Hans Kohn, in the *categorical* difference between a bad, because exclusive ethno-nationalism and good, because purportedly inclusive civic nationalism. However, as we tried to demonstrate through our critical ideological analysis, Kohn's dichotomisation is in itself rooted in the following three epistemological, ontological and methodological misunderstandings of:

1) conflating *diversity* with *difference*;
2) conflating *culture* with *ethnicity* so that de-ethnification shall require the denial of the social, political and legal significance of culture; and
3) the illusion that *dichotomies* and their oppositional configuration, including conflictual potential, can be dissolved by simply constructing a *continuum*, with more or less thick or thin forms of ethnicity or civility.

Hence, in striking contrast also to the *empiricist* and *positivist* methodological short-cuts which reduce – against the 'social fact' (Searle 2010) of myriad forms of human diversity – the relationship of identity with diversity into either/or categorisations of identity *versus* difference, thereby *conflating diversity* with *difference*, we shall see in the following chapter on the interrelationship of law and sociology from an epistemologically social-constructivist and sociological-institutionalist methodological *perspective* (see Chapter 2, section 2.2) that *all social* relationships require a conceptualisation in terms of *triadic structural relationships* of *identity–equality–diversity*, which are to be *triangulated* through the respective *interpretation* of the principle of *equality* as *human dignity* within *situational contexts* (see in detail Chapter 10, section 10.3). Only such a *triadic*, imaginary *whole* and thus *holistic perspective* for the construction of political and legal relationships, which is not to be confused with organicism or collectivism, allows for the *generation of meaning* as a functional prerequisite for the understanding of any form of inter-action, be it between two persons as merchant and customer in a market situation, as father and mother within a family or as citizens at the local, regional, national state or international level, or with reference to humankind as an imagined community, as we have seen in the analysis of the writings of jurists and philosophers from the sixteenth to eighteenth centuries in the previous chapter. Thus, it is only a sociological-institutionalist perspective and the 'functionalist style in public law' (Loughlin 2005) that can help us to see the *normative* and simultaneously *empirical problems* of naturalist fallacies, which are based on the *confusion of*

epistemology and ontology in reifying social processes and relations *as if* they were pre-given, fixed Id-Entities.

The *conflation* of *culture* and *ethnicity* is based on the naturalist fallacy of primordial theories underlying racist and ethno-nationalist as well as civic-nationalist ideologies, which declare ethnic difference to be the root cause of conflict, despite of the latter's claim that they could not be accused of ethno-nationalism, since they would politically mobilise for a civic (i.e. inclusive) nationalism. In stark contrast, our neo-institutionalist sociological approach is based on the empirical observation, as we have tried to show with the case study of Catalonia, that *ethnic* conflict does *not* follow from *cultural differences*. Difference is constructed and *politically mobilised* on the basis of real or alleged *inequality*, following from *institutionalised status relations* that might lead to the *ethnification* of *territory*, *institutions*, *culture* as well as *economics* and, finally, through the mutual re-enforcement of economic and ethnic stratification to the *structural polarisation* of *societies*. The monistic identity concept, in line with the territory-cum-sovereignty complex, thus remains the axiomatic anchor for both the ethnic and the civic model of national states.

Hence, as follows from our critical ideological analysis, the concept of *nation* and the attributive form *national* represent nothing but a *normative claim* to form a closed (i.e. independent) whole or entity termed people or nation as we learned from the historical-sociological analysis of state formation and nation building in Chapter 3. It is the concept of sovereignty-as-indivisibility which gives the concept of an independent whole or system its both *absolutist* and *exclusive* meaning, also for political and legal battles in the twenty-first century.

Nor is *ethnicity* a primordial property of persons, peoples, territories or institutions. In striking contrast to the concept of nation, this concept is not a (hidden) normative claim, but is an *empirical social relationship* following from the processes of *social closure* of more fluid and associative groupings without clearly defined membership into bounded groups which identify their members on the basis of membership rules and roles (Preyer 2018). *Ethnically divided societies* are therefore the consequence of these processes of social closure or 'bonding' in Putnam's terms and, secondly, the *polarisation of societal structures* into a clear-cut us versus them antagonism. Therefore, ethnic relations are *empirical* social *relations* as we will further elaborate in Chapter 5 on law and sociology to provide the ground for an interdisciplinary analysis of the efficacy of minority protection in the following Chapters 6 through 9.

4.5 Summary conclusions and learning outcomes

The overall purpose of this chapter is the *deconstruction* of the nation-cum-state paradigm. By taking up the results of the critical, empirical and ideological analyses of the processes of state formation and nation building in Europe in Chapter 3, which have – in spite of the normative dichotomy between the French civic-republican model of a culturally indifferent state-nation and the German ethno-national nation-state – led to the *monist-identitarian nation-cum-state paradigm* by the reification and naturalisation of basic concepts and terms such as sovereignty, state, nation, people or belonging, we have demonstrated that only an

interdisciplinary approach based on the functional interdependence of theories and methods of law and sociology can give us the *key* to the *deconstruction* of the *natural fallacies* and *ideological paradoxes,* which follow from the nation-cum-state paradigm to this day. As a consequence of the conflation of epistemology and ontology inherent in the nation-cum-state paradigm, there are two natural and ideological fallacies to be highlighted: these are confusions of the social fact of multiple human *diversities*, as if they were configured like natural *differences* in terms of dichotomic friend versus foe relations and, in line with this fallacy, the confusion of ethnicity and culture as if they were natural properties of people and/or territories.

These conclusions follow, first, from our critical ideological analyses of the *structural family resemblance* of the ideologies of racism and nationalism and primordial theories of nations and nationalism in section 4.2. Second, the critical ideological analysis of the fault lines of liberalism, communitarianism, nationalism and multiculturalism/interculturalism in section 4.3 demonstrate that these ideological fault lines also haunt the jurisprudence of national and international apex courts to this day. We have thereby identified three so-called *conundrums of the liberal-democratic state*. These are, first, the identity fiction, the majority principle and the myth of ethnic or cultural neutrality; and second, the dichotomic conceptualisation of sovereignty versus autonomy, leading to two different theories of collective self-determination. We called them the differentialist concept of national self-determination leading to exclusion and separation and the concept of *political* self-determination based on the notion of interdependence in social relations and therefore the need for full and effective *institutional equality* to be achieved by keeping a dynamic equilibrium between autonomy and integration, as is outlined in more detail in Chapter 5. Third, following from the concept of institutional equality, we outlined the epistemological and ontological dilemmas of difference underlying the false ideological dichotomy of formal versus substantive equality.

As we could demonstrate from the *perspective of conflict management* through a case study on the process of the attempted secession of Catalonia, *none* of these conundrums can be *solved* solely *by judicial fiat,* especially if based on a formalistic-reductionist interpretation of legal texts imbued with historical constitutional doctrine, inspired by ideological assumptions. The only way to overcome these conundrums and dichotomies is the recognition of the *functional interdependence* of *law and politics* which brought, in the final analysis, both the Supreme Court of Canada and the Spanish Constitutional Court to the conclusion that (peaceful) conflict regulation in case of secession claims is possible only through political negotiations and compromise.

Moreover, in section 4.4 we come to the conclusion that despite the efforts to deconstruct all of these ideological fault lines in philosophical scholarly literature and case law, the *civic-ethnic-national oxymoron* remains unresolved as the deep structure of the conflation of epistemology and ontology. This can be seen from efforts in the tradition of Hans Kohn to distinguish between 'bad' nationalism and 'good' nationalism or the dilution of nationalist, be it ethnic or civic, ideology into 'thick', 'thin' or 'thinner' versions of nationalism and/or patriotism, so that the ideologically constructed dichotomies between public/private and politics/culture are not overcome. Hence, the conclusions of such approaches on how to politically manage cultural diversity remain disappointing at best when muddling through remains the only option.

Questions

1. What makes up the 'family resemblance' between the ideologies of racism, nationalism and primordial theories of ethnicity?
2. Which ideological conundrums haunt constitutional adjudication in liberal-democratic states to this day?
3. What makes the confusion of diversity and difference and culture and ethnicity?
4. Why do we speak of an ethnic–civic–national conundrum?

Law and sociology

5

The constructivist and interpretative turn

Joseph Marko

5.1 Introduction: from essentialism to social constructivism

As we have learned from the previous chapter, all the *ideologies* of *racism, ethno-nationalism* and *primordial theories* of nation or ethnicity, tell us that these concepts are based either on the common origin of people in terms of biological descent, known as kinship, or other forms of allegedly natural relationships, thus substituting this belief in the biological descent of groupings for notions of ethnic sentiment or cultural community, understood as an a priori culturally *homogenous* group of people which can be differentiated only in this way from other groups. Fluidity or hybridity of cultures without clear boundaries stemming from essentialist differences between cultures is, from this primordial perspective, no civil(ised) culture at all, so that people who transgress boundaries by changing cultures or switching between cultures will be labelled traitors of their nation or community, or at least be classified as outsiders or part of a strange subculture whose members do not really belong to us. The conceptualisation of such closed or bounded groups will also presume that the social and political *behaviour* of the members of these groups is *predetermined* by the biological or cultural properties of such groups. With the exception of racist ideologues, advocates of nationalist ideologies and primordial theories will not deny that it is possible to change your ethnicity, but following from the underlying view of antagonistic structures of societies, they will postulate that ethnic difference is the root cause of violent conflict. Therefore, according to this approach, as outlined in Chapter 4, section 4.2, peaceful coexistence is only possible through the separation of territories or people in the forms of secession and/or voluntary population transfer, or power-dividing structures for state authorities and institutional segregation in culture-preserving sectors, such as public education, in order to enable peaceful coexistence, after the common saying: good fences make good neighbours.

In striking contrast, more or less radical *social-constructivist theories* (Breuilly 1994) tell us that ethnicity is nothing but the same wrong belief people held that red-haired women are, by definition, possessed by witchcraft, with red hair as the purported objective marker of this

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trait. In conclusion, they argue that we simply have to recognise that ethnicity as a mental construct is a false belief and that we need to stop believing such superstitions. As long as this is not achieved, ethnic entrepreneurs – be they political, economic, or cultural elites – will be able to (mis)use these beliefs as an instrument for satisfying their personal goals.

However, such a *constructivist-instrumental* approach to defining the meaning of the term and concept of ethnicity cannot answer the questions and problems about reconciliation after protracted violent conflict, which we observe empirically from deeply divided societies in Europe, such as Northern Ireland (McCrudden *et al.* 2014), Bosnia-Herzegovina (Marko 2013a, 2017) or Cyprus (Potier 2007; Loizides 2011; McGarry 2015). Why does it not work simply to deconstruct the concept of ethnicity by revealing the belief of people as a false consciousness and start telling them that they simply have to stop perceiving each and every thing in the world through an ethnic lens?

Hence, in contrast to all of the individualistic-liberal theories based on the assumption of pre-given identities and thus agencies of persons assembled like balls on a billiard table for a game called society, but also to all of the liberal-communitarian and nationalist theories, which assume that individual behaviour is structurally embedded in the culture of an *a priori* given, pre-political community, the axiomatic assumption of the sociological *neo-institutionalist approach* (see Chapter 2, section 2.2) presented here lies in the social fact that *interaction* and *social relations*, including the formation of various kinds of groupings, are always embedded in a *situative context*, so that not individuals or communities with pre-given identities, but interactions in social relationships are the basic units of analysis, whereby 'meaning-in-action' is created through 'illocutionary speech acts' over 'norm contestation' (Searle 2010: 69, 141; Wiener 2014; see section 5.3). Such a neo-institutionalist approach must – against all contestation between methodological individualism and holism in the social sciences (Moses and Knutsen 2012:1–18) – analytically distinguish the *three* dimensions of *subjective, intersubjective* and *collective* intentionality and action (Searle 2010: 59). It is only through such a *triadic structure* that we are able to analyse and understand the processes of, and the interplay between, the *social integration* and *system integration* of societies (Lockwood 1964), to be elaborated below as an alternative to primordialist, but also radical social-constructivist theories.

In the next section, we provide an overview from sociological and sociopsychological research on the basic tenets and processes in the *interplay* of *social* and *system integration*. These are:

1) against the wrong assumption of a dichotomy of personal and collective identities, the *construction* of *social categories* as both normative and empirical elements in the *formation* of *social and multiple identities*;
2) against the reproach of culturalism and groupism, the *formation of groups* through *social organisation* in the process of *institutionalisation*; and
3) *system integration* as problem of the *structural configuration* of *societies* as a whole. System integration can only be successful if social integration does not lead to a complete social closure and thus ethnification of territories, cultures and institutions, because this will frequently also lead to a political polarisation of society into a clear-cut us versus them antagonism. Following from these conceptualisations we distinguish between *three ideal*

types of societies which serve as analytical standards for empirical processes (Max Weber, see Chapter 2, Box. 2.2). Based on these concepts and models we can finally distinguish three *different meanings* of the *concept* of *ethnicity*.

In section 5.3 we then show why and how this *relational* and *dynamic sociological approach* must lead, first, to a *critical reflection* of basic concepts of *public law doctrines* which remain trapped in the dualism of (national) constitutional law and international law of the Westphalian paradigm with the concept of sovereignty as indivisibility as the primary organising principle for law and politics (see Chapter 3, section 3.2). These critical reflections about the concepts of *territory*, *polity* or *community-orientated*, and thus *reified* legal systems underlying the monism/dualism versus legal pluralism theories to this day will lead us to the *elaboration* of a legal-theoretical concept of *integration by law* through *permanent norm contestation*. Only this reconceptualisation of the static concept of law, organised as a hierarchy of norms, necessarily then with a final and supreme locus of authority, and the supposition of an external ontological existence of values of a pre-political religious or language community, necessary for the liberal, secular state to function and to survive, can help to overcome the Böckenförde paradox. This enables us, second, to see how the *heterarchical cycle of norm generation* through permanent *norm contestation* and *contextual interpretation* of abstract normative principles such as freedom, equality, self-determination, and so on, works in practice in all of the – in the broad sense – political activities called law making and implementation including adjudication by apex courts at multiple levels of governance within and beyond territorially bounded jurisdictions. Section 5.4 provides summary conclusions and learning outcomes. Finally, these critical reflections and the summary conclusions we draw from both Chapters 4 and 5, which we summarise and call the *identity–equality–participation nexus* in all social identity forming interactions provide the foundation for the following chapters, with the critical analysis of individual and group rights to existence (Chapter 6), multiple identities (Chapter 7), institutional equality (Chapter 8) and effective participation (Chapter 9).

5.2 The interplay of social and system integration

5.2.1 Social integration: the construction of social categories and social identity formation

Following from the constructivist and interpretative turn in the social sciences, the starting point for any social analysis from this perspective must be the insight that not only must ethnicity and culture not be conflated, but also the terms *diversity* and *difference* are *not homologous* terms and must *not become conceptually conflated*.

The various diversities among individual human beings with regard to *gender*, *age*, *ethnicity*, and so on, are only seemingly objective, because we believe that we observe these diversities as outside in nature. However, we suppress the fact that we can also discriminate between individuals and myriads of their alleged properties in many other ways and not only with reference to one of the *categories* listed above. Accordingly, unlike the, indeed, brute fact of diversity, difference can never be a natural property, but is always a *relational* mental concept

constructed from the perspective of a specific event or situation, which forces us to make a selection among possible pattern variables on the basis of *categorisations*, thereby enabling us to give meaning to the situation through self-perception and the perception of others, either subjects or objects.

Hence, the distinction between diversity and difference first requires that we make use of categories with which we are familiar with by socialisation, or that we construct categories in our heads through imagination and signification (see Chapter 2, Box 2.3), which are part of what John Searle calls the 'human capacity for collective intentionality' and the possibility to impose 'status functions' on others (Searle 2010: 43, 59). And as soon as we give them social and political relevance by orienting our actions towards supposed norms, values or expectations, following from such constructs we create their ontological existence in the meaning of what Max Weber labelled 'belief'. Thus, the process of the *construction* of categories is both *imaginative* and *normative*, in terms of ordering subjects/objects along the binary code of similarity/difference when constructing a model entity/quality (i.e. a category) such as race, class, gender or ethnicity.

Against both Marxist as well as liberal assumptions, and in contrast to all ideologically inspired naturalisations of cultural diversity, we must be aware that we construct social, political and legal categories through three analytically distinct, though in practice simultaneous (and thus inseparable) steps (earlier versions of the following are seen in Marko 2008b, 2017):

- on an *epistemological* level, we have to make a choice based on the binary code of similarity/difference, which we combine with
- the *normative* level, where we have to make a choice based on the binary code of equality/inequality to give either similarity or difference social or political relevance so that
- we make, on the *empirical* level, a choice based on the binary code of inclusion/exclusion.

Thus, at this abstract epistemological level, we must recognise first that the creation of mental perceptions is not value-neutral information processing, but a normative assessment on the basis of the value dichotomy equality/inequality of and for similarity or difference, which cannot be reduced to biological, anthropological or psychological predeterminations of individual identities. Second, in defining a people or a nation by so-called objective markers, such as language or religious denomination, one has to make a decision that a particular cultural marker out of a plurality of such markers *shall be* the *common* characteristic to be found in a certain number of people, thereby *constructing* a *category*, not to be confused with a *group* in the sociological sense. Again, it is a normative decision and not an empirical fact that characteristics that people are supposed to have in common constitute a particular people or nation in our imagination, so that the alleged identity of so-called common characteristics is nothing but the naturalisation of the normative concept of equality, with the demand to treat individuals with those *ascribed* common characteristics equally.

Ethnicity or ethnic identity is thus neither an inherent, natural trait within the meaning of the biological property of people(s), territories, or institutions, nor a quasi-mechanistic, unavoidable social process, but a *structural code*, with the *political function* of *exclusion or inclusion* in the process of different forms of transformation of categories into groupings, as we demonstrate below. And it is the political function of nationalism as an ideology, be it

ethnic or civic, to conceal the above-mentioned normative decisions, and thus choices, in the social construction of political unity, thereby legitimising asymmetric power relations and immunising them against criticism.

As opposed to all primordial theories of ethnic identity based on the alleged biological origin or descent and/or groupness as an alleged common possession of religion or language, *social identity theory*, following from the social-constructivist approach, theorises that the interplay between personal and social identity formation is constituted by three basic processes and empirically tested assumptions (Monroe *et al.* 2000: 434).

1) Categories such as gender, race, ethnicity or nationality are *socially* constructed. They 'structure and order the social world for us' (Brubaker 2004: 71).
2) In line with social role theory (Berger and Luckmann 1966), social identity is then based on the individual's *situative definition* of self and others by *identification* of oneself (or someone else) *as* someone who fits a certain description or belongs to a certain category. However, identification is not reduced to solely a cognitive process, as it also has a psychodynamic meaning of identifying oneself emotionally with another person, category or collectivity (Brubaker 2004: 44). Hence, every mental act of categorisation and identification is – from the very beginning – necessarily *relational* and *processual*, so that there is no natural, *a priori* dichotomy between an individual and collective identity, as liberal ideologies presuppose. Thus, based on the *triadic* structure of the *process of social identity* formation as subjective, intersubjective and collective identities (in the meaning of groups or institutions as social entities), as we demonstrate in the next sub-section, the identities resulting from personal and social identity formation must not be conceptualised as mutually excluding each other. Identity can thus no longer be understood as exclusive, within the double meaning of uniqueness and singular individuality, literally meaning indivisibility, but identities are *always multiply constructed* across different, often intersecting, or opposite categorisations and therefore also possibly conflicting within one's own self identification.
3) Based on Henri Tajfel's research (Tajfel 1978), whereby people tend to favour their in-group over out-groups, even when they represent artificial laboratory constructions and competition for resources is absent, the assumption of *social comparison* suggests the tendency that identification through self-stereotyping with the members of the in-group and the group's norms are positively evaluated. However, the conclusion that in-group favouritism and discrimination against others are – by definition – based on a relational structure of group antagonism is simply wrong, as Xenia Chryssochoou and Evanthia Lyons (2011) demonstrated through their theoretical considerations and empirical evidence. In a critical reflective way, they hint at the *methodological bias* of social psychological research, in particular experimental research:

> However, in their attempt to isolate the social psychological conditions under which in-group favouritism and out-group derogation take place, social psychologists may have given emphasis to a situation where only two possible groups with mutually exclusive membership exist. Although the original theoretization stressed that there are more than two opposing categories of belonging and despite the fact that self-categorization

> theory … emphasises the context-dependent and flexible nature of self-categories, empirical evidence was gathered and theories developed that led implicitly to a more essentialized vision of group membership, in particular for identities that relate to race, ethnicity, nationality, or religion. In our legitimate attempt to reduce prejudice and discrimination, we as social psychologists somehow forgot that group memberships are part of a web of social relations, and that social categories are the 'objectifications' of these relations and of wider theories of the social world. … Thus we involuntarily produced an idea of the world where two opposing groups fight for power and where membership in these groups is mutually exclusive.
>
> (Chryssochoou and Lyons (2011): 71)

Thus, in contrast to methodologically individualist approaches, we see that *social relations cannot* be *reduced* to subjective and intersubjective levels of *personal interaction* at the micro level, but must also include the macro level of *groups* as institutionalised actors as well as the (legally formalised) *organisations* created by them, in terms of *societal relations* (i.e. structures; see Chapter 2, section 2.2) of a system called society (see Easton 1965). The need for *system integration* cannot therefore be explained simply by reduction to the intersubjective level of social integration mechanism, because *groups* as *social entities* not only have an *internal structure* (i.e. internal status hierarchies) but are themselves *part of the larger societal structure* of intergroup relations, in terms of group based social stratifications or hierarchies. In this sense, it is not abstract individuals who have 'differential access to material as well as symbolic resources' (Simon 2011: 142), but 'members' of groups thereby experiencing what we call *structural* advantages or disadvantages in different sectors of society, such as housing, education or employment, and which may lead to 'structural discrimination' in legal terms (see Chapter 4, section 4.2 and Chapter 8). Hence, what is usually called structural discrimination in sociological literature (Simon 2011: 146) is synonymous with what we here call structural disadvantage, and must not be confused with the use of the former term in legal terminology, which distinguishes between normatively justified and unjustified disadvantage and applies only to the latter form the label of 'discrimination', requiring preventive measures or sanctions (for the legal concept of discrimination in detail, see Chapter 8).

Hence, Marxist and nationalist 'upward reductionism' (Mouzelis 1991: 137–58), which sees *the* proletariat or *the* nation as the decisive collective macro-actor determining individual action orientation, *eliminates the autonomy* of persons, groups or institutions, in short: social, cultural and political *pluralism*; whereas methodologically individualist approaches – by their 'downward reductionism' – *neglect group formation*, *institutionalisation* and the creation of *societal structures*, denouncing them as groupism, culturalism or collectivism and ignoring the problem of how *social hierarchies* are created beyond personal power relations as sociological-theoretical problems of *emergence*.

Consequently, Mouzelis identified two – what he calls – 'unhelpful orientations':

1) a tendency to look at the micro–macro problem in philosophical rather than sociological theoretical terms; for instance, when focusing on macro phenomena, the concern is primarily with their ontological nature (i.e. whether or not their features are

reducible to features of individual actors) or whether or not they are *sui generis*, 'supervenient', and so on;

2) a tendency to operate on the 'society–individual' schema, with the result that intermediate levels between the individual and the societal are ignored – even when it is highly hierarchised social systems that are the issue.

When these two unhelpful orientations are combined, one moves towards philosophical questions about the so-called nature of the social system and away from more socio-theoretical concerns with regard to what the hierarchical aspects of social life are and how a researcher of complex societies can pass from the subordinate to superordinate levels and *vice versa* without neglecting social hierarchies, thereby providing the key to an understanding of the micro–macro issue (Mouzelis 1991: 156).

And with regard to the phenomenon of *emergence* as the 'existence or appearance of relations between sub-systems', Mouzelis argues that, with these relations, which we call the structures of a social system (see Chapter 2, section 2.2):

> there is nothing metaphysical or mysterious in the perfectly unexceptional and unproblematic statement that, in the case of hierarchised social systems, any system is more than the sum of its constituent sub-systems – the 'more' here being a matter of the relationships between the subsystems. Seen from this perspective, the formidable problem of how 'society' can be 'more' than the individuals of whom it is made up evaporates; it becomes plain common sense.
>
> (Mouzelis 1991: 157)

Moreover, personal and social identity formation through self and other categorisation and multiple identification must be seen as a threefold process of *depersonalisation*, *stereotyping* and *group social influence* (Reicher *et al.* 2010).

1) Any categorisation requires *depersonalisation*. When acting in terms of social identity, we usually view ourselves and others in terms of belonging to categories, such as gender, (socioeconomic) class, or to imagined groupings, such as religious or linguistic groups as mental concepts. This has important consequences: We will then tend to see us and others as *members* of the same grouping, as being similar to each other and different from members of other groupings. Hence, we assess the nature of individuals no longer (only) with regard to personal properties, capabilities and merits as is claimed by liberal ideology, but in terms of those generalised *characteristics* which we *associate* with the categories or groupings to which they shall be seen to belong. However, this will happen only when we believe in these similarities and differences, so that the concept of membership, as well as the emotional attachment of belonging to a particular group, community, society, or nation as a precondition to being treated equally, is thus nothing but the reification of the normative principle of equality.
2) Moreover, as this cognitive and normative similarity/difference assessment extends to our beliefs, values and feelings, we will expect to agree or to disagree with others on the

basis of imagined shared understandings, values and norms. This is the process of *stereotyping*, which forms – together with the first process of depersonalisation – the basis for the development of prejudices (Yang 2000; Green and Seher 2003). However, they must not necessarily be seen only as negative because we stereotype not only others in terms of those groups that we think they belong to, but we also stereotype ourselves. Hence, when I ponder what I should do, I will answer this question with reference to my in-group stereotype, so that I will play a socially prestructured role in different situational contexts.

3) When the situation remains unclear despite this self and other stereotyping, we usually seek information, thus what becomes the basis for a model of *group social influence* (Turner 1991). With regard to the source of influence, other members of the group whom we believe to be in a position to be knowledgeable about group beliefs, norms and values will influence us. These will be persons whom we see as most typical of the in-group, in order to overcome our doubts about who we are and what we *should* do. Social reality testing – the understanding of who we are, the nature of the world we live in and how we should act – is thus necessarily a matter of deliberation and norm contestation (Wiener 2014), so that social significance and political salience are always contingent until confirmed by others, whose perspective we share and whose values and norms we endorse. However, in sharp contrast to the presuppositions of the Böckenförde paradox, shared values and norms are the *product,* not the *cause* of group formation.

In conclusion, the sense of groupness is *not* a *substantial property* of a cluster of individuals, but an *empirical variable*, which does not depend:

- on the subject matter of categories (language, religion, ethnicity) as we already postulated in the previous chapter; *but on*
- the *scope* and *intensity* of social *beliefs* in the ontological existence of these categories within a population; and
- the *possibility* of their *political activation*.

In line with Mouzelis' considerations above and our sociological neo-institutionalist approach, this means that the individual belief in shared values cannot guarantee social cohesion as such or make a culturally homogeneous community. Nor does this necessarily imply that we always construct personal as well as social identities dichotomously, as identity versus difference, with no room left for either dissent *within* groupings or cooperation *between* groupings, as not only Hobbes and Schmitt's definition of politics (Schmitt 1932, whose writings and actions legitimised German Nazi ideology; see Jacobson and Schlink 2000), but also as Tajfels experimental research might indicate when in-group favouritism is seen as objective, and thus a seemingly unavoidable mechanism of social and political *closure* in the process of transformation from categories into groups. However, as we have seen from empirical research (Chryssochoou and Lyons 2011), this need not be the case. Otherwise, feelings of altruism and more or less institutionalised cooperation with strangers could not occur, as also the research from mathematical biology makes clear (Nowak and Highfield 2011).

The empirical evidence proves that personal and social identity formation does not require a clearcut either/or decision, so that there is no *a priori* incompatibility at the psychological level in having two or more identities. These psychological features can be accomplished, as John Berry argues, in two ways: 'by engaging them simultaneously (by merging or mixing) or by alternation (by switching between them, according to the appropriateness in particular contexts)' (Berry 2011: 287). Hence, the concept of 'bicultural identity integration' is based on the finding that that there are many shadings in terms of 'mixed, hybrid forms' (Brubaker 2004: 54, 58) or 'alternating' or 'blended biculturalisms' (Simon 2011: 148–9; Wiley and Deaux 2011: 50):

- through *compartmentalisation*, multiple but separate identities coexist and remain differentiated and become salient by use in different situations, for instance by code switching in multilingual situations, as shown in Chapter 7, section 7.6;
- through *intersection*, multiple hyphenated identities are created, as this is very often the case with second-generation immigrants but also members of national minorities or co-nations;
- only through *merger* do multiple memberships lead to an inclusive dual or multiple identity as a new category or integrated biculturalism (Chryssochoou and Lyons 2011: 80).

Again, none of these three theoretical possibilities have to exist in reality in a pure form, but can be found even within one and the same language minority, as has been, for instance, empirically demonstrated by Jürgen Pirker (2014) in the case of Slovene speakers in Carinthia, one of the Austrian federal entities. He identified not only one, but various forms of bilingualism or biculturalism between the two extreme poles of assimilation and 'ethnic reproduction' (ibid: 86).

In this example, there are four traditional dual identities: *mixed identities*, when speakers identify themselves as a hybrid mix of both languages and cultures; *situative identities*, when speakers – depending on the situational context – represent themselves as either having Slovene or Austrian German nationality; *in between two stools* is the feeling of speakers who identify neither with a Slovene nor a German nation; and *bilingual identities* describes when speakers perceive both languages as being politically equal within the meaning of 'integrated biculturalism', as quoted above. However, also *assimilation* can *vary* by degrees. There are *passively adapted* identities, where speakers do not deny their Slovene-speaking upbringing; *normally adapted* identities (i.e. economically and politically utilitarian identities who tend to hide their ethnic origin); and, finally, *suppressive-adaptive* identities, insofar as speakers aggressively deny their ascribed ethnic origin, so that speakers of this category can also be found in German nationalist associations that deny and try to abolish minority rights. *New identity types* (ibid: 92–3) in today's second- and third-generations of Slovene speakers encompass *symbolic identities* (i.e. a remaining identification with the Slovene language) but drastically declining language competence due to intermarriages or residence outside the traditional, rural settlement area whereas ubiquitous *cosmopolitan identities* are developed in territorial distance from the original 'ethnie' in Smith's (2010) terminology and are based on an openness towards other cultures, for instance because of student exchange programmes, such as the European Union (EU) Erasmus programme.

Similar observations on the *gradation* of *in-between forms* of *bilingualism* and *biculturalism* have been made in the case of *Catalonia* when researching 'multiple identities in decentralised Spain' (Moreno *et al.* 1997; Moreno 2017), by distinguishing a Catalan identity (i.e. 'Catalan' and 'More Catalan than Spanish'); a Spanish identity ('only Spanish' and 'more Spanish than Catalan'); and a shared identity ('as much Catalan as Spanish'), and thereby distinguishing exclusive forms from forms of dual identities. One of the early warning indicators of the development of the new independence movements could have been the fact that, among both native populations and immigrants, the Catalan-only identity increased with the level of education. Hence, in hindsight, it is no surprise that large parts of the 70 per cent majority of Spanish citizens with dual identities (i.e. regionally, ethno-territorially self-ascribed identities such as Basque, Catalan, Andalusian, Castilian combined with a national identity of being Spanish) were easily turned towards an us *versus* them relationship. This was due to the continuing political mobilisation on the basis of political and legal factors, in particular the civic-nationalist secession movements and the decisions of the Spanish Constitutional Court against extension of the autonomy regime in 2010 and 2014, as analysed in the previous chapter.

In conclusion, all the ideas concerning the necessity of a pre-given or pre-political community, conceptualised in the Böckenförde paradox (see Chapter 3, section 3.1) as a functional prerequisite for feelings of mutual trust and solidarity, are nothing but a 'reification in the strict sense of the term' (see, in particular, Mouzelis 1991: 121–5) of social or political functions, or even a naturalisation of social relations when trust and solidarity are conceptualised *as if* they were only emotions. This naturalisation hides the normative dimension of creating deontic power (Searle 2010: 164–9), which follows from the speech acts on the intersubjective level, thereby creating rights *and* duties, not only in relation to others who have been recognised as equals, but possibly also to strangers and their desires and needs. Hence, as long as the ideologically constructed propositions of the so-called *Böckenförde* paradox and the opposition of equality and difference with its alleged predetermination for conflict and cooperation are not transformed into the *triadic structure* of identity, diversity *and* solidarity, *institutionalised* diversity governance will not be possible. Only when we no longer believe in the reified nature of social and political behaviour do we approach – at least on a theoretical level – the possibility of looking for institutional arrangements of equality, on the basis of diversity as the new essential task of constructive institution engineering for the purposes of *multiple diversity governance*. This is elaborated and explained in much more detail in the final chapter of this book (Chapter 10).

What we demonstrate in the following sub-section, with regard to the requirements of the interplay between social and system integration, is the fact that ethnicity as a *structural code*, with the political *function* of *exclusion or inclusion* in the processes of transformation of categories into groupings, has no objective content or meaning relating to language, religion or culture in general, but represents the politically driven processes of *social closure* of groupings and the *dichotomisation* of group relations into a societal configuration of an antagonistic us *versus* them position. However, it must be stressed once again that this is not a natural process following from cultural difference as such, but only one possible result in the *permanently* ongoing *processes* of social and system *integration* and *disintegration*, which may potentially lead to the collapse of severely divided societies and states.

5.2.2 Group formation through social organisation and institutionalisation

In contrast to the older studies of nationalism and their distinctions between civic and ethnic variants that were based on allegedly culturally-determined differences, Frederik Barth (Barth 1969) established a *relational* and *processual* approach. From this perspective, groups are defined by possible symbolic *boundaries* in their relationships to others. Hence, cultural differences per se do not determine boundaries, since a boundary is a product of functional differentiation, which may be of variable salience and importance over time. *Cultural variation* is thus an *effect and not a cause* of boundary making. This approach must be called the 'Copernican revolt' in studies on nationalism, as it enables the *disentanglement* of *culture* and *ethnicity* against the Herderian legacy (Wimmer 2013: 16–21) and social ontology of a world made up of 'peoples', each distinguished by a unique culture, held together by communitarian solidarity and bound together by a shared identity, which has characterised even modernist approaches to the studies of nationalism and ethnicity.

Hence, cultural differences arise from processes of *functional differentiation* within populations, which eventually lead – through *social organisation* – to the formation of distinctive *groupings* when, for instance, based on occupational specialisation, the development of some form of complementarity will gradually encourage the creation and enactment of distinguishing symbolic markers and, eventually, lead to the emergence of distinctive *groupings* with separate 'constructed' genealogies, each of which considers the others to be culturally distinctive from themselves (Eriksen 2002: 79).

Following from and further elaborating Barth's approach, Wimmer (2013: 11) has recently elaborated a comprehensive explanatory model of *boundary-making strategies*, which informs individuals and groups about their possible *theoretical* choices.

First, there is the possibility of *boundary shifting,* through the redrawing of boundaries in two different ways. Either by *expansion,* as we learned in Chapter 3 on the basis of the historical processes of state formation and nation building in Europe. In this instance, majorities (i.e. in reality intellectual and political elites) construct *the* nation as if it represents the population at large, what we called (in Chapter 4, section 4.3.1) 'identity fiction' and the myth of ethnic neutrality, which is combined in an effort to present all elements of majority culture (symbols, language, etc.) *as if* they were of instrumental use only, so that they shall be seen as culturally neutral for purposes of social cohesion and 'governmentality' (Foucault 1991). By definition, *minorities* then have to *assimilate* what is called incorporation in older sociological literature, or they will have to politically mobilise against the dominant ethnic group through what Michael Mann has labelled the 'state subverting nationalism' (Mann 1993: 730–2), as can be observed in Eastern Europe and Western Europe today. But there is also the opposite possibility of *contraction*, in empirical reality by de facto unilateral *secession*, as was the case in Kosovo in 2008.

Second, Wimmer distinguishes three forms of the *modification of boundaries*:

1) There is the strategy of 'transvaluation' or trying to invert the hierarchical order through normative inversion, as occurred with the abolition of the Apartheid regime

in South Africa. Through collective action, the minority, not in terms of numbers but power relations, will try to become the majority or to achieve an equalisation in terms of status and power.

2) Through *individual* 'positional moves' individuals may cross the boundary in a process of assimilation and upward social mobility (see also Diehl and Blom 2011: 321).
3) Finally, according to Wimmer, there is the *strategy of blurring* or developing non-ethnic forms of belonging. Of course, this begs the question of whether non-ethnic is synonymous with a civic or third type of social relationship beyond the civic/ethnic dichotomy, as we discussed at length in Chapter 4. Diehl and Blom, however, based on empirical evidence from naturalisation processes in Germany, conclude that boundary blurring allows for 'intermediate or hyphenated stages that allow individuals to feel simultaneously as members of an ethnic minority and of the mainstream', which requires, when seen from a 'neo-assimilationist perspective', what is called the need for 'structural assimilation' (see below).

In any event, ethnicity must no longer be understood as a form of collective identity characterised by pre-given, shared values and norms, in terms of a common culture and metaphoric kinship that differentiate allegedly pre-existing ethnic groups from each other, but as ethnic distinctions, which result from 'marking and maintaining boundaries irrespective of cultural differences' (Wimmer 2013: 22).

As we tried to demonstrate in the previous sub-section on the social identity theory, state-of-the-art psychology and sociology tell us that the formation of personal as well as social identities must be seen as discursively mediated processes. Thus, identity can no longer be seen as exclusive, within the double meaning of uniqueness and singular individuality, literally meaning indivisibility, as identities are constructed across different, often intersecting and even antagonistic discourses, practices and positions. As a result, the focus in social psychology and cognitive anthropology has shifted to *multiple identities*, linked to the notion of the individual person as a composite of many, even contradictory, self-understandings in different situational contexts (van Meijl 2010). In conclusion, ethnicity is thus the result of a *political process* of *social identity* construction and *group formation*, whereby actors create or reproduce order in the social world through categorisations of self and others on the basis of symbolic markers and by attempting to stabilise the boundary, through a more or less strict social closure. Strict *social closure* of groupings is therefore a *possible*, but *not a necessary*, result of *political processes*, and thus not a quasi-mechanistic process. And neither are antagonistic relationships the quasi-natural beginning of each and every encounter between persons and groupings, as political theories in the tradition of Thomas Hobbes (see Chapter 3, section 3.2) and Carl Schmitt (Schmitt 1932) might want to make us believe. As Emil Benveniste has made clear in his seminal studies on the vocabulary of Indo-European languages, the meaning of the ancient Greek word, *xenos* (the stranger), must not be understood as states or as substances but as living relationships in motion in the minds of men who think and speak. Seen from this perspective, the word *xenos*/stranger has no fixed meaning, thus it might denote an enemy, but it could also denote a guest, based on a relationship between men bound by a pact, implying precise obligations which are passed onto their descendants (Benveniste [1969] 2016: XV and 67).

What is now the relationship between identity formation, the making of groups and a *constructivist-structural* understanding of ethnicity in contrast to the primordialist and constructivist-instrumental approaches? *How are groupings* transformed into what is referred to in scholarly literature as *bounded groups or community?*

In line with social identity theory, the cognitive redefinition of the 'social group' (Turner 1991) assumes that interaction between individuals is only an antecedent of what constitutes a psychological group in the process of self-categorisation and identification based on the perception of membership of a larger entity or unit. However, 'groupness' is not a biological or psychological property of individuals per se, but an *empirical variable* regarding social relationships. Moreover, it is not dependent on the objectivity of language or religion as such, but on the distribution of belief in those cultural markers within a population, hence their relative salience for political mobilisation.

Thus, *ethnic* groups are only one possible modality in the process of group formation based on social identity formation *and* social organisation. Following Don Handelman (1977), one can typologically distinguish the following *steps of social organisation* in what we called the functional-structural requirements for autonomy and integration in the processes of social and political ordering in Chapter 2, section 2.2.

These are*:*

- *Standardised categories*: schematic processing of information treats each new person, event or issue as an already familiar category or schema, which guides perceptions, interprets experience and prepares for action (Brubaker 2004: 74–8). Roma and Sinti in Europe may be said to form a generalised and therefore abstracted *ethnic category*, but they do not form a bounded group in the sociological sense, as long as they are politically fragmented and lack the overarching organisations necessary to have institutionalised collective agency. Another example is the abstract category of Hispanics, which was originally invented by the US census office without taking into account the internal linguistic and other cultural heterogeneity which this construction brought about (Yang 2000: 10–11). Therefore, the *distinction* between *category* and *group* in the sociological sense is necessary to remind us of the naturalist fallacy of the confusion between epistemology and ontology, which is the vantage point for all ideologies of racism and nationalism and primordial theories of race and ethnicity. However, we must – at the same time – not throw the baby out with the bathwater. The very process of categorisation and classification is a necessary mental process for *understanding* social relationships in terms of an analytical framework. Therefore, we must remain aware of the *triadic structure* of all social relations and social identity formation, and thus the necessary interplay between the subjective, intersubjective, and objective levels of institution-building processes. Hence, to criticise the mental process of self and other categorisation as such, and therefore the three-fold process of de-personalisation, stereotyping and group social influence as an ideological fallacy from the very beginning (which must be avoided under all circumstances), is to neglect this third level of group social influence in both self and other-regarding social identity formation. Hence, in contrast to radical constructivist epistemological approaches, the very use of legal categories, such as race, ethnicity, and gender, does

not mean that legislators or judges themselves ethnify or racialise social relations when constructing and applying these categories as long as they remain aware of the fact that these are heuristic fictions. Seen from this (epistemological) perspective, these *categories* are *necessary* to *identify* the *processes* of *ethnification* or *racialisation* which shall be prevented or sanctioned through anti-discrimination law. And the conceptual distinction between category and group is then an additional, necessary methodological and ontological precondition for legal adjudication, as can be seen in more detail in Chapters 7 and 8.

- *Informal networks* come into being when people regularly interact with one another in terms of habitualised membership as, for instance, migrants in economic *niches* or what was labelled 'bonding' by Putnam in order to build up 'social capital' (Putnam 2007). The main difference between category and network consists in the latter's 'opportunity structure' to distribute material and immaterial resources among members, in particular when they are excluded from access to the resources of the host society (see Max Weber's definitions in Box 5.1).
- *Associations* are goal-orientated *formal organisations* such as civil society organisations for the protection, preservation and fostering of minority cultures (see Chapter 7, section 7.4) or ethnic parties claiming representation and participation in politics (see Chapter 9, section 9.2).
- Groups in terms of *community* or 'bounded group' (Brubaker 2004) – in the tradition of European state formation and nation-building processes – came into being either with a territorial base, such as territorially concentrated language groups or through 'institutionalised autonomy' in the case of religious groups (Bader 2007). However, there are – from the perspective of the construction of ideal types – two forms of bounded groups: those that are 'strongly groupist, exclusive, and affectively charged' and others which are 'much looser, with open self-understandings and a sense of affinity to others, but lacking a sense of overriding oneness vis-à-vis some "constitutive" other' (Brubaker 2004: 46–8). Open-mindedness and closed-mindedness, as an individual disposition and the *processes of social closure* in the transformation of groupings of persons into groups, when they become *institutionalised through social organisation*, are thus intimately interlinked and structure what we have called the *processes of ethnification* and *polarisation*, whereby we-and-they relationships are transformed into us *versus* them antagonisms.

Box 5.1 Max Weber: open and closed relationships, membership, organisation

A *social relationship*, regardless of whether it is communal or associative in character, will be spoken of as 'open' to outsiders if and insofar as its system of order does not deny participation to anyone who wishes to join and is actually in a position to do so. A relationship will, on the other hand, be called 'closed' against outsiders so far as,

according to its subjective meaning and its binding rules, participation of certain persons is excluded, limited, or subjected to conditions. …

It is especially likely to be closed, for rational reasons, in the following type of situation: a social relationship may provide the parties to it with opportunities for the satisfaction of spiritual or material interests … If their expectations are of improving their position by monopolistic tactics, their interest is in a closed relationship.

A party to a closed social relationship will be called a 'member' … Both the extent and the methods of regulation and exclusion in relation to outsiders may vary widely, so that the transition from a state of openness to one of regulation and closure is gradual. Various conditions of participation may be laid down; qualifying tests, a period of probation, election of new members by ballot … Finally, in case of closure and the appropriation of rights within the group, participation may be dependent on the acquisition of an appropriated right. … Thus, regulation and closure are relative concepts. There are all manner of gradual shadings as between an exclusive club, a theatrical audience the members of which have purchased tickets, and a party rally to which the largest possible number has been urged to come; … Similarly, closure within the group may also assume the most varied forms. …

A social relationship which is either closed or limits the admission of outsiders will be called an *organization* (*Verband*) when its regulations are enforced by specific individuals: a chief and, possibly, an administrative staff, which normally has representative powers. …

An association with a continuously and rationally operating staff will be called a *formal organization*. An organization which claims authority only over voluntary members will be called a *voluntary association*; an organization which imposes … its order … on all action … will be called a *compulsory association*; … compulsory associations are frequently territorial organizations.

(Weber 2013: 43–53)

Hence, depending on these dispositions of open or closed-mindedness, and the *degree* of the processes of social closure *of* groupings and the structuring of relationships *between* groupings, *contact between persons* believing to belong to different categories or groups does not automatically re-personalise and thereby de-categorise intersubjective relations and thus encourage peaceful cooperation, but contact between persons with closed-minded dispositions can also trigger aggression in diffuse situations due to their, for instance, (social) beliefs in inconsistencies in status. The *opportunity* for *reconciliation* after violent conflict is thus improved through contact *only if* it remains possible that persons who are identified as members of groups can also be assigned to other categories of interpersonal contacts. In more abstract sociological language, this means the remaining possibility of *multiple, cross-cutting classifications*, which is, however, no longer given when you are asked in any situation first and above all whether you are Croat, Serb

or Bosniak, thereby reducing identification to a singular and even socially immutable identity of each and every person, as we can see from the implementation of the Dayton Peace Accord in Bosnia and Herzegovina 20 years on. This forms what the author of this book has referred to as 'the ethnic King Midas effect' elsewhere (Marko 2006a: 543, 2017). Conversely, a *lack of contact* may also help to polarise images and emphasise group exclusiveness as we know from phenomena such as the antisemitism without Jews in Austria between the two world wars or a fear of strangers, in particular in rural areas, without having ever seen a refugee in person, as recent studies on the electoral success of right-wing parties in Europe because of their 'politics of fear' of immigrants demonstrate (Wodak 2015).

Therefore, as far as social organisation and institutionalisation are concerned, *migrants* in European societies are *not new minorities by definition*, but can form any of these modalities. Migrants who want to assimilate in order to achieve upward social mobility (i.e. 'positional moves' in Wimmer's, 2013, typology of boundary-making strategies) will simply adapt to the institutions of the host society by adopting the basic values of the society in terms of culture learning, social skills acquisition, and culture shredding, the latter denoting unlearning of the culture of their origin and parents. All of these processes of identification with the larger society are summarised in sociological and psychological literature by the concept of *cultural assimilation* (see, above all, Berry 1997).

These processes of cultural assimilation have to be distinguished from what was termed *'structural assimilation'* by Milton Gordon (1964), as a second type of incorporation and what we call social integration. The latter is, however, no longer a one-way process of identification with the host society's basic values, institutions and social practices, but requires a *two-way process* of mutual adaptation and accommodation. Migrants are therefore required to engage in learning the culture and acquiring social skills, including learning the language of the host society in order to be able to communicate (i.e. to acquire 'social capital' in Putnam's terminology; Putnam 2007). At the same time, however, not only single members, but the dominant majority population, in particular their institutional representatives, must be prepared to adapt its national institutions in accordance with the needs of minorities for effective social integration. Thus, *integration* is successful if a *high degree of contact and participation* between members of the majority and minority – the process of 'bridging' in the terminology of Putnam – is combined with a *low degree of cultural assimilation*, so that behavioural shifts – termed *mutual* 'adjustment' – can follow without 'acculturation stress' leading to 'anxiety or depression' (Berry 1997: 11–12). Hence, according to Berry, an 'integration strategy' can only be pursued in societies 'that are explicitly *multicultural*, in which certain psychological preconditions are established':

> These preconditions are: the widespread acceptance of the value to a society of cultural diversity (i.e. the presence of a positive 'multicultural ideology'); relatively low levels of prejudice (i.e. minimal ethnocentrism, racism, and discrimination); positive mutual attitudes among cultural groups (i.e. no specific intergroup hatreds); and a sense of attachment to, or identification with, the larger society by all groups …
>
> (Berry 1997: 11)

Thus, *migrants* from *lower strata* in terms of socioeconomic status will have greater difficulties in processes of integration. They will most probably start to associate in economic *niches* as a form of shelter in order to be able to adapt to the host society in terms of social skills acquisition and culture learning, with the danger of what has been termed *'downward assimilation'* (Kivisto and Faist 2010: 102–20), possibly ending up with ghettoisation and structural discrimination in public educational systems, following from the territorial concentration of migrant populations in municipal districts. Migrants will then be treated as the other and thereby become ethnicised or even racialised in terms of ascribing to them an inferior status, irrespective of the colour of their skin, their language, or their religion.

In empirical reality, migrants in European societies face many obstacles to social integration. As repeated reports of the EU Fundamental Rights Agency make clear, migrants, in particular Muslims, are subject to high levels of prejudice:

> If you are a Muslim or of Muslim origin living in the EU, your name may be enough to ensure that you never receive an invitation to a job interview. … Unequal treatment is also an everyday occurrence when trying to access public or private services, such as a doctor's practice or a restaurant. … The findings of this survey show the general lack of progress in tackling discrimination and hate crime since 2008, when we carried out our first European Union Minorities and Discrimination Survey. … As the findings show, discrimination, harassment and violence can undermine positive attitudes and hinder meaningful participation in society.
>
> (European Union Agency for Fundamental Rights 2017b: 3)

Under these conditions, it is very difficult for migrants to develop enough social capital and/or organisational capacity to be able to politically mobilise a collective identity to be officially recognised as a new minority, in order to be able to make claims to redress institutionalised inequality within the host society and to gain access to its material and symbolic resources (Chryssochoou and Lyons 2011: 83).

In conclusion, the concept of *social integration* is thus based on processes of *enculturation*, through the acquisition of knowledge and capacities, as well as status positioning through individual and social recognition in interpersonal contacts, in particular in the educational system and the labour market, and through participation in institutional settings. According to the *relative* social distance (see below) in these processes, social integration can vary to a greater or lesser extent.

The example of economic *niches* discussed above brings us, therefore, to the question of the interrelationship between the categories of 'social class' (Weber), *culture* and *ethnicity*, in terms of socioeconomic and/or ethnic stratifications of societies, which can and must be analytically distinguished, but which are interlinked in social practice.

Social class formation and the development of status groups are based on several criteria in delineating classes, including income, education, and political influence in terms of social honour and prestige. Theories of social class (Eriksen 2002: 8) always refer to systems of ranking and therefore to a distribution of power, so that the *vertical socioeconomic stratification* of society is represented in a status hierarchy of upper, middle, and lower strata. The supposition of Western, sociological theory is that members of different strata will

try to limit their interactions and relations to members of the same stratum. In particular, members of the upper strata will hold on to the privileges of their situation, while members of the lower strata will experience them as economic deprivation, cultural marginalisation and/or legal discrimination. Thereby, emotions (Marcus 2000), and in particular envy, play an important role, as does status anxiety.

In contrast, following from the theory of functional differentiation, relations between cultural groupings need *not be* structured in a *hierarchical* way, as the ideologies of racism and ethno-nationalism or the more or less open quests for assimilation want to make us believe (see Chapter 4, section 4.2). Nevertheless, cultural diversity in terms of different languages, religious world views and lifestyles, creates a *social distance* between groupings following from the historical legacy of state formation and nation building in Europe, which is usually measured by a binary code that would admit or refuse marriage, friendship, working together, living in the same neighbourhood or settling in the same region (Eriksen 2002:12). However, the binary code for measuring social distance does not mean that the empirical results must necessarily lead to a clearcut divide in terms of an us *versus* them dichotomy and a hierarchisation of group relations. In reality, *depending on the situation*, there will be various degrees of group inclusion and exclusion in terms of *dichotomisation* (i.e. an exclusive us–them kind of relationship) and *complementarisation* (i.e. an inclusive we–you kind of process), so that collective identities and thus group relations must not necessarily be perceived as mutually exclusive and hierarchical (Eriksen 2002: 26–8).

Worsley (1984: 240) has demonstrated that there are three theoretically possible relationships between class, culture and ethnicity:

1) Cultural diversity may *cut across* class when members of the same cultural grouping can be found in all occupational categories as workers, managers, civil servants or employers.
2) Socioeconomic classes may be *segmented* by ethnicity with skilled workers from one ethnic group and unskilled workers from another, or the management of a corporation from one ethnic group and workers from another.
3) They may *overlap and reinforce* each other which has been elaborated and empirically demonstrated in terms of ethnic stratification leading to structural discrimination.

The *decisive empirical question* is now, *why* and *how* the overlapping of (vertical) socioeconomic stratification and (horizontal) cultural differentiation mutually reinforce each other in such a way that also cultural diversity is transformed into status hierarchies (i.e. a vertical, ethnic stratification of society).

Ethnic stratification shall thus be defined as *institutionalised inequality* among cultural groups in a society (Yang 2000: 61). Insofar as this is a question of power relations and not cultural diversity wrongly termed as cultural difference, ethnic stratification is not random but is based on a system of formal legal or informal sociopolitical norms that determine and justify asymmetric status positions, which, in turn, leads to a structural pattern of unequal access to symbolic and material resources. Social psychological approaches argue that ethnic stratification is based on a high level of prejudices widely spread throughout society, so that discrimination and, as a consequence stratification, are inevitable. However, this type

of argumentation *confuses cause* and *consequence* and cannot explain *how* these prejudices are created. In particular, negative attitudes about out groups need to be explained by, for instance, group competition and conflict over resources.

Modernisation and competition theories thus argue that economic and political modernisation erodes the social bases for small-scale ethnic identities, such as villages, tribes or dialects, while encouraging collective action based on large-scale ethnic boundaries, such as between regions, national states or standardised languages. In this view, urbanisation, the expansion of services in the post-industrial phase, the development of peripheral regions and state and nation building create the potential for national movements and their political parties because these factors initiate contact and competition between culturally distinct populations. Hechter and Okamoto (2001: 197) argue that the *cultural division* of labour *explains* how and why ethnic and racial identities become salient *relative* to other social identities, whereas the *competition* mechanism *explains* how ethnic *collective action* is *triggered* once these salient identities are formed (for a comprehensive social theory of ethnic politics from a social-constructivist perspective see, in particular, Chandra 2012).

In conclusion, the reconstruction of social identity formation as processes of categorisation, identity formation and social organisation through institutionalisation makes clear that identifications are *dynamic processes* of political *domination* and possible socio-cultural *marginalisation* instead of contributions to social integration. Table 5.1 represents the possible functional-structural outcomes of the dual requirement of social integration for all minority groupings, irrespective of whether they are labelled old minorities (i.e. national minorities and indigenous peoples) or new minorities stemming from immigration.

Table 5.1 The dualism or duality of social integration

Social integration		*Host society*	
		Yes	*No*
Society of origin or ethnic diaspora in host society	Yes	Multiple integration	Segregation and 'downward' assimilation
	No	Social 'upward' assimilation	Marginalisation

Source: Esser 2001: 19 (modified and extended)

Hence, successful *multiple integration*, in contrast to assimilation, requires that a minority member will be and remain recognised by both the dominant majority as well as his minority group members. This requires *enculturation* through the acquisition of knowledge and capacities (i.e. social capital) for both the society of origin as well as the host society, by means of bonding *and* bridging and successful *status positioning* in the social relationships in both societies, with regard to the dimensions necessary to acquire social capital, namely public education, the labour market and effective participation.

If a minority member is to be recognised by the majority population because of a language shift and his or her acculturation into the dominant core values (in German, *Leitkultur*) of the majority, so that he or she will give up his or her different cultural identity, we speak of *assimilation* because of the opportunity for social *upward* mobility.

However, as empirical studies make clear, there is also the possibility of social *downward* assimilation in a process of *ethnic ghettoisation*, which occurs when members of minorities do not acquire the necessary social capital through measures or instruments of bridging, such as learning the language of the host society or acquiring other cultural capital through enculturation, so that they remain adapted to the culture of origin and – at the same time – territorially and institutionally *segregated* from the institutions of the host society in *ethnic ghettos*. The latter is called in scholarly literature the 'ethnic' or 'minority trap', in terms of downward assimilation (Kivisto and Faist 2010: 102–20; Kraus 2015). Finally, there is also the possibility that minority members will neither be recognised by their society of origin, nor by the host society, which is termed cultural 'marginalisation', and which often – at an individual level – goes hand in hand with 'split' identities in terms of 'serious psychological disturbances, such as clinical depression, and incapacitating anxiety' (Berry 1997: 13).

So far, we have analysed the processes of assimilation or integration more from the perspective of individual persons, including the requirements imposed on them, or the obstacles which they face in these processes. The very same process, however, must also be seen from the perspective of *group relations* in societies, which, again, can be ideal typically summarised (Marko 1995: 164). The taxonomy in Table 5.2 is therefore based on the *empirical* axis of unity / diversity and the *normative* axis of equality / inequality to explain the different possible forms of relations between ethnic groups.

Hence, *assimilation* and *separation* form the extreme poles of a continuum based on the non-recognition of cultural diversity and they can be *legally institutionalised* in two forms.

First, there is *institutional segregation* within a given state or society by exclusion from the institutions of the nation-forming majority community. Although in 1895 in *Plessy v. Ferguson*, the US Supreme Court established the infamous doctrine of 'separate, but equal' as a legitimate formula for allowing racial segregation in public education and private facilities, the *normative concept* of *equality cannot be separated from open social structures and institutions*. Segregation, as the Supreme Court ruled in the *Brown v. Board of Education of Topeka* decision in 1955, implies a *value judgment* stating that others are 'inherently inferior'. Thus, for the Supreme Court, it could no longer be upheld, notwithstanding the fact that the text of the fourteenth amendment of the US Constitution was identical to that at the time of the *Plessy* decision. Segregation based on power relations, however, is not merely a problem of dominant majorities. If the claim for *separation* is based on

Table 5.2 Ideal types of group relations

Group relation	*Equality*	*Inequality*
Unity	Integration	Assimilation
Diversity	Autonomy	Separation

some sort of 'nationalism of national minorities' (Brubaker 1996: 4–6), it tends to lead to *ghettoisation* and *segregation* by minorities themselves. This occurs together with all the associated problems, as liberal culturalists rightly insist, of the protection of members of *minorities* within *minorities* or – in case of sub-state nationalisms – of members of *majorities within minorities* as we can see from our analysis of autonomy regimes in Chapter 9, section 9.4.

Second, *territorial separation* is inevitably linked to the *creation of new minorities* or even with forced *population transfer*, irrespective of it being legalised by international treaties; for example, the Lausanne Treaty of 1923 was mentioned in Chapter 3, section 3.3 as an example of forced population transfer from one territory to another (i.e., ethnic cleansing, as it is called today). Furthermore, in 1923, this population transfer was by no means voluntary for the people subjected to it (Hirschon 2003). This is not a social invention of the twentieth century. Pogroms against Jews or the forcible transfer of Protestants, as well as Catholics, in accordance with the principle *cuius regio, eius religio*, have a long history, as we demonstrated in Chapter 3, sections 3.1.1 and 3.1.2. In addition, territorial *secession* from a given state or the *dissolution* of a state with the formation of new states and the juridical intricacies in the interpretation of a right to external self-determination under public international law, have been discussed in Chapter 4, section 4.3.

Assimilation as the other extreme pole of the continuum is just another means to negate the other, insofar as the members of ethnic groups are supposed to give up their different cultural and/or social practices in order to be treated equally, as we discussed above from a sociological and sociopsychological perspective. Very often, the cultural norms of the dominant majority are declared to be neutral and universal standards, as was elaborated in Chapter 4, section 4.3 with regard to the myth of ethnic neutrality and identity fictions. Under these conditions, the *price* for political and legal *equality* for individual positional moves in terms of upward social mobility is the repression and, finally, the *loss* of cultural *identity*. Also, the boundary of racism is transgressed when voluntary assimilation is refused by the dominant majority.

Hence, if separation and assimilation are seen as a natural either/or choice for individuals or a configuration of groupings in society, there would indeed be no path in between Scylla and Charybdis and no pluralism possible in, or of, societies. Therefore, the *recognition* of *diverse identities* and *cultures* is a necessary precondition for *group formation*, and it requires, at the same time, the *institutionalisation* of some form of *autonomy*. However, autonomy alone carries with it the constant danger of the assimilation of the members of groups into the dominant majority when they cannot (any longer) control the institutional mechanisms for the socialisation of the next generation (Patten 2014: 47–9) or may lead to ghettoisation in terms of downward assimilation as argued above. Hence, only by recognising the intimately interwoven *nexus* of the concepts of *identity* in *diversity* in terms of 'selfhood' instead of 'sameness' (Rosenfeld 2010: 27) – legal *equality* – political *participation*, to be institutionally translated into a 'model' of *autonomy and integration* as the two necessarily complementary *functions* for both groups and societies, allows, thus, for a *pluralist approach*, or what we call the model of *multiple diversity governance*, further elaborated in Chapter 10.

In summarising the findings of this sub-section, we can recall that:

- bounded or ethnic groups or communities are not culturally homogenous by definition as the ideologies of nationalism and older theories of communitarianism want us to believe;
- nor are societies internally divided *as such*, meaning that cultural diversity between groups must automatically lead to *exclusive and antagonistic* us *versus* them *positions*; but
- these are *possible* empirical consequences of *politically driven* processes of *ethnification* and *polarisation*, within the processes of both social integration *and* system integration.

5.2.3 The interplay of social and system integration: a typology of societies

From the perspective of ideal types, the interplay of social and system integration at the intersection of class and culture elaborated above through the assignment of status functions may lead to three different *configurations* of society, again structured around the basic normative value and principle of equality/inequality, on the one hand, and the question of the empirical degree of boundedness of groups through social closure, on the other.

Following Searle's observation that functional assessments lead us to use normative vocabulary, social and system integration is successful from a functional perspective if it allows for *dual* or *multiple identities* (Table 5.1), excluding thereby the complete closure of group boundaries and thus fixed group antagonisms, as well as allowing that class and culture crosscut each other. This ideal situation can be defined as a *multicultural society* based on the normative principle of the *status equality* of *individuals*, as well as *groupings*, despite the *horizontal, functional* and thus *cultural differentiation* of society, so that cultural markers such as language or religion are not attributed social and political precedence over other criteria, with regard to access to education, the labour market or political participation.

However, as we learn from the socioeconomic conflicts in European history during the course of the development of capitalism, not only as a mode of production but also in the structuration of societies, if only a minority of persons with closed-minded dispositions, individualistic identities and egotistical interests becomes economically and politically dominant, with the vision of the social space as a market where competition is the only guiding principle for the satisfaction of material interests, they bring about a *vertical hierarchy* in terms of *socioeconomic stratification* and thus a *division* of society along these lines. As the late British Prime Minister Benjamin Disraeli declared in the first half of the nineteenth century – even before the publication of the Communist Manifesto – (only) 'two nations', rich and poor, live in this country (Disraeli [1845] 2017).

Moreover, if functional differentiation through specialisation is reinterpreted by giving cultural terms priority in terms of exclusive belonging and claim making, this is the vantage point from which a possible process of ethnification of the entire society can be observed in the form of ethnic segmentation (i.e. a *horizontal hierarchy* between groups) because of their systemic or structural occupation of parts of social subsystems, such as the economy or the political system. These can be seen if occupational sectors are occupied by members of only one particular group, where only members of a grouping in the process of closure, and thus in the process of ethnification, have access to the jobs in that sector. Other empirical

indicators for such a process of ethnic segmentation are the *separation* of *private* and *public* educational facilities, making them accessible only to members of one specific group, which leads to what is now called in the public discourse and case law the creation of parallel societies; or a proposal to introduce different legal systems (see Chapter 2, section 2.1 with regard to legal pluralism) as an exception from the monopoly of the modern state in the exercise of legitimate power, as this would be the case, for instance, by the official legal introduction of a Sharia court system (see Chapter 7, section 7.4.1 for more detail). This form of society, based on the ethnic segmentation of social sub-systems, will be called the model of a *pluriethnic society*.

Finally, *mutually reinforcing* socioeconomic stratification and ethnic segmentation may lead to the socioeconomic deprivation and cultural marginalisation of not only individuals but also entire groups of society, called 'ethclasses' by Milton Gordon (1964), thus resulting in *deeply divided societies* as a consequence of the total failure of social *and* system integration. Examples of this type of scenario are the Sinti and Roma all over Europe (EU Fundamental Rights Agency 2016), who suffer from multiple forms of 'structural' discrimination (see Chapter 4, section 4.2).

In stark contrast to this case, there are groups who felt treated or were formerly conceived of as national minorities in centralised national states by the majority population who obtained, nonetheless, strong political positions in the process of transition towards multinational federations (Burgess and Pinder 2007; Requejo and Caminal 2014) over the past few decades, such as the Scots in the United Kingdom, the Catalans in Spain and the Flemish in Belgium, who belong to the richest regions in Europe, but who nevertheless make *claims to secession*, thus showing strong signs of deep division, as we learned from Chapter 4, section 4.3.

In conclusion to our critical ideological analysis, as well as on the basis of our neo-institutional sociological approach, we can thus identify *three different meanings* of the *concept of ethnicity*, depending on the underlying epistemological, ontological and methodological approaches used (Box 5.2).

Box 5.2 Three different meanings of ethnicity

Primordialist theories and the twin ideologies of *racism* and *ethno-nationalism* claim that ethnicity is a given universal category, insofar as the social world is divided into a plurality of ethnic communities based on common descent and/or a homogenous culture (language, religion, values and practices) which stand – by definition – in a position of latent conflict to each other. Ethnicity is thus first and above all a *structural code* with the *normative political function* of exclusion or inclusion. And it is the political function of nationalism as an integration ideology, be it ethnic or civic, to camouflage these normative decisions in the social construction of multiple forms of unity *as well as* difference out of a multiplicity of diversities.

A *constructivist-instrumentalist* position understands ethnicity as the perceived expectation (i.e. generalised stereotype) that diversity in terms of fictitious, but imputed biological descent (the Jews) or national geographical origin (the Italians, Turks, etc.) and thus

cultural differentiation in terms of symbolic categorisation and normative ordering of the social world can determine others social behaviour, thereby leading to *ethnic boundary making* by ethnic entrepreneurs through various political strategies. However, so the argument goes, a non-ethnic social world would be the ideal against any reification of *social relations* into *cultures*, let alone ethnic groups, with their representatives claiming to have a right to fight for the survival of their particular culture/ethnicity so that – in the end – ethnicity shall wither away in analogy to Marx's and Engels' proposition for the law and state.

If we do not believe in the meanings that exclude each other above and, with regard to the problem of how to assess the possibilities for reconciliation in deeply divided societies following from processes of ethnification and polarisation, we have then to conceptualise a third perspective.

A *constructivist-structuralist* position insists that there is also something like a *neo-primordial deep ethnic division of societies*, as this is the case, for instance, in Bosnia-Herzegovina or in Cyprus, which is not fictitious, but is a mental representation of social reality constraining individual and collective action at all levels and in all dimensions. In such a situation individuals no longer have a real choice for action because of asymmetric power relations, which result in the socioeconomic and ethnic stratification of societies mutually reinforcing each other. Hence, a neo-primordial deep ethnic division of societies – so that every aspect of life is seen through an ethnic lens (what has been called the 'ethnic Midas effect' (Marko 2008: 386) – can be the real *consequence* of the ethnification and polarisation of societal relations, but it is *not* the *root cause* of conflict as neo-racist or primordialist theories wrongly assert.

It will therefore come as no surprise that all of the *definitional efforts* and political or legal designations as minorities, nationalities, co-nations or sub-state nations remain language games in actual practice as long as the civic–ethnic dichotomy is not overcome. All the efforts to politically or constitutionally distinguish between (ethnic) groups, (national) minorities, (indigenous) peoples and nations (Nootens 2015), with the aim of denying the former two groupings of people a (justiciable) right to (external) self-determination, only conceal the *asymmetric power relations* within so-called mono-national *as well as* multinational states, frequently following from historical identity politics based on political symbolism and the rhetoric of firstcomers *versus* invaders or of a security dilemma threatening possession of a territory, as we tried to show with the seven rules of nationalism (see Box 4.2) in Chapter 4.

However, *de-ethnification cannot be achieved by de-politicisation*, as liberals want us to believe when they claim that culture must be fenced off from the public realm and declare it a solely private affair, so that cultural differences can be tolerated only as long as they remain enclosed in the private realm. Therefore, de-ethnification of *both* territorial and cultural divisions requires, above all, to overcome the reification and even naturalisation of territory as possession (i.e. homeland of a single people or nation) and of culture in terms of belonging, based on predefined, fixed common characteristics, such as language, history or values. Only with the deconstruction of all of these naturalist fallacies are we able to overcome the civic/ethnic and other dichotomies referred to above.

It is quite interesting in the context of severely divided societies and the resulting problems of constitutional design that the jurisprudence of the Constitutional Court of Bosnia and Herzegovina made explicit reference to the problem of identification of territory and institutions with ethnic identities in the so-called *Constituent Peoples* case, which was handed down in July 2000, when it declared that 'ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society', and when it further specified by contextualisation that the 'constitutional principle of collective equality of constituent peoples … prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation' (Bosnia and Herzegovina, Constitutional Court, Case no. U 5/98 III, 2000). The same problem of identification of territory and ethnicity was implicitly addressed again and again in cases before the Court, with regard to persons not willing to officially declare that they belong to one of the three constituent peoples in electoral procedures so that they were excluded from the right to stand as candidates in the direct elections for the positions of the three member Presidency, to be composed of 'one Bosniak, one Croat and one Serb', in accordance with Article V of the Dayton Constitution. In two cases handed down in 2006, Judge Constance Grewe delivered two dissenting opinions opposing this exclusion from the right to stand as a candidate in elections by constitutional fiat, in which she hinted at the real political problem of identification of territory and ethnicity as something which might have been legitimate immediately after the end of the war in 1995, but which was no longer legitimate after Bosnia and Herzegovina ratified the twelfth Protocol of the European Convention on Human Rights (ECHR; Marko 2013c: 66; see also Chapter 9, section 9.2.2). Finally, this argument was also taken up by the European Court of Human Rights (ECtHR) in the case *Sejdić and Finci* (2009) in order to strike a balance between the universal right of citizens to vote and to stand as candidates in general elections against the ethnic, particularist group rights of constituent peoples following from the identification of identity and territory and which reminds us that the civic–ethnic dichotomy is translated into the dichotomy of individual versus group rights.

This brings us to the next section, where we show why and how the *relational* and *dynamic sociological approach* which we have elaborated so far must also lead to a *critical reflection* of basic concepts of *public law doctrines* for the *elaboration* of a legal-theoretical concept of *integration* by law through *norm contestation* against the liberal-national premises of the Böckenförde paradox.

5.3 The multidimensionality *of* and integration *by* law

5.3.1 Individual versus collective rights? A false dichotomy

A critical *structural analysis* of *legal texts* can reveal the underlying *ideological assumptions* of the alleged dichotomy of individual *versus* group oriented or collective rights. These assumptions can be summarised as follows.

First, the rejection of so-called collective rights is often founded on the *equation* of *individual rights* with *liberal democracy* and *collective rights* with *authoritarian rule*, when

comparing Western with communist constitutions (Marko 1995; Karayanni and Gargarella 2015). However, legal technique must not be confused with political teleology. The notion advocated by liberals and methodological individualists that groups or cultures do not have rights because they cannot act, so that concepts such as state, people, nation, community, ethnic groups and so on may incorrectly be reified or naturalised is correct, but it simultaneously throws the baby out with the bathwater when it insists on the deconstruction of groupism and collectivism as we showed in the previous section. They completely misunderstand the legal technique of making use of *legal fictions*, which are not ghostly objects in time and space, but necessary for understanding the ontology of social relations in the process of legal institutionalisation thereby creating *legal persons*. As Hans Kelsen analysed in this context, such legal fictions serve to reconcile the ideal and ideological frameworks with the reality of social and political processes in terms of a heuristic fiction for understanding the transformation of the meaning of concepts such as, for instance, individual freedom and democracy:

> A mysterious general will and an almost mystical general person are detached from the wills and personalities of the individuals. This fictional isolation … here the personification of the state hides the fact that man rules over man, unbearable to democratic sensibilities. The *personification of the state*, now fundamental to the theory of the law of the state, doubtlessly has its roots in this ideology of democracy ….
>
> Parliamentarism thus represents itself as a compromise between the democratic demand of freedom and the principle of division of labour … the *fiction of representation* serves this purpose – the idea that parliament is only the *representative* of the people, that the people can express its will only in parliament, only through parliament – although the parliamentary principle is connected in all constitutions, without exception, to the provision that the representatives are to take *no binding instructions* from their voters, and that *parliament* is thus in its function legally *independent of the people*.
>
> (Kelsen [1929] 2000: 88, 97, emphasis in the original)

Hence, *group rights* are nothing more than *legal fictions* for the *social construction of legal persons* in terms of *agency*, and therefore to create additional legal accountability for such cognitive constructions, as this is also the case, for instance, when we speak of international organisations, multinational corporations, etc. as collective actors. But the real problem is not the question whether groups can have rights, but whether we need group-related rights *in addition* to individual rights, in order to be able to *effectively* protect the rights to *equality* and *participation* for members of minorities with different identities and cultures.

Second, there is an underlying or outspoken assumption that *special rights* would be granting *privileges* to members of certain groups which normal citizens do not have, as discussed on the basis of the case law in Chapter 4, section 4.3. But do language rights (i.e. legal guarantees for members of minority groups to use their mother tongue, for instance in administrative procedures) really constitute a privilege that members of the majority do not have, insofar as they must use the official language, which is their mother tongue anyway? Such an obviously absurd assertion takes the unstated norm of the nation-cum-state paradigm for granted, by identifying the language of the majority population with the state in

creating an official language. Special rights are thus not a privilege, but necessary to maintain *cultural pluralism and equal opportunities* (see Marko 1995; Choudhry 2012: 1109–11), by *counteracting* the *assimilative or exclusivist consequences* of both the French and German concepts of national states.

Third, whether expressly stated or not, there is also a particular fear that the *recognition* of *collective rights* is nothing else but the *first step* towards *secession* (see Marko 1995; Choudhry 2012: 1104). This assessment, however, is again based on the unstated nationality principle and equation of one people with one state. Those who believe in the national state to be the ultimate end of history insinuate that all others, in particular national minorities, follow pretty much the same obsession – namely, to form their own national state. However, it is this obsession and the *rejection of autonomy claims* which might indeed become a first step towards secession as a *self-fulfilling prophecy*, as we analysed in Chapter 4, section 4.3 with regard to the secessionist movement in Catalonia.

In contrast to the ideological fixation of social theories in political philosophy against the preservation of cultures (see Chapter 4, sections 4.3 and 4.4) and therefore on the alleged dichotomy of individual *versus* collective rights, a *structural and comparative analysis* of legal norms of public international law and national constitutional systems (for the latter see, above all, Choudhry 2012) provides a rather different picture. Such an analysis is based on the premise that one is ready to recognise that all social behaviour makes sense only in a group-related context, so that at least *three dimensions of group reference* (i.e. what we call the group-relatedness of rights) can be revealed in normative structures of instruments of public international law, as well as national constitutional law.

First, in order to perform the function of individual and collective self-determination in the meaning of the organising principles of autonomy and subsidiarity, various freedoms and human rights must be recognised as the fundamental legal instruments that enable members of cultural groups to freely express their cultural affiliations in society and *vis-à-vis* the state. *Liberal, socioeconomic and cultural rights* therefore have the effect of *indirect minority protection* by creating a social space for *associative cultural autonomy*, as we elaborate in substance in Chapters 7 and 9. Thus, the rights and freedoms of home, privacy, religion, expression, and association following from the text of Articles 8 through 11 of the ECHR were interpreted by the ECtHR so as to guarantee an *individual right* to 'cultural identity' (Marko 2013b: 115), but also forms of 'corporate autonomy' as a *group right* in the narrow sense, as we demonstrate in more detail in Chapters 7 and 9.

Hence, individual rights are quite often drafted having the *factual existence of groups* in mind as a precondition for the effective *enjoyment* of these *rights*, as the judgments on language rights of the Canadian, Swiss and Austrian Supreme Courts prove (see Marko 1995: 266–70). The Canadian Supreme Court, for instance, pointed out:

> What good is a right to use one's language if those to whom one speaks cannot understand? *Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social.* We speak and write to communicate to others.
>
> (Canada, Supreme Court, *Société des Acadiens v. Association of Parents*, Judgment of 1 May 1986, emphasis added)

By analogy, the *equal protection of law* need no longer be interpreted by the intermediary principle of non-discrimination, prohibiting any differentiation of citizens (Marko 2013b: 115) but, quite to the contrary – to paraphrase Ronald Dworkin – cultural 'diversity' has to be 'taken seriously' and thus to be treated differently in order to avoid assimilation. Any state action, therefore, whether direct or indirect, has to refrain from perpetuating past discrimination by segregation or assimilation (see Chapter 8 for more detail).

The second dimension of group reference can be seen from constitutional norms that recognise the *protection of groups* as a *legal value* per se. According to the legal-dogmatic doctrine that such norms are only constitutional proclamations (see Chapter 2, section 2.1), groups are thus an object of legal protection creating the responsibility of state authorities to take these proclamations into consideration in their dealings. However, as one can see in practice from a judgment of the Austrian Constitutional Court, rejecting the claim for bilingual topographical indications for the constitutionally recognised Slovene minority in Carinthia, neither members of the groups nor the groups themselves shall be afforded legal standing (see Austria, Constitutional Court, Decision of 14 December 2004, VfSlg. 17416/2004), so that minority protection based on principles in terms of constitutional proclamations (see Chapter 2, section 2.2) bear neither legal nor practical meaning.

The last step of the collectivisation of rights, or better said from the sociological perspective, their institutionalisation is achieved when *cultural groups* are no longer treated as if they were an object of protection, but become *subjects* of constitutional norms (i.e., *bearers* of particular *rights*). For instance, though the right to found organisations is usually guaranteed as an individual right, Article 64 of the Slovene Constitution also provides for a group right. Thus, the members of the autochthonous Italian and Hungarian communities have two constitutionally guaranteed rights. First, they may – in cooperation with others – create (private) cultural associations to foster their interests and activities. Second, they also can and do create public law-based corporate self-governing organisations, so that minority groups enjoy the group right to administer the internal affairs of these self-governing bodies in combination with the states duty to devolve administrative competences of special concern to these minorities, in addition to financing their activities. The establishment of a public school system, as well as a press and information system on such a self-governing basis, working bilingually or in the language of the minority, is then called *cultural* or *personal autonomy*, in contrast to *territorial autonomy*. The concept of corporate cultural autonomy, i.e. constitutionally entrenched autonomy in the form of functional self-government, will be dealt with in substantive detail in Chapter 9, section 9.4 with regard to the German community in Belgium, which forms part of the Belgium asymmetric system of territorial and cultural federalism.

As can be seen from this structural and comparative analysis which reveals *three dimensions of group-relatedness*, the dichotomy of individual versus collective rights cannot hold and is based on more or less unstated ideological assumptions. Group-related rights, as allegedly special rights for minorities or their members, do not by definition restrict individual rights, but can – and in most cases must – complement each other for effective multiple diversity governance in order to overcome structural inequalities and to guarantee what we termed institutional equality in Chapter 4, section 4.3 as a precondition for the preservation of cultural identities and political participation, in short, what forms the inextricable identity/

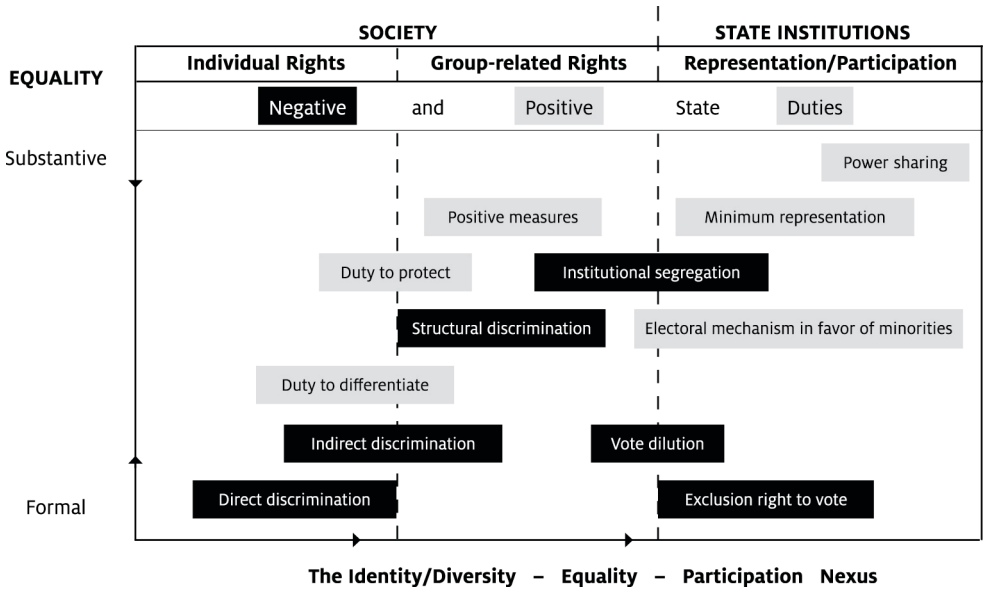

Figure 5.1 The rights and duties following from anti-discrimination and equality law

diversity – equality – participation nexus, as we can see from the legal instruments and institutions which can be identified from a comparative analysis of national constitutional law, summarised in Figure 5.1.

On the *vertical axis* you can see the distinction between *formal* and *substantive* equality, no longer conceived, however, as a dichotomy but *complementary* aspects from a relational and process-orientated perspective, as indicated by the arrow. The *horizontal axis* represents the identity/diversity – equality – participation nexus, again indicated by an arrow. Hence, there is an overview of *negative state duties* to prevent discrimination which correspond to *individual* and *group-related rights*, as well as *positive state duties* to take action in order to achieve full and effective equality. Finally, as can be seen from this overall reconceptualisation, the pillar on the right hand side of the figure shows the legal instruments and institutions of the identity/diversity – equality – participation nexus for the representation and participation of cultural groups in state institutions which is dealt with in detail in Chapter 9.

Moreover, the bifurcation in the opposition of the validity of law on the one hand and the social recognition of law on the other in all theories of legal positivism, conceals the *multidimensionality* and *multifunctionality* of law (see also Fredman 2016: 281–4), which is also important for the analysis of the case law of apex courts in Chapters 6 through 9 structured in line with the identity/diversity–equality–participation nexus.

First, there is the *redistributive dimension*. Formal equality before the law translated into the legal obligation of state authorities to treat likes alike was seen in classic anti-discrimination adjudication as an anti-classification approach, seemingly requiring the prohibition of any application of irrelevant categories such as race or sex, since each individual should be treated only with regard to his or her merits. Any special measure or affirmative action in US

constitutional terminology in favour of any of these categories translated into group-related rights as is necessary for minority protection or to achieve substantive equality in practice in social and political relationships, was therefore revealingly termed positive or benign discrimination as if amounting to reverse discrimination as such.

However, *respecting diversity* not only requires equal opportunities in terms of redistribution of material resources to overcome socioeconomic disadvantages, but much more, starting with what has been elaborated particularly well in Amartya Sen's 'capability approach' (see Chapter 6, section 6.3). As will be seen, however, from all the results of 'positive measures' in favour of Roma, Sinti and indigenous peoples in Europe in the following chapters, their disadvantaged position cannot be adequately improved when relying on the redistribution paradigm.

Second, it is therefore necessary to take the *recognition dimension* much more seriously. Stigmatisation and negative stereotyping based on prejudice and ensuing violence are everyday practice in Europe, not only caused by right-wing populist and extremist political propaganda and hate speech in so-called social media, but also in the form of institutional racism, as discussed in Chapter 1 and Chapter 4, section 4.2.

Third, the phenomena of racial discrimination and poverty of the Sinti and Roma in Europe are, as we argued in Chapter 4, section 4.2 and section 5.2 of this chapter, structurally interdependent in terms of an intergenerational vicious circle based on mutually enforcing socioeconomic deprivation and the racial inferiorisation of members of these groups. Hence, understanding the problem of structural discrimination requires a holistic analytical approach, taking into account the *participatory dimension* and the *transformational dimension* in addition to the redistributive and recognition dimension. In addition, the analysis of these dimensions requires one to tackle the infamous *public/private divide* in the legal sciences (Michelman 2012), as we show in Chapters 7 through 9 in the analysis of the case law of apex courts. Transcending this classic liberal distinction and its dichotomic conceptualisation in not only Jacobin constitutional doctrine (see Chapter 3, section 3.2) requires one to see how power imbalances in seemingly private social relations predetermine and reinforce power relations in the public sphere and vice versa. Hence, *accommodation of diversity* without a *structural change* in *power relations* as a transformative dimension of law will not bring about 'full and effective equality', in the terminology of Article 4 of the Framework Convention for the Protection of National Minorities.

5.3.2 Integration by law through norm contestation

The *relational* and *process-orientated* sociological approach elaborated in this chapter, underlying the necessary dynamic equilibrium of autonomy *and* integration (see sub-section 5.2.2.) for the model of multiple diversity governance (see Chapter 10), must also have consequences for several of the legal concepts which have been developed as doctrines of material and procedural public law.

Against the concept of *territory*, *polity* or *community-orientated*, and thus *reified* legal systems, this approach will enable us to overcome the traditional *static* and *mechanistic model* of the *separation of powers* as a stable *hierarchy of norms* (see Chapter 2, section 2.1), with the

legislative power on top, making positive law. The executive and judicial powers, then, are seen *as if* they are only implementing this democratically legitimised positive law through administration and/or adjudication. And against the confusion of a written text with legal norms, *as if* the text were embodying the specific rule for the prescribed human behaviour (Marko and Handstanger 2009), so that the civil servant or judge simply has to read the text in order to know how to decide in a specific situation, the theory of 'norm contestation' (Wiener 2014), following from the social-constructivist and interpretative approach advocated in this book, is based on the conception of a *cybernetic*, *processual* and thus *norm-generative cycle* of communicative action.

Hence, following from this transformation from the *static* into a *dynamic model* is the supposition that law making is not restricted to the legislative branch, but happens at all stages and within all phases of the exercise of legislative, executive and judicial powers. This occurs through norm generation in debates and contestations with regard to the meaning of legal texts and factual evidence, in order to produce and reproduce 'empirical, theoretical, and normative plausibility' (see Chapter 2, section 2.2) for decision making in legislative, executive and judicial bodies, with the latter usually laying down what is called the operative part of a judgment, and its justification in the part of these decisions called reasoning. This theory of norm contestation as a *permanent, cyclical norm-generative process* brings to the fore that the concept of law cannot be restricted to formal validity and social recognition alone, as this has been done in the liberalist tradition of the myth of neutrality of a liberal culture and thus only political community, discussed in Chapter 4, section 4.3. Rather, it must also include a dimension of cultural validation of normative principles and rules (Wiener 2014: 21), which is necessary for ensuring social and system *integration through law.*

Such a political and normative *theory of integration through law*, in the tradition of Rudolf Smend (see Korioth 2010; Smend [1928] 2010), is based on a system-theoretical approach of social and political ordering, which we introduced in Chapter 2, section 2.2 and applied in Chapter 3 for our historical-sociological analysis of the (re)construction of the meaning of the terms and concepts of sovereignty, state, nation, people and society, in order to give a name to the idea of a political, social and legal unity. Hence, processes of social and political *ordering* through *categorisation* and *institutionalisation* intimately link the *normative dimension* with an *institutional* and *integrative dimension*. And it is nothing but the *liberalist tradition* of Western political thought, which either *makes* the *integrative dimension* of law *invisible* as if being an allegedly neutral order, or *restricts* law making and therefore effective participation in norm contestation processes as necessary part of *political participation* in its overall function for social and system integration only to *citizens* enjoying political equality in the tradition of Aristotle's definition of the *polis*. *Citizenship*, therefore, remains to this day a *Janus-faced institution*, deciding about inclusion or exclusion, as we learned from Hannah Arendt's paradox (see Chapter 3, section 3.1), despite Aristotle's definition of *politics* as 'something that human beings, *qua* human beings, do together' (Lane 2014: 184–5, 197) which would allow also for a *cosmopolitan interpretation*.

However, if we no longer believe in the *naturalisation* of the *normative* principle of *equality* into an innate solidarity, *as if* solidarity were a feeling possible only for equals in terms of kinship or citizenship, we come to the conclusion that *integration through law* is and remains, first, a *permanent political process*, which never comes to an end in terms of perfect or complete

social cohesion or system integration. Second, the recognition of the Janus face of citizenship in terms of inclusion and exclusion should also open our eyes for the ideal of *human dignity* as a corner stone of the ideology of cosmopolitanism, which presupposes *openness* and *interrelatedness* in the construction of all political and legal systems, no longer requiring a hierarchy of norms, but enabling one to imagine a network model in terms of *heterarchical relations* without a final (i.e. sovereign) either territorial or institutional locus of authority. We designate this conception as cosmopolitan constitutional pluralism in Chapter 10 as the foundation of our paradigm of *multiple diversity governance*.

It goes without saying that such a *dynamic model* of norm generation through *interpretation* and *contestation* must immediately raise the legal-positivist suspicion of a complete confusion of law and politics, contrary to the constitutionalist dogma of the separation of powers as an institutional pillar of the rule of law. Is it then possible to differentiate between legal argumentation in terms of the better argument any longer, in order to find the correct solution of how to decide a case, and the political argumentation in terms of strategic bargaining (see below)? Is this not leading to either a judicialisation of politics or politicisation of law (Shapiro and Stone Sweet 2002), an argument which can be observed in the perennial debates concerning the advantages and disadvantages of judicial review within national constitutional systems and the conclusions drawn, either for judicial self-restraint, or judicial activism, the latter in particular being advocated for the effective protection of human rights?

James March and Johan Olsen (1998) differentiated a *logic of consequentialism* from a *logic of appropriateness* in processes of collective bargaining. The former is rooted in rational choice approaches to explain processes of strategic bargaining for utility maximisation, whereas the latter is based on sociological institutionalism and social constructivism, trying to understand and to explain why also processes of common norm socialisation and internalisation take place, and ultimately lead to social change. In line with this categorical distinction, empirical studies, based on theories of norm diffusion in the field of the transposition of human rights law from international law into national law, have made clear that both the ratification and implementation processes of human rights law mostly follow a logic of consequentialism, with a lack of socialisation (let alone internalisation) of these norms by local, regional, or national actors, thus explaining the gap of compliance with human rights (Risse *et al.* 2013; for an empirical study along these lines concerning rule of law promotion in the Western Balkans, see Kmezić 2017). And, as Wiener and Puetter (2009) argue, older theories and studies were almost exclusively focussed on the notion of 'formal validity' in processes of norm generation and adoption through (intergovernmental) negotiations, which might indeed stem from a European bias rooted in state-centred legal positivism. They thus invoke that the social recognition of norms through social learning and community based behaviour, as well as cultural validation (Wiener and Puetter 2009: 6) through individual expectations, experience and background knowledge, are based on a 'logic of contestedness' (Wiener 2007a: 64), which is even more important than formal validity, in particular in intercultural environments. Hence, based on a social-constructivist epistemology, this approach stresses that all quarrels about the objective content of norms, based on the idea that there can be only one truth that can and must be recognised through a literal interpretation of norm texts, are fruitless. Instead, the theory of norm contestation helps

to understand that *norm generation* in processes of norm setting and implementation is a *constant, reflexive communicative process* throughout all of these phases, whereby normative meaning in terms of interpretation is constantly mediated, (re)constructed and contested, based on the respective meaning-in-action used by all actors involved, either as individuals, national governments or international organisations.

However, following from our problem-orientated analysis of trying to understand the meaning of both autonomy and integration and their interplay, we must remain aware that legal argumentation does not take place in a social or normative vacuum. In other words, there is what we call a double *interpretative dilemma:*

1) In cases of *conflict* between *rules* or between *rules* and *principles* (Dworkin 1978: 22–80), it is clear for everyone that legal language, and not only constitutional text, is based on – intentionally or not – abstract terminology and phrases which leave room for interpretation, as we learned from the judicial decision of the Canadian Supreme Court in *Reference re Secession of Quebec* and from the Spanish Constitutional Court in the case concerning Catalonia's claim to secession, discussed in Chapter 4, section 4.3. But what shall be the yardstick for balancing between contrasting rules or principles in judicial decisions, because principles – understood as values – do not contain uncontested rules for dealing with conflicts over principles or values?
2) How is it possible in a situation of *cultural diversity* with – possibly – different life worlds which exclude each other, to have a meaningful legal discourse and thus legal argumentation, and not only strategic bargaining, thereby not only blurring the dividing line between law and politics, but even allowing politics to subordinate law? Is it then true with regard to *multicultural* and *multilevel constellations beyond national states*, that only a 'conflict-laden coexistence side by side in a transnationally neutralized space' will be possible (Beck 2002: 75)?

Furthermore, with resigned undertones, Luhmann comes to the conclusion that there are no longer any absolute values that can take precedence in every situation, meaning that societal integration through law cannot work, in particular if there is a lack of central authority, as is the case with transnational (Krisch 2010) or global law (Walker 2015). What can be achieved thus at best, is the 'mutual irritation and adaptation' of *functional* systems, such as law, economy or politics (Luhmann 2013: 120). To give these more abstract considerations more flesh we can also apply them to decision-making processes in adjudication in national apex courts and their competition with international courts in specifying what has been called in empirical sociological studies of law the 'politics of judgment', with the outcome – the judgment – being referred to as 'political dialogue' (Morris 2010: 66; Krisch 2010: 109–52). As Krisch makes clear in his analysis of the 'open architecture of European human rights law', in the interplay between human rights catalogues in national constitutions and the ECHR, the conflict between national constitutional courts and the ECtHR might be characterised as a *hierarchical* 'pluralist structure', due to competing claims for ultimate authority in human rights adjudication by national apex courts, as well as the ECtHR, with strong elements of diplomacy. However, against expectations stemming from the notion of conflict, and owing to the competition for supremacy following from the framing of relations between national

constitutions and the ECHR as a monist/dualist hierarchical model, his empirical analysis demonstrates that there is a very high degree of compliance. Hence, the theory of 'constitutional pluralism' (Walker 2002, 2016) enables us to *understand* this open architecture of European human rights law as a model of cooperation, where competing claims for ultimate authority need not necessarily lead to fragmentation, division, conflict and chaos.

And despite the fact that the framing of legal texts and the empirical context demarcates the borderline between arguing and bargaining (Mueller 2004: 415), we keep insisting on the theoretical insight of the functional interdependence of law and politics as a necessary functional prerequisite for the interplay of autonomy *and* integration, in particular in multicultural or pluriethnic environments and therefore our model of multiple diversity governance, elaborated in Chapter 10. This, moreover, is in line with Luhmann's own conceptual construction that the constitution is bridging the functional systems of law and politics, or what he calls 'structural coupling' (Luhmann [1997] 2012: 45–68). From our social-constructivist epistemology and ontology and the methodological theorem of functional interdependence, law and politics are *mutually constitutive*, and thus they also restrain each other in terms of autonomy.

This insight can now be combined with the conception of *human and minority rights as* institutions (Luhmann 2009), which explains the central role that human and minority rights play in social and system *integration through law*. In line with John Locke's reasoning how to transform natural power into subjective rights under positive law (see Chapter 3, section 3.2), only human and minority rights as foundational institutions will establish an overall persistent power, and thus authority of positive law, following from three minimal structural elements of any normative theory of the rule *of* law as the rule *by* law:

- the *impartiality* of legal institutions and procedure in terms of independence from political or economic interests or cultural affiliation;
- thoroughly *reasoned judgments* to make decisions (*pro* or *con*) comprehensible and persuasive for parties in proceedings. Following Dworkin's approach, the 'integrity of law', not only in terms of legality, but also in terms of its legitimacy, follows from a logic of appropriateness and argument in the process of judging, thereby requiring a comprehensive (i.e. holistic) approach and the correct use of legal-dogmatic methods of interpretation controlled by an impartial appellate jurisdiction; and
- guaranteeing every individual the right of *access to justice*, including the *right to appeal*, as community – or polity – and thus membership *independent*, and *logically preceding* in terms of the 'right to have rights' in Hannah Arendt's terminology (see Chapter 3, section 3.1 and Chapter 6, section 6.4).

In conclusion, does social and system integration of all types of minorities depend – with reference to the Böckenförde paradox – on the *assimilation* into a pre-given, static majority culture and community, with a majority's natural right to protect and perpetuate its culture as the nation-cum-state paradigm, based on the fusion of the ideologies of liberalism and nationalism, wants us to believe? Are, for instance, Austrian values non-negotiable? And is the text of the legal and constitutional order of Germany simply an expression of an 'objective order of values', as the German Constitutional Court argued in the 1950s in its

famous Lüth judgment (Germany, Federal Constitutional Court, Judgment of 15 January 1958, BvR 400/5, BVerfGE 7, 198; from a comparative perspective, see Jacobsohn 2012: 785)?

First, seen from our social-constructivist epistemological and ontological perspective, however, we believe in the added value of individual *and* group-related human and minority rights as an institution in terms of bridging the functional systems of law and politics through *norm contestatio*n about the specific *meaning* of the order of values enshrined in human rights law, either at the international, supranational, or national level, requiring the participation of those affected by law instead of declaring allegedly shared values of the majority population non-negotiable. They are, as can be seen from case law of the ECtHR, negotiated by citizens and foreigners alike – all the time. Therefore, it is not the insistence on non-negotiable values and thus the request for assimilation that contributes to social and system *integration*, which must *always* be *two-way processes* with an open end. It is only a permanent norm contestation about the specific, local, social and cultural meaning of human and minority rights in the norm cycle, and therefore in different settings ranging from the local to the international level, that can keep the swing of the pendulum in motion for integration *and* innovation and therefore prevent the transformation of liberal-representative democracy into stable populist-nationalist and authoritarian regimes.

Moreover, if we do not reify Luhmann's and Beck's pessimistic conclusions above, but remain aware that systems theory is an analytical tool and not an 'ontological reality' (Easton 1965: 37–45), these authors have simply expressed what we have ascertained as well, just in different disciplinary language: political unity or social cohesion can never be fully achieved as the end state of history, society or politics as liberal, nationalist and socialist ideologies, but also evolutionary and functionalist modernisation theories told us. History, politics and law are permanent processes driven not only by different ideas, interests, identities and emotions, but also by the permanent norm contestation of principles and goals and how to achieve them.

Second, against the argument that *constitutional pluralism* without – by definition – a final (i.e. absolute) sovereign locus of authority must end up in a Hobbesian state of nature, we must remind the reader that – from a cybernetic and thus processual view – every final authoritative decision is, firstly, a new beginning within the norm cycle; and, secondly, *no final* authority does *not mean no authority at all*! Hence, even several apex courts within the same national legal regime, as is the case, for instance, in Austria with the Supreme Court, the Administrative Court and the Constitutional Court, may be in conflict with each other with regard to opinions expressed in their reasonings on the same issue (see also Brodocz 2009; Lepsius 2011; Möllers 2011 on the German Constitutional Court; Vermeule 2011 on the US Supreme Court; Grimmel 2013; Popelier *et al.* 2013 on the role of constitutional courts in the constellation of multi-level governance within the EU; von Bogdandy and Venzke 2014 on the role of international courts).

Thus, constitutional pluralism must be understood as a realist *description* of the state of affairs, not only beyond and between, but even within national states. Such a descriptive *conceptualisation* for understanding constitutional pluralism (Walker 2002, 2016) cannot be declared an incommensurability of authority claims, whereby sharing, pooling, or coordination of authority would never be more than a political aspiration. Constitutional

pluralism must be understood from this perspective as a relational dimension between constitutional units.

It goes without saying that the constitutional profile of each conceived unit at different levels of multi-level governance is based on particular traditions, social pressures and normative dynamics which shape sovereigntist authority claims. However, they also *can* develop or include normative positions which encourage openness to the claims of others by providing for 'systemic thinking in law' (Walker 2016: 12). Such positions cannot, of course, resolve judicial conflicts, but – following from the structuralist approach of Gidden's theory of structuration (see Chapter 2, section 2.2) – might be able to *transform antagonistic dualism* into a *duality*, which 'would lend conviction and legitimacy to judicial perspectives on both sides which, in asserting the constitutional authority of their own system, were also prepared to acknowledge the equal constitutional authority of the other system' (Walker 2016: 30). These theoretical hypotheses would thus be able to explain the – counterintuitive – result of strong norm compliance in the European human rights system, despite conflicting claims for ultimate authority in Krisch's study (Krisch 2010).

Based on these considerations and similarly to Krisch's taxonomy of constitutionalism, dualism and two variants of pluralism, namely institutional and system pluralism (Krisch 2010: 75–7), Walker identifies *three different strands* of global or *transnational constitutionalism*, which he characterises as 'singularity, plurality, or commonality' (Walker 2016):

- The first strand follows from the similarity of *polity-based constitutionalism*, with all of its elements of reference to a particular, constituted object of self-government and a *singularity of authority* following from the *specific source-based* legal system.
- The second strand is a highly *functionally differentiated* and *fragmented* transnational space in terms of a *plurality* of largely *self-contained* functional or territorial units, similar to Luhmann's and Krisch's position that system integration is no longer possible.
- The third strand, alongside these two approaches, is focussed 'not on the detail of actually existing structures, but on the development of *common constitutional values, principles* … that is general or universal in ambition, and so *trans-institutional and polity-indifferent*' (Walker 2016: 313, emphasis added) what is termed 'institutional pluralism' by Krisch. Since, in this approach, there is a basis in terms of a common legal framework, it shall allow for integration, notwithstanding diversity and contestation.

But then Krisch criticises 'the predominance of holistic, unitary frames' and an 'emphasis on the parallel grounding of competing polities in individual autonomy', which bring out – in his opinion – 'the *problematic nature* of both *cosmopolitan* and *nationalist* visions of institutional development, which all too easily brush over actual societal contestation in favour of substantive considerations in the determination of the preferred scope of the polity' (Krisch 2010: 303, emphasis added). His alternative proposal for a *normative theory* of pluralism proposes – in a nutshell – a 'legal framework which builds upon the *public autonomy* of individuals and their (ultimately democratic) right to determine which polity they want to be governed in and by' (ibid: 24, emphasis added) and the creation of 'interface norms', following from the principles of the rule of law and democracy, which are 'sufficiently inclusive' to garner social recognition and legal 'authority' (ibid: 302).

However, Krisch's alternative to cosmopolitan interpretations of law is not so different from what we call 'cosmopolitan constitutional pluralism'. His *criticism* of cosmopolitanism remains *stuck* in *polity orientated*, *dualist thinking* and a one-sided *identification* of *cosmopolitanism* with *liberal-individualistic universalism*, as we show in Chapter 10, section 10.2. Hence, Krisch, in spite of his thought-provoking analyses, is *not* radical enough. If you replace the term and static concept of the unity of law seen from a polity-based perspective with the dynamic conception of integration as a necessarily permanent process, which can never come to an end, and his term and concept of legal order through the concept of a permanently ongoing norm cycle based on norm contestation, his concept of not only private, individual, but also public autonomy for the reconceptualisation of individual and collective self-determination, must also be based on *substantive ethical* considerations, which he identifies with the 'inclusivity' of 'interface norms', to be drawn from the abstract principles of democracy and the rule of law. However, as we learned in the previous section from the *Constituent Peoples* case before the Bosnian Constitutional Court, the effects of such 'interface norms', with regard to their degree of inclusiveness, are also highly contestable (see Marko 2006a).

Concluding this chapter, we now explain the structure of the following Chapters 6 through 9. Following from the results of the *deconstruction* of the *ideological fallacies* of the nation-cum-state paradigm and the conundrums of the liberal-democratic state in Chapter 4 and the explication of the social-constructivist and interpretative turn in the social sciences regarding social identity formation, the formation of groupings and groups of people in terms of social organisation through processes of institutionalisation, and, finally, the interplay of social and system integration in the second section of this chapter, we were able to draw conclusions from this *relational* and *dynamic sociological approach* for a critical reflection of legal-theoretical and legal-dogmatic concepts of public law. Thereby we were able to show why and how the ideologically inspired dichotomy of individual versus collective rights can be overcome through the recognition of the inextricable *identity/diversity–equality–participation nexus* und therefore the *multidimensionality* and *multifunctionality* of law, whereby *norms* and their underlying *values* are *permanently contested* in a norm-generative cycle at different territorial levels in different functional contexts, providing for *integration through law*.

Therefore, the results of Chapters 4 and 5 provide the basis for the following structure of the second part of this book, dedicated to the critical analysis of legal standard setting and the case law of European courts, following from the functional prerequisites for effective minority protection and multiple diversity governance.

- In Chapter 6, we analyse the *right to existence* against genocide or ethnic cleansing, to social and economic subsistence rights and, in light of Arendt's paradox, a right to have rights without belonging in terms of the Böckenförde paradox.
- In Chapter 7, we analyse, in light of the duality of languages but dualism of religions, the *right to multiple identities* against either forced assimilation or allegedly natural assimilation processes following from industrialisation and urbanisation.
- In Chapter 8, we show why the conceptualisation of *formal equality* before the law versus *substantive equality* through law is a false dichotomy in light of the dilemma of difference

and analyse the development of the case law of the ECtHR as well as the European Court of Justice towards the recognition of positive measures.
- In Chapter 9, we analyse from a comparative constitutional perspective the *differentiated rights to group representation and effective participation* in decision-making processes at different territorial levels.

These analyses give us an overview of how effective minority protection is in light of the processes of renationalisation of Europe since, at the latest, the 2000s and provide the normative and empirical ground for the elaboration of the theoretical paradigm of multiple diversity governance in Chapter 10 as an alternative to the nation-cum-state paradigm.

5.4 Summary conclusions and learning outcomes

As follows from the social-constructivist and interpretative turn in the social sciences, shortly elaborated in section 5.1, we try to show in section 5.2 that all of the naturalist fallacies and ideological paradoxes analysed in Chapter 4 need to be reconstructed in light of sociological and sociopsychological research. We therefore reconstructed three intertwined basic processes which must, however, be analytically kept separate in order to understand how they interplay. These are, first, the *cognitive and* at the same time, *normative* construction of *social categories* and the *empirical* formation *of multiple* social *identities* through social learning in processes of socialisation and internalisation. Second, the *formation of groups* through *social organisation* and thus *institutionalisation,* which explain the development of informal networks and formal associations or bounded groups, the latter frequently enjoying the legal status of legal persons. Both of these processes are summarised as processes of *social integration* in analytical distinction from the process of *system integration,* which concerns the societal configuration of relationships of groups or institutions, either as we *and* they complementarity or as us versus them antagonism. Again, both processes of social and system integration are only analytically distinct. In empirical reality we can observe processes of *socioeconomic stratification* and *cultural differentiation*, frequently leading to the ethnic *segmentation* of social subsystems such as the economy (i.e. the labour market) or even to *ethnic stratification* if socioeconomic disadvantages and the racial inferiorisation of minorities mutually reinforce each other.

However, these processes are neither natural or automatic, as advocates of (neo)liberal and (neo)Marxist ideology postulate. The key for understanding these empirical processes is rather Frederik Barth's Copernican revolution in the studies of ethnicity and nationalism, by postulating that cultural difference is not the root cause for group formation, but symbolic boundary drawing, so that cultural difference is not a cause, but an effect. This goes hand in hand with Max Weber's theorem of 'social closure' in the process of group formation, which may lead to permeable or (completely) closed boundaries of groups. Hence, both social closure in the process of social integration and the transformation of we-and-they configurations into us-versus-them constellations are processes of what we call the possible *ethnification* of territories, groupings and institutions, leading to the *polarisation* of societies. This allows us to distinguish three ideal types of societies: multicultural, pluri-ethnic and

deeply divided societies, for which Switzerland, Spain and Bosnia-Herzegovina serve as concrete examples. Against all dualisms and dichotomies of public–private, politics–culture and ethnic–civic, we come to the conclusion that (at least) *three different meanings* of the *concept of ethnicity* are used in scholarly literature as well as in public discourse, depending on the respective epistemological and ontological stances. These are, first, *primordial theories*, which see ethnicity as the biological or cultural property of people and territories and, second, *constructivist-instrumentalist theories*, which, by analogy with (neo)Marxist approaches concerning religion, declare ethnicity to be a 'false consciousness' of people through manipulation by ethnic entrepreneurs. Third, the *constructivist-structuralist approach* does not consider the ethnic division of societies to be a 'ghostly fiction' but a social and political reality in which individuals no longer have a real choice to declare, for example, that they are simply abstract citizens and nothing else. Hence, what we call the 'ethnic Midas effect', if each and every thing is seen through an ethnic lens, is a real consequence of the ethnification and polarisation of societies but not the root cause of conflict, as primordialist theories incorrectly assert.

In section 5.3, we translated the results of this elaboration of a relational and dynamic sociological approach into the *reconceptualisation* of legal-theoretical and legal-dogmatic *concepts* of public law in the legal-positivist tradition. Through a structural analysis of legal texts we demonstrated that the ideologically inspired *dichotomy* of *individual* versus *group rights* must be overcome by a conceptualisation in terms of group references of rights leading to at least a *triadic structure* of, first, individual rights presupposing the actual existence of groups for the exercise of these rights as the self-evident example of language rights shows; second, there are group rights whereby the groups and their sociocultural practices to be protected are conceived as objects of a duty to protect of state authorities; and, third, there are legal texts in which groups are recognised as legal persons with the right of their legal representatives to act in the name and behalf of the interests of these groups, usually, in our context of minority protection, through self-governance in terms of personal or functional autonomy.

Moreover, the need for the reconceptualisation of legal-theoretical and legal-dogmatic concepts also requires the contestation of the static conceptualisation of a hierarchy of norms for and within closed legal systems in the tradition of the legal dualism of national and international law of the Westphalian paradigm and the century-old debate about whether we shall interpret the relationship of national and international law as monist systems based either on the priority of national law or international law or as irreconcilable dualism following from the respective claims for ultimate sovereignty. Following from our critical analysis, we replaced these doctrines with the notion of the *multidimensionality* and *multifunctionality of law* in *dynamic*, *norm-generative cycles*. This dynamic model of law is, moreover, based on a *theory of norm contestation* (Wiener 2014) within a permanent norm-generative cycle, no longer differentiating law making and implementation as institutionally separated processes, but shows how norm generation works through contextualised debate and contestation about the meaning of abstract norms at different territorial levels, thereby providing for an empirical as well as *normative* concept of *constitutional pluralism*. Against the suspicion of legal-positivists that such a reconceptualisation will abolish the for the system of rule of law necessary *distinction* between *law and politics* and the differentiation between

(political) strategic bargaining on the one hand and the search for an impartial, better legal argument through legal methodologically controlled arguing in each case on the other, we reproach the critique of the politicisation of law and the judicialisation of politics with the theoretical-methodological theorem of the functional interdependence of law and politics, which can explain these complementary processes against the static doctrine of a separation of powers. Against the Böckenförde paradox, which presupposes the separate ontological existence of shared values, taken up again in the neo-assimilationist requests of right-wing populist parties to adapt to the majority cultures and the rights of majorities, we can also show with these reconceptualisations, that it is *not separate, shared values*, *but norm contestation* about the *meaning* of *values* in the specific situational context which can and does *provide* for *social* and *system integration* as necessary condition for effective minority protection.

Questions

1. Which processes comprise the construction of social identities?
2. Which forms of social organisation can we differentiate in the processes of group formation?
3. Why do we speak of the processes of the ethnification of territories, groupings of people and institutions instead of using the concepts of ethnic groups or nations?
4. What are the group references of purportedly individual rights?
5. How can we replace the conceptualisation of monism versus dualism in the relationship between national and international law?
6. Does the theory of norm contestation confuse the necessary distinction between law and politics?
7. Why and how does norm contestation provide for social and system integration?

Against annihilation 6

The right to existence

Joseph Marko, Hedwig Unger, Roberta Medda-Windischer, Alexandra Tomaselli and Filippo Ferraro

6.1 Introduction: the three dimensions of the right to existence

'Never again!' was the political formula for the further development of public international law after the end of the Second World War in 1945 and with the end of the Cold War in 1989 – having provided a decades-long *negative peace* through mutual nuclear deterrence – Europe, at least, seemed to enter a new, even more peaceful era. However, the wars in the 1990s in the wake and aftermath of the collapse of the multinational communist federations, the Union of Socialist Soviet Republics and Yugoslavia, and with the genocide committed in Srebrenica in Bosnia-Herzegovina under the eyes of United Nations (UN) peacekeepers in 1995, hot physical violence in its most abhorrent forms of so-called mass atrocities had returned back to Europe, shocking all but maybe the most hawkish military realists.

The concept and term 'genocide', a neologism of both Greek (*genos*, race or tribe) and Latin (*cide*, killing), had been coined by the Polish-Jewish jurist Raphael Lemkin (1900–1959), who was himself a refugee from Nazi-occupied Europe and, unlike Hannah Arendt, is almost completely forgotten today (Benhabib 2011: 41–56). He was convinced that the atrocities committed by the Axis powers during the Second World War could not adequately be covered by the provisions of the Hague Convention on Respecting the Laws and Customs of War on Land, adopted in 1907, as part of a body of international law established since the nineteenth century to regulate what is called in classic legal terminology *ius in bello* (i.e. legal regulations to establish rules of behaviour in warfare) and thus to civilise it, not least to protect the civilian population. In several publications and finally a book published in 1944, he analyses the political intents of the Axis war powers, in particular Nazi Germany, which explains the need for the codification of a new crime not to be conflated with individual murder, torture, rape and so on.

> The objectives of such a plan would be the *disintegration of the political and social institutions, of culture, language, national feelings, religion, the economic existence of national groups*, and the destruction of the personal security, liberty, health, dignity, and even the lives of individuals belonging to such groups. Genocide is directed against the

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> national group as an entity, and the actions involved are directed against individuals, *not* in their *individual capacity*, but as *members* of the national *group*.
>
> (Lemkin 1944: 79, emphasis added)

And in language which is prophetic also under the conditions of economic globalisation and for the processes of renationalisation of European national states (see Chapter 1) in the third millennium, Lemkin argues:

> Genocide is a *problem not only of war but also of peace*. It is an especially important problem for Europe, where differentiation into nationhood is so marked that despite the principle of political and territorial self-determination, certain national groups may be obliged to live as minorities within the boundaries of other states. If these groups are not adequately protected, such lack of protection would result in international disturbances, especially in the form of disorganized emigration of the persecuted, who would look for refuge elsewhere.
>
> (Lemkin 1944: 93, emphasis added)

Lemkin's analysis and classification of mass atrocities with the intent to destroy not only the physical existence of members of clearly differentiated social groups, but in particular the political and social institutions, economic existence and culture as an expression of their collective identity lays the ground for the conceptualisation of a right to existence of minorities, irrespective of whether they are old (national, ethnic, religious, linguistic) minority groups and indigenous peoples or new minorities stemming from immigration. Any *effective* right to existence must thus embrace three interrelated dimensions, which provide the structure for this chapter. These are:

- the *physical* and *psychological security* of members of a social group (section 6.2);
- their *economic subsistence* in terms of basic needs and capabilities for being able to uphold *different lifestyles* against both the poverty trap and the only seemingly natural trend to assimilation in industrialised societies (section 6.3); and
- in the spirit of Hannah Arendt's paradox, the necessity of having 'a right to have rights' against various forms of statelessness and the consequences of a more or less complete denial in the enjoyment of human rights (section 6.4).

Following from our *problem-orientated approach*, the following questions thus guide the description and analysis of the norm cycle of legal standard setting, problems of implementation, policy trends and new legal developments in the following sections concerning the three dimensions of the right to existence.

- Then UN Secretary-General Kofi Annan postulated in 2004, nine years after the Srebrenica genocide happened: 'We must protect especially the rights of minorities, since they are genocide's most frequent targets' (Annan 2004). But why are there only three judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice (ICJ), having established the occurrence of genocide in Europe? Has the Genocide Convention of 1948 thus remained only a symbolic

gesture of the international community in its effort to punish and, more importantly, to prevent the most heinous crimes against human dignity?
- Are the needs and thus claims of indigenous peoples and members of old minorities so different that it was necessary to elaborate and adopt different international legal mechanisms for the protection of their right to existence? What role does the legal concept of property play concerning the ideologically determined dichotomy of individual versus collective rights?
- Why does the Universal Declaration of Human Rights (UDHR) 1948 as a legally non-binding declaration of the UN General Assembly contain a right to nationality (meaning citizenship) which can, however, no longer be found in the legally binding Human Rights Treaties of 1966?
- Are the rights of members of minorities based on the precondition that they are – if recognised by national law – also citizens of the respective national state? Does or can the case law of international supervisory bodies or courts concerning minority protection help to overcome the dichotomy between human rights and the rights of citizens?

6.2 The right to existence in terms of physical and psychological security

Even those unfamiliar with the conflict that led to the collapse of the former Yugoslavia in the 1990s (Marko 2009; Ingrao and Emmert 2012) have heard of Srebrenica, described by the UN Secretary-General as the worst crime on European soil since the Second World War (Annan 2005). Although, tragically, the genocide against the Muslim population in Srebrenica could not be prevented, the unanimous decisions of the international courts defended at least ex post facto the right to existence of this grouping of people, both refugees and inhabitants of the area and characterised as a group in the legal sense only by the commonality of their religious affiliation, by qualifying the committed mass murder as an act of genocide (see Case Studies 6.1 and 6.2). Against all criticisms of groupism and holism in (post-)modern social sciences (see Chapter 2, section 2.2 and Chapter 5, section 5.2), these decisions confirm Raphael Lemkin's original thoughts cited above about the intimate link between the *intentional* physical extermination not only of individuals but also of a group and the *basic claim* of any *group*, namely the right to existence in its foundational dimension of physical and psychological security. In the following, we therefore elaborate in detail the *legal aspects* of this basic claim for physical and psychological security by examining the corresponding juridical concepts of genocide and ethnic cleansing, as well as crimes against humanity and war crimes under international law as well as other forms of inhuman treatment, the latter in particular protected by the European Convention on Human Rights (ECHR).

6.2.1 Legal standard setting: genocide, crimes against humanity, ethnic cleansing and war crimes

Genocide as a crime under international law is now incorporated into the legal codes of a majority of the world's national states as well as into the Statutes of the International Criminal

Court (ICC), the ICTY and the International Criminal Tribunal for Rwanda. In the early years of the development of the genocide concept during and after the Second World War, the deportation or forced expulsion of groupings of people, classified according to their ascribed ethnic belonging, was euphemistically called population transfer with all the accompanying crimes committed such as mass murder, torture or rape in the secure knowledge of impunity and which are labelled ethnic cleansing today. This was generally accepted to a certain extent also by the former Allied Forces against Nazi Germany, therefore deliberately not included in the Genocide Convention (Schabas 2009: 196) adopted by the General Assembly of the UN with the clear intention to 'punish' and to 'prevent' this form of mass atrocity 'for the future' in 1948 (Klabbers 2017: 128), the same year of the adoption of the UDHR. For instance, the mass deportation of so-called ethnic Germans in Central, East and Southeastern Europe immediately after the end of the Second World War was authorised by the Potsdam Agreement of July 1945. Hungarians from Vojvodina, Italians from the Adriatic coast, Albanians from Kosovo and members of the Turkish minority in Bulgaria were also forced to emigrate, the latter based on so-called emigration agreements between Turkey and the communist regimes of Yugoslavia and Bulgaria in their nation-building efforts (Mulaj 2008: 43–5). Hence, the UN Genocide Convention remained, not the least because of the lack of universal jurisdiction echoing Hannah Arendt's paradox (see Chapter 3, section 3.1), a symbolic legal document for decades until the end of the Cold War and the establishment of the ICTY and the International Criminal Tribunal for Rwanda by the UN Security Council in 1993.

The Genocide Convention defines genocide in Article 2 (Box 6.1).

Box 6.1 Definition of genocide, UN Genocide Convention (1948)

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

In applying the Genocide Convention, the international courts such as the ICJ and the ICTY generally require that for actions or inactions (i.e. criminal liability for not preventing criminal acts to be deemed *genocide*) two conditions must be fulfilled:

- there must be a *physical or biological destruction* of a protected group (*actus reus*); and
- there must be a *specific intent* to commit such a destruction with regard to the mental state (*mens rea*) of the perpetrator.

As one can imagine, this raises important *procedural* legal questions as to how such a specific 'intent to destroy … a group, as such' shall be construed when going 'beyond the intentions already present in the acts of violence themselves' (Klabbers 2017: 128) as we see from Case Studies 6.1 and 6.2. Moreover, genocide can be committed in wartime and in peacetime, if the conditions (i.e. destruction and specific intent) are in place. If these conditions are not fulfilled, other types of crimes, often equally severe and extremely harmful for the victims, might have been committed, such as crimes against humanity or war crimes. This, of course, raises the question: what is the difference between these offences when prosecuting crimes such as mass murder, detention in concentration camps with systematic torture and rape, which all happened during the Yugoslav wars and are all considered to constitute definitional elements of the offences enumerated above?

The term 'ethnic cleansing' became part of the international law vocabulary in 1992 when it was used to describe policies carried out in the Yugoslav wars aimed to create an *ethnically homogenous territory* (Cigar 1995; Marko 1996). At the beginning of the war in Bosnia-Herzegovina in 1992, the (then) Special Rapporteur of the Commission on Human Rights, the former Polish Prime Minister Tadeusz Mazowiecki, affirmed that 'ethnic cleansing may be equated with the systematic purge of the civilian population based on ethnic criteria, with the view of forcing it to abandon the territories where it lives' (UN Security Council 1992: para. 29). The UN General Assembly affirmed that the events happening in Bosnia-Herzegovina had to be qualified as an 'abhorrent policy of ethnic cleansing, which is a form of genocide' (UN General Assembly 1992a). According to the Security Council's Commission of Experts on Violations of Humanitarian Law during the Yugoslav war 'the expression ethnic cleansing … means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area' (UN Security Council 1993a: para. 55). For the Commission, ethnic cleansing included acts such as murder, torture, arbitrary arrest and detention, extrajudicial executions, sexual assault, confinement of civilian populations in ghetto areas, deliberate military attacks or threats of attacks on civilians and on civilian area, wanton destruction of property and, above all, the forcible removal, displacement, deportation and expulsion of an ethnic group from a given territory (UN Security Council 1993b: para. 56). The ICJ accepted the definition of the Commission in the Bosnian Genocide Case (ICJ 2007: para. 190; see also below) by citing the Commission's definition in its explanation of how the term is used 'in practice'. Thereby, however, the Court avoided to spell out a legal-doctrinal statement with the consequence that such a definition could be seen as a legally binding definition for future cases (Geiß 2013: para. 3). This begs, of course, the conceptual question what makes the difference between genocide or crimes against humanity?

Thus, while ethnic cleansing is not established as a distinct crime in its own right, it includes criminal acts that can amount to one of the atrocity crimes of genocide, war crimes and crimes against humanity, as the UN Secretary-General confirmed in his *Report on Implementing the Responsibility to Protect* (UN Secretary-General 2009: 3 fn 1; on this doctrine in general, see below). The Rome Statute of the ICC (Art. 7) and the Statute of the ICTY (Art. 5) list deportation and persecution as crimes against humanity. In armed conflicts, ethnic cleansing may also amount to a war crime (cf. 'unlawful deportation or transfer' listed in ICC, Rome Statute, Art. 8(2)(a)(vii) and in ICTY Statute, Art. 2 (g)) (Geiß 2013: para.

22–4). Nevertheless, ethnic cleansing may also amount to genocide of the persecuted group. In this case, the 'specific intent to destroy the group as such' must be proven as mentioned above which is extremely difficult as becomes clear from the case law discussed in the next sub-section.

The prosecution for *crimes against humanity* was one of the innovations of the international Nuremberg Tribunal after the Second World War, which had been set up by the victorious four allied powers after the war in order to prosecute some of the major Nazi war criminals (Acquaviva and Pocar 2008: para. 5–12; Klabbers 2017: 238). This brings to the forefront the most important principle not only for criminal justice as such, but for rule of law in general, namely the rule of *nullum crimen sine lege*. In a layman's terms, this means that nobody can be held criminally liable if his or her behaviour had not been declared a crime beforehand. This was also one of the problems which the judges of the Nuremberg Tribunal had to face. Despite the fact that the laws of humanity had been addressed in the preambular provisions of the Hague Convention (1907) mentioned above, the crime against humanity which the members of the Nazi regime were accused of as perpetrators was legally codified as crime to be sanctioned only with the Statute of the Tribunal. Hence, their crimes were no longer seen from a traditional understanding as war crimes between enemy combatants, but as atrocities carried out in particular against the civilian population in a 'European civil war', as this was characterised in hindsight by the prominent German historian Ernst Nolte (1998). However, again it took decades with the gradual expansion of international human rights law, before the notion of crimes against humanity became finally codified in Article 7 of the Rome Statute of the ICC (Box 6.2) as a standard in international criminal law.

Box 6.2 Definition of crimes against humanity, ICC, Rome Statute (1998)

Article 7

Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
   a) Murder;
   b) Extermination;
   c) Enslavement;
   d) Deportation or forcible transfer of population;
   e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   f) Torture;
   g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
   h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other

grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

i) Enforced disappearance of persons;
j) The crime of apartheid;
k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

Thus, committing several of the acts listed under Article 7 of the Rome Statute against any civilian population, pursuant to or in furtherance of a state-led or more or less directly supported policy to commit such an attack, is considered to be a crime against humanity. The concept of crimes against humanity is thus broader in its personal scope of application, whereas the *concept of genocide* is *characterised* by its aim to protect *the existence of a specific group,* as can be seen from the two qualifying elements of a *specific intent* to destroy a *group* as such. However, the decisive legal-sociological difference thus seems to lay in the *symbolic significance* of genocide as we learned above and from Chapter 3, Box 3.8 with regard to genocide denials of governmental policies and in public discourse. Designating acts as genocide rather than as crimes against humanity continues to feature in international political discourse as a great stigma (Schabas 2007: para. 30). Genocide is still seen as the 'crime of crimes'. This is indispensable to know in order to understand the judgments of the ICTY and ICJ in the genocide cases, which is discussed in the next sub-section.

The term 'war crimes' refers to serious breaches of international humanitarian law committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis. Such crimes are derived primarily from the Geneva Conventions of 1949 and their Additional Protocols I and II of 1977, the Hague Conventions of 1899 and 1907 and the most recent 1998 Rome Statute establishing the ICC (Box 6.3).

Box 6.3 Definition of war crimes, ICC, Rome Statute (1998)

Article 8

War crimes

2. For the purpose of this Statute, 'war crimes' means:
   a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
      i. Wilful killing;
      ii. Torture or inhuman treatment, including biological experiments;
      iii. Wilfully causing great suffering, or serious injury to body or health;

iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
vi. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
vii. Unlawful deportation or transfer or unlawful confinement;
viii. Taking of hostages

In addition to the above mentioned crimes distinct from genocide, especially in the case of acts or omissions committed in peacetime, various *forms of inhuman or degrading treatment* can be recognised to have been committed against members of minority groups, discussed at the end of the next sub-section (see Case study 6.3). In the European context, the most important legal basis can be found in Article 3 of the ECHR (Box 6.4). The European Court of Human Rights (ECtHR) interprets this right as an *absolute* right whose violation never can be justified.

Box 6.4 Prohibition of torture, inhuman or degrading treatment, ECHR (1950)

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Whereas torture is deliberate inhuman treatment causing very serious and cruel mental and/or physical suffering, less severe forms of ill-treatment are also banned: *inhuman treatment* causes 'intense physical and mental suffering' (e.g. ECtHR, *Becciev v. Moldova*, 2005), *degrading treatment* 'arouses in the victim a feeling of fear, anguish, and inferiority capable of humiliating and debasing the victim and possibly breaking his or her physical or moral resistance' (ECtHR, *Ireland v. the United Kingdom*, 1978). Thus, Article 3 ECHR protects persons from violations of their human dignity.

6.2.2 Implementation through case law

The following case studies demonstrate how the presented legal concepts of protecting the right to the physical and psychological existence of minorities are implemented in practice by rulings of different courts. Whereas Case study 1 shows the conflict of interpretation over the normative content of the phrase 'specific intent' to commit genocide even among two different judicial bodies of the same court, namely the ICTY (i.e. its trial and

appeals chambers), Case study 2 presents the reasoning of the ICJ in the genocide case between Croatia and Serbia on the difference between *the intent to punish or to destroy* the group. Moreover, in this case, the ICJ had also to discern the difference between genocide and ethnic cleansing. Case study 3, finally, presents cases before the ECtHR where Slovakia was accused of breaching the prohibition of inhuman or degrading treatment enshrined in Article 3 ECHR by the organised, forced sterilisation of Roma women in the past.

Case study 6.1 The 'specific' intent to commit genocide: the Srebrenica case

After having declared independence from the Socialist Federative Republic of Yugoslavia in March 1992, Bosnia and Herzegovina descended into a violent war with mass killings, rapes and the severe ethnic cleansing of the civilian population. Almost half of the pre-war population was displaced and over 100,000 people were killed.

In April 1993, the UN declared the besieged Bosnian Muslim enclave of Srebrenica in northeastern Bosnia a 'safe area' under UN protection. However, in July 1995, the UN Protection Force, represented on the ground by a 400-strong contingent of Dutch peacekeepers, failed to prevent the town's capture by units of the secessionist army of the Republika Srpska under the command of General Ratko Mladić and the subsequent massacre of more than 8000 civilians, mostly men and boys, separated from all the women, children and elderly.

Owing to the denial of the government of the Republika Srpska that such a massacre had ever happened, let alone to be called genocide, only an international court of law could authoritatively establish the facts of what had happened in Srebrenica in July 1995. This task was given to the ICTY, having been established by the UN Security Council in 1993 to prosecute serious violations of international humanitarian law in the wars within and between the former Yugoslav republics. In its judgment, *Prosecutor v. Krstić* (2001), one of the tribunal's three Trial Chambers set forth a comprehensive account of the tragedy. The Trial Chamber held that following the takeover of the town, Bosnian Serb forces executed 8000 Bosnian Muslim men of military age. In addition, the Bosnian Serb forces transported away from the area nearly all the Bosnian Muslim women, children, and elderly. Finding that these actions resulted in 'the physical disappearance of the Bosnian Muslim population at Srebrenica', the Trial Chamber concluded that the forces of the Republika Srpska had committed genocide (ICTY, *Prosecutor v. Krstić*, Trial Chamber, 2001). For his involvement in the mass killings, Radislav Krstić, the Serb officer on trial, was sentenced to 46 years imprisonment, one of the longest sentences imposed by the tribunal.

Following the appeal by Krstić's defence in April 2004, the Appeals Chamber, with a large majority, changed the verdict of the Trial Chamber. With the exception of the dissenting opinion of Judge Mohammed Shahabuddeen, the Chamber decided that Krstić was guilty to be an aider and abettor of the crime of genocide but not directly a perpetrator of it, reducing the conviction to 35 years imprisonment (ICTY, *Prosecutor v. Krstić*, Appeals Chamber, 2004).

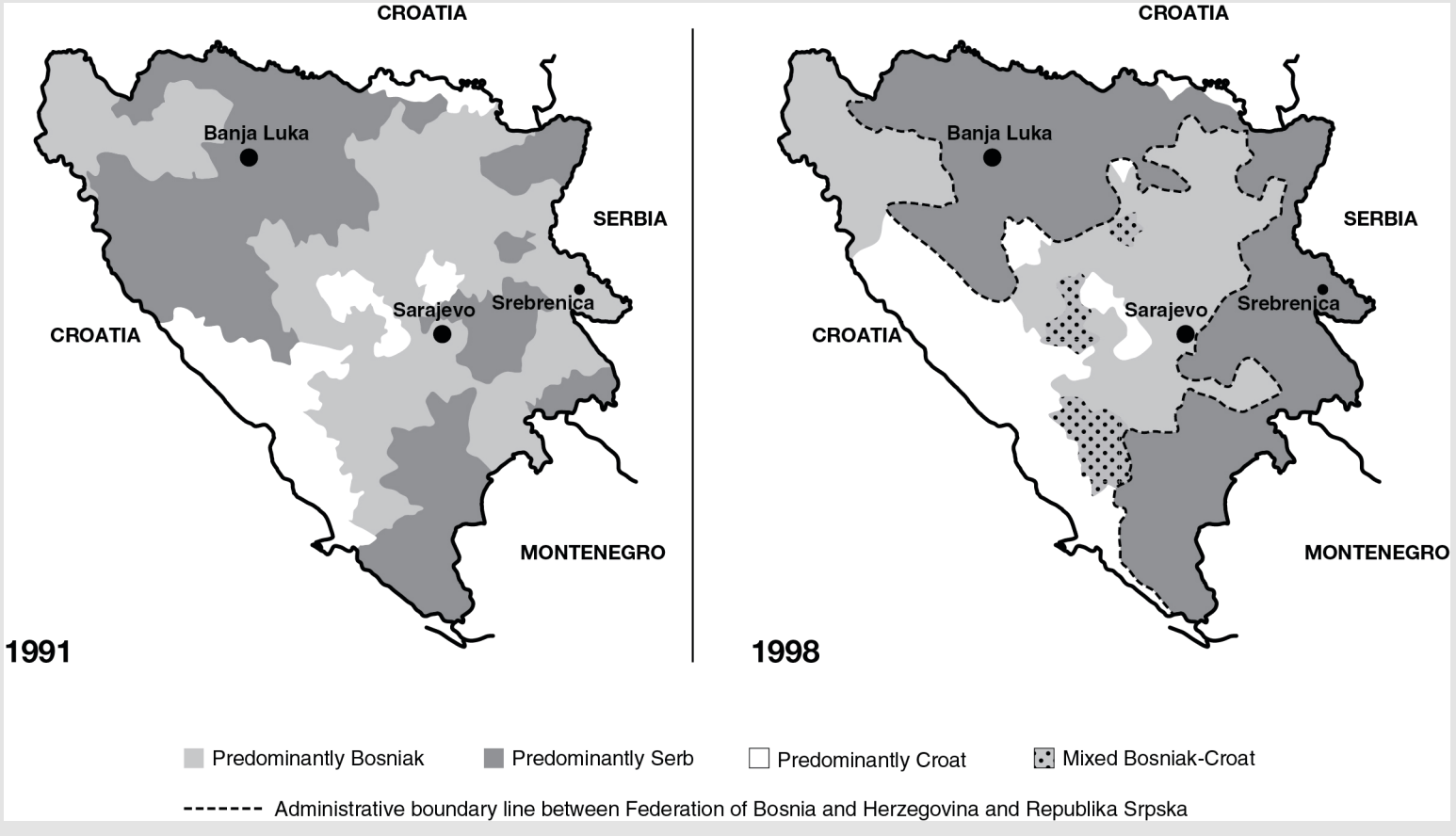

Figure 6.1 Ethnic make-up of Bosnia and Herzegovina before and after the war

Relying on its evidence, the Trial Chamber had held that Radislav Krstić intentionally participated in the joint criminal enterprise (Box 6.5) to execute the Bosnian Muslims of Srebrenica. The scale of the killing, combined with the officer's *awareness of the detrimental consequences* that it would have for the Bosnian Muslim community of Srebrenica, and with the other actions which Radislav Krstić took to ensure the community's physical demise, was considered by the Trial Chamber a sufficient factual basis for the finding of specific 'genocidal intent'.

Box 6.5 Joint criminal enterprise

Joint criminal enterprise, a form of criminal participation, is a concept that was established in the case law of the ICTY (ICTY, *Prosecutor v. Tadić*, Appeals Chamber 1999). Joint criminal enterprise is characterised by the existence of a common criminal plan or purpose pursued by a plurality of persons; all individuals who contribute to the carrying out of crimes in execution of a common purpose may be subjected to criminal liability (ICTY, *Prosecutor v. Brđanin* 2004). Participation in a joint criminal enterprise is a form of commission, as opposed to accomplice liability (ICTY, *Prosecutor v. Kvočka et al.* Appeals Chamber 2005).

The Appeals Chamber, however, rejected this approach, affirming that Krstić was aware of the intent to commit genocide on the part of some members of the officers of the army of the Republika Srpska and, with that knowledge, he *did nothing to prevent* the use of the special forces, personnel and resources under his command and control to facilitate killings happening during the Srebrenica massacre. For the Appeals Chamber, this *knowledge alone* did not amount to evidence of the 'specific' genocidal intent. The Appeals Chamber did not deny that genocide had happened, but argued that genocide is one of the worst crimes known to humankind, so that its gravity is reflected in the stringent requirement of 'specific intent'. Therefore, convictions on the basis of individual guilt for genocide can be established only where that intent can unequivocally be proved. According to the judges of the Appeals Chamber, the Trial Chamber was *too extensive* in its *interpretation* of certain terms in the genocide definition, excessively broadening the circumstances under which genocidal intent may be inferred. Therefore, the extensive interpretation of the Trial Chamber could have had the effect of encouraging negative tendencies in international humanitarian law. Indeed, it has been argued in scholarly literature that by diluting the meaning of genocide, the Trial Chamber risked undermining the authority of the ICTY and weakening the distinction between genocide and crimes against humanity, reducing consequently the capacity of the concept of genocide to punish and thereby to shame unique forms of devastation (Southwick 2005).

Later, in 2007, the ICJ concurred with the ICTY judgments that the atrocities committed at Srebrenica constituted a genocide acknowledging that 'the acts committed at Srebrenica … were committed with the *specific intent to destroy in part the group* of the Muslims of Bosnia and Herzegovina as such' (ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, emphasis added). Even if the ICJ disappointingly concluded – in particular for victims – that the accused Republic of Serbia was not responsible for the genocide committed, it boldly clarified that Serbia was *guilty* of *not having prevented* the genocide even when genocide occurs *outside its territory* and that also a state can be accused in terms of collective responsibility for such crimes (Schabas 2008; Klabbers 2017: 103–5).

Case study 6.2 State responsibility for genocide? The case of *Croatia v. Serbia*

On 3 February 2015, the ICJ issued a judgment on the merits in a case between Croatia and Serbia in which, after 16 years, the claims of Croatia and the counter-claims of Serbia that genocide had been committed by both parties were finally rejected. The case focused on Croatia accusing Serbia of breaching the Genocide Convention between 1991 and 1995, and Serbia contending that Croatia was itself responsible for breaches of the Genocide Convention committed in 1995 (ICJ, *Croatia v. Serbia*, 2015: para. 52).

Shortly after the declaration of independence by Croatia on 25 June 1991, a fully-fledged armed conflict broke out between Croatia's democratically elected new government and paramilitary forces opposed to its independence. These forces were established by the ethnically radicalised part of the Serb minority within Croatia in 1990. These groups were not only supported in the violent uprising but were also politically mobilised years before by the Republic of Serbia. This was officially established by the evidence provided by the accused leader of the Serb Democratic Party in Croatia, Milan Babić, before the ICTY (ICTY, *Prosecutor v. Babić*, 2004: para. 16). By late 1991, the paramilitary Serb forces and the Yugoslav People's Army under the influence of the Milošević regime in the Republic of Serbia controlled around one-third of the territory of the Republic of Croatia, a situation that lasted until 1995. During spring and summer 1995, Croatia succeeded, as a result of a series of military operations called Oluja (storm), in re-establishing control over a large part of its territory. It was during this military operation that the genocide alleged by Serbia in its counter-claim is claimed to have taken place. The Operation Storm was the last and decisive major battle of the so-called Croatian Homeland War, as it is characterised by Croatian historiographers and public discourse to this day. The war ended with Croatian victory, as it achieved the goals which it had declared at the beginning of the war: independence and preservation of its borders (Murphy 1995).

In the case before the ICJ, again the fundamental point to resolve was whether the 'specific intent' to commit genocide of either the Croat or Serb forces can be proven. In

order to *determine the normative meaning* of the definition of the Genocide Convention concerning the 'intent' to destroy a group as such, 'in whole or in part', the ICJ asserted that it is necessary to distinguish between *state responsibility* and *individual responsibility* since they are governed by different legal regimes. Hence, 'state responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one' (ICJ, *Croatia v. Serbia*, 2015: para. 128–9). Further on, the Court establishes the meaning and scope of 'destruction of a group in whole or in part' and specifically on *what constitutes the evidence* of the 'specific intent' with regard to state responsibility (ibid: para. 132–3). Concerning the latter, the Court concludes:

> that it is difficult to establish such intent on the basis of an isolated act. It considers that, in the *absence of direct proof*, there must be evidence of acts on a scale that establishes intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part.
> (ibid: para. 139, emphasis added)

But which acts can serve as evidence to destroy the group itself? Is a governmental policy of ethnic cleansing and the respective actions of armed forces in carrying out this policy sufficient as *indirect proof* for the special intent required? Since it will be quite often not possible to prove the genocidal intent on the basis of a governmental plan expressing the intent to commit genocide, the Court concluded, following Serbia's line of argumentation, that 'in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the *only inference* that could reasonably be drawn from the acts in question' (ibid: paras 145 and 148, emphasis added). Moreover, the Court made a distinction with regard to ill-treatment inflicted on prisoners of war: 'the intent of the perpetrators of the ill-treatment … was *not* to *physically destroy* the members of the protected group, as such, but *to punish* them because of their status as enemies, in a military sense' (ibid: para. 430).

By narrowing the definition and proof of evidence for the 'special intent' in such a way, the conclusions drawn by the Court will come as no surprise. With regard to all the specific cases of systematic violence on the territory of the Republic of Croatia committed by the Serb paramilitary forces and the Yugoslav People's Army under scrutiny, the Court concluded that the 'specific intent' to commit genocide could not be established:

> In the present case … forced displacement was the instrument of a policy aimed at establishing an ethnically homogenous Serb state. In that context, the expulsion of the Croats was brought about by the creation of a coercive atmosphere, generated by the commission of acts including some that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. Those acts had an objective, namely the forced displacement of the Croats, which did not entail their physical destruction. … It was not a question of systematically

> destroying that population, but forcing it to leave the areas controlled by these armed forces.
>
> (ibid: para. 435)

In conclusion, the Court dismissed the claim of Croatia that Serbia has to be held responsible because:

> Croatia has not established that the *only reasonable inference* that can be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group. The acts constituting the *actus reus* of genocide … were not committed with the specific intent required for them to be characterised as acts of genocide.
>
> (ibid: para. 440, emphasis added)

And the Court reiterated its conclusion with regard to the Serbian counter-claim that Croatia had committed genocide in Operation Storm in 1995: 'the forced displacement of a population, even if proved, would not in itself constitute the *actus reus* of genocide' (ibid: para. 477, emphasis added). Nevertheless, it established that several acts committed by Croatian military and police did constitute the *actus reus* of genocide, but that there was again no proof of the required special intent following from the pattern of conduct of the Croatian authorities (ibid: para. 511–12).

In the final analysis, following from both case studies we can only raise the critical question: What else can – in the end – give evidence for an *indirect* proof of evidence for committing genocide if even the *wilful intent* of ethnic cleansing and *thereby accepting* not only the forced displacement of people, but also in all probability their *killing in great numbers* because of their belonging to the same ethnic group is not sufficient to infer the existence of the necessary 'special' intent?

Case study 6.3 Forced sterilisation of Roma women in Slovakia: inhuman and degrading treatment

The forced sterilisation of Roma women in Slovakia spanned almost 46 years, beginning in July 1966 in what was at the time part of Czechoslovakia, and ending in March 2012, in the now Republic of Slovakia after the so-called 'velvet divorce' of 1992. The policy affected approximately 90,000 Roma women. The sterilisation process was part of the Slovak government's plan – in clear racist language – to decrease the perceived 'high and unhealthy' birth rates of Roma women. These women reported that they were subject to sterilisation while undergoing caesarean section during childbirth and were manipulated through 'coercion, persuasion, threat or inaccurate information' (Council of Europe Commissioner for Human Rights 2012) and thus had not provided informed or free consent in either oral or written form. Consent would have been necessary for

these procedures due to the fact that they were not lifesaving (ibid.). The Slovak government therefore violated the European Convention of Human Rights, which it signed in 1993.

The ECtHR cases comprised of *I.G. and Others v. Slovakia* (2012), *N.B. v. Slovakia* (2012), *V.C. v. Slovakia* (2012) and *K.H. and Others v. Slovakia* (2009), with 13 female plaintiffs. During these trials, the state focused on escaping a ruling of genocide, due to its negative implications, by claiming that it targeted individual Roma women but not the Roma population as an ethnic group. The Slovak government claimed that the laws and procedures to obtain informed consent had been violated, but that no genocidal actions or intentions existed (CoE Commissioner for Human Rights 2012). In all of the above cases, the ECtHR ruled that the Slovak state was guilty of not prohibiting inhumane or degrading treatment (Article 3 of the Convention) and disregarding the right to respect private and family life (Article 8 of the Convention), in addition to not holding a 'prompt and reasonable' investigation following the Roma women's complaints (CoE Commissioner for Human Rights 2012). However, the court did not decide to investigate whether *race* was a *motivating force* behind the sterilisation processes, preventing prosecution for genocide (ibid.). In the end, the women involved in the *I.G. and Others, N.B., V.C* and *K.H. and Others* cases were granted compensation for expenses and damages, to be paid by the Slovak state (ibid.).

In February 2012, the CoE Commissioner for Human Rights released a report of recommendations for the Slovak government with regard to the cases of the forced sterilisation of Roma women. The plan included the establishment of clear guidelines concerning informed consent and to provide victims with public apologies (CoE Commissioner for Human Rights 2012). A joint report released in January 2015 by the CoE and the European Roma and Travellers Forum concluded that Slovakia planned to 'increase awareness of education on parenthood, reproduction health, motherhood, and childcare (and) implement educational comprehensive non-stereotypical activities aiming at increasing awareness on sexual and reproduction behaviour', albeit without direct reference to the sterilisation of Roma women (CoE and European Roma and Travellers Forum 2015). Additionally, the UN Committee against Torture found, in its third period report on Slovakia (2014), that Slovakia had adopted new legislation regarding informed consent and medical practitioner obligations that met international standards.

6.2.3 Remaining problems and legal developments

When looking back to the main motivation for the adoption of the Genocide Convention in 1948 and the other humanitarian law treaties, namely to punish *and* to prevent genocide and other atrocity crimes for the future under the motto never again, the record of success in this endeavour is mixed at best. In particular, the Yugoslav wars in the 1990s, but also other violent conflicts like those in Cyprus 1963 and 1974, the Northern Ireland conflict

and the conflicts and wars in the Caucasus region between the late 1980s and today give evidence that the *worst crimes* threatening in particular the physical existence of national and religious minorities happen not only in Africa or Asia but also in Europe in the middle of and among the most civilised nations, as they have seen themselves over the centuries. Also the intention – in line with Arendt's paradox – to give humanity a legally enforceable voice independent of or even against the national interest of states and their political compromises when negotiating international treaties for the protection of human including minority rights took decades until the establishment of country-specific international criminal tribunals and finally the ICC.

Hence, the term punish should indicate the *basic function* of all criminal law in modern, civilised countries, namely *not* to take *revenge* for the crime committed, *but* to *prevent* the commitment of crimes by individuals *and* collective action. Thus, the two motivations of to punish *and* to prevent atrocious crimes must provide the vantage point for a more detailed *functional-structural* analysis of the remaining *problems* and new *developments* in the protection of the right to existence of minorities. These can be characterised as transformations from problems of *retributive* justice to the new concept of *restorative* or, more generally, *transitional* justice, as well as the 'responsibility to protect' doctrine.

6.2.3.1 Retributive and/or restorative justice? Perpetrators and victims between vengeance and reconciliation

In fact, until the Rome Statute was adopted, the aim of international criminal justice was essentially to help to *restore* international *peace and security* by *punishing* those responsible for heinous crimes during wartime in terms of retributive justice. The *impartial* trial and punishment of *individual* perpetrators was *considered sufficient* vindication. Justice was done in the name of the abstract notion of humanity, but not necessarily in that of the victims (Shelton and Ingadottir 1999).

Hence, even in the Yugoslavia and Rwanda tribunals, *victims* could enter the courtroom only as *witnesses* (for the ICTY and the role of the witnesses cf. Stover 2007). In the ICC Rome Statute, however, those who have suffered from heinous crimes have been elevated now from a mere aid in the establishment of facts into *full participants* with legitimate rights to make use of legal remedies and to claim reparation for the violation of their rights. Several provisions in the Rome Statute stipulate the involvement of victims during all phases of the case (e.g. Art. 15.3, 19.3, 68.3, 75, 82.4) so that they can act on their own behalf or through their representatives and no longer only through a state espousing their claims.

In addition, according to Article 75 of the Rome Statute there are three types of *legal remedies* which represent the most appropriate forms of reparation: restitution, compensation, and rehabilitation. *Restitution* or *rectification* restores precisely that which was taken. Where restitution or rectification is not possible, *substitute remedies*, including punitive damages, can be granted. In fact, monetary *compensation* is the most common form of reparation. However, compensation can only provide something equivalent in value to that which is lost. With regard to this, the ICC created the Trust Fund for Victims, whose purpose is to

encourage fundraising efforts. While it has managed to secure laudable donations from state parties, it should also seek to progressively diversify its funding base. However, the Court can also consider other types of reparation, such as symbolic reparation.

Moreover, remedies should provide the important psychological and social functions of *reintegration* and *rehabilitation* of the victimised. Victims of abuse, in particular women, often are stigmatised or socially segregated because of the horrific nature of the stories they have to tell. The need to readapt to normal society and return to pre-victim ways of life is crucial. This is very often the most problematic issue in terms of *reconciliation* efforts where women, in particular through the intersection of gender and ethnicity, are left alone by both state institutions and civil society organisations. In this context, it is more than only remarkable that the Bosnian Constitutional Court developed a constitutional doctrine requiring 'the prohibition to uphold the effects of past ethnic cleansing' in the case U 5/98, Third Partial Decision (2000) – the so-called *Constituent Peoples* case, following from the text of Annex VII of the Dayton Agreement providing for the return of refugees and internally displaced persons (see Marko 2006a, who was the judge rapporteur in this case).

Seen from a conflict resolution perspective, too often, however, *retributive justice* in terms of sanctioning crimes by establishing only individualised guilt is not seen as a necessary instrument for the prevention of crimes, but as *vengeance* of the victorious power, as critics of the Nuremberg trials had argued and as could be observed from the furious public debates on TV and in print media in Croatia, Serbia, Bosnia-Herzegovina, and Kosovo accompanying the ICTY trials, while trying to establish the truth about what had happened. Regardless of individual convictions as we could see above from the Krstić case or acquittals such as the case of the Kosovo Liberation Army commander and later Prime Minister, Ramush Haradinaj, these cases gave rise to the *claim* of *falsification of history* by the respective ethnic others of the accused. Thus, an explanation given to the judges by one of the accused in the ICTY trials is more revealing about the phenomenon of 'hijacked justice' (Subotić 2009) than anything else: 'You have your facts. We have our facts. You have a complete right to choose between the two versions' (cit. in Marko-Stöckl 2010: 348). Hence, *knowledge* and *acknowledgement*, cognition and evaluation of the same facts are not the same and the interrelationship between *retributive* justice and *restorative justice* within the broad framework of *transitional justice* (Teitel 2002) has therefore to be carefully analysed.

Retributive justice in terms of legitimate punishment may thus be the first step to satisfy the individual psychological needs of victims, but – at the same time – could also be another step in a spiral of 'intergenerational vengeance' and bloody conflicts, as was discussed in particular with regard to the repeated outbreaks of violent conflict in the former Yugoslav territories during the twentieth century (Marko-Stöckl 2010: 351). The possibly 'irreconcilable goals' (Leebaw 2008) of either guaranteeing a (negative) peace and political stability through constitutionally entrenched power sharing (see Chapter 9) between the warring parties after conflict and the claims for either *retributive* justice including compensation of victims or *restorative* justice to overcome the root causes of antagonistic group formation and structuration of society require a deeper understanding of transitional justice and how to reconcile these policy conflicts in the respective political, economic, and cultural context

for which there is no one-size-fits-all solution. Moreover, as can be seen from scholarly literature (Skaar 2012; McCrudden and O'Leary 2013; Marko 2017: 343), these remain hotly contested theoretical debates to this day.

However, *retributive* justice delivered by criminal courts and *restorative* justice to bring about *reconciliation* between conflicting groups in severely divided societies (see Chapter 5, section 5.2.3) by non-judicial means, such as truth commissions, are not naturally mutually exclusive, if seen from such a multidimensional and contextual perspective. Consequently, transitional justice should be defined by a *holistic approach* to dealing with the past that encompasses *both* instruments of *retributive* and *restorative* justice:

- *Criminal prosecutions*: criminal prosecutions hold a privileged place in the fight against impunity, in particular because of the grave character of the crimes involved. Prosecutions are preferably carried out at the national level, where they have the greatest potential to act as a deterrent and contribute to the restoration of public confidence in the rule of law (ICC, Statute of Rome, 1998). The reality, however, is that there are usually tremendous challenges facing domestic criminal justice systems in investigating and prosecuting international crimes. The *main challenge* is often the lack of political will, but in addition, there are legal barriers such as amnesties, the lack of an independent judiciary, and lack of capacity in terms of the technical and professional skills required to investigate and prosecute serious widespread or systematic crimes and security issues. A volatile security environment, continued armed conflict, and lack of a safe environment for legal actors, victims or witnesses pose extra challenges on a national level in holding perpetrators to account.
- *Security system reform*: security system reform is a crucial means for helping to reduce the likelihood of renewed conflict or abuse (Davis 2009). While there is a wide range of different reform measures that may be needed or applied in any given context, in practice, the field of transitional justice places emphasis on vetting programmes, in particular in the police, army and judiciary. These are integrity-focused personnel screening procedures, which have the transformation of public institutions, in particular law enforcement agencies, into defenders rather than violators of human rights, as their central aim (UN Secretary-General 2004). Vetting programmes have been used in places such as El Salvador and Bosnia-Herzegovina. They seek to ensure greater procedural fairness than the so-called lustration programmes which came close to political purges and were used in recent years in places such as Albania and Iraq. In Bosnia-Herzegovina, the European Union has been engaged in supporting the building of a unified professional Bosnian army as well as in strengthening the operational capacity of the Bosnian police force (Eralp 2012: 92–104).
- *Truth commissions*: truth commissions are ad-hoc commissions of inquiry established in, and authorised by, states for the primary purposes of investigating and reporting on key periods of recent past abuse, and of making recommendations to remedy such abuse and prevent its recurrence (Hayner 2011). There have been scores of truth commissions created around the world during the last few decades in places as different as Chile, Sri Lanka, Canada and Liberia. Of these, the most famous is still the South African Truth and Reconciliation Commission, with its unique truth-for-amnesty procedure

and its internationally televised public hearings. Although no prior or subsequent truth commission has possessed an equivalent power to grant amnesty, most subsequent ones have held public hearings for victims, since such hearings appear to significantly increase public awareness and open public debate about the past (Freeman 2006). However, the establishment of truth commissions may also face serious problems or even fail in contributing to clarification and reconciliation, as the examples of Serbia and Bosnia-Herzegovina demonstrate (Marko-Stöckl 2010: 344–52).

- *Victim reparation programmes*: victim reparation programmes are state-sponsored initiatives that aim to contribute to the reparation of the material and moral consequences of past abuse experienced by designated classes of victims (Baldo and Magarrell 2007). Typically, they are established upon the recommendation of a Truth Commission or at a legislature's initiative, as in Germany in the years and decades after the Holocaust. Contemporary reparation programmes usually provide compensation payments to victims and/or their families, together with privileged or dedicated access to certain public or private services, such as healthcare rehabilitation services, pension benefits and educational services. Modern reparation programmes increasingly also encompass various symbolic forms of reparation, including monuments and memorials to preserve and honour the memory of victims. For example, in 2003, the Srebrenica-Potočari Genocide Memorial Center, which includes a cemetery with more than 6000 graves, was opened by the former president of the United States Bill Clinton in Potočari (Bosnia and Herzegovina), where the massacre of Srebrenica begun.

To conclude, *transitional justice* is a multidisciplinary field of theory and practice that is linked to the fight against impunity and to the broader domains of human rights and conflict resolution. Whereas until the end of the Cold War the dominant view was that societies emerging from periods of conflict, authoritarian regimes or mass abuse had to choose between trials and amnesties, today there is recognition of the wide spectrum of tools and mechanisms that exist between those two extremes, as well as of their complementary nature. Indeed, one could say that the international viewpoint today is not to ask *whether* to deal with the past, but rather to ask *how* to deal with it. Transitional justice is a field that purports to offer principled *and* pragmatic answers to that challenge as can also be seen from the Report of the UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (UN Secretary-General 2004).

6.2.3.2 From punishment ex post facto to prevention: the responsibility to protect doctrine

As we have learned from the genocide case law of the ICTY and ICJ, there are the legal-dogmatic insecurities and thus procedural barriers established following from the fact that ethnic cleansing is seen, on the one hand, an 'autonomous crime' (Schabas 2009), but not yet codified as a separate crime in any of the international treaties prohibiting atrocity crimes on the other.

Hence, in the early years of the activities of the ICTY, the Office of the Prosecutor was extremely cautious in presenting indictments for genocide, opting instead for a broader and more general qualification of activities under the rubric crimes against humanity. For instance, in the ICTY case *Prosecutor v. Milošević et al.* (2001) the defendant Milošević was indicted for crimes against humanity, but not for genocide, in relation to possible ethnic cleansing in Kosovo. In the first cases of genocide brought before the ICTY regarding violence directed against minorities, the judges of the ICTY Trial Chambers followed the same line – not considering these acts as genocide. Such activities were considered as ethnic cleansing to be treated as crimes against humanity, but not genocide (ICTY, *Prosecutor v. Jelisić*, 1999; *Prosecutor v. Sikirika et al.*, 2001; *Prosecutor v. Stakić*, 2003). This meant that the ICTY case *Prosecutor v. Krstić* (2004) and the ICJ cases, *Bosnia and Herzegovina v. Serbia and Montenegro* (2007) and *Croatia v. Serbia* (2015), remain the great exemptions from the rule, in line with scholarly comment that genocide shall be considered to be the 'crime of crimes' and must not be diluted in its symbolic significance.

Nevertheless, the legal similarities between genocide and ethnic cleansing are obvious due to committing the same crimes of mass murder, torture, rape, detention in concentration camps and so on, as can be seen also from the dissenting opinion of Judge Cançado Trindade in the analysed ICJ case who clearly emphasised the *dynamic linkage* between both concepts. He pointed out that the initial 'intent to remove' people from the territory may degenerate into the 'intent to destroy' the targeted group and that therefore the expression ethnic cleansing should not serve 'to camouflage genocide' (ICJ, *Croatia v. Serbia*, 2015, Dissenting Opinion [Judge Cançado Trindade]: para. 241; Steinfeld 2015: 943–5). This may illustrate that genocide and ethnic cleansing, together with the understanding of their complex conceptual relationship, which became evident in the cautious approach in the reasoning of prosecutors and courts, are still trapped in the Westphalian paradigm (see Chapter 3, section 3.2) of interstate relations, based on the notion of (absolute) sovereignty and non-interference into internal matters instead of the contrasting paradigm of the protection of the cosmopolitan rights of humanity (see Chapter 5, section 5.3). This is because this had been the *historical motivation* for the adoption of the Genocide Convention in 1948, not by chance the same year as the adoption of the Universal Declaration of Human Rights.

Nevertheless, most important is the fact that the ICJ has – *against* the doctrine of both external and internal sovereignty of states – clearly established in its genocide cases that also *states* as abstract entities, represented by their holders of office, can be perpetrators of atrocity crimes and therefore bear collective responsibility, which is frequently conflated with the collective guilt of a people or nation in public discourse and thus mostly rejected, leading to the denial of atrocities outlined in Chapter 3 and above. Secondly, the ICJ has also – against the ambiguities following from the ICTY case law – clearly established that there is a 'positive duty' (see also Chapter 8, section 8.2) of states and respectively its office holders to *protect* and thus to *prevent* atrocity crimes, as developed after 1999 within the UN legal framework standard-setting mechanisms as public international soft law, with the responsibility to protect doctrine.

Hence, at the UN 2005 World Summit, many world leaders committed themselves to the so-called responsibility to protect (Box 6.6, overleaf) doctrine.

Box 6.6 Responsibility to protect

138. Each individual State has *the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity*. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

(UN General Assembly 2005a, emphasis added)

The positive 'duty to protect' populations at risk and to prevent atrocity crimes – as can be seen from this text – is not limited to member states of the UN. At the same time a *collective responsibility* of the *international community* is created to prevent such mass atrocity crimes, in the final analysis even by military intervention for humanitarian purposes (see the reference to Chapter VII of the UN Charter above), thus giving humankind more than a strong voice in terms of Arendt's paradox. Of course, advocates of the Westphalian sovereignty paradigm in scholarly literature and many member states of the UN strongly resist the concept of a collective right to humanitarian intervention so that the translation of the responsibility to protect doctrine from soft into hard law through legal codification is highly unlikely, not least because of the catastrophic results of the military interventions of North Atlantic Treaty Organization powers in Libya, Iraq and Syria to enforce regime change.

The enhanced attention and emphasis placed on the critical gap existing in the international system in case a state is proven powerless or unwilling to prevent or is the perpetrator itself ('state terrorism') was also noticed by the then UN Secretary-General Kofi Annan in a public statement, in which he urged: 'We must protect especially the rights of minorities, since they are genocide's most frequent targets' (Annan 2004). He indicated that significant gaps remained in the capacity of the UN to give early warnings of genocide and other crimes, as well as to analyse and manage that information and take action when such warnings are received. As a result, in 2004, the first Special Adviser on the Prevention of Genocide was appointed, with the task of collecting information, acting as a mechanism of early warning

to the Secretary-General and the Security Council, making recommendations on actions to prevent or halt genocide, and liaising with the UN system on activities for the prevention of genocide. Subsequently, the Secretary-General also appointed a Special Adviser on the Responsibility to Protect, who was tasked with further developing and refining the concept of the responsibility to protect as well as for the continuation of the political dialogue with member states and other stakeholders on further steps towards implementation. After the first assignment, for reasons of efficiency and effectiveness, it was decided that the Special Adviser on the Responsibility to Protect would also be charged with working together with the Special Adviser on the Prevention of Genocide to operationalise their complementary mandates and to have a greater impact. In 2008, a Joint Office on Genocide Prevention and on the Responsibility to Protect was created, with the task of preserving and enhancing existing arrangements, including capacity building and the gathering and analysis of information from the field (Vashakmadze 2012).

6.3 The right to existence in terms of basic needs and capabilities as economic subsistence rights

Our concept of the right to existence in terms of a legal status of minorities and indigenous peoples developed for this book, in the spirit of Ralph Lemkin's draft definition of genocide, goes beyond the violation of the life and physical security of members of sociocultural groupings *qua* membership and shall also be spelled out in connection with the *effective* enjoyment of *economic subsistence rights* in terms of 'basic needs and capabilities' (Sen 1999; Nussbaum 2011). This conceptualisation goes beyond the individual anti-discrimination approach, initially established after 1945 in international and European legal standard setting efforts, as elaborated in Chapter 3, section 3.4, and inspired by classic liberal and liberal-egalitarian ideological approaches (see Chapter 4, section 4.3) against any form of group-related rights. The basic assumption of our approach thus holds that the *legal prohibition of discrimination of individuals* either by actions of state institutions or private persons (i.e. de jure or de facto discrimination in US-American constitutional law terminology) is notably *insufficient* for the *protection, preservation* and *promotion* of the different ways of life (i.e. the *different social* and *cultural practices* of groupings of people) and thus, in the end, the material preconditions for upholding their different culture when members of these groupings can no longer control the conditions of the 'socialisation of the next generation' (Patten 2014: 47–9). As we see in particular from the examples of the indigenous Sami peoples in Scandinavian countries and the Russian Federation, as well as Roma and Sinti all over Europe, the possibility of upholding a different way of life in sociocultural terms is not only a legal problem of equality before the law and thus of more or less assimilation into or segregation from mainstream society, which is dealt with in Chapter 8, section 8.2. The much deeper *structural problems* for indigenous peoples are the socioeconomic existential, *material preconditions in terms of land rights* and thereby *control* over *grazing pastures, food resources, water* and *working conditions*. This goes against the aspirations of both former communist, now illiberal authoritarian regimes, as well as liberal market-orientated states and societies, together with their *concepts* of *property rights* to exploit natural resources for national industrial development

projects or private economic gains. Thus, forced evictions of indigenous peoples and minorities from their traditional homes and pastures and the destruction of the natural environment necessary to maintain their lifestyles are not at all natural consequences, as this might be claimed by different actors.

The second structural problem discussed in this section is the almost *complete socioeconomic deprivation and cultural marginalisation* of *Roma* and *Sinti*, who do not live in the economic and ecological peripheries of Europe but have been living for several centuries in the middle of European societies. Nevertheless, because of their non-sedentary way of life in previous times, they have been *racially discriminated against* for centuries and also annihilated in the Nazi concentration camps.

6.3.1 Legal standard setting: indigenous peoples under international law

In the problem-orientated overview on legal standard setting after 1945 in Chapter 3, section 3.4, we set the analytical frame with our observation of the 'swing of the pendulum' in international legal standard setting after the Second World War between, on the one hand, liberal-individualist inspired *anti-discrimination approaches* dominating the period of the Cold War until 1989, and so-called collective *rights* of groupings of people on the other, coming to the fore after 1989. Consequently, two issues also dominate recent developments in legal standard setting:

- first, the question whether a categorical difference between various categories of minorities (linguistic, religious, national) and indigenous peoples concerning their needs exists, and therefore rights to be legally institutionalised; and
- second, the ongoing ideologically inspired dichotomy between the notions of universal and thus necessarily individual human rights and group-specific interests and rights (see Chapters 5, section 5.3 and 7).

As this has also been elaborated in Chapter 3, section 3.4, the concept of collective or group-specific rights finds its textual basis in the two most important international human rights treaties of 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, which – as human rights instruments – do not refer to any categorical distinction between minorities and indigenous peoples, but lay down in identical language in Article 1 of both treaties in more *general terms* the right of self-determination of 'peoples':

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples, may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation,

> based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

We can see from the language of this text that, concerning 'needs and capabilities', there shall be no distinction made between the political and the economic dimension of the right of self-determination. Thus, in particular, when the limitation in the last sentence of paragraph 2 is taken seriously that 'in no case may a people be deprived of its own means of subsistence', we can conclude in line with scholarly literature that the political and economic dimensions are inextricably intertwined insofar as: 'full economic self-determination depends on political self-determination' (Saul *et al.* 2016: 14). However, this does not give us a clear guideline for how to translate economic into political self-determination and (re-)turns the problem to the essential question of how to legally institutionalise the concept of political self-determination as analysed from the ideological perspective in Chapter 4, section 4.3 as the autonomy-sovereignty conundrum of liberal-democratic states. Hence, also with regard to indigenous peoples, the *interpretative* question is raised: do they have a right guaranteed under international law to political autonomy within nation states (i.e. to internal self-determination) or even a right to external self-determination including secession?

This interpretative question is again inextricably intertwined with both the dichotomisation of individual versus collective rights and thus the procedural question of legal standing before supervisory bodies or courts as well as the distinction between peoples and minorities, following from Articles 1 and 27 ICCPR. The Optional Protocol to Article 27 ICPPR allows – from the perspective of legal procedure – only for individual complaints to be submitted to the Human Rights Committee (UNHRCom), the supervisory body of the ICCPR. Since the text of Article 27 reads, '[i]n 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', an individual complaint could be submitted by a member of a group such as an indigenous people thereby representing (also) the collective interests of the group/people (see in particular Jones 2018: 31–6). However, in 1985, the UNHRCom 'paradoxically' (Joseph and Castan 2014: para. 7.24) rejected a claim of violation of Article 1 ICCPR as inadmissible, thereby rendering Article 1 and the right of self-determination *in practice non-justiciable*:

> the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination, enshrined in article 1 of the Convention. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 … deals with rights conferred upon people as such …
>
> (UNHRCom, *Kitok v. Sweden*, 1985: para. 6.3)

This kind of reasoning – which we characterised as a language game concerning the concepts and terms of peoples or minorities in the introduction of Chapter 3 – was, however, modified in the following development, putting the strict categorical dichotomies between minorities and indigenous peoples as well as individual and group rights into question.

Even in 1994, the UNHRCom had elaborated in its General Comment No. 23, on the *factual linkage* between indigenous peoples and minorities in a very cautious way:

> The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the right of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of *indigenous communities constituting a minority*.
>
> (UNHRCom 1994: para. 3.2, emphasis added)

Finally, by a more *contextual* interpretation, the Commentary of the Working Group on Minorities (of the UN Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights) to the legally non-binding UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDRM) ends up in the interpretative solution for legal standing proposed above:

> That protocol does *not generally* make it *possible to claim the group-oriented rights* sought by *indigenous peoples*, but some modification of that point follows from general comment Nr. 23 of the Human Rights Committee (fiftieth session 1994). The Committee noted that, especially in the case of indigenous peoples, the preservation of their use of land resources can become an essential element in the right of persons belonging to such minorities to exercise their cultural rights (para. 7). Since the indigenous peoples very often have *collective rights* to land, individual members of the group may be in a position to *make claims not only for themselves*, *but for the indigenous group as a whole*.
>
> (UN Commission on Human Rights 2005: para. 18, emphasis added)

In conclusion, there is not only a strong connection between Articles 1 and 27 ICCPR (see Chapter 3 Box 3.2) concerning minority rights, but this interpretation makes the *categorical distinction* between the categories of *minority* and *indigenous people* as well as between individual and collective rights at least *questionable* (see in general also Pentassuglia 2018b: 142–7).

Could these interpretative reconceptualisations now give indigenous peoples, represented by one or more of its members, a right to cultural or political autonomy in the meaning of internal self-determination? Or could indigenous peoples as collective entities, represented by their elected leaders, even claim external self-determination, including secession?

In line with the general norm contestation of whether there is right to secession guaranteed under international law (see Chapter 4, section 4.3), both supervisory bodies of the two UN Covenants boldly *reject* the notion of a right of indigenous peoples to *external self-determination including secession* in line with the legislative history of the International Labour Organisation (ILO) Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which is a legally non-binding resolution of the General Assembly of the UN (for the question whether all or some provisions of UNDRIP might amount to legally binding international customary law see Barnabas 2017).

Moreover, both supervisory bodies also *deny* a right to *internal self-determination* in the form of *territorial* or *cultural autonomy* through legally institutionalised *forms of self-government* (see Chapter 9, section 9.4) to be established by state law if indigenous peoples or minorities claim their establishment. This is even more astonishing in light of the extensive reference to territories, land rights, or even cultural and territorial autonomies in the form of best practices established at national level as the following quotations from both legally binding and non-binding documents demonstrate.

Like ILO Convention No. 169, UNDRIP requires the *recognition of collective rights to land and territories* of indigenous peoples (Articles 25–32; Duffy 2008). Box 6.7 explains the different aspects of land rights as stipulated in the ILO Convention No. 169 and in the UNDRIP.

Box 6.7 The right to land in the international standards of indigenous peoples' rights

A more *comprehensive concept of land rights* has been introduced both in the ILO Convention No. 169, *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, and in the UNDRIP. In the former, the term land 'shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use' (Art. 13). Other six articles which are devoted to land rights comprise several aspects. These are:

Ownership

Rights to land ownership, possession and/or traditionally occupied, including the obligation of the state to safeguard the lands traditionally accessed by indigenous peoples, especially nomadic and shifting peasants (Art. 14.1).

Demarcation

Duty of the state to demarcate lands traditionally occupied ('steps necessary to identify …') (Art. 14.2).

Natural resources

States' obligations to safeguard indigenous peoples' rights to natural resources, and the right to participate in the use, management and conservation of such resources (Art. 15.1), excluded the sub-surface resources if retained by the state (Art. 15.2).

Relocation and compensation

(although, general) Prohibition of relocation (Art. 16.1), free and informed consent prior to removal (Art. 16.2), the right to return (Art. 16.3), and the right to compensation (Art. 16.4 & 16.5).

The UNDRIP takes some steps further, and recognises other key rights, namely, not only the right to land territories and resources owned, occupied, used or acquired (Art. 26), but also the right to conservation and the protection of the environment; the states' obligation to take effective measures to avoid storage of hazardous material without indigenous peoples' free, prior and informed consent (Art. 9).

Hence, the contention of Joseph and Castan (2014: para. 7.16, 7.18; see, in contrast, Pentassuglia 2018b: 136), who argue for an *explicit entitlement* to internal self-determination under international law is thus somewhat misleading since the authoritative legal source quoted by them refers only to land ownership and the various public and private uses of land to protect the cultural identity of Sami in Sweden. The Working Group Commentary to the UNDRM (2005) is quite explicit that the establishment of forms of autonomy is *not* a state duty:

> While the Declaration does not provide group rights to self-determination, the duties of the State to protect the identity of minorities and to ensure their effective participation *might in some cases* be best implemented by arrangements of autonomy in regard to religious, linguistic or broader cultural matters. Good practices of that kind can be found in many States. The autonomy can be territorial, cultural and local, and can be more or less extensive. Such autonomy *can be* organised and managed by associations set up by persons belonging to minorities in accordance with article 2.4. But the Declaration *does not make it a requirement* for States to establish such autonomy. In some cases, positive measures of integration (but not assimilation) can best serve the protection of minorities.
>
> (ibid: para. 20, emphasis added)

Nor does the General Comment No. 21 (2009) of the UN Committee on Economic, Social and Cultural Rights (CESCR), despite its more group-orientated language, establish a right to internal self-determination in the form of self-governing autonomies in its reference to indigenous peoples:

> States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples. The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to land, territories and resources which they have traditionally owned, occupied or otherwise acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize

> and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.
>
> (CESCR 2009: para. 36)

But is it nevertheless 'possible to realize aspects of economic self-determination even in the absence of political autonomy' as this is argued in scholarly literature (Saul *et al.* 2016: 14)? The following sub-section on implementation of legal standards through monitoring reports and case law of supervisory bodies and courts helps us to assess this claim.

6.3.2 Implementation through monitoring reports and case law

Owing to the 'dark side' of European history (Mann 2005) there remains only a handful of indigenous peoples in Europe today, such as the Sami in Scandinavia, the Inuit in Greenland and various indigenous communities in the Northern and Siberian regions of the Russian Federation. They live under extremely harsh conditions – and not only in terms of climate. Land dispossession, forcible relocation and assimilation programmes over centuries have also led to the destruction of indigenous peoples´ social and political structures in Europe (see, in general, Duffy 2008).

As can be seen from a report of the UN Human Rights Council Special Rapporteur on the 'situation of indigenous peoples in the Russian Federation' (UNHRC 2010), the official listing of the legally recognised 'small-numbered indigenous peoples of Russia' identifies 46 such groups residing within 28 constituent political-administrative units of the Russian Federation, mainly in the North, Siberia and the Far East of Russia, in total comprising 244,000 people. The territories which they live in span almost one million square miles and cover over 60 per cent of Russia. Hence, huge distances separate indigenous peoples from one another, but also from metropolitan centres – this lack of communication and transportation infrastructure isolates the populations. However, the North, Siberia and the Far East are also the areas where most of Russia's natural resources (oil, natural gas) are located and are thus close to or on the land that is inhabited by indigenous peoples and that they use for hunting, fishing and reindeer herding. What that means in practice for indigenous communities in Russia, one of the world's top exporters of oil and natural gas, used to stabilise the political regime in power in Russia (see Chapter 1), can be seen from an example given by the UNHRC Special Rapporteur in his report (UNHRC 2010). In the Khanti-Mansiyski Autonomous Region more than 60 oil companies operate. This autonomous region has adopted a law to regulate and standardise oil company activities in relation to indigenous people's rights in the region, which is an example of best practice yet an exception to the rule. However, as the report of the UN Special Rapporteur makes clear, on the basis of a 'model agreement' offered by the regional administration, families of indigenous peoples receive compensation in the best case from oil companies based on these 'contracts', which have to be signed by the heads of families without any option to discuss and to negotiate the

terms with the oil companies (ibid: para. 43–4; for environmental devastation, see also para. 47; Tomaselli and Koch 2014).

Similar problems are faced by the Sami people in the Scandinavian countries and the Russian Federation, as follows from the UNHRC Special Rapporteur's *Report on the Human Rights Situation of the Sami People in the Sápmi Region* (UNHRC 2016: para. 4–10).

The Sami population in Norway, Finland and Sweden is a numerical minority within those states and is estimated between 70,000 and 100,000. The Sami people's culture and traditions have evolved over the centuries, relying on hunting, fishing, gathering and trapping, as well as reindeer herding over a territory which traverses the northern parts of Norway, Sweden, Finland and the Russian Kola peninsula. However, due to state formation and nation-building processes over the past centuries (see Chapter 3), the Sami people are divided by the newly established state borders, cutting through linguistic and cultural communities and also constraining reindeer herding across borders (Figure 6.2). As we see from the report on the Russian Federation, natural resource extraction also sparks conflicts of interest between state authorities, mining companies and the Sami communities in the Scandinavian countries since natural resource investments and extraction, including the construction of roads, hydroelectric dams, overhead power lines, oil and gas installations, forestry projects and

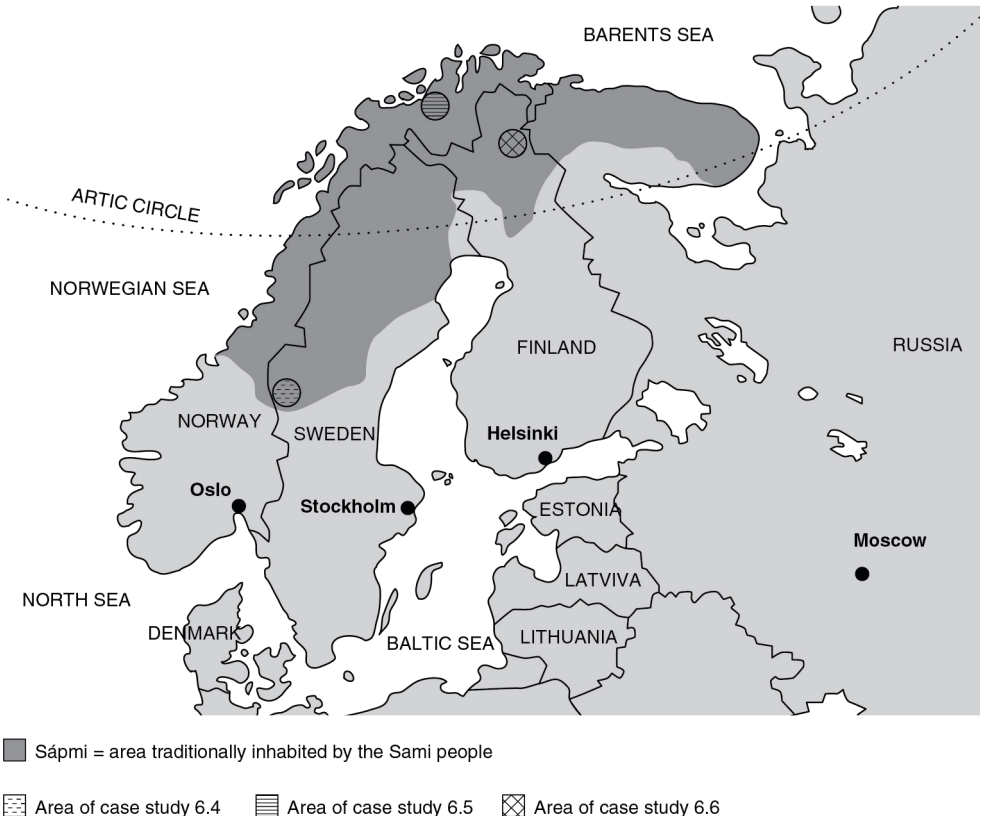

Figure 6.2 Sápmi – the area traditionally inhabited by the Sami people

tourism activities are a double-edged sword as a source of employment and development opportunities, in particular at the local level in these peripheral areas.

The following case studies of the Sami peoples struggling for their rights to uphold their traditional lifestyle as well as their own culture illustrate the difficulties for indigenous peoples in defending their rights and highlight the huge gap between law in the books – expressed in the international treaties and declarations – and law in practice in terms of implementation on the ground. So far, the ECtHR has not decided a claim of members of indigenous peoples on the merits of the case, but has always found enough arguments to declare the applications inadmissible. Nevertheless, some arguments recognising, to some extent, the special character of the indigenous peoples' rights can be found in its jurisprudence over time. Thus, Case study 6.4 presents the first case brought to the ECtHR by Sami people from Norway (European Commission of Human Rights, EComHR, *G. and E. v. Norway*, 1983) opening quasi the scene for the line of the jurisprudence to follow. Case study 6.5 is dedicated to a more recent case of the ECtHR concerning Sami land rights in Sweden (ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 2010). In comparison with European jurisprudence, Case study 6.6 presents a decision of the UNHRCom on the issue of Sami's right to their own culture reflected in the problem of forced reindeer slaughtering (UNHRCom, *Paadar et al. v. Finland*, 2014).

Case study 6.4 The Alta case – a hydroelectric power station and its possible interference with the Sami's private life

In 1979, the Norwegian Government decided to start works in the Alta valley for the purpose of erecting a hydroelectric power station which would eventually put parts of the valley under water reducing thereby traditional Sami territories. A group of Sami, at the time still pejoratively called Lapps, stood against this project in front of the Norwegian Parliament, which was deemed unlawful by Norwegian courts. Thus, two members of the Sami group brought an application before the then EComHR. They claimed not only the violation of their right to assembly under Article 11 ECHR, but substantially alleged that the construction of the Alta hydroelectric power station violated their property rights under Article 1, Protocol 1 ECHR. The reason for this was that the construction of the power plant would result in the loss of traditional lands used for herding and fishing, essential activities to the Sami's way of life.

The then EComHR denied the complaint regarding Article 1, Protocol 1 ECHR, as 'manifestly ill-founded', arguing that the applicants had in no way 'substantiated' their claim of legitimate possession or title as guaranteed by Article 1, Protocol 1 ECHR, therefore lacking sufficient evidence for the claim. However, somehow in compensation for the rejection of the claim, the Commission stated that a 'minority's lifestyle *may, in principle*, fall under the protection of private life, family life or the home' and therefore may constitute an issue falling under the protection of Article 8 ECHR (EComHR, *G. and E. v. Norway*, 1983, emphasis added). Moreover, the Commission – still in line with a 'state-centric position of denial and non-recognition' (Duffy 2008: 505) in this

period – argued the 'Lapp community' would lose only a relatively small area of herding pasture when compared with the vast areas of northern Norway used for reindeer herding and fishing. It thus concluded that a possible interference 'would be justified as being necessary, particularly for the economic well-being of the country'. Ultimately, the Commission declared the application in all points ill-founded and therefore inadmissible. Nevertheless, as a later commentator argues, the Commission's ultimate decision against the Sami revealed 'an openness to the idea that the *right to privacy* could *extend* to the protection of the *ethnic identity* of indigenous peoples' (Kovács 2016: 786, emphasis added).

In a later case concerning an application of a non-Sami Swedish citizen against a Sami hunting servitude under Article 1, First Protocol (EComHR, *Halvar From v. Sweden,* 1998), the EComHR not only decided in favour of the Sami (by its declaration of inadmissibility of the application), but also spoke openly about the necessity of protecting the traditional Sami lifestyle. The Commission found it to be 'in the general interest that the special culture and way of life of the Sami be respected, and it is clear that reindeer herding and hunting are important parts of that culture and way of life' (EComHR, *Halvar From v. Sweden,* 1998: para. 3). This acknowledgement can indeed be seen as a result of the growing awareness of the different collective interests and needs of indigenous peoples. However, the ECtHR is still reluctant to recognise indigenous peoples' rights because of the conception of property as an individual right, as the next case study demonstrates.

Case study 6.5 The Sami's struggle for reindeer grazing rights

In Sweden, reindeer herding is regulated by the Reindeer Husbandry Act (1971), which gives the Sami the right to use land and water for their own subsistence and that of their reindeer. The right may only be exercised by the members of a Sami village. In winter, grazing rights are also allowed on private lands, provided that the Sami have used them *since time immemorial* (Gismondi 2017: 43).

In 1990, more than 500 private landowners instituted proceedings against five Sami villages alleging that the Sami had no right to allow their reindeer to graze in winter on their land without a valid contract. The Sami villages, however, claimed to have a winter grazing right based on prescription from time immemorial. According to the national law, the burden of proof was placed on the Sami, who had to demonstrate that their grazing rights had not been contested in the respective areas during at least 90 years of usage. Since the Sami could not present enough evidence in support of their claim, the domestic courts finally decided in favour of the landowners. After almost 14 years of domestic legal dispute, four Swedish Sami villages submitted an application to the ECtHR claiming that the denial of winter grazing on private property amounted to a violation of their right to peaceful enjoyment of possessions under Article 1, Protocol

No. 1 of the ECHR, as well as that the excessive costs and the unreasonable length of proceedings contravened Article 6 (1) of the ECHR.

The ECtHR, however, declared the basic *substantial* claim of the Sami concerning their grazing rights with regard to Article 1, Protocol No. 1 ECHR inadmissible (ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 2009). In fact, the Court considered the claim of grazing rights not to be a 'possession' in the sense of Article 1, Protocol No. 1 of the Convention. In its reasoning the Court stated that according to Swedish law (the Husbandry Act) it is in the power of the (Swedish) courts to determine on the basis of evidence whether the Sami villages have a right to winter grazing on the specific property so that 'the right claimed by the applicants did not vest in them without the intervention of the courts'. This means, in the interpretation of the Court:

> possessions can be either *existing possessions* or *assets including claims*, in respect of which the applicant can argue that he or she has at least a *legitimate expectation* of obtaining *effective enjoyment* of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a possession within the meaning of Article 1 of Protocol No. 1.
>
> (ibid: para. 48, emphasis added)

Since the requirement to establish a 'legitimate expectation' of effective enjoyment, depending on rulings of domestic authorities was not fulfilled in the case at hand, the Court concluded that their 'property interest was accordingly in the nature of a claim and cannot therefore be characterised as an "existing possession" within the meaning of the Court's case law' (ibid: para. 51).

In its second judgment of 30 March 2010 (ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 2010) the ECtHR found that there was a violation of Article 6 (1) of the Convention with regard to the length of the proceedings, but no violation with regard to effective access to court. In its reasoning the Court explained that the Sami villages as legal entities were granted loans from the Sami fund, were represented by legal counsel and were therefore able to present their case effectively before the national courts.

This result was indeed disappointing for the Sami people because the issue that was really at stake (i.e. their subsistence rights as an indigenous people based on traditional reindeer herding) was not recognised by the Court. There was only one partly dissenting opinion of Judge Ziemele who referred explicitly to 'the specific context of the situation and rights of indigenous peoples' emphasising that the *exclusive burden of proof* for land ownership with the Sami would represent a de facto discrimination of this group (see Chapter 8, section 8.2.) and thus 'should have been seen as a case of ineffective access to court, especially as one party appears to have been obviously disadvantaged' (violation of Article 6 (1) ECHR) (ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 2010, Partly Dissenting Opinion of Judge Ziemele: para. 5, 8).

In conclusion, it can be said that the judgments of the ECtHR are based on a very *formalistic* and *liberal-individualistic understanding* of the right to free possession as an

individual right which is in contrast to the international legal standards protecting indigenous peoples (cf. above the ILO Convention No. 169; UNDRIP). Indeed, the Court's narrow interpretation of possessions fails to consider the importance of control and land use in securing the economic subsistence, but even more so the intricate link with the existing asymmetric power relations of indigenous peoples as can be seen from the partly dissenting opinion. Hence, only the recognition of an evolving contextual interpretation of Article 1, Protocol No. 1 ECHR, taking into account international legal instruments (ILO Convention No. 169; UNDRIP), as well as the decisions of other human rights bodies (e.g. the Inter-American Court of Human Rights; Kovács 2016) in its jurisprudence could contribute to an effective and more internationally coherent protection of the (land) rights of indigenous peoples (Gismondi 2017: 1; see also Otis and Laurent 2013).

Case study 6.6 Forced slaughtering of Sami reindeer – rights of minorities within minorities?

The wrong ideologically determined dichotomy of individual versus collective rights haunts even the jurisprudence of the UN supervisory bodies to this day, as we see from the discussion of legal standard setting above and the denial of the UNHRCom to adjudicate on Article 1 ICCPR as a right to collective self-determination. As a consequence, members of indigenous peoples have based their claims before the UNHRCom in most cases on Article 27 ICCPR. Nevertheless, the success rate is rather low, which also applies to the following case.

As we have seen above, Article 27 ICCPR guarantees persons belonging to minorities the right to enjoy their own culture. It was also under this aspect that the UNHRCom had to express its view in a case submitted by two Sami families in 2011. The authors of the claim before the UNHRCom were born Sami and were full-time reindeer herders, belonging to the Ivalo Reindeer Herding Cooperative and retaining traditional methods of reindeer herding. This 'natural' herding method relied on free grazing on natural pastures and therefore included higher losses of reindeer calves because of their exposure to predators, such as bears. The majority of the Cooperative, however, was composed of reindeer herders using modern methods, leading to fewer losses of calves during the year. Nevertheless, according to Finnish law (the Reindeer Husbandry Act), the maximum permitted number of reindeer for the Cooperative and for each shareholder may not be exceeded; otherwise the Cooperative has to decide on reducing the number of reindeer and is even entitled to enforce immediate slaughters, unless the Administrative Court decides otherwise as a result of a claim.

In October 2007, the Cooperative decided to carry out the slaughtering plan adopted in May 2007, meaning both Sami families would have lost almost all of their animals and, as a consequence, their ability to pursue reindeer husbandry for, according to the law, herders cannot buy new reindeer once they have lost all their animals. After exhausting domestic judicial remedies, the authors submitted their claim to the UNHRCom against

the decision on the forced slaughtering of their reindeer. The authors claimed essentially to be victims of violations of Article 26 ICCPR (non-discrimination) and Article 27 ICCPR, because the decision on the forced slaughtering of their reindeer taken in 2007 by the Ivalo Reindeer Herding Cooperative had discriminatory effects against them and the Cooperative did not take into consideration the authors' traditional Sami methods of herding, including the loss of a greater number of calves.

The UNHRCom stated that the authors were members of a minority in the sense of Article 27 ICCPR and, as such, have the right to enjoy their own culture. According to the UNHRCom it was also undisputed that reindeer husbandry was 'an essential element of their culture'. Furthermore, the UNHRCom reaffirmed its previous jurisprudence 'that economic activities may come within the ambit of article 27 if they are an essential element of the culture of an ethnic community'. Therefore, 'members of minorities shall not be denied the right to enjoy their own culture and … measures whose impact amounts to a denial of that right will not be compatible with the obligations under article 27' (UNHRCom *Paadar et al. v. Finland* 2014: para. 7.5). Nevertheless, due to a lack of evidence concerning the correct figures on reindeer numbers in the specific years in question, the UNHRCom was finally of the view that the facts before it did not reveal a breach of Article 26 or 27 ICCPR. However, it recalled in the end of its reasoning that:

> the State party must bear in mind, when taking steps affecting rights under article 27, that although different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of the Sami people to enjoy their own culture.
>
> (ibid: para. 7.7)

Four members of the UNHRCom published a *dissenting opinion* arguing essentially that the slaughter of all the authors' reindeer constituted a particularly grave interference with a substantial impact on the right of the claimants to enjoy their culture, thereby *highlighting the problem of the protection of a minority within a minority.*

The dissenting opinion argues that the State party had not shown that slaughtering of all of the reindeer was necessary for the continued viability and welfare of the minority as a whole or that the objective of reducing the number of reindeer could not have been reached otherwise. In fact, the dissenting opinion stated that

> in cases of an *apparent conflict* between *legislation*, which seems to *protect the rights of the minority as a whole*, and its *application to a single member* of that minority, … restrictions upon the right of individual members of a minority must be shown not only to have a reasonable and objective justification in the particular circumstances of the case but also to be necessary for the continued viability and welfare of the minority as a whole.
>
> (ibid appendix; emphasis added)

6.3.3 Remaining problems and developments

6.3.3.1 The necessity for the recognition of the interdependence of land rights and cultural rights as collective rights

The remaining problems and thus negative developments for the existence of indigenous peoples can be summarised as a complex set of interrelated trends. These trends are composed of ongoing threats to their effective collective control of territory traditionally inhabited by them and the collective use of natural resources to uphold their different way of life in terms of sociocultural practices and thus different social identities between the Scylla of assimilation and the Charybdis of institutional segregation, economic deprivation and cultural marginalisation. These complexities come clearly to the fore in the gap between international and national legal standard setting as law in the books and the empirical realities on the ground, not the least because of ineffective judicial implementation as law in practice.

As we have seen in the case studies in this section, basic needs as a material precondition for the subsistence of a different way of life of groups (reindeer herding, fishing, hunting etc.) are intimately intertwined with the *rights to land* in terms of their *collective control and use* (for different legal regimes of *collective property rights* in Scandinavian countries see, in particular, Suksi 2008). However, in actual fact, territories inhabited by indigenous peoples are facing more threats than ever.

Climate change and global warming, for instance, have adverse consequences not only for arctic indigenous peoples but also for the Sami, as grazing areas are currently shifting southwards. As we have seen, irrespective of the political regime, competing economic interests of states, private companies and indigenous populations are aggravating these problems, as has also been underlined by the Advisory Committee under the Framework Convention for the Protection of National Minorities (FCNM) in its Opinions on Russia, insofar as competing interests and the oil, gas and other forms of industrial exploitation generally prevail over indigenous claims (ACFC, First Opinion on the Russian Federation, 2002: para. 49). Moreover, both public and private actors also cause large-scale environmental damage affecting indigenous activities, culture and way of life. Thus the interlinked phenomena of 'land grabbing' and hence of 'resources grabbing' pose a serious threat for the existence and subsistence rights of indigenous peoples (Gilbert and Bernaz 2016; Claridge *et al.* 2015), who have been largely dispossessed of their lands in the past decades and centuries on the basis of the doctrines of *terra nullius* or *uti possidetis* (Box 6.8).

Box 6.8 Indigenous peoples' land dispossession

The doctrines of *terra nullius* and *uti possidetis*

Two international law doctrines have, inter alia, played a key role in legitimising the dispossession of indigenous peoples' lands. The *terra nullius* principle (in Latin, literally, empty territory/land) is originally derived from Roman law and referred to a

territory not, or no longer, subject to any sovereign holder of power in the meaning of European political doctrines (see Chapter 3, section 3.1). This doctrine was applied during the period of colonisation, arguing that indigenous peoples did not have any control over the territory, as territorial rights were considered valid solely within a state-run order (Gilbert 2006: 26). The *terra nullius* doctrine has been rejected only lately both in the national and the international spheres. In 1975, the ICJ ruled against this doctrine (ICJ, *Western Sahara* 1975: paras. 82–3), affirming its incorrect and invalid application, since the territory was inhabited by indigenous tribes (Xanthaki 2007: 243–4).

The *uti possidetis* doctrine was applied after 1810 in the decolonisation of Latin America promoted by the Creoles and then during the decolonisation period following the Second World War, particularly in Africa (Gilbert 2006: 36–7): This notion is also derived from Roman law, originally referring to the ancient litigations on ownership of a real property (*uti possidetis*, *ita possideatis*, as you possess, so you may possess). This principle has been adapted in international law to secure boundaries at the moment of the colonies' independence (ICJ, *Frontier Dispute (Burkina Faso v. Mali)*, 1986: para. 23). Indigenous peoples' claims over their homelands were denied as per the *uti possidetis* principle, so that the boundaries having been drawn by the colonial powers decades or even centuries before had to be respected.

The *main policies* adopted so far in spite of ongoing land dispossessions and thus restrictions on the material subsistence to uphold different ways of life, as demonstrated in the case studies, have been *land restitutions*, *co-administrations* and possibilities for *political participation*, for instance through Sami parliaments in the Scandinavian countries. The first elective assembly was created in Finland in 1975 and shortly thereafter in both Norway and Sweden. National legislation was also passed at the end of the twentieth century that permitted the Sami language to be used as official language of governmental administration in a select number of municipalities. By 2002, a cross-border Sami Parliamentary Assembly had been established (Kivisto 2015: 31). According to the amended Constitution of Finland of 1995, the aim of the amendments was to guarantee the maintenance of the distinctive Sami culture, which was interpreted to include Sami livelihoods such as fishing, hunting and reindeer herding. The Sami parliament was foreseen as an institution which would implement and foster the cultural autonomy of Sami people according to Article 1 of the Act on the Sami parliament stipulating that 'the Sami, as an indigenous people, have a linguistic and cultural autonomy in the Sami homeland'. As the president of the Finnish Sami Parliament, however, stated in 2010:

> The Sami Parliament has a very limited genuine decision making power; it is restricted solely to the distribution of certain granted appropriations. The main means of the Sami Parliament's pursuit of policies are negotiations, pronouncements and initiatives. The present right to self-determination is limited to the presentation of shared opinions

> and common representation through the Sami Parliament. The right to self-government as a people is not fulfilled, because self-government is restricted to language and culture only. It does not apply to protection of Sami livelihoods, though these, as part of Sami culture, enjoy legal protection granted by the Constitution of Finland.
>
> (cit. in Toivanen 2015: 119, 128)

There is also an *administratively devolved region* in the extreme northeastern part of Norway, the so-called Finnmark Estate. Its territory comprises 46,000 square kilometres, which is approximately the size of Denmark, traditionally inhabited by the Sami and governed in tandem by the Finnmark County Municipality and the Sami Parliament of Norway. Nevertheless, when observing what is happening on the ground, serious legal gaps emerge: the report of the UN Special Rapporteur quoted above gives evidence that the dual role of the Finnmark Estate as both a resource management agency and commercial entity raises serious concerns in particular with regard to the fact that Sami communities' severed connection to their lands and resources is a result of earlier government policies and assimilation efforts towards the Sami (UNHRC 2016: para. 23–6). Thus, in addition to the political mobilisation of indigenous peoples, a call for a new 'triangular relationship' between states, indigenous peoples and private corporations is required to enhance dialogue and reduce 'resources grabbing' despite the guarantees of consultation and free, prior and informed consent (Gilbert and Bernaz 2016; see also Chapter 9, section 9.3 on consultation mechanisms in general).

If seen from a liberal-egalitarian or liberal-nationalist perspective (see Chapter 4), members of indigenous peoples do have access to all the job opportunities offered in an industrialised, market-orientated society and welfare states such as the Scandinavian countries. Thus, Sami people – when compared with other indigenous peoples on other continents of the globe – are far less economically deprived or culturally marginalised. Nevertheless, in light of the gap between the law in the books and the law in practice, which has not been overcome even in the past two decades in the Scandinavian countries, because of increasing numbers of young Sami migrating to urban centres, in particular to Oslo, Stockholm and Helsinki, it remains an open question whether these governments have actively tried to avoid the dangers of assimilation so that Sami culture can survive into the future (Kivisto 2015: 32; Moon 2017: 378).

With regard to our critical question above in the sub-section on legal standard setting whether the categorical distinction between minorities and indigenous peoples is any longer justified, a direct comparison of the situation of *Sami and Roma in Finland* brings to the fore that they are 'two unlike minority populations' with *different claim*s (Toivanen 2015: 118–22). Nevertheless, they face the *same situation* how to navigate between the Scylla of assimilation and the Charybdis of segregation (see Chapter 3) with regard to the 'dilemma of difference' (Minow 1990), discussed in Chapter 4, section 4.3.3, from the perspective of political philosophy and a critical analysis of ideological assumptions for minority claims and rights.

While the Sami parliament made clear in its statements and initiatives that it strives for effective recognition of Sami as a distinct people and claims to be treated differently due to its basic needs, Roma as well as Sami are recognised as a language minority in the Finnish

Constitution to be protected under the minority rights clauses. Roma, also represented in governmental structures through an advisory board and affiliated with an own centre for Roma education affairs to the National Board of Education, underline the need to reach standards of living similar to the majority population (i.e. they argue for better protection against discrimination and for equal opportunities). As Toivanen, based on an analysis of the actual situation on the ground in comparison to the legal standards in national constitutional law, only seemingly paradoxically argues:

> It might be easy to conclude that these two national minorities do not share anything in common, but in fact they do: Both are developing their own strategies to cope with Finnish majority rule and have to deal with the fact that their 'own interests' cannot enter the Finnish public sphere without a certain kind of cultural translation which is, in its deepest meaning, a political translation of their own group interests to a language which is understood by the majority public. The Finnish majority has control over the framework and premises for Sami and Roma identity claims and sets the limits regarding what they can ask for. The discrepancy is between what the Finnish government says it is doing in the field of minority rights with the reality of how these groups are treated.
>
> (Toivanen 2015: 121)

But the situation for Roma and Sinti can be much worse in European countries, as we see in the next sub-section.

6.3.3.2 Mutual reinforcement of economic deprivation and racial discrimination: ghettoisation, forced mass expulsion and structural discrimination of Roma and Sinti

In striking contrast to all liberal-individualistic, liberal-egalitarian and liberal-nationalist ideological assumptions and their claims on the functioning of national states and societies (see Chapter 4, section 4.3), sociological literature provides sufficient empirical material on two interrelated phenomena which are labelled *institutional racism* and *structural discrimination*.

Institutional racism based on generalised prejudices and thus the stigmatisation of groups and their members is a consequence of the *ethnic stratification* of societies (see Chapter 4, section 4.2 and Chapter 5, section 5.2), based on negative value-judgments regarding the perception of those groups and their members as superior or inferior. The perceptive stigmatisation then leads to feelings of mistrust or even hatred with the consequence not to recognise them as equal members of society. Non-recognition might then be translated into sociopolitical claims that they have to give up their diverse identities and to assimilate into the dominant culture which can even end up in violence against members of groups simply because of their being different. Hence, supremacy and, correspondingly, subordination are produced and reproduced by norms and institutional mechanisms, which not simply discriminate (in the sociological sense) against individual persons as such, but fix their sociocultural status as members of classes in those ascribed relations of supremacy or subordination and

thereby *structurally advantage* or *disadvantage* (i.e. discriminate against them). Institutional racism and structural discrimination are thus a consequence of the *ethnic stratification* of society, disregarding the talents or merits of individuals. It is therefore no wonder that the processes of socioeconomic stratification and ethnic stratification of societies tend to mutually enforce each other, possibly leading to the complete marginalisation of certain groups as we have elaborated in detail in Chapter 5.

This is true for Roma and Sinti in particular. No other minority in Europe is more affected by this *structural interdependence of racial discrimination* and *poverty.* The systemic and continued discrimination in educational attainment which leads to their exclusion from the formal labour market so that they have to accept the lowest paid jobs at the bottom of the hierarchy of labour force as so-called unskilled workers is what Amartya Sen calls the 'poverty as capability deprivation' (Sen 1999: 87). According to Sen, poverty is surely caused by low income, but the latter may also cause a deprivation of a person's capability (i.e. lead to an 'impoverished life'; ibid.). Other factors may further affect the relationship between income and incapability, such as age, gender and social roles, location (especially if considering areas of violent conflict or cases of extreme climate events, etc.) and other variables on which the person has no or little control. Moreover, there may be a fatal combination of:

- deprivation of income; and
- difficulties in converting (this deprived) income into 'functionings' (ibid: 88).

In other words, if a person has a low income and moreover is ill or old, a low income would affect him or her more severely (ibid.). Finally, 'relative deprivation' in terms of income (i.e., an income that is not low in absolute terms) may potentially turn into 'absolute deprivation' in terms of capabilities. This is the case, for instance, of those rich countries in which people with an average income might end up in poverty because of their need of more commodities to reach the 'same social functioning' of the (wider) rich society (ibid: 89). These observations are conceptualised as the capability approach, which is often used interchangeably with the concept of the human development approach. The latter is historically associated with the Human Development Office and its homonymous annual reports under the UN Development Programme (Nussbaum 2011: 17). Both Sen and Nussbaum, however, emphasise that 'capability' must be conceived of as plural (i.e., 'capabilities'). In particular, Nussbaum stresses quality of life as 'plural and qualitatively distinct: health, bodily integrity, education, and other aspects of individual lives'. Capabilities essentially refer to 'what each person is able to do and to be' (ibid: 18). Indeed, as Sen clearly states, poverty cannot be understood solely as income deprivation, but also in terms of 'lives peoples can actually lead and the freedoms they actually have' (Sen 1999: 92). This concept is fundamental for all sectors of the society. However, it becomes even more important in relation to groups that are in a non-dominant position (i.e. minorities and indigenous peoples).

Without adequate income, Roma and Sinti in Europe are, finally, not in a position to improve their housing situation and educational opportunities of their children, which closes the vicious circle of the intergenerational poverty trap. Insofar *racial discrimination* and *socio-economic inequality* have a *systemic relationship*: each reflects and perpetuates the

other. Discrimination based on ethnicity is thus 'both the cause and effect of socio-economic exclusion' (Goodwin 2009: 137–40). This is obviously intertwined with the violation of the right to equality (see Chapter 8), but we must deal in this chapter with the right to existence with much more serious violations of human and minority rights that follow from the almost complete economic deprivation of classes of people in combination with the racial discrimination of their members when leading to residential ghettoisation or forced evictions of Roma and Sinti in richer countries of Western and Central Europe and their forced mass expulsions from these countries, even when they are citizens of member states of the European Union.

International law standards do not restrict the protection of minorities to their legal status as *citizens* of a state as can be seen from General Comment No. 23 to the ICCPR:

> The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share a common culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. … Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes. … Just as they need not be nationals or citizens, they need not be permanent residents.
>
> (UNHRCom 1994: para. 5.1., 5.2.)

The ECHR in Article 4 of Protocol No. 4 prohibits the *collective expulsion* of aliens without exception, but is leaving it within the power of the state to expel aliens *individually*. Therefore, as long as an expelling state takes a separate decision in each individual case and the measure of expulsion is taken on the basis of a reasonable and objective examination of the particular cases of each individual, the ECtHR sees no issue of collective expulsion (see ECtHR, *Andric v. Sweden*, 1999: para. 1; ECtHR, *Hirsi Jamaa and Others v. Italy*, 2012: para. 183–6). Even the fact that each of a greater number of expulsion orders is framed in identical terms is not seen in itself as sufficient evidence that there has been a prohibited collective expulsion as long as the official processing of the matter shows a certain individual variation within the group (ECtHR, *M.A. v. Cyprus*, 2013: para. 252–5).

In the past two decades, the ECtHR has dealt with a number of cases concerning the collective expulsion of Roma. The leading case is *Čonka v. Belgium* (2002), in which the applicants were Slovakian nationals of Romani origin expelled from Belgium, where they had applied for asylum. This was refused by the national authorities. Under the specific circumstances of the case and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court noted that at no stage did the national procedure afford sufficient guarantees demonstrating that it complies with the requirement for an expulsion to be legitimate, for example, by proving that the personal circumstances of each of those concerned had been genuinely and individually taken into account.

Unfortunately, collective expulsions of Roma still happen in Europe, as the example of France in 2010 shows (Box 6.9).

Box 6.9 Mass expulsion of Roma from France

In late July 2010, French President Nicolas Sarkozy called an emergency ministerial meeting, at which it was decided that some 300 illegal camps and squats would be dismantled within three months and the undocumented foreign inhabitants expelled (Phillips 2010). A statement from the president's office said the camps were 'sources of illegal trafficking, of profoundly shocking living standards, of exploitation of children for begging, of prostitution and crime' (*Présidence de la République* 2010).

The French decision followed a riot in July 2010, in which dozens of French Roma armed with hatchets and iron bars had attacked a police station, hacked down trees and burned cars in the small Loire valley town of Saint Aignan. The revolt erupted after a gendarme shot and killed a French Roma, 22-year-old Luigi Duquenet, who officials said had driven through a police checkpoint, knocking over a policeman. Media reports suggested he had been involved in a burglary earlier that day. Duquenet's family disputed the police version of events, saying he was scared of being stopped because he did not have a valid driver's licence (BBC News 2010).

The French government claimed that the eviction and expulsion orders did not target the Roma as a group and thus were not discriminatory. However, a French government memo, which was later leaked, showed that Roma camps were indeed a priority target (ibid.). The leaked circular, dated 5 August and corrected after the protests by the European Commission on 13 September 2010, showed that the French authorities had been instructed to target Roma camps, rather than deal with undocumented foreigners on a case-by-case basis, as the French migration minister and the minister for Europe had assured the European Commission (EurActiv 2010).

The Roma tackled by the French eviction and expulsion orders were mainly from Romania and Bulgaria, and thus, as EU citizens, have the right to move to another EU country with the limitations provided for by the EU's Free Movement Directive, which sets out rules on the rights of EU citizens to move and reside freely within the territory of EU member states, namely on grounds of *public policy, public security or public health* (EU Directive 2004/38/EC: Art. 27–33). EU Justice Commissioner Viviane Reding described the mass expulsions as a 'disgrace' and stated: 'This is a situation I had thought Europe would not have to witness again after the Second World War' (Reding 2010a).

Subsequently, on 29 September 2010, the European Commission decided that it would issue a letter of formal notice to France requesting the full transposition of the EU's Free Movement Directive that sets out strict and precise rules for expulsion cases, including the prohibition of collective expulsions (Art. 19(1) EU Charter of Fundamental Rights; Art. 4 Prot. No. 4 to the ECHR), unless draft transposition measures and a detailed transposition schedule were provided by 15 October 2010 (European Commission 2010; EurActiv 2010).

On 19 October 2010, Reding said she was satisfied that France had responded 'positively' to the Commission's official request and thus it decided not to pursue the

infringement procedure (Reding 2010b). The Commission made its decision after examining detailed documentation sent by France on 15 October 2010 on complying with EU rules on free movement. The information given to the Commission included draft legislative measures and plans to ensure that amendments to the French immigration law are adopted by early 2011 (ibid.).

As a result, on 16 June 2011, France adopted Law No. 2011–672 on Immigration, Integration and Nationality, ensuring that expulsions are not made on the basis of ethnicity or targeting specific groups and committing French authorities to assess each expulsion order on a case-by-case basis, taking into account social situation and age. Some human rights organisations, as Human Rights Watch, expressed concerns over the law that allegedly still contravenes EU law and appears 'designed to facilitate the removal of Roma from France' (Human Rights Watch 2011; Carrera 2013).

Forced relocations and evictions from homes – even if these are segregated detention camps in cities enclosed by walls to separate them from the residential areas or settlements in the periphery of rural villages far away from public infrastructures and services – are also a dramatic interference in a group's collective life (Koivurova 2011: 26). The assessment of the factual situation and decisions by the European Committee of Social Rights (ECSR) in recent cases against Italy, Portugal, France and the Czech Republic serve as demonstrative examples how the anti-discrimination provision of Article E under the revised European Social Charter in the enjoyment of the economic and social rights of Roma and Sinti has been violated. The ECSR found, with regard to forced evictions, that:

> the legal protection afforded to the Roma under threat of eviction is insufficient and that eviction procedures can take place at any time of the year including winter and night or day. It considers that this situation does not ensure the respect of human dignity.
>
> (ECSR, *Centre on Housing Rights and Evictions v. Italy*, 2009: para. 79)

However, forced relocations did not only affect indigenous peoples and Roma and Sinti, but was also the substance matter in the ECtHR case *Noack and Others v. Germany* (2000) involving the Sorb minority living in Germany. The applicants had been evicted from their village Horno subsequent to granting a concession for the establishment of a lignite mine and were to be relocated 20 kilometres away from the original settlement. Among the alleged violations, the Court evaluated the proportionality and the legitimacy of the measure of relocation, focusing on Article 8 ECHR on the protection of private and family life. The Court found that the adopted measure was proportionate, stressing that the population of the village had the chance to participate in public consultations and had access to remedies (Koivurova 2011: 27). In fact, the Sorbs had the possibility of choosing to be relocated to a

nearby town, for which the majority of the consulted persons had opted. Thus, according to the reasoning of the Court, they could:

> continue to live in the same region and the same cultural environment, where the protection of the rights of the Sorbs is guaranteed by Article 25 of the Constitution of the Land of Brandenburg … their language is taught in the schools and used by the administrative authorities, and where they will be able to carry out their customs and in particular to attend religious services in the Sorbian language.
>
> (ECtHR, *Noack and Others v. Germany*, 2000)

Hence, it may be argued that in this case the cultural rights and thus their right to existence were not at risk. However, according to Article 16 of the FCNM, parties shall refrain from adopting measures that may alter the proportions of population in areas inhabited by minorities. Indeed, the Advisory Committee under the FCNM showed great concern with regard to this case of forced relocation of the Sorb minority and urged Germany to duly consider the aspirations of the Sorb people to maintain their culture and thus their identity (ACFC, First Opinion on Germany 2002: para. 96; Jackson Preece 2005b: 475).

6.4 'The right to have rights': statelessness and denials of citizenship

The right to existence of minority groups and indigenous peoples has been analysed so far in its dimension of physical and psychological security as well as in its socioeconomic dimension reflected in the collective rights to land and economic subsistence. However, there is also a third dimension which must be taken into account following from Hannah Arendt's paradox (see Chapter 3). This is the legal dimension, basically summarised in Hannah Arendt's notion of 'the right to have rights' (Arendt 1973: 298).

Deprived of her German citizenship as a Jew in 1937 and in exile from her home country, Hannah Arendt (1906–1975) experienced herself to be a stateless person until she became a naturalised citizen of the United States. In her first major book, *The Origins of Totalitarianism*, which was first published in 1951 under the shadow of the Holocaust, she also reflected on the phenomenon of complete rightlessness, the 'fundamental deprivation of human rights' (Arendt [1951] 2017). She had observed with sorrowful attention the process of a gradual abolishment of the socio-economic and liberal human rights of the Jewish citizens after the Nazis had come into power in 1933, with the Jews immediately forced out of jobs in newspapers and the civil service and banned from access to health insurance in 1934. The Nuremberg Race Laws, adopted in 1935 (*Reichsgesetzblatt* I), abolished their citizenship and voting rights and made marriage and sexual interrelationships between 'Jews' and 'non-Jews' a serious crime (see the text in Chapter 4, Box 4.1). In 1936, Jews were banned from all professional jobs and after the *Reichskristallnacht* (Night of Broken Glass) in 1938, Jews were banned from attending public schools and forced to close down and sell their businesses. Arendt thus concluded that '[t]he point is that a condition of complete rightlessness was

created before the right to live was challenged' and, before people can enjoy any of the liberal human rights, there must first be a much more fundamental right:

> We became aware of the existence of *a right to have rights* (and that means to live in a framework where one is judged by one's actions and opinions) and *a right to belong to some kind of organised community*, only when millions of people emerged who had lost and could not retain these rights because of the new global political situation.
>
> (Arendt [1951] 2017: 388, emphasis added)

This was then included in Article 15 of the Universal Declaration of Human Rights of 1948 (Box 6.10).

Box 6.10 The right to a nationality, UDHR (1948)

Article 15

(1) Everyone has the right to a nationality.
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

The later human rights treaties, adopted after the Cold War had started, do not include such a general human right any longer. The ECHR does not include such a right. Neither does the ICCPR, even if Article 16 still echoes Arendt's concerns by postulating that 'Everyone shall have the right to recognition everywhere as a person before the law'. The cosmopolitan approach of the UDHR is, nevertheless, upheld with regard to a specific, vulnerable target group in Article 24, paragraph 3 requiring that 'Every child has the right to acquire a nationality'. Article 7 of the Convention on the Rights of the Child (1989) further specifies this right, but again the legal situation is more complex.

According to Article 1 of the Convention relating to the Status of Stateless Persons of 1954, the status of any person who is not considered a national or citizen of any State is known as de jure statelessness, which had, moreover, been seen consistent with customary international law (Shearer and Opeskin 2012: 102). Yet, the phenomenon of statelessness is more complex in practice: even if individuals may possess the nationality / citizenship of a state, they may not be in the position to enjoy the rights connected to it. This happens often because either they are unable to prove their nationality or there is the inability or unwillingness of the state in which they reside to protect them. This is legally called de facto statelessness (ibid: 103). This is the case, for instance, for those people who were victims of human trafficking and whose home state is unable or unwilling to offer them protection.

Hence, due to the internal conditions of public administration – in particular with regard to institutional racism – but also dramatic changes because of the dissolution of states as this

has happened with the breakdown of the multinational communist regimes of the Union of Socialist Soviet Republics and Yugoslavia in the beginning of the 1990s, the need for a 'right to have rights' against involuntary statelessness and in situations which UN bodies have referred to as arbitrary denial of 'access to citizenship' (ibid: 111) have become increasingly important again as the following case study on so-called 'erased people' in Slovenia after its declaration of independence in 1991 will demonstrate.

Case study 6.7 The 'erased' people of Slovenia and their 'right to have rights'

The case of Slovenia, which can be qualified as a case of systematic discrimination on the basis of national and ethnic origin, is particularly paradigmatic and led to a judgment of the ECtHR in *Kurić and Others v. Slovenia* (2012). After Slovenia's declaration of independence on 25 June 1991, more than 20,000 individuals were automatically (i.e. without prior information nor a chance to appeal against it, nor being made aware of the consequence of possible expulsion from the country) deleted from the registers of permanent residents of Slovenia on 26 February 1992 and consequently recorded in those of foreigners. Among them were a number of Roma, previously citizens of the Socialist Federal Republic of Yugoslavia and living for decades in Slovenia. Even if they learned about the 'erasure' from the register on the basis of newspaper articles or other media reports, they had been unable to obtain Slovenian citizenship in the short timeframe foreseen by the Slovenian authorities for acquiring citizenship after the declaration of independence (ACFC, Second Opinion on Slovenia, 2005: para. 56). As a result, these persons remained – despite of judgments of the Constitutional Court declaring the 'erasure' unconstitutional – without any clear legal status and thus in a legal limbo until 2010 (ACFC, Third Opinion on Slovenia, 2011: para. 10). During this time, these people lost their houses, jobs, or pensions' entitlements because their personal documents such as passports or drivers' licences were revoked and destroyed. In addition, their rights to family life and freedom of movement were seriously hindered (ACFC, Second Opinion on Slovenia, 2005: para. 57).

After having exhausted all domestic legal remedies, a group of 'erased' people brought claims before the ECtHR in 2006 for breaches of Articles 8, 13 and 14 ECHR. The applicants argued that domestic law (i.e. the Slovenian Aliens Act) violated their rights enshrined in Article 8 ECHR because the 'erasure' from the register of permanent residents irremediably affected their private and family life. The applicants were fully aware of the gravity of the injustice they had been victim of and formulated their main arguments concerning the violation of Article 8 ECHR (protection of private and family life) as follows:

> The 'erased' were not only denied access to Slovenian citizenship but were also bereft of any legal status conferring 'the right to have rights'. This was a serious encroachment on human dignity. … From being citizens in full possession of their rights, they had become illegal aliens overnight; some of them had also become

stateless and had lived for twenty years in a most precarious situation and been seriously hindered in the full enjoyment of their basic human rights.

With regard to Article 14 ECHR, the applicants argued that they had been discriminated against on the ground of their national and ethnic origin because, in comparison to other foreign citizens, they had been treated less favourably than true aliens (i.e. citizens of other countries than Yugoslavia) who had lived in Slovenia before independence and whose permanent residence permits had remained valid under the Aliens Act. Finally, the applicants claimed that Slovenia had failed to provide an effective remedy to the 'erased' as required by Article 13 ECHR. The Legal Status Act which was passed in 1999 by Slovenia (and later amended according to rulings of the Constitutional Court) in order to regulate the situation of the 'erased' was considered to be an insufficient legal remedy not capable to address the substance of the applicants' complaints under Article 8 ECHR.

Slovenia, as the respondent party, basically argued that the possibility to acquire Slovenian citizenship after independence was a special advantage in terms of positive discrimination given to citizens of former Yugoslav republics with permanent residence in Slovenia but that this treatment could not last indefinitely due to the need to quickly form a 'corpus of Slovenian citizenship' within a short period of time for the upcoming general elections. It constituted a necessary and proportionate means of achieving the legitimate aim of ensuring security after independence. Although the government admitted that the 'erasure' as such had been without legal foundation, Slovenia argued that the implementation of the Legal Status Act 1999 constituted an appropriate measure for ensuring the rights according to Article 8 ECHR of the 'erased'. Regarding Article 14 ECHR the respondent denied a violation because the applicants had in the opinion of the government been treated even more favourable as other aliens and concerning Article 13 ECHR sufficient legal remedies were available, accessible and effective.

In its judgment of 22 June 2012, the ECtHR (Grand Chamber) stated several violations of the Convention. With regard to Article 8 ECHR there was no dispute that the 'erasure' had dramatic negative consequences for the private and family life of the applicants. Additionally, the 'erasure' by the Aliens Act could not be considered justified because the applicants could not have foreseen or reasonably expected that their status as aliens would lead to the unlawfulness of their residence and thus to the 'erasure' with all its consequences. In addition, the Court held that the Legal Status Act came too late (only seven years later) and was not sufficient in regularising the legal situation. With regard to Article 14 ECHR, the Grand Chamber stated indeed a discrimination based on national or ethnic origin without a legitimate aim. The situation of true aliens and those who had been citizens of the former federal state of Yugoslavia after the independence of Slovenia had put only the latter into the position to lose their status as permanent residents so that the applicants had systematically been disadvantaged because of their national or ethnic origin. Moreover, the Slovenian government's defensive argument of the necessity to form a corpus of citizenship as quickly as possible could not hold

since permanent residents are not granted the right to vote. Concerning Article 13 ECHR, the Court held that the retroactive provision of permanent residence was not an adequate remedy due to the significant (almost 20) years of hardship. Therefore, the Slovenian authorities had failed, despite the efforts made since 1999, to remedy comprehensively the grave consequences for the applicants of the erasure of their names from the Slovenian register of permanent residents.

Indeed, the substance matter at stake in this legal dispute was nothing less than the official denial of the existence of ethnic or national minority groups not welcome in the newly internationally recognised state, in other words the exclusion of a certain group of persons from their citizenship. Thus their right to existence was legally neglected. In a partly dissenting and partly concurring opinion, Judge Vučinić disagreed with the majority of the Court in the assessment of the gravity of the violation of Article 8 in language reminiscent of Hannah Arendt and Immanuel Kant:

> This is no 'ordinary violation' of Article 8 § 1 of the Convention. We are dealing with large-scale violations of the right of every person to be a person before the law, the right to his or her legal personality. This absolutely fundamental right is directly provided for by Article 6 of the Universal Declaration of Human Rights and by Article 16 of the International Covenant on Civil and Political Rights. This *per se* testifies abundantly to the fact that we are dealing here with something extraordinary! Moreover, the right to legal personality is very well founded in universal and customary international human rights law. This right is a fundamental precondition for the enjoyment not only of basic human rights and freedoms …. By their 'erasure' the applicants were *de facto* deprived of their legal personality […]. They ceased to exist as 'legal subjects' – that is, as 'natural persons' in the Slovenian legal system. They were treated as disposable objects and not as subjects of the law. Needless to say, this runs counter to the applicants' inherent human personality and dignity.
>
> (ECtHR, Kurić and Others v. Slovenia, 2012: para. 319)
>
> (ECtHR, *Kurić and Others v. Slovenia*, 2012, Partly Concurring, Partly Dissenting Opinion of Judge Vučinić)

It must not come as a surprise then that Judge Vučinić qualified the 'erasure' of more than 25,000 persons as not only a 'large-scale, gross and systematic violation of basic human rights as a consequence of a deliberately organised and planned governmental policy' in the last sentence of his opinion, but even 'a legalistic means of ethnic cleansing' (ibid: 91, 94; see also Pistotnik and Brown 2018 who discuss this case of 'erased people' as state-driven process of 'racialisation').

6.5 Summary conclusions and learning outcomes

Taking the aspirations, standards and means of protection of the right to existence in all its three dimensions into account, we can conclude with the following results for an assessment whether the Westphalian paradigm of international relations and public international law

has decisively shifted to the paradigm of cosmopolitan constitutional pluralism anchored in the notion of human dignity (see in detail Chapter 10).

The hope that atrocity crimes will 'never again' happen, as was expressed right after the end of the Second World War, was also completely in vain for Europe. With the wars in Eastern and Southeastern Europe in the 1990s, the most heinous crimes including mass murder, ethnic cleansing, detention camps, mass torture and rape were again committed, following from the same interaction between criminal political and military ethnic entrepreneurs and the political mass mobilisation under the ideological banner of what Brubaker (1996) has called nationalising nationalism (see Chapters 1 and 3). Unlike in previous times, however, and due to the end of the Cold War, the UN Security Council, even if it could not prevent the genocide in Srebrenica, was able to establish an institutional mechanism early on, the ICTY, in order to punish the perpetrators of crimes against humanity and war crimes. The ICTY, with its task of retributive justice, remained very cautious and restrictive in the qualification of established facts as commitment of the crime of genocide, as we saw from the different assessments of the Trial Chamber and the Appeals Chamber.

However, several results of our legal analysis make clear that international criminal justice and international law has decisively moved away from the Westphalian paradigm. The ICTY and ICJ genocide decisions made clear that not only individuals, but also states can be responsible not only for the committing of genocide, even for the omission of not having prevented the commitment of genocide even outside of their territorial jurisdiction. And, finally, the responsibility to protect doctrine, even if it is only international soft law at present and discredited because of the so-called humanitarian interventions in Libya and Iraq, makes clear that the external and internal sovereignty of states and thus the walls of impunity for all sorts of office holders are slowly but constantly broken down.

As far as the right to existence, in terms of economic subsistence rights as a precondition for the protection of the cultural identity of minorities and indigenous peoples is concerned, most *international legal standard setting* has referred, in the final analysis, to the foundational value of human dignity and thus to the cosmopolitan paradigm, so that the requirement of citizenship for the enjoyment of minority rights has been abandoned over the past two decades and more and more doubts have been raised about the categorical distinction between all types of minorities and indigenous peoples.

The *implementation* of this paradigm, even in the richer member states of the EU, as can be seen from the case law of the ECtHR, the ECSR and the UNHRCom is, however, disappointing at best. Roma and Sinti still have to face the most serious violations of their human right to existence with forced mass expulsions, residential segregation in urban ghettos, even being physically detained by surrounding walls like detention camps, and the worst living conditions, being almost completely excluded from access to public services, in particular schooling and health services, because of the mutually reinforcing economic deprivation and racial discrimination that they suffer in all European countries. Compared with their situation, European indigenous peoples, the Sami in the Scandinavian countries and a large number of indigenous groups in the Russian Federation are much better off with regard to their economic subsistence based on fishing, hunting and reindeer herding in their traditionally inhabited areas. Nevertheless, all face serious challenges for their economic subsistence based on their different lifestyle because of the interest of these countries in further

industrial development projects through natural resource extraction, in particular oil and gas exploitation in their traditional territories. Even benign governmental policies such as the establishment of Sami parliaments or model agreements offered by local or regional administrative authorities in the Russian Federation for the conclusion of contracts between private companies and indigenous groups do not effectively improve their situation. Very disappointing is, in particular, the case law of the ECtHR, since the huge majority of its judges are not willing to give up the traditional, Roman law inspired, liberal-individualistic interpretation of the concept of property rights, which quasi automatically favours individual landowners – be it the state or private persons does not really matter – over the basic need of indigenous groups for the collective control and use of grazing land or territory for fishing and hunting. Moreover, indigenous groups are generally excluded from participation in the gains of natural resource extraction by private companies, but in best-case scenarios get compensation if they are no longer in a position to make use of their territories, very often due also to the environmental devastation caused by natural resource extraction. Hence, indigenous groups not only in Europe, but all over the globe have been and remain the victims of the tragedy of the commons driven by industrialisation by both former communist as well as old democratic regimes.

Finally, also the third dimension of the right to existence based on Arendt's paradoxical insight for the need to have 'a right to have rights' is far from realisation in actual practice, as has been demonstrated by the judgment of the ECtHR in *Kurić and Others v. Slovenia* (2012). The cases of statelessness and the denial of citizenship have dramatically increased in recent decades due to the waves of refugees from the (civil) war-torn territories within Europe and in Europe's neighbourhood to the East and South. At the same time, this triggered again a securitisation of governmental policies, not only of European national states, but also EU foreign policy leading in effect to stricter requirements not only for granting asylum, but also for granting permanent residence and citizenship status, as we learned from the introductory chapter, in terms of immigrant integration. And again, the members of minorities are the most seriously affected class of peoples, first persecuted in their home countries and then denied asylum or citizenship because of the institutional racism of national law enforcement agencies in European countries or structural discrimination, which is not effectively fought by legislations and judiciaries (Morris 2010; see also Chapter 7).

Questions

1. Is ethnic cleansing prohibited under international criminal law?
2. Why is the opposition of retributive and restorative justice a wrong alternative?
3. Why are land rights and cultural rights interdependent for indigenous peoples?
4. What is the vicious circle of poverty?
5. Why is it necessary to have a 'right to have rights' in the twenty-first century?

Against assimilation

7

The right to multiple identities

Joseph Marko, Sergiu Constantin, Günther Rautz, Andrea Carlà and Verena Wisthaler

7.1 Introduction: the politics of difference – language, religion and law

In line with the interdisciplinary approach of this book and the overall structure of Chapters 6 through 9, we again begin with a problem-oriented introduction. This is followed by a critical analysis of the developments in legal standard setting and implementation, in particular adjudication at the national and supranational levels, and, finally, conclusions are drawn and learning outcomes summarised. The central focus of this chapter is on the *obstacles* to *multiple identity formation* following from the empirical and legal *structural problems* created by the *nation-cum-state paradigm* and its underlying 'fateful triangle' of race, ethnicity and nation (Hall 2017) haunting politics, legal standard setting and case law of courts to this day, as can be seen from our analysis of the Opinion delivered by AG Juliane Kokott for the European Court of Justice (ECJ) case *Achbita v. G4S Secure Solutions* (2017) (see Chapter 4, section 4.1).

As we learned from our historical-sociological analysis in Chapter 3, *language and religion* were *similarly intertwined* as putatively objective markers of the concepts of nationhood and ethnicity in the political and legal *quest for assimilation* into what we called dominant ethnicity in Chapter 4. Therefore we might even speak of a historical trajectory in the development of the nation-cum-state paradigm from *cuius regio, eius religio* (the Augsburg Peace Treaty 1555) to *cuius regio, eius lingua* and, with the development of the concept of national self-determination, to *cuius regio, eius natio* by the end of the nineteenth century. However, this must not be seen as a unilinear, natural historical development. As Brubaker highlights in his *comparison* of *language* and *religion* regarding nationalist ideology and the development of a 'politics of difference' (Brubaker 2015: 85–118), there have been *differences* in the *modes of institutionalisation* of the ever-present linguistic and religious *pluralisms*, which we must understand as the historical legacy of structural problems and therefore path dependencies (see Chapter 2, section 2.2) affecting political and legal contestations to this day.

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First, the economic, demographic and political processes of industrialisation, urbanisation, state formation and nation building in Europe since the sixteenth century, in short modernisation processes, brought about the *linguistic standardisation* of the languages of the majority populations or centres of power, which de facto became or were de jure declared the official languages of the respective national state. Language standardisation was thus followed by linguistic cultural *homogenisation within* territorially concentrated states, requiring, at the same time, sharp cultural boundaries *between* states.

Seen from the perspective of the nation-cum-state paradigm and modernisation theories (Gellner 1997), language standardisation (White 2016) and the creation of a 'monolingual habitus' (Gogolin 1994) go hand in hand with the need for standardised public education and literacy demands for the labour force, which is postulated to be a normal, instrumental requirement. As a consequence, bi- or multilingual education and the use of minority languages in public education, the economy, administration or politics seem to require an exemption from this rule of monolingualism, as we see in this chapter in the critical analysis of case law of national and European courts.

Moreover, this 'instrumental language ideology' (May 2012: 219, 242), following from the myth of neutrality of the nation-cum-state paradigm (see Chapter 4, section 4.3), as if languages were simply a neutral medium of communication, continues to hold a *subtractive view* of individual and societal bilingualism to this day. This view must be seen as a combination of two factors. Recent studies in *Exploring the Dynamics of Multilingualism* (Berthoud *et al.* 2013) and comparative research into European language standardisation histories demonstrate why the European attitude to multilingualism has always been a selective and 'hierarchising' one (Vogl *et al.* 2013: 410–16) in terms of so-called standard *languages* and non-standard *dialects*. In line with this linguistic hierarchisation, minority languages in general were declared rural, *backward vernaculars* which are not sufficiently elaborated for modern usages of industrialised and post-industrial societies, creating – when linked with the social status of speakers – a *structural dualism* between 'plebeian multilingualism' *versus* 'prestigious monolingualism'. As a consequence, the difficulties of the children of minorities not being able to follow teaching in the de jure or de facto official language of instruction from the first day of their enrolling in secondary education were (mis-)interpreted as *learning deficits*. Therefore the conclusion that only rapid submersion (i.e. *assimilation* into the *majority language*) can help to overcome these alleged linguistic, and thus educational, deficits through the trade-off between the possibility for upward social mobility or the preservation of old-fashioned traditions, in short the choice between 'lifestyle and life chances' (May 2012: 177–83). Thus, the political and legal progression from 'language as a problem' to 'language as a right' (Gogolin 1994) was and remains a difficult, hotly contested process. As we can see from Table 7.1, not only the repression of minority languages, but also legal recognition through various forms of liberal political regimes can hinder the survival of private language use against the assimilationist forces of industrialisation and urbanisation. However, only a cosmopolitan pluralist approach (see Chapter 10) will promote the establishment of language equality by granting minority languages full official status in the public sphere and in communication with state authorities or even in the performance of their official tasks and services.

Therefore, all political and legal contestations to this day are framed by the ideologically inspired *dichotomic* understanding of, on the one hand, the instrumental need of a single,

Table 7.1 State approaches vis-à-vis minority languages, functions and consequences

	Type of regime[a]	*Rights and duties*	*Political function*	*Goal or consequence*
Language shift[b]	Repressive	*No right*: No L1 and minority group recognised	*Forced assimilation*	*Ethnic homogeneity* in the private and public sphere
	Liberal-tolerant-paternalistic	*Individual right:* Use of L1 allowed to foster learning of L2	Support in *assimilation*	*Ethnic homogeneity* in the private and public sphere
	Liberal individualistic	*Individual right:* Use of L1 allowed in private sphere	*Indifference* leading to *assimilation*; no state support for private language maintenance	No survival of L1, culture and groups leading to *intergenerational language shift* to L2
Language shift[b]	Liberal-egalitarian	*Individual right:* Use of L1 allowed in private sphere and anti-discrimination rules including positive action	*Integration*: L1 and minority groups de facto respected; support for *language maintenance* in private sphere through *intergenerational family transmission* (e.g. state subsidies for private nurseries, schools, media, associations)	Protection to assist L1 and creation of *equal opportunities*, but *no guarantee* that this is leading to group survival and *cultural diversity* in the private sphere
Language reversal	Liberal multicultural	*Individual and group rights:* As above plus use of L1 allowed in public sphere and state administration/judiciary and duty of civil service to react in L1	As above plus L1 and minority group(s) specifically recognised by legal instrument(s)	*Minority protection* to assist L1 and effort to guarantee the group survival
Linguistic balance	Cosmopolitan pluralist	*Individual and group rights*: Use of L1 in private sphere and constitutionally guaranteed equality of L1 and L2 in public sphere and state administration and the judiciary	Collective equality among groups	To guarantee linguistic and *cultural diversity* of all spheres of society

a Types of regimes (adapted from Palermo and Woelk (2011).

b Language shift from minority language (L1) to majority language (L2).

official language in terms of governability or social cohesion in communications with state authorities and in the public space and the recognition of one or more *minority languages* on the other, fluctuating between the paternalistic-liberal motivation or nationalist aspiration to provide for the quick and effective assimilation of minority-language speakers or the recognition of the equality of languages and their speakers as groups inspired by the multicultural and cosmopolitan pluralist perspective.

Second, as a consequence of the social, political and economic processes of '*secularisation*' (Bader 2007; Turner 2011) of states and societies and the political revolutions of the eighteenth century, the *relationships* between national *states*, *churches and religions* have taken a different trajectory. In line with the Böckenförde paradox, which postulates that the liberal, secular state cannot provide for the necessary trust, solidarity and social cohesion on which its existence depends (see Chapters 3 and 4), the term *secularisation* has a *broader* social and political and a *more narrow* organisational-institutional meaning. According to Max Weber's theory of rationalisation and demystification of the world, more and more aspects of everyday life came under the influence of science so that their explanation relied less and less on religious presuppositions. These processes went hand in hand with the differentiation of society into different spheres of life such as economy, politics, culture and so forth, so that religion lost more and more authority and therefore control over these value spheres leading to the privatisation, individualisation and subjectivation of religious beliefs in Europe. Secularisation in this broader sense thus means 'the erosion of those strong communal bonds that wrapped individuals into meaningful social groups' and the decline of religious 'authority structures' (Turner 2011: 137, 10–11).

In the narrow sense, the *different modes of institutionalisation* referred to above, following from the political revolutions in the United States and France as outlined in detail in Chapter 3, brought a more or less strict *institutional-organisational separation* of either *state* and *church* following the role model of the First Amendment of the US Constitution, the non-Establishment clause which is colloquially called the wall of separation, or between the French *state-nation* and *religio*n with the constitutional principle of *laïcité*. What the American and French models and thus the *different modes of institutionalisation* of *religion* have in common is the normative principle of *separation*. They differ, however, *in what* shall be separated: the institutional-organisational structures of states and recognised churches and religions, but not of religion, which can be manifested in the public and political sphere in the American case, in contrast to France's model and tradition of a republican civil religion, purportedly culturally indifferent. Ahmet Kuru has termed the former 'passive secularism' (Kuru 2009: 41–100) and the latter 'assertive secularism' (ibid: 103–58; for a comparative empirical analysis of the relationships between state, church and religion in the United States and Western Europe, see also Norris and Inglehart 2011: 83–110).

Following from this historical *structuration* of *a dual dynamics* between national states on the one hand and churches and religions on the other, three ideal types can be constructed and ordered on a continuum between the two extreme poles of *laïcité* of strict *separation* of state/politics and religion and the *identification* of the state with one established religion with, for instance, the Anglican Church in Great Britain serving as an historical example and model (Figure 7.1).

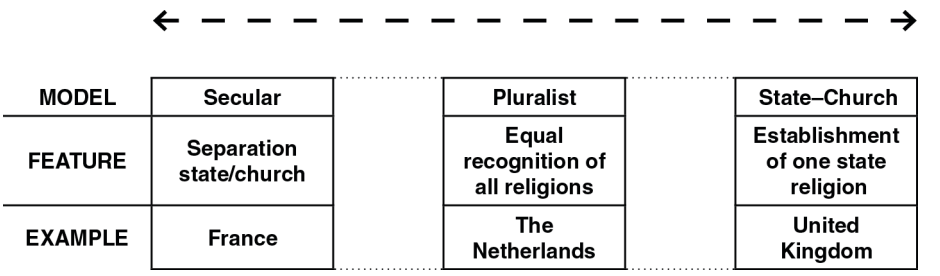

Figure 7.1 Models of state–church relations

The *transformation* of *political declarations of human freedoms* in continental Europe before the end of the eighteenth century into *justiciable human rights* to be enforced not only at the national level but also at the international level through the adoption of the European Convention on Human Rights (ECHR) with its supranational judicial mechanism in 1950 (see Chapter 2, section 2.1 and Chapter 3, section 3.4), brought about a second, *structural normative dualism* which prefigures all legal-dogmatic analyses. In those few countries of Europe where Protestant religious denominations are still recognised as the established religion (in particular the United Kingdom, Denmark, Finland, Iceland, Norway) or where the Christian Orthodox belief is declared the 'prevailing religion' (see Article 3 of the Constitution of Greece), religion does, of course, still influence the institutional relationship between church and state. But even in those countries – to quote from the text of Article 9 ECHR – 'everyone has the right to freedom of thought, conscience and religion' – so that we must not confuse, but must *structurally differentiate* between these *human rights guarantees* and the *institutional relationships* between states and all legally recognised churches or religions, not only state religions. Thus, all three types of state–church relations have to guarantee the right to freedom of religion in both its individual and corporate forms of autonomy, as we elaborate in detail in the following sections.

Finally, as Brubaker pointedly highlights for our problem orientation: 'Public life can in principle be areligious, but it cannot be alinguistic' (Brubaker 2015: 89). *Religions* are in *comparison* to *languages* neither a necessary precondition for communication and interaction in any of the spheres of society (i.e. the sociocultural, the sociopolitical or the socioeconomic sphere) nor *shall* – from a liberal ideological and thus *normative* perspective – religious belief and belonging be a precondition for equal opportunities and political participation in any of these spheres. In light of these considerations, we can – following from Gidden's seminal distinction (see Chapter 2, section 2.2) – distinguish between the *structural duality* of *languages* pervading all spheres of society, whereas the *structural dualism* of *religions* shall remain restricted to the private field and sociocultural sphere of society (Figure 7.2 shown overleaf).

All these *structural legacies against* the recognition, protection and promotion of *multiple identities* elaborated above must serve as vantage points for the following questions addressed in this chapter:

- What is the social and political *salience* of *language* and *religion* today and how is this mirrored in case law?

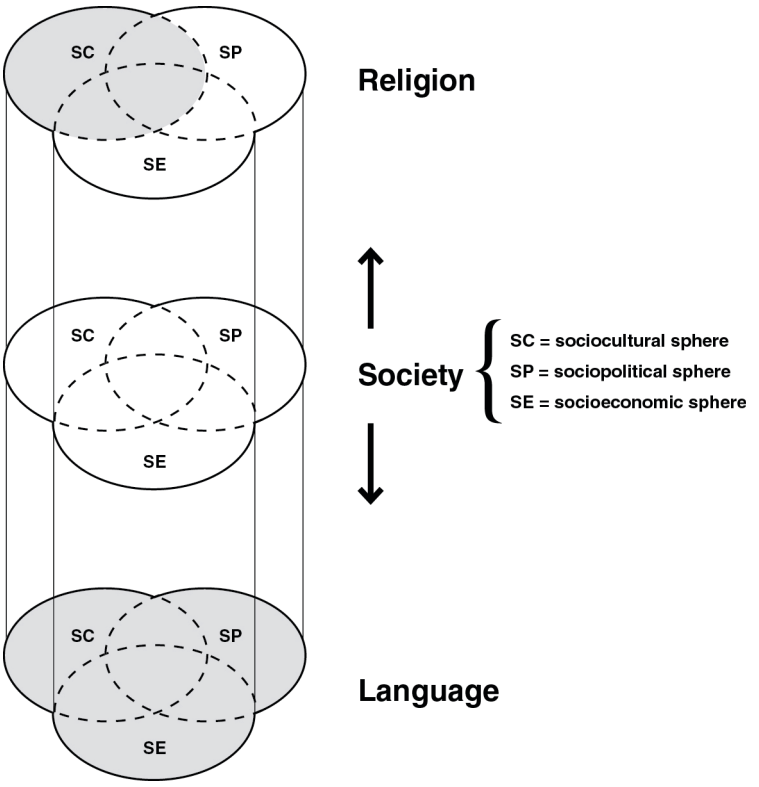

Figure 7.2 Language and religion: spheres of action and interconnections

- Do we not only need *individual anti-discrimination law* to protect a person's multiple identities, but also a *group-oriented* legal approach to at least enable the cultural survival of languages and to protect freedom of religion?
- Can the claim for the *cultural survival* of languages and religions and the ensuing sociocultural, political, and economic practices, which we summarise with the shorthand term 'culture' (see Chapter 2), be interpreted as a wish for the 'return of tribalism' (Baumann 2017) and thus illegitimate 'culturalism' and 'groupism' against the historical trend to a 'single', European 'modernity' (Brubaker 2015: 145–54)?
- Why and how is *religious* and *linguistic diversity* transformed into *ethnic difference*? Is this a natural phenomenon? Can this be traced back to the claims of political representatives of national or ethnic minorities, indigenous peoples or immigrants for economic resources, symbolic recognition, equal representation and political autonomy or sovereignty, as we elaborated in Chapters 4 and 5? And which role do not only the attitudes and behaviour of the majority populations tested in opinion polls, but also legislators, administrators and judges play?

In conclusion, the old and new obstacles to the processes of *recognition of multiple identities* form the heart of this chapter to be critically analysed in line with our approach of multifunctionality and multidimensionality of law (see Chapter 5, section 5.3). In section

7.2 we summarise the *structural duality* of *language* and the *structural dualism* of *religion* from the description and analysis of the development of *legal standard setting* in Chapter 3, sections 3.4 and 3.5. This summary is based on the *deconstruction* of the *dichotomy* of *individual* versus *collective rights* and the *public–private division* in Chapter 5, section 5.3 and thus serves as *analytical framework* for the identification of more specific conceptualisations of the rights and freedoms of language and religion following from the analysis of the jurisprudence of national and supranational European courts in the following sections. Thus, in line with our analytical distinction between a sociocultural, sociopolitical and socioeconomic sphere, in section 7.3 we discuss the *problems* of *implementation* in the *sociocultural sphere* and the problems that members of groupings in a minority position and minorities as bounded ethnic groups (see Chapter 2, section 2.2 and Chapter 5, section 5.2) face in the processes of identity formation because of ongoing or new processes of what we call the 'nationalisation of the public sphere'. In section 7.4, we discuss the *sociopolitical sphere*, which is crucial, especially for the protection of groupings in a minority position in the exercise of associative freedoms as precondition for their indirect, but nevertheless *effective* protection through the individual rights to privacy and freedoms of religion, expression and association, as guaranteed by Articles 8 through 11 of the ECHR. Section 7.5 discusses the *socioeconomic sphere* and the problems created in access to the public educational system, the public and private labour markets by the lack of social and cultural capital and the renewed obstacles created by the 'culturalisation of citizenship' (Brubaker 2015: 139) against immigrant integration. Section 7.6 then draws conclusions and summarises learning outcomes.

7.2 The duality of languages and the dualism of religions in the normative structures of minority rights and state duties

The overview on the normative structures of minority rights law summarised in Table 7.2 below brings us back to the question of the deep structures that created three structural problems in legal and ideological terms, which came to the fore in the description and analysis of the development of legal standard setting since the First World War.

First – echoing the argument of the Albanian government cited in the Advisory Opinion of the Permanent Court of International Justice under the League of Nations system and the Albanian minority school case (see Chapter 3, section 3.4) – we could observe the ideologically determined structuration of legal instruments between anti-discrimination law 'irrespective of belonging to the majority or a minority' and the reproach by liberal-individualists and liberal-egalitarians against the notion of a cultural survival of languages or religions and their sociocultural practices (see Chapter 4, section 4.3). However, as we made clear through our relational and dynamic sociological approach, elaborated in Chapter 5, section 5.2, the social organisation and process of institutionalisation must also include group-related minority rights if you are not to deny, by definition, cultural, social and political pluralism. This position is, moreover, mirrored in legal phrases and concepts such as 'persons belonging to' and 'in community with others', which indicate that the strict division between individual and collective rights is a misleading conceptualisation of a much more complex empirical reality. In Table 7.2 shown overleaf, we therefore reframe the dichotomy

	INDIVIDUAL RIGHTS	GROUP-RELATED RIGHTS i.e., "in community with others"	GROUP RIGHTS
	ECHR: Articles 5 8 (private and family life), 9 (freedom of religion), 10 (freedom of expression), 11 (freedom of association) and Article 2, Protocol No. 1 (right to education / education according to own religion) **FCNM:** Articles 7 (freedom of association and religion), 8 (freedom to establish religious organisations), 9 (media in minority languages), 10 (right to use one's language in public and in private) 11(right to use own names, inscriptions in minority languages), 12-14 (right to study of/learn in minority language) **ICCPR:** Article 27 (right to profess and practise their own religion or to use their own language)		
PRIVATE SPHERE	Freedom to *use a minority language* and to *practice religion* in private social relations Right to use his or her *surname* and *first names* and.... Positive *freedom* of religion, including..... Right to *learn* his or her *minority language* Right to *religious education*	Right to use a *minority language* and to *manifest and practise religion* in the 'public sphere' ... the right to display signs, inscriptions and other *information of a private nature* visible to the public (mono-lingual equalitwy) ... the right to proselytize *Negative freedom* of religion: - right not to be discriminated against on account of religion; - right to opt out of public religious education Freedom to use *minority language* in religious services, in private companies, associations, and peaceful assemblies Right to establish *cultural associations and media* in minority languages Right to establish *religious associations*	Right to *self-government* of *private educational institutions* (kindergartens, primary and secondary schools, universities) with *minority language as language* of instruction and/or *religious education and training*
PUBLIC SPHERE	Right to use of *minority languages* vis-à-vis public authorities: Right *to be informed* in language he or she understands Right *to address public authorities* in oral or written form Right *to get an answer* in minority language Right *to translator* in proceedings Right *to bi-lingual proceedings* *Right to religious education and teaching* according to religious or philosophical convictions of parents	*Restrictions of display of traditional local names*, street names and other *topographical indications* intended for the public only in minority languages (bi-lingual equality) *Positive equality of religions:* Religious pluralism through display of religious symbols in state institutions and/or public life or, because undecided in case law. *Negative equality of religions:* Bans of religious symbols in state institutions and/or public life through purported 'equal prohibitions' for all religions; *Prohibition of religious proselytization in hierarchically organized public institutions.*	*Rights and duties* regarding minority languages and religious education in the *public educational system*: Right to *learn minority language* like any other foreign language Minority language as *language of instruction* and *duty to learn the official language* *Bi-lingual education:* combinations of official language(s) and minority language(s) as languages of instruction If religious education is offered, teaching by a representative of the religious community

Table 7.2 Normative structures of minority rights

into an at least *triadic structuration* between *individual rights*, *group-related rights* (which presuppose at least the formation of groups and de facto existence of groupings) and *group rights or corporate rights* in the sense that legally institutionalised groupings can be perceived as agents who then act through their legal representatives.

Second, as we could also observe in the analysis of legal standard setting in Chapter 3, sections 3.3 and 3.4, the individual versus collective rights dichotomy overlaps a strict ideologically inspired *public–private* division. However, where do the borderlines between private and public actually run? Is the display of 'signs, inscriptions and other information of a *private nature visible to the public*' (emphasis added) in a minority language a strictly private affair, even more so when established on 'private property', whereas the same symbols and indications of 'traditional local names' in a minority language '*intended for the public*' (emphasis added) may be restricted as the language of Article 11 of the Framework Convention for Protection of National Minorities (FCNM) indicates (Table 7.2)? It goes without saying, as we demonstrate with case law in the next sections, that this private–public distinction has created a normative contestation about the constitutionality of what can be called *monolingual* versus *bilingual equality* of languages, for instance, in the use of minority languages before state authorities and in the public educational system. Moreover, does the sphere of influence covered by decisions of state authorities or, the other way around, the right to address state authorities in a minority language indicate an *identity* of the concepts of state and public sphere? Or do we again have to reframe the public–private division into a triadic structuration of state–public–private in order to be able to make the norm contestations and therefore the political changes over time more visible? Our graphical representation in Table 7.2 tries to demonstrate that it is exactly the *third* sphere of group-related rights where the borderline between private and public is frequently contested.

These contestations are, in turn, inspired by *two philosophical paradigms* elaborated in Chapter 5, section 5.3 in more detail: this is, on the one hand, the liberal-egalitarian *redistribution paradigm* with the goal to achieve 'full and effective equality between persons belonging to a national minority and those belonging to the majority' in the language of Article 4 FCNM through the adoption of 'where necessary, adequate measures … in all areas of economic, social, political and cultural life'. Translated into legal technique and justificatory reasoning, as we see in much more detail in the analysis of case law in Chapter 8, this has raised the question how the rule of legal *equality* of individuals *before the law* can be justified through an exception from this rule through positive actions (or affirmative action in US constitutional terminology) in terms of *equality* through state intervention *by law* on behalf of members of certain categories of persons or groupings in the sociological sense in terms of group-related rights. On the other hand, the *recognition paradigm* is represented in legal technique and justificatory reasoning either by the recognition of *groups* and the legal institutionalisation of their *rights* following, in particular, from the operationalisation of the phrase what is 'necessary in a democratic society' in the language of Articles 8 through 11 ECHR by the European Court of Human Rights (ECtHR). Thereby the Court constantly rules that *political* and *cultural pluralism* also in terms of relations between groupings makes 'the essence of democracy' which justifies or even requires not only group-related but also group rights on behalf of minorities, as we learn, for instance, from the corporate rights of religion below and the analytical distinction of what we term *positive* and *negative equality*

of religions following from Article 9 ECHR. The recognition paradigm is, moreover, also represented by the concept of *accommodation* between the same *individual rights* of different actors as exemplified by the concepts of positive and negative freedom of religion following from the text of Article 9 ECHR or different individual rights of different actors such as positive freedom of religion and the right to undertake economic activities which is, as we see from the case law of the ECtHR and the ECJ below, of particular relevance for *horizontal relations* between private actors in a market economy.

Third, in the elaborations above, we have always referred to national minorities as so-called old or autochthonous minorities as we could see from the text of the FCNM when using the language 'in areas traditionally inhabited' in Article 10. But as Sia Spiliopoulou Åkermark invokes in her seminal article:

> If we protect minorities primarily for cultural reasons, why then is the culture of old minorities more valuable and deserving of protection than the culture of recent – and perhaps more vulnerable – immigrants? … Why do our liberal democracies, or at least most of them, readily accept the obligations of the FCNM but reject the obligations of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), which, inter alia, requires respect for their cultural identity (Art. 17(1))?
>
> (Spiliopoulou Åkermark 2010: 15)

Thus, how do states and international monitoring mechanisms react to the insight that the basic *needs* (see Chapter 6 section 6.3) of *old and new minorities* are basically the same and, as we concluded from our sociological analysis in Chapter 5, section 5.2, that the ideal of successful double integration also requires the protection of new minorities against the challenges and dangers of downward assimilation, institutional segregation and complete marginalisation as possible consequences of the political division of societies?

With this elaboration on the deep structures of law and the structural problems in effective minority protection, we have laid the groundwork for the following sections, where we analyse the ongoing norm contestations for the possibility to defend multiple personal and social identities in the sociocultural, sociopolitical and socioeconomic spheres of society and, finally, draw conclusions whether our general observation on the renationalisation of Europe following from the backlash against multiculturalism in Chapter 1 holds true.

7.3 Multiple identities: the sociocultural sphere

7.3.1 The structural duality and multidimensionality of language rights

7.3.1.1 The relationship of official languages and minority languages: the dual dichotomy of private versus public use and individual versus group rights

As we have demonstrated above, the deep structure created by the historical development of national states and the creation of a monolingual habitus is formed by the dichotomic

conception of official languages versus minority languages and therefore the *ongoing norm contestations about the role of languages* either as instruments of communication for the smooth functioning of states in terms of governability and the protection of the social cohesion of societies or as *necessary components* of personal and social *identity formation*. In line with Brubaker's distinction between a 'nationalising nationalism' of majority populations and the 'nationalism of national minorities' (Brubaker 1996: 4–6), this contestation about the role of languages can work on behalf of both majorities and minorities and, if political mobilisation leads to their polarisation, might even end in the division of states and societies (see Chapter 5, section 5.2). Hence, the result of this normative structuration is a permanent *ideologically* fuelled confrontation between the alleged need for the protection and promotion of the state language on the one hand and recognition and preservation of minority linguistic identity *and* thereby of a plural, multilingual and culturally diverse society on the other.

To begin, France is the paradigmatic example of the country with a strong ideological bias against the recognition of minorities (see Daly 2015 and Chapter 3, section 3.2) and their languages. Although French was declared an official language only in 1992 and 25 regional languages are spoken throughout France, with Maghrebi Arabic most commonly spoken second language (about 2 per cent of the population; Paronia 2017), France is an 'indivisible, secular, democratic and social Republic' and ensures 'the equality of all citizens before the law, without distinction of origin, race or religion' according to Article 1 of the French Constitution. Article 3 declares that national sovereignty belongs to the people and 'no section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof'. Based on these underlying principles of the French constitutional order, the Constitutional Council (*Conseil Constitutionnel*) rejected the existence of a *peuple corse* in a 1991 decision (see Chapter 3, Box 3.1). The same dogmatic approach informed the 1999 decision of the *Conseil Constitutionnel* regarding the ratification of the European Charter for Regional or Minority Languages (ECRML). The French government signed the ECRML in May 1999 and attached an interpretative declaration specifying the meaning and scope of application it intended to give to the Charter or to certain of its provisions in the light of the text of the constitution. Insofar as the use of the term groups of speakers did not grant collective rights to speakers of regional or minority languages, the ECRML was declared compatible with the French Constitution. However, the *Conseil Constitutionnel* blocked the ratification of the Charter. It held that certain provisions of the ECRML conferred 'specific' rights on 'groups' of speakers of regional or minority languages within territories in which these languages were used. Therefore, the judges emphasised that the prohibition of 'recognising collective rights to any group, defined by a community of origin, culture, language and belief' derived from the unity (*unicité*) of the French people, meaning that French people are 'one and indivisible' (France, Constitutional Council, Decision of 15 June 1999). Moreover, the judges found that certain ECRML provisions challenged the constitutional status of French as the official language because they seemed to recognise a right to use a language other than French, not only in private life but also in public life. Consequently, the specified provisions of the ECRML were declared inconsistent with the French Constitution.

This rigid conceptual-normative framework is so deeply entrenched in the mindset of the French political and academic elite (see Grewe 1991; Schnapper 2000; Bui-Xuan 2004; an

exception is Pierré-Caps 1988) that it hardly leaves any way out of the conundrum. The only option left seemed to be an amendment of the Constitution, which required either a referendum or a three-fifths majority vote of the two houses of the French parliament (National Assembly and Senate) convened in a congress. The government chose the latter option and submitted a draft constitutional law consisting of one article to parliament, which was supposed to authorise the ratification of the ECRML. The National Assembly approved the draft law in January 2014. In October 2015, the Legal Committee of the Senate adopted a motion against the draft law and few days later 180 senators out of 348 voted in favour of this motion. This meant, according to the Senate's procedural rules, the rejection of the draft law without further debate. France remains, therefore, the classic example of an agnostic liberal and culturally indifferent regime, denying any minority rights.

The normative-conceptual framework of majority–minority relations in several Central and Southeastern European countries is based on the same ideological premises. In the 1990s, several constitutional courts in the region upheld restrictive norms regarding minority language rights by adopting a rigid reading of the constitutional principle of equality based on the concept of *formal* rather than *substantive* equality (see Chapter 8). The reasoning of the courts was thereby framed as a conflict between the so-called *special* rights of national minorities and the *general* principle of (formal) equality, with the latter to be given priority so that positive actions on behalf of minorities would in general be found unconstitutional (on the respective decision of the Slovak Constitutional Court see Bröstl 2007). However, the so-called Copenhagen criteria of 1993 included the 'respect for the rights of minorities' as a 'conditionality' requirement for European Union (EU) accession (see, in general, Kochenov 2008). Hence, linking minority rights protection to EU enlargement led to the ratification by most countries of the region of the FCNM and, by several of them, of the ECRML, and therefore a proliferation of domestic norms dealing with minority rights (see Lantschner *et al*. 2008, 2012). Their implementation, however, proved to be problematic in many cases due to the ideological framing of constitutions in the French, Jacobin tradition.

The case of the Supreme Administrative Court of Lithuania is instructive in this regard, following a judgment of the Constitutional Court stipulating that the 'state language preserves the identity of the nation, it integrates a civic nation, it ensures the expression of national sovereignty, the integrity and indivisibility of the state, and the smooth functioning of the state' (Lithuania, Constitutional Court, Decision of 21 October 1999, Case no. 14/98). In this 'spirit of the constitution', the Supreme Administrative Court of Lithuania held that the FCNM is 'a document of a political and policy-making character and not a normative document' (Lithuania, Supreme Administrative Court, Decision of 30 January 2009). Hardly any international lawyers would agree with this astonishing statement that challenges the legally binding character of the Convention. The court reiterated this position in 2011 and 2013 rulings regarding the use of minority languages on public signs and street names. In line with our observation of the questionability of the strict public–private division above, the judges consistently held that all inscriptions displayed *in public* must – without exception – be in the state language. Contrary to the text of Article 10 FCNM, which differentiates between bilingual and monolingual signs in the minority language with regard to the public–private distinction, it is therefore illegal to display signs and street names in minority languages (Lithuania, Supreme Administrative Court, Decision of 8 July 2011, Case no. A-662–2474/

2011). Moreover, in 2013, the court required the local authorities of Šalčininkai district to remove all bilingual signs from *private homes* and replace them with Lithuanian language signs, despite the fact that residents paid for the bilingual plates and displayed them on their private properties (Lithuania, Supreme Administrative Court, Decision of 30 September 2013, Case no. A-520–1271/2013). The local officials in charge of the implementation of this ruling faced high fines in case of noncompliance. Such ideologically inspired decisions are effective instruments for the 'nationalisation of public space' (Marko 2014) and beyond by allowing state interference even into the private sphere without restriction or necessary justification on the substantive grounds of 'national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of others', in the language of Articles 8 and 10 ECHR.

In conclusion, a political regime that aims to achieve linguistic homogeneity will interfere even in the sphere of private life. Another example of such intervention is the case law dealing with the spelling of surnames and forenames according to minority language rules which *rationae materiae* and *personae* fall within the scope of Article 8 ECHR, which guarantees the right to respect of private and family life. Generally, the ECtHR grants a wide margin of appreciation (see Chapter 2, section 2.1) to states with regard to the regulation of the use of languages in personal documents confirming the civil and legal status of a person. Two cases regarding the spelling of Kurdish names in Turkey seem to suggest a shift in the case law of the ECtHR from a minority-friendly approach to a position favourable to the idea of linguistic unity of the state.

In *Güzel Erdagöz v. Turkey* (2008), the ECtHR found a violation of Article 8 on the ground that the Turkish authorities had refused the applicant's request for rectification of the spelling of her forename according to its Kurdish pronunciation. The judges noted the wide variety of linguistic origins of Turkish forenames and underlined the fact that the Turkish law did not indicate clearly enough the extent and manner in which the authorities use their discretion when it comes to imposing restrictions on and rectifying forenames (ECtHR, *Güzel Erdagöz v. Turkey*, 2008: para. 53–5). In contrast, in *Kemal Taşkın and Others v. Turkey* (2010), the ECtHR found no violation of Article 8 and backed the position of the Turkish authorities which refused to change the applicants' names according to Kurdish spelling on the basis that they contained characters (i.e. q, w and x) which do not exist in the Turkish alphabet (ECtHR, *Kemal Taşkın and Others v. Turkey*, 2010: para. 59–72). The Turkish government argued that given the important role of the official language of a state, the restriction of the applicants' right to private life pursued the legitimate aims of protecting the rights and freedoms of others and the public order. The court held that the applicants did have the possibility of registering their traditional names by the phonetic transcription in accordance with the Turkish alphabet. The court also noted that if the names in question were spelled with the letters of the Turkish alphabet, they would acquire no offensive or ridiculous meaning, likely to cause the applicants inconvenience in their social life or create any obstacle to their personal identification (ibid: para. 6). In other words, *the court completely ignored the main issue at stake* – that is, that the spelling of the names is salient in the context of the Kurdish minority's efforts to preserve their mother tongue and distinct cultural identity in a state pursuing a repressive official language policy. Instead, the judges looked at the case

only from an *instrumental* perspective *indifferent* to cultural diversity. As Peroni (2013) rightly points out, the court thereby also failed to attach any significance to the wider context of the case and to the long history of discrimination faced by the Kurdish minority in Turkey.

The use of minority names in personal documents also raises problems when a state language policy shifts the matter from the private to the public sphere. In 1999, the Lithuanian Constitutional Court ruled on the constitutionality of the norms stipulating that in passports, the names and forenames of Lithuanian citizens belonging to national minorities must be written in Lithuanian letters, as they are pronounced, with or without Lithuanian suffixes (this choice being left to the person concerned). As mentioned above, the court referred to the status of the Lithuanian language as the official language of the state and emphasised the fact that it therefore had a 'constitutional value', which made its use compulsory in public life. The judges upheld the constitutionality of the name-related legislation, noting that a passport is an 'official document' certifying a permanent legal relationship between an individual and his or her country of citizenship. This type of relations belongs to the public sphere of the state, and thus, the names of individuals must be written in the state language. The court emphasised that:

> [i]n case legal norms provided that the names and family names of these citizens had to be written in other, non-Lithuanian letters, then not only the constitutional principle of the state language would be denied but also the activity of state and local government institutions, that of other enterprises, establishments and organisations would be disturbed.
>
> (Lithuania, Constitutional Court, Decision of 21 October 1999, Case no. 14/98: item 7)

In 2009, the Lithuanian parliament asked the Constitutional Court to interpret the main points of its 1999 decision. The court softened slightly the interpretation of the relevant norms but the substance remained the same: a Lithuanian passport should contain the names of individuals written in the state language. Exceptionally, when a person so requests, 'it is allowed to specify the name and family name of the individual in other, non-Lithuanian graphic signs of writing and in non-grammaticised form in other sections for entries of the passport' (Lithuania, Constitutional Court, Decision of 6 November 2009, Case no. 14/98). However, the court stated that:

> such entry of the name and family name of the individual in non-Lithuanian graphic signs of writing in other sections for entries of the passport should not be made equal to the entry regarding the identity of the individual made in the state language.
>
> (ibid.)

In 2014, the Ministry of Justice again asked the Constitutional Court to interpret some points of its 1999 ruling. The judges first emphasised that the parliament and the state institutions 'must pay heed to the constitutional imperative of the protection of the state Lithuanian language and assess any potential danger for the common Lithuanian language and the distinctiveness of the Lithuanian language' (Lithuania, Constitutional Court, Decision of

27 February 2014, Case no. 14/98). The Constitutional Court held that, in certain cases, following the prior approval of the so-called State Commission of the Lithuanian Language, non-Lithuanian names and surnames can be registered not only in Lithuanian characters but also in different characters of, however, only the Latin alphabet which are consistent with the tradition of the Lithuanian language and do not violate the rules of the national language. This means that no names may be written in the Cyrillic alphabet, which is a clear case of indirect discrimination (see Chapter 8) against citizens belonging to the Russian minority.

The restrictive state language policy of Lithuania has been challenged at the ECJ. In *Runevič-Vardyn and Wardyn* (Box 7.1), the ECJ acknowledged that 'a person's forename and surname are a constituent element of his identity and of his private life' (ECJ, *Runevič-Vardyn and Wardyn*, 2011: para. 66) and declared the submission admissible.

Box 7.1 ECJ, *Runevič-Vardyn and Wardyn* (2011)

Mrs. Malgožata Runevič-Vardyn, a member of the Polish minority in Lithuania, requested the Vilnius Civil Registry Division to change her name and surname on her birth and marriage certificates according to the spelling of the Polish language. Following the refusal of that request, Mrs. Runevič-Vardyn and her husband Mr. Wardyn, a Polish citizen, brought an action before a Lithuanian court that asked the ECJ for a preliminary ruling. The main question was whether EU law precludes rules of a member state, which require that surnames and forenames of individuals be entered on the certificates of civil status of that state in a form that complies with the spelling rules of the official national language.

Moreover, the ECJ emphasised that Council Directive 2000/43/EC, which implements the principle of equal treatment between persons irrespective of race or ethnicity is an expression of the principle of equality laid down in the European Union Charter of Fundamental Rights (EUCFR) and that the scope of application of the directive cannot be defined restrictively. However, the Court concluded that in this case the so-called Race Directive does not apply because its scope *ratione materiae* does not cover national rules governing the manner in which surnames and first names are to be entered on certificates of civil status. In an astonishing twist, the ECJ mentions Article 22 of the EUCFR (respect of the cultural and linguistic diversity) within a line of reasoning defending the measures taken with the aim to protect the 'state's official national language' (ECJ, *Runevič-Vardyn and Wardyn*, 2011: para. 43–4, 86–7). While the Court did not exclude the possibility that the refusal by Lithuanian authorities to change the names in the personal acts registering the civil or legal status might cause inconvenience for those concerned, it held that EU law does not preclude a refusal to change surnames and forenames, unless such a refusal is liable to cause 'serious inconvenience' to those concerned at administrative, professional and private levels. Hence, the governments of EU member states have a 'margin of appreciation' (see Chapter 2, section 2.1) in this regard, and whether state policy on the protection of an official language causes

serious inconvenience to members of minorities or not must be judged by domestic courts on a case-by-case basis. Thus, according to the ECJ, it is for the domestic court to decide whether the state's linguistic policies reflect a fair balance between the interests at issue: on the one hand, the rights of minorities and, on the other, the legitimate protection of its official state language.

Following the ECJ preliminary ruling in *Runevič-Vardyn and Wardyn*, the Lithuanian court found no 'serious inconvenience' and dismissed the complaint. However, a review of subsequent Lithuanian case law on name spelling indicates a more nuanced interpretation of the name-related regulations. A number of courts found that the refusal to register a surname in its original spelling was discriminatory and contrary to the jurisprudence of the ECJ and the ECtHR (Mickonytė 2017: 359). For instance, in February 2017, the Supreme Administrative Court of Lithuania decided that the state authorities must issue a passport for a Lithuanian national, Ms Alexia Gorecki-Mickiewicz, in which her name is written in its original form (i.e. with the letters x and w, which do not exist in the Lithuanian alphabet; Lithuania, Supreme Administrative Court, Decision of 28 February 2017). The Court held that such a measure was necessary in order to protect the right to private and family life guaranteed under Article 8 ECHR (Mickonytė 2017: 360–1).

Exactly the opposite legal position with regard to linguistic rights of minorities as *necessary precondition for the protection, preservation and promotion of minority cultures* thereby bridging the entire private–public divide has been taken by the Austrian Supreme Court in 1979. After a child had been taken away from her mother and put into a community home within a monolingual German-speaking environment, the Supreme Court argued in line with the respective provisions of the Austrian Civil Code concerning the protection of children that it is 'in the best interest' of a hitherto bilingually in Slovene and German educated child to be further educated not only in the official German language, but also in the minority language so that it would be able to make use of the constitutionally guaranteed language rights in the future (Austria, Supreme Court, Decision of 14 March 1979, 1 Ob 528/79). And the Austrian Constitutional Court ruled in 1983 that 'the reason for the lawfulness [of the use of a minority language] as [second] official language' in public administration and the judiciary in the settlement areas of a minority 'is not the incomprehensibility of the official language [German], but the *possibility to preserve and to foster the minority language*' (Austria, Constitutional Court, Judgement of 29 September 1983, VfSlg 98901/1983; emphasis added).

Moreover, as an example how to *overcome* the ideological *dichotomisation* of *individual* and *group rights* we consider in more detail the case of Romania. According to Article 1 of its Constitution, Romania is a 'sovereign, independent, unitary and indivisible national state'. While Article 13 declares Romanian the official language of the state, Article 6 (1) guarantees the right of persons belonging to national minorities to preserve, develop and express their ethnic, cultural, linguistic and religious identity. In July 1999, a group of 61 members of parliament called on the Constitutional Court to examine the compatibility of the ECRML with the Romanian constitutional framework. They argued that the ECRML ignored constitutional values such as the concept of 'national and unitary state' which are central to the Romanian constitution. Thus, the Charter's ratification would first require an amendment to the constitutional provision regarding the official language. It is worth noting that at the end of their argument, the Romanian members of parliament referred to the French

Constitutional Council's Decision of 15 June 1999 discussed above, emphasising the 'familiarity' between the French and Romanian constitutions. Finally, in the view of the authors of the complaint, the Charter violated the constitutional principles of equality and non-discrimination (Romania, Constitutional Court, Decision no. 113/1999).

The Court, however, held that the ECRML's ratification did not violate Article 1 of the Romanian Constitution since, according to the Charter, the protection and promotion of regional or minority languages is based on the principles of national sovereignty and territorial integrity of the states. The Court found that ratification did not require a revision of Article 13 of the Romanian Constitution because the Charter made clear that the measures in favour of regional or minority languages should not be to the detriment of the official language. The judges pointed out that such 'special measures' required by the provisions of the ECRML did not violate the principles of equality and non-discrimination but simply took into account the specific conditions of regional or minority languages. The Court noted that many of the measures provided by the Charter already featured in Romanian legislation and ruled that the decision of the French Constitutional Council of 15 June 1999 was not relevant to the case, in view of the different set of constitutional provisions that applied to national minorities in Romania. However, the majority of the political elite in Romania insisted on the rejection of the ratification of the Charter and a compromise to break the deadlock was reached only after Romania's accession to the EU. The Romanian parliament finally ratified the ECRML on October 2007, more than 12 years after the country had signed the Charter.

Let us remember that the Romanian legal system, like that of France, does not recognise the concept of group rights. However, the constitutional courts of the two states reached opposite conclusions regarding the ratification of the ECRML. Contrary to the *formalistic* and through the *Jacobin constitutional doctrine*-inspired notion of the 'indivisibility' and therefore 'singularity' of the French 'people' underlying the concept of the French 'nation' (Daly 2015: 467), as expressed in the *Peuple Corse* decision, the Romanian judges *contextualised* the international legal obligations following from the European Charter for Regional or Minority Languages (ECMRL) in light of its 'legislative history' and within the framework of the provisions of the Romanian constitution, thereby being able to overcome the ideological dichotomy of individual versus group rights (see Chapter 5, section 5.3).

7.3.1.2 Minority languages in the administration and judiciary

The use of minority languages in the administration and the judiciary has both an instrumental and an intrinsic value. Besides ensuring communication with the public authorities, using a minority language vis-à-vis state authorities guarantees the preservation and promotion of the respective minority identity, as we learn from the judgment of the 1983 Austrian Constitutional Court quoted above. Taking another example, in 1988 the Supreme Court of Canada held in *Ford v. Quebec* (*Attorney General)* that '[l]anguage is not merely a means or medium of expression; …. It is a means by which a people may express its cultural identity. It is also the means by which one expresses one's personal identity and sense of individuality'.

Following these minority-friendly interpretations of high courts, for whom language is not only a means of communication in terms of implementation of the law but also an essential element of social identity formation, we therefore chose to deal with the use of

minority languages vis-à-vis state authorities in the social-cultural dimension and the public sphere, although there are obvious overlaps and synergies with other related policy areas in the sociopolitical and socioeconomic spheres.

Persons belonging to national minorities may exercise their language rights in relation to public administration and the judicial system according to either the *personality* or the *territoriality* principle. The personality principle implies that the language rights are attached to individuals who, therefore enjoy them without any territorial limitation. According to the territoriality principle, persons belonging to national minorities can exercise language rights only within a certain administrative area where these norms shall apply. For instance, Slovene legislation guarantees a set of rights for Hungarians and Italians in the so-called 'ethnically mixed territories' (i.e. six municipalities for the Hungarian minority and three municipalities for the Italian minority). Taking another example, the French-speaking minority in Italy may exercise language rights only in the territory of the special autonomous region of the Aosta Valley bordering France.

The *internal administrative-territorial* design of states in conjunction with the application of the territoriality principle therefore *determines* the *level of protection* that members of a minority group enjoy. For instance, Italy is a regional (quasi-federal) state with an asymmetric constitutional structure. Five of the 20 Italian regions have a special autonomous status; that is, they have their own autonomy statutes as laws of constitutional rank, significant legislative and administrative competences, as well as financial autonomy, and they enjoy a special relationship with the central government on a bilateral basis. Protection of linguistic minorities in Italy is to all intents and purposes a matter that falls under the competence of sub-national authorities. One of outcomes of this system is that individuals belonging to the same minority group enjoy different treatment depending on their place of residence. Consider, for example, the situation of the Ladins, a small minority in Northern Italy (Rautz 2008). Ladins speak several dialects belonging to the group of Rhaeto-Romance languages, also spoken in Switzerland, and live territorially, concentrated in several mountain valleys located in three neighbouring provinces: South Tyrol, Trento and Belluno. While South Tyrol and Trento are autonomous provinces that together form the region of Trentino-South Tyrol with special autonomous status, Belluno is part of Veneto, a so-called ordinary region. Thus, the legal protection of the Ladin minority language differs substantially from province to province. In South Tyrol, Ladin is a co-official language in two valleys and enjoys a high level of protection. In the province of Trento, it is protected in few municipalities by means of a special provincial law. Finally, in Belluno there is no special regional or provincial regulation regarding the Ladin language, and only the minimum standards of the Italian framework law on historical-linguistic minorities are applicable.

As we learned from the development of legal standard setting in the previous section, an additional restrictive element is the fact that states shall, according to the FCNM, guarantee to persons belonging to national minorities the right to use their mother tongue in relations with administrative authorities in those areas inhabited 'traditionally or in substantial numbers' by the respective minorities. Hence, the question arises: what constitutes a 'substantial number'? An approach shared by many countries is to require a *numerical threshold*, so that a minority can claim language rights only in designated administrative-territorial units where a certain percentage of the population belongs to the respective minority group.

Thus, threshold arrangements restrict the exercise of language rights on the basis of the territoriality principle twice. The Austrian constitutional framework, for instance, guarantees Slovenian, Hungarian and Croatian minorities the exercise of their linguistic rights in three *Länder (*i.e. federal entities): Carinthia, Burgenland and Styria. Moreover, persons belonging to these minorities cannot exercise their language rights in communications with public authorities on the entire territory of these three *Länder*, but only in 'administrative districts' with a 'mixed population.' The Constitutional Court had to clarify the specific meaning of these terms and ruled in a minority-friendly way that these are either administrative districts or municipalities and their subdivisions (i.e. settlements) with a share of 10 per cent of minority language speakers (Austria, Constitutional Court, Decision of 13 December 2001, VfSlg 16404/2001). Taking another example of a specific arrangement, the system of nationality self-governments in Hungary requires different minority population thresholds for the exercise of different language rights (e.g. 10 per cent for bilingual toponymy and 20 per cent for recruitment of civil servants who speak the minority language).

One might reasonably assume that the more territorially concentrated a minority is, the better chance to exercise language rights it has. Obviously, even thresholds should not represent an obstacle to the use of minority languages in relations to state authorities and in the public sphere. On this issue, the position of the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC) is that a regulation that stipulates a 50 per cent threshold is in violation of the obligations following from the FCNM (ACFC, First Opinion on Bosnia and Herzegovina, 2005: para. 79–81). Hence, the ACFC welcomed domestic legislation allowing 'the use of minority languages in dealings with local authorities in areas where minorities account for more than 20 per cent of the population' (ACFC, First Opinion on Romania, 2001: para. 49). Moreover, it emphasised that caution and flexibility must be exercised in the application of thresholds and that authorities must take into account 'the specific local situation, notably the actual needs and demands of persons belonging to national minorities' (ACFC, Third Opinion on the Slovak Republic, 2010: para. 22).

However, in *empirical* reality even *large* and *territorially concentrated* minorities may be *negatively affected* through the process of urbanisation. Romania offers an illustrative example in this regard. The country has a large Hungarian minority most of whose members live in the historical region of Transylvania. According to Romanian legislation, ethnic Hungarians shall enjoy the right to use their mother tongue in their relations with local public authorities in administrative-territorial units where they represent at least 20 per cent of the inhabitants. This system is, however, more advantageous for minority communities *concentrated in small rural municipalities* whereas in urban areas with a large number of inhabitants it is less probable that a minority reaches the 20 per cent threshold. Thus, almost half of the members of the Hungarian minority in Romania who live in six cities of Transylvania, the largest being Cluj-Napoca/Kolozsvár, are not able to exercise their linguistic rights in relations with state institutions.

At this point, it is worth noting that the ACFC welcomes the reduction of the thresholds (ACFC, First Opinion on Austria, 2002: para. 45) and encourages states to find pragmatic solutions and 'not to exclusively rely on statistics' (ACFC, Fourth Opinion on the Slovak Republic, 2014: para. 53). For instance, the display of bilingual place names in areas where a minority population no longer reaches the threshold should take into consideration the

Table 7.3 Thresholds in the Austrian legal system

Year	*Threshold*	*Adoption/Amendment*
1976	25%	Law on Ethnic Groups (*Volksgruppengesetz*) stipulated this threshold for the entitlement to display topographical indications in minority languages.
2001	10%	Austrian Constitutional Court declared the 25% threshold unconstitutional and established a much lower one. For years, lawmakers and the Carinthian executive authorities ignored the decision of Constitutional Court.
2011	17.5%	Authorities and minority organisations reached a political compromise for a new threshold that entered into force by means of constitutional law.

symbolic value of the minority language and would be a 'positive tool of integration which conveys the message that a given territory is shared in harmony by various population groups' (ibid: para. 57).

That this minority-friendly interpretation meets fierce resistance can be seen from the Austrian example in Table 7.3. After the Constitutional Court declared the 25 per cent threshold established by law unconstitutional in 2001, the administrative and legislative authorities responsible for the implementation of the judgment and the amendment of the law objected to doing so or remained passive due to lack of political will (see Marko 2014: 284–5).

As late as 2011, the representatives of the federal authorities and the Land Kärnten (Carinthia) and three associations representing the Slovene minority in Carinthia negotiated and agreed upon a 17.5 per cent threshold, which is the mean of 25 and 10. This *political compromise* not only became legally binding for all national minorities, but it was stipulated in a constitutional law. First, this implies that persons belonging to national minorities are no longer able to raise the constitutionality of this legislation before the Constitutional Court. Second, it will be difficult to change the threshold in the future. A 17.5 per cent threshold is not necessarily a satisfactory solution for other small minorities like Hungarians and Croats in Burgenland. The ACFC expressed concern regarding the impact of the new threshold and pointed out that Austria should ensure the necessary conditions for the use of minority languages in relations with administrative authorities not only in 'areas inhabited by persons belonging to national minorities in *substantial numbers* but also, and especially, in those areas where they have been living *traditionally*'. Thus, '[g]iven the significant decrease in the figures related to persons speaking minority languages in recent decades in Austria, thresholds should be applied with particular caution' (ACFC, Third Opinion on Austria, 2011: para. 84).

In preliminary conclusion, following from the national and supranational court judgments, we can therefore hypothesise with Palermo who points out that:

> languages of the minorities are often seen as the main threat to the development of the state language, thus something against which the state language must be protected.

> This often creates a clash between laws aimed at protecting the minority languages and state language laws.
>
> (Palermo 2011: 8)

Also Slovakia (Table 7.4) is an illustrative example in this regard.

The Slovak State Language Law of 1995 stipulated the compulsory and exclusive use of the Slovak language in communications with the public administration and laid down pecuniary sanctions for noncompliance. In 1997, the Slovak Constitutional Court struck down these provisions but upheld its overall aim and structure (Slovak Republic, Constitutional Court, Judgment no. 260/1997 Coll.). The Law on Minority Languages of 1999 abrogated the fines for violations of the state language law and established a rather weak framework for the use of minority languages in the public sphere and in relations with state institutions. For instance, the 1999 regulation did not oblige civil servants employed by a municipality where a minority reached the legal threshold (20 per cent at that time) to speak the respective minority language. This meant that, in practice, the exercise of the right to use the mother tongue in dealings with the administration was 'still conditioned, de facto, by the linguistic skills of the civil servants and ultimately, by their good will' (Palermo 2011: 9). The State Language Law of 2009 reintroduced fines and restrictions on the use of minority languages in public and private life. Following a wave of sharp criticism from the international community, a softer version of the state language law was adopted in 2011. It reduced the maximum amount of the fine to €2,500 and the number of situations in which sanctions applied. Perhaps as a way to counterbalance the criticism for maintaining pecuniary sanctions in the State Language Law, Slovakia also introduced fines in the Minority Languages Law of 2011. Moreover, it lowered the threshold required for the exercise of language rights from 20 per cent to 15 per cent. However, until 2021 there will be no change in practice regarding the number of bilingual municipalities in which persons belonging to a national minority can exercise their linguistic rights in relations with public authorities. To achieve this status, the minority population of the respective municipality must reach the 15 per cent threshold in two consecutive censuses (i.e. in 2011 and in 2021).

Table 7.4 Language laws in Slovakia

Year	*Law*	*Main features*
1995	State language law	Fines for not using Slovak in public communication Restrictions on the use of minority languages
1999	Minority languages law	Abrogation of fines from State Language Law of 1995 Weak framework for protection of minority languages
2009	State language law	New fines for not using Slovak in public communication Interference in the use of minority languages in private life
2011	State language law	Amount of fines is lowered Number of situations in which sanctions apply is reduced
2011	Minority languages law	Fines for violation of certain provisions of the law Threshold is lowered to 15%; practical effects only in 2021

In 2013 and 2014, the Romanian High Court of Cassation and Justice (HCCJ) issued two decisions which affect various aspects of the right to use minority languages in relations with the public administration. They demonstrate the possible systematic approach elaborated in Table 7.1 and the problems in implementation. Article 120 (2) of the Romanian Constitution establishes the general principle that in those territorial-administrative units where citizens belonging to a national minority are 'significantly' represented, provision shall be made for the oral and written use of that national minority's language in relations with local public administrative authorities. Law no. 215/2001 on local public administration stipulates that in administrative-territorial units where the share of the members of a national minority amounts to at least 20 per cent of the population, citizens have the right to use the respective minority language, in writing or orally, in relations with local public administration authorities and to receive the answer both in Romanian and in their mother tongue (Article 19 and 76 (2)). Moreover, in such municipalities, local authorities shall employ persons who know the respective minority language in jobs that require 'interactions with the public' (Article 76 (3)). The secretary of a territorial-administrative unit has the task to ensure the transparency and communication of the documents issued by the local council and mayor with interested authorities, institutions and persons (Article 117). Law no. 188/1999 on the legal status of public servants also contains a provision regarding employment of persons who know minority languages (Article 108) and bans any discrimination based on ethnic criteria (Article 27 (2)).

In 2011, the local authorities of the Valea Crișului/Sepsikőröspatak municipality and the National Agency of Civil Servants publicly announced a job opening for the position of a 'secretary of the municipality'. Valea Crișului/Sepsikőröspatak has a population of around 2300 inhabitants and approximately 98 per cent of the residents belong to the Hungarian minority. The job requirements included inter alia knowledge of the Hungarian language at advanced level. One of the candidates challenged this language requirement at a regional court of appeal and the National Council for Combating Discrimination. Both bodies rejected the claim and ruled that the language requirement is in conformity with the anti-discrimination legislation. The plaintiff appealed both decisions before the HCCJ, the Supreme Court of Romania. The HCCJ held that administrative jobs that require interactions with citizens are only those involving 'a direct contact' with the public, such as working at an information counter. The court stated that as the secretary holds a management position within the hierarchy of the civil service, he or she does not have direct contact with the citizens but only coordinates the communication activities (Romania, High Court of Cassation and Justice, Decision no. 2968/2013) thus making the knowledge of a minority language unnecessary. The judges reiterated this argument in the second judgment in a phrase which not only contradicts the logic of the first reasoning, but also clearly illustrates the court's bias in terms of an 'instrumental language ideology':

> The fact that in exercising his/her tasks, the secretary of the municipality has direct contact with Romanian citizens of Hungarian ethnicity, cannot objectively justify, in itself, the imposition of Hungarian language knowledge as occupational requirement in a state in which the relations between citizens and public authorities are conducted in Romanian, as official language
>
> (Romania, High Court of Cassation and Justice, Decision no. 1438/2014: 5)

As a court of cassation, one of the tasks of the HCCJ is to ensure the uniform interpretation and application of the law by all lower courts. Therefore, one may argue that the restrictive approach of the HCCJ renders a basic language right of national minorities in Romania inoperable.

International instruments allow states a wide margin of appreciation in relation to the right to *use minority languages in the judicial system*. But Article 6 (3) ECHR and Article 10 (3) FCNM provide for two basic *human rights* as *minimum standard*. Everyone charged with a criminal offence has …

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of accusation against him;
b. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Moreover, Article 9 ECRML contains detailed provisions that deal also with civil and administrative proceedings, but states can choose which provisions to transpose into their domestic legislation from the *à la carte* menu of the Charter.

In contrast, the *highest level of language rights* is achieved with a *bilingual administration* and *judiciary* which can be found in practice at a national level through territorial self-governance arrangements. Again the autonomous province of South Tyrol may serve as an example, since the implementation of this bilingual system also led to an astonishing development under EU law. In South Tyrol, German and Italian are co-official languages. Civil proceedings are either monolingual (i.e. either in Italian or in German) and therefore guaranteeing what we called above *monolingual equality*, or they are *bilingual*. Parties to the proceedings have the right to choose the language they want to use. They know that agreeing to use the same language may speed up the proceedings. If the court procedure is bilingual, the court offices ensure the translation of the documents. However, the parties can use German only in front of the courts located in South Tyrol due to the principle of territoriality. If the losing party appeals to a higher court outside the autonomous province, all documents of the proceedings must be translated into Italian. As a rule, criminal proceedings are carried out in the language chosen by the defendant. A criminal trial may be bilingual if co-defendants choose different languages (for more details see Fraenkel-Haeberle 2008).

It is worth noting that these rules providing residents of South Tyrol with extensive language rights in the judicial system have to be applied to all EU citizens, as held by the ECJ in cases *Bickel and Franz* (1998) and *Grauel Rüffer v Pokorná* (2014). The first case concerned criminal proceedings brought against Mr Bickel, an Austrian lorry driver, and Mr Franz, a German tourist, who breached Italian law while travelling in South Tyrol. They did not speak Italian and, relying on the special language rules applicable in South Tyrol, requested to have the criminal proceedings in German. The second case concerned civil proceedings between Ms Grauel Rüffer and Ms Pokorná in an action for damages following a skiing accident. Ms Grauel Rüffer, a German skier, was injured on a ski slope located in South Tyrol and requested damages from Ms Pokorná, a Czech skier, who allegedly had caused the accident. The documents of the civil proceedings were drafted in German even though the use of Italian is compulsory before Italian civil courts in general.

The ECJ had to clarify whether EU law requires the extension of the rules of procedure applicable to Italian citizens living in South Tyrol to citizens of other member states who are travelling or living in the province. In *Bickel and Franz* (1998), the court – going far beyond the minimum standard following from Article 6 (3) ECHR – came to the conclusion that:

> the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals. Consequently, persons like Mr. Bickel and Mr. Franz, in exercising that right in another Member State, are in principle entitled … to treatment no less favourable than that accorded to nationals of the host State so far as concerns the use of languages which are spoken there.
>
> (ECJ, *Bickel and Franz*, 1998: para. 16)

The Italian government had argued that the aim of the special language rules applicable in South Tyrol is to protect the German-speaking minority residing in the province. The ECJ acknowledged that 'of course, the protection of such a minority may constitute a legitimate aim' but then noted that this aim would not be undermined 'if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement' (ibid: para. 29). A restrictive interpretation of the Italian law granting the right to have criminal proceedings conducted in German only to German-speaking Italian citizens who are residents of South Tyrol would infringe the principle of non-discrimination on the grounds of nationality. Thereby, when declaring that national rules are in violation of EU law, the ECJ transformed the logic of the four freedoms of movement from an instrument of 'negative market integration' into one of 'positive integration' (see Craig and de Búrca 2015: 665–6). The ECJ reached the same conclusion regarding the use of languages in civil proceedings in the case *Grauel Rüffer v. Pokorná* (2014).

All this goes to show how dynamic the processes of legal standard setting and implementation through adjudication are, and that contextual factors such as the size and geographical concentration of minority groups shape a country's system of language rights, as can also be seen from empirical research.

A 2010 empirical study, carried out in a Romanian county where around 85 per cent of the population was ethnic Hungarian, found that over 80 per cent of Hungarian inhabitants used their mother tongue 'always/most of the time' in oral communications with public authorities. However, the figure dropped to slightly over 50 per cent in the case of written communications (Horváth *et al*. 2010: 84–5). Taking another example, the right to receive answers in the mother tongue may remain an empty letter in the absence of a correlative obligation of the state authorities to employ civil servants who have a good knowledge of the respective minority language. Slovakia's 1990 law on the official language is a case in point. The law allowed the use of minority languages in relations with the public authorities in those municipalities where minorities represented at least 20 per cent of the population. However, the civil servants employed in these areas were not required to know and

use minority languages and all public documents were issued in the official language only (Daftary and Gál: 2000: 20–21).

A similar situation regards the right to use minority languages *in the judiciary*. In most cases, there is no obligation for the state to provide judges and court personnel who know minority languages; therefore, the courts generally use translators and interpreters. In Austria, *even if the judge has the necessary minority language skills*, a procedure can be carried out only in the respective minority language if all parties agree to this. As soon as one party demands German as the language of communication, the procedure has to be carried out in German with the assistance of interpreters. In any case, written records of the proceedings have to be laid down in German. Moreover, there is no right to translation of all written statements, including evidence of experts. Only criminal charges, written submissions of parties in civil and administrative procedures, and criminal sentences or other forms of judgments have to be translated (Marko 2014). By contrast, in Slovenia the court proceedings are bilingual if the parties prefer to use different languages – that is, Slovene and Italian or Hungarian. When all parties agree to use a minority language, the proceedings are conducted monolingually. If the proceedings are conducted in a minority language, the minutes are recorded in that language. The court must ensure the interpretation of all statements and expert opinions and translation of all documents in the language(s) of proceedings. If a court of higher instance has to deal with a case that has been started bilingually at the court of lower instance, bilingualism extends even beyond the ethnically mixed areas. The ministry of justice is responsible for the training of judges and court personnel for conducting bilingual proceedings. All costs arising from judicial proceedings in minority languages (i.e. monolingual and bilingual) are covered by the state.

7.3.2 The structural dualism of religion

Freedom of religion, although a key foundational element of the modern human rights doctrine, remains a highly controversial issue. As outlined in the introduction, despite the historical-structural legacy postulated by historians and social scientists in terms of the secularisation of European societies and the separation of state and church in most European countries (see, however, the eminent critique of these concepts by Bader 2007: 33–64), religion has and continues to have an intrinsic *dual dynamic* as both a marker of identity as well as a tool for the organisation of political and social life, as we elaborated in the introduction to this chapter. And it is the *ideological* and *normative legacy* of *liberalism* to this day that we insist that religions and membership of religious communities must not play a role for equal opportunities, upward social mobility and political participation.

Hence, it should not come as a surprise that we could witness, also in recent decades, several intense political debates and norm contestations regarding various aspects of 'freedom of thought, conscience and religion' including the right – to use the language of Article 9 ECHR again – 'to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance'. Intense political debates were, not the least, sparked by controversies about different outcomes of judgments at the national and supranational level (i.e. by

the ECtHR and the ECJ) concerning the question whether crucifixes on classroom walls or wearing a headscarf in the public education system, but also in private relations between an employer and employee can or even must be prohibited. Other controversies concerning freedom of religion centred on the question whether religious rules for the slaughtering of animals may justify exemptions from animal protection legislation or which conditions may be required in national law for the *official recognition* of religious associations and whether and to what extent state authorities can intervene in the sphere of corporate *autonomy* of recognised churches and religious associations, for instance, to resolve conflicts between their members. These examples not only represent the problems of the *structural dualism* of freedom of religion in terms of the *dichotomic* understandings of *public* and *private* relations, as well as *individual* and *group rights,* as we elaborated in the introduction to this chapter, but they must also be seen in the broader political *context* of *social* and *system integration* of societies, which we elaborated in Chapter 5.

Thereby, religion and its role for identity formation in social relations may affect three dimensions which can be distinguished analytically: the *way of believing*, the *way of life* and the *way of living together* in society, all of which are regulated by international and national law (Marko 2012: 27). The first dimension affects the personal conscience of individuals and is thus internally oriented (in legal terminology called *forum internum*). As a way of life and a way of living together, freedom of religion is practised in an external dimension (*forum externum*). This dimension is again normatively structured by three forms of relationships, as can be seen in Figure 7.3. The general functional structuration of individual liberal human rights norms following from the wording of Article 9 ECHR must be perceived as a *triangular relationship* between the state and individuals to be protected against unjustified state interference into the exercise of their religious freedom in both the private and the public spheres (i.e. *positive freedom* of religion) and individuals to be protected against any form of religious domination (i.e. *negative freedom* of religion) by either state authorities or private parties. In the latter case there is thus not only a duty of state authorities to refrain from religious indoctrination but also a duty to protect the exercise of positive as well as negative freedom of religion between private parties (i.e. what is called the horizontal effect in legal-dogmatic terminology). This can lead to highly sensitive acts of balancing in the application of the proportionality principle as standard of judicial review, in particular of supranational courts, as can be seen from the case law of the ECtHR whether proselytism is to

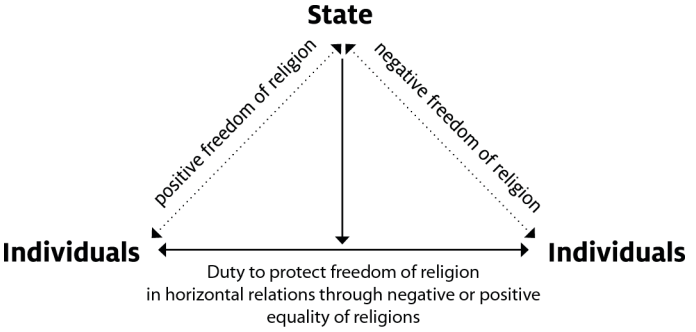

Figure 7.3 Freedom of religion: tripolar structure

be considered an exercise of positive freedom of religion or an unjustified interference into negative freedom of religion (see in particular ECtHR, *Kokkinakis v. Greece*, 1993, and *Larissis and Others v. Greece*, 1998).

Hence, in general we can analytically differentiate the following structurations of the concept of freedom of religion within the respective context of state–church–religion relationships:

- the distinction between *individual positive* freedom *of* and *negative* freedom *from* religion;
- the relationship and postulated models of *accommodation* between states and religions in terms of *group-related negative* or *positive equality of* religions;
- the *corporatist* freedom or *group right* of recognised churches or religious associations in the form of autonomy (i.e. self-governance of their internal affairs).

Freedom of religion and the *accommodation* of *religious ways of life* can be distinguished from the *ways of belief* and *the ways of living together* as an analytical tool to understand and explain the case law discussed in the following sub-sections, but they are, of course, in practice intimately linked to situational contexts, like praying and holiday requirements at work, dress codes in public life, slaughtering of animals, burial rules or religious customs affecting private law such as the (non)recognition of marriage ceremonies, divorce and inheritance rules, which pose the problem of recognition of 'legal pluralism' (see Chapters 3 and 4). The following sub-sections present how European courts have addressed these complex normative issues of freedom of religion along the lines of our structuration above.

7.3.2.1 Positive versus negative religious freedoms and positive and negative equality of religions

As indicated above, the text of Article 9 of the ECHR (Box 7.2) includes all three structural relations elaborated above.

Box 7.2 Freedom of thought, conscience and religion, ECHR (1950)

Article 9

- Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Two preliminary statements are necessary after reading this text. As follows from the normative framework composed of Article 9 and Article 14 ECHR, the anti-discrimination provision and the settled case law of the ECtHR – which also informs the interpretation of EU law by the ECJ – freedom of religion is one of the foundations of a democratic society because 'the pluralism, indissociable from a democratic society … depends on it' (ECtHR, *Kokkinakis v. Greece*, 1993; *Buscarini and Others v. San Marino*, 1999; *Eweida and Others v. The United Kingdom*, 2013). Hence, according to legal-dogmatic doctrine, limitations of the freedom of religion by state interference can only be justified in relation to the 'substantive' goals exhaustively enumerated in paragraph 2 of Article 9, to be finally subject to judicial review.

Moreover, since the 'individual rights' perspective in the interpretation of Article 9 is inextricably intertwined in practice with the 'group-related' perspective, it is not possible to neatly separate the case law presented in the following sub-section along these lines. Quite to the contrary, we see that the ideologically predetermined *individual* versus *group rights dichotomy* together with the *private* versus *public dichotomy* again determine the reasoning of judgments. More specifically, these dichotomies influence the outcome of the norm contestations (i.e. where to draw the boundary lines in the relationships between states, churches and religions). As this is different with the issue of 'autonomy' as corporative group right, we describe and analyse the respective case law in a separate sub-section below.

Hence, to clarify in more detail the *complex normative relationships* summarised in Table 7.2 on page 234 in terms of *rights and duties* of either state authorities, churches or religious communities, and individual persons regarding the concept of freedom of religion:

- *Positive freedom* of religion shall guarantee individuals the right to practice their religious belief alone or in community with others in private and in the public sphere; this corresponds, first, with the *duty* of the state *not to interfere* without legitimate grounds in these religious practices and raises, for instance, the problem of whether it is possible to categorically distinguish between 'religious' and 'sociocultural' (i.e. non-religious symbols or practices), as we see from the norm contestations about dress codes and the use of crucifixes. Following from the anti-discrimination provisions regarding religion, there is, second, also a *duty* of the state *to protect* religious beliefs and practices in so-called horizontal relations between private parties, as we see from case law of the ECtHR and the ECJ in contractual relations between employers and employees. Whether positive freedom of religion also allows for proselytisation (i.e. to try to convince somebody to change his or her religion) in horizontal relations is a matter of dispute. Moreover, as can be seen from Table 7.2, positive freedom of religion also guarantees, in conjunction with Article 11 ECHR, the individual right to *establish religious associations* so that this is a right with an obvious *group-related dimension*. Frequently, this will then also include the *group right* to self-government of private educational institutions (kindergartens, primary and secondary schools, universities) on the basis of religiously inspired education and/or religious training.
- *Negative freedom* from religion shall guarantee individuals the right not to be forced by state authorities and private parties to hold or practice religious beliefs as can be seen,

for instance, from a case concerning the duty to take an oath on the Gospel (ECtHR, *Buscarini and Others v. San Marino*, 1999). This freedom thus corresponds first with the *duty* of the state *to refrain* from any such activities under the liberal and republican topos of a state's necessary 'neutrality' vis-à-vis religious denominations and philosophical convictions and, second, the *duty to protect* individuals against all 'pressures' to change or to give up their religious denomination or philosophical conviction, be it by state authorities or private parties. This corresponds in particular with the right to opt out of public religious education, as specified by Article 2, Protocol No. 1 ECHR.

- The concept of *negative equality* of religions is derived from the liberal topos of state neutrality or equidistance vis-à-vis religions with the consequence that legislative and administrative authorities generally *prohibit* the manifestation of religious symbols or the exercise of religious practices in state institutions or the public sphere. This is on an equal basis with the purpose to cement the *strict private–public divide* in social relations between religious groupings and the state which is – simultaneously – identified with *the* public sphere.
- The concept of *positive equality* of religions then describes or proscribes the group-related *equal right* of all recognised religions and their members to manifest religious symbols and exercise religious practices in state institutions and the public sphere. As a consequence, *religious pluralism* becomes a characteristic element of the respective society and state.
- The traditional *corporate group rights* of Christian churches and religious associations, and also newly recognised religions, include their institutional autonomy for the self-governance of their internal affairs, with the corresponding duty of the state to refrain from unjustified interferences into this autonomy. Moreover, churches and religious associations will frequently have the *right to participate* in the *public educational system* if religious education is offered, in general through representatives of the respective religious association or through teachers accredited by them. This will raise the question of whether the state has to pay their salaries.

In conclusion, guaranteeing 'religious freedom', according to the text of Articles 9 and 14 ECHR, requires states to find various forms of *balance* between positive and negative freedom *of* and *from* religion as well as equality *between* religions, through which we call from a legal-dogmatic perspective the *redistribution paradigm*. This follows from anti-discrimination law. The *recognition paradigm* follows from the 'accommodation' of individual rights with legal duties and the recognition and implementation of group-related or group rights (for the philosophical debate regarding the redistribution and recognition dimensions, see Chapter 5, section 5.3). Moreover, corresponding with Kymlicka's seminal distinction between 'external intervention' and 'internal restriction' (see Chapter 4, section 4.3), such a balance is not only required in relationships *between* a religion and a state and between different religions, but also *within* a religion, among members of the same religious community, highlighting the problem of 'the protection of minorities within minorities'. Indeed, as pointed out by Deveaux, dilemmas regarding the accommodation of religious diversity and cultural practices are primarily *intracultural* rather than *intercultural*, and reflect the different interests of different members or groups within the same religious community (Deveaux 2003).

To begin our description and analysis of case law, here is an exemplary judgment of the Swiss Supreme Court handed down in 1993. After the school authorities of the Canton Zürich had refused to grant a Muslim girl an exemption from coeducative swimming classes as part of compulsory public education, her father complained before the courts because of the purported violation of freedom of religion. The Swiss Supreme Court, as the final court of appeal, accepted the complaint and declared the refusal to grant an exemption a violation of freedom of religion. The reasoning thereby responds to the central arguments of the cantonal authority in rejection of the appeal for the grant of an exemption with, however, interesting generalising statements. First, the Court clarifies the scope of application *rationae personae* and *materiae* of Article 9 ECHR and the respective norm of the Swiss constitution and their interrelationship concerning the question of whether the refusal to participate in coeducative swimming classes must be considered as required by their religious beliefs. With the assessment of the Court that there is a specific problem with Islam, insofar as this religion 'does not restrict religiously motivated behaviour to the spiritual-religious life as this is consistent with the dominant view in a secular society based on a plurality of values, but combines with its belief system also the duty to follow religious rules in all spheres of life', the Court addresses our analytical distinction made above between ways of believing and ways of life and whether it is possible to draw a boundary line between them. The Court, however, circumvents this analytical trap following from the antinomy of a secular society and the state's 'neutrality', in particular with regard to ways of believing, as this is settled case law in Switzerland in two steps. First, the Court declares that 'it *must not evaluate religious attitudes and rules or even their theological correctness*, in particular the interpretation of the pertinent parts of holy scriptures, as long as the borderline to arbitrariness is not transgressed' (emphasis added). The small 'back door' left open thereby for interferences into what we called above the *forum internum* is justified in the reasoning with the legal-dogmatic doctrine that also 'human rights' are not 'absolute' rights, but must be balanced with conflicting duties or rights of others, prescribed as either implicit or even explicit 'limitations' following from the text of Article 9 (2) ECHR. Hence, the Court argues 'Guaranteeing freedom of religion without assessment which religious rules are covered by the constitutionally guaranteed protection would render this right absolute' (Switzerland, Federal Supreme Court, *A. und M. gegen Regierungsrat des Kantons Zürich*, BGE 119 Ia 178: 186). In a second step, however, the Court swings the 'back door' fully open by ruling that it can deal 'without limitations with *religions as social phenomenon*' (emphasis added) and, therefore, whether a certain behaviour is based on religious belief or not. This argumentative pattern, however, is interpretatively extended and generalised in two ways of central concern for the construction and legitimation of our model of multiple diversity governance, namely the *protection of minorities within minorities* and the *categorical distinction* between *assimilation* and *integration* necessary for social and system integration. Concerning the first argument, the Court argues:

> It is *irrelevant* whether *all members* of a religious community comply with the contested religious practices, or a *majority*, or even a *minority*. Due to the wide scope of application of the constitutionally guaranteed freedom of religion, this right must be protected even when the practices in question have to be seen as a consequence of the

> religious beliefs of a minority. It is also irrelevant whether the compliance with the religious rule must be considered a general practice in the country of origin, in this case Turkey, of the person invoking it.
>
> (ibid: 187, emphasis added)

This means that the 'application of a rule of reciprocity', which is so prominent in public debates on immigrant integration, cannot be a legitimate legal argument.

With regard to our *analytical distinction* between *ways of life* and *ways of living together* and therefore the question of whether it is possible and, if so, how to draw a boundary line between these two spheres, the Court – in interpretation of the constitutional framework – finds it necessary to draw a *categorical distinction* between *assimilation* and *integration,* even for members of so-called 'new minorities':

> In the opinion of the cantonal minister the restrictive administrative practice in granting exemptions is justified by the principle of integration which requires that foreigners have to adapt to the living conditions of the host society. Members of other countries and other cultures staying in Switzerland have, without doubt, to comply with the *domestic legal order* like Swiss citizens. However, there is *no legal duty* that they have, in addition, *to adapt their traditions* and *ways of life*. The integration principle does *not* allow to postulate a legal rule that they have to *constrain* their religious and philosophical *beliefs* which have to be considered inappropriate.
>
> (ibid: 196, emphasis added, all translations by the author)

Hence, applying these generalised legal principles to the facts of the case, the Swiss Supreme Court found that the refusal to grant an exemption from coeducational swimming classes, which were only a small part of the compulsory sports classes, and since the father had not asked for an exemption in general, amounted to a disproportionate interference into the constitutionally guaranteed right to (positive) freedom of religion. This landmark decision regarding *immigrant integration* was, however, overruled by a Swiss Supreme Court judgment in 2008 stating that 'participation in the economic, social, and cultural life and thus social peace and equality of opportunities … can only be guaranteed by the enculturation and integration of children and teenagers from other cultures into the established societal conditions … It is the task of the constitutional state to create the minimum of inner cohesion of state and society which is necessary for a harmonious living together based on respect and tolerance. It can and must be expected from foreigners that they are ready to live together with the local population and to accept the Swiss legal order with its principles of democracy and rule of law – which the state has to defend also against deviating claims which are culturally justified – as well as the local social and societal circumstances' (Swiss Supreme Court, 24 October 2008, BGE 135 I 79, p.88, 7.2, translation by the author). This position became settled case law and was also confirmed by the ECtHR, *Osmanoğlu and Kocabaş v. Switzerland* (2017) with the argument that 'the children's interest in an all-round education, facilitating their successful social integration according to local customs and mores, takes precedence over the parents' wish to have their daughters exempted from mixed swimming lessons' (para. 97, emphasis added).

The problem raised but denied in substance in the later judgments of the Swiss Supreme Court and the quoted judgment of the ECtHR whether not only minorities as such but also (conservative, more strictly believing) members of minorities have to be protected, also underlies the structural normative problem in the judgment of the ECtHR, *Cha'are Shalom ve Tsedek v. France* (2000). Brought before the court as a case of indirect discrimination, a Jewish group adhering to stricter rules of religious slaughtering did not receive authorisation from the French state to follow their own ritual slaughter because permission had – in the eyes of the government – already been granted to a more 'representative' Jewish religious community with different slaughter rules. However, according to the reasoning of the ECtHR, the difference of treatment was limited in scope, pursued a legitimate aim (protection of public health and public order) and was proportional to its aim so that the application was rejected on its merits. The dissenting opinion stated, however, that the state was violating Article 14 and was treating the Jewish minority group in a discriminatory way by not having carefully taken into consideration their request for ritual slaughter independently of the authorisation given to another Jewish group. Hence, with the denial of the authorisation, the state, and also the ECtHR, had failed to secure religious pluralism in terms of the protection of minorities within minorities.

In striking contrast, in the United Kingdom, Sikhs are exempted from various laws, such as the duty to use a crash helmet when riding a motorbike (if they wear their turban) and are allowed to carry the *kirpan* (a ceremonial knife) in places where similar dangerous items are prohibited. Along these lines, the British High Court argued in 2008 that a Sikh school student could wear the *kara*, a religious bangle, in violation of the school's 'no jewellery' policy, and found the school guilty of indirect discrimination on grounds of religion and race for refusing to allow the student to attend the school wearing the *kara* (UK, England and Wales High Court of Justice, Judgment of 29 July 2008: para. 160). For further rulings on religious diversity and education, see Box 7.3.

Box 7.3 Rulings on religious diversity in the field of public education

Concerning religious diversity vis-à-vis public education, the ECtHR shows a mixed record, at times accommodating religious diversity and other times restricting freedom of religion. For example, regarding religious education, which is an important aspect of socialisation and identity formation, the ECtHR followed a rather minority-friendly jurisprudence. Article 2 of Protocol 1 ECHR (on the respect for religious convictions of the parents within the public school system) includes not only the school curriculum but also the organisation of the school such as prayer duties or other activities, holidays or dietary laws of a religious minority. According to the Court, the public school system has to be objective and pluralistic and has to respect the religious and philosophical beliefs of the parents (ECtHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 1976). In the case *Folgerø and Others v. Norway* (2007) the Court, however, underlined the principle of fair treatment of minorities which means that minority interests need not always be subordinated to those of the majority nor must they give

a free hand to all convictions. The Court declared no violation of Article 2 Protocol 1 ECHR in several cases on behalf of 'traditional' (read Christian) religions; for instance, if the curriculum pays more attention to a religion historically linked to a state or does not offer alternative optional lessons because of the administrative limitations of a school (see ECtHR, *Appel-Irrgang v. Germany*, 2009 and ECtHR, *Grzelak v. Poland*, 2010). At national level, the German Federal Administrative Court permitted Jewish children to be excused from Saturday attendance at school (Germany, Federal Administrative Court, Decision of 17 April 1973, VII C 38.70; BVerwGE 42, 128) and in 1991, the Swiss Supreme Court ruled that it was unconstitutional for a cantonal school law to make no provision at all for exemptions from school attendance requirements for religious reasons (Switzerland, Federal Supreme Court, *E. und H.S. gegen Kantonschulrat, Regierungsrat und Verwaltungsgericht des Kantons Glarus*, BGE 117 la 311). See, however, the text below for more recent developments in the case law of national and supranational courts, in particular regarding the use of religious symbols in public education.

Also under the FCNM, persons belonging to national minorities have the freedom of thought, conscience and religion (Article 7) and the external right to manifest their religion or belief and establish religious institutions, organisations and associations (Article 8). Furthermore, Article 4 stipulates 'full and effective equality between persons belonging to a national minority and those belonging to the majority'. Article 4 taken in conjunction with Article 5 (on the promotion of minority culture and the need to refrain from assimilatory practices) creates a *state obligation* of substantive equality to promote and 'preserve the essential elements of their identity, namely their religion … traditions and cultural heritage'. Freedom of religion under the mechanism of the FCNM contains also a positive state duty under Article 12 (on education) and Article 6 (on promoting spirit of tolerance). Positive duties of protection through dialogue shall prevent tensions between religious communities or between communities and the state (ACFC, First Opinion on Georgia, 2009: para. 94, para. 183; First Opinion on Montenegro 2008: para. 65; Second Opinion on Spain, 2007: para. 111; Second Opinion on United Kingdom, 2007: para. 253). Moreover, the state needs to involve representatives of religious groups when it comes to decision-making processes concerning their issues such as the educational system (Article 8), the preservation of religious heritage, the promotion of religious identity or financial support (ACFC, Second Opinion on Denmark, 2004: para. 146, para. 156; First Opinion on Poland 2003: para. 592; Second Opinion on Slovenia, 2005: para. 192; Second Opinion on Moldova, 2004: para. 50). The curricula and the content of religious education are addressed under Articles 8 and 12, in particular the state's obligation to foster knowledge of the religion(s) of national minorities. The need to promote this knowledge and to revise textbooks, which is particularly relevant for teachers in the subjects of history and religion, features in almost all above mentioned country-specific opinions of the ACFC.

It should also be pointed out that there is a lot of informal mutual exchange in the supervisory practice between the various relevant European legal tools in the matter of freedom

of religion. For instance, Article 19 FCNM explicitly refers back to the ECHR concerning limitations with regard to minority protection, and the ACFC – conducting the monitoring process under the FCNM – pays attention to the ECtHR jurisprudence in terms of minimum standards as we learned from Chapter 3, section 3.4. Other institutions and non-legally binding documents, contributing to the European integration process must also be mentioned such as the Organisation for Security and Cooperation in Europe's (OSCE) Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools, promulgated by the OSCE Office for Democratic Institutions and Human Rights or recommendations by the European Centre against Racism and Intolerance, whose mandate includes issues of religious intolerance. In the Council Resolution on the Response of Educational Systems to the Problem of Racism, the EU recognises the importance of promoting interreligious dialogue. The EU Agency for Fundamental Rights is also relevant for developing policies relating to fundamental rights for EU institutions and member states, focusing on xenophobia, racism and antisemitism (see European Union Agency for Fundamental Rights 2016, 2017a and 2017b).

However, it seems that the pendulum has swung, in general, in the other direction since the 2000s for the *recognition paradigm*, in particular based on the principle of *accommodation,* as can be seen from national legislation and case law concerning the manifestation of one's religious belief when using religious symbols, more specifically the Christian crucifix and the Islamic headscarf and the burqa in the public sphere or in state institutions. Thereby *priority* is given to *negative freedom* of religion in balancing individual rights and corresponding duties following from legal-doctrinal principles created by courts in their interpretation of constitutional provisions such as so-called state neutrality vis-à-vis religions. In addition, the purported danger of the creation of parallel societies is invoked by courts whereas explicit legislation and administrative regulations are applying the concept of *negative equality of religions* as we see from the example of France to ensure the republican way of living together through *general prohibitions* affecting allegedly all religions in an equal way.

As early as 1988, the German Federal Administrative Court ruled in a case of a teacher wearing the typical red Bhagwan dress that this behaviour violates the basic right of negative religious freedom (Germany, Federal Administrative Court, Decision of 8 March 1988, 2 B 92.87). In September 2003, the German Federal Constitutional Court ruled in the case of the trainee teacher Fereshta Ludin, who was barred from teaching at a school in Baden-Württemberg because she insisted on wearing her Muslim headscarf. The Court stated that a public school teacher could not be forbidden to wear a headscarf, but only because there was no law prohibiting it. According to the Court, the legislator must decide whether to prescribe a ban on headscarves or not (Germany, Federal Constitutional Court, Judgment of 24 September 2003, 2 BvR 1436/02; BVerfGE 108, 282). In the meantime, several German *Länder* (federal entities) enacted such legal provisions for teaching staff in public education. To give an example, the Baden-Württemberg law does not single out Islam as a religion, but makes reference to 'political, religious, ideological or similar external manifestations … which are liable to call into question the neutrality of the state authority'. Moreover, German laws do not apply to pupils in public schools as is, however, the case in France. The French law no. 2004–228 on secularity and conspicuous religious symbols in schools, adopted in 2004, prohibits the display of 'ostentatious' religious symbols in public educational institutions for

both teachers and pupils. By administrative decree it is specified that 'ostentatious' symbols in any case include the Islamic headscarf, the Jewish *kippa* and the Sikh turban, whereas Christian crosses are excluded from the ban if their size is not 'excessive'.

Among the reasons for limiting positive freedom of religion, the need to *avoid* the creation of *parallel societies* is invoked. For example, in 2006, the German Federal Constitutional Court rejected the complaint of parents who did not want their children to be influenced by Darwinism, pointing out that public education is compulsory in order to prevent the creation of parallel societies and to integrate minorities (Germany, Federal Constitutional Court, Decision of 31 May 2006, 2 BvR 1693/04). In 2014, the Court restated the interest of society in avoiding parallel societies in a case involving parents challenging the content of the official school curricula and therefore requiring the permission for home schooling their children (Germany, Federal Constitutional Court, Decision of 15 October 2014, 2 BvR 920/14).

The pendulum's swing towards limiting positive freedom of religion also reflects concerns about *protecting* the *national values* of the so-called *host society* in cases concerning immigrant integration. In contrast to the judgment of the Swiss Supreme Court of 1993 cited above, which had clearly distinguished between law and moral or religious values and therefore *integration* and *assimilation* before this judgment was overruled in 2008, the Italian Supreme Court of Cassation, in considering public security as a good to be protected, rejected the complaint of an Indian Sikh in May 2017, who was fined for carrying the *kirpan* (Sikh ceremonial dagger). The Italian Court held that attachment to one's own religious values, though lawful in the country of origin, is not acceptable when this violates *the values of the host society* (Italy, Supreme Court of Cassation, Judgement no. 24084 of 15 May 2017). These concerns were also reflected in the ban enacted by several French cities against the *burkini* (a female swimming suit that covers the whole body and respects Islamic tradition) in the summer of 2016. However, the French Council of State set a legal precedent by suspending the ban enacted by the municipality of Villeneuve-Loubet (France, Council of State, Order of 26 August 2016).

The issue of headscarves and other religious symbols *in public spaces* has been addressed many times by the ECtHR (Marko 2012; Medda-Windischer 2012; Koenig 2015; Henrard 2016). In the case *Lucia Dahlab v. Switzerland* (2001), the wearing of a headscarf by a Muslim teacher was seen as too powerful a religious symbol in her role as a civil servant in public education, which might have an impact on the freedom of conscience and religion of very young children in primary education (four to eight years old in this case). The ECtHR considered the headscarf 'a powerful external symbol' and argued that it 'might have some kind of proselytising effect' on these young children. Therefore – according to the Court – prohibition of the use of the headscarf did not infringe the freedom to manifest the religious faith of the teacher. Moreover, the judgment evaluated the principle of gender equality in relation to a mandatory religious rule of wearing a headscarf and came to the conclusion that they are incompatible. Thus, it is 'difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'. In *Kurtulmuş v. Turkey* (2006) the ECtHR clarified that the duty of neutrality of the state applies also to teachers at the university level.

In the case of *Leyla Şahin v. Turkey* (2005), the focus moved from teachers to students. In this case, the applicant had enrolled at the University of Istanbul but refused to comply with the prohibition to wear a headscarf. Her appeals against the decision of the university authorities were finally rejected at national level by the Turkish Constitutional Court with reference to the constitutional principle of secularism as one of the constitutional foundations of the Republic of Turkey when the state was founded in 1924. According to the Constitutional Court, secularism must be seen as a guiding principle for the relationship between the Turkish republic and the manifestation of religion in the public sphere:

> Secularism is the civil organiser of political, social and cultural life, based on national sovereignty, democracy, freedom and science. Secularism is the principle which offers the individual the possibility to affirm his or her personality through freedom of thought and which, by the *distinction* it makes *between politics* and *religious beliefs*, *renders freedom of conscience and religion effective*. In societies based on religion, which function with religious thought and religious rules, political organisation is religious in character. In a secular regime, religion is shielded from a political role.
>
> (cit. in ECtHR, *Leyla Şahin v. Turkey*, Judgment of 10 November 2005: para. 39, emphasis added)

The majority of the judges of the Grand Chamber of the ECtHR, however, took an interesting approach, which we conceptualised as *principle* of *positive equality* above, which no longer justifies the prohibition of the manifestation of religious symbols in the public sphere with reference to the constitutional principle of secularism in this *context*, but requires an interference of the state in terms of *positive action,* to ensure at least mutual tolerance.

> The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the *State's duty* of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed … and that it *requires* the State to *ensure mutual tolerance between opposing groups*. … *Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other*.
>
> (ibid: para. 107, emphasis added)

Moreover, the Court refers to this concept of *positive equality* as an *essential element* for the *protection of minorities* through what we referred to as the accommodation paradigm above.

> Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and *proper treatment of people from minorities* and avoids any abuse of a dominant position. … Pluralism and democracy

> must also be based on dialogue and a *spirit of compromise* necessarily entailing various concessions on the part of *individuals or groups* of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. … It is precisely this *constant search for a balance* between the fundamental rights of each individual which constitutes the foundation of a 'democratic society'.
>
> (ibid: para. 108, emphasis added)

However, also the Grand Chamber of the Court finally rejected the application with reference to the 'specific' political circumstances in Turkey and its role as 'subsidiary' instrument in the protection of human rights, and decided to grant Turkish authorities a wide 'margin of appreciation', not least due to the fact that there are no general standards among the state parties of the ECHR. Moreover, with regard to gender equality, which became a more and more important issue in the case law of the Court, it is regrettable that the judgment did not take care of the 'intersectional' issue in this case (for a critical analysis in this regard, see Bosset 2013: 204–7).

In the case of *Dogru v. France* (2008), the Court again relied on the constitutional principle of *laïcité* as a founding principle of the Republic, 'to which the entire population adheres and the protection of which appears to be of prime importance' (ECtHR, *Dogru v. France*, 2008: para. 72). With regard to the factual situation of the case, a Muslim girl had refused to remove her headscarf in sports classes before the 2004 law cited above had come into force. Since all efforts by school authorities 'to convince' her of the necessity to remove the headscarf through a 'dialogue' in disciplinary proceedings had failed, meaning that 'these events had led to a general atmosphere of tension within the school', the national authorities had, in the assessment of the ECtHR, thereby contextualising the abstract principle in light of the facts of the case, 'fully satisfied the duty to undertake a balancing exercise of the various interests at stake'. In conclusion, the Court rejected the application on the merits. This approach was restated and reinforced in the case *Aktas v. France* (2009) concerning a girl refusing to remove the headscarf when enrolling for school. This time, the Court, without any effort to contextualise the case, simply referred to the French law of 2004 and its own case law without any further reasoning and declared the application inadmissible with the argument that the law 'was also meant to protect the constitutional principle of secularity, an aim in keeping with the values underlying the Convention and the Court's case law', thereby giving French authorities not only a wide margin of appreciation, but in reality *carte blanche*.

In line with this more and more submissive jurisprudence of the ECtHR vis-à-vis France, it is worth discussing the case ECtHR, *S.A.S. v. France* (2014), concerning the 2010 French law no. 2010–1192 banning clothes concealing the face in public spaces. This case takes up our conceptualisation of *negative equality* of religions and the *distinction* between the *ways of life* and the *ways of living together* which serve as our analytical framework for the comparison of the ECtHR case law in this section.

The government had invoked before the ECtHR several *justificatory reasons* for the general ban of concealing the face in public space, namely public safety and a package of 'three values' declared a 'minimum set of values of an open and democratic society', namely 'respect for equality between men and women, respect for human dignity and respect for the minimum requirements of life in society' (ECtHR, *S.A.S. v. France*, 2014: para.116).

The Court, however, stated that these three values 'do not expressly correspond to any of the legitimate aims enumerated in the second paragraphs of Articles 8 and 9 of the Convention' and therefore applied a proportionality test with rather surprising arguments (ibid: para.117). First, the Court argued that the ban could not be justified as concerns the respect for *equality between men and women*:

> [A] State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.
>
> (ibid: para.119)

This argument can be seen as a reminder of the difference between John Locke and Jean-Jacques Rousseau elaborated in Chapter 3. Whereas Locke's liberal conception of freedom requires *freedom from* the *state*, Rousseau's republican conception of a civil religion *requires freedom through* the state as he had argued in his *Du Contract Social; Ou Principes du Droit Politique*: 'The social contract, in order not to be an empty formula, must tacitly include the agreement which alone authorises all others that whoever refuses to comply with the general will can be forced by the entire body to follow it; which means nothing else, but to force him to be free' (bk I, ch. 7).

Second, *human dignity* cannot be invoked, 'however essential it may be', the Court argues. It cannot 'legitimately justify a blanket ban on the wearing of the full-face veil in public places' since it has to be seen as an expression of a 'cultural identity which contributes to pluralism that is inherent in democracy' (ECtHR, *S.A.S. v. France*, 2014: para. 120).

Third, however, the Court finds that 'the respect for the minimum requirements of life in society … or of "living together" … can be linked to the legitimate aim of the "protection of the rights of others" '. With the French government, the Court argues that 'the face plays an important role in social interaction' and that 'open interpersonal relationships … form an indispensable element of community life within the society in question'. The Court is 'therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent state as breaching the right of others to live in a space of socialisation which makes living together easier' (ibid: para. 122). Thus, turning its back on Locke and returning to Rousseau's conceptualisation, the Court agrees with the government's reasoning that:

> the voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of 'living together in French society' and that 'the systematic concealment of the face in public spaces, contrary to the ideal of fraternity, … falls short of the minimum requirement of civility that is necessary for social interaction'
>
> (ibid: para. 122)

The Court therefore concludes, in the spirit of Rousseau: 'It indeed falls within the *powers of the State* to secure the conditions whereby individuals can live together in their diversity'

(ibid: para. 141). And, in a somewhat inconsistent way, the Court finally legitimises its judgment by arguing that the ban was 'not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face' so that France was granted 'a wide margin of appreciation in the present case' (ibid: para. 151 and 155). Furthermore, the Court noticed that there is no common ground between European states. In conclusion, since states have a wide margin of appreciation, such bans are a choice each 'society' can make.

In 2011, Belgium enacted a similar law which was then again upheld by two judgments of the ECtHR confirming that the concept of living together can justify laws that ban full-face veils (ECtHR, *Dakir v. Belgium*, 2017 and *Belcacemi and Oussar v. Belgium*, 2017). In 2017, Austria also enacted a federal law banning full-face coverings in public. Persons concealing their face with clothes or other items in a manner that they are no longer recognisable may be fined €150. According to this law, public places or public buildings are defined as areas that are either permanently or at certain times accessed by groups of various numbers of people. These areas include not only state-run but also private bus, rail, air and ship facilities. However, the law allows for so many exceptions that the political intention as burqa ban becomes obvious: there are exemptions possible for health or occupational reasons, traffic and sport-related activities, and artistic, cultural or traditional events.

The debates regarding the display of religious symbols do not only regard the Islamic headscarf but also *Christian symbols* like the crucifix, demonstrating the problem of accommodation by giving priority either to positive or negative freedom of religion. In the late 1980s, the authorities of Canton Ticino in Switzerland declared a school regulation valid under the Swiss constitution claiming that the crucifix in classrooms did not constitute a religious message but was merely a *symbol* expressing *Swiss values*. The argument was accepted by the Federal Council, ruling that the mandatory crucifix was legal. The case was finally referred to the Swiss Supreme Court, which overruled the decision concluding that the state as guarantor for the 'confessional neutrality of schools … cannot assume the authority to clearly demonstrate its own ties with one confession' (cit. in Toggenburg and Rautz 2012: 212–13). The same conclusion was drawn in 1995 by the German Federal Constitutional Court in its ruling on the subject of Bavaria's primary school regulations:

> Positive freedom of religion is a right of all parents and pupils, not just Christians. The resulting conflict cannot be settled on the basis of the principle of majority decisions as the fundamental right to religious freedom is one that is specifically intended to protect the rights of minorities.
>
> (Germany, Federal Constitutional Court, Decision of 16 May 1995, 1 BvR 1087/91; BVerfGE 93,1)

The crucifix debate came to Europe-wide attention with the ruling of the ECtHR in November 2009 in a case relating to the Finnish-born Italian Soile Lautsi, whose children went to school in the Italian region of Veneto. In the case *Lautsi v. Italy* (2009), the Chamber of the Second Section of the ECtHR had to decide on her claim that the display of crucifixes violated the principle of secularism following from negative freedom of religion and the rights of parents to have their children educated in conformity with their religious and philosophical convictions.

Whereas the Italian government invoked the 'positive moral message of Christian faith transcending secular constitutional values' for the 'role of (Catholic) religion in Italian history and its deep roots in the country's tradition' (at para. 51), the judges of the Chamber followed the applicant and ruled that 'the symbol conflicted with her convictions and infringed her children's right not to profess Catholicism', declaring that Italy was violating Article 9 and Article 2, Protocol 1 to the ECHR.

However, on appeal the Grand Chamber found no violation, although it granted that:

> by prescribing the presence of crucifixes in State school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regulations confer on the country's majority religion preponderant visibility in the school environment.
>
> (ECtHR, *Lautsi and others v. Italy*, 2011: para. 71)

According to the Court, 'a crucifix on a wall is an essentially *passive symbol* and … cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities' (ibid: para. 72, emphasis added). Thus, the crucifix is not to be seen as a tool of indoctrination.

In another ruling concerning Christian crosses, the Court found that the desire to manifest religious beliefs by wearing such symbols at work (i.e. *in horizontal relations* between private parties) cannot be limited by the need to protect the corporate image of a company (ECtHR, *Eweida and Others v. the United Kingdom*, 2013). The same issue had to be resolved in two preliminary rulings by the ECJ whether private companies discriminated against employees requiring to be allowed to wear headscarves at the workplace. In the first case, *Achbita v. G4S Secure Solutions* (2017), the ECJ ruled in interpretation of Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, that an abstract, purportedly equal, blanket ban of the respective company for its employees to wear any 'visible signs of their political, philosophical or religious beliefs in the workplace' cannot be considered direct discrimination (see, however, our critical analysis of the ideological framing of this case by Advocate General Kokott in Chapter 4, section 4.1). This conclusion is based on the *formalistic-reductionist assessment* that such a blanket ban does 'not introduce a difference of treatment that is directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78' because the internal rule of the company 'is treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs'. However, the Court goes on, 'it is not inconceivable' that the blanket ban might amount to indirect discrimination which is for the referring court to decide based on the proportionality test. And the ECJ then defines the three criteria of the proportionality test to be applied in light of the facts of the case, thereby flinging the door wide open for the justification of such a blanket ban:

> As regards, in the first place, the condition relating to the existence of a legitimate aim, it should be stated that the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate. …

> As regards, in the second place, the appropriateness of an internal rule such as that at issue … it is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner. …
>
> As regards, in the third place, … it must be determined whether the prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition … covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.
>
> (ECJ, *Achbita v. G4S Secure Solutions*, 2017: para. 2)

It should be noted that Ms Achbita wanted to work as a receptionist for the company, meaning that she would interact with customers.

In the analogous case *Bougnaoui v. Micropole SA* (2017) concerning the interpretation of Directive 2000/78/EC handed down by the ECJ on the same day, the referring court had asked somewhat differently whether an employer may take into account the wishes of a customer no longer to have that employer's services provided by a worker wearing an Islamic headscarf so that the willingness of the employer to comply with this request 'constitutes a genuine and determining occupational requirement within the meaning of that provision.' In this case, however, the Court found – somehow in contradiction with the reasoning in the previous case declaring the prohibition of wearing the headscarf a legitimate aim and necessary in interaction with customers – that 'subjective considerations, such as the willingness of the employer to take account of the particular wishes of the costumer' can never be qualified a 'genuine and determining occupational requirement'.

Hence, while the ECtHR has tended to *favour negative* over positive *freedom* in cases regarding the *headscarf debate*, in other cases *positive freedom* has been given priority in contestations over or within *Christian religions*, for example in the case *Barankevich v. Russia* (2007). In this case, permission to hold services in a public place was refused by the local authorities because the officially recognised Church of Evangelical Christians practice a religion that was different from the Christian Orthodox *religion professed by the majority of the local residents*. In this case, the ECtHR found a violation of positive freedom of religion because the rights of a minority group were made conditional on their acceptance by the majority.

What conclusions can, finally, be drawn regarding the *recognition paradigm*, in particular, the efficacy of the *accommodation* paradigm in the need for balancing the individual rights to positive and negative freedom of religion in combination with positive equality versus negative equality of religions? Does the historical legacy of a structural dualism of religion still predetermine the results of judgments of high courts today?

In line with Alessandro Ferrari's seminal article (Ferrari 2012), we can observe 'the parallel history of the Muslim headscarf and the Christian crucifix' in the norm contestations before European courts, but also between the different judicial bodies within the ECtHR, on the *meaning* of religious symbols and how difficult, if not superficial, it is in practice to distinguish between culture, politics and religion as both the liberal and republican ideological approaches postulate. Are headscarves and crucifixes now passively religious symbols

or, even less so, only cultural symbols, so that they – in legal-dogmatic terms – would fall outside the scope of application of freedom of religion? Or do we have to interpret *both* symbols as strong religious symbols so that – in line with the principle of negative equality of religions in order to fulfil the duty of state authorities to be 'neutral' vis-à-vis all religious convictions – all public manifestations of religious symbols must be prohibited *equally*?

However, the 'zigzagging' (Marko 2012: 32) of European courts between the different conceptions we used as analytical framework above, can be termed 'inclusive "double-standard" secularism' (Ferrari 2012: 80–84). If only Christian religious symbols are declared passive or cultural symbols, but not others (the headscarf, the *kippa*, the turban etc., as was explicitly specified by the French governmental decree of 2004), the purportedly secular distinction between religion and culture leads, as a consequence, to the balance being regularly tipped in favour of the 'traditional' Christian churches and religions in Europe and, thereby, at the same time excluding 'non-traditional religious groups (read Islam)' (Ferrari 2012: 81) from the public or even the private sphere. These distinctions frequently go hand in glove in judicial reasonings of national courts when interpreting symbols as *abstract danger without contextualisation* requiring empirical evidence beyond the single case (in contrast, see the sociological case studies about the alleged parallel societies in Germany by Schiffauer 2008). Hence, when state neutrality shall, first and above all, guarantee public order, when *cosmopolitan values* such as human dignity and equality are *reinterpreted* as part of the respective *national identity* or the *rights of others* – who are, in reality, not those of other people in a minority position, as the Explanatory Comment of the FCNM states, but those of the respective *cultural majority population* – the justificatory grounds invoked by governments conceal the *assimilationist* and *exclusive tendencies* of the principle of state neutrality and the concept of negative equality vis-à-vis religions. By 'reading the secular principle in light of the protection of social cohesion interpreted as a collective good reflecting specific national identities' (Ferrari 2012: 80), freedom of religion can no longer serve as instrument of at least indirect protection of minorities but leads to the n*ationalisation of the public sphere*, which we also identified in relation to linguistic pluralism above. Hence, the liberal human rights and freedoms of Articles 8 through 11 ECHR no longer serve the purpose of recognition of cultural diversity and accommodation.

7.3.2.2 Corporate rights

As stated above, freedom of religion unfolds not only in terms of individual rights in the *forum internum*, but also in the group-related dimension when religious practices are exercised together with others in the public sphere (*forum externum*). Hence, religion as an 'associational' phenomenon (Bader 2007) also needs an organisational element which goes beyond the de facto existence of groups, so that we must also deal with two more questions from the perspective of the scope of application of Article 9 ECHR *rationae personae* and *rationae materiae*: first, must states parties of the ECHR legally recognise any religious grouping and their beliefs? And, second, which group rights in the specific meaning of corporate rights do legally recognised churches and religious associations enjoy under the generic label of autonomy and self-government of their internal affairs?

The following case law of national and European courts analysed in this regard clearly refers to the *double structural dualism* of the relationships between state–church–religion,

which we hypothesised in the introduction to this chapter. Following from this understanding we can find in the case law of the ECtHR three *types* of *religious association* in terms of communicative action and institutionalisation which must be differentiated, and whose rights and duties are all covered by the meaning of 'freedom of religion' under Article 9 ECHR.

First, as can be seen from the reasoning of ECtHR, M*etropolitan Church of Bessarabia v. Moldova* (2001) and ECtHR, *Religionsgemeinschaft der Zeugen Jehovas v. Austria* (2008), the Court assessed the refusal to register and thereby to legally recognise a religious association with regard to the question whether there was an interference into freedom of religion. Both governments had argued that their rejection of the registration did not interfere into religious freedom, because religious believers had not been prevented to meet in public to exercise their religious rites and services. In the case of the Metropolitan Church of Bessarabia, the Court, however, noticed that only religions recognised by a government decision could be practised in Moldova so that 'in the absence of recognition the applicant Church may neither organise itself nor operate … while its members cannot meet to carry on religious activities without contravening the legislation on religious denominations' and concluded:

> As regards the tolerance allegedly shown by the government towards the applicant Church and its members, the Court cannot regard such tolerance as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned.
> (ECtHR, *Metropolitan Church of Bessarabia v. Moldova*, 2001, para. 129)

Second, the very same argument had been invoked by the Austrian government against the application of Jehovah's Witnesses before the ECtHR against the continued refusal to be registered as a 'religious society' in the meaning of Austrian law. This type of legal personality in the form of a public law entity enjoys several 'privileges' in contrast to so-called 'registered religious communities'. This type of legal personality had been created by law in 1998, some time after Jehovah's Witnesses had applied for recognition as religious society. Despite the fact that Jehovah's Witnesses are not a new, unknown religious association and make up the fifth largest religious community in Austria, the Austrian government was only ready – after the legal establishment of so-called registered religious communities – to register them according to this type of legal personality, unlike not only old recognised 'religious societies' such as the Israelite Religious Society (1890), Islam (1912) or the Evangelical Church (1961), the Greek Orthodox Church (1961) and the Oriental Orthodox Churches (2003). Such religious societies do not only enjoy a wide scope of self-government regarding their internal organisation, including to levy taxes from their members, but they may also operate private schools, their representatives may sit on regional educational boards of the public educational system, and all persons who belong to them and exercise pastoral functions are exempt from military service and alternative civilian service. In contrast, a 'religious community' must set out the main principles of the religious community's faith, the aims and duties deriving from it, the rights and duties of the community's adherents, including the conditions for terminating membership, how its bodies are appointed, who represents the community externally and how the community's financial resources are raised. In 1997, the responsible Austrian minister had dismissed the applicant's request for registration as a religious society due to their unclear internal organisation and their alleged

negative attitude towards the State and its institutions. Further reference was made to their refusal to perform military service or any form of alternative service for conscientious objectors, to participate in local community life and elections and to undergo certain types of medical treatment, such as blood transfusions.

In this case, with Jehovah's Witnesses claiming to be discriminated against in comparison with the other recognised 'religious societies', the Court goes a step further to give Article 9 ECHR more substance than simply declaring it an 'individual' right which can be exercised in community with others:

> Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords …
>
> The Court reiterates further that the *ability to establish a legal entity* in order to *act collectively* in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning. The Court has consistently held the view that a refusal by the domestic authorities to grant legal-entity status to an association of individuals amounts to an interference with the applicant's exercise of their right to freedom of association ….
>
> (ECtHR, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, 2008, para. 61–2)

In conclusion, the Court rejects the defensive argument invoked by the Austrian government that no instances of interference with the community life of the Jehovah's Witnesses had been reported and that the lack of legal personality may be compensated by 'auxiliary associations' (at para. 67).

Third, it follows from the non-discrimination review of the Court according to Article 14 ECHR that the further requirements established by law in 1998 for the recognition as a religious society and their application in the case of Jehovah's Witnesses could not be justified. The amendment of the law required the (de facto) existence of the religious association for at least 20 years in Austria and for at least 10 years as a registered religious community; a number of two adherents per thousand members of the Austrian population; the use of income and other assets for religious purposes, including charity activities; a positive attitude towards society and the State; and no legal interference as regards the association's relationship with recognised or other religious societies. In comparison with the recognition of the Coptic Orthodox Church, which had only existed in Austria since 1976, the Court concluded a violation of Article 14 ECHR with regard to the 10-year waiting period invoked by the government as a necessary tool to verify whether the religious community was ready to integrate into the existing legal order by stating the long-standing existence of Jehovah's Witnesses internationally, their long establishment in the country and therefore familiarity to the competent authorities.

To summarise, we can therefore establish the *minimum standards* following from Article 9 ECHR concerning the registration and legal recognition of religious communities:

- First, religious freedom is not without limits. 'States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety' (see ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, 2001: para. 113).
- Second, in terms of *positive freedom of religion*, Article 9, in conjunction with Article 11, ECHR guarantees not only the group-related right to exercise this right in community with others in private and the public sphere (what was termed 'auxiliary association' above), but a *group right* for the establishment of a corporate legal entity endowed with self-government rights.
- Third, *differential treatment* in the right to establish a *corporate legal entity* amounts to *discrimination* if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Concerning the second question raised above, to what extent interference in self-government rights might be justified, the ECtHR stated the need for clarity as well as foreseeability in the case *Hasan and Chaush v. Bulgaria* (2000) in the dispute over leadership of the Bulgarian Muslim community. According to the Court, the Bulgarian state had arbitrarily intervened in a dispute over the leadership in the Muslim community, violating Article 9 ECHR, because the legislation on the registration of the leadership of religious communities did not provide clear and foreseeable criteria; therefore, it appeared that the Bulgarian government had opted for one leadership over another. In a later case concerning the division of the Bulgarian Muslim community and the attempt of the Bulgarian government to mediate among the factions, the Court clarified some limits of the margin of appreciation of states. Whereas neutral mediation does not amount to interference, measures favouring a leader or group in a divided religious community or seeking to compel the community to have a single leadership violate freedom of religion (ECtHR, *Supreme Holy Council of the Muslim Community v. Bulgaria*, 2004; see also ECtHR, *Serif v. Greece*, 1999). This type of interference is not necessary for the protection of public order or the rights and freedom of others. On the contrary, states should commit to preserving pluralism and fostering tolerance among competing groups, following from the principle that the 'autonomous existence of religious communities is indispensable for pluralism in democratic society'.

State intervention in the organisational aspects of religious communities is also addressed in the framework of the FCNM. In the monitoring practice of the FCNM, the ACFC is rather reluctant to criticise when it comes to systems of state religion or differentiations. In several opinions, the ACFC pointed out that differential treatment does not violate the FCNM as long as religious minorities can exercise their religious rights (ACFC, First Opinion on Croatia, 2006: para. 38; First Opinion on Georgia, 2009: paras. 90–3). The most important question on exercising the freedom of religion for the ACFC concerns the registration of religious groups (ACFC, Second Opinion on the Former Yugoslav Republic of Macedonia, 2007: para. 102–3; First Opinion on Estonia, 2001: para. 34; Second Opinion on Estonia, 2005: para. 79; Second Opinion on Moldova, 2004: paras. 78–81; Second Opinion on the Russian Federation, 2006: paras. 170–3; First Opinion on the Former Yugoslav Republic of Macedonia, 2004: para. 60). In these opinions, the ACFC pointed out that discriminatory

treatment, which cannot be justified, violates not only Article 7 FCNM but also restricts the adequate manifestation of one's religion (Article 8).

7.4 The sociopolitical dimension

Cultural aspects of social identity formation and communication are inextricably intertwined with politics, so that the assertion of a need to *strictly distinguish* between *culture* and *politics* is an ideological construction (see Chapters 4 and 5) in the same sense as the *private–public distinction* analysed in the previous sub-section (see also Ferrari and Pastorelli 2012, concerning religions and the public–private divide). For the purpose of this chapter, to test our hypothesis of the structural legacy of a duality of languages but dualism of religions in society at large, we reduce the sociopolitical dimension of social identity formation to the main freedoms and corresponding actions through which minorities and their members can play a *political* role in '*civil* society' (Kivisto and Sciortino 2015); for example by their participation in the formation of 'the' public opinion and a 'political culture' (Welch 2013). Or, as the ECtHR defines this political role in the case of *Egitim ve Bilim Emekcileri Sendikasi v. Turkey* (2012) after Turkish authorities had forced the Education and Science Workers' Union to delete the goal of 'education in the mother tongue' from its constitution:

> The Court recognises that such a proposal may have run counter to majority beliefs in public opinion, certain institutions or certain State organisations, or even government policy. That being said, the Court reiterates that it is necessary for the proper functioning of democracy that the various associations or political groups are able to take part in public debates in order to help find solutions to general questions concerning political and public stakeholders of all persuasions ….
>
> (ECtHR, *Egitim ve Bilim Emekcileri Sendikasi v. Turkey*, 2012: para. 56)

These freedoms and actions are, in particular, regulated by the rights to 'freedom of expression' (Article 10 ECHR) and 'freedom of association' (Article 11 ECHR) and are also connected with freedom of religion and the prohibition of discrimination on grounds of, inter alia, language and religion. We need not concern ourselves here with issues related to the political representation and participation of minorities in elected and consultative bodies, which are analysed in detail in Chapter 9.

Following from the text of Articles 10 and 11 ECHR in terms of the scope of application *rationae personae* and *materiae*, we deal in the following sub-sections with the question of whether and to what extent members of minorities have a *right to use their minority language* not only in private social relations, according to the traditional meaning of 'freedom of language' from a liberal perspective, but *also in public*, since this is *not expressis verbis guaranteed* in the text of Article 10. The right to use minority languages not only when, for instance, publishing minority media in private property, but also having access and a right to participation in publicly owned media, must again be seen as a *group-related right* whose scope of application goes far beyond an individual right to use his or her minority language in, for example, interviews with the public media. Moreover, a general question regarding all

human rights is posed – to what extent the general 'freedom of expression', guaranteed to 'everyone', *can be limited* for the prohibition of hate speech and/or racist or religiously fundamentalist propaganda? To phrase it differently, how much *criticism* through, for instance, satire about religions and minorities in the media must be allowed in the name of liberal democracy? What makes the distinction between criticism and insult in those cases? And can the national identity of a state be protected by criminal law? As far as the text of Article 11 and the right to *freedom of association* is concerned, we analyse the scope of application *rationae personae* and *materiae*; that is, the right to establish a cultural association aiming to promote a certain language and culture necessary for the protection, preservation and promotion; in short, the ideologically contested right to survival of the cultures and lifestyles of minorities, whereas we deal with the *freedom to found political parties* representing minorities in Chapter 9, section 9.2, since this right is a functional prerequisite for political representation and participation in general.

7.4.1 Minorities and freedom of speech

In line with our approach of multifunctionality, we must recognise that freedom of expression or freedom of speech – and therefore the use of a language – is a vital element of any liberal society for purposes of social identity formation and communication among members of society, in short for social and system integration, as elaborated in Chapter 5, section 5.2 and above. Last but not least, as summarised by Thompson, freedom of speech contributes to the formation of what is called the 'public opinion' in theories of communication, 'enabling citizens to exercise effective collective control over their governments' and therefore is a fundamental element of democratic government (Thompson 2012: 223).

Freedom of speech as a fundamental right is part of all liberal human rights instruments at the global level. It is stipulated in Article 19 of the Universal Declaration of Human Rights, Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 (d) (viii) of the International Convention on all Forms of Elimination of Racial Discrimination (ICERD). At the European level, Article 10 ECHR is the most important legal source. Article 10, paragraph 1 of the ECHR defines the scope of application *rationae materiae* of the right to freedom of expression as the freedom 'to receive and impart information and ideas without interference by public authority and regardless of frontiers'. As mentioned above, this wording does, however, not refer to the use of languages, be it official languages or minority languages, as can be seen from settled case law of the ECtHR. The landmark decision in this regard was handed down with the judgment of the ECtHR, *Relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium* (1968), known as the *Belgian Linguistics* case. In this case, dealing with the claim of the appellants to have a right to (public) education in the children's mother tongue as a minority right in the respective Flemish and French unilingual regions of Belgium (see in detail Chapter 9, Figures 9.5 and 9.7), the Court did not find a violation of any of the provisions of the ECHR, including Article 10, and thereby accepted the *linguistic homogeneity* imposed by Belgian law on the basis of the territoriality principle. Only the fact that children were denied access, solely on the basis of residence of their parents, to French-language schools

in six communes with special status in the Brussels region was declared discriminatory with a narrow majority.

Hence, freedom of speech is not identical to the right to use one's minority language as a language of communication in the public sphere, let alone to use it vis-à-vis state authorities, as we elaborated in the previous section in detail. However, without the possibility of voicing their needs and ideas, members of minorities are unable to fully participate in society, as follows from the identity/diversity – equality – participation nexus which we elaborated in Chapter 5, section 5.3, with the consequence of risking the perpetuation of unequal power relations. Or, as this is highlighted in the Thematic Commentary of the ACFC on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs in paragraph 13, 'effective participation, full and effective equality and promotion of national minorities' identity and culture are the three corners of a triangle which together form the main foundations of the Framework Convention'. Hence, in line with Brubaker's statement cited in the introduction that a society can be areligious but not alinguistic, we cannot – in the interpretation of the scope *rationae materiae* of the individual right to freedom of speech – turn a blind eye to the fact that freedom of speech must include the use of a language of one's choice also in the public sphere. In a very cautious way, this is now also recognised by the ECtHR in the case of *Egitim ve Bilim Emekcileri Sendikasi v. Turkey* (2012) by referring – in contrast to the *Belgian Linguistics* case (1968) – to the scope *rationae materiae* of Article 10 ECHR in declaring that 'Article 10 protects *not only the substance* of the ideas and information expressed *but also the form* of expression, regardless of the medium or *language* in which they are conveyed' (ibid: para. 73, emphasis added). Therefore, the Court ruled, based on Article 10 ECHR and no longer on Article 2, Protocol No. 1 ECHR in conjunction with Article 14, that the goal of the association, namely 'to promote the development of education only in the Kurdish language, as a mother tongue in addition to the Turkish language' pursues a legitimate aim and had to be considered proportional in light of the possible *limitations* according to Article 10 (2) ECHR for the justification of the government's interference in the right to freedom of expression of the association. The Court, however, rebutted the government's arguments by declaring that the goal of mother tongue education only in the Kurdish language, as laid down in the association's constitution, 'was not calling for the *use of violence*, armed resistance or uprising nor was it *inciting hatred*, this being an essential element for the Court to take in consideration' (emphasis added). Regarding the alleged risk to the 'territorial integrity of national territory' invoked by the government, the Court observed that not even the Turkish government had accused the association of pursuing a 'hidden agenda', leading the Court to conclude 'that there was no clear or imminent threat to the State's territorial integrity' (ibid: para. 75).

In conclusion from the ECtHR case law under Article 10 ECHR, the act of balancing through the proportionality test will be decisive, *either* on behalf of the *interests of state and society* as they are enumerated as possible limitations of the exercise of this right in paragraph 2 of Article 10, *or* on behalf of *minority needs* in terms of social identity formation and communication in the minority language as a functional prerequisite for effective political participation. The question of limitations in the right to exercise freedom of expression brings, however, another legal-dogmatic and politically highly sensitive problem to the fore: are there not only *negative duties* of state authorities to refrain from unjustified interference in

this freedom, but also *positive obligations* for state authorities (i.e. a *duty to protect*; see above and also Chapter 8, section 8.2) against the excessive use of the right to freedom of speech?

Indeed, unlimited freedom of speech could result in statements being made that target members of minorities, insulting, denigrating and thereby discriminating against them, so that 'incitement to hatred', as termed by the ECtHR in the Turkish case above as one of the essential elements to be taken into consideration in the proportionality test under Article 10 ECHR, not only may serve as justification for the limitation of freedom of expression *ex post*, but may even require *preventive* action ex ante as a *positive obligation* of state authorities following from Article 10 as the ECtHR ruled in *Erbakan v. Turkey* (2006):

> It may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance … provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued.

In particular, international treaties within the UN framework, namely the ICERD and the ICCPR, require the legislators of its state parties that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law' (Article 20 (2) ICCPR) and that 'each State Party shall prohibit and bring to an end, by all appropriate means, including legislation required by circumstances, racial discrimination by any persons, group or organisation' (Article 2 (1) (d) ICERD). Hence, many European and non-European countries have enacted laws to reflect this. In some cases, such as Belgium and France, national legislation includes the prohibition of denying the Holocaust and/or crimes against humanity (see Chapter 6) or, as is the case in Germany, laws against hate speech are used to these ends. The United States, on the other hand, distinguishes itself for their commitment to protect freedom of speech, except in case of danger of unlawful actions, as explained by former US President Obama, 'the strongest weapon against hateful speech is not repression; it is more speech – the voice of tolerance that rallies against bigotry and blasphemy, and lifts up the values of understanding and mutual respect' (cit. in Green 2014: 177). In the FCNM framework, the ACFC has suggested the introduction of measures to criminalise hate speech based on ethnic grounds and the incitement to violence as a tool to oppose hate crime (ACFC, Thematic Commentary, 2016: para. 56).

Moreover, in the past decade, the development of the *internet and social media* has brought heightened attention to the issue of racist and hate speech, since many people seem to believe that they are free to express their ideas, including racist and hateful statements, in anonymity and with impunity. However, we must ask ourselves 'why has freedom … come to define itself as the freedom to hate' (Butler 2013: 124)? Minorities, by definition the weaker party in asymmetric power relations, are particularly vulnerable. Thus, racist propaganda and hate speech must be considered as a mechanism to reproduce unequal power relations and to keep minorities in a subordinate position. Scholars have found that racist speech can provoke *physical* and *emotional damage* (Matsuda *et al.* 1993) leading Waldron to argue that hate speech not only has an expressive function, but is also a *performative* and *moral act* that carries a message for both the targeted minority groups as well as society at large, and aims at becoming a 'permanent visible fabric of society'. According to Waldron, hate

speech offends not only the dignity of minorities and vulnerable members of the society, but is also an attack on the 'public good of inclusiveness' and should be seen as a 'threat to social peace' (Waldron 2012: 3–6). Martineau and Thompson focus on the problems of misrecognition raised by racist and hate speech (Martineau 2012; Thompson 2012). Focusing on hatred of religion, Thompson points out that hate speech causes a *range of harms of misrecognition*: *physical* harm, because persons might fear of becoming a target of violence, undermining self-confidence; *psychological* harm, because people might internalise negative images and develop low self-esteem; and *status* harm, because groups are stigmatised and their members have fewer opportunities to be esteemed (Thompson 2012). Citing Parekh, the author also warns against the danger of not only openly offensive language, but also subtle, moderate and ambiguous jokes and images (ibid: 220). Martineau adds that the misrecognition caused by negative and demeaning speech endangers the social cohesion of society because it encourages the targeted groups to turn inward and close ranks, thereby 'shutting down points of commonality and closing off borders' (ibid: 164–65). However, it should not be forgotten that members of minorities might not only be the victims of hate speech but also the perpetrators.

What are the results of an analysis of the case law of the ECtHR with regard to limitations of freedom of expression in cases of hate speech and racist propaganda, including denials of the Holocaust or crimes against humanity? What makes the *difference* in the adjudication of the Court between *critical comments* of religious communities or national identities and hate speech as a *public incitement to ethnic, racial or religious hatred*? Is the (simultaneous) incitement to violence the proverbial *red line*, which, when transgressed, will no longer be protected under freedom of expression?

The Court has addressed these issues by referring not only to paragraph 2 of Article 10 on the possibility for states to interfere with freedom of speech, but also to Article 17 ECHR on prohibition of the abuse of human rights, which states that the Convention cannot be used to destroy any rights or freedoms set forth in the Convention or limit them beyond what is provided in the Convention (ECtHR 2016). As the Court had spelled out in *Seurot v. France* (2004), '[T]here is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 by Article 17'.

Hence, by reason of Article 17, the Court declared various applications inadmissible in which applicants, who had made remarks that incited ethnic, racial and religious hatred, claimed that their freedom of speech had unduly been restricted by their governments. These cases involved in particular criminal convictions of the applicants by domestic courts for not only inciting hatred, but also incitement to violence and support for terrorist activity. In *Norwood v. the United Kingdom* (2004) the applicant had displayed a poster supplied by the British National Party, with the New York Twin Towers on fire accompanied by the words 'Islam out of Britain – Protect the British People'. The ECtHR ruled that such a generalised, vehement attack against a religion, linking it as a whole with terrorism, was incompatible with the values proclaimed and guaranteed by the Convention. Also, in *Roj TV A/S v. Denmark* (2018) the ECtHR declared the application inadmissible because of promoting the Kurdistan Worker's Party (PKK) terrorist activities. The Court found that the television station could not rely on the protection of Article 10 ECHR as it had tried to invoke that right for ends contrary to the values of the Convention. Its support for terrorist

activity had been in violation of Article 17. In contrast, in *Jersild v. Denmark* (1994) the ECtHR found a violation of Article 10, because the applicant, a journalist, had made a documentary containing extracts from a television interview in which abusive and derogatory remarks had been made about immigrants and ethnic groups in Denmark. The Court made a distinction between the openly racist remarks and the documentary of the journalist, arguing that he had sought to analyse and to explain these remarks made by a particular youth group, so that the documentary as a whole had not been aimed at propagating racist views and ideas, but at informing the public about an issue of political interest.

Applications against convictions of Holocaust denial and denying crimes against humanity were also declared inadmissible under Article 17 ECHR. In the case *Garaudy v. France* (2003), the author of a book was convicted of the offences of disputing the existence of crimes against humanity, defamation of the Jewish community and incitement to racial hatred. The ECtHR argued that the denial of 'clearly established historical events did not constitute scientific or historical research.' The real purpose for the author was the rehabilitation of the National Socialist regime and the accusation of the victims of falsifying history. Additionally, in *M'Bala M'Bala v. France* (2015) the application was declared inadmissible because the artistic performance as 'comedy' was, in the assessment of the ECtHR following from the circumstances of the case, a demonstration of hatred and anti-Semitism and support for Holocaust denial, 'disguised' as an artistic production.

In *Perincek v. Switzerland* (2015), the Grand Chamber of the ECtHR, however, held that there had been a violation of Article 10 ECHR because of the criminal conviction of the applicant for publicly expressing the view in Switzerland that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years did not constitute a genocide. The Swiss courts held that the statements of the applicant appeared to be motivated by racist and nationalist sentiments and did not contribute to the historical debate. The ECtHR, however, found that it had to strike a balance between Article 8 ECHR (right to private life) to protect 'the dignity' of the victims and identity of Armenians living today and Article 10. Hence, it was not 'necessary in a democratic society' for the Court to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community since the applicant's statements were a matter of public interest and did not amount to a call for hatred or intolerance.

In other cases concerning incitement to religious intolerance, implicitly or openly also calling for violence or condoning terrorism, the ECtHR upheld the governmental interferences by reference to the limitations enumerated in Article 10 (2) ECHR.

In *Sürek v. Turkey* (1999), the applicant was the owner of a weekly review which published readers' letters vehemently condemning the military actions of the Turkish authorities against the Kurdish people in southeast Turkey. The ECtHR upheld the conviction of the applicant since the readers' letters had amounted to an 'appeal to bloody revenge' and identified persons by name, stirring up hatred and exposed them to the possible risk of physical violence. The Court considered that the applicant as the owner of the review had been responsible for the collection and dissemination of information to the public, in particular in situations of conflict, and therefore liable for the content of the readers' letters. In *Leroy v. France* (2008), a cartoonist complained of his conviction for publicly condoning terrorism through a drawing published in a Basque weekly newspaper representing the attack on the

New York Twin Towers accompanied by the text: 'We all dreamt of it. … Hamas did it'. The ECtHR found no violation of Article 10 in arguing that the applicant commented approvingly on the violence perpetrated against thousands of civilians and, in addition, the impact of such a message in a politically sensitive region, namely the Basque Country, could not be overlooked. Also in *Soulas and Others v. France* (2008), the ECtHR found no violation of Article 10 because of criminal proceedings against the applicants after the publication of a book entitled *The Colonisation of Europe* with the subtitle *Truthful Remarks about Immigration and Islam*. The rejection of the application was justified with reference to the terms used in the book to arouse a feeling of rejection and antagonism in the readers through the use of 'military language' when the religious community in question was designated as 'the main enemy' and the need for a 'war of ethnic re-conquest'. Similarly, in *Féret v. Belgium* (2009), the ECtHR pointed out that leaflets distributed by the party of the applicant, the National Front in Belgium, with slogans against immigration such as 'Stop the sham integration policy' and 'Send non-European job-seekers home' and against the 'Islamification of Belgium' aroused feelings of distrust, rejection and hatred, and thus restriction to the right to freedom of speech was justified in the interests of preventing disorder and protecting the rights of others. In the case of the former leader of the French *Front National*, Jean-Marie Le Pen, who had given an interview with *Le Monde* and asserted, inter alia, that 'the day there are no longer 5 million but 25 million Muslims in France, they will be in charge', the ECtHR found no violation of Article 10 because of his conviction for incitement to discrimination, hatred and violence towards a certain group of people (ECtHR, *Le Pen v. France*, 2010).

In the 2010s, various events, such as the publication by a Danish newspaper of a cartoon denigrating the Prophet Muhammad and the online release of the movie *Innocence of Muslim* depicting Muhammad in a way considered offensive, which were followed by protests and riots by Muslims around the world, as well as the terrorist attack against the headquarters of the magazine *Charlie Hebdo*, which published satirical cartoons of the Prophet Muhammad, sparked a hot debate about the issue of *defamation* of *religions* and *blasphemy laws*. This raises a question about the *relationship* between *freedom of expression* and *freedom of religion* and how to balance them.

This topic has been discussed widely in the academic world. As explained by Green, some scholars, such as Guiora, argue that religious speech deserves less protection because of the capacity of religious leaders to incite their listeners and convince them to act, which requires treating this type of speech in terms of national security. In contrast, other scholars, like Marshal, Shea and Dacey, oppose blasphemy laws and limits to religious speech, considered as a threat to religious freedom (Green 2014). Such limitations by law tend to protect prevalent religious orthodoxies and dominant religious leaders and limit internal debates within religion, targeting dissidents and their heterodox views. However, as pointed out by Green, Dacey focuses on the protection of religious believers rather than religion and argues that since religious beliefs shape individual identity, it is necessary to limit speech that denigrates them (ibid.). According to Pinto, it is necessary to recognise the asymmetrical power relations between majority and minority members. Thus, in cases of groups whose cultural identity is vulnerable, offence to religious feelings should be prohibited and sanctioned in order to protect the right of the integrity of one's cultural integrity, because offences exclude minorities' cultural identity from the public sphere, preventing minorities' inclusion in society (Pinto

2012). Finally, the question has been raised whether criticising religion from a secular perspective is always in conflict with religious freedom (Asad *et al.* 2013).

Hence, are 'religious feelings' of both majority populations and minority groups simply a 'private compulsion', as Advocate General Kokott argued in her Opinion in the ECJ case *Achbita v. G4S Secure Solutions* (2017) (see Chapter 4, section 4.1), or do they fall under the protection of freedom of religion *rationae materiae* with a positive obligation of state authorities to protect them when Articles 10 and 9 ECHR are taken in conjunction in judicial review procedures?

As can be seen from an analysis of the case law of the ECtHR, this court gives *religious feelings of people in both a majority and minority position* legal relevance. Addressing cases involving the alleged offence of Christian groups, the ECtHR has recognised a 'right to respect for religious feelings' in order to ensure religious peace (ECtHR, *Otto Preminger-Institut v. Austria*, 1994; *Wingrove v. United Kingdom*, 1996). In *İ.A. v. Turkey* (2005), the court considered a book that criticised the Prophet of Islam as an 'abusive attack' and argued that the fine imposed by the Turkish government on the publisher met a 'pressing social need', whereas statements in a TV programme in the form of harsh criticism of the Kemalist system of democracy and secularism in Turkey as 'despotic, merciless and impious' could not be considered hate speech inciting hostility and were thus not deemed a violation of Article 10 in the case *Gündüz v. Turkey* (2003). The mere fact of defending Sharia, without calling for violence to introduce it, could not be regarded as hate speech. At the same time, however, the Court stated – in application of Article 11 ECHR – in *Refah Partisi (the Welfare Party) and Others v. Turkey* (2003), regarding the dissolution of a political party that aimed at introducing Sharia and setting up a plurality of legal systems in Turkey, that a regime based on Sharia is incompatible with the fundamental principles of democracy set forth in the ECHR. Hence, only several years later, in the case ECtHR, *Erbakan v. Turkey* (2006) the Court became much more critical in its general assessment of Sharia law also in application of Article 10 ECHR. It found that comments made in a public speech by a well-known politician with the vision of a society structured exclusively around religious values appeared hard to reconcile with the pluralism typical of contemporary societies with different groups, so that combating all forms of intolerance must be considered an integral part of human rights protection. In conclusion, speeches of politicians should avoid making statements which could foster intolerance. With regard to the fundamental value of free political debate in a democratic society, however, the Court found the prosecution of Mr Erbakan unjustified and a violation of Article 10 ECHR.

Moreover, we have to deal with the problem raised in case law of whether the *denigration of national identity* can be made criminally liable as hate speech by national law. In the case ECtHR, *Dink v. Turkey* (2010) Mr Dink, editor-in-chief of a bilingual Turkish-Armenian weekly newspaper, had published several articles in which he expressed his views on the identity of Turkish citizens of Armenian origin. He was found guilty of 'denigrating Turkish identity' in 2006, but was killed in 2007 when he left the offices of the newspaper. His relatives, the applicants in the case, complained of the verdict against him which, they claimed, had made him the target for extreme nationalist groups. The ECtHR indeed found a violation of Article 10 since the series of articles he had written did neither incite to violence, resistance or revolt, nor had they been insulting or offensive. The Court concluded

that it must be necessary in a democratic society to convey ideas and opinions an issue of public concern and that debates about historical events of a politically sensitive nature must be able to take place freely. In the case *Stern Taulats and Roura Capellera v. Spain* (2018), two Spanish citizens were held criminally liable for setting fire to a photograph of the royal couple at a public demonstration. The ECtHR held that this was a violation of Article 10, because the crime committed by the applicants had been a political, rather than personal, critique of the institution of monarchy and the king as representative of the Spanish nation. In conclusion, the facts could not be considered as constituting hate speech, nor was the prison sentence proportionate.

Finally, we come back *to hate speech and the internet* in light of Judith Butler's question cited above: 'Why has freedom … come to define itself as the freedom to hate' (Butler 2013: 124)? How does the ECtHR deal with hate speech on the internet?

In *Delfi AS v. Estonia* (2015), the ECtHR had to deal for the first time with a complaint about the liability for user-generated comments on the internet news portal of the applicant's company (i.e. whether it could be held liable for the offensive comments posted by its readers below its online news articles). The Court highlighted the conflicting new possibilities for freedom of expression on the internet and its dangers, namely the fact that hate speech and speech inciting violence could be disseminated worldwide in a matter of seconds, usually remaining available online for an unlimited period of time. Hence, the Court ruled that the state parties to the ECHR may impose liabilities on internet news portals without violating Article 10 ECHR, if there is a *failure to take measures* to *remove clearly unlawful comments* without delay, *even without notice* from the alleged victim or from third parties. Following from the determined facts of the case at hand, the Court found no violation of Article 10.

In *Pihl v. Sweden* (2017) the ECtHR found the application inadmissible as being manifestly ill-founded, since the national authorities struck a fair balance when refusing to hold the association which ran the blog liable for an allegedly defamatory online comment. With regard to the facts of the case the Court found that the comments, despite being offensive, had not amounted to hate speech or incitement to violence. In the case *Smajić v. Bosnia and Herzegovina* (2018), the ECtHR found the application inadmissible, as being manifestly ill-founded, however, for different reasons. The case concerned the applicant's conviction for the incitement to national, racial, and religious hatred, following a number of postings on an internet forum, describing possible military action against Serb villages in case of a new war. The ECtHR found the conviction justified because the domestic courts had carefully examined the case and the penalties imposed were not excessive. In *Nix v. Germany* (2018), the ECtHR found the conviction of the applicant for posting a picture of a Nazi leader and swastika in a blog justified and declared the application inadmissible. Despite the allegation of the applicant that the blog post had to be seen as a critical comment only because of discrimination against children from a migrant background, the Court found that the applicant had not clearly and obviously rejected Nazi ideology.

In conclusion, the ECtHR follows its settled case law concerning hate speech and incitement to violence in the internet in the same way as in other media.

7.4.2 Minorities and the media

The media (i.e. channels of communication to provide data, entertainment and information such as newspaper, radio, TV and internet resources) are an important tool for exercising freedom of speech. The relationship between the media and freedom of speech is *expressis verbis* addressed by Article 10 ECHR on freedom of speech, stating that states can require 'the licencing of broadcasting, television or cinema enterprises'. As clarified by the ECtHR, this provision means that states are permitted to regulate with a system of licences the organisation of broadcasting in their territory, especially regarding technical aspects, although with strict supervision, owing to the importance of the right to freedom of speech (ECtHR, *Groppera Radio AG and Others v. Switzerland*, 1990). In *Informationsverein Lentia and Others v. Austria* (1993) the Court added that licences can be refused based on various considerations, such as 'the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from the international legal instruments'. However, according to the Court, reporting information and ideas must be grounded in the *principle* of *pluralism*. Thus, an Austrian law establishing a public monopoly on broadcasting, used to refuse a licence to establish a radio station to broadcast programmes in German and Slovene (among other languages), was considered not necessary in a democratic society and a violation of Article 10 (ECtHR, *Informationsverein Lentia and Others v. Austria*, 1993). In stark contrast, in the case *United Christian Broadcasters Ltd v. United Kingdom* (2000) the ECtHR considered that the refusal to provide a religious charitable association with one of the few available national radio licences, but no restriction on religious bodies applying for and being granted licences for local radio broadcasting, pursues the aim of protecting the right of others and avoiding the dominance of one viewpoint at the expense of others 'in a country such as the United Kingdom which is home to such a wide diversity of religious faiths and political beliefs'.

Access to the media is particularly important in the FCNM framework. Here, the media are considered to be tools to provide information as well as to encourage intercultural understanding and a sense of solidarity, improve the visibility and prestige of the minority language, and allow communication among dispersed members of minorities, encouraging them to enjoy their rights more actively (ACFC 2016: para. 63, 69). As understood in the FCNM framework, for minority members, the importance of the media goes beyond being an instrument of freedom of speech. Rather, access to the media by minority members should be considered as part of the task of engineering multiple diversity governance. Indeed, access to the media has an important influence on the life of members of minority groups and plays a major role in managing diversity and protecting minorities, by providing autonomy as well as fostering integration (Figure 7.4 shown overleaf). Indeed, besides being a means of communication and information, the media play several other functions relevant for minorities and their place in society.

First, all media *shape multiple identities* both as members of the larger society and as members of minorities. Indeed, identities are related 'to the everyday deeds of individuals establishing social alliances through the networks of communication and information' (Folch-Serra and Font 2001: 175). Media form a key element of these networks, inviting one 'to construct a

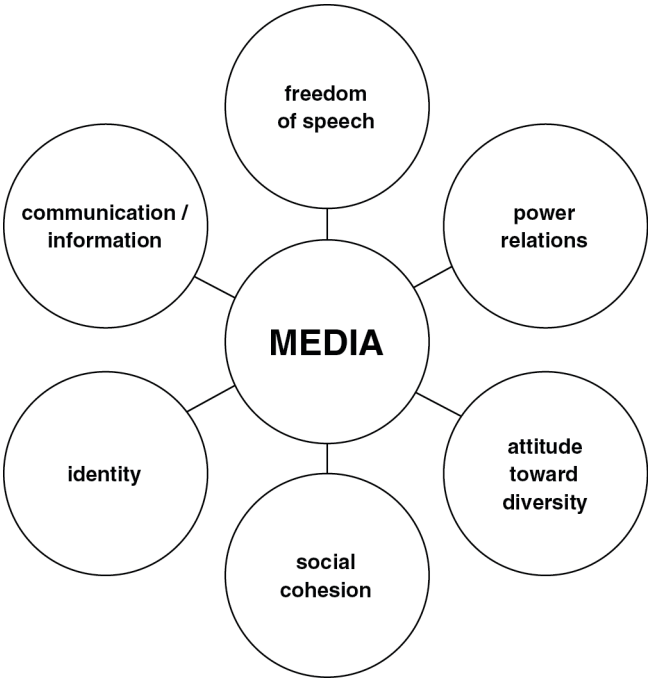

Figure 7.4 Media spheres of action

sense of who 'we' are in relation to who 'we' are not' (Cottle 2000: 2). In terms of identity and language acquisition and preservation, media reports written and published or broadcast in the minority languages in the minorities' own media are of central importance.

Second, the media are a tool to *foster social cohesion*. As pointed out centuries ago by Alexis de Tocqueville as the 'predecessor' of Benedict Anderson's theoretical model of an 'imagined community' (Anderson 2006):

> When men are no longer united among themselves by firm and lasting ties, it is impossible to obtain the co-operation of any great number of them unless you can persuade every man whose help you require that his private interest obliges him voluntarily to unite his exertions to the exertions of all the others. This can be habitually and conveniently effected only by means of a newspaper; nothing but a newspaper can drop the same thought into a thousand minds at the same moment …. The effect of a newspaper is not only to suggest the same purpose to a great number of persons, but to furnish means for executing in common the designs which they may have singly conceived.
>
> (Tocqueville [1835] 1980: 111)

The media, thus, 'serve as a system for communicating messages and symbols' and their function is to entertain, inform and 'inculcate individuals with the values, beliefs and codes of behaviour that will integrate them into the institutional structures of the larger society'

(Herman and Chomsky 1988: 1). In other words, the media have a 'societal purpose' by training 'the minds of the people to a virtuous attachment to their government' (Chomsky 1989: 13).

Third, following from the previous functions, the media also *shape the relationship* between *minorities* and the *society at large* and attitudes towards *diversity*. On the one hand, the media can improve understanding among the different components of society and strengthen social bonds. On the other hand, media can cause misunderstandings and hostility among the groups that are part of the larger national community (Tereskinas 2003: 209).

Finally, the media *reproduce power relations*. Indeed, the media are not a neutral tool. It is not only the search for profit and the need to reach bigger audiences that pushes the media to reflect the interests and opinions of the majority, but their modus operandi encourages the representation of the interests of the most powerful groups (Goldfarb 1998: 13). There is thus the risk that the media reinforce stereotypes on minorities, consequently preserving forms of oppression. Moreover, a homogenised media market, new media and mass communications lead to the *standardisation* of media culture and information. That in turn promotes the process of *concentration* of a few *world languages* at the expense of smaller national and minority languages. The world's most commonly used languages account for 81 per cent of all internet content, from 30 per cent in English to two per cent in Russian. Furthermore, the rapid *digitalisation* of media systems is taking over more and more functions in everyday social life and thereby creating more and more *uniformity* in socio-cultural and political behaviour across all cultural boundaries and social strata within and between societies.

In this regard, as pointed out by Jackson-Preece (2018), the development of digital technology and the internet has a relevant impact on minorities and their members and runs the risk of creating new inequalities, since economies of scale *privilege majority languages*. However, according to the author, the internet also presents *great potential for minorities*, for example by providing platforms for social networking, bringing together isolated communities and supporting minority languages in various fields like education. Yet, the internet can be beneficial only if specific measures sustain the presence of minority languages online (ibid).

Indeed, the media do not have to be monolingual and serve only the majority population. Plurilingual media can affirm cultural diversity and question majority hegemony. Specific arrangements can guarantee minority access to the media, promoting autonomy as well as integration. Such arrangements can vary from providing programmes for minorities and representing minority perspectives in a majority media to including minority members in the media world, the creation of a minority media and guaranteeing access to foreign media in a minority language. In this way, the media can contribute to tackling stereotypes, representing minority perspectives and encouraging the reproduction of minority languages and culture. Based on the work of Klimkiewicz, it is possible to distinguish three dimensions of minority access to mass media (Klimkiewicz 2003: 160):

- access to media products, namely the possibility for a minority audience to enjoy mass media programmes and so receive information and entertainment in their own language;

- access to media institutions, namely the possibility for members of minorities to become producers and journalists and therefore have the power to decide how the media are organised, what should be presented and how it should be covered; and
- access to media representation, namely the fact that minorities are portrayed as part of the message, as well as the need to eliminate negative representations.

In discussing media access, it is important to bear in mind that there are different types of media (such as public and private broadcasts, informative and commercial, local, national or sometimes international), which have different objectives and target groups. In this light, it is important to clarify whether minority media are in a dominant position for a group or are not covering all media types and therefore are only a complementary service to the majority media in the official language of the state. In this case, for minorities, objective and balanced reporting in the majority media is particularly important.

7.4.2.1 The status of minorities and their media in Europe

Media coverage and media funding, on the one hand, and the protection of minorities on the other, are interrelated matters. In addition to Article 10 ECHR, other international instruments like the FCNM in Article 9 and the ECRML make it easier for minorities to form networks and obtain a minimum standard of guarantees. The ECRML, for example, is also explicitly targeted at minority media. It calls upon states to ensure a minimum standard of access to the media for minorities and to provide them with the help necessary (ECRML, Article 11).

Print media are especially important for the survival of a minority because they serve as a tool for language acquisition and reproduction. In view of their usually limited circulation and low advertising revenues, minority newspapers are dependent on financial support (Box 7.4). European countries do not have a standardised system of support for the press, but a rough distinction can be made between direct and indirect forms of support. In addition to direct government subsidies, indirect measures are common, including preferential taxes and a zero printed paper rate for dispatch by post. In view of the educational role of the print media and the growing problem of media concentration, such support must be considered legitimate for certain selected media, even though adverse effects on free competition are possible in some cases.

Box 7.4 State aid and common market rules

Article 107(1) Treaty on the Functioning of the European Union (TFEU) forbids:

> any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

However, according to the *de minimis* rule, state aid not exceeding a ceiling of €200,000 over any period of three years is not deemed to affect trade between member states and/or does not distort or threaten to distort competition and therefore does not fall under Article 107 (1) of the Treaty (European Commission, 2006: 5–10).

In any event the Treaty provides in Article 107 (3) (b) for the possibility that the European Commission considers to be compatible with the common market any 'aid to promote the execution of an important project of common European interest'. Therefore it is arguable that the protection of minority cultures and minority interests is such an interest. Moreover, the Treaty of Maastricht (1992) Article 107 (3) (d) explicitly provides that the Commission considers to be compatible with the common market 'any aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest'. From Article 167 (1) EC Treaty it is obvious that 'cultural and heritage conservation' in the sense of the TFEU is not confined to the protection of the national cultural heritage but can also extend to the protection of Europe's 'regional diversity'.

There is no reason to think that aid granted to minority newspapers should not fall into the realm of the European Commission rules provided that they potentially affect trade between member states. However, this can be excluded if the aid at stake falls short of the mentioned threshold of €200,000. Moreover, such an effect does not seem plausible if the minority newspaper in question does not stand in competition with any newspaper produced in other member states.

There is no reason to assume that the Commission will in principle be opposed to aid granted to minority newspapers. In 1992 the Commission did, for instance, authorise state aid granted to the British government to a private television channel for the production of programmes in the Welsh and Gaelic languages. In that context, the Commission acknowledged that the quality of programmes in minority languages needs to be guaranteed. Two years later the Commission expressed the view that it would take into account financial difficulties when public service broadcasting is addressed to linguistic minorities or local needs (European Commission 2001: 42). There is *prima facie* no reason why the Commission should not stick to this line of thinking when it comes to the production of newspapers published in a minority language.

State aid granted to minority newspapers has to be authorised by the Commission if the aid at stake is able to affect the interstate trade. However, there are good arguments that even in cases requiring authorisation by the Commission, this authorisation is likely to be granted. First, the protection of the diversity of cultures and languages is a policy aim that the EU has itself subscribed to in Article 22 of the Fundamental Rights Charter. Second, the ECJ has underlined that the protection of minorities is a 'legitimate aim' the member states are free to pursue. Third, the European state aid regime itself declares the aid that aims to promote cultural heritage to be compatible with the common market. The recent years of European integration (most prominently the Treaty of Lisbon with its new Article 2 underlining that the protection of 'rights of persons belonging

to minorities' is a founding value of the EU and which makes Article 6 the Charter of Fundamental Rights legally binding) have made clear that the promotion of minority languages forms part of this heritage. In this sense, aid given to open-minded minority newspapers is not very likely to be considered as violating the EC rules on state aid (especially if they are not sectarian and self-centred in their orientation but promote the overall European aim of viable minority languages on the European territory).

According to a 2006 study commissioned by the Council of Europe, in spite of the efforts made at national and European levels, fewer than ten European minorities enjoy a full media offering. A choice of daily newspapers and periodicals, as well as 24-hour radio and television programmes in the minority language produced by the minority communities themselves, are only available to the Basques and Catalans in Spain, the German-speaking minority in Italy, the Russians in Estonia and Latvia, the Swedes in Finland and the Hungarians in Romania (Moring 2006: 15). Within the EU, at least 20 minority communities have print and electronic media that report regularly in their language. Others, like Welsh speakers in Great Britain, Irish speakers in Ireland and Frisians in the Netherlands, have no daily newspapers but are fully catered for with electronic media. In 10 per cent of the 56 countries of the OSCE there are no legal requirements to provide minority media; in the remaining 90 per cent there are at least a few general provisions for radio and television in minority languages, while just under 20 per cent have provisions for television channels for minorities. Those minorities that have been separated from their mother countries as a result of changes to national borders are normally able to consume media in their mother tongue from across the border (ibid: 16).

Both the FCNM and ECRML provide for *positive duties* to develop *plurilingual* media and promote minority access to media products, institutions and representation. The former postulates that states 'shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism' (FCNM, Art. 9 para. 4). Under the ECRML regime, the Committee of Experts of the European Charter for Regional or Minority Languages (CECL) noted that, by reason of their relative economic and political weakness, minority languages are at an inherent disadvantage when it comes to opportunities to be seen and heard in the media, and specified the necessity for this imbalance to be redressed by positive measures (CECL, First Report on Germany, 2002: para. 59).

In the monitoring practice of the FCNM, the ACFC also highlights the *role of the press* and refers to a corresponding resolution of the Council of Europe. In particular, minorities are not to be hindered in the creation and use of printed media. In Romania, a particularly positive example, in 2003 there were over 120 publications in Hungarian (press and online) in various counties in the country, which received state funding. The ACFC emphasised that all minorities in Romania have numerous publications, mostly in the minority language or bilingual (ACFC, Second Opinion on Romania, 2005: para. 114). In order to encourage minority participation, the ACFC has pointed out the importance of *targeted training* for members of minorities and awareness-raising activities concerning minority issues among

media professionals (see for example ACFC, Fourth Opinion on Cyprus, 2015: para. 46–50; also ACFC, Thematic Commentary 2016: para. 70). In addition, the ACFC has addressed the issue of online media and has pointed to the importance of access to high-speed internet, especially in remote areas, where minority communities often live (ACFC, Thematic Commentary, 2016: para. 69).

The ACFC is consistently of the opinion that the fact that a minority has *transnational access* to media products in its own language (e.g. from the kin state) cannot be an argument against the need for the minority to have its own media. In addition, the ACFC noted in several opinions that *intercultural dialogue* in the field of media continues to be complicated by the fact that a majority of the persons belonging to national minorities continue to follow largely foreign-based media, in particular TV, thereby often falling outside the domestic information system (ACFC, Second Opinion on Estonia, 2005: paras. 19, 72, 85). This concern was further reflected as a need for more programming for minorities on public service. In other words, access to exclusively foreign media provides access to media products rather than media institutions and representation, not guaranteeing the representation of minorities and their needs in a local context and minority participation in the decision-making process of the media. Furthermore, such arrangements, while pursuing the goal of protecting diversity, do not contribute to fostering integration or the creation of a cohesive society. Indeed, the majority and minority population are subjected to different visions and conceptions of society. It should be stressed that there is not only a need to receive information at stake but also a need to produce information in the minority language by members of the minority in order to promote tolerance and cultural pluralism. State authorities should thus facilitate comprehensive access to the media in the private and public sector. Otherwise, the television programmes now available in Europe via satellite (almost 200 channels), which supply migrants with around the clock information from their home countries such as Turkey and various Arab/Asian states, will further encourage the development of parallel societies.

Another aspect concerns the *improvement of digital services* in *minority languages*. This solution does not replace the importance of providing adequate resources to radio broadcasting at national and regional levels because digital radio is used by people belonging to national minorities only to a limited extent (ACFC, First Opinion on Sweden, 2003: para. 43). The CECL was also reflecting a concern that a significant proportion of radio programming in the language of some minorities was transmitted digitally, which excluded most people from being able to listen to those radio programmes (CECL, First Evaluation Report on Sweden, 2002: para. 237, 242, 353). The report on the UK pointed to the risk of exclusion of those who did not possess the correct digital apparatus to select the Welsh language for the second S4C television channel (CECL, First Evaluation Report on United Kingdom, 2003: para. 161–2). In the report on Austria, it was noted that television programmes in Croatian and programmes in Hungarian from the Burgenland studio had been made available on digital television in Vienna, which the CECL found insufficient, underlining the importance of a solution to make the programmes available via a more accessible medium (CECL, First Evaluation Report on Austria, 2004: para. 72, 77). On the other hand, due to the digitalisation of broadcasting, the ACFC welcomed the fact that Sami language TV news programmes are accessible throughout Finland (ACFC, Second Opinion on Finland, 2006: para. 96).

A very common problem, noted by the ACFC, is the time slots set aside for minority programmes, which very often do not reach the greatest possible target audience. For instance, TV programmes aimed at minorities were broadcast early on weekday afternoons on the main Hungarian terrestrial channel and repeated on Saturday mornings on the second channel, transmitted via satellite (ACFC, Second Opinion on Hungary, 2004: para. 73, 74). The CECL also noted that, in Austria, radio programmes in the Czech language are made available on medium wave, an arrangement which was found insufficient (CECL, First Evaluation Report on Austria, 2004: para. 73).

The relevance of the media has also been highlighted by other European organisations, in particular the OSCE, which has created a monitoring office under the auspices of the Representative on Freedom of the Media. Furthermore, the OSCE has adopted 'Guidelines on the Use of Minority Languages in the Broadcast Media'. Finally, a number of promising initiatives have been launched by non-governmental organisations, some of which receive EU funding, although the EU's contribution in the field is rather limited given a lack of powers and the limited European public sphere.

7.4.2.2 Perspectives for a European public sphere

In today's information society, the media offering has been extended from the standard repertoire of television, radio and press to include new digital platforms. That means far greater opportunities for the creation of a *transnational* European public sphere. This new variety of media offerings, however, has been accompanied by a process of *market concentration* deriving from alliances and mergers at national and European levels. The fundamental task of *public* service broadcasting, namely to provide all citizens with a varied quality offering of correct, objective and neutral information, is now almost beyond the means of public broadcasting corporations. Thus, the contribution of regional and local media to the protection of linguistic diversity has become all the more important. The complex relationship within a common public sphere requires the right to impart and share, the right to be heard (the right of recognised presence in society) and the right to be understood. This dimension has recently raised arguments for the maintenance of national public service broadcasting *and* a European public sphere for a common dialogue across national borders. But since there is no detectable European public sphere today, there is no substantial European public opinion either.

As experience at the national level shows, the development of a *European identity* (see, in particular, Kraus 2008; Kastoryano 2009) presupposes a European public service medium offering print, electronic and new digital media products. Theoretically, shared interests within Europe and the need for an exchange of information should be conducive to the establishment of such a public service. But it did not take the spectacular failure of Robert Maxwell's newspaper project in the 1990s (*The European*, which was hailed as the first European newspaper but disappeared after less than 10 years on the market) to confirm the difficulties of establishing a European public sphere. A European media sphere can only exist in the languages of the citizens and hence also in the minority languages. The situation is indicative of the neglect of the role of small cultural groups and language diversity: existing

regional and local media networks represent the capillaries that can be used to reach many citizens of Europe.

Thus, minority media can actually function as a tool to develop a European public sphere. Over 50 million citizens in the EU speak a minority language, without counting the foreign migrant population. Their local minority media do not focus only on specific regional needs and interests; they play an important role in connecting European topics with citizens speaking a lesser used language. These media often report how Europe has a positive impact on the daily life of every single person. These media are raising awareness especially when it comes to the role of the EU as a peace project and as promoter of diversity in Europe. Furthermore, particularly regional and local media know the interests and needs of each individual belonging to a minority because they are in closest contact with citizens and play an important role in raising public awareness on European issues and in encouraging people to take an active part in EU debates.

Moreover, according to empirical data, the majority of EU citizens get most of their information on politics from local and regional media. Therefore, EU institutions in general and in particular their antennas in the member states should put more emphasis on communication policy regarding its contact with local media. Citizens belonging to minority groups are an important demographic factor within the EU, experiencing the EU's motto 'Unity in diversity' in daily life. With the enlargement of the EU, a multiplicity of new regional and minority language communities have further enriched the EU's linguistic and cultural diversity. Therefore, supporting regional and minority languages and their media would underline the importance of transborder or transnational interaction by creating a European public sphere that is not limited to elitist national publics, as critics of the EU contend (Haller 2009; Judt 2011).

Indeed, minority organisations and their media are already nurturing the tender plant of a European public sphere. European integration is leading to greater networking among minorities and to common cross-border projects. The European Bureau for Lesser Used Languages, for example, has been using its minority press agency Eurolang to report on EU topics of relevance to minorities since 2000; the European Association of Daily Newspapers in Minority and Regional Languages provides networking for daily newspapers written in regional and minority languages; Cafe Babel provides young Europeans with well-written multilingual articles from the member states, including Catalan, and Mercator Media collects, disseminates and analyses reports on minorities throughout Europe.

7.4.3 Organisations promoting minority cultures

Besides being a prerequisite for representation and participation in state institutions (see Chapter 9), *freedom of association* (Article 11 ECHR) is highly relevant for minority identity preservation because it serves as a stepping stone for the development of a *network* of cultural, social and political institutions that aim to protect and promote the distinct linguistic and cultural identity of minority groups. The ECtHR addressed this interrelation of Articles 9 and 10 with Article 11 ECHR in several cases dealing with the contracting states' refusal

of *registration* or the *dissolution* of civic associations seeking recognition and promotion of a distinct minority identity.

In the ECtHR case *Sidiropoulos and Others v. Greece* (1998), the applicants were a group of Greek citizens who claimed to be of Macedonian ethnicity and to have a 'Macedonian national consciousness'. They attempted to establish a non-profit association, called 'Home of Macedonian Civilisation', which aimed to promote the cultural identity of the Florina region. However, the Greek courts refused the registration of this association, arguing that there is no Macedonian minority in Greece and that the objectives of the association are unlawful and a threat to the territorial integrity of Greece. The Greek government justified the interference with the freedom of association with the aims of maintaining national security, preventing disorder and upholding Greece's cultural traditions and historical and cultural symbols (*Sidiropoulos and Others v. Greece*, 1998: para. 37). The applicants claimed, inter alia, a violation of Article 11 (freedom of association) and Article 14 (non-discrimination) of the ECHR. The Court stated that:

> [t]erritorial integrity, national security and public order were not threatened by the activities of an association whose aim was to promote a region's culture, even supposing that it also aimed partly to promote the culture of a minority; the existence of minorities and different cultures in a country was a historical fact that a 'democratic society' had to tolerate and even protect and support according to the principles of international law.
>
> (ECtHR, *Sidiropoulos and Others v. Greece*, 1998: para. 41)

Hence, the Court found Greece in violation of Article 11 of the ECHR.

It is also worth analysing the case *Gorzelik and Others v. Poland* (2004), which concerns the refusal of Polish authorities to register an association called the 'Union of People of Silesian Nationality'. The association claimed to be 'an organisation of the Silesian national minority' and aimed inter alia 'to awaken and strengthen the national consciousness of Silesians', 'to restore Silesian culture' and 'to protect the ethnic rights of persons of Silesian nationality' (ECtHR, *Gorzelik and Others v. Poland*, 2004: para. 19). The Polish authorities acknowledged the existence of Silesians as an 'ethnic minority' but not as 'national minority' and refused to register the association. They argued that the registration of the Union would give it the right to take advantage of 'privileges' conferred on national minorities such as the exemption for minority organisations standing in elections from the five per cent threshold of the vote required to obtain seats in parliament (see, in general, Chapter 9, section 9.2). The applicants complained that the Polish authorities had arbitrarily refused to register their association and alleged a breach of Article 11 of the ECHR. The ECtHR noted that pluralism is 'built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities' and acknowledged that 'forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights' (ibid: para. 92–3). Regarding the registration procedure, the court noted that Polish domestic legislation lacked a definition of 'national minority'. Therefore, it was for the national courts to interpret the notion of 'national minority', as distinguished from 'ethnic minority', within the meaning of the Polish Constitution and

to determine whether the concerned association qualified as an organisation of a national minority. In the view of the ECtHR, the Polish courts did not overstep their margin of appreciation in considering that there was a pressing social need to restrict the exercise of the applicants' right to freedom of association 'in order to protect the existing democratic institutions and election procedures in Poland and thereby … protect the rights of others' (ibid: para. 103). However, was the measure proportionate to the legitimate aims pursued? The judges – following the argumentation in the submission of the government – noted that that the refusal to register the association:

> was not a comprehensive, unconditional one, directed against the cultural and practical objectives that the association wished to pursue, but … [i]t was designed to counteract a particular, *albeit only potential*, abuse by the association of its status. It by no means amounted to a denial of the distinctive ethnic and cultural identity of Silesians … On the contrary, in all their decisions, the authorities consistently recognised the existence of a Silesian ethnic minority and their right to associate with one another to pursue common objectives.
>
> (ibid: para. 105, emphasis added)

Hence, the Court concluded that the state's interference was proportionate to the legitimate aims pursued and unanimously held that there was no violation of Article 11 of the ECHR. Poland did not restrict the applicants' freedom of association per se. By refusing to register an association that claimed to represent a Silesian 'national minority', the Polish authorities did not aim to prevent the applicants from expressing and promoting a distinct minority identity but from establishing a legal entity which would be entitled to a special status under electoral rules (see, however, the critical comment by Marko 2009: 628).

How can the ECtHR's judgments in *Sidiropoulos* and in *Gorzelik* be reconciled? The inescapable conclusion that emerges from the argumentation of judges Costa, Zupančič and Kovler in their joint concurring opinion on the *Gorzelik* case is that the most important aspect for the ECtHR is the assessment of the factual context, which inevitably attracts criticism in terms of casuistry exercised by this court. However, an essential distinction between *Sidiropoulos* and *Gorzelik* regards the claims made by the minority organisations. While in the former case the core issue was the recognition of a minority group identity as such without the political aspiration to representation and participation in parliament, in the latter case, the crux of the matter was the possibility to make use of a set of so-called privileges conferred to national minorities by electoral legislation. But as we have seen in Chapters 3 and 4, a strict distinction between culture and politics is an ideological construction. This is clearly revealed by decisions of domestic courts that refuse to register associations seeking recognition and promotion of distinct ethno-cultural identities or dissolve political parties taking part in general elections on the grounds that such organisations have a hidden political agenda, which is directed against the unity of the nation and represent a threat to territorial integrity of the state. The case law of the ECtHR dealing with such issues is analysed in detail in Chapter 9, section 9.2.1, whereas we have dealt with the problems of registration and dissolution of religious associations and churches in the previous section above.

7.5 The socioeconomic dimension

In the introduction to this chapter we stressed the multifunctionality and 'duality of languages' as both a necessary instrument of communication in social relations and for social identity formation and the configuration of societies; in short for social and system integration. Hence, language issues, in particular the historical legacy of state formation and nation building leading to a 'monolingual habitus' (Gogolin 1994) through language standardisation and cultural homogenisation, play an important role to this day also in the socioeconomic dimension. *Two policy fields* and their interplay are of utmost importance in this respect as we learned from Chapter 6, section 6.3.3.2. This is the role which language plays in formal (i.e. institutional) *primary and secondary education* for the acquisition of 'capabilities' (Sen 1999; Nussbaum 2011) and the negative consequences which structural discrimination can have in terms of 'poverty as capability deprivation' (Sen 1999: 87). The success or failure in linguistic skills acquired in primary and secondary education will then be decisive for access to and participation in the *public and private labour market*. As we have learned from the modernisation theories of nationalism in Chapter 4, this was true for old minorities in the processes of transformation from agrarian into industrial and post-industrial societies, but this is also perceived as problem of integration of new minorities, as we outlined in Chapter 1.

Moreover, as we encountered with the *Belgian Linguistics* case of the ECtHR in the previous section, history seems to repeat itself with what we called the *national paradox* (i.e. the civic-nationalist claims of the 'stateless nations' in Western Europe for sub-national language homogenisation of both the public as well as private economic spheres; Keating 2001b), which we discuss below with the examples of case law from Flanders and Catalonia. These cases will remind us of the inextricable relationship between education and the socioeconomic sphere: is it sufficient or even an added value in the labour market to provide for bilingual education against the homogenising and thus assimilative forces of the official national language and world languages alike? Or do these trends require monolingual education in the minority language even if it is recognised as a second official language in order to guarantee its survival and, through the control of the socialisation process of the new generation, also cultural survival? Finally, European integration is a project with the aim of establishing not only a common market based on negative integration by tearing down all barriers hindering freedom of movement of persons, goods, capital and services, but also to achieve an 'ever closer union among the peoples of Europe' by preserving, at the same time the 'national identities' of the member states as well as 'linguistic diversity' (Articles 1, 3 and 4 TFEU; see also Chapter 3, section 3.4). But are these goals compatible with each other? Is the fact that different languages are spoken in and within different member states a problem when it comes to achieving the aim of a common market? Are not multinational companies compelled to promote their products and services in several languages and to conclude their contracts in different vernaculars so that Europe's linguistic diversity places extra costs on them, as Elke Cloots (2014) argues in her article about the ECJ case *Anton Las v. Psa Antwerp NV* (2013)?

7.5.1 Minority languages in education

The ACFC Thematic Commentary on Education (2006) highlights different scenarios ranging from monolingual education in a minority language to monolingual education in a majority language (Box 7.5) and the different organisational forms required as policy choices for national and sub-national governments.

Box 7.5 Types of education for minorities

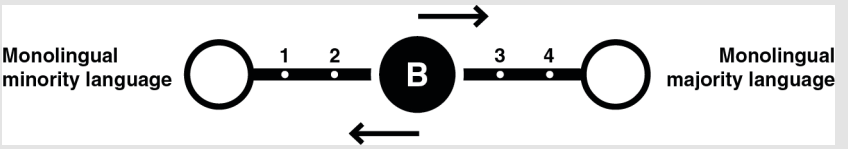

Figure 7.5 Sliding scale of approaches in education for minorities

1) Minority language dominates and the majority language is taught as a distinct subject.
2) Minority language dominates but some subjects are taught in the majority language.
3) Majority language dominates and only some lessons are taught in the minority language.
4) Majority language dominates and the minority language is taught as a distinct subject.

B: True bilingualism, where both languages are taught equally.

The German speakers in the autonomous province of South Tyrol, Italy – often cited as one of the best protected minorities in Europe – enjoy a *monolingual educational system* with German as language of instruction from kindergarten to high school. In both the Italian and the German schools, however, the teaching of the other (second) language as a distinct subject is compulsory. Although this might seem – from the point of view of preserving the German language and culture – very effective, it has not led to a bilingual, 'integrated bicultural' society (see Chapter 5, section 5.2). The institutionally divided educational system has rather led to the development of parallel societies, since there are fewer opportunities for pupils to be in contact with their peers from the other linguistic group, which results in very few interlinguistic friendships and thus to a low degree of intercultural socialisation between the two linguistic groups (Baur and Larcher 2011; Constantin 2011).

Moreover, although this segregated school system respects the right of parents to choose an educational system according to their own convictions, it does not consider mixed marriages and the children of bilingual families, which now constitute more than 10 per cent of South Tyrolean children. Thus, the monolingual educational system in South Tyrol

responds very well to the aim of education to preserve and protect the minority language and culture, but it does not create a cohesive society or contribute to the goals of the European Union to create a multilingual society (on the EU's multilingualism policy see Gazzola 2016). However, pilot projects and private schools have tried to counterbalance the shortcomings of this segregated educational system with experimenting on various forms of bilingual education and exchange programmes between the two school systems.

Speakers of the Ladin language, the so-called *minority within the minority* situation, have organised their school system differently, namely based on *multilingualism* and *parity*: from kindergarten onwards children are exposed to all three official languages as languages they study, as well as languages of instruction, namely Ladin, German and Italian. While Ladin is the main language of instruction at the beginning, its importance decreases progressively, while the use of German and Italian as languages of instruction in class increases over time. Finally, all three languages are used on an equal basis (for details see Alber 2012, 407–9).

Other minority regions have opted for *bilingual school systems* where subjects are taught in two languages, thus focusing more on the aim of education to build a cohesive and multilingual society. There are different approaches and means of implementation for bilingual teaching and the share of teaching in the minority or majority language differs for each minority group: the Hungarian minority in Slovenia follows a bilingual educational system. In the first years of primary school, all subjects are taught bilingually, with one teacher per language in class and all the textbooks printed in both languages. From the fourth year onwards, the teaching changes to using – in theory – both languages as a medium of instruction. *In practice*, however, this is *organised differently in all schools*: some present a topic in Slovene and discuss it in Hungarian, some randomly change the language, and so on. The consequence is that the use of languages in this educational system depends very much on the school and on the personal linguistic competences of the teacher.

The Austrian Constitutional Court was faced with a similar situation and had to decide whether teaching the Slovene language in the federal entity of Carinthia after the first three years of bilingual education, was sufficient if it was taught only four hours a week like any other foreign language while all other subjects (apart from religion) were taught in German, as a legacy of the assimilationist intentions of the law in the past. The Austrian Constitutional Court decided that four hours per week were not sufficient for an adequate teaching of the language of the Slovene minority and that it was not logical to provide students with a bilingual education for the first three years and then change in the fourth year – at the end of primary school – to teaching Slovene as a foreign language (Austria, Constitutional Court, Judgment of 9 March 2000, Vfslg. 15759/2000). *Bilingual teaching* is interpreted by the Austrian Court *not* as a means to help the necessary process of *adaptation to the majority culture* including language, hence also facilitating so-called socioeconomic 'structural assimilation' (Esser 2001; see also Chapter 5, section 5.2) into the majority society, but education in the minority language is rather interpreted as a means to support and *strengthen the identity* of the Slovene minority and hence the development of its culture (see also section 7.2).

But *bilingual education* may have also a number of *shortcomings*: children enter school with a privileged knowledge of one of the languages and thus teachers as well as pupils face challenges which might also affect the quality of the lessons taught and consequently the quality of transmitting of the minority identity. One language, often the dominant state

language, will always remain the preferred language due to a lack of teachers in the minority language, even though the ACFC considers that the lack of teachers is not an excuse for not offering minority or bilingual education and therefore calls on states to offer adequate training of teachers in the minority language. Additionally, the availability of textbooks needs to be secured, where kin states could also play an important role.

7.5.2 Minority languages in the labour market

Access to and participation in public institutions, which we consider in Chapter 9 from the perspective of the representation and participation of minorities in public institutions, and language-based discrimination in the private labour market are salient issues that link language policies and the equality principle.

Language proficiency requirements may constitute a disproportionate obstacle for access to certain occupations for persons belonging to national minorities. Even the certification of language proficiency may raise problems, as demonstrated by relevant ECJ case law. In the case *Angonese v. Cassa di Risparmio di Bolzano SpA* (Box 7.6), the ECJ held that the principle of non-discrimination precludes any requirement that language knowledge must have been acquired within the national territory. The Court noted that persons not resident in the autonomous province of South Tyrol had little chance of acquiring the certificate of bilingualism (known as *patentino*) issued by the provincial authorities. Therefore, it was difficult, or even impossible, for them to gain access to the employment in question.

Box 7.6 ECJ, *Angonese v. Cassa di Risparmio di Bolzano SpA* (2000)

Roman Angonese, an Italian citizen resident in the autonomous province of South Tyrol, applied for a job in a private local bank. In South Tyrol, Italian and German are both official languages and Angonese was requested to submit a specific certificate of bilingualism, the so-called *patentino*. This certificate is compulsory for access to jobs in the public service and provincial authorities issue it after an examination that takes place only in that province. Although *Cassa de Risparmio* is a private bank, it decided to require the *patentino* for access to employment, according to a provision of the National Collective Agreement for Savings Banks, which authorises the institutions concerned to lay down the conditions and rules for recruitment, as well as the selection criteria. Angonese did not have the *patentino* but he submitted other documents attesting to his linguistic skills. After *Cassa di Risparmio* rejected his application because he had not produced the *patentino*, Angonese brought an action before the domestic court, which requested a preliminary ruling from the ECJ. The question was whether it is compatible with European law to make the admission of candidates for a competition organised to fill posts in a company governed by private law conditional on possession of the official certificate attesting to knowledge of local languages issued exclusively by a public authority of a member state at a single examination centre.

The ECJ acknowledged that it is legitimate to require a job applicant to have a certain level of linguistic knowledge in private labour relations. The possession of a certificate such as the *patentino* may be a criterion for assessing that knowledge. However, 'the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, must be considered disproportionate in relation to the aim in view' (ECJ, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000: para. 39, 42–3). Therefore, requiring job applicants to prove their language knowledge exclusively by means of this specific *patentino* certificate did constitute a form of *indirect discrimination* in violation of the EU fundamental right of freedom of workers.

The ECJ dealt with a similar issue in *European Commission v. Kingdom of Belgium* (2015) which stemmed from domestic regulations on language requirements established under the complex constitutional design of the country. The Belgian Constitution defines four language areas (i.e. French, Dutch, bilingual French-Dutch and German; see also Chapter 9, section 9.2.3); that is to say, four different parts of the national territory in which uniform rules are applied with regard to the use of languages, particularly in relation to administrative matters. Candidates for posts in local services established in the French- or German-speaking areas, whose diplomas or certificates did not show that they were educated in the language concerned, were required to provide evidence of their linguistic knowledge by means of one particular type of certificate. Only one particular Belgian body issued the certificate following an examination conducted by that body in Belgium. The European Commission argued that such a requirement constitutes discrimination, prohibited by Article 45 TFEU, which guarantees the freedom of movement of workers within the Union. The ECJ noted that under Article 3(1) of EU Regulation no. 492/2011 on freedom of movement for workers, member states are entitled to lay down the conditions relating to the linguistic knowledge required by reason of the nature of the post to be filled. However:

> the right [of the state] to require a certain level of knowledge of a language in view of the nature of the post must not encroach upon the free movement of workers. The requirements under measures intended to implement that right must not in any circumstances be disproportionate to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.
>
> (ECJ, *European Commission v. Kingdom of Belgium*, 2015: para. 25)

The Court acknowledged that it may be legitimate to require a person applying for a public service job to have knowledge of the language of the area in which that municipality is located of a standard commensurate with the nature of the post in question. However, to require that the respective person provides evidence of his linguistic knowledge exclusively by means of one particular type of certificate, issued only by one particular body appears, from the perspective of the freedom of movement of workers, disproportionate to the aim pursued. Hence, the ECJ concluded that Belgium had failed to fulfil its obligations under Article 45 TFEU and the EU Regulation no. 492/2011.

However, following from the case law of the ECtHR as we pointed out in the subsection above, the Belgian Constitution and Belgian Law have created, with the exception of

Brussels region, monolingual language regions whose jurisdiction in language issues does not only affect access to the public labour sector but also *interferes into private relations*. As becomes clear from legislative history, the Flemish Act of 1973 had a dual purpose. On the one hand, Dutch should become the language of economic life in Flanders rather than French in terms of a reversal of power relations since Francophone Belgians, not only in the Walloon region, had dominated all public and economic life (i.e. government, education, and business) and not only since the creation of Belgium as an independent state in 1831. On the other hand, the Act was adopted by the Flemish parliament in order to ensure that (Flemish-speaking) workers and other employees understand the conditions of their employment contract and get the opportunity to climb up the ranks of their company. This is the background for the case of the ECJ, *Anton Las v. Psa Antwerp NV* (2013), in which the Court had to decide whether the strict provision of the Flemish Act that private labour contracts concluded in any other language than Dutch are null and void is a violation of the fundamental freedom of movement of workers because Mr Las, a Dutch citizen, had been employed in the port of Antwerp by a company belonging to a multinational group (Psa Antwerp) whose registered office is in Singapore with a contract drafted in English. After his dismissal, he claimed before the Antwerp Labour Court to declare his contract null and void so that he would get the much higher compensation according to Belgian Labour Law, whereas the company invoked that the employment contract would fall under the EU freedom of movement regulations with the consequence that the Flemish Act 1973 did violate EU law.

Interestingly, like the ECtHR in the ***Belgian Linguistics*** case, the ECJ did not even raise doubts in its judgment about the fact of the linguistic homogenisation of public *and*, in this case, also private relations, but only raised the problem with regards to the freedom of movement of workers and declared the language requirements disproportionate to the attainment of its objectives, since less restrictive, but equally effective alternatives were available if the drafting of an authentic version of an employment contract in a language known to all the parties concerned were permitted, in addition to a version in the official regional language.

Hence, the case law of both the ECtHR and the ECJ permit member states and their subnational regions to strive to promote their official language by imposing linguistic constraints not only on the communication with public authorities, but also between private parties. This can be traced back to the lack of the competence of the EU to regulate language rights so that adjudication by the ECJ remains basically restricted to the problem of negative integration; that is, the question whether national (constitutional) law is in conformity with the fundamental freedoms for market integration, as discussed in Chapter 3, section 3.4. Thus, the efforts of the EU with the European Strategy for Multilingualism with its three general socioeconomic objectives, namely, strengthening social cohesion, the integration of migrants and intercultural dialogue; promoting mobility of the labour force in the common market, employability and growth in Europe; and managing multilingual communication in a supranational democracy had its 'golden age' in the 2000s (Gazzola 2016). In line with the 'backlash of multiculturalism' and the 'multiculturalism is dead' public discourse since 2010 (see Chapter 1), the promotion of multilingualism to achieve these goals is no longer high on the agenda of the European institutions, except the European Parliament (see Van Dongera *et al.* 2017).

Table 7.5 A typology of bilingualism

		Competence L1	
		High	*Low*
Competence L2	High	Competent bilingualism	Monolingual assimilation
	Low	Monolingual segmentation	Linguistic marginalisation

L1: minority language; L2: majority language.

Source: Esser (2006: 210)

Moreover, in contrast to the assumption of the claims of neo-assimilationists that immigrants are unwilling to learn the language of their host societies (see Chapter 1), *empirical studies* also prove that there is a considerable number of immigrants who – like second generation immigrants to the United States – give up the language of their society of origin (L1) and shift to the language of the host society (L2) (Table 7.5).

In contrast to all public anti-multiculturalism discourse, there is a strong tendency in particular among Turks in Germany, in comparison with Greek and ex-Yugoslav immigrants, to give up L1 and to shift to L2, so that Hartmut Esser (2006: 228, 239) concludes that a special tendency of Turks to preserve their culture cannot empirically be validated. Moreover, there is *competent bilingualism among immigrants* in considerable numbers, again relatively more among ex-Yugoslav immigrants. Esser demonstrates that L1 'language resilience' is influenced by intra-ethnic communication and cooperation, in particular, through ethnic neighbourhoods, intra-ethnic endogamy and ethnic networks. Moreover, *language resilience* and therefore the preservation of linguistic identity is perceived as social capital *in cases of discrimination* in efforts for upward mobility, whereas the cultural status of L2, as well as its usability and training in the host society are factors which support a language shift to L2. Moreover, geographic concentration (i.e. a critical mass) of L1 speakers can shift the trend from monolingual assimilation to competent bilingualism (Esser 2006: 278). Hence, there are – contrary to the neo-assimilationist assumptions – no clearcut either/or alternatives in terms of language shift or resilience with regard to immigrant integration.

Finally, two reports of the Organisation for Economic Co-operation and Development (OECD) provide the results of empirical studies about the *intergenerational mobility* of migrants and their children in terms of educational attainment and access to the labour market in several European member states of the OECD. Following from the experience of large-scale low-educated immigration to Austria, France, Germany and the Netherlands in the post-Second World War economic boom period, the children of immigrants born in these countries had relatively lower starting conditions for socioeconomic upward mobility in comparison with their peers with so-called native-born parents, in spite of generally high educational aspirations among migrant families. The educational attainment of children of these low-educated immigrants depends on the amount of years immigrant parents have spent in the host country. There is evidence that good language skills of parents positively impact their children's educational outcomes, in particular when they are young. In conclusion, the *employment gap* between children whose parents were born outside the EU

and native-born parents *decrease* with the *level of educational attainment*, suggesting that a person's own education is the strongest driver for access to the labour market. Nevertheless, a significant employment gap and difference in occupational upward mobility remains: for children whose parents were born outside the EU, only 20 per cent find work in an occupation requiring a higher skill level than his/her father needed in his occupation, whereas about one-third of children of immigrants from EU countries with native-born parents move upward the occupational ladder (see OECD 2017 and 2018).

7.6 Monolingual or multilingual equality?

Recent studies (Berthoud *et al.* 2013) and comparative research into European language standardisation histories demonstrate why the European attitude to multilingualism has always been a selective and 'hierarchising' one (Vogl *et al.* 2013: 410–16), in terms of 'standard' languages and non-standard 'dialects', as well as – when linked with the social status of speakers – 'plebeian multilingualism' *versus* 'prestigious monolingualism'. Throughout state formation and nation building in Europe, plurilingualism was seen as a problem for all efforts towards the standardisation of languages, in order to build a linguistically and culturally homogenous national state, according to either the Jacobin or the Herderian model. These multifaceted developments towards national monolingualism in the nineteenth and twentieth centuries worked at the expense of both internal and external multilingualism. Internal multilingualism describes 'native language multilingualism', which includes not only the standard variety, but also non-standard varieties within an individual language, such as technolects, dialects and colloquial language (Wandruszka 1979: 13; Gogolin 2008); whereas external multilingualism refers to the relationship of several languages, either as separate coexisting languages or a mix of several languages within a state territory. Also at the EU level, despite claims for minority language protection and promotion (European Bureau for Lesser Used Languages) and promoting English as the dominant *lingua franca* (Hülmbauer and Seidlhofer 2013; White 2016), the policy for the promotion of linguistic diversity and language learning according to the formula one plus two (i.e. the mother tongue and two or more foreign languages; Council of the European Union 2002; Gazzola 2016) was, and to a large extent still is, no more than a cumulative approach, based on the preservation and representation of the national languages of the member states (Gogolin 1994; Kraus 2008: 76–138; Krzyżanowski and Wodak 2011).

Recent sociolinguistic research on multilingualism, both at the micro level of corporations and institutions and the macro level of the European Union, clearly demonstrates the *new challenges* and *trends* that run up against the established (normative-ideological) criteria of 'correctness' of the use of languages, in terms of the application of standardised language, 'purity' of the language and the 'native speaker' as a benchmark for success in language instruction. Hülmbauer and Seidlhofer (2013: 400–1) argue for a redefinition and re-evaluation of competence(s): given the situational and contextual character of intercultural communication, 'there needs to be room for in situ negotiation and ad hoc language choices'; that is, we have to readjust our perceptions of languages and use of languages 'from separate languages to communicative practices'. This also includes having to 'shift

the focus from quantitative to qualitative considerations; that is, from the question how many and which separate languages to include into an effective European communicative framework to how linguistic resources are being realised … through which modes'. Hence, a *one language at a time* approach, which is based on cumulative, segregational assumptions towards plurilingual phenomena, is considered clearly outdated and *should be replaced* by an *all languages at all times approach*, which allows for the 'holistic exploitation' of all possible resources in plurilingual practices. This proposal has been tested at the micro level in the higher education sector. An analysis of the different patterns and degrees of multilingualism at the officially trilingual Free University of Bolzano, the capital of the autonomous province South Tyrol in Italy, revealed that multilingualism resulted either from the interaction of different languages at the very same event in the mode of intrasentential code-switching or 'from the combination of many monolingual events' as institutional policy (Veronesi *et al.* 2013: 262–65). However, only the former 'strategy proved to be fruitful in increasing both the degree of interaction among the participants … as well as the elaboration and the comprehension of new concepts'. In this sense, *multilingualism* in terms of language alternation *enhances comprehension* and *fosters creativity*, insofar as the resolution of terminological conflicts allows for novel interpretations of established concepts (ibid: 269).

Finally, not only the language policies of Belgian's monolingual regions have contributed to what we call the process of an *ethnification of language* following from our relational sociological approach (see Chapter 5, sections 5.2 and 5.3). From this perspective, also the *comparison* between *Quebec* and *Catalonia* offers some interesting insights on the overall problem why national minorities or co-nations opt for what we term *monolingual* or *multilingual equality* in both the *public* and *private spheres* of social relations in their claims for effective minority protection in a territorially delimited jurisdiction.

In *Ballantyne et al v. Canada* (1993), the UNHRCom dealt with complaints of three English-speaking business owners from Quebec who challenged the provisions of Bill 101 (Box 7.7) banning the use of English for the purposes of advertising; for example on commercial signs outside business premises or the name of the firm. The authors of the complaints claimed violations of Articles 2 (effective legal remedy), 19 (freedom of expression), 26 (non-discrimination) and 27 (minority language rights) of the ICCPR and argued that prohibiting the use of any language other than French for commercial signs was neither an appropriate nor a justifiable remedy against threats to the French culture. On the other hand, the government of Quebec claimed that the disputed provisions of Bill 101 (as amended by Bill 178) were reasonable and provided Quebec 'with a means of preserving its specific linguistic character and give French speakers a feeling of linguistic security' (UNHRCom, *Ballantyne et al v. Canada*, 1993: para. 8.10).

Box 7.7 Bill 101 and language policy in Quebec

Bill 101 of 1977 (also known as the Charter of the French Language) is a provincial law of Quebec. It declares French to be the official language of the province and shapes all aspects of its language policy. Bill 101 aims to make French the language

of government and courts, as well as the everyday language of education, communication and business. The Supreme Court of Canada declared several provisions of Bill 101 unconstitutional. For instance, initially Bill 101 provided that laws must be enacted only in French. In 1979, the Supreme Court struck down these provisions in the case *Attorney General of Quebec v. Blaikie et al*. Taking another example, in 1988, the Supreme Court held in *Ford v. Quebec* (*Attorney General)* that provisions restricting the use of commercial signs written in languages other than French are unconstitutional as they breach freedom of expression. A few days after the Supreme Court of Canada delivered the ruling in *Ford v. Quebec* (*Attorney General)*, Bill 101 was amended by Bill 178 that maintained French as the only language on outdoor public signs, posters and commercial advertising, inside shopping malls and on public transport. Exceptionally, signs in languages other than French were allowed inside private enterprises as long as they also advertised in French. Obviously, Bill 178 did not change the substance of the disputed provisions of Bill 101. Finally, in 1993, Bill 83 brought the text of Bill 101 into compliance with the ruling of the Supreme Court by allowing the use of English on outdoor public signs in Quebec, as long as French is predominant.

The UNHRCom rejected the claim of the applicants under Article 27 ICCPR arguing that English-speaking citizens of Canada are not a linguistic minority (although they are in minority within the province of Quebec). In the view of UNHRCom, Article 27 refers only to minorities at state level. Moreover, the committee found no discrimination under Article 26 ICCPR noting that the restrictive norms of Bill 101 apply to both French and English speakers 'so that a French-speaking person wishing to advertise in English … may not do so' (ibid: para. 11.5). There was, however, a violation of Article 19 ICCPR because a state 'may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice' (ibid: para. 11.4). In conclusion, the aim of Quebec's government to protect the vulnerable position in Canada of the francophone group was legitimate as long as the requirement to solely use French applied only in the public domain.

In 2010, the Spanish Constitutional Court addressed, inter alia, the question of language use in the socioeconomic sphere in Catalonia in a landmark judgment on the constitutionality of the fundamental law of this autonomous region where Catalan and Spanish are co-official languages (see also Chapter 4, section 4.3 for the debate of this judgment in terms of a right to democratic secession). Article 6 of the Autonomy Statute of Catalonia (ASC) of 2006 specified that Catalan, as the 'own language' (*llengua pròpia* in the Catalan language) of the autonomous region, is 'the language of normal and preferential use' in public administration and in the public media and, thus, citizens 'have the right and the duty' to know it (Box 7.8 below). According to Article 34 ASC, any user or consumer of goods, products and services, has the right to use, orally or in writing, the official language of his or her choice. Institutions, companies and establishments that are open to the public in Catalonia are bound by this obligation of 'linguistic availability'. What does this mean? Do private enterprises have an obligation to function in both official languages or is it possible when

doing business in only one language that this is the Catalan language? Do users of private services have the right to receive a reply in the language of their choice?

Box 7.8 Statute of Autonomy of Catalonia (2006), Articles 6 and 34

Article 6. Catalonia's own language and official languages

(1) Catalonia's own language is Catalan. As such, Catalan is the language of normal [~~and preferential~~]* use in public administration bodies and in the public media of Catalonia, and is also the language of normal use for teaching and learning in the education system.

(2) Catalan is the official language of Catalonia, together with Castilian, the official language of the Spanish State. All persons have the right to use the two official languages and citizens of Catalonia have the right and the duty to know them. The public authorities of Catalonia shall establish the necessary measures to enable the exercise of these rights and the fulfilment of this duty. In keeping with the provisions of Article 32, there shall be no discrimination on the basis of use of either of the two languages.

…

Article 34. Linguistic rights of consumers and users

Each individual, in his or her capacity as user or consumer of goods, products and services, has the right to be attended orally or in writing in the official language of his or her choice. Bodies, companies and establishments that are open to the public in Catalonia are bound by the obligation of linguistic availability within the terms established by law.

* The Spanish Constitutional Court struck out the term 'and preferential' as unconstitutional.

Before clarifying these issues, the constitutional judges had first to decide whether the definition of Catalan as the 'own language' (in the translation of the Spanish Constitutional Court) of Catalonia upset the legal equality between Spanish and Catalan. The Court found no 'imbalance in the nature of both languages as co-official pursuant to constitutional law, to the detriment of Spanish' (Spain, Constitutional Court, Judgment of 28 June 2010, Part II, para. 14 (a)). In this interpretation, the term 'own language' would only mean that 'Catalan is a language that is unique or exclusive to Catalonia in comparison with Spanish' (ibid.) which is spoken all over the country. Second, however, the Court held that defining Catalan as *llengua pròpia* of Catalonia does *not justify* an imposition of its *preferential use* to the detriment of Spanish. As Catalonia has two official languages standing on equal footing, it is unconstitutional to upgrade one of them to a preferential rank. Thus, the Court struck down this part of Article 6 ASC. Moreover, the judges held that the ASC provision regarding the *duty to know*

Catalan was not generally legally enforceable because a duty of citizens corresponds to a correlating right of the public authority. As public authorities have no right to address citizens exclusively in Catalan, the law cannot formalise such a general duty of all citizens living in Catalonia (Spain, Constitutional Court, Judgment of 28 June 2010, Part II, para. 14 (b)).

Finally, Article 34 ASC with the right to a choice between the two official languages extended to the economic sphere, thereby imposing a duty on private companies to function in Catalan when addressed in this language, was interpreted by the judges in such a way as to bring this provision into conformity with their view on the strict equality of the two official languages.

Thereby, the Constitutional Court emphasised that the obligation of 'linguistic availability' does not mean a duty to be imposed on private entities and companies, their owners or staff, to use any of the two official languages in private relations. The right to be assisted in the language of one's choice is only enforceable in relations between public authorities and citizens. Therefore, in relations between private parties, 'it is inconceivable that the [ASC] imposes in an immediate and direct way such obligation to the citizens' (Spain, Constitutional Court, Judgment of 28 June 2010, Part II, para. 22).

As we learned from the analysis of this judgment in Chapter 4, section 4.3 whether Catalonia has a right to unilateral secession, also this 'strictly' legal interpretation of the Autonomy Statute could not – against the intentions of the judges – offer a way out between competing sovereignty claims and thereby contribute to a political moderation. Quite contrary, this judgment even triggered the civic-nationalist inspired political mobilisation in Catalonia.

7.7 Summary conclusions and learning outcomes

What conclusions can be drawn from this analysis of the relevant case law of domestic and international courts, which highlights the practical outcomes of various approaches of states vis-à-vis cultural, linguistic and religious diversity?

This chapter has explored the *multidimensionality* of the right to a minority identity in diversity from a problem-oriented perspective. It highlights the impact of ideologies on the full recognition and enjoyment of linguistic rights and freedom of religion, as well as the outcomes of the *permanent norm contestation* process between minorities and majorities on three dimensions: sociocultural, sociopolitical and socioeconomic. These dimensions refer to spheres of action where power relations are at play and factors of cultural diversity become salient and problematic for society at large, shaping the social and legal status of groups. The critical analysis of the case law of domestic and international courts shows that the *promotion of cultural diversity*, in terms of a state's intervention to foster minority identity and substantial equality, as well as the recognition of both the individual and collective rights of linguistic and religious minorities, is at times *limited*, especially in the sociocultural and socioeconomic areas.

In the sociocultural sphere, the domestic norms and court rulings point towards a *process of renationalisation* rather than embracing a cosmopolitan view (see Chapter 10). Their ideological underpinnings are often reminiscent of liberal nationalism doctrines, relying on the

concept of state neutrality and the public/private dichotomy, which lead to exclusionary and discriminatory outcomes in practice. The dominant culture is taken as the norm whereas linguistic and religious diversity is seen as deviant. Hence, minority rights are recognised only as special exceptions to the general rules of monolingualism and secularism. However, the instrumental ideology of language – that is, language seen only as a communication tool – continues to inform and shape domestic norms and policies that aim at the assimilation of minority groups. From this ideological perspective, protecting and promoting linguistic diversity brings high costs and few benefits to society.

While the *normative structure* for the language rights of minorities is based on the *differentiation* between the *public* and *private* sphere, an appropriate structure for the exercise of these rights must take into consideration the distinction between state institutions, the public sphere and private life. This triadic structure is more minority friendly than the public–private dichotomy and allows for development of pluralist approaches towards languages and cultures.

The broad set of *international standards* and *domestic norms* regulating the use of minority languages in the public sphere does *not guarantee*, in practice, the *full exercise* of this right. First, the language rights of minorities are often framed in general and vague terms, leaving to the states a wide margin of appreciation as regards the selection and implementation of particular language policies. Second, in countries with a strong ideological bias against minority rights and cultural diversity, the public authorities focus on the *protection* of the state's *official language*. Even the high courts, trapped in the nation-cum-state paradigm, find it difficult to strike the right balance between the legitimate aim to protect and promote the state language and the necessity that this protection is not pursued at the expense of minority rights. As the analysis of domestic jurisprudence demonstrates, high courts may restrict the use of minority language in the public sphere by adopting a rigid reading of the principle of formal equality. Such an approach is problematic because the state 'can make itself blind – to religion, race, ethnicity – but it cannot choose to become deaf or mute' (Zolberg and Long 1999: 21). In other words, *state neutrality* in the field of language policy is a *myth*. States that pretend to be neutral in reality impose the majority language and culture on the entire society. The *practical effects* of a neutral state's linguistic policies are the *assimilation* of minorities and *linguistic homogenisation*.

Regarding *religious diversity*, four main elements should be emphasised. First, in the past 15 years, there has been a *growing awareness* of religious issues and there has been progress in setting minimum standards. Secondly, such standards, however, seem to *struggle to find a balance* between positive and negative freedoms, often relying on the latter. More and more states are reluctant to foster positive freedom, prohibiting, for instance, the manifestation of religion in public life. The *jurisprudence* of the ECtHR shows a sub-optimal accommodation of religious diversity regarding various issues, such as the wearing of headscarves at work or school, the acceptance of religious holidays or the respect for religious diversity at work, *zigzagging* between what we call the models of *negative* and *positive equality*. Similarly the monitoring system of the FCNM does not show enough clarity in these topics. Thirdly, with the swing of the pendulum, the *secular model* of state–church relations is in vogue, with its fiction of the neutrality of the state and the limitations and problems that it brings to religious minorities. Finally, it should be pointed out that tensions regarding religious

diversity are driven by the flux of foreign migrants and the growing presence of Muslims in Europe, which have sparked *xenophobic* and *Islamophobic reactions*. In other words, it is the increasing presence of Muslim migrants, rather than religious diversity, that European societies struggle to govern and accommodate.

However, what we are seeing in connection with headscarves and crosses on classroom walls might be a *matter of interpretation*. The real question is whether state neutrality can really only be achieved by banning all religion from the public space or whether it could also be demonstrated by offering all religions equal access to the public space. That would help to transform the public space into a forum for intercultural communication and debates on values, something that is increasingly needed in today's societies. Instead of calls for assimilation deriving from 'politics of fear' (Wodak 2015), it would be better to enter into a self-confident debate on values without, however, declaring them a priori non-negotiable as this is proclaimed by conservatives, liberal-nationalists and right-wing populists alike (see Chapter 4). What must be required of Muslims' official representatives and representative organisations – clearly and consistently – is respect for the fundamental values of human rights and the rule of law as this has been established by the paradigmatic Swiss Supreme Court judgment of 1993, thereby clearly demarcating the boundary line between assimilation and integration. The crucial role of states in the coming years will be to introduce the best instruments for a *better integration* of members of religious groups while defending European values as they are laid down in the TFEU. It is thus questionable whether prohibiting religious symbols in the public space (i.e. what we term negative equality of religions) will help to accelerate the integration of Muslims or rather risks creating parallel societies.

In the *sociopolitical sphere*, we witness a more pluralist governance of multiple diversity, especially concerning freedom of expression and freedom of association. In legislation and court rulings, there prevails a tendency to adapt freedom of expression to the needs of minority members in the name of the principles of tolerance, social peace and non-discrimination and a focus on avoiding violent content. The media are widely recognised as a salient tool for promoting mutual trust, and access to media by minorities is provided under the principle of pluralism and is considered as fostering social integration and intercultural understanding and counteracting hegemonic majoritarian discourses and representation, improving the level of democracy in society. However, in reality, cultural diversity still suffers from a lack of coverage in the media and cases of misrecognition and stereotypes against minorities abound. This fact is influenced by the technology-driven development of current media structures and practices, like the concentration of media ownership and the commercialisation and standardisation of content, which is impacting on minority rights, both directly and indirectly, limiting pluralism and diversity in the media. Such a development requires further commitments and solutions to protect the rights of persons belonging to minorities. Finally, in relation to the freedom of association, democratic states cannot arbitrarily limit participation in public life of organisations seeking recognition and promotion of a minority group's distinct cultural and linguistic identity. Governments may impose limitations on the right to association and freedom of expression only in defence of the values underlying the ECHR (i.e. for fighting against hate speech and incitement to violence).

In the *socioeconomic sphere*, preserving and promoting linguistic diversity requires states to adopt a proactive minority-friendly approach in the interconnected fields of the economy

and education. The high court rulings show that domestic linguistic policies in the socioeconomic sphere are shaped by contextual factors linked to the majority–minority dynamics, which generate diverging understandings of the role and functions of language(s). In the economic sector, the two main areas of norm contestation regard language-based discrimination on the labour market and the state and sub-state language policies limiting or imposing the use of certain language(s) in private entities and companies. In education, jurisprudence clearly highlights the tension between a functional/instrumental understanding of education relating to the socioeconomic dimension of minority rights on the one hand and a primordial/essentialist understanding of education contributing to the development and protection of identity relating to the sociocultural dimension of minority rights on the other. Following the functional and instrumental understanding of education that is currently prevailing when dealing with minority languages in education (Spiliopoulou Åkermark 2010), the aim is to best prepare minority members for participation in economic life and thus prepare them for a multilingual environment where the bigger and more prestigious languages dominate, and smaller minority languages are seen as less economically relevant and therefore not supported as much. This functional/instrumental perspective on education is also in line with the trend followed by national states to reduce the protection and promotion of linguistic, religious or cultural diversity in order to create a more cohesive society. Education in minority languages is thus dependent on the prestige and power of each minority, which translates to the number of minority language speakers.

In conclusion, it is desirable that norms and standards of minority protection further evolve in order to provide a more comprehensive recognition of the right to multiple identities that goes beyond the rule-exception doctrine (see Chapter 8, section 8.3) and provides formal as well as institutional equality to minority members in the cultural, economic and political spheres. What is needed is the proper balance of autonomy *and* integration (Marko 1995) in order to spark solidarity and social trust, and thus social cohesion.

Questions

1. What is the difference between the duality of language rights and the dualism of freedom of religion?
2. How would you assess the role of domestic and international courts in enforcing language rights in the sociocultural, sociopolitical and socioeconomic spheres?
3. With regard to the freedom of religion, what is the difference between positive and negative equality and which of these two concepts is more often embraced by European states?
4. For members of minority groups, what are the advantages and disadvantages of monolingual education (in their mother tongue) or bilingual instruction in terms of identity preservation and socioeconomic integration?
5. Why is minority access to media of paramount importance and to what extent do legal standards and court jurisprudence guarantee this right?

Against discrimination

8

The right to equality and the dilemma of difference

Joseph Marko

8.1 Introduction: equality – an empty idea?

We have already outlined in Chapter 4, section 4.3, the conundrums of the liberal democratic state in dint of the ideological underpinnings of liberalism, nationalism and socialism. Following from the analysis of case law of apex courts in Europe, in this section we argue that the dichotomy of *formal equality* before the law and *substantive equality* through law is ideologically prefabricated and masks the not only epistemological but also political 'dilemma of difference' (Minow 1990) in the form of the deep structure of asymmetric power relations in the process of transformation of what is perceived as normal into norms. Hence, the dilemma of difference cannot effectively be targeted if the rule of *formal* equality shall require only state authorities *to refrain* from discrimination against individuals on certain grounds such as, for instance, those enumerated in Article 14 of the European Convention on Human Rights (ECHR; Box 8.1 shown overleaf), and if, at the same time, *substantive* equality and thus the ensuing so-called positive duty of state authorities *to interfere* in social, economic, cultural and political relations, in order to bring about 'full and effective equality', as spelt out in Article 4 of the Framework Convention for the Protection of National Minorities (FCNM; Box 8.1) is declared *reverse discrimination* per se. Thus, as we try to demonstrate in this chapter, the dichotomic conception of formal versus substantive equality is already part of the dilemma. Nor does this dilemma follow from allegedly natural ethnic differences between persons and groups as the ideologies of nationalism and racism, as well as primordial theories of ethnic origin (see Chapter 4, section 4.2) postulate. Rather, it must be understood in terms of our sociological conceptualisation and terminology outlined in detail in Chapter 5, section 5.2 from the perspective of positional *and not* necessarily cultural differences between persons within and between groups and their ascribed or voluntarily chosen membership. In this respect, the second dichotomy of individual versus group-related rights following from the dichotomic conceptualisation of formal versus substantive equality is an ideologically prefabricated dichotomy, which cannot be maintained from the perspective of comparative constitutional law as we demonstrated in Chapter 5, section 5.3.

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Box 8.1 Non-discrimination and effective equality, ECHR (1950) Article 14 and FCNM (1994) Article 4

Article 14 ECHR

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 4 FCNM

1. The Parties undertake to guarantee to persons belonging to national minorities the right of effective equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

Hence, we demonstrate and analyse in more detail in this chapter with reference to case law of apex courts the basic and hotly contested question about the *meaning* of the concept and normative *principle* of equality concerning *specific rules* in terms of individual and group-related *rights* as well as *negative* and *positive state duties* which follow from *different interpretations* of the *text* of the two legal provisions quoted in Box 8.1.

As a thought-provoking starting point for the reconsideration and reconceptualisation of the principle of equality, we can make reference to the seminal article of Westen, calling equality an 'empty idea' (Westen 1982). From a comparative and diachronic perspective, case law of apex courts in Europe and North America indeed seems to demonstrate nothing but a pendulum swing between the two allegedly opposing extreme poles of 'equality before the law' and 'equal protection of the law', to use the terminology of Article 4 FCNM, on a continuum of possible state action, thereby depending on the general mood of politics and/or attitudes of populations leaning either more to welfare policies or pressuring for neoliberal austerity measures. However, this *framing* of the problem remains deeply anchored in the nation-cum-state paradigm, as well as in the nineteenth and twentieth century societal and ideological cleavages of liberalism versus socialism.

As we elaborated in Chapter 4, sections 4.2 and 4.3, the nation-cum-state paradigm is based on the *equation* of *equality* with the conception of *identity* as *sameness*, thereby *excluding* the theoretical *combination* of *equality* with *diversity* and leading, in practice, to the *suppression*

of all forms of *pluralism*. In striking contrast, the *identity/diversity–equality–participation nexus* we identified from a comparative analysis of national constitutional law (see Chapter 5, Figure 5.1) shows that many of the legal instruments we find in the constitutional law of European states already effectively *combine equality* with cultural, social and political *diversity*, thereby protecting 'those strands of identity a person neither wants nor should be expected to lose' (see also Schiek 2011: 22–4) against ideological pressures for and sociodemographic trends leading to assimilation.

Moreover, following from our social-constructivist and sociological neo-institutionalist approach (see Chapter 2, section 2.2) and postulating the *multidimensionality* and *multifunctionality* of law, the equality principle has to be interpreted within this broader analytical framework as we elaborated in general terms in Chapter 5, section 5.3 (see also Fredman 2016: 281–4).

First, there is the *redistributive dimension*: formal equality before the law translated into the legal obligation of state authorities to treat likes alike can no longer be applied in adjudication as an anti-classification approach, seemingly requiring the prohibition to make reference in the reasoning of courts to irrelevant categories such as race or sex, since each individual should be treated only with regard to his or her merits. Any special measure, or affirmative action in US constitutional terminology, in favour of any of these categories can therefore no longer, by definition, be termed reverse discrimination. Hence, the term *positive discrimination*, frequently used in scholarly literature, should also be avoided, because of the otherwise misleading conclusion that (any form of) discrimination must be a discriminatory act. However, as US President Lyndon B. Johnson had made clear in a talk to students of Howard University in 1965, these conceptualisations do not adequately address the *problem of factual inequality* stemming from centuries of slavery and racism:

> But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others', and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through these gates. … To this end equal opportunity is essential, but not enough, not enough.
>
> (Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, Vol. II, entry 301)

Therefore, respecting diversity not only requires *equal opportunities* for *individuals* in terms of redistribution of material resources to overcome socioeconomic disadvantages, but much more, starting with what has been elaborated particularly in Amartya Sen's 'capability approach' (see Chapter 6, section 6.3) and what we have termed *institutional equality* in terms of effective participation which can only be guaranteed by the legal *recognition* of *group rights*.

Second, it is therefore necessary to take the *recognition dimension* much more seriously into account. We have already addressed stigmatisation and negative stereotyping based on prejudice and ensuing violence caused by right-wing populist and extremist political propaganda

and hate-speech in so-called social media in Chapter 7, section 7.4. We come back to the problem of *institutional racism* (see Chapter 4, section 4.2), which we discuss in the next section of this chapter with regard to processes of *racialisation* of categories of people in terms of discrimination grounds in the reasoning of decisions of national and supranational apex courts in more detail.

Third, the phenomena of racial discrimination and poverty of the Sinti and Roma in Europe are, as we argued in Chapter 5, *structurally interdependen*t in terms of an intergenerational vicious circle based on mutually enforcing socioeconomic deprivation and the racial inferiorisation of members of these groups. However, as we learned from the analysis of the 'multiculturalism-is-dead' public discourse in Chapter 1 and the ensuing quest for a return to assimilation, new minorities stemming from immigration also face the challenge of mutually enforcing socioeconomic deprivation and racial inferiorisation based on Islamophobia among majority populations in Europe, propagated by right-wing populist and extremist political parties. Hence, against neo-Marxist approaches, which postulate that all forms of cultural marginalisation and racial inferiorisation have their root cause in the socioeconomic stratification of capitalist societies and can be overcome by socioeconomic redistribution as well as against neoliberal approaches which decree *the* market as a panacea guaranteeing social-upward mobility based on individual effort and merit, we are convinced that so-called societal disadvantage is neither a natural by-product of individual failures to successfully compete on the markets, nor that it can be overcome simply by the redistribution of material resources. Instead, we insist that societal disadvantage can frequently be traced back to *structural discrimination*, which can neither be explained by the aggregation of intentional individual discrimination by state or private actors as liberal ideology and methodological individualism would assert, nor that this is simply bad luck or the fate of people. Structural discrimination in terms of exclusion by (territorial) ghettoisation and institutional segregation is rather the result of the failures of social and system integration (see Chapter 5, section 5.2) following from a lack of effective political participation.

Hence, understanding the problem of structural discrimination requires a holistic analytical approach, taking into account also the *participatory dimension* and the *transformational dimension*. In addition, the analysis of these dimensions requires one to tackle the infamous *public–private divide* in legal sciences (Michelman 2012). This also haunts the deliberations of European courts regarding language rights and the protection of freedom of religion as demonstrated in Chapter 7. Transcending this classic liberal distinction and its dichotomic conceptualisation in not only Jacobin constitutional doctrine (see Chapter 3, section 3.2) requires one to see how power imbalances in seemingly private social relations predetermine and reinforce power relations in the public sphere and vice versa. This cannot be adequately captured by the dichotomy of formal versus substantive equality in terms of the redistribution dimension, but demands a reconceptualisation in terms of institutional equality as elaborated in Chapter 4, section 4.3.3 from a political-philosophical perspective. Hence, accommodation of diversity without a structural change in power relations will not bring about 'full and effective equality' as we demonstrate in the third section of this chapter with regard to the critics of positive measures or affirmative action when they argue that these measures are ineffective at best, or even lead to the 'fragmentation' and 'division'

of societies, infamously labelled 'balkanization' by US Supreme Court Justice Sandra Day O'Connor in her reasoning in the case *Shaw v. Reno*, 1993.

In section 8.2, we show with the analysis of the case law of European apex courts the hotly contested development of the legal-dogmatic concepts of *indirect discrimination* and *positive obligations* of public authorities and thus the transformation of the strictly individualistic anti-discrimination approach to a recognition of the necessary group-relatedness of so-called individual rights (see also Chapter 5, sub-section 5.3.1). In section 8.3, we analyse the interrelated normative and empirical problem, whether quota regulations introduced by national law of several European countries on behalf of women can be justified under European Union (EU) law and the ECHR and whether quota regulations could also be an effective instrument for the protection and promotion of the cultures of national minorities. We conclude this chapter in section 8.4 with summary conclusions and learning outcomes.

8.2 From anti-discrimination to substantive equality in case law: the legal-dogmatic development

As can be seen from the text of Article 14 ECHR and Article 4 FCNM, the term discrimination is not legally defined. Reading the text of these two normative provisions, two particular questions are raised to which answers are by no means self-evident and thereby leading one to the case law analysed in this section:

- First, *what* constitutes discrimination in the enjoyment of rights and freedoms set forth in the ECHR? Or, in different words, *which behaviours* amount to discrimination?
- Second, is *every discrimination* on the in Article 14 ECHR enumerated grounds as such prohibited? Again, in other words: is the prohibition of discrimination an absolute rule which does not allow for justification of the respective behaviour?

The textbook wisdom in constitutional law will answer the first question without much ado with reference to Aristotle's definition of the principle of formal equality: 'Treat like cases as like' (see Gosepath 2007) and the consequence which follows from this rule, namely that you have to treat different cases differently. But does this really help to decide a case? Are not these rules empty ideas if you must decide *why* a case is equal or different? It is thus no surprise that education and training in common law adjudication is training in the *art of distinguishing* (see Chapter 2, section 2.1).

The European Court of Human Rights (ECtHR) had to deal with the *meaning* of the very term discrimination for the first time in a minority protection context as early as 1968 in the so-called *Belgian Linguistics* case that we discussed in Chapter 7, section 7.4.1 from a different angle. Here, the original English and French texts of the ECHR differed, so the judges had to deliberate how to make sense of this different wording. Was it simply a matter of translation or was there a deeper difference in conceptualisation? It is worth quoting the reasoning of the judges in this case in greater length since they had to *frame the understanding* of the *meaning* of equality and discrimination at that time in a rather principled way:

> I. B. 10. … In spite of the very general wording of the French version (*sans distinction aucune*), Article 14 (art. 14) does not forbid every difference in treatment in the exercise of rights recognized. This version must be read in the light of the more restrictive text of the English version ('without discrimination'). In addition, and in particular, one would reach absurd results were one to give Article 14 (art.14) an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted …
>
> … It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14 (art. 14). On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> (ECtHR, Case '*Relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium*', 1968)

What can we conclude now from this reasoning with regard to our basic questions raised above?

First, there is a seminal *difference* in legal terminology between the concepts of *distinction* and *discrimination*. To declare any distinction made by national authorities a violation of Article 14 must lead to 'absurd results' so you cannot – based on the French text – deduce from the text of Article 14 ECHR an 'absolute prohibition' on making distinctions.

Second, an absolute prohibition of discrimination is 'unreasonable': 'discrimination' by making distinctions in rule making or rule application requires an 'objective and reasonable justification', based on an 'aims-effects' assessment which is further specified as having a 'reasonable relationship of proportionality' of aims and effects.

Third, and most interestingly, the principle of 'equality of treatment' cannot be reduced to the simple rule that all state authorities have to treat all persons – irrespective of their personal characteristics or status in society – equally so that anti-discrimination law would lead to an 'anti-classification approach', as termed by Fredman above. Against this French Jacobin tradition, which would require an abstract citizen, the judges of the ECtHR insist

that there are not only 'situations and problems' which 'call for different *legal* situations', but 'certain *legal* inequalities tend to correct *factual inequalities'* (emphasis added). Consequently, the judges hereby establish a legal obligation for all state authorities of what we will call henceforth the *duty to differentiate* on the basis of the determination of the factual situation. By pointing to the fact that 'legal inequalities' (de jure discrimination in US-American legal terminology), might 'correct factual inequalities', they moreover open the gate for the conceptualisation of what later and under EU law developed into the concepts of 'indirect discrimination' and 'effective equality in fact', to be achieved by 'positive' or 'special measures', called 'affirmative action' in US terminology.

Is it now self-evident after these clarifications what is needed to treat likes alike and, at the same time, when it is necessary to treat different things or situations differently? The case law of national apex courts as well as the ECtHR gives, however, evidence that this is not at all self-evident when the concept of *formal* equality before the law is interpreted in a *formalistic-reductionist* way. This is the case when judicial review of state action is based solely on the content of the text of a normative provision and the review is focussed on the question whether there is evidence of legislative *intent to discriminate* against a particular group or category of persons or intent on the side of the implementing authorities when applying rules. Such an intent-focussed approach ignores the *effects of rule making or rule implementation* which can also amount to what is later termed 'indirect' discrimination. The same holds true if judicial review is *not based on a comparison* of individual persons or situations in light of the *factual context* of the case, but when persons are – what we called in Chapter 5, section 5.2, from a sociological perspective, 'upward reductionism' – 'de-personalised' into abstract categories so that the comparison is reduced to the comparison between men and women or minority and majority. Based on such formalistic-reductionist interpretations, national apex courts in Europe made, for instance, no distinction with regard to the factual context when declaring in cases of job dismissals that all males and females are to be treated equally, no matter whether the woman involved is pregnant or not. As the European Court of Justice (ECJ), however, ruled in the case of *Dekker* (1990), such cases would constitute *direct discrimination* without need for any comparison: 'An employer is in direct contravention of the principle of equal treatment for men and women … if he refuses to enter into a contract of employment with a female candidate whom he considers to be suitable for the job where such refusal is based on possible adverse consequences for him of employing a pregnant woman' because of national rules which allowed sickness insurance companies to refuse employers the reimbursement of financial benefits in the event that the insured person, the employee, is unable to perform his or her duties within six months of commencement of the insurance (ECJ, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 1990: para. 14).

These rules did, however, not foresee an exemption for pregnancy from the rule permitting reimbursement of financial benefits to be refused. And the Court added with regard to the matter of comparison: 'The fact that no man applied for the job does not alter the answer to the first question' (ibid: para. 18).

As late as 1985, the ECtHR *refused* to take into consideration the *disparate effects* of 'equal' treatment with regard to race discrimination in the case *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985). The applicants had argued that newly adopted immigration

rules in the UK disproportionately excluded applicants from the New Commonwealth and Pakistan. The Court, however, argued:

> Whilst a Contracting State could not implement 'policies of a purely racist nature', to give preferential treatment to its nationals or to persons from countries with which it had closest links did not constitute 'racial discrimination.' … That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them as racist in character: it is an *effect which derives not from the content of the 1980 Rules* but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others.
>
> (ECtHR, *Abdulaziz, Cabales and Balkandali v the United Kingdom*, 1985: paras. 84–5, emphasis added)

As we can see from these two cases, the textbook distinction between *direct* and *indirect discrimination* was not yet clearly established in the jurisprudence of European apex courts in the 1980s. Identical legal definitions of these concepts were, however, laid down in secondary law of the EU (Box 8.2) with the so-called Race Directive (Council Directive 2000/43/EC) and the consolidated Gender Equality Directive, recast in 2006 (Directive 2006/54/EC).

Box 8.2 Legal definitions of direct and indirect discrimination, EU Council Directive 2000/43/EC

Article 2

Concept of discrimination

1. For purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
   (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been, or would be treated in a comparable situation on grounds of racial or ethnic origin;
   (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to ethnic or racial origin takes place with the purpose or effect of violating the dignity of a person and of creating an

intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

(EU Council Directive 2000/43/EC)

As a preliminary conclusion, we can summarise the developments in the conceptualisation of the principle of equality based on case law from the ECtHR and the ECJ and the legal standard setting under EU law:

Article 14 of the ECHR translated the principle of equality before the law, in short formal equality, into a prohibition to discriminate on grounds such as sex, race, language, religion and so on, without, however, defining, the meaning or possible content of the concept of discrimination. As early as 1968, the ECtHR developed the basic conceptual framework to make the concept of discrimination applicable. The Court thereby harmonised the different English and French linguistic versions and introduced a distinction between 'difference in treatment' and 'complete equality of treatment' as well as between 'legal inequalities' and 'factual inequalities', whereby it might be necessary to correct such factual inequalities through legal inequalities. The Court, however, did not define any of these concepts or designate them as formal or substantive equality, nor did it call the latter case *positive discrimination*. Instead of elaborating on a *substantive* definition of discrimination, the Court dealt with the *procedural* question of a possible justification of acts of discrimination and elaborated a standard of judicial review of acts of the legislative, administrative or judicial powers of the so-called Contracting States (i.e. those that have ratified the ECHR). This standard of review is based on a means–end assessment, which became known as the 'proportionality test' (see Chapter 2, section 2.1). The ECtHR did not, however, clearly define and distinguish between direct and indirect discrimination, as this was laid down in the EU Directives 2000, nor did it develop any doctrine of substantive equality until the beginning of the 2000s.

Hence, the *structural elements* for a more comprehensive conception of the different forms of discrimination relating to minority protection, already in place in the *Belgian Linguistics* case, were applied for the first time to the factual situations at hand 30 years later.

We have already addressed the ECtHR case *Sidiropoulos and Others v. Greece* (1998) in Chapter 7, section 7.4.3 as an example of the sociopolitical dimension of so-called individual rights. The ECtHR found a violation of Article 11 ECHR, in combination with Article 14, since the Greek courts had refused to register an association, Home of Macedonian Civilization, with the argument that such an act endangers Greece's national identity and security. The ECtHR, however, requiring 'convincing and compelling reasons' as justification and thereby leaving no political discretion under the doctrine of the 'margin of appreciation', rejected the Greek government's line of defence and took the factual context of the case seriously, also developing what we call a *group-related perspective*:

> [T]he aims of the association … were exclusively to preserve and develop the traditions and folk culture of the Florina region …. Such aims appear to the Court to be perfectly

> clear and legitimate; the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics, for historical as well as economic reasons. Even supposing that the founders of an association like the one in the instant case assert a minority consciousness … allow them to form associations to protect their cultural and spiritual heritage ….
>
> (ECtHR, *Sidiropoulos and Others v. Greece*, 1998: para. 44)

In conclusion, the Court found that the refusal to register the association was 'disproportionate to the objectives pursued' and ruled that there had been a violation of Article 11 ECHR.

In the case *Thlimmenos v. Greece* (2000), the ECtHR went a step further and developed a doctrinal argument which we term the *duty to differentiate*, since the Greek courts had not differentiated between the reasons for a criminal conviction when denying Mr Thlimmenos the right to work as a chartered accountant. The ECtHR reasoned that 'in this context the Court notes that the applicant is a member of the Jehovah's Witnesses, a religious group committed to pacifism' (para. 42) so that his criminal conviction for refusing military service because of his religious beliefs had not been properly taken into consideration. Unlike other commentators, who praise this judgment as the first case of indirect discrimination handed down by the ECtHR, this author does not think that the structure of this case can be compared with the definitions of indirect discrimination adopted in the same year in the two EU directives quoted above. Thlimmenos concerns the discrimination of an *individual* by the factual exclusion from access to a profession because the Greek courts had not taken the factual *difference* (i.e. his belonging to a religious group) into consideration and thereby violated the *duty to differentiate* following from Article 14. Indirect discrimination according to the EU directive concerns, however, a factual *group-related effect* of allegedly neutral provisions (Art. 2.2. (b) Race Directive).

In the next case of relevance from a minority protection perspective, *Chapman v. the United Kingdom* (2001), the ECtHR developed a doctrine which already had been implicitly addressed in *Sidiropoulos*. A *general duty to protect* persons in the enjoyment of the rights and freedoms guaranteed by the ECHR had already been established in *Doctors for the Right to Life v. Austria*, 1988, arguing that Article 1 ECHR requires an 'effective guarantee' to make use of liberal human rights such as freedom of assembly. 'In a democracy', the Court argued at paragraph 32, 'the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate', after Austrian authorities had prohibited a demonstration for the fear of counter-demonstrations. In Chapman, the Court develops a *special duty to protect* the 'different lifestyles of minorities' (i.e. in line with the recognition dimension elaborated upon in the introduction to this chapter), in the meaning of a *positive obligation* of state authorities not only to respect, but also to protect *and* promote the *diverse identities of groups*, which had been denied in mainstream legal scholarship as being legal standard under public international law so far (see Marko 2008a).

Requiring even more attention is the argument quoted below that the 'duty to protect' the different identities and lifestyles (of minorities) serves not only the purpose to:

> recognise their special needs … and to safeguard the interests of minorities themselves, but to preserve a cultural diversity of value to the whole community … The Court

> observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see … in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community. …
>
> [T]he vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyles both in the regulatory planning framework and in reaching decisions in particular cases …. To this extent there is thus a positive obligation imposed on Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.
>
> (ECtHR, *Chapman v. the United Kingdom*, 2001: para. 93 and 96)

With this line of argument, the Court – at least at a theoretical level – *transcended* any liberal-egalitarian ideological underpinning following from the redistribution dimension as well as any *liberal-paternalistic ideological underpinning* for the justification why special needs have to be recognised and undertakes a *change of the ideological paradigm* to a *multicultural understanding,* insofar as cultural diversity should be recognised as valuable for democratic societies as a whole. *Chapman v. the United Kingdom* in this respect solidifies the more general line of argument in the jurisprudence of the ECtHR in cases concerning freedom of religion (Article 9) and freedom of association (Article 11) where the Court had to decide what the phrase 'necessary in a democratic society' in the respective second paragraphs of these articles entails for the justification of possible limitations in the enjoyment of these freedoms. As we elaborate in Chapters 7 and 9, the Court ruled in cases such as *United Communist Party of Turkey and Others v. Turkey* (1998), *Serif v. Greece*, (1999) and *Leyla Sahin v. Turkey* (2005) that 'the essence of democracy is pluralism', not only political pluralism in terms of multiparty systems, but also the religious pluralism of societies; in short, what we termed the *positive equality* of religions in Chapter 7, section 7.3.2 to be observed by states.

However, this positive duty to protect was not applied by the ECtHR itself in practice when it rejected the claims both in *Chapman* as well as *Sahin* on the merits of the case. Moreover the duty to protect doctrine developed in *Chapman* cannot yet be called a duty to take positive measures *strictu sensu*. The duty to protect in this case still resembles the duty to differentiate in dealings of state authorities (i.e. policy making through legislation or by implementing acts) and thereby to take the factual context of a person as member of a disadvantaged group into consideration or even the impacts for entire groups in the meaning of the definition of indirect discrimination under EU law.

Only with the cases *Hugh Jordan v. the United Kingdom* (2001), concerning the statistically disproportionate deaths of Catholics in Northern Ireland, and *Nachova v. Bulgaria* (2004), concerning the death of two Roma who had been killed by police when having tried to escape conscription, the ECtHR takes over all the other elements of the concept of indirect discrimination under EU law. Thus, the Court argues in *Hugh Jordan*: 'Where a general policy or measure has *disproportionately* prejudicial *effects on a particular group*, it is not excluded that this may be considered discriminatory notwithstanding that it is *not specifically aimed* or directed against that group' (ECtHR, *Hugh Jordan v. the United Kingdom*, 2001: para. 154,

emphasis added). Whereas the Court, however, denied statistical data as evidence in that case, it took the last step in the development of the concept of indirect discrimination in *Nachova* by shifting the burden of proof to the respondent government.

Only with the cases *Stec and Others v. the United Kingdom* (2006) and *D.H. and Others v. Czech Republic* (2007), the ECtHR again returns to the comprehensive conceptualisation of equality which it had already developed at a theoretical level in the *Belgian Linguistics* case. At paragraph 51, the Court argues in *Stec* with regard to gender equality and develops its conceptualisation much further to an understanding which is called substantive equality in legal scholarship and even extends it to a concept of *equality of groups*:

> Article 14 does not prohibit a Member State from *treating groups differently* in order to correct '*factual inequalities*' between them; indeed in certain circumstances a *failure to attempt to correct inequality* through different treatment may in itself *give rise to a breach of the article* …
>
> (ECtHR, *Stec and Others v. the United Kingdom*, 2006: para 51, emphasis added)

This conceptualisation of the meaning of the principle of equality, is – in comparison with the *Belgian Linguistics* case – remarkable in two aspects: first, the phrase 'treating groups differently' *gives up* the *strictly individualistic liberal bias* that, by nature, only individuals can have rights; second, the violation of the rule of equal treatment (i.e. 'legal inequality' in the language of the Court in *Belgian Linguistics* case) may not only be justified but also goes a decisive step further! Also, the 'failure to attempt to correct' factual inequalities may lead to a violation of Article 14 ECHR. This will raise the question whether the concept of factual inequality comprises every possible social, economic or other disadvantage? Can a distinction no longer be made between the *sheer fact* of disadvantage for persons or groupings of people and the *normative concept* of discrimination? Is the obligation to take positive measures therefore a *general duty* for all state authorities to *level out all existing factual inequalities* and to aim to generate absolute equality between persons and groupings? It must come as no surprise that this question is a highly contested ideological field which we deal with in detail in the next section.

However, before we move to the next section we must deal with case law of the ECtHR regarding *institutional segregation in the public educational system*, with which it had to deal in two landmark cases, namely *D.H. and Others v. the Czech Republic* (2007) and *Oršuš and Others v. Croatia* (2010). These cases are remarkable from a perspective of comparative constitutional law in terms of the consolidation of conceptual elements for the establishment of direct or indirect discrimination and which positive duties follow for state authorities to effectively fight against *racial discrimination*. These cases are also exemplary for the discussion and construction of the problems involved in adjudication following from the fact that the respective Chambers of the ECtHR had come to different conclusions before they were overturned by judgments of the Grand Chamber.

In the first case, *D.H. and Others v. the Czech Republic* before a Chamber of the Second Section of the ECtHR, the applicants were a number of Roma children who had been put into separate schools for children with learning difficulties on the basis of individual psychological tests and with the consent of their parents. Statistical evidence based on opinions of the Advisory Committee under the FCNM disclosed, however, that between 80 and 90 per

cent of pupils in such special schools were of so-called Roma 'origin' and that they had been enrolled in these schools mostly because of their lack of knowledge of the Czech language. Hence, the question was raised in this case whether such a de facto situation can give rise to the assumption that there is direct or indirect discrimination against the applicant children because of their Roma origin?

In the proceedings before the Chamber regarding the question of exhaustion of domestic remedies, it came to the fore that the Czech Constitutional Court had also determined that Roma children are placed in special schools because of their insufficient command of the Czech language, the language of instruction in regular primary schools. The applicants thus argued that the statistics provided would be sufficient prima facie evidence for the fact that they are victims of racial segregation. Since they received a substantially inferior education in comparison with that provided in ordinary primary schools, they were, as a result, denied access to regular secondary education. However, there were no so-called racially neutral explanations for the statistical disproportionality of Roma and non-Roma children enrolled in special schools. The Czech government rejected the claim of racial segregation and argued that the applicants have to prove that there is indeed a difference in treatment with regard to the applicants as individual persons and general statistical material cannot suffice as evidence.

The majority of the judges of the Chamber, with reference to a previous judgment, followed the arguments of the government and declared that statistics are not sufficient to disclose a practice which could be classified as discriminatory. After a case-by-case analysis of the individual applicants' educational achievements, the Chamber came to the conclusion that the applicants' parents are responsible 'as part of their natural duty to ensure that their children receive an education' and concluded:

> Although the applicants may have lacked information about the national educational system or found themselves in a climate of mistrust, the concrete evidence before the Court in the present case does not enable it to conclude that the applicants' placement or, in some instances, continued placement, in special schools was the result of racial prejudice, as they have alleged.
>
> It follows that no violation of Article 14 of the Convention, taken together with Article 2 of Protocol No. 1, has been established.
>
> (ECtHR, *D.H. and Others v. the Czech Republic*, 2006: para. 52 and 53)

In his concurring opinion, Judge Costa, however, raised doubts about what we call the *framing of the case* and the *methodology* of the Court. He agreed with the majority that cases should always be examined from the perspective of the individual application, but 'in the present case', he argued:

> [T]he Court had to determine whether the decision to place or retain the 18 applicants in 'special schools' was a result of 'racist' attitudes. Were they victims of *systemic segregation* and, therefore, discrimination based on 'race' or (more specifically) their association with a national minority, contrary to Article 14, or not? It is here, obviously, that the doubt arises and the difficulty lies. The danger is that, under the cover of psychological or intellectual tests, virtually an entire, socially disadvantaged, section

> of the school population finds itself condemned to low levels of schools, with little opportunity to mix with other children of other origins and without hope of securing an education that will permit them to progress.
>
> (ibid: para. 3 and 4, emphasis added)

Since the applicants appealed the decision of the Chamber, the case came before the Grand Chamber which handed down its judgment on 13 November 2007. In the proceedings before the Grand Chamber, the applicants basically reprimanded the judgment of the Chamber as deviation from previous case law by requiring proof of discriminatory intent and submitted more specific statistical data for pupils placed in special schools in the district of Ostrava, gathered from questionnaires which had been filled in by the headmasters of schools. Whereas Roma children represented only 2.25 per cent of the total of primary school pupils in Ostrava, the proportion of Roma pupils assigned to special schools was 50.3 per cent. The applicants claimed that this was sufficient *prima facie* evidence of the practice of racial discrimination so that the burden of proof must shift to the government. The government contended in response that such statistical evidence cannot be conclusive since there is no official data on the ethnic origin of pupils and, moreover, the state had allocated twice the level of resources to special schools as to ordinary schools, thereby echoing the infamous doctrine 'separate but equal' of the US Supreme Court, *Plessy v. Ferguson* (1896), through which this court upheld the constitutionality of racial segregation laws for public facilities as long as they were equal in quality. Then, the government argued that the applicants had deprived themselves of the possibility of continuing education through a lack of personal interest since none of the applicants had attempted to pursue secondary education. And with regard to the legal interpretation of Article 14 ECHR, the government invoked that this provision cannot be construed as an obligation to take positive measures since no international instrument contains a general definition of a state's positive obligations.

In striking contrast to the Chamber judgment, the Grand Chamber – in an obvious attempt to clarify the conceptual background of European anti-discrimination law in order to avoid differing jurisprudence even within the ECtHR itself – gave a 'recapitulation of the main principles' to be applied in the case at hand after an overview of the legal definitions for direct and indirect discrimination in EU law (Box 8.2) and several principles and normative standards developed by several international organisations.

What now are *the standards of review for alleged race discrimination* in this consolidated version given by the Grand Chamber (Box 8.3)?

Box 8.3 Standards of review for alleged race discrimination

(ECtHR Grand Chamber, *D.H. and Others v. the Czech Republic*, 13 November 2007)

- Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination

and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction (at para 176).

- A general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, so that discrimination may result from a de facto situation (at para. 175).
- No difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (at para. 176).
- As regards the burden of proof and what constitutes prima facie evidence, there are no procedural barriers to the admissibility of evidence. Proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (at para. 178).
- Where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of a certain group or category, it is for the respondent government to show that this is the result of objective factors unrelated to any discrimination. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (at paras 180, 179).
- Lastly, the vulnerable position of minorities means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases. There is an international emerging consensus recognising the special needs of minorities and an obligation to protect their security, identity, and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

In clear contrast to the methodology and the conclusions of the Chamber judgment, which did not conceptually distinguish between direct and indirect discrimination but focussed on an individual case-by-case analysis of empirical facts when it ruled that the applicants could not establish clear evidence that their placement was the result of racial prejudice on the side of the authorities, the Grand Chamber completely changed the approach.

First, it established a clear *analytical framework through a conceptual analysis*, from which more specific rules follow the case law of the ECtHR, and also EU law, including the case law of the ECJ with regard to the phenomenon of indirect discrimination so as *to be able to explicate the problem* at hand against a formalistic-reductionist approach that is focussed only on evidence of discriminatory intent in rule making and rule implementation in individual cases. Hence, the Grand Chamber clarified:

> The applicants' allegation in the present case is not that they were in a different situation from non-Roma children that called for different treatment or that the respondent state had failed to take affirmative action to correct factual inequalities or differences between them … In their submission, all that has to be established is that, without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.
>
> (ECtHR Grand Chamber, *D.H. and Others v. the Czech Republic*, 2007: para. 183)

Second, the judges of the Grand Chamber no longer focussed on the examination of the individual cases of the applicants but on whether a 'presumption of indirect discrimination arises in the instant case', which cannot – according to the definition of indirect discrimination given – be established on an individual basis. Hence, with regard to the standards summarised in Box 8.3, the judges determined that statistical evidence is allowed and that the government had not contested the data when arguing that no official data exists in general for the ethnic origin of pupils. So, the Grand Chamber concluded that the data submitted about the disproportionate numbers of Roma children in regular primary schools compared with special schools did 'reveal a dominant trend' that the 'neutral' statutory provisions had a considerably higher impact in practice on Roma pupils than non-Roma pupils. The Grand Chamber judges therefore focussed the central question on whether there was an objective and reasonable explanation for this disproportional impact.

In light of the decisive facts determined, the judges then came to the conclusion that this was not the case. The psychological tests carried out were declared not to be capable of constituting an objective explanation, since the Czech government itself had acknowledged that they were conceived for the majority population, nor were the tests at any time analysed in light of the particularities and special characteristics of Roma children. Moreover, the judges shared the concern of the other Council of Europe institutions about the 'more basic curriculum' and, in particular, 'the segregation the system causes'. Nor did the judges buy the argument about the 'informed' consent of the parents being faced with a dilemma:

> A choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism, and special schools where the majority of pupils were Roma.
>
> … As a result of the arrangements, the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed compared to ordinary schools and where they were isolated from pupils of the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into ordinary schools and develop the skills that would facilitate life among the majority population.
>
> (ibid: para. 203 and 207)

Hence, the Grand Chamber established that the relevant legislation as applied in practice had a disproportionately prejudicial effect on the Roma community so that the applicants

as members of that community suffered the same discriminatory treatment, constituting a violation of Article 14 ECHR in conjunction with Article 2 of Protocol No. 1 with regards to each of the applicants.

Finally, with the case *Oršuš and Others v. Croatia* (2010), the ECtHR developed and applied a full-fledged doctrine of a *positive duty* to take *special positive measures* on behalf of minorities. As for the facts in this case, again Roma children had been enrolled in special classes within, however, regular primary schools as a means of positive action. Distinguishing the case from *D.H. and Others v. the Czech Republic*, the Court argued:

> that temporary placement of children in a separate class on the grounds that they lack an adequate command of the language, is not, as such, automatically contrary to Article 14 … However, when such a measure disproportionately or even, as in the present case, exclusively, affects members of a specific ethnic group, then appropriate safeguards have to be put in place …
>
> (ECtHR, *Oršuš and Others v. Croatia*, 2010: para. 157)

Based on this finding, the Court developed and applied the doctrine of a positive duty to take special positive measures:

> the State in addition had the *obligation to take appropriate positive measures* to assist the applicant in acquiring the necessary language skills in the shortest time possible, notably by means of special language lessons, so that they could be quickly integrated into mixed classes. …
>
> … such a high drop-out rate … called for the implementation of *positive measures in order*, inter alia, *to raise awareness* of the importance of education among the Roma population *and to assist* the applicants with any difficulties they encountered in following the school curriculum. Therefore, some additional steps were needed in order to address these problems, such as active and structured involvement on the part of the relevant social service ….
>
> (ibid: para. 165 and 177, emphasis added)

Since the Croatian authorities had, however, failed to provide opportunities to learn the Croatian language and to adequately test the progress of pupils in such Roma-only classes, the Court found a violation of Article 14 in conjunction with Article 2 of Protocol 1 ECHR.

The various steps in the development of the case law of the ECtHR from *Sidiropoulos and Others v. Greece* (1998) to *Oršuš and Others v. Croatia* (2010) have *transformed* the whole understanding of the principle of equality. What we could observe in the development from a duty to differentiate with regard to the facts of the case, followed by a duty to protect and to promote the security, identity and lifestyle of minorities in decision-making processes to, finally, a duty to take special measures tailored to the specific needs of minorities was an incremental process from a liberal-individualistic and liberal-egalitarian understanding of the principle of formal equality towards a conception of substantive equality, which cannot be conceptualised without taking into account the effect of the application of normative regulations. This *effect-oriented interpretation* requires one, however, to give up the idea that

discrimination happens only in individual cases to single, abstract persons on the basis of discriminatory intent which must then be proven by the victim. The effect-oriented interpretation rather *allows* – as we could learn from the concurring opinion of judge Costa in the Chamber judgment in *D.H. and Others v. Czech Republic* above – the *sudden insight* that the individual case might not be so unique, but originates from *systemic discrimination*. This type of discrimination need not follow only from racial prejudice and discriminatory intent of state authorities, but is characterised by its effect on a whole category or group of people *because of* their *different positional status in society* so that the Grand Chamber judges in actual fact avoided the examination of the individual cases of the applicants. Not by chance therefore, all the conceptual insecurities in the development of the case law of the ECtHR with regard to prima facie evidence of discrimination, the use of statistics and the possible shift of the burden of proof mirrored the efforts to develop a clear conceptual distinction between direct and indirect discrimination which was, finally, consolidated in *D.H. and Others v. Czech Republic* with the help of the definition found in the EU Directives and the case law of the ECJ. The development of the concept of indirect discrimination helped, finally, to develop a concept of positive measures or affirmative action in US constitutional terminology.

With the *duty to protect* the identities and lifestyles of minorities, the ECtHR had apparently also moved from the redistributive dimension to the 'recognition dimension' addressing stigma, prejudice and violence as this was the case, for instance, in *Nachova v. Bulgaria* (2004). Despite the duty to take special measures so that a failure to effectively do so might amount to indirect discrimination as adjudicated in *Oršuš and Others v. Croatia*, the ECtHR failed, however, to reach the third and fourth dimension, the *participatory*, let alone *transformative*, dimension to trigger *structural change* in order to be able to effectively fight systemic discrimination. This final stage in the development of the equality principle from *formal* via *substantive* to *institutional* equality to overcome the dilemma of difference, as we elaborated in Chapter 4, section 4.3 from a political-philosophical perspective, therefore needs further detailed analysis of the question of whether the normative concept of 'indirect discrimination' can adequately cover the phenomena of institutional racism and structural discrimination, as they have been developed in sociological research. This problem thus leads us to the next section.

8.3 Structural discrimination: is there a need for quotas?

This *transformative process* from the strictly individualistic *anti-discrimination* approach to *equality law* even *requiring positive actions* in the development of the case law of the ECtHR has been no unilinear development. With the multiculturalism-is-dead political discourse since 2010, the backlash followed suit also with the ECtHR cases *Yordanova and Others v. Bulgaria* (2012; see the detailed analysis in Chapter 4, section 4.2) and *Ciorcan and Others v. Romania* (2015) returning to a focus on subjective intent in the development of minority protection, let alone a change of the paradigm from minority protection to multiple diversity governance which the ECtHR had expressed already when stating that cultural diversity is not only of value for the affected minorities, but for the whole of society as such. Seen from a *holistic, multidimensional and structural perspective* it is obvious why individual litigation in the fight against discrimination can never be effective to prevent discrimination, let alone achieve 'full and effective equality' for

minorities as this is phrased in Article 4 FCNM quoted in Box 8.1. Are therefore stronger regulatory instruments in the form of *rigid quotas* on behalf of not only minorities necessary? The ideological and legal battles concerning this issue bring us to the next sub-section in terms of legal and empirical analysis: to what extent are *affirmative action* or *positive measures*, including quotas, compatible with European law, in particular EU law? And can positive measures effectively fight structural discrimination or are they counter-productive as critics argue?

In the United States, race relations had been the focus of concern for affirmative action in both politics and law after the Second World War because of century-long slavery and socioeconomic deprivation, but also de jure race discrimination, in particular through institutional segregation of the public educational sector following the US Supreme Court's infamous decision and legal-dogmatic formula of 'separate but equal' created in *Plessy v. Ferguson* (1896), in order to be able to justify segregation (see, above all, Rosenfeld 1991 and Kennedy 2013b) whereas, in Europe, gender relations became the political and legal field for the development of anti-discrimination into equality law or, in traditional understanding, for the development from formal to substantive equality and therefore also the political effort to *structurally transform* social relationships.

As regards gender equality, the legal obligation for the member states to guarantee equal pay between the sexes had already been part of the European Economic Community(EEC)/EU primary law from the very beginning, created with the establishment of the EEC in 1958 through the Rome Treaties. The 'equal pay' obligation, originally intended as an instrument to *prevent distortions of market competition* (i.e. to promote *negative integration*) has then been amended and expanded in line with the development of the human rights and freedoms jurisprudence of the ECJ to incorporate equal treatment of men and women far beyond equal pay (see in particular Craig and de Búrca 2015: 380–94 and 892–963). Article 10 of the Treaty on the Functioning of the EU (TFEU), according to the Lisbon Treaties, now provides that the EU may take action to combat discrimination based on sex, racial or ethnic origin, religion, belief, disability, age or sexual orientation. This general antidiscrimination provision, which had originally already been introduced with the Amsterdam Treaty in 1997, established the legal basis on which the Race Directive and the Framework Equality Directive (2000) quoted above were adopted. Both Articles 5 in these directives include the possibility for member states to maintain or adopt 'positive action measures' to 'ensure full equality in practice'. The legal concept can now be found under Article 157 (4) TFEU (Box 8.4).

Box 8.4 Positive action measures, TFEU, Article 157

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
   …
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment

and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

However, with regard to the *problem of structural discrimination* under consideration in this section, the question remains what 'full equality in practice between men and women' as the overall goal of positive action means and what sort of 'measures providing for specific advantages' as part of the concept of positive action can then by justified in a judicial review procedure by the ECJ since they are, as follows from the legal structure of Article 157 TFEU, constructed as an exception from the rule of equal treatment between men and women.

Hence, following the legal-dogmatic method of interpretation, a closer look into the legislative history will shed more light on the understanding of the meaning of the concept of 'full equality in practice', forecasting also the inroad taken by the jurisprudence of the ECJ taken in the 1990s.

The text of the directive on the implementation of equal treatment of the principle of equal treatment for men and women as regards access to employment, promotion and working conditions (Council Directive 76/207/EEC), adopted in 1976, was still framed within the framework of negative integration. However, as can clearly be drawn from its text, the principle of equal treatment is not merely programmatic (i.e. without normative consequences) but a legal obligation for the member states to abolish 'any laws, regulations and administrative provisions contrary to the principle of equal treatment' (Article 3. 2.) and to declare null and void also 'any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions' (Article 3.2. (b)), thereby also conferring the so-called horizontal effect (i.e. legally binding force on legal relations between private parties) to the equality principle. Even more striking in hindsight is the text of Article 2 paragraph 4, declaring that 'this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities'.

In conclusion, the 'principle of equal treatment' is no longer confined to the meaning of formal equality before the law of any member state (i.e. making discrimination of men or women by state authorities justiciable) but develops this principle further into a conceptualisation of *effective equality* by three additional steps:

- prescribing *horizontal effect*, also making discrimination by *private parties* justiciable;
- requiring state authorities to become active by abolishing all legal regulations with discriminatory effect not only in state law, but also collective agreements and even private contracts; and
- allowing for positive action to promote *equal opportunities*.

This final point is further specified in a legally not binding Council Recommendation of 13 December 1984 on the promotion of positive action for women, which can be seen as the textual link for the *construction* of the *legal concept* of structural discrimination.

Already the preamble makes clear that formal equality before the law is considered inefficient by declaring that:

> existing legal provisions on equal treatment, which are designed to afford *rights to individuals*, are *inadequate for the elimination* of all existing *inequalities* unless parallel action is taken … to counteract the *prejudicial effects* on women in employment which arise from *social attitudes, behaviour and structures*

in particular, as this is further outlined in recommendation 1(a) 'structures, based on the idea of a traditional division of roles in society between men and women' (emphasis added). The demonstrative list of 'possible actions' in recommendation 4 then gives an overview of 'aspects' to be taken into consideration:

- 'informing and *increasing* the *awareness* … of the need to promote equality of opportunity for working women,
- … appropriate … *training*, including the implementation of supporting measures …
- … recruitment and promotion of women in sectors and professions and at levels where they are *underrepresented* …
- adapting working conditions …
- active *participation* by women in decision-making bodies, including those representing workers, employers and the self-employed' (emphasis added).

Thus far, the developments in EU primary and secondary law lead, in light of the findings of sociological research on systemic or structural discrimination elaborated in Chapter 4, section 4.2 and above, to the following questions concerning the interpretation of legal texts.

First, the question is raised, if and how can *structural factual inequality* be distinguished from the concept of *indirect discrimination*? The example given in the Recommendation of the Council is the *segregation* of the labour market along gender lines, which *has to be abolished* and which is not a consequence of discrimination by state authorities or private actors as agents who commit discrimination, but is caused by attitudes and 'structures of society'; more specifically, 'the traditional division of gender roles in society between men and women'. In conclusion, the text of the recommendation seems to suggest that *states* are *allowed to intervene* through positive measures into economic and social relationships in order to attain equal opportunities for men and women even *independent* of *any acts* of past direct or indirect discrimination.

Second, the question is raised whether equal opportunities have to be seen as *opportunities for individual persons* to guarantee *fair conditions* from the very beginning of any competitive process as this was addressed by US President Johnson quoted in the introduction to this chapter or as *group-oriented equality of opportunities* (i.e. resulting in a proportional share for groups in the *outcome of distributive processes*)? Both of these conceptions might serve as 'legitimate public interest' and goal to be achieved by positive measures which have – in any

case – to be justified in judicial review procedures since *positive action* is seen as *exception from the rule of equal treatment* of men and women according to a systematic interpretation of Article 1(1) and Article 2(1) in conjunction with Article 2(4) of Directive 76/207/EEC (Box 8.5).

Box 8.5 Positive measures and the rule–exception doctrine, EU Council Directive 76/207/EEC

Article 1

1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as 'the principle of equal treatment'.
2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
2. This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.
3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.
4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1). (1) OJ No C 111, 20.5.1975, p. 14. (2) OJ No C 286, 15.12.1975, p. 8. (3) OJ No C 13, 12.2.1974, p. 1. (4) OJ No L 45, 19.2.1975, p. 19.

(EU Council Directive 76/207/EEC)

Third, the question is raised which type of positive action can *effectively serve those goals* and who is entitled to make use of positive measures or whether positive action is *even a legal obligation*? Again, the text of Recommendation 84/635/EEC includes several hints in this regard. With information and awareness raising, as well as training and supportive measures, two

kinds of positive action are mentioned in the text. Moreover, the need for recruitment and promotion of women in positions where they are 'underrepresented' already addresses a third kind of positive action which became the *battlefield of litigation* before the ECJ from the 1990s on, namely whether and which form of *quota systems* transgress the legal justification for positive measures as an 'exception' from the rule of 'equal treatment' between men and women.

These three questions make clear that *different types* of positive measures and their analysis in light of philosophical, legal-dogmatic as well as sociological perspectives and their interdependence must provide the *analytical focus* for the problem of *legal conformity* and the *empirical effectivity* of anti-discrimination regulations against structural inequality or synonymously structural discrimination in sociological language. However, because none of the definitions of direct and indirect discrimination in the EU Directives explicitly refers to the phenomenon of structural discrimination, it remains to be seen whether the concept of anti-discrimination including positive action is further developed in the case law of the ECJ to cover also the consequences of structural discrimination.

The first case brought before the ECJ, *Kalanke v. Freie Hansestadt Bremen* (1995), did, however, disappoint all those who had expected a transformation of the equality paradigm from formal to substantive equality in practice to be achieved by a quota system for the recruitment and promotion of women in the civil service. In the course of the proceedings before the Court, Advocate General Tesauro drew a categorical analytical distinction between 'equality of opportunities' and 'equality of results' finally taken over by the judges in their reasoning. Following the 'rule–exception' structure of Article 141 of the Treaty Establishing the European Community (today Article 157 TFEU), the judges therefore concluded:

> It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. …
>
> As the Council considered in the third recital in the preamble to Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ 1984 L 331, p. 34), existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures.
>
> Nevertheless, as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly (see Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 36).
>
> National rules which guarantee women *absolute* and *unconditional priority* for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive.
>
> (ECJ, *Kalanke v. Freie Hansestadt Bremen*, 1995: para. 19–22, emphasis added)

With regard to the second explicative question raised above, the Court therefore narrowed down the concept of equal opportunities to fairness in the meaning of equal chances as

starting point for competition and applied this narrow meaning within the already mentioned rule–exception frame. The alternative approach possible is discussed with reference to the jurisprudence of the Canadian Supreme Court at the end of this section.

In European scholarly literature, the approach of the ECJ was heavily criticised as being soft, making the concept of substantive equality in practice ineffective since information, awareness raising, support and training will, if at all, only slowly change 'social attitudes, behaviour and structure' in the wording of Recommendation 84/635/EEC, quoted by the ECJ without, however, drawing any normative conclusions from its concept. Also, the European Commission was obviously shocked by this judgment and rendered a 'Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*'. The Commission, in the question 'How to interpret Kalanke' then constructed an alternative interpretation and a way out:

> either the Court dismissed the possibility of justifying any quota system, even one containing a safeguard clause which allows the particular circumstances of a case to be taken into account, or the Court restricted itself to the 'rigid' quotas provided for in the Bremen law as applied to Mr. Kalanke, that is in an automatic manner.
>
> (European Commission, 1996: 8)

However, such a *dichotomy* is wrong in the opinion of the Commission which argues in conclusion that the ECJ had only condemned *rigid quotas*, thereby giving women an 'absolute' (i.e. 'automatic' and 'unconditional') right to appointment and promotion so that member states and employers are free to have recourse to all other forms of positive action, including *flexible quotas*.

The response by the ECJ followed suit with the case *Marschall v. Land Nordrhein-Westfalen* (1997). The law of the Federal State Nordrhein-Westfalen did prescribe a quota system for the appointment and promotion of women. In contrast to the legal regulations in Bremen it did, however, include a so-called saving clause, so that the judges argued:

> Unlike the rules at issue in *Kalanke,* a national rule which, as in the case in point in the main proceedings, contains a saving clause does not exceed those limits [of the exception in Article 2(4) of the Directive, see § 22 of the Kalanke judgement quoted above] if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate.
>
> (ECJ, *Marschall v. Land Nordrhein-Westfalen*, 1997: para. 33)

The Court thus found the provisions of the Land's law in line with EU law. Of particular interest with regard to the construction of the legal concept of structural discrimination is, however, the Court's renewed reference to Recommendation 84/635/EEC giving it, in contrast to Kalanke, this time normative force as an instrument for the interpretation of valid

EU law and thereby reconceptualising the meaning of equal opportunities as can be seen from the text of the reasoning:

> As the *Land* and several governments have pointed out, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.
>
> *For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances*.
>
> It follows that a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are underrepresented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world.
>
> (ECJ, *Marschall v. Land Nordrhein-Westfalen*, 1997, para. 29–31, emphasis added)

In conclusion, this judgment, first, clarifies that the lack of equal opportunities need not necessarily be based on past direct or even indirect discrimination so that *positive action* including *flexible quotas* are a possible *legal instrument* for both state authorities and private parties to fight against *structural* factual inequalities. Second, the reasoning at paragraph 30 also insinuates that the concept of equality of opportunities cannot be narrowed down to fair chances for individuals as a starting point for competition. Such a strictly individualistic liberal ideological premise is insufficient for equal chances. Hence, specific measures are *necessary* to achieve *equal opportunities of result* as can be seen from the term and indicator 'underrepresentation' and thereby what we termed group-related orientation as part of the concept of 'full equality in fact' according to Article 2(4). The following cases *Badeck and Others* (2000) and *Abrahamsson and Anderson* (2000) confirm this interpretation. The ECJ, in *Badeck*, even speaks of a 'flexible *result* quota' (at para. 28, emphasis added).

To this day, however, neither primary nor secondary EU law *prescribe* a positive duty to take positive measures which must – by definition – be group-related *special* rights insofar as they target members of *certain* groups or categories such as gender and race or social and national origin. Thus, there can be no special measures without regard to specified groups or categories.

In conclusion, we can summarise with regard to legal standard setting and the case law of the ECtHR and the ECJ. Owing to the fact that a special provision for the protection of (ethnic or national) minorities had been proposed but not agreed upon with the adoption of the ECHR in 1950, the anti-discrimination provision of Article 14 ECHR, with its reference to 'national minorities' as one of the grounds of discrimination remains a substitute provision. Its weak effect stems from two interdependencies. First, Article 14 has always been considered by the Court an 'accessory' provision requiring first a violation of one of

the substantive rights and freedoms. Finding, however, a violation of rights and freedoms, such as the right to privacy, property, freedom of religion or freedom of assembly, indirectly covering the necessary preservation of the identity of minorities, the majority of judges very often abstained from dealing with the additional claim of discrimination. Second, anti-discrimination, like other rights and freedoms of the ECHR, has been, *strictu sensu*, seen as an individual right, so that the group-related dimension usually was and remains ignored. Hence, the ECtHR had a long way to go to adopt the concept of indirect discrimination, let alone that of positive action until 2010, and we can even see a regression in light of the renationalisation of Council of Europe member states since then.

As far as the case law of the ECJ is concerned, the development of equality law including the concept of structural discrimination to be overcome by quotas followed from gender relations. The protection of minorities as groups and/or diverse identities, never was and still is not one of the explicit aims of the European Union. Economic integration and the creation of a single market through the four freedoms of movement of persons, workers, capital and services stood at the beginning of European integration and the constant search for a balance between the preservation of the sovereignty of the member states and the delegation of competences and thus policy fields to the European level. Hence, the anti-discrimination approach remained the dominant pillar in the further development of EU primary law after the turn from negative market integration by removing the obstacles in the enjoyment of the four freedoms to the human rights approach, finalised with the adoption of the EU Fundamental Rights Charter through the Nice Treaty in 2000, put into force, however, only with the Lisbon Treaties 2007. Nevertheless, the impact of EU antidiscrimination law on minority protection could be seen in different policy fields such as employment, education and, to a lesser extent, culture, as was elaborated and discussed in Chapter 7 concerning language rights in these fields. However, there is no competence of the EU to adopt legislative acts in the field of minority protection so that it could require positive measures as a legal duty following from EU law in the field of minority protection. Nor did the ECJ, despite of even recognising the need for flexible quotas in gender relations as a consequence of the fact of structural inequality, come close to the jurisprudence of the ECtHR to interpret the anti-discrimination directives as including a duty to take effective measures to prevent discrimination so that a failure to take such measures could amount to discrimination.

Finally, we have to try to assess the *empirical effects* of positive measures or affirmative action. *Critics of affirmative action* usually raise three kinds of objections.

First, they argue that *special measures* constitute a *privilege* for certain individuals or even groups and therefore have to be deemed as reverse discrimination. They consider such measures *double injustice* because they do not address the real victims of past discrimination, but confer unjust privileges on those persons or groups who are the beneficiaries of affirmative action who have never been discriminated against themselves.

Second, critics also argue that affirmative action is simply not effective to overcome the burdens of past discrimination. Hence the second line of criticism, in particular in the United States, denies that there is any causal effect from affirmative action in remedying past discrimination. Empirical evidence demonstrates, however, that they are right and wrong at the same time, depending on the expectations and the time frame applied: An empirical study on the 'lingering effects' of past discrimination proved that – after mandatory desegregation

of public education following from the judgments of the US Supreme Court in *Brown v. Board of Education* (1954/1955) – 70 per cent of African American pupils attending pre-school and primary school institutions still had to attend de facto racially segregated schools in the school year 1998/99 (Cunningham *et al.* 2002), as racially segregated neighbourhoods in villages and towns were perceived as a factual situation based on voluntary, individual decisions (Mayorga-Gallo 2014). This means 'societal discrimination' – in the opinion of the majority of the judges in US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) – does not constitute a 'compelling state interest' which justifies voluntary affirmative action measures by local authorities, for instance planning regulations in housing policies in order to bring about residential desegregation.

Other empirical studies, however, demonstrate what will happen when affirmative action is abolished, as this was the case after the decision of the US Court of Appeals for the Fifth Circuit in *Hopwood v. Texas* (1996), or after a referendum in California in 1996. One year after the abolition of affirmative action in California, the rate of admission of African Americans to the University of California at Berkeley dropped from 49.6 per cent in 1997 to 20.3 per cent in 1998, in spite of the fact that there had been more African American candidates, so that the author of the study concludes that the abolishment of affirmative action 'appears to be very harmful for minorities' (Caldwell 2009: 813).

However, the myth of a colour-blind society (Kennedy 2013a) can be deconstructed from a different perspective. Since Americans of Asian origin made up 4 per cent of California's resident population in 2000 but 5.9 per cent of all college and university students according to one research study, they were no longer recognised as a minority and thus were excluded from affirmative action programmes (Lee 2008). On the one hand, the author of this study agrees with critics of affirmative action that only with the US Supreme Court's decision in *Regents of the University of California v. Bakke* (1978) Asian Americans had become 'ethnicised'. On the other hand, Lee criticises the stereotype that their educational success can be explained by their eagerness to learn since they do not form a uniform cultural group and, moreover, face 'structural barriers'. In spite of a bigger number of students and graduates, they remain underrepresented in important higher positions, such as in Congress, as chief executives of companies or at universities. Hence, she comes to the conclusion that the social status as a minority does not depend on representativeness in terms of numbers, but on access to the decision-making process and power.

Third, the US Supreme Court declared any 'benign racial gerrymandering' in the case *Shaw v. Reno* (1993) unconstitutional because it might lead to 'racial' conflict. As to the facts of the case, a North Carolina congressional reapportionment plan had foreseen the creation of two majority black electoral districts in order to be able to send a second black representative from North Carolina to the House of Representatives. The apportionment plan was, however, contested before the Supreme Court. The applicants argued that 'the deliberate segregation of voters into separate districts on the basis of race' violates 'their constitutional right to participate in a "color-blind" electoral process'. Justice Sandra Day O'Connor, writing the majority opinion, followed this argument:

> Express racial classifications are immediately suspect because … there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications

> are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. … Racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.
>
> (US Supreme Court, *Shaw v. Reno*, 1993: 642–3 and 648)

And she concludes:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of political system in which race no longer matters ….
>
> (ibid: 657)

Apart from the moral problem that Justice O'Connor simply equates *malign* gerrymandering, which is beyond doubt discrimination according to the equal protection clause of 14th amendment of the US Constitution, with *benign* gerrymandering as form of remedial affirmative action on the basis of the ideologically questionable doctrine of a 'colour-blind' constitution, this empirical question must also be raised: what are the causes and consequences here? Is affirmative action by definition the root cause of conflict which may 'balkanize' US society? Or does a history of slavery and *de jure* race discrimination not empirically prove that the development of race relations in the USA, in particular police violence, are a root cause of conflict so that Justice Blackmun delivered a dissenting opinion in the case *Regents of the University of California v. Bakke* (1978) in which a white student had successfully contested a quota for admission of minority students with the argument of 'reverse discrimination'. Justice Blackmun argued in his dissent:

> It is somewhat ironic to have us so deeply disturbed about a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning … have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful … I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot – we dare not – let the Equal Protection Clause perpetuate racial supremacy.
>
> (US Supreme Court, *Regents of the University of California v. Bakke*, 1978: 404 and 407)

Finally, we have to discuss three different normative strategies for how to translate the more abstract principles concerning full and effective equality or positive or special measures into legally binding rules.

First, as we already learned from Article 4, paragraph 3 FCNM (Box 8.1), there are legal provisions which declare *by definition* that special measures on behalf of minorities shall not be considered an act of discrimination.

Second, as we have seen from the case law of European courts, this leads to the construction of what we have termed the *rule–exception doctrine* in Chapter 4, section 4.3 and in this chapter. Hence, the rule of (formal) equality before the law allows judges to uphold measures *on behalf of* minorities as laid down in constitutions or international legal instruments. It goes without saying that the rule–exception doctrine is, of course, perfectly in line with the principle of rule of law so that all state action, including legislation, must be subject to judicial control if people feel their rights have been violated. At the same time, a social science perspective and empirical analysis showed in Chapter 5, section 5.3 that human and minority rights are – in the terminology of Niklas Luhmann – an 'institution', 'coupling' the subsystems of law and politics in terms of what we termed functional interdependence, so that judicial review in this respect is an institutional arrangement with the important function to keep the dynamic equilibrium between these two subsystems. Therefore, it goes without saying that every court will also have an institutional self-interest to defend this power of judicial review in terms of the legitimisation of its judgments or even to expand it by arguing for the need to improve the balance between democracy and rule of law. This institutional self-interest can, however, have – ideologically speaking – a neoliberal and, at the same time, conservative effect when courts – mirroring the general attitudes of society and political elites – strike down progressive legislation and regulation trying to overcome structural barriers for full and effective equality by insisting on a strict interpretation of the rule of formal equality or granting a wide margin of appreciation to national legislation (see, in particular, Agha 2017) by, for instance, sidestepping the problem of race discrimination. On the other hand, courts will be seen as the spearheads of progressive, structural transformation if they strike down reactionary laws and regulations motivated by liberal-paternalistic or nationalistic ideology in political processes. Hence, the rule–exception doctrine is an expression of the permanent pendulum swing between judicial activism and judicial self-constraint, characteristic of the institution of judicial review (see Chapter 2, section 2.1).

Third, in line with the transformative dimension, the *strategy of reframing* not only puts the liberal-individualistic, meritocratic ideology and therefore the dichotomic conception of *formal versus substantive equality* into question but also constructs ways and means for *overcoming* this *dichotomy*. This can be seen, in particular, in international legal instruments such as, for instance, from General Comment No. 25 of the Committee on Elimination of Discrimination against Women, in particular its paragraph 18. In this paragraph, the Committee declares that it 'views the application of these measures not as an exception to the norm of non-discrimination' and postulates that positive measures are by definition:

> the obligation of States parties under the Convention to improve the position of women to one of de facto or substantive equality with men … irrespective of any proof of past discrimination. The Committee considers that States parties that adopt and implement such measures under the Convention do not discriminate against men.

As in the two strategies discussed above, this would require that courts simply reject the admissibility of claims against affirmative action.

The legal system which came closest to this conclusion is Canada where the Canadian Supreme Court case *Lovelace v. Ontario* (2000) turned the rule–exception doctrine upside down in trying to dissolve the dichotomy of formal versus substantive equality. The factual background of this case was the exclusion of so-called First Nation bands who had approached the Ontario government for the right to control reserve-based gaming activities. The profits from these activities were to be used to strengthen the bands' economic, cultural and social development through a First Nations Fund. The appellants were informed by the government that the proceeds from the commercial casino were to be distributed only to Ontario First Nations communities registered as bands under the Indian Act. At the individual level, all the appellate groups had members who were entitled to register as individual 'Indians'. As communities, however, the appellants were 'non-status' since they were not registered as Indian Act 'bands' and did not have reserve lands. The appellants thus claimed that their exclusion from the First Nations Fund was a violation of the equality principle of section 15 of the Canadian Charter of Rights and Freedoms. Section 15 (1) includes the prohibition of discrimination on the grounds of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Section 15 (2) postulates: 'Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantages of individuals or groups' according to the grounds enumerated in subsection (1).

The Court of Appeals declared that section 15 requires an interpretation in which subsection 2 cannot be seen as exception from a rule under subsection 1, because both subsections shall form a 'coherent concept' of equality. Hence, 'special programmes' in terms of 'remedial initiatives' by the government shall be supported by the courts. Nevertheless, in line with our line of argument about the intimate link between rule of law and judicial review, the Appeals Court judges declared that even such programmes cannot be exempt from judicial control. However, judicial control in such cases must be restricted to the question of whether the special programme serves a disadvantaged group and impacts the improvement of their standard of living.

Chief Justice Iacobucci then followed this approach by declaring that section 15 of the Canadian Charter comprises a *coherent concept of substantive equality* with the purpose *not only* to *prevent discrimination*, but *also* to *reduce disadvantage*. Only a 'substantive equality analysis allows for the realization of the provision's strong remedial purpose and avoids the pitfalls of a formalistic or mechanical approach' (at paras 54, 59 and 93). He comes to the conclusion that a 'contextual analysis' of the facts must suffice which does, however, not give a *carte blanche* to the government. Against the rule–exception doctrine of the US Supreme Court and European Courts which require the alleged party (i.e. state authorities) to prove that they did not violate the constitution or EU law, the burden of proof in the Canadian approach lies with the claimant (i.e. a third party) whose rights not to be discriminated against have allegedly been violated (see also Baker 2008: 539).

8.4 Summary conclusions and learning outcomes

Starting with the provocative question of whether the normative principle of equality is based on an 'empty idea', we first highlighted that the concept of equality is trapped in

two ideologically prefabricated dichotomies in anti-discrimination law. These are, first, the conceptions of formal equality *before* the law requiring state authorities to *refrain* from discrimination and substantive equality *of* the law demanding state authorities to *intervene* in social, economic, or political relations in order to achieve factual equality which are seen as mutually excluding normative prescriptions, meaning that the case law of apex courts constructed a *rule–exception doctrine*. Second, the conceptualisation and distinction between *direct* and *indirect* discrimination remains trapped in the dichotomy of *individual* versus *group rights*. As we have demonstrated from the development of case law of the ECtHR, indirect discrimination cannot be understood without a *comparison* of the effects of discrimination in *group-related* terms, nor is it possible to establish a discriminatory *intent* as if it were following from individual agency. Nevertheless, the procedural requirements (i.e. prima facie evidence on the basis of statistics leading to a shift of the burden of proof) remain contested in the jurisprudence of the ECtHR to this day.

Moreover, as we learn from sociological research, litigation on individual cases based on the concept of direct discrimination and the liberal-individualistic or liberal-egalitarian ideological framing of the rule–exception doctrine remains completely ineffective against institutional racism and structural discrimination. Thus, in the judgment of the Chamber of the ECtHR, *D.H. and Others v. the Czech Republic* (2006), Judge Costa came to the 'sudden' insight in his concurring opinion that the placement of Roma children might be based on 'systematic discrimination' which cannot be adequately judged on the basis of a case-by-case examination of the facts in each individual application without seeing the whole picture. It is necessary therefore to take into account the multidimensionality of discrimination. These are, first, the *redistributive dimension*, which must not, however, be restricted to a formalistic-reductionist interpretation of the principle of formal equality by focussing on a legal text and the establishment of individual intent, but not taking the effects of discrimination into account or by depersonalising the facts into abstract comparisons of social and legal categories. Such an approach will always remain trapped in the two dichotomies referred to above. Second, it is therefore necessary to also take the *recognition dimension* into account and to take stigmatisation and negative stereotyping based on prejudice much more seriously than is currently the case in the jurisprudence of the ECtHR. Third, as we argued in Chapter 4, section 4.2 and Chapter 6, section 6.3, the phenomena of racial discrimination and the abject poverty of Roma and Sinti all over Europe are the consequence of the mutual reinforcement of the socioeconomic stratification of societies and racial inferiorisation by ethnic majority populations, which cannot adequately be conceived as indirect discrimination, but requires us to take the transformative dimension seriously and thus lead to a reconceptualisation of anti-discrimination and equality law into what we termed structural discrimination.

This conceptual approach brings to the fore the legal problem of whether positive measures in European legal language or affirmative action in US constitutional terminology is not only a political question which must be left to the legislative bodies of nation states, but even a legal *fiat* if legal terminology is used in international instruments ratified by European states or in EU law, which are commonly seen as an expression of the concept of substantive equality (such as Article 4 FCNM or Article 157 TFEU). This problem was highlighted in the jurisprudence of the ECtHR in the cases *D.H. and Others v. the Czech Republic* (2007) and

Oršuš and Others v. Croatia (2010). The ECtHR, however, stopped one step short before the conclusion that positive measures are a legal obligation of states' parties to the ECHR when postulating that 'in certain circumstances a failure to correct inequality through different treatment may in itself give rise to a breach of the Article [Article 14 ECHR]'. Thus, the question whether there is indeed a legal obligation to take special measures or not *remains indeterminate* since the Court never specifies what the 'certain circumstances' are.

The second problem related to positive measures is the *legal-dogmatic* question of whether quota regulations conform with national constitutional law or EU law. In this regard we have seen that the ECJ in the first case, *Kalanke v. Freie Hansestadt Bremen* (1995), took a rather cautious approach following from the liberal-egalitarian approach of the rule–exception doctrine. However, based on scholarly criticism, but also a so-called communication from the European Commission, the ECJ changed its approach in *Marschall v. Land Nordrhein-Westfalen* (1997) and developed a rather progressive line, which allows even for 'flexible result quotas' to overcome structural discrimination in gender relations, due to the explicit regulation in primary EU law. This is, however, not the case for minority protection due to the history of European integration which had originally focussed on (negative) market integration. It must therefore come as no surprise that the case law of the ECJ concerning minority protection remained focussed on a market integration framework and no case was brought before the ECJ attacking positive measures on behalf of ethnic groups or national minorities with regard to, for instance, access to education or the labour market. Instruments for the equal political representation and participation of ethnic minorities in state institutions that are functionally equivalent to quota systems are dealt with in Chapter 9.

Finally, as far as, first, the *justice and fairness* of special measures or affirmative action is concerned, we learned from the philosophical and political theoretical debates that they are seen as double injustice insofar as – so the critics argue – these measures do not address the real victims of past discrimination, but privilege in particular the more affluent members of said groups. Second, affirmative action is said to have remained completely ineffective after decades of implementation in school desegregation. Statistical evidence, however, demonstrates that conclusions are depending on the expectations of possible results and the time frames applied. Third, as Justice O'Connor argued in *Shaw v. Reno* (1993), affirmative action may lead to the 'balkanization' of societies. Again the question must be raised, however, what are the causes and effects? Is ethnic difference a root cause of (violent) conflict so that affirmative action is even entrenching ethnic or racial identities in US legal terminology and therefore leading to the division of societies? Or is it the other way around? Is it not the attitude of so-called white supremacy and the police violence which is the actual root cause of violent conflict in the United States so that, first of all, anti-discrimination law and adjudication inspired by liberal ideology shall remain completely ineffective in fighting institutional racism and structural discrimination as we learn from the US Supreme Court case *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) above, in which the majority of judges trivialised ghettoisation as 'societal discrimination' being the individual fate of everybody? But shall such an ideological perspective then be a legitimate argument to abolish affirmative action on behalf of the most vulnerable groups? The same is, of course, true for Roma and Sinti all over Europe and – more and more – new minorities in Europe, due to rising xenophobia because of increasing nationalist sentiments in Europe since the 2000s.

Questions

1. Is the normative principle of equality 'an empty idea'?
2. What makes the difference between direct and indirect discrimination?
3. Under what conditions might state authorities have positive obligations following from the equality principle?
4. Are 'strict' quotas for minorities allowed under EU law?
5. Will positive measures on behalf of minorities necessarily lead to societal fragmentation or so-called parallel societies?

Against marginalisation

9

The right to effective participation

Joseph Marko and Sergiu Constantin

9.1 Introduction: the analytical framework – autonomy, subsidiarity and integration

The third Thematic Commentary of the Advisory Committee under the Framework Convention for the Protection of National Minorities (FCNM) on the 'Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs' (ACFC 2008) already highlighted that 'effective *participation*, full and effective *equality* and promotion of national minorities' *identity* and culture' are 'the three corners of a triangle which together form the main foundations of the Framework Convention' (ibid., para. 13, emphasis added). This is in line with our understanding of the identity/diversity – equality – participation nexus in Chapter 5 (Figure 5.1) that none of these three 'corners' can correctly be understood in isolation, but that they must always be put in relation to each other. Seen from this perspective, we can now pull the various threads of the book together with regard to effective participation concerning questions already encountered in previous chapters. For instance, in Chapter 6, section 6.3, we learned that the Finnish majority 'frames' the legitimacy of minority claims and that the president of the Sami parliament, in principle one of the most prominent examples of the institutional representation of the cultural, economic and political interests of indigenous peoples in Europe, deplored the lack of political influence that the parliament has in actual fact. Hence, the overall problem is raised: what do we *mean* by effective participation if legal obligations laid down in international and national law and the establishment of corresponding institutions do not suffice? And *how* is it possible to *measure* efficacy?

We must, therefore, return to the three steps of critical reflection of *conceptualisation*, *operationalisation* and *measurement* of legal instruments and institutional arrangements in order to develop a comprehensive analytical framework (see also Hirschl 2014: 238–44). Based on the triangulation of the normative principles of dignity, equality and diversity (see also Chapter 10, section 10.5), the *right* to *individual* and *collective self-determination* is the axiomatic vantage point for our structuration, not only with regard to the rights to existence,

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identity in diversity (i.e. multiple identities and equality) but also regarding effective participation in terms of self-determination through the normative *principles* and *institutional arrangements* of *autonomy*, *subsidiarity*, and *integration* (see Chapter 10, section 10.5).

Effective participation in this analytical framework of autonomy, subsidiarity and integration therefore requires the following *functional* and *structural prerequisites*. Following from the 'dilemma of difference' elaborated in Chapter 4, section 4.3, different *groupings* must be recognised, so as to have a *right to raise their voice* (i.e. a right to *make claims*), which affects both their own affairs as well as the results of decision making for society at large, and of which they are a part, in terms of a comprehensive understanding of 'integration of diverse societies', as also elaborated in the so-called Ljubljana Guidelines of the High Commissioner on National Minorities of the Organisation for Security and Cooperation in Europe (OSCE 2012). Without the 'recognition of diversity and multiple identities, non-discrimination and effective equality, shared public institutions, inclusion and effective participation' as 'structural principles', the integration and cohesion of 'diverse, multi-ethnic societies' is not possible (ibid: 3).

Hence, to start with this most fundamental precondition, denied by the Jacobin tradition in Western and Southeastern Europe, as we learned in previous chapters, this is the *political* function of *liberal* human rights in general, such as the right to privacy and home (Article 8 of the European Convention on Human Rights, ECHR), freedom of religion (Article 9 ECHR), freedom of expression (Article 10 ECHR) and freedom of association (Article 11 ECHR) in their contextualised meaning through the case law of the European Court of Human Rights (ECtHR). This political – in a broad sense – function is called the *indirect effect* of liberal human rights for *minority protection*, since these rights cannot be conceived as strictly individual rights irrespective of social relations and group formation, but always by having to take into account these dimensions, as discussed in detail in Chapter 7, with regard to language and religion and in Chapter 8, concerning the normative principle of 'full and effective equality'. Therefore, adjudication on liberal freedoms and political rights, in particular freedom of association in terms of *political party formation* for the protection of all forms of minority interests as well as the *right to vote* and *to stand as a candidate* in elections (Article 3, Protocol 1 ECHR), denies or justifies the legitimacy of claims of groupings to have a right to raise their voice in a pluralist society. All of these issues are discussed in section 9.2.1.

Sections 9.2.2 and 9.2.3 on different electoral systems and instruments for electoral engineering, deal with the question of how to legally institutionalise *political representation and participation* of minorities in state bodies, frequently contested as unfair privileges by advocates of individualistic liberalism and liberal egalitarianism, as discussed in Chapter 4, section 4.3.

The possible institutional arrangements range from exemptions from threshold requirements in proportional vote systems and so-called benign gerrymandering in majority vote systems to reserved seats and proportional representation in the legislative, executive or judicial branch. The problem of *representation* thus concerns all matters regarding how to *enable* or even *guarantee* that elected or appointed minority representatives can influence the decision-making processes in state bodies. The de jure and de facto composition of state bodies according to different *theories of political representation*, such as symbolic, descriptive and substantive representation, are thus the focus for the assessment of how effective different instruments of minority representation can be.

Political participation, as discussed in this chapter, is then the umbrella term for the normatively regulated procedures and empirical *processes* of decision making in state bodies, and how effectively minorities and their representatives can *influence* the *results* of those decision-making processes. Typologically, we differentiate three functions and/or phases of decision making from the weakest to the strongest political and legal position of groupings. These consist of the possibility of *informing* state institutions or even a right to be *consulted* without, however, a right to appeal the outcome of decisions made by those institutions; *participation in co-decision making* in state institutions as elected or appointed representatives of minorities; and, finally, *veto powers* in co-decision making, again to be differentiated with regard to their effect as either a suspensive veto, which can be overcome by a mediation mechanism, or as an absolute veto, which cannot be overturned.

Section 9.3 of this chapter then returns to the problem and question of *autonomy* or *sovereignty* and the respective conceptualisations of the right to *self-determination*, which has already been discussed from a philosophical and critical ideological perspective in Chapter 4, section 4.3 as one of the conundrums of the liberal-democratic national state. The purpose of this section is, however, a more legal-dogmatic and legal-sociological analysis of the development of internal self-determination in terms of territorial and non-territorial autonomy regimes. In light of our neo-institutional approach and analytical framework of autonomy, subsidiarity and integration, we therefore present and analyse the case studies of South Tyrol and Belgium for the inextricably linked relationship of the concepts of autonomy, federalism and power sharing.

Figure 9.1 provides a visual overview of the *continuum* between *liberal* and *political human rights* and their group-related dimension and the possible forms of *collective self-determination*.

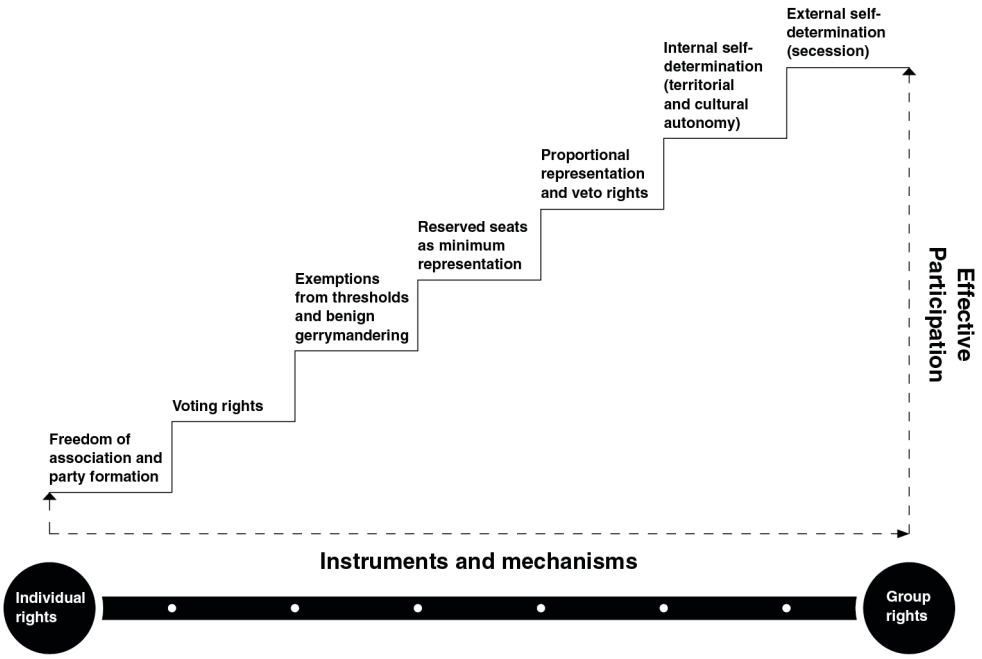

Figure 9.1 Effective participation: a continuum of instruments and mechanisms

9.2 Preconditions for effective participation: liberal freedoms and political rights

Representation of minorities in elected bodies at national and sub-national levels is an essential element of participation in public life, which depends on the interplay among, inter alia, the right to freedom of association, the right to free elections and the right to vote and to stand as a candidate in elections (Table 9.1).

Table 9.1 Liberal freedoms and political rights in instruments of the United Nations and the Council of Europe

	UN	*CoE*	
	ICCPR	*ECHR*	*FCNM*
Freedom of association and freedom of assembly	Articles 21 and 22	Article 11	Article 7
Right to free elections, right to vote and to stand as candidate, and right to effective participation in public affairs	Article 25 (a) (b)	Article 3 of Protocol no.1	Article 15

CoE: Council of Europe; ECHR: European Convention on Human Rights; FCNM: Framework Convention for the Protection of National Minorities; UN: United Nations; ICCPR: International Covenant on Civil and Political Rights

As follows from the settled case law of the ECtHR, any restrictions on the exercise of these freedoms and rights are acceptable in a democratic society only with reference to the enumerated grounds for limitation in paragraphs 2 of Articles 9, 10, and 11 ECHR. Hence, the state parties to the ECHR may impose certain limitations on freedoms of expression and association in the interests of national security, territorial integrity and public safety, for the prevention of disorder, serious unrest and crime, for the protection of health and morals or for the protection of the rights and freedoms of others. However, the states do not enjoy unlimited discretion in this regard and the ECtHR is empowered to assess on a case-by-case basis whether such restrictions are 'necessary in a democratic society' by applying the proportionality test in its review procedure (see Chapter 2, section 2.1). Political organisations of national minorities often challenge existing laws and policies or even the constitutional design of their state and a number of key issues arise in these disputes: Is minority rights activism an issue of national security? Is it legitimate to ban ethnic parties? Are autonomy claims a threat to the territorial integrity of a state? Is it discriminatory to establish a system of reserved seats for minorities in elected bodies?

Answering these questions requires an in-depth analysis of the case law of the high courts and quasi-judicial bodies that are called upon to interpret and apply the international and domestic standards on minority participation in public affairs.

In the following pages, we focus on the European approaches in this field. Developments at United Nations (UN) level are rather limited, because the UN Human Rights Committee

(UNHRCom) 'has not yet had the chance (or arguably not yet taken the chance) to effectively and explicitly enforce [the right to effective participation of minorities]' (Verstichel 2009: 194). Although the UNHRCom is aware that this is one of the most relevant matters for minorities, so far it has followed a very restrained approach and has confined itself to the sphere of cultural rights when asserting the importance of effective participation of minority groups (ibid: 192; see also Chapter 6, section 6.3.1 regarding the right to self-determination of indigenous peoples).

In comparison, the ECtHR has been more engaged in this field, although in an indirect way, due to the scope of protection offered by the Convention. The ECHR contains no provision regarding minorities (except the reference in Article 14 dealing with non-discrimination). Nevertheless, the fundamental rights and freedoms protected under the ECHR reflect various minority concerns and the ECtHR has dealt with numerous applications regarding issues relevant for minority participation in public life as we could already learn from the case law discussed in Chapters 7 and 8.

9.2.1 Freedom of association as a prerequisite for political representation of minorities

A significant number of ECtHR cases under Article 11 (freedom of association and assembly) deal with the refusal of registration or dissolution of organisations and political parties that aimed, inter alia, to promote minority political representation and participation and/or to change the state's constitutional design (Box 9.1).

Box 9.1 Selection of ECtHR cases on freedom of association and assembly

- *United Communist Party of Turkey and Others v. Turkey* (1998)
- *Socialist Party and Others v. Turkey* (1998)
- *Freedom and Democracy Party (ÖZDEP) v. Turkey* (1999)
- *Yazar and Others v. Turkey* (2002)
- *Dicle for the Democratic Party (DEP) of Turkey v. Turkey* (2002)
- *Refah Partisi (the Welfare Party) and Others v. Turkey* (2003)
- *Democracy and Change Party and Others v. Turkey* (2005)
- *Demokratik Kitle Partisi and Elçi v. Turkey* (2007)
- *Herri Batasuna and Batasuna v. Spain* (2009)
- *Sidiropoulos and Others v. Greece* (1998)
- *Ouranio Toxo and Others v. Greece* (2005)
- *Bekir-Ousta and Others v. Greece* (2007)
- *Tourkiki Enosi Xanthis and Others v. Greece* (2008)
- *Emin and Others v. Greece* (2008)
- *Stankov and the United Macedonian Organization Ilinden v. Bulgaria* (2001)
- *United Macedonian Organization Ilinden and Ivanov v. Bulgaria* (2005)

- *United Macedonian Organization Ilinden PIRIN and Others v. Bulgaria* (2005)
- *United Macedonian Organization Ilinden and Others v. Bulgaria* (2006)
- *Gorzelik and Others v. Poland* (2004)

The *general approach* of the ECtHR in such cases is that *only convincing* and *compelling reasons* can justify restrictions on freedom of association. The states have a certain margin of appreciation (see Chapter 2, section 2.1) in this regard, but they must exercise their discretion reasonably and in good faith. When evaluating the arguments brought up by states seeking to justify restrictions, the Court looks at the state interference and the factual context of each case and determines whether the restriction was proportionate to the legitimate aim pursued.

Such a balancing of group-related rights with public interests is apparent in the ECtHR cases *Sidiropoulos and Others v. Greece* (1998) and *Gorzelik and Others v. Poland* (2004). The ECtHR found a violation of Article 11 in the former case, since the promotion of a minority culture cannot endanger national security in a democratic society, whereas the Court upheld the decision of the Polish authorities in the latter case to deny registration to an association called the Union of People of Silesian Nationality claiming to represent the Silesian 'national minority'. We have discussed these two cases and the reasoning of the judges of the ECtHR from a comparative perspective in Chapter 7 section 7.4.3.

While the above cases concern a *negative obligation* under Article 11 ECHR – that is, public authorities must abstain from interfering with the freedom of association – the state also has a *positive obligation* (see also Chapter 8, section 8.2) to secure effective enjoyment of the right of free assembly and association. Therefore, public authorities must take the necessary measures to guarantee the proper functioning of an association or political party. The ECtHR dealt with this positive obligation under Article 11 ECHR in *Ouranio Toxo and Others v. Greece* (2005). The case concerns a mob attack on the offices of a political party that aims, inter alia, to defend the interests of the Macedonian minority living in Greece. A group of demonstrators attacked the headquarters of the Ouranio Toxo party in the town of Florina and set it on fire after the party displayed a sign written in the Macedonian language in front of its premises. The applicants claimed interference with their freedom of association because of the acts directed against them and the passive attitude of the police forces and judiciary during and after the violent events. The Court concluded that the Greek authorities had failed to take the measures necessary to defend and promote the values inherent in a democratic system, such as pluralism, tolerance and social cohesion. Greece argued that the sign displayed by the party had strong negative historical connotations echoing the civil war which had broken out after the Second World War, and thus the local population perceived it as provoking. However, the ECtHR pointed out that 'the consciousness of belonging to a minority and the preservation and development of a minority's culture cannot be said to constitute a threat to "democratic society", even though it may provoke tensions' (ECtHR, *Ouranio Toxo and Others v. Greece*, 2005: para. 40). Moreover, affixing a sign with the party's name written in Macedonian 'cannot be regarded as reprehensible or considered to constitute in itself a present and imminent threat to public order' (ibid: para. 41). Hence, by both

their acts and omissions, the Greek authorities violated Article 11 ECHR. Thus, with this judgment, the ECtHR sent a signal that the states must ensure the freedom of assembly and association, not only by abstaining from measures impeding the registration of parties and associations of minorities, but also by taking all the necessary measures to address restrictions of this freedom through actions of third parties (the local population in the present case).

When dealing with freedom of association in connection with freedom of expression (see also Chapter 7, section 7.4.3), the ECtHR stresses that the latter also applies to information or ideas that offend, shock or disturb, including statements that challenge the constitutional design of the state. In the case of *Socialist Party and Others v. Turkey* (1998), the Court established that '[i]t is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself' (ECtHR, *Socialist Party and Others v. Turkey*, 1998: para. 47).

Similarly, the ECtHR established that the promotion of minority cultural and linguistic identity cannot be arbitrarily impeded in *United Macedonian Organisation Ilinden-Pirin and Others v. Bulgaria* (2005), a highly relevant case in the context of political participation of national minorities. In 1998, the United Macedonian Organisation: Ilinden–Pirin (UMO Ilinden–Pirin) party was founded in the geographical region of Pirin Macedonia. One year later, the Sofia City Court registered the party but a large group of members of parliament asked the Constitutional Court to dissolve it, arguing that the ultimate aim of UMO Ilinden–Pirin was the secession of Pirin Macedonia from Bulgaria (on party bans in Europe in general, see Bourne and Bértoa 2017). The Constitutional Court held, on the one hand, that there was no Macedonian minority in Bulgaria and therefore UMO Ilinden–Pirin was not an ethnic party, which is forbidden under Article 11(4) of the Bulgarian Constitution. On the other hand, the Court found that various actions and statements of members of the party and its predecessor organisations fell under Article 44 (2) of the Constitution, which prescribes the dissolution of organisations whose activities are directed against the country's sovereignty or territorial integrity or against the nation's unity (Bulgaria, Constitutional Court, Decision of 29 February 2000, Case no. 3/99). The judges declared UMO Ilinden–Pirin unconstitutional and the party was dissolved with immediate effect.

Subsequently, the party representatives lodged a complaint before the ECtHR under Article 11 ECHR. The Court reaffirmed the principle that democratic states cannot arbitrarily limit the participation in public life of associations or political parties seeking recognition and promotion of a minority group's distinct cultural and linguistic identity. The ECtHR held that the UMO Ilinden–Pirin party did not pose a threat to national security, even if party members called for *internal* or even *external self-determination*: 'The mere fact that a political party calls for *autonomy* or even requests *secession* of part of the country's territory is not a sufficient basis to justify the dissolution on national security grounds' (ECtHR, *United Macedonian Organisation Ilinden and Others v. Bulgaria*, 2005: para. 61, emphasis added; see also *United Macedonian Organisation Ilinden–Pirin and Others*, 2006).

This does not mean that the Court recognises a right to secession. It is rather a reminder that the essence of democracy is the plurality of opinions and that secession should not be a taboo topic in the public debate (Gilbert 2002: 778). However, the ECtHR has upheld dissolutions of *separatist political parties* allegedly *linked to terrorist organisations*, arguing that

this radical measure met a 'pressing social need' because its members did not denounce the use of violent means to achieve political goals. Illustrative in this regard is *Herri Batasuna and Batasuna v. Spain* (2009). This case concerns the decision of the Spanish authorities to declare illegal and dissolve the Basque separatist parties *Herri Batasuna* and *Batasuna*. The ECtHR found no violation of Article 11 ECHR. It upheld the dissolution as 'necessary in a democratic society, notably in the interest of public safety, for the prevention of disorder and the protection of the rights and freedoms of others' (ECtHR, *Herri Batasuna and Batasuna v. Spain*, 2009: para. 94) because they were considered the 'political branch' of the terrorist organisation Euskadi Ta Askatasuna (commonly known as ETA).

The above cases reveal the two paramount questions in the case law of the ECtHR under Article 11 ECHR regarding the problem of *militant democracy* (Loewenstein 1937) addressed in our analysis of the Catalan independence movement in Chapter 4, section 4.3: first, whether organisations or political parties seek to achieve their aims by democratic means or violence and, second, whether the goals of the respective organisations or parties are themselves compatible with fundamental democratic principles. Hence, on the one hand the Court declares political activities including the organisation of demonstrations and speeches of politicians by organisations and political parties propagating unilateral secession not to be a violation of Articles 10 and 11 ECHR, as long as they do not incite to racial, ethnic and religious hatred and violence. On the other hand, as we learned from Chapter 7, section 7.3 in the case of *Refah Partisi (the Welfare Party) and Others v. Turkey,* 2003, whose ban was upheld by the ECtHR, calls for setting up a system of legal pluralism, in particular sharia law, have to be considered incompatible with the fundamental principles and values underlying the ECHR.

The aforementioned cases against Turkey, Greece and Bulgaria are not random manifestations of arbitrariness. They reflect a particular model of the combination of state and nation. Indeed, the restrictive approach applied by these countries is linked to the so-called Jacobin model of the ethnically neutral state nation (see Chapter 3, section 3.2), which influenced their historical processes of state formation and nation building. As indivisibility of the nation and territory are ideological tenets, there is little room for the recognition and expression of ethnic *and* cultural diversity in the public sphere. From this perspective, the recognition of national minorities is perceived as undermining the unity of the nation and, ultimately, sapping the strength of the state. Similarly, proposals of territorial self-government arrangements aiming to manage diversity and ensure effective participation of minorities are perceived as the first step towards secession. Thus, more often than not, such states see the organisations or political parties claiming to represent the interests of minorities as a threat to national security and their domestic legislation forbids the establishment of ethnic parties.

Domestic legislation banning ethnic political parties in line with the Jacobin model has been under scrutiny not only in terms of ECtHR jurisprudence, but also by means of the Opinions of the ACFC, as illustrated, for instance, by its First Opinion on Bulgaria. Article 11(4) of the Bulgarian Constitution declares: 'There shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent seizure of state power'. In 1990, the Bulgarian authorities registered a party called Movement for Rights and Freedoms, which represents mainly the interests of the Turkish minority, but which also receives support from members of other ethnic groups. According to Article 1 of its statute, the Movement for

Rights and Freedoms is a political organisation 'founded with the purpose of contributing to the unity of all Bulgarian citizens, respecting the rights and freedoms of the minorities in Bulgaria in accordance with the Constitution', domestic legislation and international instruments for protection of human rights and minority rights. Soon after its registration, 93 members of parliament challenged the constitutionality before the Constitutional Court. However, the judges rejected their request on the ground that 'a party can [only] be alleged to be founded on ethnic grounds when its statute does not allow persons belonging to other ethnic groups to become its members' (Bulgaria, Constitutional Court, Decision No. 4 of 21 April 1992, Case no. 1/91). Although the party in question was not dissolved, the constitutional provision was not amended either. The ACFC argued with regard to such a constitutional ban that this 'is problematic vis-à-vis the FCNM, in that, failing more flexible legislation for its interpretation, it is liable to cause unwarranted limitations of the right to freedom of association as enshrined in Article 7 FCNM' (ACFC, First Opinion on Bulgaria 2004: para. 61).

Minority representation and participation in public affairs can be impeded not only through banning minority organisations but also through the *imposition* of *excessive requirements* for their *official registration*. These situations also fall under the broadly interpreted provision of Article 7 FCNM, which guarantees individuals belonging to national minorities, inter alia, the freedom of assembly and association.

The negative impact of excessive burdens imposed upon newly established minority organisations is particularly evident in Romania. According to Romanian electoral legislation, any organisation of national minorities can participate in the parliamentary elections. However, the law differentiates between two categories of minority organisations: those already represented in parliament and those which are not. While the former can run in elections without meeting any special requirements, the latter may participate in the electoral process only if they fulfil several conditions. These organisations must have 'public utility' status – that is, they must fulfil a list of cumulative criteria: they must carry out their activity for the general interest, have operated for at least three years and have already achieved some of their proposed goals with proof of continuous activity, in addition to cooperating with public institutions and non-governmental organisations from Romania or abroad. The government grants the status of public utility, but no application submitted by the various organisations claiming to represent national minorities has been successful since 2008 (Cârstocea 2011: 168). In addition to the demanding requirements of public utility status, a minority organisation wishing to participate in elections must submit extraordinarily detailed membership data to the Central Electoral Office. The members of the organisation must constitute at least 15 per cent of the total number of citizens self-identifying as members of the respective minority in the last official census. If, in order to fulfil this condition, the minority organisation needs to have more than 20,000 members, its membership list shall include at least 20,000 persons with residence in at least 15 counties and Bucharest, but not less than 300 persons for each of these counties and Bucharest. Obviously, a newly established minority organisation has no chance of meeting these requirements and running in elections. The ACFC raised concerns about this restrictive approach of Romania, emphasising that the negative impact of these regulations goes beyond the sphere of political representation of minorities. As the law grants political organisations of minorities certain

prerogatives that cultural associations do not have, the 'differential treatment between organisations of minorities is not conducive to pluralism and internal democracy within minorities' (ACFC, Second Opinion on Romania 2005: para. 107).

This case also illustrates the weak impact of the FCNM's monitoring mechanism. The Romanian authorities simply ignored the ACFC's recommendation to amend the restrictive requirements; thus, in 2012, the ACFC noted 'with regret that the situation with regard to the registration conditions envisaged for organisations of national minorities has not changed in Romania' (ACFC, Third Opinion on Romania 2012: paras 120–1).

9.2.2 Right to free elections

The right to participate in an election as a voter and the right to stand as a candidate for election are basic principles of a democratic society, therefore prohibitions or restrictions in this area are *prima facie* violations of fundamental human rights and minority rights (Table 9.1). Overly *restrictive language knowledge requirements* for candidates running in elections count among such violations.

While a state has a legitimate aim to protect and promote its *official language*, there are limits to the way in which and the degree to which it may impose linguistic requirements in the sociopolitical and socioeconomic sphere (see Chapter 7, sections 7.4 and 7.5). In *Antonina Ignatane v. Latvia* (2001), the UNHRCom dealt with a complaint from a member of Latvia's Russian-speaking minority. In 1993, Ms Ignatane obtained a language proficiency certificate issued by a commission of five Latvian language specialists. This document, stating that she had attained the highest proficiency in Latvian (a so-called third-level proficiency), is valid for an unlimited period. Less than one month before the 1997 local elections, the Riga Election Commission struck Ms Ignatane off the electoral list on the basis of an opinion issued by the State Language Centre, claiming that she did not have the required proficiency in the state language. Subsequently, Ms Ignatane claimed a violation of Article 25 (right to be elected), in conjunction with Article 2 (non-discrimination based on language) of the ICCPR.

The Latvian government argued before the UNHRCom that participation in public affairs requires a high level of proficiency in the state language and that such precondition is reasonable and based on objective criteria. An ad hoc examination carried out by an inspector of the State Language Centre in 1997 showed that the language proficiency of Ms Ignatane did not meet the requirement for 'third level'. It is worth noting that the Latvian government acknowledged that the State Language Centre's conclusions were relevant only to the issue of the candidate's eligibility and in no way implied the automatic invalidation of the language certificate she had received in 1993. At the time of the case, around 40 per cent of the country's population did not speak Latvian as their mother tongue. However, the only precondition for standing as a candidate in local elections was the knowledge of the state language. The UNHRCom concluded that Ms Ignatane had 'suffered specific injury in being prevented from standing for the local elections' and, thus, Latvia had violated her right to participate in public life as guaranteed by Article 25 ICCPR in conjunction with Article 2 ICCPR (UNHRCom, *Antonina Ignatane v. Latvia*, 2001: para. 7.5).

The ECtHR provided a similar reasoning in *Podkolzina v. Latvia* (2002). In this case, the applicant, Ms. Podkolzina (who is a member of the Russian minority), claimed a violation of Article 3 of Protocol No. 1 (right to free elections) to the ECHR, Article 13 (right to effective remedy) and Article 14 (non-discrimination) of the ECHR. In 1997, Ms. Podkolzina received a language proficiency certificate of the 'third level', but later, following an ad hoc examination, an inspector of the State Language Centre drew up a report to the effect that she did not have an adequate command of the official language. Consequently, the Central Electoral Commission struck her off the list of candidates of her party in the 1998 parliamentary elections. The ECtHR noted that the Central Electoral Commission based its decision on an additional assessment made by 'a single civil servant, who had exorbitant power in the matter' and in the 'absence of any guarantee of objectivity' (ECtHR, *Podkolzina v. Latvia*, 2002: para. 36). The Court held that the procedure applied to the applicant was 'incompatible with the requirements of procedural fairness and legal certainty to be satisfied in relation to candidates' eligibility' (ibid.). Therefore, the decision to strike Ms Podkolzina off the list of candidates was not proportionate to a legitimate aim. In 2002, the Latvian parliament abolished the provisions of the Parliamentary Elections Act regarding language requirements for candidates in Latvian elections.

Violations of the right of minorities to effective participation in public affairs are likely to occur in the case of countries that are deeply divided along ethnic lines. Even in the context of domestic legal-institutional frameworks that are seemingly favourable to pluriethnic coexistence, the (non-)application of certain electoral rules leads to violations of the right to vote and to stand as a candidate in elections. The case of *Aziz v. Cyprus* (2004) is illustrative in this regard.

The Cypriot Constitution of 1960 provides for *separate electoral lists* for the Greek Cypriot and Turkish Cypriot communities. Nonetheless, from 1963 onwards, the participation of Turkish Cypriot MPs was suspended because the Turkish Communal Chamber stopped operating after violent clashes in 1963 and the Greek Communal Chamber was abolished in 1965. Thus, in practice, there were no separate electoral lists and it became impossible to implement the relevant constitutional articles providing for the parliamentary representation of the Turkish Cypriot community and the quotas to be filled by the two communities. Following the de facto partition of Cyprus in 1974 (Figure 9.2), the members of the Turkish Cypriot community living in the Greek Cypriot government-controlled area were excluded from participating in elections.

The applicant, Mr Aziz, argued that these rules deprived him of his right to vote under Article 3 of Protocol No. 1 to the ECHR (right to free elections) and Article 14 ECHR (non-discrimination) in conjunction with Article 3 of Protocol No. 1. The Cypriot government argued that the constitutional provisions of the country, including its electoral system, provided for two different communities, the Greek Cypriot and the Turkish Cypriot community, whereby both of them could participate in governmental affairs only through their own representatives. Members of the Turkish Cypriot community could not vote for the Greek Cypriot candidates and vice versa. The applicant lived in a very small Turkish Cypriot community with only a small number of members, thus the government argued that the numerical strength of the Turkish Cypriot community, and not the electoral rules, prevented the applicant from enjoying his right to vote. The ECtHR acknowledged that states had

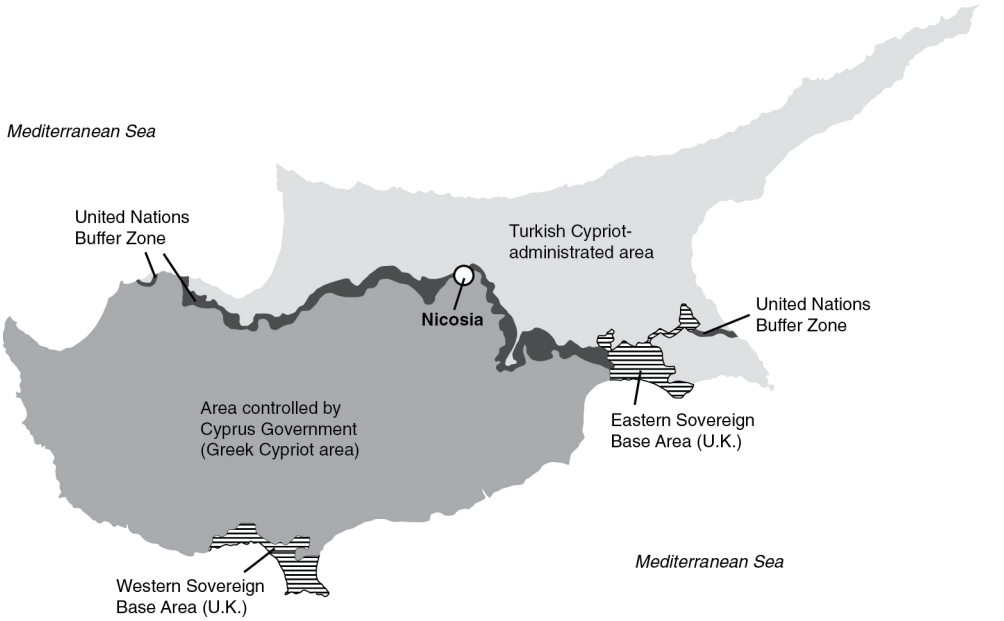

Figure 9.2 The division of Cyprus since 1974

'considerable latitude to establish rules within their constitutional order governing parliamentary elections and the composition of the parliament', but such rules had to be justified on 'reasonable and objective grounds'. The Court found Cyprus in violation of Article 14 in conjunction with Article 3, Protocol No. 1 of the Convention since the Cypriot government failed to produce such grounds which could justify the still existing constitutional provisions regulating the voting rights of members of the Greek Cypriot and Turkish Cypriot communities whereby only the latters' voting rights had become impossible to implement in practice so that 'Turkish Cypriots in the applicant's situation are *prevented from voting at any parliamentary election*' (ECtHR, *Aziz v. Cyprus*, 2004: paras 28 and 37, emphasis added). Thus, the *total exclusion* from the right to vote as citizen of the Republic without the legislative power having tried to change this 'difference in treatment' on the basis of community membership for such a long time could no longer by justified in the Court's opinion.

Two years after the ECtHR judgment in *Aziz v. Cyprus*, the Cypriot authorities passed Law 2(I)/2006 on the exercise of the right to vote and stand for election of members of the Turkish Cypriot community with *habitual residence* in the government-controlled area. In other words, Law 2(I)/2006 does not apply to Cypriot citizens who are members of the Turkish Cypriot community and who reside in the government-controlled area only occasionally, from time to time, or temporarily. Nor can Turkish Cypriots living outside the government-controlled area (Figure 9.2) claim a right to vote or to stand for election in the Republic of Cyprus based on the ECtHR judgment in the *Aziz v. Cyprus* case and Law 2(I)/2006. The ECtHR dealt with this issue in *Erel and Damdelen v. Cyprus* (2010). In this case, the applicants were Turkish Cypriots living in the Turkish Cypriot controlled part of Nicosia (i.e. part of the Turkish Republic of Northern Cyprus) which is, however, internationally recognised

only by the Republic of Turkey. The applicants requested the Cypriot government to be placed on a separate electoral list for the Turkish Cypriot community, in order to vote and stand for elections. The applicants claimed that the residence requirements laid down by Law 2(I)/2006 were contrary to the Cypriot Constitution and the ECHR. Following the refusal of the Cypriot authorities to declare their request admissible, the applicants complained before the ECtHR of violations of Article 3 of Protocol No. 1 to the ECHR (right to free elections), Article 14 ECHR (non-discrimination) in conjunction with Article 3 of Protocol No. 1 to the ECHR and Article 1 of Protocol No. 12 to the ECHR (general prohibition of discrimination). The Court recalled that establishing a residence requirement in order to exercise the right to vote in elections is not, in principle, an arbitrary restriction incompatible with Article 3 of Protocol No. 1. Furthermore, the ECtHR emphasised that the states enjoy a wide margin of appreciation in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Thus, legislation establishing a residence requirement for a parliamentary candidate is, as such, compatible with Article 3 of Protocol No. 1. It is deemed appropriate to enable the candidates to acquire sufficient knowledge of the issues associated with the parliament's tasks. The applicants (who were living voluntarily in an area that is not under government control) failed to persuade the Court that the decisions of the Cypriot parliament directly affected them. The ECtHR noted that, even if measures passed by the Cypriot legislature may have some significance and interest beyond the government-controlled areas, this cannot be regarded in the same light as the direct and enforceable impact of those measures on those residents within those areas. After considering the very particular circumstances of the case and its case law on the matter, the Court found no violation of electoral rights and no evidence that the applicants had been discriminated against. Thus, the application was rejected as inadmissible on the ground that it was manifestly ill founded.

As paradoxical as it may seem, also the establishment of ethnic conflict settlement mechanisms may lead to de jure or de facto exclusion from the right to vote and to stand as a candidate in elections if persons do not belong to certain ethnic groups (Marko 2009: 631). *Sejdić and Finci v. Bosnia and Herzegovina* (2009), *Zornić v. Bosnia and Herzegovina* (2014) and *Pilav v. Bosnia and Herzegovina* (2016) are illustrative ECtHR cases in point. According to the Constitution of Bosnia and Herzegovina, which is based on the Dayton Peace Agreement, the country consists of two entities with their own constitutions: the Federation of Bosnia and Herzegovina (hereinafter 'the Federation') and the Republika Srpska (Figure 9.3).

The Constitution makes a distinction between two categories of citizens: the so-called 'constituent peoples' (Bosniaks, Croats and Serbs) and the 'others' (i.e. persons belonging to national minorities and those who do not declare affiliation with any of the above). To ensure the *parity representation* of the *constituent peoples*, the Presidency of Bosnia and Herzegovina consists of three members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska. The composition of the second chamber of Bosnia and Herzegovina's parliament is based as well on the principle of parity representation. The House of Peoples has 15 members: five Bosniaks and five Croats from the Federation, and five Serbs from the Republika Srpska. In the so-called *Constituent Peoples* case of 2000, the Constitutional Court of Bosnia and Herzegovina struck down several constitutional provisions of the two

Figure 9.3 Bosnia and Herzegovina

entities, including those that identified only one or two particular ethnic groups as 'constituent people' of each entity. The Court held in a five-to-four majority decision that 'the *constitutional principle of collective equality* of constituent peoples … prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation' (Bosnia and Herzegovina, Constitutional Court, Partial Decision Part 3 of 1 July 2000, Case no. U 5/98 III 2000: para. 60, emphasis added). Moreover, the Court *rejected* a strict *identification* of *territory* and certain *ethnically* defined members of the country's joint institutions. The majority opinion emphasised that:

> the Serb member of the presidency, for instance, is not only elected by voters of the Serb ethnic origin, but by all citizens of the Republika Srpska with or without a specific ethnic affiliation. He thus represents neither the Republika Srpska as an Entity nor the Serb people only, but all the citizens of the Republika Srpska electoral unit.
>
> (ibid: para. 65)

It follows that all ethnic groups, including the very small ethnic communities that form the category 'others' (Figure 9.4 shown overleaf), must enjoy equal rights irrespective of where they live in the country because the identification of *territoriality* and *ethnicity* may affect the rights of individuals and groups, leading to *discriminatory treatment*. Nevertheless, since the

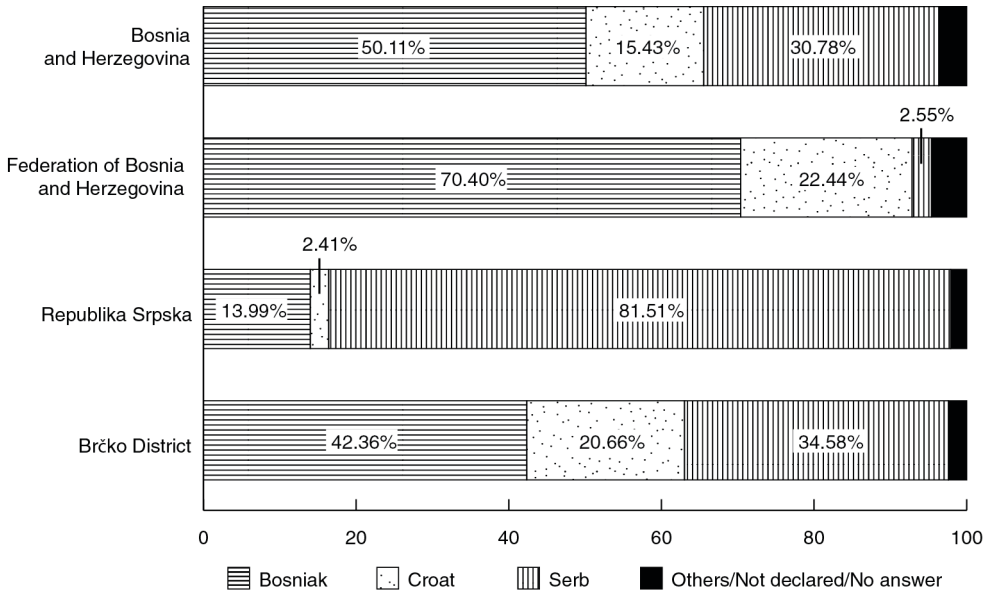

Figure 9.4 Population of Bosnia and Herzegovina (Census 2013)
Source: Agency for Statistics of Bosnia and Herzegovina (2016)

ethnically determined composition of the Presidency and the House of Peoples, in political science literature termed as a system of 'corporate' power sharing (see sub-section 9.2.4 below), is laid down in the Dayton constitution itself, the exclusion of all citizens not declaring themselves as belonging to any of the constituent peoples from the right to vote and to stand as candidates in elections for the members of the Presidency, could not be addressed in the case before the Constitutional Court of Bosnia and Herzegovina (see Marko 2006).

Hence, Mr Dervo Sejdić, then leader of the Roma community and therefore unable to stand as a candidate for the Presidency of the country, and Mr Jakob Finci, then President of the Jewish community, prevented from standing for election to the House of Peoples, submitted an application to the ECtHR.

In the case *Sejdić and Finci v. Bosnia and Herzegovina* (2009) the ECtHR first acknowledged that the de jure exclusion of the 'others' under the Dayton constitution from these official posts initially pursued an aim that was broadly compatible with the general objectives of the ECHR, namely the restoration of peace. The adoption of the impugned constitutional provisions followed a fragile ceasefire agreement on the ground between the so-called constituent peoples. These rules were designed to end a brutal conflict marked by genocide and ethnic cleansing (see Chapter 6, section 6.2). However, the Court observed that, despite continuing challenges, there were 'significant positive developments in Bosnia and Herzegovina since the Dayton Agreement' and held that the applicants' continued ineligibility to stand for election lacked an objective and reasonable justification. Therefore, Bosnia and Herzegovina violated Article 14 ECHR (non-discrimination) taken in conjunction with Article 3 of Protocol No. 1 (right to free elections), as well as Article 1 of Protocol No. 12 to the ECHR (general prohibition of discrimination).

The *Sejdić and Finci* case reveals that the enforcement of execution of ECtHR judgments is a weakness of the ECHR system, which is worth examining in more detail in order to highlight the practical difficulties in achieving effective political representation of minorities despite the efforts of the international community. The Council of Europe (CoE) member states undertake to abide by the final judgments of the Court in every case to which they are parties. The CoE's Committee of Ministers has the task of supervising execution of the Court's judgments by the states. When the ECtHR finds a state in breach of the ECHR, the Court's judgment requires the respective state to take individual measures in favour of the applicant(s) and/or general measures designed to prevent the recurrence of similar violations in that state in the future. Measures with a general character include the abrogation or the amendment of domestic norms that do not comply with European human rights standards or the adoption of a certain new legal and policy framework. However, the ECHR does not provide for a sanctioning mechanism applicable to a country reluctant to execute a judgment of the Court. In such a case, the only sanctions available are the suspension and withdrawal of that country's membership from the CoE. This may happen only in exceptional circumstances, when the respective state persistently refuses to fulfil its obligations and all instruments of political pressure of the CoE bodies have failed to persuade it to do so.

The Bosnian government failed to implement any of the above measures. Although the judgment of the ECtHR in the *Sejdić and Finci* case was published in December 2009, the 2010 Bosnian elections were held on the basis of the legal framework that the ECtHR found to be in violation of European human rights standards. It took political leaders of the three 'constituent peoples' more than one year to reach an agreement on the formation of the new government. The protracted ethno-political deadlock in Bosnia and Herzegovina meant that no progress could be expected in the execution of the *Sejdić and Finci* judgment. Between 2009 and 2013, the CoE urged Bosnia and Herzegovina several times to adopt the necessary constitutional reform. In January 2012, the CoE's Parliamentary Assembly warned Bosnia and Herzegovina that, if the legal amendments required by the *Sejdić and Finci* judgment were not adopted before the 2014 elections, the continued membership of the country in the CoE would be at stake (CoE 2012). Moreover, the Stabilisation and Association Agreement with the European Union (EU) has been suspended until the country meets its obligations. As there was still no progress, in October 2013 the CoE Parliamentary Assembly claimed that it 'will not tolerate yet another election in blatant violation of the *Sejdić and Finci* judgment' (CoE 2013). In October 2014, the country went through the second elections held in violation of the *Sejdić and Finci* judgment. Two months later, the EU Foreign Affairs Council agreed on a plan to reactivate the country's Stabilisation and Association Agreement, which also lays down the requirement to implement the ECtHR ruling. The 2018 general elections were also carried out without implementation of the ECtHR judgment. So far, the combined political pressure of the CoE and the EU has not compelled the political elites of the three constituent peoples to find a way out of the legal and institutional straitjacket established by the Dayton Peace Agreement. This case illustrates that, not only the allegedly ethnically neutral state model (Jacobin model), but also an ethnic-based state model favouring particular ethnicities, is liable to impede minorities' involvement in public affairs.

The similar case *Zornić v. Bosnia and Herzegovina* (2014) concerns the ineligibility of a citizen to stand for election to the House of Peoples and the presidency of the country because she refused to declare affiliation to any of the constituent peoples. The ECtHR came to the same conclusions as in *Sejdić and Finci* and held that Ms Azra Zornić's continued ineligibility to stand for election lacked objective and reasonable justification, amounting to a violation of Article 14 ECHR, taken in conjunction with Article 3 of Protocol No. 1, as well as a violation of Article 1 of Protocol No. 12. The finding of a violation in *Zornić v. Bosnia and Herzegovina* was the direct result of the Bosnian authorities' failure to introduce constitutional and legislative measures to ensure compliance with the *Sejdić and Finci* judgment. The ECtHR stressed that this failure 'is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery' (ECtHR, *Zornić v. Bosnia and Herzegovina*, 2014: paras 39–40).

The case of *Pilav v. Bosnia and Herzegovina* (2016) concerns the exclusion of Bosniaks and Croats living in Republika Srpska and Serbs living in the Federation from standing in elections for the presidency of Bosnia and Herzegovina. Mr Ilijaz Pilav, who declares himself Bosniak, lives in Republika Srpska. In 2006, his candidacy to the presidency of Bosnia and Herzegovina was rejected because, pursuant to Article 5 of the Constitution of Bosnia and Herzegovina and electoral legislation, the member of the tripartite presidency elected from Republika Srpska must be a Serb. Mr Pilav challenged the decision of the Central Election Commission before the Constitutional Court of Bosnia and Herzegovina, claiming that the regulations preventing him from standing for election to the presidency on the grounds of his ethnic origin violate, inter alia, Article 1 of Protocol No. 12 to the ECHR (general prohibition of discrimination). However, the Constitutional Court found no violation and upheld the respective restrictions as 'justified by the specific nature of the internal order of Bosnia and Herzegovina that was agreed upon by the Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties' (Bosnia and Herzegovina, Constitutional Court, Decision of 29 September 2006, Case no. AP-2678/06 2006: para. 21). In her dissenting opinion, Judge Constance Grewe emphasised the principle that the constituent peoples must enjoy equal rights regardless where they reside (as laid down by the Court in its decision in the *Constituent Peoples* case mentioned above) and argued that the existing combination of ethnic and territorial restrictions for presidential elections leads to unjustified discrimination and ethnic separation.

Having exhausted all domestic remedies, Mr Pilav brought the case before the ECtHR, complaining that the constitutional norms preventing him to stand for election to the presidency on the grounds of his ethnic origin amounted to discrimination prohibited by Article 1 of Protocol No. 12 to the ECHR. The Court noted that it had already found a similar constitutional precondition to amount to a discriminatory difference in treatment in the case of *Sejdić and Finci*. While Mr Pilav, who is affiliated with one of the 'constituent peoples', has a constitutional right to participate in elections to the presidency, he would be required to leave his home in Republika Srpska and move to the Federation in order to effectively exercise this right. Furthermore, the ECtHR recalled that, in relation to cases concerning Article 3 of Protocol No. 1, it has found that a residence requirement was not disproportionate or irreconcilable with the purposes of the right to free elections. Referring, inter alia, to the case of *Erel*

and Damdelen v. Cyprus (2010) discussed above, the Court noted that the exercise of electoral rights 'may depend on the nature and degree of the links that existed between the individual applicant and the legislature of the particular country' (ECtHR, *Pilav v. Bosnia and Herzegovina*, 2006: para. 44). Unlike the applicants in *Erel and Damdelen v. Cyprus*, who did not have permanent residence in the government-controlled area of Cyprus and, therefore, did not satisfy the residence requirement, Mr Pilav lives in Bosnia and Herzegovina and is obviously concerned with the political activity of the presidency of the country. Hence, in *Pilav v. Bosnia and Herzegovina* there is a clear correlation between the right to vote and stand in election and the individual being directly affected by the acts of the political bodies so elected. The ECtHR recalled that, in the *Zornić* case, the Court argued that the time is ripe for a political system that guarantees the exercise of electoral rights to all citizens of the country without discrimination based on ethnic affiliation. Notwithstanding the differences with *Sejdić and Finci and Zornić*, the judges unanimously held that Mr Pilav's exclusion from election to the presidency because of the residence requirement based on a combination of ethnic origin and place of residence amounts to discriminatory treatment in violation of Article 1 of Protocol No. 12. It is worth noting that the ECtHR followed the same line of reasoning as the Constitutional Court of Bosnia and Herzegovina in the *Constituent Peoples* case mentioned above.

Finally, an issue which necessitates closer examination is the impact that the dissolution of a political party may have on the right to stand in elections of its members or other persons pursuing the (illegal) activities of the dissolved party. In the cases *Etxeberría and Others v. Spain* (2009) and *Herritarren Zerrenda v. Spain* (2009), the ECtHR upheld the decisions of the Spanish Courts not to allow political groups, which wished to continue the activities of the dissolved separatist Basque parties, *Herri Batasuna* and *Batasuna* to participate in elections. The Court held that there had been no violation of Article 3 of Protocol No. 1 as the Spanish authorities proved beyond a doubt the applicants' link to previously dissolved parties that supported a terrorist organisation.

9.2.3 The impact of electoral engineering on minority representation and participation

In the introduction to this chapter, we addressed how different electoral systems impact the exclusion or can provide for the inclusion of minorities. For the latter, these are exemptions from threshold requirements in proportional vote systems and 'benign gerrymandering' in majority vote systems.

The landmark judgment in the case law of the ECtHR regarding electoral engineering is a Belgian case: *Mathieu-Mohin and Clerfayt v. Belgium* (1987) concerns, inter alia, the right to vote for a 'candidate of one's own choice' as this is termed in American constitutional law. What does this mean? Following from Section 2, US Voting Rights Act 1965, 'vote dilution' amounts to a violation of the *equal effect* of votes cast, if 'members of racial or ethnic minorities have less chances than other members of the electorate to participate in the electoral process and to elect candidates of their choice' (Davidson 1989). But can this concept of vote dilution and the right to vote for a candidate of one's choice be transferred to the European context, in particular with regard to linguistic minorities?

Hence, before we discuss the judgment of the ECtHR, it is necessary to explain the factual context. Starting in the 1970s, the increasing tensions between the Dutch- and French-speaking communities in Belgium triggered a process of constitutional reform that established a complex power sharing legal and institutional framework.

The outcome of the six state reforms (in 1970, 1980, 1988, 1993, 2001 and 2012, respectively) is a consociational multinational state with three official languages (Dutch, French and German) and a complex three-tiered structure: federal level, regions and communities, which are equal from a legal point of view, but which have powers and responsibilities in different fields. The federal government cannot overrule or amend regulations adopted by the communities and regions within their exclusive spheres of competence. Besides the three regions (Flemish, Walloon and Brussels-Capital) and the three communities (Flemish, French and German speaking), Belgium has four language areas (Dutch, French, bilingual Dutch-French and German). All of these federal levels overlap to various degrees (Figures 9.5, 9.6 and 9.7).

The Flemish Community and Flemish Region merged and their competences have been unified so there is only one Flemish government and one Flemish parliament. The Flemish Community exercises its powers in the Flemish Region and partially in the Brussels-Capital Region. The French Community and the Walloon Region have separate institutions. In 2011, the French Community decided to rename itself the Brussels-Walloon Federation, to

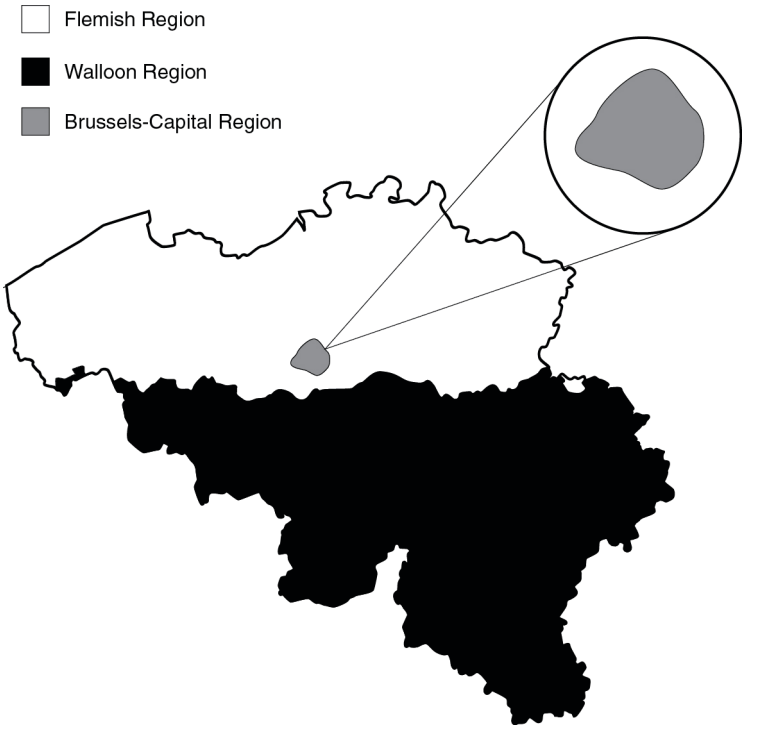

Figure 9.5 Belgium's regions

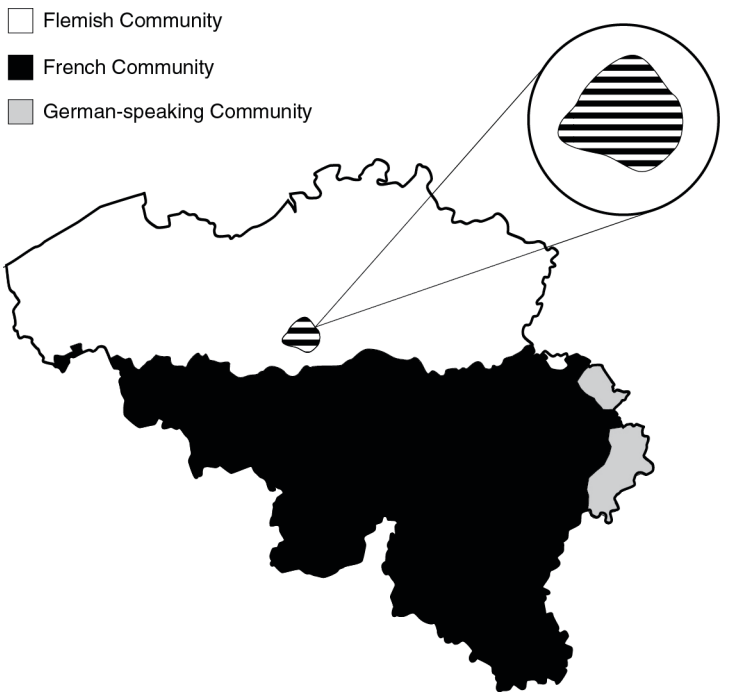

Figure 9.6 Belgium's communities (note: the striped area is the Brussels-Capital Region, where both the Flemish and French communities have jurisdiction)

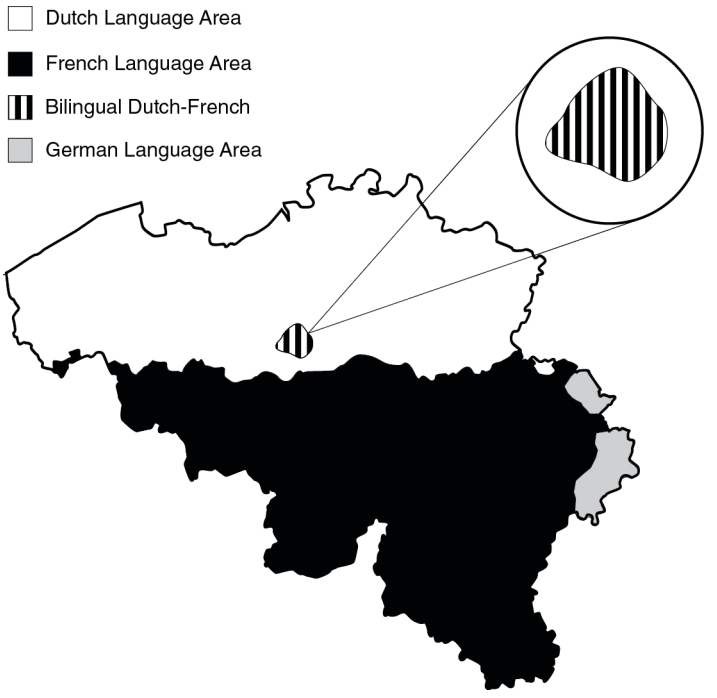

Figure 9.7 Belgium's language areas

highlight the link between the French-speaking region and the capital. Brussels is officially bilingual (Dutch and French) but has a majority French-speaking population. The French Community has its own parliament and government and exercises its powers in the Walloon Region (with the exception of nine municipalities where the German-speaking Community exercises its powers) and partially in the Brussels-Capital Region. The German-speaking Community has its own government and parliament. In 2017, the German-speaking Community renamed itself as Ostbelgien (East Belgium).

Each language area has one official language, with the exception of Brussels-Capital, which has two (Dutch and French). A Belgian municipality can only belong to one of the four language areas. Based on the *territoriality principle*, the local authorities use only the *official language(s)* of the *linguistic area* where the municipality is located. However, Belgian federal law lists 27 'municipalities with language facilities' where residents may also use, in relations with administration and in education, an official language other than that of the respective language area. In the Flemish Region, there are 12 municipalities with facilities for French speakers. Six of them are bordering the Brussels-Capital Region. In the Walloon Region, there are four municipalities with facilities for Dutch speakers and two for German speakers. All nine municipalities of the German-speaking Community offer facilities for French speakers.

Moreover, the Belgian system includes three distinct types of legislative bodies: the national parliament, the community councils and the regional councils. The Flemish Council and the French Community Council consist of members of the Dutch and French language groups respectively in the two chambers of the Belgian parliament. The administrative unit (*arrondissement*) Halle-Vilvoorde is located in the Flemish Region. It comes, thus, under the authority of the Flemish Council despite having a sizeable French-speaking minority. Before the sixth Belgian state reform of 2012, the Brussels-Halle-Vilvoorde (BHV) electoral district covered the administrative *arrondissements* of Brussels-Capital (with 19 municipalities) and of Halle-Vilvoorde (with 35 municipalities). The BHV held a very special position within the Belgian federal system because it was the *only electoral district spanning two regions* (i.e. the Brussels-Capital Region and the Flemish Region) and *two language areas* (i.e. bilingual Dutch-French and Dutch).

The *Mathieu-Mohin and Clerfayt v. Belgium* case arose from the circumstance whereby, under Belgian law, a member of parliament elected in the BHV electoral district, wishing to join the Dutch language group in the two houses of the parliament and to sit on the Flemish Council, had to take the parliamentary oath in Dutch. In other words, the *French-speaking voters* living in the *arrondissement* of Halle-Vilvoorde *could not be represented in the Flemish Counci*l other than by members of parliament who have taken the oath in Dutch. Ms Mathieu-Mohin and Mr Clerfayt were elected in the BHV electoral district and *took their parliamentary oath in French*. Therefore, they became members of the French Community Council (which has no responsibility for the *arrondissement* of Halle-Vilvoorde) but not of the Flemish Council.

The two applicants claimed before the ECtHR that these rules violate Article 3 of Protocol No. 1 to the ECHR (right to free elections) and Article 14 ECHR (non-discrimination) in conjunction with Article 3 of Protocol No. 1 because, in practice, they *do not enable French-speaking electors* in the administrative *arrondissement* Halle-Vilvoorde to vote for *French-speaking*

representatives to the Flemish Council, while Dutch-speaking electors can vote for Dutch-speaking representatives.

The Court noted, however, that the contested regulation 'fits into a general institutional system of the Belgian State, based on the territoriality principle' and that Belgium's legitimate aims are 'to achieve an equilibrium between the Kingdom's various regions and cultural communities by means of a complex pattern of checks and balances' and 'to defuse the language disputes in the country' (ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 1987: para. 57). Finally, the Court acknowledged Belgium's margin of appreciation in terms of determining its electoral rules and found no violation of the ECHR.

However, five judges issued a dissenting opinion pointing out that the margin of appreciation may not undermine the effective protection of the rights enshrined in the Convention. In this regard, the judges argued that the contested system did not ensure 'the free expression of the opinion of the people in the choice of the legislature' as stipulated in Article 3 of Protocol No. 1 to the ECHR and created a language-based distinction contrary to Article 14 ECHR. In the final analysis, in *Mathieu-Mohin and Clerfayt v. Belgium*, the ECtHR denied the right of a minority population to vote for 'candidates of its own choice' (i.e. refusing the claim of the applicants to what we have termed 'descriptive representation' and explained in Table 9.2 in sub-section 9.2.4 below).

The issue of the BHV electoral district became the epitome of tensions between the Flemings and the Walloons. The 2002 Federal Elections Act established provincial electoral districts all over Belgium with the sole exception of the Flemish Brabant province, which remained divided into the Leuven and BHV electoral districts. In 2003, the Belgian Court of Arbitration – which was renamed the Constitutional Court in 2007 – ruled that maintaining the BHV electoral district was illegal because the candidates from the province of Flemish Brabant were treated differently from the candidates from other provinces (Belgium, Constitutional Court, Judgment of 26 May 2003, Case no. 73/2003: para. B.9.5). For instance, the candidates running in the BHV electoral district were competing with candidates from outside the Flemish Brabant province – that is, the Brussels-Capital Region. The Court concluded that the legislature must find an appropriate solution for the BHV problem within four years. However, the Flemish and Walloon political actors only managed to reach a compromise on this issue many years later.

Following the constitutional reform of 2012, the BHV electoral district was finally split. A separate electoral district, Brussels-Capital was established. Halle-Vilvoorde and Leuven formed together a single provincial electoral district corresponding to the province of Flemish Brabant. The inhabitants of the Halle-Vilvoorde administrative *arrondissement*, whether French or Dutch speaking, can no longer vote for Brussels-based candidates in the elections for federal parliament. The only exception applies to those living in the six Flemish municipalities with French language facilities located around Brussels, who can choose to vote for candidates either from Brussels or from Flemish Brabant. The inhabitants of the Brussels-Capital electoral district can now only vote for Brussels candidates. However, it is worth noting that the existence of the BHV for the election of the Chamber of Representatives had advantages for both communities. The Francophone parties could put high profile Brussels-based candidates on the ballot and gain votes from French-speaking inhabitants of the 35 municipalities of the Halle-Vilvoorde administrative *arrondissement*. On the Flemish side,

pooling the votes of the small Dutch-speaking population of Brussels with the votes cast in Halle-Vilvoorde increased the chances of the Flemish parties to win mandates in Brussels (Hooghe and Deschouwer 2011: 645). Now the probability that a Flemish candidate running in the Brussels-Capital electoral district will win a seat in the Chamber of Representatives is rather low. For instance, in the 2014 federal elections, only French-speaking candidates were elected in Brussels-Capital.

Although the BHV electoral district was split for the Chamber of Representatives, it was maintained for the election of the 10 so-called co-opted senators (four French speakers and six Dutch speakers). The co-opted senators are appointed by the other senators based on the results obtained by the parties in the election for the Chamber of Representatives. The Flemish nationalist parties challenged the legality of this exceptional rule of the electoral code before the Constitutional Court, arguing that Flemish candidates were discriminated against because they had to compete with French-speaking candidates. The applicants referred specifically to the 2003 decision of the Constitutional Court on the BHV discussed above. However, the Court rejected the complaint, pointing out that the difference in treatment was a deliberate choice of the constitutional legislator, which 'not only knew about the challenged electoral constituencies, but specifically embraced this choice' (Belgium, Constitutional Court, Judgment of 28 May 2015, Case no. 81/2015: para. B11.2). Moreover, the judges held that they are 'not competent to rule on a difference in treatment or a limitation of a fundamental right that is based on the Constituent's will' (ibid: para. B.11.2 and B.12). As Graziadei (2015) argues, this decision shows the Constitutional Court's rather prudent approach to politically salient cases that divide Belgian language communities.

It is undoubtedly true that electoral engineering has a great impact on the level of minority representation in elected bodies. Indeed, not only the type of electoral system matters (Box 9.2), but also the *drawing of electoral districts' boundaries* and a particular district's magnitude (i.e. the number of candidates to be elected in each electoral district). Electoral engineering can take the shape of *benign* or *malign* gerrymandering.

Box 9.2 Examples of electoral systems and their impact on minority representation

Majority vote systems and proportional representation

Majority vote systems are frequently considered to hinder the representation of minorities, whereas proportional representation systems are considered to promote them. But this is not necessarily true. The effects of the electoral system chosen *depend* in great deal on the *sociopolitical and demographic circumstances*. This is also the case with regard to the possibilities of national or ethnic minorities to be represented. If the voters of a minority party are, for example, *dispersed* throughout the country, it is evident that they will not be able to win seats by majority vote in electoral districts. By contrast, if they are geographically *concentrated*, they may be able to get the majority in one or several

electoral districts. There are several examples in Southeastern Europe where minority parties were able to win seats through majority vote: the Greek minority party won seats in Albania, as well as the Albanian and the Roma minority parties in Macedonia. In Serbia, the Hungarian, Albanian and Bosniak parties were able to gain seats as long as a majority vote system was applied. After the change to a proportional representation system, these parties failed to enter the parliament because of the five per cent threshold requirement.

Moreover, it is not only important whether a majority vote or a proportional representation system applies, but also *how* the electoral system is *designed* in detail. Two key elements of electoral systems are therefore discussed here: electoral districts and the practice of gerrymandering and thresholds, followed by a critical commentary on alternative vote and single transferable vote.

Electoral districts and gerrymandering

It is evident that the creation of electoral districts is of decisive importance in majority vote systems with single-member constituencies. The candidate who gains the majority of votes in an electoral district in one or two rounds wins the seat. Thus, boundaries of districts are often arranged for political reasons, called 'gerrymandering' after US practice since the nineteenth century. The general aim of gerrymandering is either to concentrate votes for a party into a few electoral districts to ensure the re-election of the incumbent, or to diffuse them across several districts in order to minimise the number of seats which could be won by the party in opposition. In both cases gerrymandering is practised with a 'malign' intent.

Gerrymandering can, of course, also be used either to hinder or to promote the representation of minorities. Through so-called 'benign gerrymandering' some districts in the United States were rearranged after the adoption of the Voting Rights Act 1965 in order to enable the election of more African American representatives in Congress. However, the US Supreme Court, which, as a rule, has not been against political gerrymandering as such, declared these attempts unconstitutional in *Shaw v. Reno* (1993) because they violated the right 'to participate in a "color-blind" electoral process'. One good example of minority discriminating gerrymandering can be found in Macedonia, where a snake-shaped district was created for the 1998 elections in order to concentrate Albanian minority votes into a single district, with the effect that more seats could finally be allocated to the majority population.

The design of electoral districts can, however, also be a matter of concern in proportional representation systems. On the one hand, small districts can lead to a high threshold excluding minorities from being represented. On the other hand, large districts can hinder the representation of geographically concentrated minorities, which might win seats in smaller districts. Examples can be found in the cases of Serbia and Slovakia.

Electoral thresholds

Thresholds are generally used in proportional representation systems to prohibit the fragmentation of the party system and the parliament. By excluding small and/or

smallest parties from representation, thresholds also affect the chances of minority parties to get seats even if such a result was not intended.

From the perspective of minority protection, the question whether such thresholds should also apply to minority parties must be raised. In Germany, already in 1952 the Federal Constitutional Court declared a 7.5 per cent threshold in the Land Schleswig-Holstein, de facto prohibiting the Danish minority from being represented, a violation of equal voting rights, but later the Court held that it is constitutionally not necessary (but possible) to make an exemption from the then implemented five per cent threshold for the Danish minority. On the basis of a German–Danish agreement, an exemption for the Danish minority from the five per cent threshold in Schleswig-Holstein was ordered by law in 1955. Similar exemptions from thresholds were introduced for the parliamentary elections in Poland and Serbia.

Alternative/single transferable vote

Some authors are of the opinion that the Australian 'alternative vote' or the Irish 'single transferable vote' would be the most appropriate electoral systems for multi-ethnic societies in Southeastern Europe. In both systems, voters have the possibility of declaring not only their first choice of a party/candidate on a ballot but also their second, third and subsequent choices among all the parties/candidates standing. The idea is that this could enable party leaders to attract the second or third preferences of voters from other ethnic groups and therefore to bridge ethnic divides. In practice, none of these systems was applied in Southeastern Europe except for the parliamentary elections in Bosnia-Herzegovina in 2000 which led, however, to a complete fragmentation of parliament so that the three ethno-national parties which had been excluded from coalition government effectively spoiled the legislative process, mobilised their electorate and won a landslide victory in the following elections in 2002. Given the complex political and cultural problems in these societies, it is, therefore, highly questionable whether such electoral systems would work in the same way as this is theoretically assumed.

Article 16 FCNM, read in conjunction with Article 15, aims to protect national minorities against 'malign gerrymandering'; that is, redrawing electoral districts in a way that would negatively affect minority representation. The ACFC has criticised countries such as Slovakia, Albania, Lithuania, Ukraine and Denmark for changes in the boundaries of electoral districts, and also for changes of the borders of municipalities, which have a negative impact on minority representation (Marko 2010c: 235).

In the case of Slovakia, the controversy started with the adoption of Law No. 302/2001 on the self-government of upper-tier territorial units establishing eight self-governing regions. The representatives of the Hungarian minority contested the administrative-territorial reorganisation, arguing that it aimed to limit its influence in the decision-making process at the regional level. The Hungarian minority in Slovakia is concentrated along the border with Hungary in an area stretching from east to west. The Slovak regions stretch rather

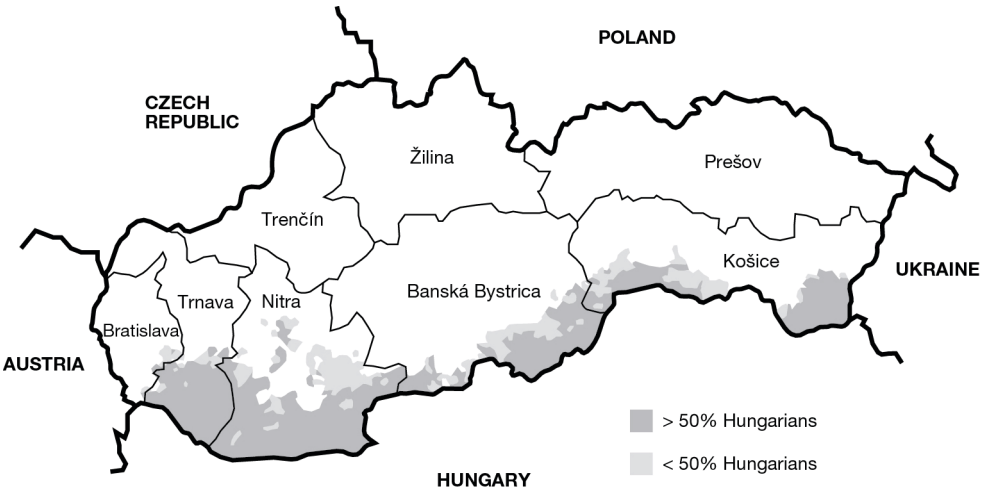

Figure 9.8 Distribution of the Hungarian minority among the Slovak regions

from north to south, thus dividing the Hungarian population into several regions (Figure 9.8 shown overleaf). In fact, none of the eight self-governing regions has an ethnic Hungarian majority. In only two regions (Nitra and Trnava) more than 20 per cent of the population is Hungarian.

Law No. 303/2001 on elections to the bodies of self-government regions (Regional Elections Law) introduced a majority vote system. According to this law, a party can nominate only one candidate for regional elections in each electoral district. The candidate who receives the highest number of votes in his/her electoral district is elected to the council of the self-government region.

In the 2001 regional elections, 60 candidates belonging to the Hungarian minority were elected to regional councils. In the 2005 elections, the number of seats won by ethnic Hungarian candidates reduced to 53. In the 2009 regional elections, the Hungarian minority won 40 seats and one candidate of the Roma Coalition Party was elected to the regional council of the Prešov region. In the 2013 regional elections, the two parties representing the interests of the Hungarian minority won only 34 seats combined. These electoral results are a clear indicator how the majority vote system leads to a steady decrease of their representation, as it crosscuts settlement areas of the minority population.

Croatia's 1992 elections for the Lower House of the parliament show clearly the negative impact of gerrymandering on the quality of minority representation. At that time, the country had a mixed electoral system: 60 members were elected according to proportional representation voting (with the entire territory of the country forming one single constituency) and 64 were elected in single-member districts (Marko and Kregar 1998: 157–8). Four of these 64 had to be elected by members of national minorities in special constituencies. Moreover, according to the 1992 Croatian electoral law, national minorities representing over eight per cent of the total population in the 1981 census were entitled to proportional representation in the parliament. The Serbian minority was the only one to fulfil this condition. In 1981, 11 per cent of Croatia's population was Serbian.

In accordance with the proportional representation rule, 13 seats of the Lower House of the parliament were allocated to the Serbian minority. However, smaller municipalities or parts of municipalities were joined together to form constituencies in a way that seems to indicate a gerrymandering strategy. The electoral districts' size in terms of numbers of voters was unbalanced and, '[a]s far as the ethnic composition was concerned, there was an absolute Croat majority in 55 out of 60 constituencies, an absolute Serbian majority in one and a relative Serbian majority in three' (ibid: 158–9). Obviously, the design of the electoral districts did not favour the election of 13 Serbian candidates. To ensure the constitutional requirement of proportional representation for the Serbian minority, the Croatian government had to provide an ad hoc solution. First, the Constitutional Court exempted the Serbian People's Party from the three per cent electoral threshold, which gained the party three seats. Then, another eight mandates were given to candidates of Serbian origin who ran in the elections on the lists of various Croatian parties. As Marko and Kregar (ibid: 160) point out, '[t]his procedure, although in conformity with the law, could raise the question of the "authenticity" of these Serb representatives – whether the Serb population had the right to vote for "candidates of their choice" '.

This Croatian example brings us to the issue of *electoral thresholds* (Box 9.2). While countries with proportional representational electoral systems use them to prevent an excessive fragmentation of their parliaments, the principle of effective equality would allow for the exemption from legal thresholds for political parties representing national minorities (Marko 2009: 635). The constitutional courts of several European states followed this line of reasoning. For example, the German Constitutional Court has upheld the exemption from a five per cent threshold in favour of the party representing the Danish minority in Schleswig-Holstein (Figure 9.9). Taking another example, the Italian Constitutional Court struck down a regional law of the autonomous region of Trentino-South Tyrol (Figure 9.10 shown overleaf), which introduced a five per cent threshold for the elections of the regional assembly because this would have impaired the fair representation of the small Ladin community. The Polish Constitutional Tribunal upheld special measures for the parties representing national minorities. They were granted a lower number of signatures for registration in elections and they were exempted from a five per cent threshold (ibid: 636–7). The ACFC welcomed the exemption from thresholds in countries such as Poland, Germany and Serbia and encouraged Lithuania, the Russian Federation, Ukraine and Albania to change their electoral rules accordingly.

In Europe, legal thresholds range from 0.67 per cent in the Netherlands to 10 per cent in Turkey (Reynolds *et al*. 2005: 83). To ensure minority representation, the thresholds to enter the parliament under proportional representation systems should be low enough to ensure that parties representing the interests of national minority parties surpass it. In a rather astonishing judgment, the ECtHR held in *Yumak and Sadak v. Turkey* (2008) that a 10 per cent threshold does not violate Article 3 of Protocol 1 to the ECHR (right to free elections). In this case, the two applicants stood in the 2002 parliamentary elections as candidates of the People's Democratic Party, which was known for its commitment to the Kurdish cause. This party had polled 6.22 per cent of the national vote but had obtained more than 45 per cent of the votes cast in southeastern Anatolia where the majority of the population is Kurdish. While the Court acknowledged that a high threshold may deprive part of the

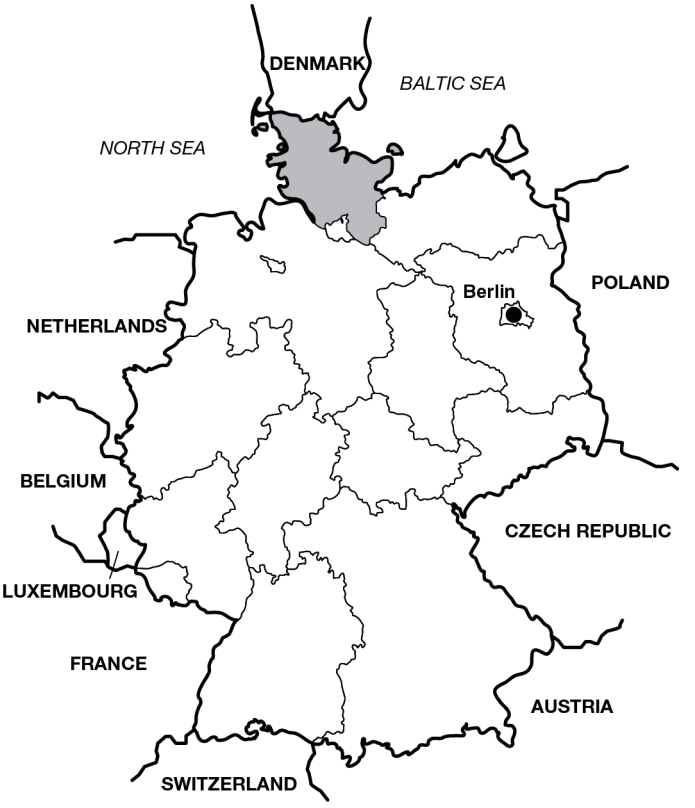

Figure 9.9 Germany's Bundesland Schleswig-Holstein

electorate of representation and that 'in general a 10 per cent electoral threshold appears excessive' (ECtHR, *Yumak and Sadak v. Turkey*, 2008: para. 147), it noted that the state has a wide margin of appreciation in this sphere. The interference in question has 'the legitimate aim of avoiding excessive and debilitating parliamentary fragmentation' and Article 3 of Protocol No. 1 to the ECHR does not impose on the state 'the obligation to adopt an electoral system guaranteeing parliamentary representation to parties with an essentially regional base' (ECtHR, *Yumak and Sadak v. Turkey*, 2008: paras 124–5). Four judges signed a joint dissenting opinion. For them, Turkey's threshold not only failed to accommodate the interests of a large part of the electorate that identifies with a particular region or with a national minority, but clearly exceeded the very wide margin of appreciation left to the state and violated Article 3 of Protocol No. 1. A pro-Kurdish party managed for the first time to pass the 10 per cent threshold in the June 2015 parliamentary elections.

Lower thresholds *promote* minority representation but they do *not* necessarily *guarantee* the representation of minorities in elected bodies. Small minorities may not be able to obtain the number of votes required for a mandate. To solve this problem, states may provide for special measures such as *dual voting* and *reserved seats* for persons belonging to national minorities in order to guarantee their effective participation (see below and subsection 9.2.4).

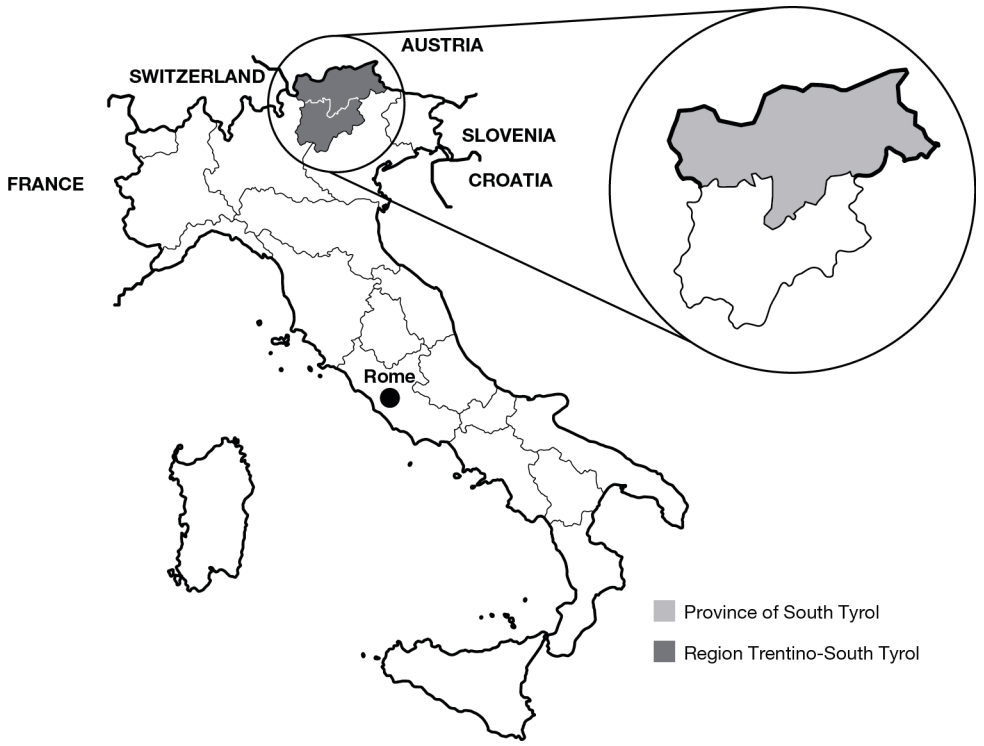

Figure 9.10 Italy's autonomous province of South Tyrol

According to a strictly individualistic liberal approach, all so-called special measures aiming to achieve an effective participation of national minorities are, by definition, a violation of the principle of individual equality before the law. The Slovak Constitutional Court followed this restrictive approach and blocked an attempt to introduce in the local elections law of 1998 a rule aiming to achieve proportional representation of national minorities in the elected bodies of local self-government. The Court held that such a system was contrary to the constitutional principles of equal access to public offices and free competition of political forces in a democratic society. The Court ruled that the Slovak Constitution:

> does not contain any provision which could be construed as the basis for adopting a procedure which would make it possible to restrict or modify the fundamental rights of citizens with a view to improving the situation of persons belonging to national minorities or ethnic groups.
>
> (Slovakia, Constitutional Court, Decision 318/1998: 15)

Moreover, free competition of political forces is breached 'when, after the elections, the seats in individual municipal councils are allocated on the basis of the proportions of persons of Slovak ethnicity and persons belonging to individual national minorities and ethnic

groups which these councils represent' (ibid.). On the contrary, as Marko (2010c: 225) argues:

> both effective participation through political representation mechanisms, as well as full and effective equality, cannot be considered without a group dimension. You cannot represent an individual in parliament or guarantee effective equality to a single person without making a group-related category the yardstick of comparison.

It is worth noting, however, that the OSCE High Commissioner on National Minorities (HCNM) has criticised the Slovak 1998 draft law on local elections because it introduced an ethnicity-related condition for eligibility to hold a seat in the local council, thus 'preventing the electorate from voting for a candidate with an ethnicity different from that described' (cit. in Venice Commission, 2011: 61).

The principle 'one person, one vote' is one of the fundamental rules of democratic electoral systems. However, the special mechanism of *dual voting* is justified if it concerns a small minority, has a transitional character and it is impossible to reach the aim pursued through other less intrusive measures that do not infringe upon equal voting rights (Venice Commission, 2008: para. 71). Slovenia is a case in point since the Slovene constitution prescribes two *reserved seats* in parliament for the representation of the Italian and Hungarian minority. Hence, the members of the small Italian and Hungarian minorities have two votes in the parliamentary elections. They cast one vote, as all the other Slovene citizens, for party lists representing various ideological orientations in a proportional representation electoral system. Their second vote is for the election of the representative of their minority under a majority voting system. Only members of these national minorities who live in ethnically mixed areas and are registered in a special electoral roll have the right to vote for their representative. The procedure for the election of these minority representatives is regulated by the National Assembly Elections Act that provides for the establishment of special constituencies in those areas in which the Italian and Hungarian national minorities reside. The Slovene law regulates the nomination of separate electoral commissions for these special constituencies, which include at least one member of the respective minority.

The dual voting right for members of Hungarian and Italian national minorities has undergone the judicial review of the Constitutional Court with regard to its compatibility with the principle of equality before the law. The Court emphasised that the special voting rights of persons belonging to national minorities is an expression of the constitutionally guaranteed protection of these communities. Therefore, 'such "positive discrimination" is not constitutionally inadmissible; on the contrary, the Constitution requires that the legislature implement such measures in the legislation', although it represents a 'departure from the principle of equality of voting rights' (Slovenia, Constitutional Court, Decision U-I-283/94: para. 35).

This example of dual voting by the members of the Italian and Hungarian minorities in the Slovene parliament brings us to the next section already. Whereas special measures concerning voting rights and electoral engineering on behalf of minorities cannot – despite their *benign intent* – effectively guarantee that minority groups will be represented in state

bodies, the next category of legal instruments which can be summarised as forms of *minimum representation* and *proportional representation* through reserved seats in state bodies shall effectively *ensure* minority representation and therefore also participation already by constitutional prescription.

9.2.4 Reserved seats, proportional representation and veto powers: effective mechanism or double-edged sword?

Box 9.3 provides two additional examples of reserved seats as mechanism for minimum representation.

Box 9.3 Examples of reserved seats for national minorities

In Romania, according to Article 62(2) of the Constitution, 'organisations of citizens belonging to national minorities, which fail to obtain the number of votes necessary for representation in parliament, have the right to one Deputy seat each, under the terms of the electoral law'. Article 56 (1) of Law No. 208/2015 on the elections of the Chamber of Deputies and Senate regulates the situation of legally established organisations of citizens belonging to national minorities, which failed to obtain at least one mandate in the parliament because they did not reach the electoral threshold of five per cent of the valid votes cast at the level of the entire country in the last elections. In such case, according to paragraph 9 of this Article, a minority organisation has the right to one seat in the Chamber of Deputies 'beyond the total number of Deputies resulting from the representation rate.' The main organisation of the large Hungarian minority passes the electoral threshold of five per cent and, thus, does not need the special mechanism of reserved seats. After the 2016 parliamentary election, 16 national minorities each have a member: Albanians, Armenians, Bulgarians, Croatians, Germans, Greeks, Jews, Italians, Macedonians, Poles, Roma, Russians, Ruthenians, Serbs, Turks and Ukrainians. The Czech and Slovak minorities have jointly one member.

In Croatia, according to Article 19 of the Constitutional Law on the rights of national minorities (2002) and Articles 16–19 of the Law on election of representatives to the Croatian parliament (consolidated text of 2011), members of national minorities can elect at least five and not more than eight members of parliament. A national minority with a share of more than 1.5 per cent of the total population of the country shall be guaranteed at least one and not more than three parliament seats. National minorities with a share of less than 1.5 per cent of the total population of Croatia shall have the right to elect at least four members of the parliament from among the members of national minorities in accordance with the electoral law. Members of the Serbian national minority elect three representatives. Members of the Hungarian and Italian national minorities elect one member of parliament each. Members of the Czech and Slovak national minorities jointly elect one member of parliament. Members of the

> Austrian, Bulgarian, German, Polish, Roma, Romanian, Ruthenian, Russian, Turkish, Ukrainian, Vlach and Jewish national minorities jointly elect one member of parliament. Members of the Albanian, Bosniak, Montenegrin, Macedonian and Slovenian national minorities jointly elect one member of parliament.

Most of the states applying reserved seats establish limits regarding either candidacy or electorate. While in the former case only minority members can be candidates, in the latter scenario only minority members are allowed to vote on reserved seats. For instance, candidacy is constrained in Kosovo and electorate is restricted in Croatia and Slovenia (Kroeber 2015: 6). The registration of the minority background of voters or candidates is a problematic aspect and a potentially sensitive matter (OSCE 2014: 47–8).

However, such a system of 'minimum representation' raises also several questions regarding the *legitimacy, authenticity and accountability* of minority representatives in the legislature. A striking example is Romania, where some minority candidates obtained many times more votes than the number of persons belonging to the respective minority (King and Marian 2012; Cârstocea 2013). For instance, in the 2012 parliamentary elections, the candidate of the Ruthenian minority organisation obtained 20.4 times more votes than the number of self-declared Ruthenians in the 2002 census; and the candidate of the Albanian minority organisation received 20.9 times more votes than the number of people that declared their ethnicity as Albanian in 2002 (Cârstocea 2013).

As mentioned above in the context of freedom of association, the Romanian electoral legislation lays down restrictive conditions for minority organisations not yet represented in the parliament and wishing to participate in the electoral process. These provisions remove internal competition between various organisations of a given national minority and keeps the organisation represented in parliament in a privileged position because it receives all state funds allocated to the respective minority. Thus, the Romanian system of reserved seats has entrenched a pattern of clientele politics, advantageous to both the state and minority organisations represented in the parliament. While the former can proclaim that Romania ensures the highest standards of minority participation, the latter are granted governmental subsidies for the preservation and promotion of their group identity (King and Marian 2012).

The Romanian case shows that the reserved seats mechanism may in fact be a window-dressing exercise that leads to token representation of minorities rather than effective participation. More often than not, minority members of parliament cannot influence the decision-making process on matters that concern their communities. Moreover, the Romanian system lacks effective vertical and horizontal accountability mechanisms, therefore 'representation of small national minorities … remains "captured" by a closed circle of political elites' (Cârstocea 2013: 18).

As in the case of threshold exemptions and dual voting, the mechanism of reserved seats has been challenged before constitutional courts as a violation of the equality principle. While the Constitutional Court of Montenegro declared the provisions on reserved seats in the 2006 Law on Minority Rights and Freedoms unconstitutional (Montenegro, Constitutional Court, Decision of 11 July 2006, Case no. U- I- 53/ 06), the Croatian Constitutional Court has rejected the claim that special measures (such as reserved seats) aiming to ensure

proportional representation of minorities would breach the Constitution. In the view of the Croatian Court:

> it is evident that the application of the principle of equality does not always provide for sufficient protection of minority groups. If the principle of equality was applied alone, … the special characteristics and specific interests of the ethnic or national minorities and communities in society would be neglected, which might, in certain cases, lead to their discrimination.
>
> (Croatia, Constitutional Court, Decision of 12 April 2001, Case no. U-I-732/1998: para. 9)

The Court concluded that proportional representation of minorities is not contrary to the Constitution and, thus, legal regulations that take into consideration the specific situation of national minorities are not discriminatory.

Given the great diversity among national minorities across Europe and their different historical, geographical and demographic contexts, minority representation remains a complex matter that can hardly be solved with a simplistic, one-size-fits-all solution. This brings us to the next mechanism of *proportional representation of ethnic groups* in state bodies, not only giving them the possibility to raise their voices but also the possibility to influence the decision-making processes through what we call *co-decision making*. Proportional representation is thereby not necessarily restricted to minority groups as we saw with regard to so-called constituent peoples in Bosnia and Herzegovina, but connected with a broader constitutional and institutional framework of *consociational democracy* and/or so-called *multinational federalism*.

Before we discuss these institutional arrangements, however, we must recall and reflect the *overall problem* underlying this chapter on effective participation with its functional prerequisite of political representation. *Who* and *what shall be represented* in parliament for *which purpose*? The doctrine of 'one person, one vote' (i.e. the individual right to equality in voting rights) does not immediately reveal the underlying *theory of representation* developed in the context of the American and French revolutions (see Chapter 3, section 3.2) and their constitutional principles or doctrines, namely that all citizen voters are supposed to elect the representatives of *the* respective nation as a whole, and not classes or groups of people, so that all representatives in parliamentary bodies of liberal-democratic systems shall enjoy a free mandate in the exercise of their legislative power. Claims for a right to vote for a candidate of one's choice as well as minimum and proportional representation of groups through power sharing, however, can no longer be reconciled with this conceptualisation of the 'symbolic-formalistic' representation of *the* nation. Hanna Pitkin therefore distinguishes *three types* of political representation: symbolic-formalistic, descriptive and substantive (Pitkin 1967). Table 9.2 gives an overview of the intricate relationship between and overlapping of different concepts of the individual right to vote and to stand as candidate in elections with group-related rights to representation and participation in decision-making processes in elected bodies.

The theory of 'consociational democracy' (Lijphart 1969, 1977; for a short overview, see Lijphart 2004) proposes an approach based on proportional representation of groups, veto powers, and segmental autonomy of cultural groupings. It was originally developed by Arend Lijphart to explain why several Central and Western European countries such as Switzerland, Austria and Belgium did not follow the model of Westminster democracy based on strict

Table 9.2 Integration through voting rights, representation and participation

Individual rights	*Group-related rights*	
Right to vote in general elections	**Representation**	**Participation** in decision-making processes
• **active**: to cast a vote	• **symbolic-formalistic**: The legal fictions of national representation or voters of electoral district and the constitutionally entrenched free mandate of representatives	• simple majority
• **passive**: to stand as candidate in elections • right to elect **a candidate of one's choice**	• **descriptive**: The active and/or passive right to vote depend on ascriptive attributes such as gender, ethnicity, leading to *different electoral rolls* or the requirement for elected candidates to *declare* their (linguistic, religious) ethnic *affiliation* before or after the elections (= corporate or liberal power sharing)	• qualified majorities: 2/3 • qualified majority: double majorities of (linguistic, religious) groups in parliament • veto rights (with suspensive or absolute effect)
	• **substantive**: Constitutionally guaranteed *minimum* representation or *proportional* representation	

majoritarianism. Consociational democracy works at the state level (e.g. Switzerland and Belgium) as well as at the regional level (e.g. South Tyrol in Italy and Northern Ireland in the United Kingdom). An essential aspect of such power sharing arrangements is how to balance *proportionality* and *parity* in representation and participation (Box 9.4).

Box 9.4 Power sharing arrangements in South Tyrol

The 1972 Autonomy Statute of South Tyrol (Italy) established a system that provides three linguistic groups with a set of specific institutions and mechanisms that aim to ensure effective equality, representation and influence on the decision-making process. According to the 2011 census, 69.41 per cent of the South Tyrol's population are German speakers, 26.06 per cent are Italian speakers and 4.53 per cent are Ladin speakers. Until recently, the Commission of Six, one of the most important decision-making bodies, ensured a double parity between the actors involved. On the one hand,

three members represented the state and the other three represented the autonomous province. On the other hand, the Italian and German linguistic groups each had three representatives. At the end of 2017, the Autonomy Statute was amended with the aim of strengthening the protection of the Ladin minority. According to this new regulation, one of the members of the Commission of Six representing the state must belong to the German or Ladin linguistic group and one of those representing the province must belong to the Italian linguistic group. Moreover, the majority of the representatives of either the German or Italian linguistic group in the provincial parliament may renounce the right to nominate their own member in the joint commission in favour of a Ladin speaker. Currently, the three state-appointed members of the Commission of Six belong to the Italian, German and Ladin language group respectively. Out of the three province-appointed members, two are German speakers and one is an Italian speaker.

The provincial parliament of South Tyrol is elected through an open list proportional representation electoral system, so German and Italian linguistic groups are proportionally represented. Moreover, the small Ladin linguistic group has a guaranteed seat in the council. If none of the Ladin candidates receives enough votes to be elected, one mandate is assigned to the Ladin candidate who received the highest number of votes. The Italian Constitutional Court has upheld this system, arguing that, in certain circumstances, the goal to protect linguistic minorities may require specific guarantees that go beyond the principles of proportional representation and equality (Italy, Constitutional Court, Judgment no. 261 of 19 June 1995). The composition of South Tyrol's government must reflect the numerical strength of the linguistic groups as represented in the provincial parliament. The Ladin linguistic group has guaranteed representation in the provincial government as well. All provincial and municipal public bodies ensure the proportional representation of linguistic groups in the composition of their organs and guarantee the representation of Ladins. Members of the three linguistic groups have access to jobs in the public service in proportion to the numerical strength of those groups, ascertained from self-declarations of belonging (or affiliation) to a linguistic group. In practical terms, this means that candidates only compete for the posts reserved for their respective group, not for the totality of the posts. Those who do not make the declaration are excluded from applying for public posts, offices, public housing and various other social contributions.

Over the past three decades, theoretical battles have been waged between so-called adherents of 'integration' and 'accommodation' (for a comparative overview see, above all, Choudhry 2008: 15–40), with the overall question of which institutional and territorial devices can best serve the goal of keeping a state together in deeply divided societies. A summary conclusion of 'integrationists/centripetalists' (Horowitz 1985; see also McGarry *et al.* 2008) hypotheses and proposals – based on the idea that institutional and territorial pluralism must crosscut ethnic divisions and thereby start to minimise, and in the end 'transcend', ethnic differences – provides the following mosaic of devices.

- An electoral system designed for vote pooling will force party leaders to attract voters across the ethnic divide and thereby make ethnic moderation pay (Horowitz 1997).

- Ethnic intragroup divisions along other cultural or socioeconomic cleavages should be fostered to provide for more intragroup pluralism and thereby promote the necessity for inter- and trans-ethnic crosscutting politics and alliances (Horowitz 1997).
- Based on the assumption of the necessity to disperse power from the centre in order to achieve stability and preserve the political unity of the state, federalism or asymmetric territorial autonomy arrangements are seen as instruments to devolve the conflict to the regional or even local level and thereby to transform the ethnic conflict into political competition by providing for more public positions to be filled by party leaders and their affiliates. However, this goal cannot be achieved if one of the ethnic conflict parties can cement its power in and through a regional territorial stronghold, therefore integrationists advocate – what we term – *multicultural* instead of multinational federations (see Chapter 10, section 10.5); that is, the idea that, at the regional level, crosscutting cleavages must be preserved or created by drawing regional boundaries in such a way as not to coincide with the settlement areas of ethnic groups.

Against these assumptions, regarding how to overcome conflict by transcending the ethnic divide and the proposed institutional and territorial devices, *accommodationists* raise serious objections. In a nutshell, their arguments run as follows. Integrationist devices do work in divided societies, but only: if there is already an extensive heterogeneity, hybridity and mixing of peoples; if there is a willingness of the majority to accept new members into their community; and with small and/or territorially non-concentrated minorities.

Moreover, centripetal parliamentary or governmental coalitions that exclude radical parties will provide for an unstable equilibrium at best, because those parties' underlying problems and ethnic claims are not adequately addressed. Conflict will not be minimised or even transformed as long as radicals can form a strong parliamentary opposition against the reconstruction and reconciliation efforts of a coalition of moderates in a government, as occurred in Bosnia-Herzegovina with regard to the so-called Coalition for Change between 2000 and 2002. They will constantly contest the logic of moderation by mobilising the respective ethnic constituencies through accusations against the moderates of being traitors of the respective vital national interest. In effect, ethnic intragroup competition will not trigger moderation at the elite level and therefore it will also make inter-ethnic cooperation more difficult or even impossible. In addition, vote pooling and a simple catalogue of human rights will not address the deep-seated mistrust in a severely ethnically divided society, so that a mixing of peoples will have to be enforced against their will.

Based on the assumption that national self-determination disputes need to be addressed by recognition of more than one nation, in order to end secessionist claims and to prevent future violent conflicts, accommodationists insist on the necessity of the following institutional devices for severely divided societies through a complex arrangement composed of institutional and territorial elements.

- They argue first for the necessary recognition of public space for the (social) identity formation of groups, which means – translated into legal terms – the *constitutional recognition* of groups as co-nations with equal rights as groups, as this was adjudicated by

the Constitutional Court of Bosnia-Herzegovina in the *Constituent Peoples* case of 2000 (see section 9.2.2).

- Based on such a legal institutionalisation of ethnic diversity, they opt for executive power sharing, which can be *complete* (i.e. comprising all significant communities and their representatives); *concurrent* (i.e. with party leaders representing the majority within each ethnic community); or comprising a *plurality* of each significant group's representatives. Moreover, the institutional and legal mechanisms can – in Lijphart's own terminology – 'predetermine' the ethnic keys in power-sharing executive arrangements, which is labelled 'corporate' power sharing compared with 'liberal' power sharing, when group affiliation is not pre- but self-determined.
- In addition, they advocate a *proportional vote system* and *proportional representation*, not only in the executive but also in the legislature, judiciary, police services and the army. Moreover, *veto powers* can be legally institutionalised in different ways: either as an *absolute* veto power for one ethnic group in the legislature, in the executive or even in the judiciary, so that the decision-making process in the respective institution can effectively be blocked. *Suspensive* veto powers allow only for a temporary stop in the decision-making process in the respective institution as a compromise will have to be achieved ultimately, through negotiations within the framework of the same institution, when – after the expiration of a certain time limit – the same proposal can be adopted with a simple or qualified majority. The same logic of forcing parties to compromise is applied when the case has to be – without reaching the compromise in the respective institution – referred to an umpire, usually a judicial body whose decision-making process cannot be blocked along ethnic lines, as mentioned above (on the concept of 'power sharing courts', see Graziadei 2017).
- With regard to *territorial devices*, accommodationists very often also opt for *federal* arrangements or territorial *autonomy* regimes, based on the idea that regional and/or local self-government for a territorially concentrated co-nation provides a feeling of security for the people, which is seen as a prerequisite for the possibility of giving up a claim to secession. Hence, they advocate ethnically exclusive territorial autonomy or federal units through self-government, so that each significant group is in a majority position within its homeland settlement area, in combination with inter-ethnic power sharing on the national or, respectively, federal level. Moreover, the institutionalisation of *cross-border* activities and *regional* functional cooperation (for a comparative legal and empirical study of EU law, see Engl 2014) with ethnic kin in a neighbouring state, or even the ethnic kin-state, is also supposed to foster the protection of identity and thereby disperse the feeling of being only a minority in one's own home, which is, at best, merely tolerated.
- Finally, accommodationists are rather sceptical that deeply entrenched ethnic divisions, in particular after violent conflict, allow for more than *coexistence* of *groups* and *cooperation* on the *elite level*. Hence, they are ready to accept the further existence of the ethnic pillarisation of society (i.e. institutional segregation brought about by territorial delimitations) but also in the field of public education. They do not therefore advocate efforts of reconciliation from the very beginning, in order to tackle the ethnic pillarisation of society on behalf of the goal of an integrated multicultural society.

It goes without saying that accommodation through consociational devices, or complex power sharing in the broader sense, is criticised by *integrationists* from both a normative and an empirical perspective. On the normative level, they criticise group rights as well as separation based on ethnic criteria, necessary for the implementation of consociation, as both an unfair privilege and a violation of basic human rights standards, in particular the fundamental right not to be discriminated against on the basis of ethnic origin. Against the assumptions of accommodationists, they purport that the institutional arrangements of power sharing will not build mutual trust but will lead to resentment by those who are not privileged or who remain excluded or discriminated against. Moreover, they argue on the empirical level, with reference to Cyprus (1963), Northern Ireland (1974) or Lebanon, that power sharing is not a cure but part of the disease, since it will not only maintain but even deepen ethnic divisions, leading sooner or later to the final break up of these states. Why should radical ethnocentric political and economic elites have an interest in elite cooperation – the basic premise of Lijphart's model? For integrationists, this is a completely implausible argument.

Also *veto power in decision-making processes* might be a double-edged sword. Therefore, it is worth discussing at this point the *effects of veto rights*, which have the role of translating the mere representation of minorities into the power to decisively influence the decision-making process.

According to Bieber (2004: 21), 'the effectiveness of veto rights hinges on two components: a) the definition of policy areas where veto rights apply, and b) the mediation processes that are activated once a veto is invoked'. However, it is obvious that, in deeply divided societies, group-based representation through ethnic quotas in conjunction with strong veto powers may 'turn democracy into ethnocracy' (Marko 2006c: 8) and block the decision-making process, so that the ACFC Thematic Commentary on the Effective Participation (2008: 7) observes that '[i]n certain specific circumstances, a system of "veto" or "quasi veto" rights can even lead to a paralysis of state institutions'.

The different effects of *suspensive* and *absolute veto powers* can also be demonstrated by the example of the implementation of the Dayton constitution in *Bosnia and Herzegovina* in Annex 4 to the Dayton Agreement. According to Article IV. 3. (e) of the Dayton constitution, a bill may be declared 'destructive of a vital interest of the Bosniak, Croat, or Serb people', suspending the legislative process. If all mediation efforts in parliament to find a compromise fail, the bill must be referred to the Constitutional Court for judicial review of 'its procedural regularity'. The final decision of the Court is binding with regard to the further legislative process. Neither the concept of 'vital national interest' nor the meaning of procedural regularity was, however, defined in the Constitution or the Rules of the Court. In contrast to this suspensive veto power, Article IV. 3. (c) in conjunction with (d) contains a provision which – in effect – gives absolute veto power to either three members of the House of Peoples or to nine members of the House of Representatives elected from the territory of the Republika Srpska, whereas Croats and Bosniaks are required to form coalitions in both houses in order to use the veto power of representatives or delegates elected from the Federation of Bosnia and Herzegovina. This form of veto power is therefore colloquially referred to as the 'entity veto'.

The *different empirical effects* of these two forms of veto mechanisms can be clearly seen from the statistics collected and case law of the Constitutional Court of Bosnia and Herzegovina in the period between 1997 and 2007 (for the following, see Marko 2013c: 63–4 and 69–71). Of the 260 bills rejected in the Bosnia and Herzegovina House of Representatives between 1996 and 2007, 52.3 per cent were vetoed by Republika Srpska's representatives, but only 7.6 per cent by representatives from the Federation of Bosnia and Herzegovina. Consequently, since 1998, the High Representatives, based on so-called Bonn Powers endorsed by the UN Security Council, started to substitute the parliamentary legislative process by the preliminary imposition of laws necessary to keep the state together and to maintain Bosnia and Herzegovina's prospects in the Stabilisation and Association Process with the EU.

In stark contrast, the so-called vital national interest veto to be finally settled by the Constitutional Court was only invoked four times in the same period. In Case No. U 8/04, the Croat delegates in the House of Peoples invoked the vital national interest veto against the bill labelled 'the Framework Law on Higher Education' because it did not foresee for the establishment of an exclusively Croat-language university. The Constitutional Court declared this request legitimate and declared the vital national interest to have been violated since the language of instruction in education falls by scope of *rationae materiae* under the definition of vital national interests in the Entities' constitutions (Bosnia and Herzegovina, Constitutional Court, Decision of 25 June 2004, Case No. U 8/04). In an interesting twist, however, the Court turned the underlying political claim in its reasoning upside down by declaring that the vital national interest clause does not cover exclusion based on use of languages but requires that all three official languages be used as languages of instruction in higher education. It is obvious from this reasoning that the Court, by denying a right to exclusive mother tongue instruction, wanted to break up the existing institutional segregation in place in higher education. The draft law on the public television network of Bosnia and Herzegovina was contested in Case No. U 5/06, again with the argument that it would discriminate against Croats by not allowing them to have their own public television station. The Court rejected the request with the argument that the draft law would not exclude or privilege any official language and that no evidence was given of de facto discrimination (Bosnia and Herzegovina, Constitutional Court, Decision of 31 March 2006, Case No. U 5/06). In an interesting *obiter dictum*, the Court at the same time generalised the legal definitions from the entities' constitutions by declaring that the vital national interest is affected by effective participation in all public institutions, the use of all of the three official languages in education and in information systems and with regard to multicultural/religious life. This means that the lists of definitions in the constitutions is not exhaustive, but that it is within the jurisdiction of the Constitutional Court to specify what constitutes the meaning of vital national interests. The Court reiterated these principles in Case No. U 7/06 and rejected the claim of Bosniak delegates that the Agreement between Bosnia and Herzegovina and the Republic of Croatia on Cooperation for the Protection of Victims of the War would violate their vital national interest (Bosnia and Herzegovina, Constitutional Court, Decision of 31 March 2006, Case No. U 7/06). Taken together, the Constitutional Court thus followed the line of jurisprudence established in Case No. U 5/98, the *Constituent Peoples* case, in order 'to break up the ethnic discrimination and institutional homogenisation on Entity level' and

to provide the groundwork for institutional changes towards a pluriethnic composition in all the institutions. The majority of the Court did, however, not dare to break up the strict ethnic determination of top positions in the legislature and executive – the essence of the corporate power sharing system. It thus comes as no surprise that this system of total exclusion from the fundamental right to vote was brought before the European Court of Human Rights by Mr Sejdić and Mr Finci, as discussed above.

In conclusion, the vital national interest veto mechanism, corresponding to the original intent of Lijphart's model, was in practice dysfunctional, since it was effectively replaced by the entity voting mechanism, as the superior mechanism to protect ethnic interests against state-building efforts. Hence, in spite of formal coalitions between the ethno-national parties in government, this veto mechanism effectively allowed either the Serb or Bosniak coalition partners to transform the entity veto into an ethnic veto so that *every political conflict of interest* – as is usually the case between government and opposition – was *turned* into a *permanent conflict over identities* and created a situation of permanent political crisis.

The case of *Northern Ireland* stands in stark contrast to the example of corporate power sharing in Bosnia and Herzegovina. Whereas the Dayton constitution fixes by definition the numbers of Bosniak, Croat and Serb representatives in the collective Presidency and the House of Peoples, the power-sharing system established in Northern Ireland after the 1998 Good Friday Agreement is a form of *liberal power sharing*, insofar as the members of the legislative assembly have an obligation to declare themselves as 'nationalist', 'unionist' or 'other' only after the elections. Moreover, the composition of the executive body has to reflect the parties' share of seats in the legislature so that all sizeable parties receive executive posts proportionate to their share of seats in the Assembly. As McCrudden *et al*. (2014: 3–4) argue, the 'comparative novelty' of the d'Hondt divisor is additionally used to determine the sequence in which parties 'pick' ministries. The largest party gets first pick of the ministries available and so on until the available ministries are filled. From 1998 to 2007, the first minister and deputy first minister were elected together by a procedure that required cross-community consent (i.e. an Assembly majority and a concurrent majority of unionists and nationalists). Since 2007, the first minister is the appointee of the largest party in the Assembly, while the deputy first minister is the appointee of the largest party in the largest designation (nationalist, unionist or other) apart from the first minister. However, parties represented in the assembly are not obliged to join the government. If they so wish, they can opt out and stay in opposition. In actual fact, this system worked in a very constructive manner (see McCrudden *et al*. 2014: 7). The leading parties in Northern Ireland agreed to meet in advance in 2007 and 2011 to indicate how they would express their preferences among portfolios which was a strong sign of mutual confidence building intended to avoid surprises in the formal allocation process and enabled the parties to express and resolve anxieties. The mechanism is strongly inclusive. All parties with a significant electoral mandate (i.e. more votes than needed following from the d'Hondt divisor) can get automatic access to the executive if they so wish. No one can veto this mechanism. And regarding democratic theory, the system is also democratically fair. The party which wins more votes in the elections gets more participative influence in and through the executive. Nevertheless, there is also criticism of this system.

Any measure before the legislative assembly requires cross-community consent if it is successfully made the subject of a 'petition of concern' signed by at least 30 members of the legislative assembly. This procedure gives the designated nationalists and unionists a potential veto to protect the interests of their communities and is allegedly unfair to the others because their votes carry less weight as they 'count towards the composition of the majority or qualified majority (60 per cent) thresholds, while the votes of nationalists and unionists count towards *both* the majority or qualified majority thresholds *and*, respectively, the intra-nationalist and intra-unionist thresholds' (ibid: 6).

Unlike Bosnia and Herzegovina, however, Northern Ireland's consociationalism does not exclude the others. Those who prefer not to designate themselves as nationalist or unionist have the right to be elected to the legislature and to be represented in the executive. It is worth noting that, before the 2006 amendment of the Northern Ireland Act 1998, the election of the first minister and deputy first minister ruled out, in practice, candidatures of the others because the procedure required cross-community consent. However, under current regulations, nothing would stop the others from nominating the first minister if their party would be the largest in the legislative assembly, so that the allocation of positions in the executive is not necessarily based on religion or ethnicity only. In light of these considerations, Northern Ireland's legal-institutional arrangement would likely pass a judicial review by the ECtHR (ibid: 22–4).

After having analysed the different legal instruments and institutional mechanisms of our staircase model, presented in Figure 9.1 at the end of the introductory section, in order to demonstrate the theoretical growth of the political voice of minorities between the complementary individual right to vote and to stand as candidate in elections and group-related rights of political representation and participation in co-decision making processes, in the next section we discuss consultative mechanisms of and for minorities.

9.3 Consultative mechanisms

The ACFC Thematic Commentary on the Effective Participation points out that consultative mechanisms are 'an additional way to enable persons belonging to national minorities to take part in decision-making processes' (ACFC 2008: 7) and encourages states to establish legal-institutional frameworks that provide for both representation of and consultation with national minorities. It reflects the basic principle spelled out in the FCNM Explanatory Report that Article 15 FCNM requires the state parties to consult minority groups 'by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to affect them directly' (CoE 1995: para. 80).

While instruments and mechanisms discussed in the previous sections of this chapter could facilitate minority representation, consultative mechanisms may be 'more effective in transmitting the interests of minority constituencies into the chain of legislative or political decision-making' (Weller 2010: 479). Indeed, consultations are considered a key tool for dialogue and negotiation between majority and minority groups and/or indigenous peoples, especially when it comes to administrative measures (i.e. development plans and programmes that are likely to affect their specific interests; see also Chapter 6, section 6.3.3).

Table 9.3 International standards on consultative mechanisms

CoE		*UN*		*OSCE*	
Legally binding instruments			Non-binding instruments		
FCNM	ECRML	ILO Convention no. 169	UNDRIP	Copenhagen Document	Lund Recommendations
Article 15	Article 7(4)	Inter alia, Articles 6, 7(1), 15(2), 22(3)	Inter alia, Articles. 10, 15(2), 19, 30(2), 32	Para. 20	Para. 12

CoE: Council of Europe; ECRML: European Charter for Regional or Minority Languages; FCNM: Framework Convention for the Protection of National Minorities; ILO: International Labour Organisation; UN: United Nations; UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples

The large number of international instruments dealing with consultation-related issues at the universal and European level (Table 9.3) highlights the importance of these mechanisms. Particularly developed are UN regulations that lay down indigenous peoples' rights to consultations and/or to be consulted and to give free, prior and informed consent.

The practices of states in this field led to the development of a wide scale of consultative bodies, ranging from ad hoc arrangements and weak institutions with a limited mandate and functions (Box 9.5) to strong mechanisms legally entrenched in constitutional law, which really influence decision-making processes.

Box 9.5 Mandate and functions of consultative mechanisms

OSCE, Lund Recommendations (para. 12)

'These bodies should be able to raise issues with decision makers, prepare recommendations, formulate legislative and other proposals, monitor developments and provide views on proposed governmental decisions that may directly or indirectly affect minorities. Governmental authorities should consult these bodies regularly regarding minority-related legislation and administrative measures in order to contribute to the satisfaction of minority concerns and to the building of confidence'.

CoE, FCNM Explanatory Report (para. 80)

'Parties could promote – in the framework of their constitutional systems – inter alia the following measures:

- consultation with these persons, by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to affect them directly;

- involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly;
- undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities.'

Some of these mechanisms focus on specific issues of high interest for minorities and indigenous peoples (e.g. education, culture) or on a particular group that has special features, needs and expectations (e.g. Roma minority, Sami people). More often than not, consultative bodies function around high-level institutions of governance (e.g. government, parliamentary committees, presidential office). However, there are also multilevel consultative mechanisms that work in parallel with central, regional and local public authorities, as well as complex systems that combine various forms of consultations (Weller 2010: 486–8). Last but not least, minorities and indigenous peoples may be consulted also at the international level through various mechanisms and forums in which they directly or indirectly participate (Box 9.6).

Box 9.6 Examples of mechanisms and forums for consultation at the UN level

The UN Special Rapporteur on Minority Issues (formerly the Independent Expert on Minority Issues) was established in 2005 with the mandate to promote the implementation of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and to identify best practices. The Rapporteur receives information from states, international expert bodies, UN agencies and minority non-governmental organisations and undertakes country visits for consultation and assessment of domestic minority-related norms and policies.

The UN Forum on Minority Issues was established in 2007 with the aim to provide a platform for dialogue and cooperation on issues pertaining to national, ethnic, religious and linguistic minorities. It brings together academics and experts, and representatives of both governments and non-governmental organisations of minorities. It examines specific thematic issues and focuses on concrete measures and recommendations aimed at protecting minority rights.

The UN Permanent Forum on Indigenous Issues was established in 2000 as an advisory body to the UN Economic and Social Council. It deals with indigenous issues related to economic and social development, culture, the environment, education, health and human rights. The UN Permanent Forum on Indigenous Issues is one of three UN bodies that are mandated to deal specifically with indigenous peoples' issues. The others are the **Expert Mechanism on the Rights of Indigenous Peoples** and the **Special Rapporteur on the Rights of Indigenous Peoples**.

The *functioning* of a consultative body depends on several factors, such as membership, working procedures and resources. According to the ACFC:

> [a]ppropriate attention should be paid to the 'inclusiveness' and 'representativeness' of consultative bodies. This implies, *inter alia*, that where there are mixed bodies, the proportion between minority representatives and officials should not result in the latter dominating the work. All national minorities should be represented, including numerically smaller national minorities.
>
> (ACFC 2008: para. 109)

Transparent and inclusive *appointment procedures* that take into consideration the diversity of and within minority groups ensure the necessary credibility of consultative bodies. A *balanced composition* of such bodies between minorities and government officials requires a preponderance of minority representatives or at least equal representation. In its First Opinion on Slovakia, the ACFC welcomed the fact that, 'whereas previously a majority of the members of the Council of National Minorities and Ethnic Groups were representatives of the government, at present a majority represents minorities' (ACFC, First Opinion on the Slovak Republic 2000: para. 46). Furthermore, in its Third Opinion on Ukraine, the ACFC underlined that any 'decisions regarding the composition of advisory or consultative councils must be taken transparently and in close consultation with the relevant minority representatives in order to ensure that they constitute effective mechanisms to establish constructive dialogue with the minority community involved' (ACFC, Third Opinion on Ukraine 2012: para. 139).

When it comes to *working procedures*, the ACFC highlights the importance of rules' consistency, work's transparency and meetings' frequency. In its First Opinion on Ukraine, the ACFC recommended the revision of the working methods of a consultative body established by the Ukrainian presidency because the body 'convened only rarely, and it [did] not constitute a forum for regular and frequent consultation and dialogue on issues pertaining to national minorities' (ACFC, First Opinion on Ukraine 2002: para. 72). In its Third Opinion on Ukraine, the ACFC reminded the authorities that 'consultations must be conducted regularly and at appropriate level to ensure that they constitute useful mechanisms for persons belonging to all national minorities' (ACFC, Third Opinion on Ukraine 2012: para. 138).

Adequate *financial* and *human resources* are essential for the effective functioning of consultative bodies. In its Second Opinion on Romania, the ACFC noted that the 'Council of National Minorities [had] relatively limited impact on decisions taken by the executive' as it has no legal personality 'and the bare minimum of human and material resources to organise its meetings effectively' (ACFC, Second Opinion on Romania 2005: para. 188).

The academic literature (Hofmann 2008; Marko 2006; Weller 2005 and 2010) divides consultative mechanisms according to their type of activity into four *main categories*: mechanisms of coordination, mechanisms of consultation *stricto sensu*, mechanisms of co-decision and mechanisms of minority self-governance. The latter two mechanisms are, however, according to our typology not consultative mechanisms, but instruments of representation and participation in all societal affairs or provide for autonomy.

Mechanisms of coordination play a very limited role in consultations. Weller (2010: 485) argues that they 'are not genuine minority consultative bodies' but rather intergovernmental bodies

'charged with ensuring that minority policy is delivered in a consistent way' by all public institutions. In most coordination mechanisms, government officials outnumber minority representatives and this raises legitimate concerns regarding the effectiveness and representativeness of these bodies. For instance, in its First Opinion on Estonia, the ACFC pointed out the weak position of the Presidential Roundtable on Minorities, an expert body that the government failed to consult when addressing issues falling within its competences (ACFC, First Opinion on Estonia 2001: paras 57–8). In its Second Opinion on Estonia, the ACFC welcomed the fact that, in 2003, Estonian authorities changed the structure of the Presidential Roundtable on Minorities with the aim of increasing minority representativeness. While acknowledging the establishment of a 'chamber of representatives of national minorities' within the Presidential Roundtable as a step forward, the ACFC underlined the need for further improvement of this body's functioning (ACFC, Second Opinion on Estonia 2005: para. 22).

Mechanisms of consultation stricto sensu can be divided into three main types (Weller 2010: 483–4) according to their organisation, composition and strength.

1) The first type of such consultative bodies resembles coordination mechanisms because governmental officials dominate them in terms of membership (including the selection of minority representatives) and working process. For instance, the ACFC noted in its First Opinion on Bulgaria that an institution called the National Council on Ethnic and Demographic Questions was functioning 'attached to the Council of Ministers as a joint body in charge of consultation, co-operation and co-ordination' (ACFC, First Opinion on Bulgaria 2004: para. 103). However, from the ACFC's point of view, it did not carry 'enough weight in the process of reaching decisions that affect the interests of minorities (ibid: para. 105). In its Second Opinion on Bulgaria, the ACFC expressed concern over the consultative body's 'lack of transparency of the admission procedure', which is 'not conducive to the establishment of a long-term dialogue between the representatives of national minorities and the authorities' (ACFC, Second Opinion on Bulgaria 2010: para. 194).
2) The second type of consultation mechanisms *stricto sensu* are bodies affiliated with a high government office (i.e. president, prime minister, federal chancellor) or with a specific minister in charge of minority issues (Weller 2010: 484). While this direct access of minorities to high-ranking officials may be useful in certain cases, it does not necessarily translate into a strong influence in the decision-making process. Generally, these bodies have a mixed composition of governmental and national minority representatives. However, in some cases the membership is (or should be) extended to other categories as well. Austria is an illustrative example in this regard. At the federal level, national minorities are consulted mainly through advisory councils to the federal Chancellery. The Austrian government appoints the members of these advisory councils for national minorities based on proposals made by minority organisations, political parties and the churches. It is questionable whether giving membership in these consultative bodies to political parties is beneficial in terms of representativeness and effectiveness. Let us remember that Austria's Freedom Party has a clear anti-minority rights agenda. In its First Opinion on Austria, the ACFC referred to the criticism from national minorities' organisations, according to which these advisory councils are not representative enough of the persons belonging to national minorities. Moreover, the ACFC recommended

that the Austrian authorities 'review the appointment procedure for advisory council members with a view to improving it' and 'look into ways of increasing the powers' of these bodies (ACFC, First Opinion on Austria 2002: para. 69). It is particularly remarkable that the ACFC took note that advisory councils for national minorities 'appear to represent only persons belonging to autochthonous national minorities' and encouraged authorities to consider the possible extension of the composition of advisory councils or to set up 'a wider consultative body' (ibid: para. 70). This seems to be an indirect recommendation to involve additionally in these bodies representatives of new minorities stemming from immigration.

3) The third type of consultation mechanism *stricto sensu* consists of 'minority consultative councils that are principally composed and organised by minority representative organisations' (Weller 2010: 484). As such, they set up their own rules regarding membership, working procedures and activities. For instance, various non-governmental organisations representing a minority (or more minorities) may establish such an umbrella institution as a means to coordinate and streamline their interests and initiatives into coherent draft regulations and policies, programmes and action plans to be put forward to the government and/or parliament. These umbrella institutions may reach decision makers either through direct access or through representation in parliamentary committees, ad hoc ministerial commissions and/or regular consultative bodies.

The main feature of all consultative mechanisms discussed above is that *none of the institutions of governance* (e.g. government, parliament, presidency) involved in consultations with minority groups and indigenous peoples have a *legal obligation* to take into consideration their proposals. In other words, giving minorities and indigenous peoples a voice through formal representation in a consultative mechanism does *not* necessarily *guarantee* their *effective* participation.

As indicated above, forms of territorial and non-territorial autonomy in terms of the right to internal self-determination through the self-government of affairs exclusively affecting the group in question, cannot be considered a consultative mechanism, but must be dealt with separately in the next section.

9.4 The right to internal self-determination

Arguably, self-governance through territorial or non-territorial autonomy not only gives minorities the highest level of control over the main issues that concern them but also strengthens their effective participation as equals in public life. However, almost 20 years ago, Wiberg (1998: 43) bluntly noted that '[i]t is fair to claim that no clear account of the concept of autonomy is available'. As Potier (2001: 54) argues, autonomy 'escapes definition because it is impossible to concretise its scope. It is a loose and disparate concept that contains many threads, but no single strand'. It is not surprising, therefore, that in the political discourse autonomy has been used as an interchangeable term for a range of concepts such as 'independence, self-government, self-determination, self-direction, self-reliance and

self-legislation' (Wiberg 1998: 43). More recently, Nootens emphasised the great deal of confusion that surrounds the autonomy concept:

> [w]hile some define it as self-government/self-rule, others argue it should not be equated with self-government. Some consider that decentralisation processes can be appropriately described as autonomous arrangements, whereas others take autonomy to differ from decentralisation in being more than a mere delegation of powers; and some scholars use it to describe the status of federated entities as well, while others consider autonomy to describe the status of entities that are less empowered than the ones that are members in a federation.
>
> Nootens (2015: 35)

Despite the lack of consensus among lawyers and political scientists on the scope and structures of autonomy, most legal definitions of the concept refer to a *devolution* of legislative powers – not mere *decentralisation* of administrative functions – from state authorities to an autonomous entity. This type of devolution and self-governance of affairs, which predominantly or even exclusively concerns the identity and interests of a territorially or functionally delimited group of people, follows from the *normative principle of subsidiarity*. This principle, originally developed by Catholic social thought in the nineteenth century and taken into EU law by the Maastricht Treaty of 1992 (today Article 5 (3) of the Treaty on European Union), requires that all affairs which are close to the people be governed by themselves so that superordinate political entities have, on the one hand, only a supervisory role but are, on the other, obliged to support self-governing entities, if they lack the capacity to exercise their powers (see Palermo and Kössler 2017: 19–20). The magnitude of self-governance depends on the types and degree of powers transferred. Autonomy arrangements vary along a continuum ranging from basic forms of associations and few competences to complex entities with broad legislative, executive and judiciary powers.

Even the strongest form of autonomy functions within the constitutional framework of a state, thus, however, fall short of full sovereignty, theoretically making the categorical difference between federalism and confederalism.

Self-government arrangements can be divided into two basic ideal types: *territorial* and *non-territorial* autonomies. The main differences between territorial and non-territorial autonomies concern their founding principle, subjects (beneficiaries), working mechanism and legal basis (Table 9.4). However, there are clear areas of overlap between territorial and non-territorial autonomies. On the one hand, a territorial arrangement includes a set of rules that allows the various minority groups living in the autonomous entity to govern themselves in specific fields, such as education, culture and religion. On the other hand, territory still matters for non-territorial autonomies because such regimes require 'a precisely delimited territorial scope of application' (Kössler 2015: 247; see also Bachvarova and Moore 2015); that is, either the entire territory of the country or only a part of it, such as an administrative-territorial unit or an area that cuts across administrative boundaries. For example, in Finland, the Sami people enjoy non-territorial autonomy in the northernmost part of the country, in an area considered the 'Sami homeland', which crosscuts administrative boundaries because it encompasses three municipalities and parts of a fourth one (ibid: 248).

Table 9.4 Ideal types of autonomy

	Territorial autonomy	*Non-territorial autonomy*
Principle	Territoriality	Personality
Beneficiaries	The whole population of a given territorial-administrative unit	Members of a specific minority group that live in the country
Mechanism	The territory of the state is organised in a way that a minority group at state level constitutes the regional majority in a given territorial-administrative unit	The persons belonging to a minority group establish a legal person (e.g. a minority council) that deals with matters of minority concern (e.g. culture, education)
Legal basis	Public law	Public and private law

Some scholars (e.g. Lapidoth 1996; Gagnon and Keating 2012) and practitioners use the term 'political autonomy' for territorial autonomy arrangements. Non-territorial autonomy is an umbrella term encompassing concepts such as 'personal', 'functional' or 'cultural' autonomy. To make things more confusing, some of these terms may have different meanings for different authors (Nootens 2015; Suksi 2014, 2016). For Tkacik (2008), functional autonomy means the decentralisation of control over a single functional subject matter. Whereas for Lapidoth (1996), cultural autonomy is synonymous with personal autonomy, Heintze (1998) considers it a special case of a personal (or functional) non-territorial autonomy arrangement limited to cultural affairs, where the group is organised and officially recognised as a legal person functioning under private law.

For most scholars, minority groups have no right to autonomy under international law (see also Chapters 3, section 3.4 and Chapter 6, section 6.3). However, non-binding instruments of the OSCE and CoE contain clear references to such arrangements. Establishing 'appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances' (OSCE 1990: para. 35) of minorities is one of the possible means to promote their ethnic, cultural, linguistic and religious identity. In regions where they are in a majority, persons belonging to national minorities 'have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation' (CoE 1993: Article 11).

In practice, there are numerous examples of territorial and non-territorial autonomies in Europe. Most territorial autonomies were established in the Western part of the continent under the constitutional framework of former centralised states that went through a process of what is called *devolution* of powers to the sub-national level (i.e. United Kingdom) or *regionalisation* (e.g. Italy, Spain). In Belgium, this process led to a full *federalisation* of the country through constitutional amendment in 1993.

Finland is an interesting case of a unitary state organised on a decentralised basis, whereby, at a sub-national level, regional and local territorial units enjoy a high level of self-government. Finland has granted a significant territorial autonomy to the Åland Islands (Box 9.7). A special feature of this self-government arrangement is the right of domicile on the Åland Islands

(*hembygdsraett*). It can be described as a form of regional citizenship and aims to protect the islanders' Swedish identity by imposing a number of restrictions on certain rights of citizens from mainland Finland who move to the Åland Islands. The right of domicile is acquired at birth if either parent has it already. Other Finnish citizens who have an adequate knowledge of the Swedish language can request it after five years of permanent residence. The right of domicile is a prerequisite for the exercise of the rights to vote and to stand in elections for the Åland parliament, to acquire and hold real property and to conduct business in the region. When Finland joined the EU, Brussels took into consideration the special status of the Åland Islands under international law, and, by derogation from EU law, granted the autonomous region the right to maintain those restrictions linked to the right to domicile.

Box 9.7 Territorial autonomy of the Åland Islands

The Åland Islands belonged to Sweden until the 1809 Treaty of Fredrikshamn when the archipelago was ceded to Russia. Under Russian rule, these islands became part of the Grand Duchy of Finland. Following the Finnish declaration of independence (1917), the Ålanders expressed their will to join Sweden and the League of Nations was called upon to solve the sovereignty dispute between Stockholm and Helsinki. It is worth noting that Finland proposed the first Act on the Autonomy of Åland in 1920 – that is, before the League of Nations started to discuss the matter. The Council of the League of Nations ruled in 1921 that Åland should remain under Finnish sovereignty and Helsinki pledged to provide further strong legal guarantees for the preservation of the Swedish identity of the islanders. One year later, these guarantees were included in the Act on the Autonomy of Åland. Thus, the autonomy arrangement was not a guarantee per se, but the 'indispensable basis for the special guarantees, protected under public international law by virtue of the League's decision' (Stephan 2011: 32). The Act on the Autonomy of Åland (as amended in 1951 and 1991) is not a constitutional law, but the Finnish parliament can amend it only with the consent of the Lagting, the Ålandic legislative assembly composed of 30 members elected through a proportional vote system only by persons who hold the right to domicile in Åland. The Ålanders also elect a representative in the Finnish parliament. The Lagting has broad exclusive legislative competences including, inter alia, education and culture, municipal administration, public order, health care, environment, traffic and postal service.

The president of Finland has the right to veto Ålandic laws if the Lagting exceeds its competences. The administration of the archipelago is vested in the regional government, which has corresponding broad executive powers. The Finnish government maintains public offices on the islands, such as tax authorities and a population register, and the Finnish president appoints a governor of the region in agreement with the speaker of the Lagting. The governor is also the speaker of the Ålands Delegation, which is composed of two representatives of the Finnish government and two representatives of the Lagting. Besides being a consultative body to central and regional authorities, the Ålands Delegation has inter alia competences regarding the financial administration

of the archipelago. To finance the autonomy system, revious autonomy only after the fa gets an annual lump-sum payment amounting to 0.45 per cent of the revenues of the national budget and the Lagting is free to decide how to spend this money. All public institutions function in Swedish, the sole official language in the islands. Public schools are monolingual, with Swedish as the language of instruction.

South Tyrol is another illustrative example of territorial autonomy where the exercise of certain rights is conditional. According to Article 25 of South Tyrol's Autonomy Statute, Italian citizens can *vote* in the provincial elections *only four years* after taking up *permanent residence* in the province. The rationale for such a temporary derogation from the general constitutional principle that citizens enjoy active and passive electoral rights on the entire territory of the state is to *impede* any attempt to influence the election results by *engineering demographic changes* through the pre-election migration of Italian citizens from other parts of the country into the province of South Tyrol. The Italian Constitutional Court has confirmed the legitimacy of these electoral rules that temporarily restrict the exercise of the right to vote within the autonomous entity, in the light of their aim to protect and preserve the cultural identity of linguistic minorities (Italy, Constitutional Court, Judgment no. 240 of 17 December 1975).

In contrast to the Western European approach vis-à-vis territorial and diversity governance, most Central, Eastern and Southeastern European countries are reluctant to establish territorial autonomies as a means to accommodate ethno-linguistic diversity. Instead, they tend to favour non-territorial forms of self-governance, focusing on culture-related issues. The approach of each ex-communist country has been shaped by various contextual factors, such as historical background, state formation and nation-building processes, high linguistic heterogeneity and intermingled ethnic, linguistic and religious communities, constitutional traditions of state centralism and turbulent transition from totalitarianism to democracy. For example, Romania and Slovakia strongly reject minority claims for territorial autonomies. Both countries have large Hungarian minorities and see territorial autonomy as a stepping-stone towards secession. Estonia, which adopted a law on cultural autonomy already in 1925, re-established a non-territorial autonomy system in 1995, despite the preference of the Russian minority for a territorial arrangement. The choice of the Estonian authorities was also 'a means to emphasise state continuity with the interwar period and to foster the country's post-communist identity' (Kössler 2015: 260). Hungary and Slovenia, which have small and/or territorially dispersed minorities, also opted for non-territorial autonomy solutions. Serbia, on the other hand, is an asymmetrically decentralised state that established a weak territorial autonomy in the province of Vojvodina and a rather frail system of cultural autonomy for national minorities at state level (Box 9.8).

Box 9.8 Territorial and cultural autonomy in Serbia

While Vojvodina was under the Habsburg Empire's rule for several centuries, it became part of the Kingdom of Serbs, Croats and Slovenes at the end of the First World War. This multicultural region was one of the richest and most developed areas of

the kingdom and, after the Second World War, of the Socialist Federal Republic of Yugoslavia. Vojvodina enjoyed broad autonomy under the 1974 Yugoslav Constitution, including extensive legislative, executive and judicial powers, similar, in most respects, to those of the federation's republics. However, the 1990 Constitution of the Republic of Serbia practically abolished the autonomy systems (Marko 1991). Vojvodina regained some elements of its previous autonomy only after the fall of the Milošević regime. The administrative autonomy of the province was restored in 2002, but the 2006 Serbian Constitution did not substantially extend the province's competences. The 2009 Statute of the Autonomous Province of Vojvodina aimed to strengthen the autonomy but, in 2013, the Constitutional Court struck down several provisions of the law. While the current self-government arrangement is weak in terms of powers, it guarantees several minority rights, such as the use of minority languages by provincial authorities, proportional representation in the legislature and civil service, and self-governance in the fields of culture and education.

The 2006 Serbian Constitution granted national minorities the right to 'elect their national councils in order to exercise the right to self-governance' (Article 75) and the Law on National Councils of National Minorities adopted in 2009 established the cultural autonomy system at the state level. The national minority councils are '*sui generis* bodies under public law' that are 'intended to work as ethnic mini-parliaments' (Beretka 2014: 261). Each minority group establishes a single national minority council, which may have between 15 and 35 members, depending on the size of the respective minority. As a rule, the council's members are directly elected by citizens belonging to the respective minority through a proportional representation system. The condition for direct elections is that at least 40 per cent of the persons who belonged to the respective minority according to the last census voluntarily register on special minority electoral rolls. Failing to fulfil this condition leads to an indirect election of the council's members by an assembly of electors. The law provides for no mechanism to check whether citizens who register on minority electoral rolls belong to minority groups, thus there is a clear potential for abuse. It is certainly possible that persons belonging to the majority population hijack one or more national minority councils, which would raise questions regarding their legitimacy.

The competences of national minority councils fall into three main categories (Korhecz 2015: 80–1):

1) autonomous decision-making powers, in the areas of education, culture, information and official language use. For instance, they determine the traditional names of settlements in the language of the national minority if the minority language is in official use in that area. Moreover, they can require the transfer of so-called founding rights of the most important state, provincial and local public educational and cultural institutions to the national council.
2) In several cases, only national councils are empowered to propose a draft decision or to veto the decision of provincial or local self-government bodies.

3) They have the power to express opinions regarding almost all administrative decisions in the areas mentioned above, but the state and territorial self-government authorities are not obliged to follow them.

Each council has a president, an executive body and four committees that are consultative organs working on topics related to education, culture, media and the use of minority languages. The financial resources of national minority councils come mainly from the state, provincial and local authorities' budgets.

The Serbian non-territorial autonomy system fits the needs and expectations of the national minorities that have a functioning network of educational, cultural and media institutions. However, it brings few benefits to minority groups with a lower institutional capacity.

In the context of non-territorial autonomy arrangements, it is worth noting the wide *functional autonomy* enjoyed in the field of education by Ostbelgien – that is, Belgium's German-speaking Community (GsC). The parliament of the GsC is composed of 25 members directly elected every five years. It regulates by decrees in the GsC's fields of competence and appoints the government which consists of four ministers, including one in charge of education. The number of persons living in the nine municipalities of the German-language area make up 0.7 per cent of the Belgian population and 2.14 per cent of the population of the Walloon Region. As a rule, municipalities are subordinated to the region where they are located, but following a 2004 agreement between the GsC and the Walloon Region, the former took over the supervision and funding of the nine German-speaking municipalities from the latter. The GsC has five spheres of competence: education, culture, language use in administration and the judiciary (with certain limitations), personal affairs (e.g. health, family, youth) and cooperation with federal and international bodies. In the field of education, the federal government has retained only the power to determine the period of compulsory instruction and minimum requirements for issuing a diploma.

The territory inhabited by German speakers covers two areas informally known as Old Belgium and New Belgium. While the former belonged to the kingdom since it became independent in 1830, the latter was incorporated into the Belgian state only after the First World War. Let us remember that the current Belgian federal structure consists of regions, communities and language areas (Figures 9.5, 9.6 and 9.7 above). New Belgium consists of the districts of Eupen, St Vith and Malmedy. While the district of Malmedy is part of the French Community, the GsC covers the nine municipalities of Eupen and St Vith. The GsC and the German-language area overlap entirely.

Obviously, in both French and German monolingual areas there are inhabitants whose mother tongue is that of the other language area. German speakers living in the French language area and French speakers from the GsC are thus de facto linguistic minorities. They are not officially recognised as such by Belgian legislation, which, nonetheless, offers them what are called language facilities. Hence, Belgian municipalities with language facilities shall offer services to their residents not only in the official language of the respective language area, but also in the other official language. For instance, all nine municipalities of the

GsC provide such facilities for French speakers. By way of exception from the general rule of German language education, there are primary schools in the GsC with instruction in French. Moreover, secondary schools are also allowed to teach in French other subjects than the French language itself. They are free to decide whether some subjects 'should be taught in the second language, and if so, which. However, these subjects are not allowed to make up a total of more than 50 per cent of the lessons' (Eurydice Network 2018). The same regime applies to the German-speaking population of two municipalities in the Malmedy district that is part of the French Community.

All educational institutions located in the German language area are organised and financed (or subsidised) by the GsC. The minister of education determines the structure, curricula and methods of teaching and ensures the financing of the school system. For instance, a 2011 decree allowed the establishment of bilingual kindergartens in the GsC and a similar regulation of 2015 provides for the possibility to establish, under certain conditions, bilingual primary schools. The education system of the GsC is financed from the federal and regional budgets and from a share of the radio and television dues paid by the residents of the GsC (ibid.).

There is no tertiary education in the GsC, except training to become kindergarten and primary school teachers, nurses or accountants. As there is no German-language higher education institution in Belgium, the German-speaking students have two options: to study in their mother tongue abroad or to enrol in Belgian universities with instruction in French or Dutch. Teachers in the secondary schools of the GsC must prove their German language knowledge if they have a degree from a Belgian university. Finding qualified teachers with a good command of the specific terminology in German may be problematic. Another challenge is to ensure the availability of necessary teaching materials in German because they are seldom published in Belgium. Thus, teachers have to adapt textbooks used in other German-speaking countries to local syllabi.

After this overview on different examples of autonomous regimes, how are the *empirical effects evaluated* in scholarly literature? Following from the case studies of particular autonomy regimes and their comparison to each other, several of the authors referred to above have come to the conclusion that there is a mixed record at best with regard to whether different forms of institutional autonomy arrangements, within the meaning of regional *territorial self-government* or *corporate self-government institutions* established by public law, in contrast to *civil society associations*, are effective instruments of minority protection, or whether they lead – contrary to their goals – to the domination and discrimination of majorities, as well as minorities within minorities, the entrenchment of ethnic divisions, institutional segregation and/or territorial separation, and, in the end, to claims to secession. Therefore, so the argument goes, territorial and non-territorial autonomies will not necessarily empower minorities, contribute to more inclusive democratic politics or lower the potential of conflict, but – even if they are not causes of – they will at least exacerbate conflicts within societies or even between states if kin states become involved in supporting their minorities. Moreover, non-territorial autonomies and even territorial autonomies are said to work as benign instruments for a transition period to help minorities and 'stateless nations' (Keating 2001b) adjust themselves to the need for assimilation, as long as those minorities are not recognised as equal partners. In particular, territorial autonomies are thus said to help to

reproduce the hegemony of the 'territorial-rule-cum-cultural hegemony model of the nation-state' (Kraus 2015: 85), as we also demonstrated in detail with the Catalan independence movement in Chapter 4, section 4.3.

These and additional arguments can be found in scholarly literature when the normative principles and institutional devices for *autonomy* are combined with those for integration in terms of ideologically or ethnically determined *power-sharing mechanisms*. Critics of such institutional arrangements insist that constitutionally entrenched power sharing, in particular if it is based on ethnic division, will not only entrench ethnic divisions through proportional representation in the federal government, but through its resulting mutual veto powers will lead to blockage of the legislative, executive, and even judicial decision-making processes. As a consequence, not only Bosnia and Herzegovina – kept together by a coerced peace agreement, enforced constitution and enforced implementation of this normative framework by international actors after a civil war (Marko 2013a, Keating 2015) – but also established federal democracies such as Belgium (Caluwaerts and Reuchamps 2015; Swenden 2015) might become failed states and collapse sooner or later along the lines of the federal borders mirroring the ethnic division. Against the critical question thus raised in scholarly literature and by diplomats – why not simply give in to the claims to secession in both Bosnia and Herzegovina and Belgium – we show in the next chapter that many of the problems of reconstruction and reconciliation through constitutional and institutional engineering after violent conflict follow from the false conceptualisation of so-called multinational federations, which do not overcome the civic/ethnic divide.

9.5 Summary conclusions and learning outcome

Following from our analytical framework of the triangle of effective participation, to be interpreted in light of the principle of institutional equality (Chapter 8) and the recognition of identity in diversity (Chapter 7), we tried to reflect upon the concepts of political influence, representation and participation, how these concepts are translated into institutional arrangements and, finally, how to empirically assess all legal instruments which give minorities a voice, political influence and (co-)decision-making power not only in their own affairs, but also in society at large. This approach – following from our theoretical framework of multiple diversity governance through autonomy and integration – is visualised in Figure 9.1 as a staircase model of effective participation. This demonstrates again that the ideological dichotomy between individual and human rights cannot be upheld.

The same conclusion can be drawn from the comparative analysis of national and European rules concerning freedom of association, including the formation of political parties, voting rights and electoral mechanisms, as well as systems which provide for minimum or proportional representation in state bodies. None of these legal instruments in favour of minorities can be understood without taking their group-related dimension into account, as can be seen from case law of all courts. This is even the case when the judgments provide a mixed record in favour of minority protection.

As far as Southeastern European constitutions follow the Jacobin model – claiming sovereignty and indivisibility of their respective nation – limitations of freedom of association

by forming political parties along ethnic lines were generally rejected by the ECtHR even if they would advocate secession. As we have seen from the case law with regard to freedom of expression in Chapter 7, the red line justifying prohibitions is only transgressed if parties advocate the use of violence or seem to pose a serious risk of this. National legislation and jurisprudence is also minority friendly as far as the right to vote and to stand as a candidate in elections is concerned. Paradoxically, power-sharing systems between ethnic groups established after serious ethnic conflict in order to help to pacify the situation on the basis of collective equality, as we have seen from the example of the Dayton constitution in Bosnia and Herzegovina, seem to require restrictions of the passive right to vote for others – mostly minorities and their members – who do not belong to the constituent peoples as so-called state-forming nations. The relevant case law of the ECtHR does not generally prohibit power sharing instruments including electoral mechanisms, but its political effects must be understood as requiring the contracting parties of the ECHR to carefully balance the individual voting rights as fundamental rights required for any democracy to function, with the need for power sharing to at least ensure peaceful coexistence. Hence, the *total exclusion* of a complete category of people cannot be justified, as follows from case law of the ECtHR on Bosnia and Herzegovina and Cyprus. With regard to electoral engineering through the *benign gerrymandering* of electoral districts in majority vote systems and through exemptions from thresholds in the allocation of parliamentary seats in proportional vote systems, we again see a mixed record in case law of national courts. Whereas some courts simply deny the justification for so-called minority privileges on the basis of an understanding of the equality principle as formal equality before the law (see also Chapter 8), several constitutions in Southeastern Europe grant exemptions from thresholds. On the contrary, the ECtHR accepted a 10 per cent threshold in Turkey which effectively excluded Kurdish parties from parliament until recently. Finally, as far as *reserved seats* in parliaments which not only foster, but legally guarantee representation in elected bodies are concerned, the record is also mixed. The two reserved seats for the Italian and Hungarian minorities in combination with a system of two votes for members of these minorities were contested before the Slovenian Constitutional Court, but the Court upheld this system and did not find a violation of the principle of equality. In Romania, however, reserved seats allow the practical establishment of a clientelist system which has nothing to do with minority representation.

As far as *proportional representation* and *co-decision making* in state bodies are concerned, we discussed the example of Bosnia and Herzegovina. Power sharing including veto powers in the decision-making processes does not necessarily guarantee effective representation and participation, even for those groups who are involved in the power sharing systems and traditional, small ethnic minorities are completely excluded from the political processes on the state level. Moreover, the example of Bosnia and Herzegovina gave ample evidence that absolute veto power for one ethnic group or even one ethnic party in parliament will lead to the obstruction and breakdown of parliamentary decision making. In the following section, we discussed *consultative bodies* as a mechanism to give minorities information and allow them to exert influence on the political system. These mechanisms are frequently used by governments with the adverse intent and effect to control in particular financial contributions from the state budget aimed at fostering minority cultures. As we have seen in

particular from the country-specific opinions of the Advisory Committee under the FCNM, these mechanisms have serious structural flaws.

In the final section, we returned to the topic of *collective self-determination* in the form of *autonomy regimes*. As we could see from our analysis, there is no scholarly consensus on the concepts of territorial, non-territorial, functional or personal autonomy and their specific advantages or disadvantages. What became clear, however, is the fact that there is a clear East–West divide. Whereas territorial autonomies had been established in Western Europe after the First and Second World Wars, Eastern and Southeastern European countries rejected the establishment of territorial autonomies after the transition from communist to democratic regimes in 1989 for fear of secession. In conclusion from the description and analysis of the examples of territorial and non-territorial autonomy regimes in Western and Southeastern Europe, we found an at best mixed record. However, the example of the German-speaking community in Belgium can serve as an example of *best practice*.

Questions

1. Why do we call the legal instruments for effective participation a staircase model?
2. Do exemptions from threshold requirements or benign gerrymandering guarantee representation in elected bodies?
3. What are the pros and cons of veto powers for minorities?
4. How effective are consultation mechanisms?
5. What are the similarities and differences between territorial autonomy and non-territorial autonomous regimes?

10

From minority protection to multiple diversity governance

Joseph Marko

10.1 Introduction: changing the paradigm

From our analysis of case law on minority rights protection and the norm contestations between and within European national and supranational apex courts in Chapters 6 through 9, it becomes obvious that both our initial questions raised at the beginning of this book (why we should protect minorities of all kinds and how it would be possible to effectively protect them) still remain hotly contested. With the backlash against multiculturalism after 2010 and the growing ethnification and polarisation of and within European societies following from the electoral competition between *all* political parties in the left–right spectre of who can best curb immigration to Europe with permanent references in public discourse to the normative principles and values of the nation-cum-state paradigm, such as the need for the protection of national borders, national cultures and national identities, these initial basic questions become even more relevant as a political challenge for the future of democracy and rule of law within and beyond Europe. Is therefore the concept of social and system *integration* in categorical distinction to the theoretical sociological differentiations between cultural and structural *assimilation* that we presented in Chapter 5, section 5.2 only wishful thinking of 'cosmopolitan utopianism' (Vertovec and Wessendorf 2010b: 31) which does not recognise facts on the ground, namely problems and conflicts? In other words, multiculturalists would argue for a cultural relativism, underpinning their blindness. Instead of 'harmonious integration', the critics argue, *multicultural policies end up in a vicious circle*: multiculturalism fosters the preservation of cultural differences; this in turn leads to communal separateness, which deepens socioeconomic disadvantages and provides an incubator for extremism and terrorism (Rodriguez-Garcia 2010: 255).

As we tried to show, however, through the deconstruction of the ideological presumptions of Jennings', Arendt's and Böckenförde paradoxes and the conundrums of the liberal-democratic state in Chapters 3 and 4, the normative principles and institutional arrangements

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of civic-national and ethno-national states in Europe are the result of a contingent, in no way unilinear or natural process of modernisation. In this final chapter, we therefore sketch out basic elements of the *alternative* to the nation-cum-state paradigm, which we term the *model of multiple diversity governance*.

Following from the *social-constructivist* epistemological perspective and the *relational* sociological approach outlined in Chapter 5, we insist on the possibility of combining the *normative* principles of liberty and equality with the *empirical* fact of cultural diversity. However, instead of equating the relationship between liberty and equality before the law with the notion of 'identity as sameness' (Rosenfeld 2010: 27) of members within a political republican community, our alternative is based on the notion of *human dignity* as a *necessary point of reference* and thus axiomatic anchor for the construction of our model of multiple diversity governance for all territorial levels.

Moreover, we demonstrate the necessity of the *method of triangulation,* familiar to students of geodesy but not necessarily to students of social sciences and law. Through the triangulation of the normative principles of liberty and equality with human dignity, we can show that it is theoretically possible to *reconcile liberty* and *equality with multiple diversities,* which had been declared impossible under the monist-identitarian nation-cum-state paradigm. Finally, we follow Antje Wiener's reconceptualisation of *norm contestation* (Wiener 2014) in a *permanent norm-cycle of norm-generation* in different situations at different territorial levels, ubiquitously making and implementing norms through the interpretation and contestation of the meaning of abstract normative principles such as liberty, equality, self-determination, sovereignty and human dignity, as outlined in Chapter 5, section 5.3. This reconceptualisation of legal theory helps us to understand the *empirical processes* of *constitutional pluralism*, which we can, for instance, observe from the constitutional dialogue between national apex courts and European supranational courts with their respective sovereignty claims on who shall have the final say. However, the concept of constitutional pluralism is not only helpful as an explanatory model of the empirical processes of norm contestation between courts but must also be combined with the philosophy and *ethics of cosmopolitanism* in order to establish a *normative theory* of what we call *cosmopolitan constitutional pluralism* in order to be able to debate also possible limits of tolerance in human rights adjudication against the reproach of Eurocentrism and moral relativism.

Thus, in section 10.2 we, first, undertake a critical *ideological analysis* of the fault lines between *liberalism* and *cosmopolitanism/universalism* and liberalism and *communitarianism/particularism*. This enables us to identify the remnants of the nation-cum-state paradigm, in particular the false dichotomy between individual and group rights also in cosmopolitanism/universalism debates. Second, in section 10.3 we deconstruct the false dichotomies of universalism versus particularism and (moral) relativism and demonstrate the indivisibility of human and minority rights against all reproaches of Eurocentrism and develop a theory of *cosmopolitan constitutional pluralism*. In section 10.4, we analyse case law of national and supranational apex courts and demonstrate the generation of a new/old cleavage between nationalist and cosmopolitan interpretations of human rights at different territorial levels. We term the latter *cosmopolitan constitutional law-in-the-making*. In section 10.5, we come to the reconceptualisation of basic concepts and models that follow from our model of multiple diversity governance. Through the *triangulation* of the normative principles of *dignity*, *equality* and *diversity* we can overcome the Janus face of the binary opposition of inclusion/

exclusion, which is translated into a dynamic model of autonomy, subsidiarity and integration through effective participation. Hence, the model of *multicultural federalism* shall help to overcome to civic/ethnic dichotomy in conceptualisations of pluriethnic or multinational states in future efforts of constructive constitution engineering, in particular in peacebuilding processes. In section 10.6 we, finally, provide a summary overview of the essential elements of our model of multiple diversity governance.

10.2 Cosmopolitanism and the fault lines of universalism, communitarianism/particularism

So far we have dealt with two of the four problems of social ordering regarding the structuration of vertical and horizontal relations within and between states and societies. These were, first, the reification and naturalisation of processes of symbolic boundary drawing, so that we have to deal with three different meanings of ethnicity (see Chapter 5, section 5.2), which must not be confused. Second, the dichotomisation between the concept of *the* individual, which stands in strict opposition to society, nation, state or people as a whole, can no longer be upheld in the light of the social identity theory and the processes of group formation through social organisation in the form of institutionalisation (see Chapter 5, section 5.2). Nevertheless, *two dichotomies* remain *unresolved*: first, there is the alleged dichotomy between *universalism* and *particularism*, with the latter allegedly leading to pluralist theories based on cultural *relativism*. This dichotomy is frequently seen in parallel with the alleged dichotomy between *universalism* and *cosmopolitanism*, with the latter being accused of advocating an elitist understanding of culture as a hybrid fluidity that shall be significant for the bourgeois male 'frequent traveller' (Calhoun 2002). Second, this dichotomisation is intimately linked with the alleged dichotomy between individual and collective rights.

Moreover, the problem and question remains open regarding whether the model of *multiple diversity governance* can also have an explanatory value for all of the economic, social, and cultural problems stemming from *globalisation*; that is, whether it is of *heuristic value* for processes and horizontal or vertical relations, not only *within* and *between*, but also *beyond national states*, in order to understand the phenomena of *global governance* and *transnational* and *global law*. In connection therewith, two crucial questions crop up again and again:

1) Is co-existence, let alone cooperation, possible in a world beyond national states that is characterised by cultural diversity without 'a sense of commonness', in terms of collective identities and political communities providing for the necessary bond of solidarity that 'defines the demos', and for which 'an appeal to morality or reason or the creation of institutions' cannot act as a substitute (Bauböck 2002: 113)?
2) Because of the fragmentation and pluralisation of actors and legal regimes beyond national states (Krisch 2010; Teubner 2012; Walker 2016), how is it possible to effectively make binding collective decisions with authority?

Before we come to this new perspective, however, we have to deal once again with all of the dichotomisation or recombination of universalism, cosmopolitanism, particularist

relativism (or liberal nationalism and communitarianism) and liberalism in political theory and social philosophy. From scholarly literature we can thus learn about conceptualisations which construct either a double *dichotomy* between universalism and cosmopolitanism, and universalism or cosmopolitanism and nationalist particularism, or which create ideas and constructions in *combinations* of these approaches, *depending* on the respective *perspective* adopted with regard to the meaning of the concept of cosmopolitanism.

Steven Vertovec (Vertovec and Cohen 2002: 6) has identified five such perspectives or meanings of cosmopolitanism which can be found in academic scholarship dealing with globalisation. These are cosmopolitanism as:

- a philosophy or worldview;
- an attitude or disposition;
- a practice or competence;
- a sociocultural condition; and
- actors and transnational institutions.

As can be seen from this list, the first three meanings refer to internal dispositions of individuals, either from an observer's or a participant's perspective, whereas the latter two refer to actors, including institutions, and sociocultural as well as political relations among different actors. From our perspective of multiple diversity governance beyond national states, we are interested in conceptualisations that follow from, in particular, the phenomena of cultural and political globalisation.

David Held has summarised the 'globalization of communities and cultures' (Held 2002: 52–5) leading to the *pluralisation* of political orientations and allegiances, with regard to all of the perspectives identified above in the following way. There are:

- an increasing plurality and diversity of political communities;
- this allows for political identities beyond the immediate communities in which one is born and communication with groups beyond borders;
- national states no longer have the capacity to contest the imperatives stemming from global economic change;
- the sovereignty of national states is contested by international and supranational organisations; and
- national communities are locked into webs of regional and global governance.

In conclusion, the globalisation of communication leads to an increased *interdependence* of so-called political communities, which goes hand in hand with *multi-layered identities* and *complex loyalties* of individuals, so that the rights, duties and welfare of individuals can only be adequately entrenched if they are underwritten by *both* regional and global regimes, laws and institutions.

Summarising the *developments in international law*, Klabbers (2011: 11–19) has identified the *processes* of *fragmentation*, *pluralisation*, *verticalisation* and *privatisation*, which have definitely transformed the Westphalian paradigm of international law created by sovereign states, thus originally framing and taming the state of anarchy conceived as the billiard table model of international relations.

The process of fragmentation goes hand in hand with the dual process of pluralisation. The first process refers to the fact that it is no longer only states who are the main actors in international relations, but also international (governmental) organisations (IGOs), with their quasi-independent powers and, more recently, international non-governmental organisations (INGOs), which can exert considerable influence worldwide in their respective policy sectors, such as Amnesty International, Human Rights Watch or Greenpeace for environmental challenges. And, finally, the role of the individual person, via the notion that human rights with its legal status as *ius cogens* (see Chapter 2, section 2.1) in public international law trumps state sovereignty, is also gaining more and more importance for international relations. This phenomenon already indicates that there is a second process of pluralisation going on. Not only is it the increase in terms of *types* and *numbers* of *actors* overcoming the traditional divide of public actors (i.e. states and IGOs) and private actors such as INGOs and multinational corporations, but also new *forms* of *regulation* for *processes* of *coordination* and *cooperation* which contest our legal-dogmatic understanding, stemming from state-centred positive law created and enforced by legitimate authorities. There is not only hard law in the form of international treaties between states and decisions of supra-national institutions, but also soft law in the form of agreed guidelines, statements of common positions or policies that do not impose legally binding obligations (Cassese 2005: 196–7), so that sanctions in multinational *forums* or even within international organisations are based on rituals of naming and shaming, as is the case, for instance, with the country-specific Opinions of the Advisory Committee under the Council of Europe's Framework Convention for the Protection of Minorities (see Chapters 6 through 9 for many examples), euphemistically called 'soft jurisprudence' (Lantschner 2008), with, however, the possibility that such emerging standards might one day become hard law.

The *twin processes* of *fragmentation* and *pluralisation* raise, of course, the not only legal-theoretical but also highly political question concerning what shall happen in case of a *conflict* of laws, principles and interests. Traditionally, public international law – seen from the perspective of sovereign and equal states that create international law by concluding treaties – is conceived as a horizontal legal order which, however, lacks a locus of final authority to decide on conflicts if this is not specifically foreseen, as is the case with the United Nations (UN) Security Council under Chapter VII of the Charter of the United Nations with regard to a threat or breach of international peace. As can be seen from this example, not ad-hoc, but permanent *conflict management* seems to *functionally* require some sort of *verticalisation* of relationships in terms of laws and institutions; that is, some sort of hierarchy of laws and final authority granted to an institutional mechanism to authoritatively decide on the issue in dispute. Such a process of verticalisation and institutionalisation of dispute resolution can thus be labelled the *constitutionalisation* of international law (Klabbers *et al.* 2011), in analogy to the model of national states where the constitution is conceived to form the 'supreme law of the land' and a supreme court given the authority to decide as a final court of appeal, as we learned in Chapter 2 from the famous US Supreme Court case, *Marbury v. Madison* of 1803. Such a process of 'constitutionalisation' of international, transnational or global law therefore seems to require the notion of a legal system and, if it is to be considered as part of a democratic political system, also a political community or *demos*, so that collective decisions can be responsive to those whom they affect.

Hence, the great *alternative* discussed in academic discourses in international law, international relations, and legal and political philosophy is that of a non-statist regime of global governance versus world government (i.e. global statehood; Scheuermann 2014: 113–18).

- *Global governance* must be conceived as some sort of *institutional network (*Teubner 2014: 245–47) in which sovereign states, IGOs, but also private actors, cooperate in a non-hierarchical way but nevertheless 'low-intensity' form of 'constitutional pluralism' in order to tackle the 'common' economic, ecological, cultural and political challenges stemming from globalisation, without, however, having to resolve the twin problems of hierarchy and final authority, despite the realist notion of anarchy in international relations.
- A *world government* is – in analogy to the models of national states – conceived either as a centralised world state or as a global, but territorially layered and institutionally differentiated, federal system, based on the principle of autonomous self-government and globally shared rule.

It goes without saying that both the empirical and normative arguments in favour or against any of those two ideal-typical models for a transnational ordering of international relations, or even supra-national order, are highly contested (Held 1995, 2010; Cohen 2012; Scheuermann 2014). A world government based on a monistic constitutional order is frequently seen by liberal republicans and nationalists, as well as 'genuine' cosmopolitan theorists (Kleingeld and Brown 2014; Lane 2014), as a Trojan horse for neoimperialist aspirations and tendencies.

In conclusion, world government is both seen as normatively undesirable and empirically unrealistic in a world – as it had been imagined by Herder at the end of the eighteenth century – still basically structured as a pluriverse of culturally homogeneous nations and their sovereign states. Moreover, democratic government is considered to be possible only at the level of nations and thus within national states, but – due to the problems of scale and time – not above and beyond national states, as we can learn from academic disputes about the 'democratic deficit' of the European Union (EU) and the denial of the necessity of a 'constitution' for Europe (Grimm 2005, 2012). Moreover, the concept of 'constitutional pluralism' (Walker 2002, 2016) underlying the model of global governance is also heavily criticised as a nonsensical 'oxymoron' (Loughlin 2014).

Therefore, in summarising the consequences of the globalisation of communication and cultures, we can again recognise the *dichotomisation* in philosophical and legal debates, along the lines of the monist-identitarian discourse in defence of the social reality, of a pluriversity of national states forming the hard core of international relations, even if complemented by new actors and constellations. All theorising that the core elements of 'belonging, identity, and citizenship' are overcome by these processes of globalisation and replaced by 'non-communitarian, post-identity politics of overlapping interests or hybrid publics' (Hall 2002: 25) is declared to be simply naïve 'idealistic' and wishful thinking or, at least, premature. But if 'diversity is a fact for cosmopolitans, but a problem for universalists' (Hollinger 2002: 231), Hall correctly diagnoses that *political theorists* will tell us once again that '*the combination of equality and difference is impossible*' (Hall 2002: 30, emphasis added).

But what do we recognise in all of these arguments in defence of social reality in terms of 'belonging, identity, and citizenship'? It is, if at all, the 'Böckenförde paradox' in different terminology or Kohn's dichotomy with all of its assessments of 'bad' nationalism *versus* 'good patriotism', or 'thick, thin and thinner forms' of cultural and political 'community', as we learned from the debates about liberalism, nationalism and multiculturalism in Chapter 4, section 4.4.

For instance, Craig Calhoun, on the one hand, argues that:

> most versions of cosmopolitan theory share with traditional liberalism a thin conception of social life, commitment and belonging. They imagine society – and issues of social belonging and social participation – in a too thin and casual manner. The result is a theory that suffers from an inadequate sociological foundation.
>
> (Calhoun 2002: 95)

On the other hand, he argues that 'the cosmopolitan image of multiple, layered citizenship can helpfully challenge the tendency of many communitarians to suggest not only that community is necessary and/or good, but that people normally inhabit one and only one community' (ibid.). So is a 'communitarian cosmopolitanism' (Bellamy 2015: 228–32) the right approach to balance the 'proper acknowledgement of "thin" basic rights with a "thicker web" of special obligations' (Bellamy and Castiglione 1998)? And if Calhoun then argues – more or less in contradiction to his statement above – 'that in cosmopolitanism as in much other political theory and democratic thought there is a tendency to assume that social groups are created in some pre-political process – as nations, for example, ethnicities, religions or local communities' (Calhoun 2002: 96), what makes the difference then between cosmopolitanism and liberal or even ethnic nationalisms?

Rainer Bauböck also pinpointedly raises the question: 'Where is the *Polis* in a Cosmopolis?' (Bauböck 2002: 110, emphasis in the original). The millennia-old Stoic cosmopolitan approach deriving from the Greek word *kosmopolitês*, literally translated as 'citizen of the world', with the more or less outspoken understanding of denying 'local' or 'particular' affiliations based on 'cultural' boundaries (Kleingeld and Brown 2014), is put into question by him by stating 'a nowhere land is not a polis and a nowhere man is not a citizen', thereby quoting not only a Beatles song, but also restating the Arendt paradox discussed in Chapter 3. He thus concludes – quite similarly to Canovan in Chapter 4, section 4.4 with regard to concepts of a 'minimal state' in liberal theories – that despite all trends towards forms of 'governance without government' at the transnational or global level, a *normative theory* of democratic cosmopolitanism must be able to explain 'what kind of *demos*' institutions will represent and be accountable to. And since a 'political community cannot be wished into existence', the 'alternative' for him is that the *demos* not only conceptually precede the institutions that represent it, but must also correspond to a social reality: a significant status of membership, a widespread sense of belonging and a historical trajectory of community. Liberal democracy is not exhaustively characterised by the rule of law, the division of powers and a periodic opportunity of citizens to dismiss their government. Sustainable democratic institutions require a shared sense of political identity among citizens (Bauböck 2002: 113–14, 119).

Also Calhoun – not differing from critics of the democratic deficit of the EU because of its lack of a European *demos* based on a single language of communication – is critical with regard to mechanisms of representation in conceptions of governance at the transnational level: 'In the absence of state-like forms of explicit self-governance, it is not clear how the representation of peoples escapes arbitrariness' (Calhoun 2002: 96).

However, Joseph Schumpeter has already demonstrated through his *realist theory of democracy* – in his deconstruction of what we called in line with Hans Kelsen the 'legal fictions' of a 'general will of the people' and its 'representation' in an elected parliament in Chapter 9, section 9.2 – that there is no *demos* but instead a competition between political parties trying to maximise the votes cast in general elections in order to gain maximum power for being able to form – via the majority of seats in parliament – the executive leadership (Schumpeter 1942). In other words, Popper's definition of democracy that democratic government simply means the opportunity to peacefully dismiss the executive from office (Popper [1944] 1977: 174) is certainly more in line with social reality than the insistence on a preceding *demos* to be represented by institutions, as we can learn from political practice after revolutions and wars. And as we know from the practice of parliamentary democracies that parliamentary elections do not necessarily take place only after the end of the constitutionally foreseen electoral cycle, but that governments call early elections if they see a better chance to win them, we must conclude with the maxim of Bert Brecht: 'It is the government which elects its people', not the other way round!

Our final point of analysis of the fault lines between cosmopolitanism, universalism, particularism/nationalism and liberalism leads us to analyse the positions taken concerning the *relationship* between *individual* and *group rights*. Again, what we see in these debates is that there are positions which – from a cosmopolitan-liberal perspective – deny the pluralism of groups and cultures and thus of group rights and see them as a dangerous aberration towards nationalist ideology, whereas communitarian cosmopolitans see group rights as a necessary complement to individual rights. For instance, Hollinger promotes a 'new cosmopolitanism … by trying to keep both a universalist insight that nationalists tend to deny, and a nationalist insight that universalists tend to deny' in focus at all times, namely: 'the contradiction between the needs of the ethnos and the needs of the species that the new cosmopolitanism faces, rather than ignores', so that universalism and new cosmopolitanism make an 'important difference' (Hollinger 2002: 230–1). For Hollinger, it is necessary that new cosmopolitans avoid:

> *pluralism* … [It] is more conservative in style: it is oriented to the pre-existing group, and is likely to ascribe each individual a primary identity within a single community. Both cosmopolitans and pluralists are advocates of diversity, but pluralists are more concerned to protect and to perpetuate cultures … Cosmopolitanism is more liberal in style: it is more oriented to the individual, and expects individuals to be simultaneously and importantly affiliated with a number of groups …
>
> (ibid., emphasis added)

In contrast, Calhoun argues – in line with social identity theory, outlined in Chapter 5, section 5.2 – that we should recognise 'the importance of public discourse as a source of social

solidarity, mutual commitment and shared interest' since 'neither individuals nor social groups are fully or finally formed in advance of public discourse. People's identities and understandings of the world are changed by their participation in public discourse'. Hence, for him, the creation of *cosmopolitan institutions* is crucial, but 'appeals to abstract human rights in themselves' are not sufficient. 'Building cosmopolitanism solely on such a discourse of individual rights – without a strong attention to diverse solidarities and struggles for a more just and democratic social order – also runs the risk of substituting ethics for politics' (Calhoun 2002: 97, 107).

Again these debates over (liberalist) universalism and (communitarian) particularism in relationship to cosmopolitanism leave open whether we remain trapped in the dichotomy of individual human rights and group-related minority rights or overcome this dichotomy. The next section is thus dedicated to the effort to deconstruct this dichotomy of individual *versus* group-related rights.

10.3 Cosmopolitan constitutional pluralism

This brings us to the debate concerning which role not only the concept of *human and minority rights as institutions* as such, but a more specific focus on the foundational cosmopolitan principle or value of *human dignity*, can or shall play for the conceptualisation of a *normative theory* of pluralist constitutionalism. At the same time, we have thereby come full circle with regard to the *cosmopolitan legacy* of Enlightenment philosophy in the history of human rights, touched upon in Chapter 3, section 3.2.

Religiously inspired, universal as God-given natural human rights law, as exemplified by the speeches and writings of the Dominican friar, Bartolomé de Las Casas in his efforts to protect native Caribbean populations against exploitation and extinction during Spanish colonisation at the beginning of the sixteenth century (Gillner 1998), was transformed by philosophers and jurists into secular natural law based on their contractarian theories for the creation of a political or synonymously civic society out of a multitude of persons living in the state of nature. We learned from Chapter 3, section 3.2 how the problem of the transformation of crude power into legal authority led to liberal and democratic paradoxes, so that all contractarian theories ended in heuristic 'juristic fictions' (Vaihinger 1925: 24–6) of a people or *demos* or even naturalisations of these fictions, which provided the grounds for the ideologies of liberalism, nationalism, and racism. Therefore, as we learned from these transformations of the meanings of concepts and legal categories, the cosmopolitan legacy of the Enlightenment era, with its belief in *humanity* – in our terminology and from our perspective a *social category* as a point of reference for legal construction and *not* a *community* or *polity* – was suppressed and replaced by the nation-cum-state paradigm, at the latest with the French Declaration of the Rights of Man and Citizen of 1789 and its *nationalisation* of the cosmopolitan legacy, as one can see from the text of Article 1 in conjunction with Article 6 of the Declaration (see the text quoted in Chapter 3, section 3.2).

Instead of conceiving an eventual 'inescapable conflict between man and citizen', as Margaret Canovan (1996: 133) postulated, however, we have to reconceptualise the meanings of the social and legal categories of man and citizen as a relationship between the

ideal-typical notions of citizen, as a member of a *particular* political community, and man, conceived as part of a *universal* entity called humankind as an *analytical category*, thereby avoiding once again the ideological pitfall of the dichotomy of universalism versus particularism, or, respectively, relativism, which is evoked, in particular, in human rights discourse (Donnelly 2013: 75–118).

With the development of the religiously-inspired or more secular natural law conceptualisations of human rights in the modern sense through European Enlightenment philosophy, we can finally see that the *very idea of human rights as a universal concept*, as well as *cosmopolitanism*, are based on the same fundamental moral notion. As follows from Locke's transformation of 'natural' power into 'positive' law and without thereby renouncing the 'natural right to have rights', in particular access to justice: *all human beings* – because of being humans – shall be considered equal, within the meaning that they all have *equal moral worth* before the state when its positive law comes into play (see also Baer 2009: 440). In other words, human rights of morally equal persons are conceptually not dependent on national citizenship, and thereby the notion of belonging to a certain state or other particular community that confers the status of membership as a prerequisite for the enjoyment of rights. In this regard, Hans Kelsen also deconstructed the fiction of belonging as a necessary element for the definition of a *Staatsvolk* (*demos*) or what is conceptualised by liberal republicans and liberal nationalists alike as a thin community. Democracy, he argued, requires a politically conceptualised *Staatsvolk* into which *foreigners* must also be *included*:

> Citizenship and the right to permanent residency in a municipality ('*Heimatberechtigung*') are institutions of the modern state, but they are not essential elements of the state. A state must have subjects, but not 'citizens'. Therefore, also *foreigners are part of the Staatsvolk insofar they are subject to the legal order of the state;* even if they do not enjoy any rights, but have only duties. The *Staatsvolk* is not only composed of citizens. They only form a group of human beings which possess special privileges and duties.
>
> (Kelsen 1925: 160, emphasis added)

However, the *practical problem* of the theoretical alternative of human rights and historic citizenship as a legal institution for purposes of exclusion (Brubaker 1992; Bosniak 2006) remains to this day trapped in Hannah Arendt's observation of the paradox that human rights will remain a meaningless moral or legal category, as long as their implementation and enforcement is dependent on the very same national states, so that 'the loss of a polity itself expels him from humanity' (Arendt [1951] 2017: 389).

At the same time, the *concept of the universality of human rights* and that of cosmopolitan thinking are criticised as *eurocentrist* and *imperialist*, owing to their intellectual origins in the European history of state formation and nation building, and because of having been (mis)used for the justification of the exercise of power in the various phases of colonialism and Western imperialism since the beginning of the modern age. Thus, the reproach of Eurocentrism stresses that European ideals of universal human rights as, for instance, opposed to 'Asian values' (De Bary 1998), can only be relative or particular; that is, not considering different cultural values, principles and norms existing in countries of other

continents of the globe and the consequences which follow from them for social and political ordering.

However, this *juxtaposition of universalism versus relativism or particularism* can again be deconstructed as an ideological dichotomy. This 'binary opposition' (Donnelly 2008: 202) is based on the dual confusion of the axiomatic and normative dimensions of the conceptualisation of universalism and cosmopolitanism on the one hand and the political desirability and/or empirical possibility of establishing a *universalistic* (i.e. substantially uniform) human rights regime on the global level on the other.

Donnelly makes clear that even a reformulation in presenting universality and relativity as a continuum, thus suggesting that it is possible to have 'more or less' of both at the same time, will be misleading, so that a much better representation would be to conceive of the relationship as 'a multidimensional discursive space' (ibid: 197). In doing so, Donnelly distinguishes four 'meanings' and concepts of 'universality' (ibid: 196–9):

- *Conceptual universality* as the epistemological vantage point in defining the very idea of (personal) human dignity, in analogy to Anderson's social-constructivist approach in the imagination of communities; however, this position was criticised as eurocentric and imperialist, not only in post-colonial studies, but also in analytical positivistic linguistics and French structuralism (Mahlmann 2012: 374–5).
- *Substantive universality* in Donnelly's taxonomy will then – from his epistemological perspective of multi-perspectivity – only seemingly (and paradoxically) mean 'the universality of a particular conception or list of human rights', with the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 as the prime example. Therefore, 'international legal universality' as the contemporary body of international human rights law is also 'relative', in the sense that 'it holds (only) across a particular universe, namely, states', and is 'incomplete', in the sense 'that a number of states continue to resist … hegemonic international human rights norms'.
- *Functional universality* is the claim that human rights perform the function of *protection* against certain *standard threats to human dignity* posed by modern states *and* modern markets in most places of the modern world, so that 'human rights today remain the only proven effective means to assure human dignity in societies dominated by markets and states'. The protection of human rights against states *and* non-state actors is thus one of the most difficult problems and concerns for the conceptualisation of global constitutionalism, which remains sensitive to cultural diversity (Wiener 2007b).
- *Anthropological universality*, finally, means that there is an emerging cross-cultural consensus on the necessity of human rights 'in some large or significant groups of societies, civilisations, or cultures' driven by functional universality and supported by international legal universality.

Donnelly's deconstruction of the dichotomy of universalism *versus* relativism and *reconceptualisation* in terms of a multidimensional relationship between the *universality and relativity* of human rights is an important theoretical insight for the construction of the model of multiple diversity governance. Criticising these different concepts of universality either as eurocentric or utopian-thinking, as has been done by post-modern structuralists,

but also by all primordial nationalists, is simply a 'genetic fallacy' (Donnelly 2008: 112). The relativity – not to be confused with normative relativism – of the substantive, functional, and anthropological universalities in Donnelly's taxonomy are no absolutist truth claims as critics argue, but refer to the empirical *possibility* to implement those normatively claimed universalities and the already ongoing process of *universalisation* of the European conception of human rights within the UN framework and political *cooperation* and processes of *integration* within, between, and beyond the level of national stats. Hence, without the notion of conceptual universality as an epistemologically axiomatic vantage point, there would indeed be no imagination and thus no conceptualisation of *humanity*, *humankind* or *cosmopolis* possible as a meaningful *social category* and we would remain stuck in the tradition of the history of ideas from Hobbes to Huntington that social relations and politics from the local to the global level *can* only be conceived of as an eternal *bellum omnia contra omnes*.

In spite of the deconstruction of the ideological dichotomy between universalism/cosmopolitanism *versus* particularism/relativism, two problems remain to be discussed from the perspective of judicial adjudication.

First, which role does the concept of *human dignity* really play in the decisions of apex courts? Is human dignity a *subjective human right*, like freedom of speech, religious freedom, or a right to privacy? Is human dignity not simply one in a plethora of human rights that are constitutionally entrenched or is it a *superhuman right* trumping all other law, including other human rights, because of its character as an absolute value and thus enjoying absolute validity, which cannot be restrained by balancing it against other rights or public interests? Or, is it exactly the other way round, whereby human dignity – even if constitutionally entrenched in national law, as in the case of Article 1 of the German Constitution after Germany's experience of the atrocities committed by the leaders and followers of the Nazi regime – is simply an *empty idea*, like the principle of equality (see Westen 1982 and Chapter 8), with no specified meaning and thus only a *rhetorical strategy* having completely different meanings in judicial reasoning from case to case (see, for instance, the analyses of jurisprudence by McCrudden 2008; Dreier 2014)? Does this really mean that there is no core or minimum content identifiable which must remain absolutely free from interference (in German constitutional doctrine, *Wesensgehalt*), irrespective of its categorisation as a value, normative principle or subjective human right?

Second, is the distinction introduced above between relativism and relativity not merely a 'language game' (Wittgenstein; see also Chapter 3, section 3.1, masking the problem of whether or not there are *limits of tolerance* in hard cases of human rights adjudication? What makes therefore the difference between the 'comprehensive pluralism' advocated by Michel Rosenfeld and our effort to construct a model of 'cosmopolitan constitutional pluralism'?

Even to give a short sketch of Rosenfeld's model of comprehensive pluralism, based on what he calls 'equality and the dialectic between identity and difference' and fully elaborated in his monograph on 'law, justice, democracy, and the clash of cultures' (Rosenfeld 2011), is impossible. In a nutshell, he takes up the problem of *limits of tolerance* by introducing more of a 'thought experiment', in the form of a 'counterfactual ideal designed to provide a useful baseline' to justify his conclusion that there can be no normative justification for what liberal

culturalists and liberal nationalists, discussed in Chapter 4, section 4.3, called the need for 'external intervention', in order to protect the individual rights of members of communities against any 'internal restrictions' arising from commands of community leaders.

In the following passage, Rosenfeld introduces this 'counterfactual' ideal and the conclusions he draws therefrom:

> At the risk of being accused of paying too much attention to what may appear as a mere philosophical technicality, a consistent proponent of comprehensive pluralism must insist that, strictly speaking, a completely homogenous group without any potential for internal dissent need not practice tolerance or refrain from any purely intra-communal act no matter how repulsive to outsiders. … To illustrate this point, let us consider the particularly revolting example of excruciatingly painful prolonged torture leading to death. Now, for a group to remain completely homogenous as understood here, all members of the group must agree on a commonly held conception of the good, on the normative validity of practices consistent with such common ideology, and on the impossibility of any future deviation or dissent from the conception or practices involved. Consistent with this, a practice of torture within such a homogenous group must be assumed to be equally fully voluntarily accepted by both the torturer and the victim. … In such a case, no matter how horrendous, comprehensive pluralism does not allow for intervention.
>
> (Rosenfeld 2011: 116–17)

And, following from 'the theoretical implications of comprehensive pluralism's rejection of strict universalism', it shall become clear that also 'in the case of less extreme but nonetheless difficult and troubling situations' such as 'female circumcision', comprehensive pluralism does not 'justify upsetting communal bonds for purposes of implementing fundamental individually oriented equality rights' under the condition that 'no coercion is involved, and provided the women to the contested practice are fully adult and treated as genuine members (albeit not equal members by Western standards'; ibid: 118).

Against this theory of 'comprehensive pluralism', our conceptualisation of *cosmopolitan constitutional pluralism* is, in stark contrast, anchored in the concept of human dignity as the *axiological supposition* necessary for the imagination of conceptual universality *and* as the minimum moral standard in order to be able to *triangulate* the abstract principles of liberty with equality and equality with diversity. Such triangulation will serve as a compass needle in *normative goal orientation*, in balancing the abstract, universal categories and principles of liberty, equality and diversity with the specific particular, situative, factual requirements, without ending up finally – like with comprehensive pluralism – in normative relativism on a theoretical level. At the same time, the concept and category of human dignity, underlying all human rights legal discourse, must also serve as the *ethical guideline* in legal practice, helping to establish the *limits of tolerance of* and *by* the law, against otherwise irreconcilable conceptions about the value of human life.

Susanne Baer (2009) demonstrated the need for *triangulation* of *dignity* with *equality* and *liberty*, both as an epistemological, as well as a methodological requirement, with reference to the example of the EU Charter of Fundamental Rights (EUCFR). This document begins

with chapters on dignity, freedoms and equality, and has additional chapters on solidarity and justice. However, this *structure* does not imply a 'hierarchy', Baer argues (ibid: 437), but *reveals* a *triangle* with *dignity*, *freedom* and *equality* at the corners. The chapter on dignity, defined as a right, also mentions life and the integrity of the person, demonstrating a concern with regard to protection from exploitation. In chapter II of the Charter, many of the freedoms listed express freedom as a right to self-determination beyond isolated autonomy, when systematically taking relationships and communication into account. The chapter on equality addresses discrimination based on a non-exhaustive list of grounds, but it also pays specific attention to the recognition of cultural and linguistic diversity (Article 22). Hence, the EUCFR moves beyond a narrow, textual focus, also taking *contextual, systemic linkages* into account, so that the recognition of 'structural inequality' can be based on the chapter on solidarity, which covers guarantees such as workers' rights, but also access to basic needs and services. In going far beyond notions of constitutionalism in terms of literalism or so-called original intent or scholarly debates about natural versus positive law conceptions, Baer convincingly argues that:

> since recognition of human dignity as the assumption underlying the legal subject per se is so foundational to law as such, it has sometimes escaped textual attention, because the concept serves as the bedrock on which to construct a constitutional order.
>
> (ibid: 440)

This *model* of *cosmopolitan constitutional pluralism* therefore also supports Donnelly's concept of a seemingly paradoxical substantive universality going on in actual practice, through the process of the *universalisation* of human rights by the international treaties, customary law, general principles and soft law developed by international and regional organisations, such as the competent bodies of the UN, the Council of Europe and the EU, all going back to the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 and – as we saw with special reference to the concept of human dignity in Chapter 6 – also to the adoption of the Genocide Convention in 1948, in reaction to the mass atrocities committed by the totalitarian political regimes in Europe before and during the Second World War. In the view of Alexandra Xanthaki, as well as in our view in this book, this universalisation of human rights, and thus creation of the 'foundations that constitute the branch on which we sit' form the – in our eyes also crosscultural and multicultural – 'core of human rights', which no cultural practices and beliefs may violate (Xanthaki 2010).

That this is also the position of UN bodies can be seen from General Recommendation No. 19 *Violence against Women* (CEDAW 1992) adopted by the Committee on the Elimination of Discrimination Against Women (CEDAW), calling on state parties to legally prohibit family violence and abuse, including forced marriage, dowry deaths and acid attacks as unacceptable, irrespective of them being cultural practices. The UN General Assembly has also condemned honour killings and emphasised that 'such crimes are incompatible with all religious and cultural values' (Xanthaki 2010: 44–5). Finally, General Recommendation No. 35 on gender-based violence against women updated General Recommendation No. 19 and was adopted by CEDAW on 26 July 2017 (Box 10.1 overleaf).

Box 10.1 CEDAW, General Recommendation No. 35 (2017)

29. The Committee recommends that States parties implement the following legislative measures:

(i) Ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalized and introduce, without delay, or strengthen, legal sanctions commensurate with the gravity of the offence, as well as civil remedies;
(ii) Ensure that all legal systems, including plural legal systems, protect victims/survivors of gender-based violence against women and ensure that they have access to justice and to an effective remedy, in line with the guidance provided in General Recommendation No. 33;
(iii) Repeal, including in customary, religious and indigenous laws, all legal provisions that are discriminatory against women and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence. In particular, repeal the following:
(iv) Violence against women, including child or forced marriage and other harmful practices, provisions allowing medical procedures to be performed on women with disabilities without their informed consent and provisions that criminalize abortion, being lesbian, bisexual or transgender, women in prostitution and adultery, or any other criminal provisions that affect women disproportionally, including those resulting in the discriminatory application of the death penalty to women;
(v) Discriminatory evidentiary rules and procedures, including procedures allowing for the deprivation of women's liberty to protect them from violence, practices focused on 'virginity' and legal defences or mitigating factors based on culture, religion or male privilege, such as the defence of so-called 'honour', traditional apologies, pardons from the families of victims/survivors or the subsequent marriage of the victim/survivor of sexual assault to the perpetrator, procedures that result in the harshest penalties, including stoning, lashing and death, often being reserved for women and judicial practices that disregard a history of gender-based violence to the detriment of women defendants.

In conclusion, there is an *inevitable relationship* existing with regard to the concepts of *cultural diversity* and *human dignity* within, between, and beyond national states. Cultural diversity cannot be conceptualised, let alone practised, without the notion of human dignity underlying all conceptualisations of individual or collective self-determination in the form of *autonomy*. And social as well as system *integration* against all efforts to eliminate cultural diversity and other forms of pluralism is not possible without the 'structural coupling' (Luhmann) of *law and politics* through the concept of human dignity. Hence, the concept of *cosmopolitan constitutional pluralism* and its application cannot be reduced to the level of transnational or global law as critics of the concept of transnational and global law do. Interpreting political unity, legal equality and cultural diversity from the perspective of

human dignity is therefore a task for courts at all territorial levels, as we see from the phenomenon we term *cosmopolitan law-in-the-making* in contrast to nationalistic interpretations of legal texts in the next section.

Therefore, humanity is not a utopian notion or 'cosmopolitan diktat' as advocates of the 'multiculturalism is dead' discourse claim, nor can it be conceptualised as a uniform, abstract 'polity or community-based' concept in the tradition of (Western) European constitutionalism (Tully 1995). Hence, neither 'rootless cosmopolitanism nor purified nationalism' (Tully 1995: 32) can be the alternative.

Three consequences follow from this position:

1) Cultural diversity beyond, between and within states has become an undeniable 'social fact' (Searle 2010), which requires critical reflection on the liberal dogmas of homogeneity of cultures and national states as prerequisites for their governability.
2) Against Samuel Huntington and others who categorically deny the concept of humanity as a possible political and legal category and predict the 'clash of civilisations', we must stress that humanity is a socially and politically relevant category, in the light of the challenges of globalisation, which must again be defended, so that we will not experience a *déjà vu* in the twenty-first century of what had been prophetically summarised already in the middle of the nineteenth century by the Austrian playwright, Franz Grillparzer as a maxim of European history: 'From humanity to nationality to bestiality' (Grillparzer 1960: 500).
3) The formation of transnational or global political societies, or even communities, can only proceed on the basis of *multiple* affiliations and their ensuing rights and duties. Global citizenship cannot replace other forms of belonging with ensuing rights and duties, and must include not only other fellow citizens, but also strangers.

However, citizenship as an 'invention' and legal institution of the national state was and remains a legal instrument for social closure (Brubaker 1992; Bosniak 2006) and political exclusion and *vice versa*. Global governance, however, requires a different conceptualisation: not closure and exclusion, but *openness and inclusion*, which must not be understood as completely open borders or a natural right to citizenship. Hence, sub-national, transnational or global citizenship must be understood as *multilevelled* and allowing for the *multiplicity of identity formation*, beyond the confines of state and nation, as we were able to empirically observe in Chapter 5, section 5.2 with the example of multiple – including cosmopolitan – identity formation by members of the Slovene-speaking minority in Austria.

Only then can a reconceptualised *civic solidarity among strangers* (Habermas 2001: 102), based on equality in diversity, become a realistic choice instead of the pressures for identitarian closure following from a request to assimilate into the majority culture or the consequences of the rejection of such a request, probably leading to downward assimilation or complete marginalisation.

As can be seen from Box 10.2 shown overleaf, the *EU Common Basic Principles for Immigrant Integration Policy* in the EU avoid the two reductionist poles: 'anti-multiculturalism (the abomination of any sign of diversity and pluralism, negatively interpreting it to mean segregation and a lack of cohesion) and extreme cultural relativism (or uncritical multiculturalism, based

on a naïve, essentialist conception of culture)' (Rodriguez-Garcia 2010: 257). The list and its underlying concept rather try to carefully *balance rights and obligations for immigrants, host state and host society.*

Box 10.2 The EU Common Basic Principles for Immigrant Integration Policy (2005)

1. Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States.
2. Integration implies respect for the basic values of the European Union.
3. Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to make such contributions visible.
4. Basic knowledge of the host society's language, history and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.
5. Efforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society.
6. Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.
7. Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, inter-cultural dialogue, education about immigrants and immigrant cultures, and stimulating living conditions in urban environments enhance the interactions between immigrants and Member State citizens.
8. The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.
9. The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.
10. Mainstreaming integration policies and measures in all relevant policy portfolios and levels of government and public services is an important consideration.
11. Developing clearer goals, indicators and evaluation mechanisms are necessary to adjust policy, evaluate progress on integration and to make the exchange of information more effective.

Hence, what we observe in reality in the political and legal discourse on asylum law and immigrant integration today as a challenge stemming from globalisation is not the end of the national state and its substitution by transnational or global law and governance. Nevertheless, due to the 'multiculturalism is dead' discourse and renewed securitisation of

minority issues, we are experiencing the generation of a *new cleavage* between *denationalisation* and *renationalisation* of societies and legal systems (Beck 2002: 97). The development of such a political cleavage like that of capitalism versus socialism in the nineteenth century, or between economy and ecology after 1945, with all of them having led to new social movements in (violent) protest against ruling political elites, can be identified through their structural, organisational and normative components:

> the shift from society to politics occurs when a particular social divide [*structural* component] becomes associated with a particular set of values or identities [*normative* component], and when this is then brought into the political world, and made politically relevant by means of an organised party or group [*organisational* component].
>
> (Zürn and de Wilde 2016: 6, emphasis added)

The *structural* and *organisational* components of this cleavage have already been addressed in this book in almost all chapters, with several references to the renationalisation of Europe and the electoral success of right-wing populist parties all over Europe.

Its *normative component* can paradigmatically be experienced from the interpretative dilemmas in judicial adjudication, along the lines of *cosmopolitanism versus* (communitarian) *nationalism*, the latter being inherent in the reasoning of judgments of national apex courts concerning the concept of *constitutional identity*, and the former expressly referring to the concept of *human dignity*. What we see from the jurisprudence referring to human dignity in the cases discussed here is the phenomenon of what we call 'cosmopolitan law in the making' at the national, supranational and international levels, which can be understood as a form of constitutional pluralism, based on the collective memory of human dignity as the core of human and minority rights and their function as institutions structurally coupling all autonomous *loci* of authority.

10.4 Cosmopolitan constitutional law in the making

The *norm contestation* between the European Court of Justice (ECJ) and the German Constitutional Court, in terms of limits for European integration based on the notion that the sovereign member states are *Herren der Verträge* (masters of the treaties), started very early on with reference to the human rights provisions of the German Basic Law (GG) and the so-called eternity clause – laid down in Article 79, paragraph 3 GG – that Articles 1 and 20 GG, providing for the Constitution's structural principles, namely human dignity, democracy, the rule of law, the welfare state and federalism, cannot be amended under any circumstances. In the case *Internationale Handelsgesellschaft* (Germany, Federal Constitutional Court, Decision of 29 May 1974, 2 BvL 52/71; BVerfGE 37, 271), colloquially called the 'Solange I' judgment (see Craig and de Búrca 2015: 280–1), the Constitutional Court refused to recognise the unconditional supremacy of European Communities law (i.e. the law of the European Communities before the adoption of the Maastricht treaty, transforming the European Communities into the EU) with the argument that Article 24 GG, at the time of decision, did not cover a transfer of power to amend an 'inalienable feature' of the 'basic structure of the Constitution, which

forms the basis of its identity'. In 1986, the Constitutional Court delivered its so-called Solange II judgment. The Court argued that '*Solange* (so long as) the protection of the constitutionally guaranteed rights is equivalent at EC level', it will not make use of its power of judicial review of normative acts of European bodies.

The second inroad against the doctrine of supremacy and direct effect of EU law was developed by the German Constitutional Court in the so-called Maastricht-decision (Germany, Federal Constitutional Court, Decision of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92; BVerfGE 89, 155). The claimants had argued that the ratification of the Maastricht Treaty would violate the 'sovereignty' of Germany and therefore transform sovereign German 'statehood' in such a way that Germany would no longer be a 'sovereign state'. The Court rejected the claim, but invented the concept of a *Staatenverbund* (Federation of States, see Craig and de Búrca 2015: 283) – never used so far in German legal texts – to maintain not only the notion of the 'sovereign statehood' of Germany but also to send a political warning to the German political authorities. By characterising the EU as a 'federation of states' the judges expressed the notion that the *EU must never become a federal state* because then EU member states would no longer be sovereign. Therefore, any further step in European integration and thus 'dilution of sovereignty' would fall under the 'strict scrutiny' of the Court (see the critical analysis by Marko 1998). However, with this decision, the German Court did not follow its previous 'Solange' jurisprudence, with reference to human rights as an essential marker of the identity of the German Constitution, but reasoned on the necessity for democratic legitimation, which could – in the opinion of the judges – only follow from the 'spiritual, social and political homogeneity of a people' based on a common language. This reasoning in the tradition of the philosophy of Herder (see Chapter 3, section 3.2) was heavily criticised in the legal scholarship as a fall back into an ethno-nationalist conceptualisation and terminology, which had also dominated the decisions and reasoning of the Court in two cases concerning the right to vote for foreigners in local elections (Germany, Federal Constitutional Court, Judgment of 31 October 1990, 2 BvF 3/89; BVerfGE 83, 60). In these decisions, it was no longer citizenship but the characterisation of a person 'being German', that became the essential criterion for the decision that 'a single foreigner' participating in general elections would violate the principle of popular sovereignty (for a critical ideological analysis, see Marko 1995: 223–42).

In conclusion, the German Constitutional Court has developed two different, opposing lines of argumentation to establish limits of European integration, which it exercises in judicial review procedures. The first line of argumentation in the Solange-jurisprudence is based on the *cosmopolitan approach*. The second line of argumentation, however, is based on a defence of external sovereignty vis-à-vis supranational integration, whereby the legal-dogmatic concept of internal popular sovereignty is reconceptualised into *ethno-national terms*, so that the essence of German democracy is declared to be lacking at the European level. With its subsequent judgments on the constitutionality of the ratification of the Lisbon Treaty (Germany, Federal Constitutional Court, Judgment of 30 June 2009, 2 BvE 2/08; BVerfGE 123, 267), and the constitutionality of Germany's participation in the Euro-Stability Mechanism (Germany, Federal Constitutional Court, Judgment of 7 September 2011, 2 BvR 987/10; BVerfGE 129, 124), the Court developed *two standards* of judicial review, which it termed '*ultra vires* control' and 'constitutional identity review'. The different designation of

these judicial review mechanisms, however, *masks* the underlying *opposition* in terms of a *cosmopolitan* versus *nationalist interpretation* of the German constitution.

Nonetheless, as the President of the Constitutional Court outlined in a presentation, the Court does not see its exercise of *ultra vires* control – whereby the Court examines whether European bodies exercise powers which were not transferred to them by the member states – as well as identity review as a problem of super- or subordination between the ECJ and the German Constitutional Court, but as an 'appropriate allocation of responsibilities and assignment in a complex multi-level system'. In the opinion of the President, the normative *concept* of *responsibility for integration* shall overcome the only apparent dichotomy between the 'preservation of constitutional identity and the promotion of [European] integration' (Vosskuhle 2012: 23–6). However, the concepts of constituent power, popular sovereignty and constitutional identity – when interpreted from a nationalist perspective – provide for 'populism in a constitutional key' (Corrias 2016). Hence, the notion of *constitutional identity* is Janus faced: it can serve either for the *legitimation* of decisions in which the *national identity* of Germany shall be defended, or it can serve as the 'interface doctrine', in Krisch's terminology for the creation of 'persuasive authority', following from the *cosmopolitan approach* as can be seen in the decision of the Constitutional Court on the European Arrest Warrant (Germany, Federal Constitutional Court, Decision of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317), already called 'Solange III' in the legal literature (Hong 2016).

In this case, the German Constitutional Court refused to grant direct effect to a European Arrest Warrant for extradition to Italy since the person to be extradited had been sentenced to long-term imprisonment *in absentio* before an Italian criminal court. Since an impartial and fair procedure had not been guaranteed by the Italian authorities after extradition, upon the request of the competent court in Germany, which had to decide on the appeal against extradition, the Constitutional Court argued that the 'principle of guilt' in criminal procedures belongs to the 'constitutional identity' of Germany so that 'German *sovereignty must not lend its hand to violations of dignity by other states*' (Germany, Federal Constitutional Court, Decision of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317: para. 62, emphasis added).

A couple of years beforehand, the ECJ had handed down the case, *Kamberaj v. Istituto per l Edilizia sociale della Provincia autonoma di Bolzano* (2012), which also belongs to the category of 'cosmopolitan constitutional law-in-the-making'. In this case, a third-country national and long-term resident in the autonomous province of Bozen-Bolzano in Italy was excluded from social housing benefits due to the fact that the money earmarked for this purpose in the provincial budget had already been exhausted. The ECJ, however, held that, under Article 34 of the EUCFR, the right to social assistance under the EU Charter must be interpreted as a human right, thereby pre-empting the categorical distinction between citizenship/non-citizenship:

> in order to combat social exclusion and poverty, the Union (and thus the Member States when they are implementing European Union law) recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources …
>
> (ECJ, *Kamberaj v. Istituto per l Edilizia sociale della Provincia autonoma di Bolzano*, 2012: para. 80)

Therefore, in conclusion, the Court ruled:

1. Article 11(1)(d) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as precluding a national or regional law, such as that at issue in the main proceedings, which provided, with regard to the grant of housing benefit, for different treatment for third-country nationals enjoying the status of long-term resident conferred pursuant to the provisions of that directive compared to that accorded to nationals residing in the same province or region when the funds for the benefit are allocated (ibid.).

However, constitutional pluralism in the form of a dialogue between apex courts with different *loci* of authority and an emerging cleavage between *nationalist* and *cosmopolitan* interpretations of human rights law can also be observed within the same court, namely the ECtHR, in particular with regard to the application of its margin of appreciation doctrine in cases concerning the Islamic headscarf. The decisions of the ECtHR case of *Eweida and Others v. the United Kingdom* (2013), in comparison with the cases of *S.A.S. v. France* (2014) and *Ebrahimian v. France* (2016), clearly demonstrate the zigzagging course of the chambers and the Great Chamber of the ECtHR, between an interpretation that is minority friendly in balancing the positive freedom of religion of a Muslima to 'manifest her religion in public' (Article 9 ECHR), against the negative freedom of religion of 'others' (i.e. the majority population) and an interpretation of the same text of Article 9 ECHR, which gives in to the 'national constitutional tradition' of one country (for a detailed discussion, see Chapter 7, section 7.3.2).

10.5 Reconceptualisation through triangulation and the translation of principles and norms into institutional arrangements

Within the *reality* of *pluriethnic societies*, which are not completely ethnified and polarised (see Chapter 5, section 5.2), there are always more than two categories and groupings and therefore at least two, but frequently more others. In contrast, the framework of the *nation-cum-state paradigm*, with its categorical majority/minority distinction, is destined to *produce* the *dichotomic thinking* of us *versus* them relations leading to the civic-ethnic-national oxymoron (see Chapter 4, section 4.4). However, if we see social relations as a *network* of contingent and *multiple situations* of *inclusion/exclusion*, and thus the possibility of persons and groupings being *ubiquitously* in a majority *or* minority position at different territorial levels and in different social and political dimensions, we are able to conceive the formation of *triangular relations* and thus the possibilities of *pluralist inclusion*, as can be learned from Elke Winter's seminal work on multicultural Toronto (Winter 2011:104–9). Like triangulation in geodesy, there is – in addition to *the* dominant group – always a second point of reference regarding relations towards other groups (not necessarily to be perceived as minorities), and the relations among these other groups. Hence, it is necessary to clarify the relationship between us and *several* others by forming a *multicultural* we, in *opposition* to the significant *other* as them. As Winter convincingly argues, 'If "we" want to be pluralist or *multi*cultural

(and not primarily assimilative, hybrid, *inter*cultural, or melted), "us" cannot be extended into a "we", but must recognise the existence of another particular "us" within the realm of "we"' (ibid: 105). Such a relational approach might also explain the 'Swiss anomaly' of nation-building in Europe. According to Andreas Wimmer:

> The analysis of the Swiss case demonstrates that we need to take genuinely *political* factors into account in order to explain which types of *ethnic* categories are transformed into nations and where the boundaries of *national* belonging in a heterogeneous cultural landscape will be drawn. The structure and reach of political alliances turns out to be crucial in that regard, thus lending further support to a relational and power-configurational account of political identity formation. … Where political alliances of the elites controlling the nation-building project reach across an ethnic divide, become institutionalised and organisationally stabilised, a *pan-ethnic national identity* will develop.
>
> (Wimmer 2011: 734, emphasis added)

If you replace the characterisation of *pan-ethnic* national identity with *multicultural* national identity, Switzerland therefore comes close to the ideal type of *multicultural federalism* which we develop from comparative analysis below in order to overcome the false dichotomies and conceptualisations of (mono)ethnic versus (multi)national states and/or societies.

Moreover, the construction of *triadic structures* through *triangulation* requires overcoming the binary logic of inclusion/exclusion, by recognising the fact that group formation as institutionalisation through social organisation and thus the success of social and system integration depends on an openness of attitudes and symbolic boundaries acting against processes of social closure. If we therefore cross-tabulate inclusion/exclusion with openness/closure, we come to see the *possible Janus face* of both *inclusion and exclusion*.

As we can see from the upper left-hand sector in Figure 10.1, only the openness of attitudes and thus symbolic boundary drawing without complete social closure allows for

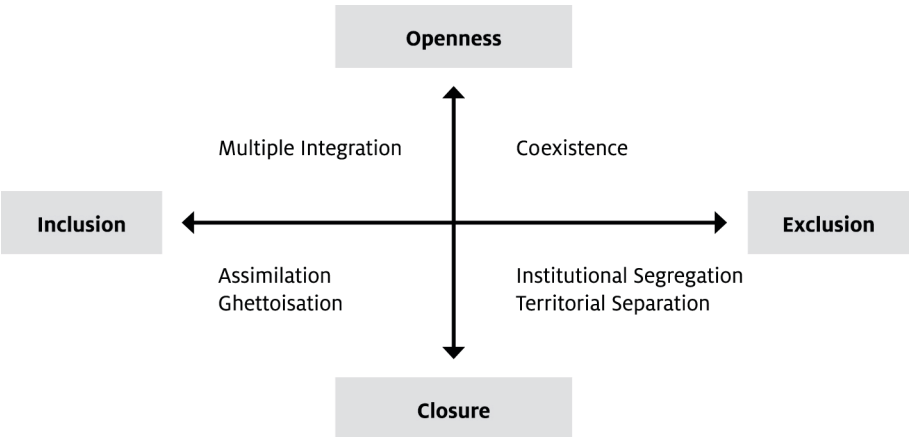

Figure 10.1 The Janus face of inclusion/exclusion

successful *multiple integration*, within the meaning of social integration through 'bonding' *and* 'bridging', to use Putnam's terminology. Social closure *and* inclusion, as represented in the lower left-hand sector, however, will lead to the double request for assimilation, which can either be assimilation into the dominant majority culture or downward assimilation within ethnic ghettos, leading to parallel societies (see also Chapter 5, section 5.2).

Hyphenated identities of individuals and *coexistence* between groupings, represented in the upper right-hand sector, are possible as long as symbolic boundary drawing in the formation of groups does not lead to strict social closure, so that boundaries remain permeable in both directions, whereas strict social closure on the basis of ascribed identities leads to automatic exclusion and thus to institutional *segregation* and/or territorial *separation*.

These insights help us to understand, first, the complex interplay of the *functions* and *normative principles* of 'autonomy and integration' in *existing pluri-ethnic societies* (Marko 2008b; Palermo 2015; see also Chapter 9), as well as, second, that the *theoretical construction* of an *alternative model* of *multiple diversity governance* must be based on a reconstruction of the *normative concept* of individual and collective *self-determination*. As we outlined in Chapter 4, section 4.3, a differentialist concept of individual and national self-determination, which is based on the notion of sovereign (i.e. exclusive) negative freedom for and the autarchy of individuals and collectives to do whatever they want, can never provide the theoretical baseline for the accommodation of all sorts of diversity. Therefore, only a relational approach based on the concept of *interdependence of individuals and groupings*, in terms of positive *political liberty*, thus, no longer as 'freedom from interference', but as 'freedom from domination' (Young 2007a: 39–76) and an *effective right* to participation irrespective of belonging, can provide the ground for the construction of the model of multiple diversity governance, to possibly reconcile *political unity*, with *legal equality* and *cultural diversity*.

Moreover, as we learned from Winter's empirically tested concept of 'pluralist inclusion' above, the construction of a model of multiple diversity governance requires, first and above all, the transformation of dichotomic into triadic structures. From our epistemological, ontological and normative perspective, which is based on multiperspectivity, multidimensionality and multifunctionality, we conceive of *all social* relationships as forming a *triadic identity/diversity–equality–diversity nexus*, representing the deep structure of the model of multiple diversity governance. Moreover, only the triangular conceptualisation of dignity, liberty, and equality which we termed *cosmopolitan constitutional pluralism* above, allows us to theoretically construct and preserve the public space or individual and collective *autonomy in between* the individual and different forms of institutionalised totalities, called state, nation or society in correspondence to Hannah Arendt's definition of 'politics' (see Chapter 2, Box. 2.4). From a *legal-methodological* perspective, triangulation thus requires that we interpret the normative text and factual context in a given case of any of these normative principles or rights in the light of the others. Therefore, from our neo-institutional sociological perspective, *equality* must no longer be seen as requiring identity, within the meaning of sameness as the nation-cum-state paradigm has it, since this would – by definition – exclude any space between assimilation or separation and exclusion. The only choice then left for individuals and groupings would be either assimilation or exclusion. To be recognised as equals by the majority population, others would have to give up their respective different personal and social identities, or they would have to accept their, at best,

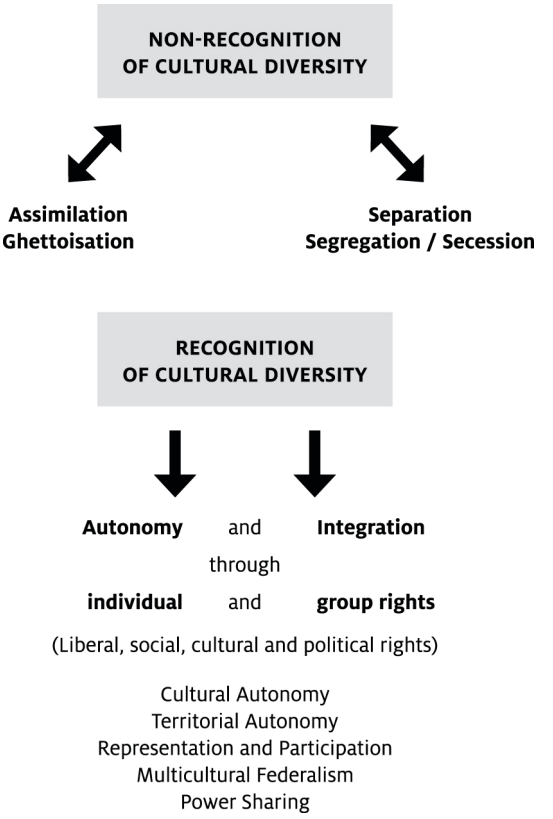

Figure 10.2 The recognition and protection of diversity through autonomy and integration

second-class citizenship status. Nor can the space in between assimilation and separation on a continuum between these two extreme poles be seen as a hybrid mix of ethnicity and non-ethnicity / civility, as we argued above. Quite to the contrary, the dynamic interplay of *autonomy and integration* needs to be understood as a *third type* of *institutional arrangement* (Figure 10.2).

This also requires recognising *legal equality* in terms of *both* individual and group-related rights, however not as natural rights following from pre-given, fixed Id-Entities, to paraphrase Sigmund Freud. Quite to the contrary, both individual and group-related rights must be understood as relational, processual and thus malleable in normative content. Therefore, they are to be determined in their situational, practical meaning by permanent 'norm contestation' (Wiener 2014) at various territorial levels and in different *forums*, such as civil society, media, parliaments and the judiciary, and therefore requiring a *right to participation* without prior membership in a community as a precondition as we demonstrated in Chapter 5, section 5.3.

In conclusion, on the basis of Figure 10.3 shown overleaf, we are able to visualise how *the translation of the normative principles of dignity, liberty and equality* as necessary components for the effective recognition and preservation of cultural diversity must work in terms of the *institutional arrangements and legal institutions or instruments* that can be found in various

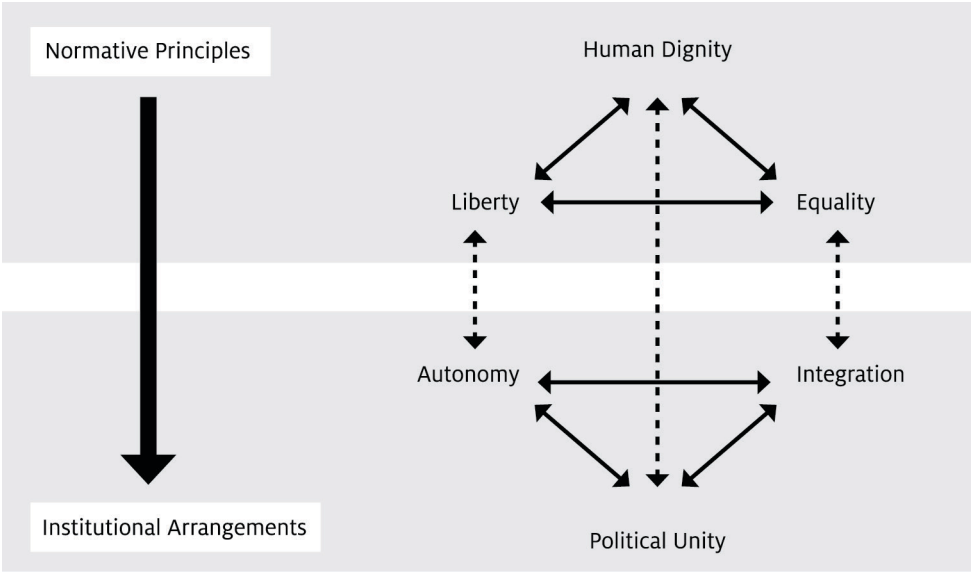

Figure 10.3 Cosmopolitan constitutional pluralism: normative principles translated into institutional arrangements

constitutional systems, thereby moving beyond the false dichotomy of individual *versus* group rights.

From this perspective, we can also *overcome* the *dichotomy* between civic and ethnic nations and nationalisms, as well as the *conceptualisations of 'multi- or pluri-national' states* (Burgess and Pinder 2007; Requejo and Caminal 2014), as being composed of a 'hybrid mix' of more or less ethnic equals cultural and civic equals territorial elements. Both types of *civic-territorial* and *ethno-cultural* nations cannot simply be ordered on a continuum in order to conceptualise the normative principles and institutional devices of multinational states that are in between these ideal types. As we learned from Chapter 3, section 3.2, there is no unilinear development towards modernity based on cultural indifference, as the Jacobin ideological conception and modern theories of nationalism would have it. Nor is there a more or less politically civilised ethnicity in terms of cultural belonging (see also Palermo and Kössler 2017: 98–105). For the purpose of creating a coherent taxonomy, we must recognise that *both* the French state-nation and the German nation-state models are conceptually based not only on *territorially delimited* but also on *culturally homogenised*, states and – despite their different consequences in terms of assimilation and separation combined with exclusion – represent the *same category* of *mono-national* states. Against earlier conceptualisations of multinational states based on the ethnic/civic dichotomy and following the method of triangulation, we therefore can construct the *theoretical model* of *multicultural federalism* (see also McGarry and O'Leary 2015), in contrast to mono-national unitary or federal states, or multinational and/or pluriethnic unitary or federal states. This conceptualisation of multicultural federalism as *tertium comparationis* not only allows for a better *comparative analysis* of the *institutions* and *institutional arrangements* of existing mono- and multinational states, but also enables us to take into account the dynamics

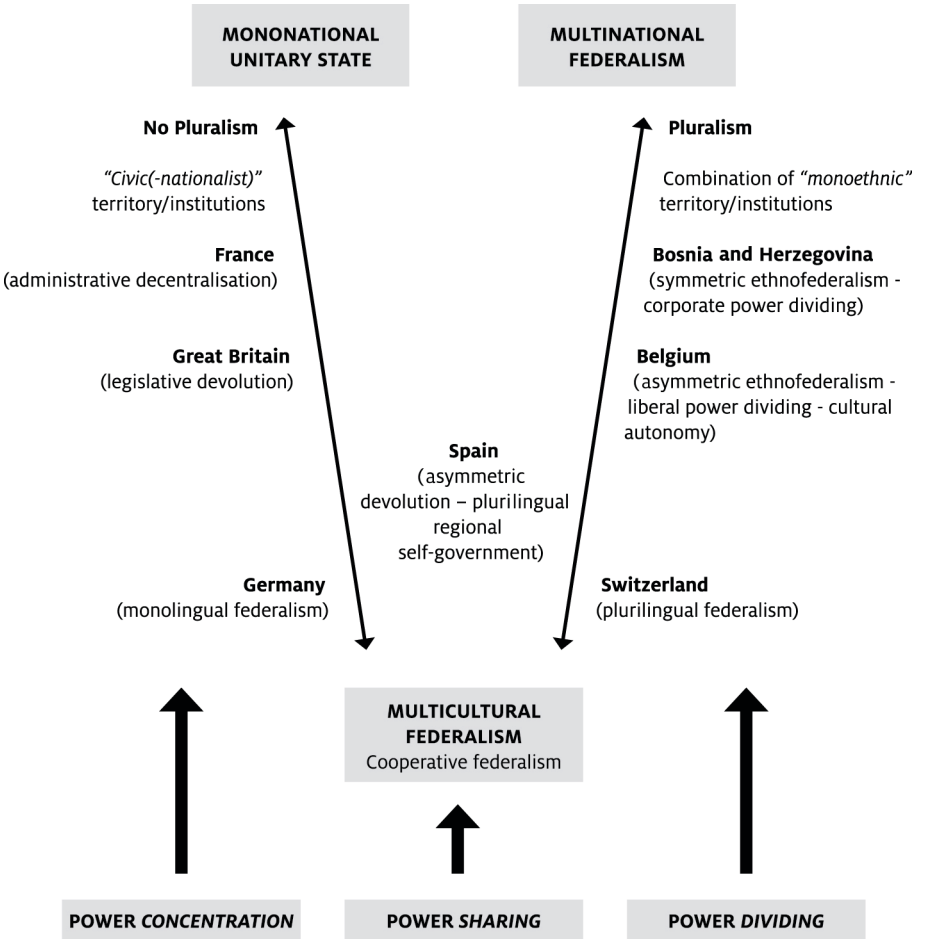

Figure 10.4 Mono- or multinational states and multicultural federalism

of the *political processes* of *ethnification* or *de-ethnification* as *explanatory factors* for political and constitutional change, which must play an important role in the conceptualisation of institutional arrangements for constitutional engineering in peace-building efforts (see, in particular, Brandt *et al.* 2011). Figure 10.4 therefore helps us to visualise the interdependence between theories of federalism and the different models of power sharing and their devices.

10.6 The model of multiple diversity governance: a summary overview

Having come almost to the end of this book, we can summarise, in Table 10.1 shown overleaf, the main features of the two opposing paradigms, the nation-cum-state paradigm and the model of multiple diversity governance from the interdisciplinary perspectives of law, ideology and sociology and provide a summary overview of our findings.

Table 10.1 The nation-cum-state paradigm compared with the multiple diversity governance model

	The monist-identitarian nation-cum-state paradigm	*The multiple diversity governance model*
Epistemological and ontological foundations	*Substantialist* and *static* thinking: reifications, naturalisation, dichotomisations	*Relational* and *dynamic* approach: triadic structures, situative triangulation
Foundational normative principles, legal approaches, and theoretical models	*Sovereignty* as indivisibility	The functional interdependence of *autonomy* and *integration*
	Absolute freedom from non-interference	*Freedom* from *domination*
	Natural socioeconomic stratification, but *individual legal equality* before the law to achieve (individual) *equal opportunities*	*Functional* differentiation, cultural segmentation, and possible ethnic stratification are politically driven processes; need for *institutional equality* to overcome *structural discrimination*
	Legal systems: closed and hierarchically structured with the notion of a final, single authority	*Cosmopolitan constitutional pluralism*: heterarchical network structure with several loci of authority
Functions, structures and legal institutions	The deep structure of monist-identitarianism:	The deep structure of multiple diversity governance:
	elimination of *pluralism* through *assimilation or exclusion/separation*	the *identity/diversity–equality–participation nexus*
	Anti-discrimination law: *rejection* of group rights	Equality law: need for *recognition* of *group rights*
	Rejection of bilingual equality	*Recognition* of need for *multilingual equality*
	Structural dualism of state and religions: *privatisation* of religion	*Positive equality* of religions in public sphere
	Power *concentration* or corporate *power dividing* mechanisms	Liberal *power sharing* and *multicultural federalism*

10.6.1 The politics of fear

The *three trends of the renationalisation* of Europe identified in the introductory chapter are the reaction to the new wave of economic, cultural and political globalisation since the 1960s. Globalisation does not automatically bring more economic prosperity for everybody or more open-mindedness and intercultural understanding. In particular with regard to economic globalisation and the continuing exploitation of cheap labour in Asia and Africa by North American and European multinational companies, there are winners and losers both in other continents of the world as well as in European national states. Nor did more and more transnational or supranational European integration diminish the *political* and *social significance of* the *national state*. This can be observed from the rise of *right-wing populist parties* all over Western and Central Europe in general elections and from the fact that there is no unilinear trend towards liberal democratisation and secularisation in Eastern and Southeastern Europe, as the heralds of the 'end of history' prophesied after 1989. *Not liberalism, but ethno-nationalism* came to the fore again after the end of communism as ideology for the legitimation of the new illiberal political systems to the north, east, and south of Vienna. Hence, as Brecht wrote in his *The Resistible Rise of Arturo Ui:* 'The womb he crawled from is still going strong' (Brecht [1941] 1981).

The common denominator of right-wing populist and illiberal, hence nationalist and neo-racist, politics in West and East is – like in the 1920s with the rise of fascism in Europe – the 'politics of fear' (Wodak 2015) against all those who are *made* others. Whether they are autochthonous, linguistic or religious minorities, or so-called new minorities stemming from immigration, does not matter. They shall serve as scapegoats for all evils following from economic globalisation. Hence, the *nation-cum-state paradigm* remains the *dominant* lens through which we (shall) see and understand the world around us.

10.6.2 The Janus face of the nation-cum-state paradigm

As we have tried to prove throughout this book, the deep structure of what we call the *monist-identitarian* nation-cum-state paradigm, despite the factual historic formation of the dualism of a French model of the civic-republican state-nation on the one hand and the German model of the ethno-national nation-state on the other, can be traced far back into Western and Central European history with its religious wars between Christian denominations and the political revolutions against the actual or attempted monarchic exercise of absolute political power. This history however is *and remains* Janus faced. The results of these political revolutions are not only constitutionally guaranteed human rights and liberal-democratic political systems which came into being after centuries of countless European wars and two World Wars between national states or multinational empires. There is also the extinction, forced transfer, segregation, discrimination or assimilation of people who became termed indigenous peoples in the Arctic belt or linguistic or religious – in short, culturally different – minorities, thus classified as dangerous and a problem for the security, governability and social cohesion of modern states. As we learned from Chapters 6 through 9, nothing has changed in this respect since 1492: Muslims and Jews remain the victims of anti-Semitic

attacks and Islamophobia; Roma and Sinti live in abject poverty and are segregated and discriminated against all over Europe; the terms 'genocide' and 'ethnic cleansing' are new in the legal vocabulary of the twentieth century, but not the fact that mass atrocities occur against members of cultural groups simply because of their ascribed difference, as we learned from the Balkan wars in the 1900s and again in the 1990s. Also, with the aggravated exploitation of natural resources irrespective of the type of political or economic regime and legitimising ideology; that is, neoliberal market economy or – former communist, now nationalist – central planning, indigenous peoples in Europe are also doomed to fail in the preservation of their traditional lifestyles.

That nothing has changed can also be seen from the very same legal vocabulary and the concepts we use in describing the underlying processes of the renationalisation of Europe and the conflicts which follow from them, such as the continuing protracted violent conflict in Ukraine, the Scottish and Catalan secessionist movements, or the terrorist attacks carried out by political fundamentalist groups in the name of Islam against civilians of all religious creeds or right-wing extremist groups against refugees. To this day, we can distil the terms sovereignty in the meaning of indivisibility of the nation and state, freedom from domination, historical injustice or in the name of the people and all the other phrases of the 'seven rules of nationalism' (Box 4.2) from political speeches, but also from legal documents. Modern history and thus the second modernity following from industrialisation and urbanisation seem to have come full circle as we learn from the ongoing contestations about the principles and values of the majority which have purportedly to be defended against all outsiders. These norm contestations about the values of European law and society prove that a *new/old political cleavage emerges* after the cleavages of capital versus labour and economy versus environment which developed in the nineteenth and twentieth centuries. This is the old contestation between the ideology of *individualistic liberalism* ('There is no such thing as society!', as Margaret Thatcher infamously quipped), in particular through its fusion with *civic nationalism* (expressed in the provisions of the 1789 French Declaration of the Rights of Man and of the Citizen, as we argued in Chapter 3) and *Enlightenment cosmopolitanism*, which was completely suppressed in the course of the nineteenth century during the development of the history of ideas and ideologies. Thus, the monist-identitarian nation-cum-state paradigm with its natural and ideological fallacies and paradoxes haunts political theory and jurisprudence to this day. In Chapter 4, we identified the *interrelationship* of the following three conundrums:

1) nationalist *identity fiction* in combination with the *majority principle* and the *myth of neutrality* of liberal principles and institutional arrangements;
2) the *wrong dichotomisation* of *formal* versus *substantive equality*, not only of individuals, but also of groups without recognising the underlying 'dilemma of difference' (Minow 1990) and thus the need for a differentiated yet effective, *participation* as a *human right* in all decision-making processes, irrespective of the status of citizenship in terms of *institutional equality* (Marko 1995); and
3) the *dichotomy* between the claim for a natural right to *national self-determination* of peoples through, by definition unilateral *secession*, presented by political philosophers as the *democratic right theory*, and the public international law debates concerning whether there is a right to *political self-determination* of peoples, including a right to secession in cases of gross violations of human rights, labelled *remedial secession theory*.

10.6.3 Deconstructing the monist-identitarian meta-ideology

In deconstructing the monist-identitarian meta-ideology of the nation-cum-state paradigm, we must start with its deep structure, the naturalist fallacies following from the *reification* and *naturalisation* of the concepts of sovereignty, state, nation, people, individual and belonging to a territory or group. Already the term belonging, *as if* persons were simply property of nations or territory, opens the eyes to the process of reification and naturalisation occurring in our heads. The processes of reification and naturalisation are a consequence of the *conflation* of *epistemology and ontology*, *masking* the *cognitive* and *normative* mental *processes* that peoples, nations and states are not things in the outside world which we can observe like the stars in the sky, but social categories constructed in our heads to understand and explain human behaviour as a process of social and political ordering. And it is exactly the *primary political function* of the ideologies of liberalism and nationalism for the legitimation of the exercise of political power to make these cognitive and normative processes invisible through their truth claims that social categories are identical to empirical reality.

In reality, however, we *socially construct* social and political order in our heads along the following lines, as we demonstrated in Chapter 2, section 2.2, in terms of *problem-orientation* by:

- the *definition* of unity as a problem of *construction*;
- the *normative assignment* of individuals and groupings to the constructed unity / entity as a problem of *ordering*;
- the *justification* of the exercise of power as a problem of *legitimation*;
- the *incorporation* of individuals and groupings into the political decision-making processes as a problem of *integration*; and
- the *maintenance* of the *distinction* between *person and institution* as problems of *autonomy*.

These theoretical and methodological insights then help us to critically analyse the *functional-structural* elements and the *family resemblances* (Wittgenstein [1953] 2009) of the ideologies and social theories of racism, nationalism and liberalism in their contest with multiculturalism / interculturalism and cosmopolitanism, as we demonstrated in Chapter 4, sections 4.2 and 4.3. This is the *naturalisation* and *equation* as well as *dichotomisation* of the social and legal categories of:

- identity = equality = inclusion; so that, by definition
- difference = inequality = exclusion.

In particular, the development of the ideologies of racism and nationalism and the process of substitution of the category of race by ethnicity and culture can, in the final analysis, not deceive the fundamental ideological construction of all of these ideologies as well as primordial theories of nation-building. These are:

- the confusion of the social fact of multiple human *diversities* as if they were configured like natural *differences*; and
- the confusion of *culture* with *ethnicity* as if they were properties of territory and / or people.

We demonstrated in Chapter 5 that all of these natural and ideological fallacies cannot be upheld in light of modern sociology and social psychology.

First and foremost, there is *no dichotomy* between *individual* and *collective identities*, as all ideologies claim. However, we form various social identities through social learning in the processes of socialisation and internalisation by the ubiquitously evaluative and thus normative processes of categorisation, self and other-stereotyping and social comparison so that *multiple identities* are the *rule* and not a psychological deviation.

Second, against reproaches of groupism and culturalism in sociological and philosophical scholarship, we demonstrate that *group formation* through functional differentiation and the ensuing symbolic boundary drawing (i.e. Frederic Barth's Copernican revolution in the studies of nationalism; Barth 1969) and the processes of *institutionalisation* through *social organisation,* are sociopolitical universals. Both social identity formation and group formation must be seen as intimately linked with regard to the problem of *social integration* following from our taxonomy of social and political ordering above.

Third, the epistemological *conflation* of *culture* and *ethnicity* comes to the fore when we understand that group formation through social organisation is a process of *social closure* (Max Weber) based on normative and empirical *inclusion* or *exclusion,* expressed in terms of (in)formal membership. Hence, ethnicity is not a biological property or feeling of attachment, following from kinship, but the reification and naturalisation of the (legal) category of membership and the rights and duties in terms of equality/solidarity which follow from this reification. In conclusion, ethnicity therefore is nothing more than a code for the processes of ex/inclusion and boundaries between groupings which do not follow from naturally predetermined cultural differences but from symbolic boundary drawing. Hence, groupings and their boundaries are more or less open and permeable, so that we speak of a *process of ethnification* the more closed boundaries between sociocultural groupings become through social closure. Individuals then face the choice to remain excluded or to assimilate into a homogenous, ethnic culture. And it is exactly the foundational functional-structural characteristic of the ideology of racism, if even assimilation into another group – the functional equivalent of baptism – is rejected.

Going hand in hand with the process of ethnification as a problem of *social integration*, but to be kept analytically distinct, is the *problem* of *system integration*. Following from the system-theoretical perspective as an analytical tool, we try to understand the structuration of societies as a whole (i.e. the structural configuration of the relationships of groupings and institutions either as 'we and they' *complementarity* or 'us versus them' *antagonism*). Thus, in empirical reality we can observe processes of socioeconomic stratification and/or cultural segmentation, possibly followed by the ethnic stratification of societies if the socioeconomic stratification and the ethnic inferiorisation of groups overlap and mutually reinforce each other. In this latter case, we can observe the polarisation of societies into single 'us versus them' constellations and the possible break-up of (multi)national states. Seen from the perspective of ideal types, we can therefore distinguish between multicultural, pluriethnic and deeply divided societies and states, for which Switzerland, Spain and Bosnia and Herzegovina could serve as practical examples, as could be seen from Figure 10.4. In conclusion, from our social-constructivist and neo-institutionalist sociological approach, there is not one true meaning of the concept of ethnicity, but there are at least three different meanings in use in academic scholarship and public discourse. These are:

- *primordialist* versions which still believe in the natural origin of descent and the kinship of peoples;
- *constructivist-instrumentalist* versions which defy the concept of ethnicity as false consciousness in analogy to (neo)Marxist approaches concerning religion and are invented by so-called ethnic entrepreneurs who want to politically mobilise people not for the general good, but for their own material interests; and
- *constructivist-structuralist* versions which do not consider the deep ethnic division of societies as being a ghostly fiction but take them seriously as structural constraints for any social and political interaction if, what we call the ethnic Midas-effect, these divisions forces everybody to make his or her choice only after having evaluated the consequences of ethnic ascriptions.

10.6.4 What is the alternative? The model of multiple diversity governance

The question is thus raised: is there no theoretical or practical alternative or way out of the Scylla of assimilation and the Charybdis of all forms of separation? Is coexistence between different cultural groupings the best what we can achieve for peaceful living together, as this is postulated by liberals, neoconservatives and nationalists alike?

As we learned in Chapter 4, the *monist-identitarian* nation-cum-state paradigm is based on the theoretical conception that the preservation of liberty and equality in the law and the practice of democratic welfare states requires cultural homogeneity on the basis of shared values which the liberal, secular state cannot guarantee itself. Therefore, the equation of equality and diversity is, by definition, excluded. As we have tried to demonstrate through our deconstruction of the monist-identitarian meta-theory, the underlying assumptions of this theoretical conception are, however, based on ideological truth claims. Nevertheless, we cannot simply declare liberalism and nationalism to be false consciousness and hope that people stop believing in the superstition of ethnicity and the legal fictions of sovereignty, nation and state so that we simply have to wait until world governance without international borders comes into being through an 'invisible hand', as in the tradition of Adam Smith's macro-economic theories.

What we need, therefore, is a *theoretically comprehensive* and *morally persuasive* social and political theory detailing how it is possible to reconcile *political unity* with *legal equality* and *multiple diversities* without assimilation or territorial separation and/or institutional segregation. We call this alternative theoretical model the *model of multiple diversity governance,* which helps to overcome the consequences of the conflation of epistemology and ontology in the form of natural and ideological fallacies and their paradoxes.

Theoretically, this model is based on several multiplicities. These are:

- multiperspectivity (the epistemological level);
- multidimensionality (the ontological level);
- multifunctionality (the empirical level).

Methodologically, we make use of the *method of triangulation*, known by students of geodesy, in order to overcome the ideologically predetermined dichotomies of civic–ethnic,

universal–particular, public–private, and politics–culture, which form the structural backbone of the meta-theory of monist-identitarianism. Thereby we construct triadic structures such as liberty – equality – diversity or human dignity – liberty – equality in order to identify the theoretical possibilities of how to combine social categories with normative principles and institutional arrangements and thereby preserve and foster social, political and cultural *pluralism*.

What are the moral and empirical foundations for such an approach? Instead of the monist-identitarian paradigm and dichotomy of identity–difference, our model of multiple diversity governance is based on the *concept of human dignity* as a necessary point of reference for the *interpretation* of *normative principles* and the *construction* of *institutional arrangements*. Thus, the concept of human dignity is not an 'empty idea' as analysts of the casuistry in the case law of apex courts argue, but has to be seen in light of our model of multiple diversity governance. Therefore:

- human dignity is, first and foremost, the *epistemological precondition* for the cosmopolitan 'imagination' (Delanty 2006) of universal human rights without which any political and legal discourse about public law and the rule of law would be meaningless; thus,
- human rights as a legal expression of human dignity such as the right to life, physical and psychical integrity, liberty and the various liberal freedoms of religion, speech and association, *ontologically* form the 'coupling structure' (Luhmann) between law and politics as subsystems of social systems as a whole; and
- *empirically* we can observe the ongoing *universalisation* of international human rights catalogues, including the establishment of what we call the limits of tolerance across different cultures or civilisations. Additionally, the reference to human dignity can establish a not only comprehensive but also firm *normative grounding* of a morally persuasive philosophy and political theory of pluralism against the, otherwise possible, reproach of cultural relativism.

Moreover, cosmopolitan pluralism is also the underlying philosophy and legal theory for the ongoing norm contestation in terms of a permanent norm-generative cycle between European apex courts at all territorial levels in their interpretations of sovereignty and/or constitutional identity, either by referring to the national identities of the respective nation states or to human dignity. Thus, what we observe in the so-called constitutional dialogue between apex courts within nation states or between the ECtHR and the ECJ with national courts in light of their respective sovereignty claim to have the final say in the case at hand, can only be adequately understood by conceptualisation as 'constitutional pluralism' (Walker 2016). Taken together, cosmopolitan pluralism and constitutional pluralism can then be seen as the heterarchical, nonetheless comprehensive *descriptive* as well as *normative theory* of 'cosmopolitan constitutional pluralism' against the traditional notions of polity and territory-fixed legal theories of monism versus dualism of national and international law and the respective normative hierarchies created thereby.

Finally, we come full circle following from our model of social and political ordering when we ask the question of how the triangulation of dignity–liberty–equality can be translated into institutional arrangements. The concept of individual self-determination which follows from the triangulation of the principles of liberty and equality and their mutual relationship

through the concept of human dignity, is the concept of *positive liberty* in terms of autonomy and thus freedom from domination, but not negative liberty as freedom from interference by any others. In this respect, individuals do not possess sovereign power in a state of natural affairs, as liberal contractarian philosophies postulate, but they are autonomous, constrained not only by the establishment of a civil state among themselves as equal citizens, but by the mutual respect for their equal dignity which follows from their moral status as human beings. From this conceptualisation of the normative principles of dignity, liberty and equality, collective forms of self-determination in the form of institutional arrangements follow. Hence, only collective autonomy, either in the form of territorial or cultural (i.e. functional) autonomy as self-governance entrenched in public law *and* integration through political representation and participation, establish the functional requirements for the possibility to successfully reconcile political unity with legal equality and multiple diversities. Moreover, *autonomy and integration* are not static states of affairs which can simply be achieved once and for all. Quite contrary, we have to understand the functional and structural institutional elements of this model from the perspective of a *dynamic equilibrium*: the permanent pendulum swing between integration and disintegration of cultures, groups, societies, states or civilisations. Only such a perspective can help us to find the right direction again in the permanent processes of norm contestation *between* law and politics.

At the end of this textbook, we hope that students of the very broad field of studies in human and minority rights protection can make multiple use for their own research of this panoramic view, which we have tried to present with our interdisciplinary methodological perspective. We hope that this book will not only serve as a resource for many details of law in the books and law in practice, but will also provide sound theoretical and methodological knowledge to ask the right questions, to develop a sound analytical framework and not to forget to mistrust all facts and knowledge that is declared self-evident. In this way, we hope, this book will give many incentives for fresh thinking and will also serve, with all the new ideas, concepts and models presented, as a research agenda for the future.

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Lithuania

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Index

Note: Page numbers in *italics* and **bold** denote figures and tables, respectively; and those with a 'b' denote boxes.

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