

Csongor István Nagy, *Is minority language a right or a privilege? European institutions' contribution to the decline of linguistic diversity*, 47(2) *Language Problems and Language Planning* 136-159 (2023).

The numbers in the text refer to the page-numbers in the final publication.

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Is minority language use a right or a privilege? European institutions' contribution to the decline of linguistic diversity

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Abstract

This paper demonstrates how European institutions bend to the idea of the mono-ethnic and monolingual nation-state. Instead of encouraging the use of minority languages and accepting them as a value, minority languages are treated as a tolerated but voluntarily assumed handicap. This is in stark contrast to the treatment of other types of protected identities, such as religion, gender and sexual orientation. Against this background, there is a desperate need for clear value-setting by the European institutions and for a clear message that language shaming is not a venial sin of the monolingual nation-state but a no-go zone even for populists. For this, however, language chauvinism should not be condoned but condemned.

1. Introduction

Besides its coercive function manifested through enforceable rules, the law also has an important expressive effect: it reinforces and even shapes societal values and social patterns. The function of the international legal regime on linguistic minorities, and particularly on languages of minorities, is not only to provide legal remedy in individual cases, but also to convey messages to the society.

This paper demonstrates that, either explicitly or implicitly, European institutions treat language rights rather as a “privilege” than a fundamental “right.” Although, at least formally, ethnic minorities are subject to enhanced legal guarantees 137* that go beyond baseline human rights protection,¹ under the discursive surface, the attitude of European institutions bends to the idea of

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the monolingual nation-state and treats language identity as an identity that is tolerated rather than promoted. Language rights are often conceived as a privilege accorded by the state and not a right (that is, not a protected but a tolerated identity), which is in stark contrast with the treatment of other types of protected identities, such as religion, gender and sexual orientation.

This attitude has an unfortunate impact on national language policies, as it not only sets the law but also sets (or fails to set) international values. This paper demonstrates that the indifference of the European institutions, against the backdrop of unsupportive or even restrictive state policies, eventually contributes to the decline of minority languages. By failing to offer a clear symbolic endorsement of language rights, which would require treating them as a fundamental right and not as a privilege, European institutions miss an important opportunity to provide an impetus for social attitudes and state-level political choices in favor of minority languages.

The paper is structured as follows. Section 2 presents the idea of monolingual nation-state, its recognition in Europe and how it makes, by definition, minority languages second-ranked. Section 3 presents three institutional attitudes to minority languages: the ostrich policy of turning a blind eye, the outspoken disregard of binding international standards and the implicit suppression of these standards by means of “legal interpretation.” Section 4 sets out the paper’s conclusions and proposals.

2. The idea of the monolingual nation-state

The identity of a polity has been defined by a varying set of features (e.g. race, religion, gender, sexual orientation, ethnicity, language).² These features have determined who could be regarded as “first-class” citizen (that is, who could enjoy the full spectrum of rights and the full recognition of his or her dignity) and, indirectly, the characteristics of the polity. The number of these defining features has been declining but the process has never gone so far as to make the state completely neutral by discarding the predominance of an ethnicity and language (or particular ethnicities and languages).³ A 138* few centuries ago, a good citizen was expected to be white, the follower of the state religion, heterosexual, of the dominant ethnicity and speak the state language, preferably as a native speaker. This set of features no longer defines first-class citizenship, with the exception of ethnicity and language. After all, if the state had no ethnic and language preference, it would no longer be a nation-state, but a state of all its citizens.⁴ Ethnicity, in this regard, is not necessarily connected to biological descent and embraces a “cultural package,” including adherence to a national mythology.

“Law and Competitiveness” research group. The author is indebted to János Fiala-Butora, Bálint Kovács, András László Pap, Balázs Tárnok and the two anonymous reviewers for their comments. Of course, all views and any errors remain the author’s own.

¹ For an overview and analysis, see Björn Arp, *International Norms and Standards for the Protection of National Minorities: Bilateral and Multilateral Texts With Commentary* (Brill, 2008). As to definition of “ethnic” and “national” minorities, see András L. Pap, *Genealogy in Law as a Technology for Categorizing, Contesting and Deconstructing Monoracialism*, 7(1) *Genealogy* 1, 3-4 (2023).

² Dmitry Kochenov, *Citizenship* 88-104 (MIT, 2019).

³ For a historical account of the regulation of language use in Europe, see Noémi Nagy, *A hatalom nyelve – a nyelv hatalma* 39-197 (Dialóg, 2019).

⁴ János Kis, *Túl a nemzetállamon*, in *Az állam semlegessége* 129-185 (Atlantisz Kiadó, 1997) (Arguing the a nation-state by definition cannot be ethnically neutral.).

The above concept of the mono-ethnic and monolingual nation-state (hereafter referred to jointly as “monolingual nation-state”) has important repercussions. Race, religion and sexual orientation no longer define the polity and determine who can be a first-class citizen, but ethnicity and language do. This implies that only the dominant ethnicity and language can have top-rank status, all other ethnicities and languages are tolerated to a varying degree. When developed, the concept of the monolingual nation-state limited discrimination and opened the perspective of emancipation to several suppressed social groups, making them part of the political community. However, this inclusion came with a condition: the abandonment of the minority ethnic and language identity.

In this context, language is not only an instrument of communication whose treatment is determined by considerations like practicability, effectiveness of communication and manageability. But also, language is a sign of power and dominance, which expresses allegiance to and identification with the polity.

Probably the most expressive and concise definition of the monolingual nation-state was provided by Clermont-Tonnerre⁵ during the French Revolution. A debate emerged in the French Parliament (États généraux) about the status of non-Catholics under the new regime, which extended to the status of Jews. Clermont-Tonnerre offered full emancipation at the price of full assimilation.

“We must refuse everything to the Jews as a nation and accord everything to Jews as individuals. (...) They must be [French] citizens individually. But, some will say to me, they do not want to be citizens. Well then! If they do not want to be citizens, they should say so, and then, we should banish them.”

The quote very well demonstrates how the monolingual nation-state blended inclusion and exclusion. On the one hand, it had a historical merit. It discarded religion and race as defining traits of national identity, which made it possible for minority communities to become first-class citizens. The monolingual nation-state does not require its citizens to change attributes that cannot be changed **139*** physically (such as race) and it tolerates changeable attributes that no longer belong to the state’s identity (religion). Jews were not even required to convert to Catholicism (state religion was abandoned in France in the wake of the revolution anyway). This made first-class citizenship a question of choice and ruled out the most blatant forms of discrimination. On the other hand, those insisting on their separate ethnicity and language were excluded from the political nation. Put simply, minorities could be first-class citizens once they were no longer minorities. The offer of assimilation in exchange for full emancipation invited the biological being and required the cultural being to be left behind. Persons belonging to a minority were not to be discriminated against being able to speak a minority language but for speaking it. This attitude is very well

⁵ “Speech on Religious Minorities and Questionable Professions” (23 December 1789). Reproduced in Lynn Hunt, *The French Revolution and Human Rights: A Brief Documentary History* 86-88 (Boston/New York: Bedford/St. Martin’s, 1996).

expressed by the infamous French school warning of the “vergonha”⁶ era which equated speaking Breton (and any minority language) with spitting.⁷

Inclusion as understood by the monolingual nation-state can be described with Henry Ford’s famous quote about the Model T. Henry Ford introduced the “assembly line” to construct motor vehicles. This made the product cheaper but, at the same time, eliminated consumer choice, as all the cars had the same design and the same color (black). When criticized for that, Henry Ford smartly riposted that “any customer can have a car painted any color that he wants, so long as it is black.”⁸

The idea of the monolingual nation-state theoretically belongs to the past. Although states have their own ethnic and language identity, international treaties, at least theoretically, provide for the protection of ethnic and language minorities and this protection extends not only to the biological but also to the cultural being. Not only must a minority person not be discriminated against being a minority, but they are also entitled to express and manifest their ethnic and language identity.⁹

Still, in reality, the monolingual nation-state determines the application of legal rules either explicitly or implicitly. Language and ethnicity are one of the various protected identities and, as such, are supposed to have a rank equal to religion, gender and sexual orientation. What is more, they are (at least formally) subject to enhanced legal guarantees that go beyond baseline human rights protection (such as the Framework Convention for the Protection of National **140*** Minorities and the European Charter for Regional or Minority Languages).¹⁰ In reality, however, Europe appears to have side-lined language rights.

In *Mentzen v. Latvia*,¹¹ in the context of name rights, the European Court of Human Rights (ECtHR) pronounced that “the official language is, for (...) [some] States, one of the fundamental constitutional values in the same way as the national territory, the organisational structure of the State and the national flag.” It takes only one step to get from the idea that the state language is at the heart of national sovereignty (just like national territory) to the view that giving room to a language different from the state language is tantamount to the loss of sovereignty.

In *Lautsi v. Italy*,¹² a chamber of the ECtHR ruled that the requirement of Italian law that crucifixes be displayed in classrooms violated the European Convention on Human Rights (ECHR). The judgment was overturned by the Grand Chamber on account of intruding into the core of state identity. The crucifix could not be displayed as a religious symbol, as states can have no religious

⁶ Vergonha means “shaming” in Occitan and refers to the era when the French government used various discriminatory policies to suppress and stigmatize the speakers of minority languages. See Julie Tetel Andresen & Phillip M. Carter, *Languages In The World: How History, Culture, and Politics Shape Language* 73 (John Wiley & Sons, 2016).

⁷ “It is forbidden to spit on the ground and speak Breton.” See Elmar Ternes, *The Breton Language*, in *The Celtic Languages* 377 (Donald MayAulay ed, Cambridge University Press, 1992).

⁸ Samuel Crowther & Henry Ford, *My Life and Work* by 72 (Doubleday, 1922).

⁹ See Article 7(2)-(4) of the European Charter for Regional or Minority Languages; Articles 4 & 6(2) of the Framework Convention for the Protection of National Minorities.

¹⁰ See Björn Arp, *International Norms and Standards for the Protection of National Minorities: Bilateral and Multilateral Texts With Commentary* (Brill, 2008).

¹¹ *Mentzen v. Latvia*, no. 71074/01 (decision 7 December 2004).

¹² *Lautsi and others v. Italy*, no. 30814/06 (judgment of 3 November 2009).

identity. But it can be displayed as an ethnic symbol, as states can have an ethnic identity.¹³ As Judge Bonello put it in his concurring opinion: the symbol was “imprinted on the national identity” and was part of the “cultural personality” of the Italian nation.

3. Three methods of denying language rights

The European reaction to minority languages features a salient contradiction. On the one hand, there is a general mantra that languages are values and are to be protected, and minorities have the right to use their language and to express and manifest their ethnic and language identity. In other words, they are protected as cultural beings and their language rights are formally recognized. The protection of ethnic and language minorities, at least on the level of statutory language, goes beyond the standard human rights protection and they are afforded rights that could not be derived from general human rights law. On the other hand, in terms of practice, language rights are either knowingly overlooked by the European **141*** institutions or are treated as a privilege or a voluntarily assumed handicap. Minority languages give rise to second-rank identities and entail a legally tolerated burden at a time when being bi- or multilingual involves extra efforts by itself.

There is a stark contrast between what European institutions claim and what they actually do in terms of protecting language rights. Although lip service is paid to the preservation of language identity, it is suppressed by the predominant consideration of the monolingual nation-state. Notwithstanding the law in the books, the real message to the society is conveyed by the law in action. European institutions have developed various creative techniques to avoid the application of the enhanced standards protecting language minorities.¹⁴ First, European institutions may hide behind procedural and technical evasions to avoid the merits of controversies. Second, at times, they may outspokenly disregard the law. Third, as a more sophisticated way of disregard, they may avoid the confrontation with the idea of monolingual nation-state by means of tendentious interpretation. Although interpretive discretion provides an effective cover, a cross-category benchmarking showcases that ethnic and language identity is denied the protection that is outright afforded to other protected identities.

3.1. Ostrich policy: “whereof one cannot speak, thereof one must be silent”¹⁵

¹³ Brett G. Scharffs, Kokkinakis and the Narratives of Proper and Improper Proselytizing, in *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis* 155, 177 (Jeroen Temperman, T. Jeremy Gunn, Malcolm D. Evans ed, Brill, 2019) (“An observer of the Court’s work could be forgiven for concluding that the Court is acting in an unprincipled and ad hoc manner, invoking distinctions that do not exist in the law when it suits their purpose, making sweeping conclusions about what is proper and improper, and reaching contradictory conclusions about the proselytising effect of overt but silent religious symbols.”)

¹⁴ It seems that in this field the sharp divergence between law in the books and law in practice is a more general phenomenon. See Anna K. Meijknecht, *Minority Protection: Standards and Reality: Implementation of Council of Europe standards in Slovakia, Romania and Bulgaria* (T.M.C. Asser Press, 2004); Emma Lantschner, Sergiu Constantin, Joseph Marko (eds), *Practice of Minority Protection in Central Europe* (Nomos, 2012).

¹⁵ Ludwig Wittgenstein, *Logisch-philosophische Abhandlung*, 14 *Annalen der Naturphilosophie* 185-262 (1921). For a translation see Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, translated by C. K. Ogden, 27 (Dover Publications, 2012).

Complaints rejected on procedural grounds do not visualize substantive problems and are treated as if they had never existed. These decisions are usually not published and are difficult to present as a form of policy attitude, given that, at least formally, they focus on technical legal issues.

The ECtHR's decision in *Pereszlenyi v. Slovakia*¹⁶ is an epitome of this technique. Slovakia's media authority fined a local television station for airing a report on a car accident where two witnesses talked live in Hungarian without providing Slovak subtitles. According to the Slovak Language Law,¹⁷ regional television stations, including private ones, can broadcast in the minority language only if they provide Slovak subtitles or repeat the program in Slovak. Mr. Pereszlenyi, the head of the television station, lodged a complaint with the ECtHR. It claimed that 142* the requirement of subtitling generated extra costs for minority televisions and it was impossible to comply with in case of live broadcasting. The ECtHR rejected the application on formal grounds that went against its own settled practice.¹⁸

Surprisingly, the decision came after six years, while rejections on formal grounds usually occur within a year and the Court endeavors to issue substantive judgments within three years.¹⁹ The bizarre treatment of the case raises perplexing questions, especially if taking into account that the ECtHR has not admitted any case concerning the Slovak Language Law in the last 28 years since its adoption.

In light of the ECtHR's controversial attitude, it may not come as a surprise that European political bodies are even more reluctant to take up the cases of language minorities.²⁰ On the one hand, denying these rights would be a blatant violation of the law and would seriously undermine their integrity. On the other hand, the suppression of linguistic minorities is a very sensitive issue, which may evaporate over the years if these minorities assimilate and trade their language with the state language.

¹⁶ *Július Pereszlenyi-Servis TV-Video v. Slovakia*, no. 25175/15 (decision of 25 May 2021). See János Fiala-Butora, Linguistic discrimination as a social, legal, and human rights phenomenon, 73(3) *Jazykovedny Casopis* 285, 290-291 (2023).

¹⁷ Act No. 270/1995 on the State Language of the Slovak Republic. *Zákon č. 270/1995 Z. z. - Zákon Národnej rady Slovenskej republiky o štátnom jazyku Slovenskej republiky* (v znení č. r1/c95/1995 Z. z., 260/1997 Z. z., 5/1999 Z. z., 184/1999 Z. z., 24/2007 Z. z., 318/2009 Z. z., 35/2011 Z. z., 204/2011 Z. z., 373/2013 Z. z., 125/2016 Z. z., 264/2022 Z. z.). For an overview on the use of minority languages in Slovakia, see Liudmila Mikalayeva, Guido Schwellnus, Lilla Balázs, The Revocation of Minority Protection Rules in New EU Member States Language and Education Policy in Slovakia and Latvia, 364(2) *L'Europe en Formation* 379 (2012); Ágnes Vass, If Yes, Why Not? Minority Language Use and Accommodation of Minority Language Rights in Slovakia, 8 *Acta Universitatis Sapientiae, European and Regional Studies* 43-56 (2015).

¹⁸ The interpretation of the procedural rules in *Pereszlenyi v. Slovakia* is irreconcilable with the Court's several earlier decisions and judgments. See e.g. *Andrášik and Others v. Slovakia* (decision, no. 57984/00, 22 October 2002); *Orange Slovensko, a. s. v. Slovakia* (decision, no. 43983/02, 24 October 2006; *Mazurek v. Slovakia* (decision, no. 16970/05, 3 March 2009; *Bubláková v. Slovakia* (judgment, no. 17763/07, 15 February 2011.).

¹⁹ See The ECHR in 50 questions 9 (European Court of Human Rights, 2021), available at https://www.echr.coe.int/documents/50questions_eng.pdf; European Court of Human Rights, Annual Report 2021 8 (Council of Europe – European Court of Human Rights, 2022), available at https://www.echr.coe.int/Documents/Annual_report_2021_ENG.pdf.

²⁰ For a presentation of the “formalistic, superficial and dismissive” attitude of the Advisory Committee on the Framework Convention for the Protection of National Minorities, see János Fiala-Butora, Implementation of the Framework Convention for the Protection of National Minorities and the European Language Charter: unified standard or divergence?, (2) *Hungarian Journal of Minority Studies* 7 (2019).

The saga of the Minority SafePack, which aimed to make the protection of national, ethnic and language minorities part of EU law, eloquently demonstrates the deep dilemma of the EU's political institutions.²¹ In the first round, the European Commission refused to register the European Citizens' Initiative for the EU "manifestly lacking legislative powers" in the field. This decision was quashed by the EU General Court.²² After the Commission registered the Initiative and the required signatures were collected, in the second round, the European Commission refused to propose a legislative act, claiming that the subject was satisfactorily regulated in EU law.²³ The 143* Commission's controversial reasoning raised serious concerns. How is it possible, as the Commission claimed, that the EU has no legislative power over the subject, yet, satisfactorily legislated in the field?

The Commission's decision is all the more confusing because the European Citizens' Initiative is an important element in the Commission's efforts to bring the EU closer to its citizens and increase its democratic legitimacy, which has not really lived up to the expectations. The Minority SafePack was only the sixth successful initiative since the introduction of this instrument by the Treaty of Lisbon in 2007. The Commission was, however, ready to sacrifice this important policy goal to increase the EU's popular support in order to avoid the issue. The decision went against the European Parliament's position, which backed the initiative with three-quarters majority,²⁴ and came at a substantial political cost. The initiative was supported by a number of national parliaments, such as the Bundestag, the Dutch parliament and the Hungarian national assembly, 1 123 422 signatories and approximately 50 EU million citizens (12% of the EU's population) belonging to national minorities.²⁵

²¹ For an overview of the EU's failure to provide for an adequate protection of national minorities, see Dimitry Kochenov, A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection, 31 Boston College International and Comparative Law Review 1 (2008).

²² Case T-646/13 *Bürgerausschuss für die Bürgerinitiative Minority SafePack – one million signatures for diversity in Europe*, ECLI:EU:T:2017:59.

²³ Communication on the European Citizens' Initiative Minority SafePack – one million signatures for diversity in Europe, C(2021)171. Although EU law is adopted by three legislative bodies jointly (Commission, European Parliament, Council), only the Commission has the power to put the legislative process in motion by making a legislative proposal. The Commission's decision was attacked again before the Court of Justice of the European Union (CJEU). The General Court rejected the claim. Case T-158/21 *Citizens' Committee of the European Citizens' Initiative 'Minority SafePack – one million signatures for diversity in Europe' v European Commission*, ECLI:EU:T:2022:696. The judgment was appealed to the CJEU. Case C-26/23 P *Minority SafePack – one million signatures for diversity in Europe v Commission*.

²⁴ Press Release: "Minority SafePack": Parliament supports proposals for diversity across EU (17 December 2020), available at <https://www.europarl.europa.eu/news/en/press-room/20201211IPR93639/minority-safepack-parliament-supports-proposals-for-diversity-across-eu>.

²⁵ Federal Union of European Nationalities, Minority SafePack: The European Commission turned its back on national minorities (14 January 2021), available at <https://www.fuen.org/en/article/Minority-SafePack-az-Europai-Bizottsag-cserbenhagya-az-oshonos-kisebbsegeket> ("The Commission rejected the request of those for whom preserving Europe's linguistic and cultural heritage is not merely a good-sounding slogan, but a daily challenge. The position of the Commission is nothing more than a patronizing pat on our shoulders, while 1 123 422 signatories were waiting for concrete measures and actions. The Commission has now let down the approximately 50 million citizens of the Union who belong to national and linguistic minorities. Millions of them live in a situation of inequality in their own country already, now the European Commission, which is supposed to be the guardian of democracy, the rule of law, dignity, and justice, is also turning its back on them.").

Probably, the most astonishing example of ostrich policy is the contemporary application of the Beneš Decrees in Slovakia, which provide, among others, that the property of ethnic Hungarians and Germans can be confiscated without compensation.²⁶ The Beneš Decrees were adopted after the Second World War and the Czech Republic and Slovakia were admitted to the EU under the premise that they “no longer produce legal effects.”²⁷ In reality, however, the decrees have never been repealed. Quite on the contrary, they were confirmed and declared untouchable by the Slovak Parliament in 2007. Slovakia is still applying these explicitly discriminatory ethno-racist provisions to confiscate the property of ethnic Hungarians. One of these cases has reached the ECtHR in *Bosits v. Slovakia*, where the Court decided for the applicant on a fair-trial **144*** basis.²⁸ The Beneš Decrees have also been used to confiscate about 40 plots to build the D4 highway. The perversity of the latter is that the EU is financing the project through the European Investment Bank. In these cases, the Slovak state uses “grandfathering:”²⁹ the ancestors of the owners were ethnic Hungarians, hence, the property should have been taken from them without compensation, if it had been taken, the owners would not have it today.

What is interesting in this case is not the diabolic nature of ethno-racism, but the European Commission’s insensible reaction. The Beneš Decrees have been the subject of various petitions³⁰ in the European Parliament,³¹ but the Commission went to great length to duck the question. It refused to take any action and maliciously referred the victims to the Slovak authorities to have their fundamental rights protected. That is, the Commission suggested that the victims seek remedy before the very authorities that discriminated them because of their ethnicity. The Commission based its conclusion on two bogus arguments. First, it noted that the case did not come under the scope of EU law, although the victim in *Bosits v. Slovakia*, as the descendant of the original owner, was a Hungarian citizen and domiciliary, hence, it was a cross-border matter. Second, it purported that the Beneš Decrees were no longer applied in Slovakia, although the ECtHR’s judgment in *Bosits v. Slovakia* clearly confirmed just the opposite.

In another case, Slovakia provided restitution for property confiscated during the socialist era but limited this to those who had Slovak citizenship and place of residence. These requirements amounted to a salient violation of EU law, as they involved express discrimination based on citizenship. Furthermore, the law was discriminatory also on the basis of ethnicity: as a lot of

²⁶ Decision No 104/1945 of the National Council of the Slovak Republic on the confiscation and accelerated redistribution of agricultural property owned by Germans, Hungarians and the traitors and enemies of the Slovak nation, and the related Dekret presidenta republiky 12/1945 ze dne 21. června 1945 o konfiskaci a urychleném rozdělení zemědělského majetku Němců, Maďarů, jakož i zrádců a nepřátel českého a slovenského národa.

²⁷ See Joint Statement on the Benes Decree, IP/02/588, Brussels, 11 April 2002, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_02_588/IP_02_588_EN.pdf.

²⁸ *Bosits v. Slovakia*, no. 75041/17 (judgment of 19 May 2020).

²⁹ Balázs Tárnok, Slovakia Still Applying the Beneš Decrees – Principle of Collective Guilt in the European Union (15 July 2020), available at <https://eu Strat.uni-nke.hu/hirek/2020/07/15/slovakia-still-applying-the-benes-decrees-principle-of-collective-guilt-in-the-european-union>

³⁰ Balázs Tárnok, EP committee demanding action of the European Commission on the Beneš Decrees (27 January 2021), <https://eu Strat.uni-nke.hu/hirek/2021/01/27/ep-committee-demanding-action-of-the-european-commission-on-the-benes-decrees>

³¹ See e.g. Question for written answer to the Commission nr. E-001388/2021, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-001388_EN.html, and the Commission’s answer, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-001388-ASW_EN.html; Question for written answer to the Commission nr. E-003262/2021, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-003262_EN.html.

Germans and Hungarians were expelled from Slovakia after the Second World War, the exclusion mainly affected them. The victims had two avenues to have their rights enforced under EU law. They could assail the law before Slovak courts and request them to submit a preliminary question to the CJEU. Unfortunately, although obliged under EU law, the Supreme Court of Slovakia refused to make a reference.³² Hence, the only chance of the victims was to have resort³³ to the Commission and seek³⁴ its intervention. Unfortunately, the Commission refused to act for geopolitical reasons.³⁵ The reaction was staggering, as it was clear that the Commission was the victims' last hope and the exclusion of the citizens and domiciliaries of other Member States amounted to a flagrant violation.

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3.2. Outspoken disregard of the law

The treatment of the Slovak Language Law by the OSCE High Commissioner on National Minorities provides a good example of how a European institution defies the law to evade a complaint about language rights. The 2009 amendment to the Law heavily restricted (or as the Economist put it: "criminalized"³⁶) minority languages in Slovakia.³⁷ One of the most appalling provisions of the amendment was the prohibition to use of minority languages in official communication in areas where the minority makes up less than 20% of the population, including, for instance, communication between doctors and patients in public hospitals.³⁸ The debate generated by the 2009 amendment reached the OSCE High Commissioner on National Minorities, whose very function is to protect and advocate for minority rights. Nonetheless, High Commissioner Knut Vollebaek was quick to pronounce the law in conformity with international law and standards.³⁹ His statement came as a staggering disappointment and went against, for

³² Question for written answer to the Commission nr. E-002657/2021, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-002657_EN.html.

³³ Question for written answer to the Commission nr. E-002655/2021, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-002655_EN.html.

³⁴ Question for written answer to the Commission nr. E-002657/2021, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-002657_EN.html.

³⁵ Joint answer given by Mr Reynders on behalf of the European Commission to written question nr. E-001533/2020, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-002655-ASW_EN.html

³⁶ Hovorte po slovensky! Slovakia criminalises the use of Hungarian (The Economist, 30 July 2009), available at https://www.economist.com/world/europe/displayStory.cfm?story_id=14140437

³⁷ For an overview of the 2009 amendment, see Lukasz Wardyn & Jan Fiala, The 2009 Amendment of the Slovak State Language Law and Its Impact on Minority Rights, 29 Polish Yearbook of International Law 153 (2011). The Law as originally adopted established financial penalties for the use of languages other than the state language. These penalties were abolished in 1999 (184/1999 Z. z.), but re-introduced in 2009 (318/2009 Z. z.). In 2011, the financial penalties were reduced but not abolished (35/2011 Z. z.).

³⁸ See European Commission for Democracy through Law (Venice Commission), Opinion no. 555/2009 (Strasbourg, 8 October 2010), paras 48-57.

³⁹ Opinion of the OSCE High Commissioner on National Minorities on Amendments to the Law on the State Language of the Slovak Republic, the Hague, 22 July 2009. See Amendment to the Act on the State Language of the Slovak Republic (Non-Paper), HDIM.DE/0213/09 (1 October 2009), available at <https://www.osce.org/files/f/4/39022.pdf>. The statement of the High Commissioner may have been influenced by the consideration that the dispute surrounding the Slovak Language Law raised no security threat. For the changing justifications and rationale of the protection of national minorities, see Athanasia Spiliopoulou Åkermark, Justifications of Minority Protection in International Law (Brill, 2021).

instance, the opinion of the Venice Commission,⁴⁰ which identified various points where the language restriction violated international law. As to the use of minority languages in public hospitals, the Venice Commission pointed out that such restrictions had been pronounced to violate international law already in *Diergaardt et al. v Namibia*.⁴¹ Here, the UN Human Rights Committee condemned a governmental instruction for civil servants not to reply to the written or oral communications, including simple telephone conversations, with the authorities in the Afrikaans language and found it to violate Article 26 of the International Convention on Civil and Political Rights. This decision predated the OSCE High Commissioner's whitewashing declaration. It is difficult to imagine that if the 2009 amendment to the Slovak Language Law violated the general standards under international law, it did not violate the enhanced European standards. 146*

Interestingly, EU institutions also remained silent in the matter, although the Commission acknowledged that the 2009 amendment affected interstate trade and restricted free movement within the internal market.⁴² Nonetheless, instead of enforcing the law (and the EU's founding values recognized in Article 2 TEU), the Commission created a separate portfolio for the protection of linguistic diversity. The Commissioner for Multilingualism functioned between 2007-2010 and kept on closing his eyes to the language restrictions.

3.3. Cross-category benchmarking: can antidiscrimination law be discriminatory?

There is a salient difference between the effective treatment of language and other types of protected identities, such as religion, gender and sexual orientation. EU institutions treat language and ethnicity-based discrimination leniently and are deferential in accepting states' justifications. Contrary to other protected identities, they protect only language origin but not language identity (expression of language identity).

The ECtHR case-law is the baseline of human rights protection in Europe. It is supposed to shelter several protected identities (e.g. race, gender, sexual orientation, religion, language), without establishing any ranking among them.⁴³ Nonetheless, the ECtHR has treated ethnicity and language in a significantly less protective manner than other protected identities.⁴⁴

⁴⁰ European Commission for Democracy through Law (Venice Commission), Opinion no. 555/2009 (Strasbourg, 8 October 2010).

⁴¹ *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia* (No. 760/1997) (6 September 2000).

⁴² Opinion on the Implementing Principles to the Slovak State Language Law Prepared by the European Commission's Legal Service (2010), available at <https://perma.cc/C5PJ-9G2G>. See Csongor István Nagy, Do European Union Member States Have to Respect Human Rights? The Application of the European Union's 'Federal Bill of Rights' to Member States, 27(1) *Indiana International & Comparative Law Review* 1, 2 (2017).

⁴³ See Article 14 of the ECHR.

⁴⁴ For a general overview of the case-law of ECtHR on language minorities, see Noémi Nagy, "Nesze semmi, fogd meg jól": A nemzeti kisebbségek nyelvi jogainak védelme az Emberi Jogok Európai Bizottságának és Bíróságának joggyakorlatában, (3) *PRO MINORITATE* 3 (2020). For a comparison between the case-law of the ECtHR and the CJEU, see Noémi Nagy, Language rights as a sine qua non of democracy – a comparative overview of the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union, (2) *Central and Eastern European Legal Studies* 247 (2018).

The ECtHR dealt with name rights in a number of cases, but has refused to establish a right to have one's name registered in the mother tongue.⁴⁵ Linguistic minorities have to live with a double name: in private life, they use their own name, in the "official sphere," they are referred to with its state language equivalent. Although the Court recognized that a person's name is part of private and family life and not registering it in the minority language may be discriminatory, it concluded that this is a question of state language policy, which is an unreviewable state competence.⁴⁶ In *Mentzen v. Latvia*, the Court bluntly pronounced 147* that "each Contracting State is at liberty to impose and to regulate the use of its official language or languages in identity papers and other official documents."⁴⁷

In *Ádám and other v. Romania*,⁴⁸ the ECtHR considered that learning in the minority language is a privilege and it is not against the ECHR to disadvantage pupils for making use of this privilege. If minorities want to be treated like the majority, they should not choose schools teaching in the minority language. In Romania, the final high school exam (baccalaureate) disadvantaged minority students mainly in two ways. First, they had to pass two extra exams (minority language and minority literature) within the same time-frame as majority students did. It has to be noted that the final high school exam contained two elective subjects (a professional subject of choice and a foreign language of choice). Romania could have eliminated the disparate treatment by allowing minority pupils to choose minority language and literature in place of one of the elective subjects, but refused to do so. Second, the exams on Romanian language and literature were the same for Romanian and minority students. The exam did not take into account that minority pupils were not native speakers and that their education was provided predominantly in the minority language. They were tested in the same way as Romanian native speakers.

The ECtHR acknowledged that the two extra exams constituted a burden, but found that minority students were free not to attend a minority school and they should be aware that if they choose to pursue studies in a minority language, they will be disadvantaged at the final high-school exam. They could have avoided the unequal treatment, if they had pursued their studies in the state language.

Likewise, the ECtHR acknowledged that testing Romanian and minority pupils under the same standards in Romanian language and literature entails a disparate burden and admitted that treating unequals equally amounts to discrimination, but bluntly refused to examine the issue as it considered it to come under unreviewable state competence. The Court held that "it is not its role to replace the State in deciding what subjects will be tested in the baccalaureate or the order and pace of the exams" and Romania is "better placed (...) to evaluate the local needs and conditions" and to decide if it provides equal treatment and opportunities.⁴⁹ The refusal to adjudicate the issue

⁴⁵ See *Mentzen v. Latvia*, no. 71074/01 (decision 7 December 2004); *Bulgakov v. Ukraine*, no. 59894/00 (judgment of 11 September 2007); *Baylac-Ferrer et Suarez c. France*, no. 27977/04 (decision of 25 September 2008). See, in this regard, Aistė Mickonytė, *The Right to a Name Versus National Identity in the Context of EU Law: The Case of Lithuania*, 42 *Review of Central and East European Law* 325-363 (2017).

⁴⁶ *Bulgakov v. Ukraine*, no. 59894/00 (judgment of 11 September 2007), para 43(a).

⁴⁷ *Mentzen v. Latvia*, no. 71074/01 (decision 7 December 2004), B.2.(b).

⁴⁸ Péter Varga, *Az Emberi Jogok Európai Bíróságának ítélete a nemzeti kisebbségi iskolák diákjai érettségi többletterhének ügyében*, 5(3) *Kisebbségi Szemle* 59-70 (2020).

⁴⁹ Para 93.

was controversial, as the Court, by referring the decision on the matter to the entity whose actions were objected to, made Romania judge in its own matter.

The Court's reasoning features a complete submission to the idea of the monolingual nation-state. First, contrary to the ECtHR's allegation, the possibility of education in the minority language was not a privilege but an internationally guaranteed right. Romania ratified the European Charter for Regional or Minority **148*** Languages and committed to provide education in the minority language up to the secondary level⁵⁰ and also committed not to discriminate pupils for making use of this possibility. Second, according to the statistics reproduced in the judgment itself, "the success rate in the Romanian language and literature exams was 17 to 18% lower for Hungarian language students than for their Romanian peers,"⁵¹ while in other subjects the success rate of Hungarian pupils was the same or even slightly higher. Third, the Court found that the disadvantage that minority pupils suffered was a consequence of their "conscious and voluntary choice to study" in the mother tongue and noted that they were not obliged to attend a minority school.⁵² Put it otherwise, minority students were not disadvantaged because of their language identity itself but because of the lawful expression of their language identity.

A cross-category examination reveals that the ECtHR does not treat language identity evenhandedly and denies it the treatment it otherwise affords to other protected identities. The Court has consistently held that the shelter enjoyed by protected identities also extends to the expression of these identities. Not only is discrimination for faith prohibited, but also discrimination for the expression of faith. Not only is discrimination for being homosexual prohibited, but also discrimination for pursuing a homosexual lifestyle. Nonetheless, as to language identity, the Court limited the legal protection to the identity itself and refused to extend it to the manifestation thereof.

It is unquestioned that the prohibition of discrimination based on sexual orientation also encompasses the prohibition of discrimination based on the expression of this sexual orientation. In *E.B. v. France*,⁵³ the applicant was refused approval for the purposes of adoption, because of her lesbian life. The ECtHR found this to violate the ECHR. Homosexuality as a protected identity implies that same-sex relationships (partnerships, civil unions) have to be recognized the same as opposite-sex relationships (though they do not need to be designated as marriage). According to the ECtHR, states have to afford to same-sex couples a status more or less comparable to marriage,⁵⁴ although they may choose not to label it as marriage⁵⁵ **149*** but civil union or registered partnership. Never has the ECtHR indicated that the homosexual life is a question of

⁵⁰ See Reservations and Declarations for Treaty No.148 – European Charter for Regional or Minority Languages, available at <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=148&codeNature=0>.

⁵¹ Para 8.

⁵² Para 101.

⁵³ *E.B. v. France*, no. 43546/02 (judgment of 22 January 2008).

⁵⁴ Case *Vallianatos and Others v. Greece*, nos. 29381/09 & 32684/09 (judgment of 7 November 2013); *Fedotova and Others v. Russia*, nos. 40792/10, 30538/14 and 43439/14 (judgment of 13 July 2021). In *Oliari and Others v. Italy*, nos. 18766/11 & 36030/11 (judgment of 21 July 2015), the same-sex couple married abroad but Italy provided no legal recognition of their relationship as a same-sex civil union. The ECtHR found this to violate the ECHR.

⁵⁵ Case *Schalk and Kopf v. Austria*, no. 30141/04 (judgment of 24 June 2010); Case *Hämäläinen v. Finland*, no. 37359/09 (judgment of 16 July 2014); Case *Chapin and Charpentier v. France*, no. 40183/07 (judgment of 9 June 2016).

choice and if homosexuals do not pursue it, they encounter no disadvantage. Nor did the Court say that homosexuals should live as homosexuals without their legal relationship being recognized by the law.

In the same vein, the ECtHR established in numerous cases that transgender people have the right to have their gender-conforming name registered and legally recognized.⁵⁶ The Court has never expected transgender persons to live with double names and accept an official name that is irreconcilable with their gender identity. According to the Court, living under a gender-discordant name violates the Convention, living under an ethnicity-alien name does not.

Religious freedom is protected in the same extensive way. Freedom of religion and the protection from discrimination implies not only the prohibition of discrimination for having a given religious faith but also the prohibition of discrimination for expressing that religious faith. In *Thlimmenos v. Greece*,⁵⁷ the applicant refused to enlist in the army for religious reasons and, hence, was convicted. A few years later, his appointment as a chartered accountant was refused because of his criminal record. The ECtHR found the latter a disproportionate consequence and stressed that “[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”⁵⁸ The state was expected to take into account that the applicant refused military service for religious reasons and should have treated him more leniently than those who refuse it for other reasons. In *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*,⁵⁹ the Court held that if the state confers a privileged status on places of worship, it cannot deny this privileged status from specified religious groups in a discriminatory manner.

The disparate treatment between language identity and other protected identities may be explained with the Court’s stance that states may not have a religiously or sexually determined identity, but are entitled to have an exclusive language identity. Although the ECHR makes absolutely no distinction between 150* the different protected identities and the Court is expected to apply the prohibition of discrimination in a non-discriminatory manner, it seems that it cannot resist the obsolete idea of the monolingual and mono-ethnic nation-state.

4. Conclusions

The faint and condoning reaction of European institutions to the violation of language rights gives rise to the impression that the expression of language identity, contrary to other protected identities, such as religion, gender and sexual orientation, is not protected as a fundamental right but merely by the grace of the monolingual nation-state. The current institutional practice, instead of

⁵⁶ *X and Y v. Romania*, nos. 2145/16 & 20607/16 (judgment 19 January 2021); *Y.T. v. Bulgaria*, no. 41701/16 (judgment of 9 July 2020); *A.P., Garçon and Nicot v. France*, no. 79885/12 (judgment of 6 April 2017); *S.V. v. Italy*, no. 55216/08 (judgment 11 October 2018). See Lena Holzer, Legal gender recognition in times of change at the European Court of Human Rights. ERA Forum 23, 165-182 (2022).

⁵⁷ *Thlimmenos v. Greece*, no. 34369/97 (judgment of 6 April 2000).

⁵⁸ Para 44.

⁵⁹ *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, no. 32093/10 (judgment of 2 December 2014), paras 48-49.

encouraging the use of minority languages and accepting them as a value, calls for the mere toleration of a self-imposed social handicap. With this, Europe misses a significant opportunity to set an international value and to provide a significant impetus for social attitudes in favor of minority languages. This is most unfortunate, given that language discrimination and language-shaming does not belong to the past.⁶⁰ The modern form of “verghona”⁶¹ can be sensed in countries with sizeable language minorities, where politicians may try to profit from social prejudices and chauvinism with the active assistance of ethnically biased courts. This is very well illustrated by the case of Gheorghe Funar. In a television debate organized during the presidential campaign of 2014, Mr Funar, a Romanian ultranationalist politician, called Hungarian the “language of horses” and promised to utterly ban it if elected president. The Anti-Discrimination Council condemned him but the Romanian Supreme Court quashed the fine. Staggeringly and absurdly, the Court claimed that the designation was not neither insulting, nor humiliating, because horses are “nice” animals.⁶²

The European reaction to the recent hate speech of Romanian President Klaus Iohannis is the epitome of the European denialism concerning language discrimination. President Klaus Iohannis wanted to cater to the ultra-nationalist Romanian voters: it humiliated the Hungarian community in Romania by mocking its language in a public speech and incited hatred by endorsing the conspiracy theory that they work to “secretly steal” the western half of Romania (which is **151*** a particularly absurd claim given that Hungarians account for 6,5 % of the population). President Iohannis reacted to a parliamentary proposal (tabled several years before) for regional devolution of power and extension of language rights and ripped open an old sore, as the conspiracy theory that “the Hungarians want to steal Transylvania” was one of the slogans with which the communist Romania justified the persecution and systematic discrimination of ethnic Hungarians. The Romanian Anti-Discrimination Council found that the discriminatory statement violated the human dignity of Hungarians in Romania and imposed a fine.⁶³ The decision was affirmed by the Court of Appeal in Bucharest⁶⁴ but it was finally quashed by the Romanian Supreme Court for being part of unreviewable political communication. Soon after his hate speech against a minority language, President Iohannis received the International Charlemagne Prize for, among others, the “protection of minorities and of cultural diversity.”⁶⁵ At the award ceremony, Charles Michel, President of the

⁶⁰ For an account of the language shaming practices and denial of public services, including emergency medical treatment, in Slovakia, see János Fiala-Butora, *Linguistic Discrimination and Linguistic Equality – Three Models of Coexistence*, MTA Law Working Papers 2022/10, available at <https://jog.tk.hu/en/mtalwp/linguistic-discrimination-and-linguistic-equality-three-models-of-coexistence>. States may use different less blatant but still unfair methods to discriminate against minorities. Linking certain rights to a particular minority percentage may appear to be reasonable but can be unfair in case of urban minorities. Similarly, administrative borders may be set deliberately in a way that disadvantages minorities under the percentage rule. See Bengt-Arne Wickström, *On the political economy of minority rights. Three ways to manipulate a minority: Goals, rules, and border poles*, 64 *European Journal of Political Economy* 1 (2020); Bengt-Arne Wickström, *Unstable Orders and Changing Minority Protection The Effects of Urbanisation*, in *Minority Rights and Liberal Democratic Insecurities* 76 (Anna-Mária Biró, Dwight Newman ed., Routledge, 2022).

⁶¹ Noémi Nagy, *A hatalom nyelve – a nyelv hatalma* 83-88 (Dialóg, 2019).

⁶² See “De ce a câștigat Gheorghe Funar procesul cu CNCD și udemeristul Tanczos Barna” (24 October 2022), available at <https://justnews.ro/de-ce-a-castigat-fostul-primar-al-clujului-gheorghe-funar-procesul-cu-cncd-si-udemeristul-tanczos-barna-dupa-ce-a-spus-ca-maghiara-e-limba-cailor/>.

⁶³ Decision nr. 443/20.05.2020.

⁶⁴ Civil judgment nr. 100 of 29 January 2021 of the Court of Appeal of Bucharest.

⁶⁵ *Begründung des Direktoriums der Gesellschaft für die Verleihung des Internationalen Karlspreises zu Aachen an den Präsidenten von Rumänien, Klaus Iohannis* (Karlspreis 2020/21), available at <https://www.karlspreis.de/en/news/charlemagne-prize-2020-21>

European Council, praised him for “vigorously and fervently defend[ing] the respect and inclusion of all minorities.”⁶⁶ One may wonder what should a politician do to become unworthy of the International Charlemagne Prize, if ethnically motivated hate speech and sheer language-shaming does not suffice?

Most minority languages are on the decline, many of them are on the verge of extinction. The socio-linguistic literature features various analyses and proposals as to how to counter this tendency and preserve languages and language diversity.⁶⁷ From the available policy options, moral approval by norm-setting institutions is clearly the cheapest means to vitalize language use. Unfortunately, however, European institutions have failed to make use of the expressive effect of the law to effectively set language diversity as a fundamental value and, thereby, missed an important opportunity to counter the decline of linguistic diversity.

⁶⁶ Speech by President Charles Michel at the award ceremony of the International Charlemagne Prize to Klaus Iohannis (2 October 2021), available at <https://www.consilium.europa.eu/en/press/press-releases/2021/10/02/speech-by-president-charles-michel-at-the-award-ceremony-of-the-international-charlemagne-prize-to-klaus-iohannis/>

⁶⁷ For instance, on the difficulties of maintaining a bilingual university curriculum, see Emőd Veress, Tízéves a Sapientia Erdélyi Magyar Tudományegyetem jogászképzése: mérleg és jövőkép, 68(9) Magyar Jog 531-537 (2021).