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THE RIGHTS OF NATIONALITIES AND ETHNIC GROUPS TO THEIR ANCESTRAL SOIL AND BILINGUAL EDUCATION: A STUDY IN INTERNATIONAL PUBLIC LAW*

Introduction

The term "nationality" is not absolutely clear, because in Western Europe, especially in France, in the U.K., and perhaps also in Italy and the U.S.A., "nationality" means citizenship (in the singular) and only in the plural can the term also be used for so-called "national," that is, ethnic groups. On the other hand, in Spain the "nacionalidades" (as Catalunya or Euzkadi) is the usual denomination for regional communities with an ethnic background.¹

In Eastern and Central Europe the term "nationality" has for centuries been usual for ethnic communities, both in former imperial Russia as well as now in the Soviet Union (this also after the new federal constitution of 1974),² and the expression "nationalities," in German "Nationalitäten," can be found everywhere, even in many more or less official books,³ applied to the greater ethnic communities. We can quote the expression "nationalities' politics" (Nationalitätenpolitik). Only the smaller ethnic (and linguistic) groups are called "ethnic group" ("etniceskaja grup") In former Austria-Hungary "nationalities" were the peoples (ethnically seen) and therefore it was spoken about "Nationalitäten" in German, and about the Right of the nationalities (Nationalitätenrecht).⁴ In our time also in regard to Yugoslavia the term "nationalities" is, not only in the Serbo-Croat, Slovene or Macedonian language-, but also in the English-language books, usual for greater ethnic groups.⁵ The "nationalities" are, therefore, in Eastern and Central Europe, but casually also in other parts of Europe and in certain states of the other continents and in the Third and Fourth worlds, spoken of in the sense of ethnic groups. We can also quote the African Charter of Human Rights and Peoples Rights.⁶

It is preferable to speak of ethnic communities or, also for non-dominant groups, of ethnic groups, and within the UN also of ethnic minorities. Here we quote the plurilingual dictionary of Golias of Ljubljana going in this direction.⁷

The term "ethnie," used for the first time in France, and now also in Italy ("etnia"), means approximately the same as ethnic group or ethnic minority. It is not yet generally used, but has recently become more widely known.⁸

* Original: English

The Term "Ancestral Soil"

The notion "ancestral soil" or "native soil," which is the same, has existed for centuries, especially in Eastern and in Central Europe. There are terms such as "Heimat" in German, "domowina" in Sorbian, "domovina" in Croatian, Serbian and Bulgarian (in Serbian and Croatian also "zavicaj"), in Slovene "domovje" (but also "domovina" and in certain connections "domacnost"); while in Russian the expressions "rodina," "otecestvo," "rodnaja zemlja," "rodnaja storona" are usual, meaning the land of birth (roditi - to be born), but also the native soil. In English there can be found the expression "homeland" or also "habitat," but these expressions are not as exact as "ancestral soil" or "native soil" and the word "homeland" has been recently also utilized in an abusive manner by the Republic of South Africa for the so-called "homelands."⁹ Formerly it was said that the German word "Heimat" cannot be translated in Latin-Romance languages, but this is an error. One can refer to the French notion "pays des ancêtres" and also "patrimoine," the Italian term "paese degli antestori" (land of the ancestors) or "suolo natale" (soil of birth), in Spanish "pais natal." the often heard word "patria" cannot be accepted, because it means in Italian, in French ("patrie"), in Spanish, etc., the State (état-nation) and not the ethnic communities as it was said by Charles de Gualle in his "L'Europe des Patries," which was not a "Europe of Peoples," or a "Europe of Regions" or "L'Europe des ethnies" (Guy Héraud).¹⁰ In various Slavic languages we find the term in connection with "home" - domov ("domov" in Czech and Slovak), "domowina," "domovje" or "domovina" as quoted above. Also in the Scandinavian languages we find the relation to "Heimat" or "Domov" as in Swedish "hemland," in Danish "hjemstavn" or "hjemland" or "hjemmet," in Norwegian "hjemsted," in Faeroese "hejma;" in Dutch native soil is more readily applied "geboortegrond" or "geboortestreek." The Polish expression "ojczyzna" has no relation to the expression in the other Slavic languages. In all cases there exists a near-relation to the "land," the soil of the ancestors or (as in German) to "home." In the English literature the expression "ancestral soil" is to be found scarcely; anyway, the literature in western, northern, southern and Central Europe about the notion "Heimat" or "native soil" is very remarkable in nearly all important languages.¹¹

Also in the U.S.A. the notion "ancestral soil" becomes more and more usual, because of the immigration of ethnic groups bound in their thinking to the ancestral soil, the soil of their ancestors. And in Canada we find a situation closer to that in Europe, because in Canada the so-called ethnicity, connected to the ethnic background of all human beings, is very well developed and more and more widely known.¹²

It is possible that the German word "Heimat" gives the most clear explanation of what is meant here. The connotative significance of "Heimat," filled with emotion ("Heimatgefühl"), developed by Johann Gottfried Herder in the 19th century and also in our times estimated by the so-called universalistic school of Vienna (based on the ideas of Othmar Spann),¹³ certainly exists also in Slavic peoples, especially within the Czech people, since the time of F. Palacky. It also has been recently observed in China,¹⁴ but is not so generally recognized in Western Europe or in the Americas.

But it exists also there. And if one asserts that the nomads have no ancestral soil, as the Roma (Gypsies, Sinti) or the Inuit (Eskimoes, Kalaallit) or the Sami (Lapps), this is not well-founded. Only the space of this ancestral soil is wider, greater, as also it is in regard to the Beduins, the Tuaregs and the Berbers in the Saharan Regions.¹⁵

The Juridical Significance of "Ancestral Soil"

Before the beginning of the modern mass-migrations (tourist traffic, migrant workers, refugees) - only in the four main immigration States within the EEC there live at present about 14 million foreign workers¹⁶ - the native soil ("Heimat") was the most significant quality of the ethnic communities (peoples in the sense of Art. 1 of the two International Conventions on Human Rights of 16th December 1966).¹⁷ The peoples living in a social community were and are also today bound to such a native soil as a heritage of their ancestors. In the German, Austrian and the Swiss doctrine one can read often "Heimatrecht" or "Recht auf Heimat." But this leads to certain errors. "Heimatrecht" means in Austria, Switzerland, Liechtenstein and in South Tyrol denizenship especially for foreigners, who got the "nationality" in the French or Anglo-Saxon meaning of the word, i.e. citizenship (nationalité, nationalità, Staatsbürgerschaft) of a certain State with a social and legalized right to domicile in a certain town or commune or municipality (in Austria and Switzerland: Heimatzuständigkeit, in Italy: pertinenza), this for social protection. In Austria this was abolished by the Third Reich in 1939 without a revival after the Second World War, and also in South Tyrol this institution does not exist any longer. It exists today only in Switzerland (one must be "Bürger" of a certain commune) and in the Principality of Liechtenstein. In these cases the expression "right to a homeland" (habitat) does not mean the right to the native soil or the ancestral soil. In languages where definite articles exist, as in German, Greek, Italian, French, Dutch, Spanish, Portuguese, it is not right to use the indefinite article (ein, eine in German; un, une in French; uno, una in Italian, and so on) in connection with the ancestral soil. All men have traditionally a certain ancestral soil. A definite article is here absolutely necessary; thus, in German: Recht auf die Heimat; in French: Le Droit des peuples à leur foyer natal (sol ancestral, pays des ancêtres); in Italian: il diritto dei popoli al suo suolo natale (o ancestrale, paese degli antenatori); in Spanish: El derecho de autodeterminación de los pueblos y el derecho a el país natal.¹⁸ Certainly, in the Slavic languages grammatical articles generally do not exist and from their background many other languages (Kalaallit in Greenland, Inuit in Canada and Labrador, Chinese, Urdu, Irit, etc.) have no grammatical articles, neither definite or indefinite, but there are no difficulties in knowing what is meant. The right to the ancestral (native) soil of peoples is, juridically, always the right to the innate (hereditary, ancestral) soil, where the ancestors were settled for generations. A new domicile (for migrant workers, refugees, etc.) is not "the" innate soil (in German: Neue Heimat, Zweite Heimat), but this new domicile can become after a certain period also the native soil in the sense of the French notion "Patrimoine").

All the peoples have the right to live unmolested on their ancestral soil, i.e. in a certain limited region. This is a purely juridical category, but also a social category, belonging to the science of politics. It implies the following rules:

1. Everybody has the right to liberty of movement within the framework of laws and conventions protecting linguistic and ethnic communities and to return to his native soil (European Convention on Human Rights and fundamental freedoms, in value only for the Member-States of the Council of Europe and the EC);

2. The right to retain the lawfully acquired domicile without molestation and as long as this is freely so desired, is recognized in principle as inviolable to each person and to each ethnic group (people, ethnic community) as an *ens socialé*;

3. Domicile is deemed to be lawfully acquired:

a) by a national: if acquisition is realized by choice, in the free exercise of a right to freedom of movement within the framework of laws or conventions for the protection of locally established linguistic or ethnic communities (domicile of choice). The occupation of a territory by war or warlike events does not constitute a right to a new residence of the soliders or of the civilians of the aggressor-power within the territory of a people or an ethnic community, neither by individuals nor by invading groups (the settlement of Germans by the Third Reich in Poland, in the Ukraine, in southern Styria and in northern Slovenia or also in the parts of Carinthia with Slovene inhabitants, etc., or of Italians under the fascist regime in certain parts of Dalmatia or in Fiume/Rijeka and in South Tyrol¹⁹ was therefore illicit and has not created a right to a new (second) ancestral soil);

b) By derivation, in the free exercise of a right to continued residence at the domicile of the parents or the legal guardians (domicile of origin, native soil, ancestral soil, in German "angestammte Heimat;" in French also "patrimoine"), provided that the aforesaid parents or guardians have lawfully acquired such domicile either by choice or by derivation (*ex injuria jus non oritur*);

c) By ethnic groups and ethnic communities (peoples) when they live for a longer time in a certain territory. They live lawfully in this territory. What means "a longer time" is not absolutely clear. Generally a settlement of almost 25 years is presupposed, but there are also authors as Guy Héraud demanding three generations (90 years) or, for Western Europe, the domicile on this ancestral soil since 1900 or 1910.²⁰

4. The notion of "unmolested." Lawfully acquired domicile is deemed unmolested (without discrimination), if the free exercise of the rights set forth in the United Nations Declaration of Human Rights of 10 December 1948, and in the Covenant of Civil and Political Rights of 16 December 1966, and in comparable other international instruments is secured in law and in fact. To these rights belong also the basic principles of education in family and elementary school in the mother tongue.

The Right to the Ancestral Soil in Public International Law

The right of peoples (ethnic communities) and also of the individuals belonging to those ethnic communities, to their native soil is also recognized by public international law through the following instruments:

1. Inhibition of expulsion of ethnic groups:

In Art. 3 of the Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Liberties (only for the Member-States of the Council of Europe and recently adopted also by the EEC) it is said: "No one shall be exiled from the State of which he is a national." The enforced mass migration and the expulsion of ethnic groups (and whole peoples) from their ancestral soil as was practiced by Adolf Hitler²¹ and Stalin in Eastern Europe (by Hitler also in regard to the South Tyroleans and the Baltic Germans),²² was condemned by the IMT (International Military Tribunal of Nuremberg) in regard to the expulsions realized by the Third Reich.

Not only did the IMT condemn the expulsion of ethnic groups, but also in the above quoted protocol No. 4 to the European Convention for Human Rights²³ the expulsion and therefore generally enforced mass (e)migration not only of individuals, but also of (social and ethnic) groups is prohibited with the following words: "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national. No one shall be deprived of the right to enter the territory of the State of which he is a national" (Art. 3). And Art. 4 says: "Collective expulsion of aliens is prohibited." And within the UN the massive (enforced) exoduses are condemned, especially in regard to racial groups.²⁴

Certainly, the European Convention is valid only for the Member-States of the Council of Europe, and recently also for the EC (EEC). But it corresponds to Public International Law and its provisions.

If one would consider that mass migrations, if enforced, could be legalized in wars or warlike events, one must recognize the fact that in these cases the Convention of the Hague on the laws of the War on Land of 18 October 1907²⁵ is valid with the amendment of the Geneva Convention of 12 August 1949, on the Protection of Civilians in War-Times. During an occupation in war-times the occupant power is not allowed to force the subjects of the occupied State to change their domicile or to renounce their ethnic identity.

The right of peoples and ethnic communities to their ancestral soil is also connected with the right of peoples to self-determination, more clearly formulated in the French doctrine "Le droit des peuples à disposer d'eux-mêmes. Many international legal instruments stipulated the right of each people ("all peoples" in the two international covenants on human rights, Art. 1) to decide its political status freely (that means "in liberty") without any influence or immixtion from abroad. The peoples have the right - Art. 27 of the International Covenant of Civil and Political Rights - to pursue "in community with the

other members of their group" their economic, social and cultural development. This means especially also the right to an education of the children of the members of an ethnic community in their mother tongue.

Art. 1 of the two International Conventions of Human Rights (and also Art. 27 of the Convention of Civil and Political Rights) is binding international law and we refer in this connection to the two UN Reports of Héctor Gros Espiell and Aureliu Cristescu (ius cogens).²⁶ If there should be any doubts about the contents of Art. 1 of the Conventions, the United Nations gave an authentic interpretation in the UN Declaration on the friendly relations and the cooperation between the States of 24 October, 1970, No. 2625 (XXV), defining that this right of (recte: to) self-determination includes the right "to constitute a sovereign and independent State, become immersed in another State or to a union with it, if the people decides in this sense with its free will, or to have another political status."

This is said also, as a principle, in basket 1, principle VIII, of the Conclusion Act of the European Conference on Security and Cooperation of Helsinki, 1975, giving to all peoples, and therefore to all ethnic minorities and communities the right almost to cultural autonomy,²⁷ based on their ethnic character and their linguistic heritage.

One can also remember the Italian-Yugoslav Memorandum of London (Londonski sporazum) of 5 October 1954, confirmed also by the Osimo Treaty of 1975, after which (Art. 4) the ethnic character of the two zones of Trieste must be safeguarded, and it is prohibited to alter this ethnic character.²⁸

The Right to the Ancestral Soil and the Education

Generally - not everywhere, as it is demonstrated in Ireland (Eire), Brittany, Poland, Scotland, etc. - the use of a mother tongue belongs also to the native soil, and the Ammann Report demonstrates this right in regard to education.²⁹ If the State impedes the education of the children of an ethnic group in the mother tongue, it commits the crime of cultural genocide. The question of bilingual education can or must be considered in the same manner as the education in the mother tongue. This can be possible if an ethnic minority group has two (or three) working languages, i.e. the mother tongue and the language of other ethnic groups on the same ancestral soil (as in Bratislava, in Brussels, in Eastern Brittany, in Ireland and so on); also, the official language within the State can be judged as an element of bilingualism ("notre avenir est bilingue" in Alsace, "dvojezicni je bolje" in Southern Carinthia). But this is a question with differences for each ethnic community.

Notes

1. La Constitución Española de 1978, Madrid (Presidencia del Gobierno Secretaría General Técnica, Núm. 80, extraordinario) 1978; L. López Rodó, *La autonomías, encrucijada de España*, Madrid (Aguilar), 1980.

2. Apart from the Soviet literature, the best documented book is: Paolo Biscaretti di Ruffia, Gabriele Crespi Reghizzi, 1979, *La costituzione sovietica del 1977*, A. Giuffrè, Milano.
3. See for example: V.I. Kozlov, 1982, *Nacionalnosti SSSR, Financi i statistika*, Moskva; see also: Olo Ignats, *Folkens Fångelse, Nationalitetspolitiken i Sovjetunionen*, Ordfrontsforlag), Stockholm.
4. For details see: Theodor Veiter, 1984, *Nationalitätenkonflikt und volksgruppenrecht im ausgehenden 20. Jahrhundert*, 2 Vols., Intereg, Munich; and Braumüller, Vienna, with further literature.
5. Zev Katz, Rosemarie Rogers, Frederic Harned, 1976, *Handbook of Major Soviet Nationalities*, Collier Macmillan, London, with book references.
6. African Charter on Human Rights and Peoples' Rights, adopted by the OAU in Nairobi, 28 June 1981. Text inter alia in English in "The Review" of the International Commission of Jurists, Geneva, No. 27, December, 1981; in French, with commentary, in: Alain Fenet, et al., 1982, *Droits de L'Homme Droits des Peuples*, PUF, Paris.
7. Janko Golias, *Petjezični glosar ustave in samoupravljanja SPRJ*, 1976, Društvo znanstvenih in tehničnih prevajalcev Slovenije s sofinanciranjem Kulturne skupnosti Slovenije, Ljubljana.
8. Roland Breton, 1981, *Les ethnies*, PUF, Paris; see also the quarterly *Etnie*, Milano, published since 1978.
9. William Petersen, 1979, *The Background to Ethnic Conflict*, E.J. Brill, Leiden; Hans O. Staub, 1975, *Südafrika Report. Rassentrennung, Wunschtraum, Wahn und Wirklichkeit*, europaverlag, Wien; Jost F. Noller, 1977, *Theorie und Praxis der Apartheid*, Peter Lang, Bern; Felix Ermacora, 1983, *Menschenrechte in der sich wandelnden Welt*, Vol. 2: Africa, Verlag der Osterr. Akademie der Wissenschaften, Wien; International Anti-Apartheid Year, 21 March 1978 - 20 March 1979, UNO-Doc. OPI/E 601-25.000, February 1978.
10. Guy Héraud, 1974, *L'Europe des ethnies*, 2nd ed., Presses d'Europe, Paris.
11. Marc Lengereau, 1970, *Le droit à la Heimat*, Grenoble (Université des Sciences sociales de Grenoble, U.E.R. de sciences juridiques; Ernest Petric, 1964, "Das Recht auf die Heimat. Kot pojem mednarodnega prava," 2 Vols., (dissertation), Ljubljana (also a book separately published; F.H.E.W. du Buy, 1975, "Das Recht auf die Heimat im historisch-politischen Prozess," (thesis at the University of Utrecht; also published as a book in Euskirchen (Verlag für zeitgenössische Dokumentation, 1974); Theodor Veiter, 1975, *Le droit des peuples à disposer d'eux-mêmes et à leur foyer natal*, A. Giuffrè, Milano (in: *Scritti in onore di Manlio Udina*); Otto Kimminich, 1978, *Das Recht auf die Heimat*, Osmipress, Bonn.

12. Anthony D. Smith, 1981, **The Ethnic Revival in the Modern World**, Cambridge University Press, Cambridge; Nathan Glazer, Daniel P. Moynihan, 1975, **Ethnicity: Theory and Experience**, Harvard University Press, Cambridge, Mass. and London.; I.R. Grigulevich, S. Ya. Kozlov, 1979, **Ethnocultural Processes and National Problems in the Modern World**, Progress Publishers, Moscow.
13. Walter Becher, 1985, **Der Blick aufs Ganze. Dans Weltbild Othmar Spanns. Gedanken zur Jahrtausendwende**, Universitas Verlag, München. About the philosophic ideas of Othmar Spann there exist many books. He was also criticized very often.
14. See: **China's Minority Nationalities**, Beijing (China Reconstructs - Great Wall Books), 1984; Yin Ming, 1977, **United and Equal. The Progress of China's Minority Nationalities**, Foreign Language Press, Peking.
15. Tony Hodges, 1982, **Historical Dictionary of Western Sahara**, The Scarecrow Press, Metuchen, N.J., and London; Wolfgang Neumann, 1983, **Die Berber. Vielfalt und Einheit einer alten nordafrikanischen Kultur**, DuMont, Köln.
16. Vittorio Gazerro, 1985, "Lavoratori stranieri e diritti umani," in: **AWR-Bulleti**, No. 3, Vienna (with many figures).
17. See: **Menschenrechte. Internationale Dokumente**, 1981, Deutsche UNESCO-Kommission, Bonn; Klaus Berchtold, 1978, **Human Rights in International Law**, Colledge Texts, Verlag d. Österr. Staatsdruckerei, Vienna.
18. José A. Obieta Chalbaud, 1985, **El derecho humano de la autodeterminación de los pueblos**, Tecnos, Madrid (a fundamental work).
19. Friedl Volgger, 1984, **Mit Südtirol am Scheideweg. Erlebte Geschichte**, Haymon, Innsbruck; Antony Evelyn Alcock, 1970, **The History of the South Tyrol Question**, Michael Joseph Ltd., London; See also: Theodor Veiter, 1984, **Bibliographie zur Südtirolfrage 1945-1983**, Braumüller, Vienna (about 300 pages); Karl Stuhlpfarrer, 1985, **Umsiedlung Südtirol 1939-40**, 2 Vols., Löcker, Vienna.
20. See note 10; Guy Héraud, 1984, **Les communautés linguistiques en quête d'un statut**, édition Tradition et progrès, Aosta/Aoste.
21. See the official French publication: **Les transferts internationaux de populations**, 1946, PUF, Paris.
22. Jürgen van Hehn, 1982, **Die Umsiedlung der baltischen Deutschen**, Johann Gottfried Herder-Institut, Marburg/Lahn; Dietrich A. Loeber, 1972, **Diktierte Option. Die Umsiedlung der Deutschbalten aus Estland und Lettland 1939-1941**, Dokumentation, Wachholtz, Neumünster.
23. Herbert Miehsler, Herbert Petzold, 1978/1980, **European Convention on Human Rights**, 2 Vols., Carl Heymanns, Cologne.

24. Sadruddin Aga Khan, 1981, **Study on Human Rights and Massive Exoduses**, Doc. E/CN.4/1503, 31 December.

25. Martens NRG, 31st tome, ed. 3, p. 461; Friedrich Berber, 1967, **Völkerrecht. Dokumentensammlung, Band II Konfliktrecht**, C.H. Beck, Munich.

26. Héctor Gros Espiell, 1980, **The Right to Self-Determination: Implementation of United Nations Resolutions**, UN-Doc. E/CN.4/Sub.2/405/Rev.1 ex; Aureliu Cristescu, 1981, **The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments**, UN-Doc. E/CN.4/Sub.2/404/Rev. 1.

27. J.E.S. Fawcett, 1977, "The Helsinki Act and International Law," in *Revue belge de droit international*, No. 1-2, Bruxelles; Hannes Tretter, (ed.), 1984, **Die Abschlussdokumente der Konferenz für Sicherheit und Zusammenarbeit in Europa von Helsinki 1975 und der Nachfolgekonferenzen Belgrad 1978 und Madrid 1983**, Böhlau, Vienna; **Sicherheit und freidliche Zusammenarbeit in Europa, Dokumente 1954-1975, (4 Vols.)**, 1968-1976, Staatsverlag der DDR, East Berlin.

28. Memorandum d'Intesa. Senato della Repubblica 1954, No. M LXXVIII; Manilio Udina, 1979, **Gli accordi di Osimo**, Ed. LINT, Trieste; Ernest Petric, 1982, "Osnutki zakonov o pravicah Slovencev v Italiji v luci osimske pogodbe," in **Razprave in gradivo**, Vol. 15, Institut za narodnostna vprasanja, Ljubljana. In regard to the linguistic groups in Yugoslavia see: Koca Jončić, 1982, **Nationalities in Yugoslavia**, Medjunarodna Politika, Belgrade; and Jure Petricević, 1983, **Nacionalnost stanovstva Jugoslavije**, CH-5200, Adria, Brugg (very important).

29. Charles D. Ammoun, 1976, **Study of Discrimination in Education**, UN-Doc. E/CN.4/Sub.2/181/Rev.1; Hernán Santa Cruz, 1978, **Racial Discrimination**, UN-Doc. E/CN.4/Sub.2/370/Rev.1.