

THE PRINCIPLE OF TERRITORIALITY AND THE PRESERVATION OF THE NATIONAL AND LINGUISTIC IDENTITY OF PEOPLES

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heoretical reflection on the distinction between collective and individual human rights and on the description of their respective natures and contents seems to be gradually taking shape with more and more detailed studies, but the doctrine by which they are analysed still fails to realise that the march of recent history is towards the recognition of these collective rights. The consequences of the upheavals in the countries of the East as a result of increased respect for individual and collective human rights, then, are not very clear, though we can foresee a generalized increase in the recognition of and respect for all these rights. In spite of Croatia's bitter experience, it is likely that the general level of awareness as regards collective results will benefit, at least in Europe.

It's true that there are international legal texts that implicitly or explicitly deal with rights that can only be exercised by peoples. One emphatic example is the collective right *par excellence*, the right to free determination, clearly expressed in Article 1 of the International Agreement on Civil and Political Rights and that on economic, social and cultural rights, both of 19 December 1966. These agreements have been ratified by many members of the United Nations, amongst them the Spanish state. Although many states take it that this right can only be exercised by subject peoples in the process of decolonization, there is no legal argument against its application to other peoples. Because the right to self-determination and the other collective rights of peoples have only recently been included in international documents, it is not surprising that there are difficulties involved in their fulfilment and interpretations that evade the responsibilities of the states concerned. But this does not mean that the



exercise of these rights is an unattainable utopia, as has been demonstrated, in particular in the case of German unification and in general in events in the former communist countries, which I referred to above.

Another collective right which is more and more frequently recognized in international texts and in some states'

legislation is the right to the development of each people's culture and language. The biologist Jean Dausset says that "cultural and linguistic diversity, like physiological diversity, is essential to the preservation of human life". In this aspect also we see that positive international law has given us regulations such as Article 27 of the International Agreement on Civil and Political Rights, mentioned above, which says that "Those states in which there exist ethnic, religious or linguistic minorities will not deny the individuals belonging to these minorities their right, in common with the other members of their group, to lead their own cultural life, to profess and practise their own religion and to use their own language". No-one could claim that this text encourages an "affirmative action", a protective action, by states, when we realise that the article is constructed with a sentence containing a double negative, but the clarity of the objectives of this article has been noted by the French state, which has set aside its application and has not therefore included it in its legislation, on the grounds that it goes against the equality of French citizens.

More recently we find a text that more clearly encourages positive action by states towards the various nations they embrace, in point 45 of the concluding document of the meeting in Vienna, in January 1989, of the Conference for European Security and Co-operation, in which it is stipulated that "the

states will take measures to ensure that the individuals belonging to national minorities or regional cultures within their territory can diffuse, have access to and exchange information on their mother tongue".

When all is said and done, the preservation of a language and of all the other elements that go to make up a people's identity is not just a cultural phenomenon that can develop in isolation from a people's general evolution. The exercise of linguistic and cultural rights is closely tied to other collective rights, especially political rights. In support of this statement we can see that a clause like Article 27, reproduced above, appears in an International Agreement on Civil and Political Rights and not in the International Agreement on Social, Economic and Cultural Rights approved the same day by the same international organism.

It is worth commenting now on the distinction between legal linguistic models based on the principle of personality and models based on the principle of territoriality. The difference is one we can compare analogically to the individual rights/collective rights dichotomy, but referred to linguistic policy models.

According to Ninyoles,

"1. A policy based on the principle of personality of linguistic rights guarantees the individual certain services in his language, regardless of where he is.

"2. The criterion of territoriality consists in limiting to certain specific regions the right to make use of public services in one's own language, which maintains high priority there."

Several authors comment that the principle of personality is only advisable in those areas with considerable dispersion of linguistic groups and in which the use of the language is on a genuinely comparable level. Otherwise, according to Ninyoles, "the most likely result is that one of the languages concerned –the one with most international diffusion, the one that is best adapted to the technological conditions or the one that has an initial advantage in the power structure– will gradually displace the other and co-equality will in practice become more and more illusory". There is one case in which the personalist policy is useful for the preservation of the languages to be normalized, which is if the state's central institutions respect the personal right of individuals to deal with them in the official language of his or her choice (this is the case with the state administrations of Canada, Belgium and Switzerland, for example).

When a language to be normalized occupies a delimited historical territory, sociolinguists agree that only by applying the principle of territoriality within the linguistic area it occupies can the foundations be laid for the possible recovery of the language. The territorial model delimits geographical areas in such a way as to achieve the maximum possible exclusiveness in the use of the respective languages within the territories assigned to them. The dealings of the administration and the public services with the public

take place only in the language that corresponds to each territory, and the public, in theory, does not have an ample right to deal with the administration in the language of their choice, as what prevails is the language of the territory (the case of Quebec, the cantonal and communal administrations of Switzerland and also the territorial administrations of Belgium). The personal model, then, is founded on the freedom of the individual and allows the social use of languages to evolve according to the demand –in other words, according to socio-economic and cultural conditions, without legal restrictions. The principle of territoriality, on the other hand, sets out to protect a geographical area from the excessive influence of another language that has spread there or come to dominate, and that therefore threatens the survival of the language of that territory. This model normally involves monolingualism in the administration within the territory and therefore restricts the public's freedom of choice in language. Thus in this model individual rights are limited by the collective right of the people that wants to preserve its language within its national or historical territory.

The two models do not normally appear in a pure form, since there are combinations of one model with the other in different spheres. For example, in Andorra Catalan is territorial in the administration and trade, but in teaching there is the individual personal right to choose from Catalan, Castilian and French. In some cases international law itself imposes a specific linguistic freedom, as for example in the case of the right of any accused person not understanding the language of the court to use his or her own language and to be freely assisted by an interpreter. The modern doctrine on linguistic rights, partly because of the problems arising in states that want to protect their endangered languages, has had to look closely at the nature and contents of the principles of territoriality and freedom of choice of language so as to safeguard the languages that, even under territoriality, show a tendency to recede.

De Witte, for his part, asserts that linguistic rights –and I would add all other collective rights– are not a derogation or a particularity of the basic right of equality and non-discrimination, but that they constitute a proper and suitable application of this law. In other words, that having recognized the Aristotelian principle that similar treatment must be given to similar cases and different treatment to different cases, and bearing in mind Lacordaire's statement that "Entre le fort et le faible c'est la liberté qui opprime et la loi qui affranchit", the next step is that juridical inequality is not only justifiable but actually necessary to achieve real equality. In this way, special juridical support for unnormalized languages, even when it limits the individual freedom of choice of language in some cases, derives from the correct application of the principle of equality, since all that is actually intended

is that these languages should reach a situation analogous with that of the dominant language in their respective territories.

Having said that, I must point out that the main object of combining the principles of personality and territoriality is the preservation of the collective rights of minorities. Thus in Switzerland we see how, by not taking this factor into account, the Federal Tribunal has applied the principle of territoriality against a Romansh-speaking population which because of a process of linguistic substitution has become a minority in its own historical territory, while German-speakers have become the majority. The Federal Tribunal itself has also protected the German majority by prohibiting education in French for a minority that presented no threat to the identity of the territory.

Even then, and following the Resolutions of the European Parliament on the protection of regional and ethnic languages and cultures, to protect the identity as a people of any group that differs from the state majority, a gradual strengthening is needed of home-rule and of competences on territorial levels in which the minority constitutes the majority. This, as the European Charter on regional and minority languages intends, need not prevent states from also adequately promoting their real equality with more widespread languages through special measures aimed at their promotion and support within their competences. In Spain we could say that there is a mixed model, halfway between territoriality and personality, completely opposed to the mixed models of Belgium, Canada and Switzerland, since territoriality is only guaranteed for the majority language, Castilian, while in territories with other languages the principle of personality applies. This is just the opposite to the linguistic model practised by these states, who years

ago realised that a model like Spain's –which some of them had indeed tried– failed to guarantee a situation of equality, in the sense in which I have described it above, and therefore endangered the survival of the languages in an unfavourable situation.

It is cause for concern that during this period of consolidation of a democratic régime there has been no significant evolution towards real respect for pluralism and for the various signs of national identity differentiated from the rest of the Spanish state, especially the most significant ones, like language and law. Despite the constitutional principles opposed to a dominant historical discourse of prepotency, jacobinism and the mistrust of the citizens belonging to the majority national and linguistic group, these years have not seen education in schools, information in the state's organs of communication or a general attitude on the part of the state administration that, instead of systematically denouncing supposed sob-stories and an even more supposed discrimination of Castilian, overturn this traditional attitude and lay the foundations for collaboration from a position of respect and for an increase in the self-determination of what the Constitution calls nationalities.

Unfortunately, there are no signs that a change is on the way. On the contrary, everything points to an obsessive continuity. Take, for example, the promulgation of dispositions that impose Castilian –even in spheres where the laws of the Franco régime kept silent in this respect–, or with the contestation of the up-dating of Catalan civil law. The extension and strengthening of the international doctrine and practice of respect for the territorial rights of peoples could infuse greater hope, amongst others, to the possibility of constructing our future on the basis of our own identity. □