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Summary

The Concept of the Study

The title of the study may be translated as "*Language Law and Protection of Minorities in Federal Switzerland*". Written from a non-Swiss perspective it aims at determining how the elaborate Swiss language system works in detail, what its general mechanisms and principles are and whether it may eventually be transferred to other multilingual states.

For this purpose the author analysed all the legal provisions, principles and practices dealing with language and minority issues on the level of the Federation as well as of those Constituent States which are particularly relevant: the Cantons of Bern, Fribourg, Valais with bilingual language systems (French–German), the Canton of Jura as a product of self-determination eager to defend the French language and culture, the Canton of Grison which alone has a trilingual language order (German–Italian–Rhaeto-Romanic) and the Canton of Ticino as protector of the Italian language in Switzerland.

There is no specific language code in Switzerland, neither on the federal nor on the cantonal level, but a great number of applicable norms and rules permeate all areas of the law and codification has often been seriously considered. Accordingly, the first task was to collect, analyse and comment on them with particular regard to the development of linguistic law over the course of time. The second task was to compare all corresponding norms, e.g. federal and cantonal provisions determining the official language in civil courts, in public schools, in parliaments, etc. The third task was to explain the legal differences discovered by considering the specific situation of each linguistic group involved.

In order to facilitate comparison of the individual systems, all chapters dealing with specific language law, namely those on the Federal language law (Chapters 6 and 7) and on the language law of the relevant cantons mentioned above (Chapters 8-13), have a similar layout: they start with a "typology" which describes the nature of the relevant language group. They are followed by paragraphs on the constitutional language order, the use of language within the administrative bodies, in schools and universities and by courts, in the legislative process and in parliamentary debates. All chapters end with a part on representation. Typology is the key element for understanding that language law is a

consequence of a certain type of relationship between majority and minority (or minorities) within the entities concerned: If the linguistic majority in a canton corresponds with the German-speaking majority on the federal level the author calls it an "absolute majority". If, on the other hand, the linguistic minority in a canton corresponds with a minority group on the federal level, e.g. the French, Italian or Rhaeto-Romanic language group, the author speaks of a "relative majority", being a majority in the particular constituent State but only a minority in the whole of Switzerland. As the comparative analysis shows, in the latter situation the cantonal majority tends to regard the respective canton as a "reservation" where it will defend its own language and culture against the federal majority. Accordingly, the cantonal law prescribing the use of the majority language as the official language of the canton appears to be stricter than in a canton dominated by a group which can be characterised as an "absolute" majority like the German-speaking group in Switzerland if it also dominates a canton.

This analysis conducted in the study warrants the conclusion that the Swiss language order is implicitly based on a concept of *relativism* which is one of the possible answers to the crucial question of how federalism can contribute to solving minority conflicts.

The Course of the Analysis

The first three chapters constitute the general part of the book: Chapter 1 on the nature and situation of languages and language groups in Switzerland, Chapter 2 on the development of the Swiss concepts of "State" and "nation" in the course of time, and Chapter 3 on the legal theory underlying language law. These chapters are designed to lay the foundations for understanding the Swiss language order which is based on the two constitutional principles of *linguistic plurality* ("Sprachenvielfalt") and *linguistic peace* ("Sprachfrieden"). Linguistic peace serving as a meta-principle can only be attained by balancing two more specific constitutional principles: one is the territorial principle ("Territorialitätsprinzip") which can implicitly be deduced from the Swiss Constitution (Schweizerische Bundesverfassung) of 1999, and the other is linguistic freedom ("Sprachenfreiheit"), which is now explicitly mentioned in the Constitution but was recognized long before as an unwritten constitutional right.

The *territorial principle* (Chapter 4) concerns establishment and applicability of official languages to be used mainly in public administration and the courts. However, it also extends to some fields where individu-

als as civil actors use their languages in public. It provides for the rules necessary to determine which languages must be recognized in a multilingual society and how they are to be applied. The Swiss version of linguistic territoriality follows a certain scheme which allows for determining the relevance of each language in a reference area, e.g. the local community, the district or the whole canton. This is done on the basis of certain factual and normative criteria. If two or even more languages must be recognized as official languages according to these criteria the coordination of these languages will become necessary and, consequently, a rather complex linguistic regime will follow. It is typical for the Swiss system that the number of official languages increases from the bottom to the top, that is to say, from the local to the cantonal level, but never vice versa. In other words: Any language which is an official language in any single village is supposed to be an official language of the respective district and canton. According to the territorial principle a canton cannot declare itself monolingual if it contains any bilingual district. If in exceptional cases a certain language is recognized as an official language on the local level although it is not an official language of the district or canton, the principle of territoriality will have given way to the protection of minorities. This is why the territorial principle on the one hand and the principle of minority protection on the other hand can be distinguished from each other quite clearly. Apart from these exceptional cases the territorial principle must generally be applied in such a way that it would not endanger linguistic peace: According to Swiss constitutional law it must never be used to oppress minorities and must respect the limits deriving from the principle of proportionality.

It is apparent that the application of the territorial principle may prevent individuals from using their own language when communicating with cantonal authorities or municipalities, or when appearing in court or attending classes at school, and so may frustrate a legitimate individual interest. For this reason Swiss constitutional law grants the individual *linguistic freedom* (Chapter 5). If this constitutional right collides with the territorial principle, which has the same constitutional status, both of them must be brought into a balance considering all the details and conditions of the case. The more private or even intimate a communication is the more likely the individual's linguistic freedom will prevail; the more official a communication is, e.g. in a formal court hearing, the more likely the territorial principle will prevail. With the territorial principle and individual rights limiting each other the linguistic order follows the well-known concepts of the rule of law.

The book continues with two chapters on federal law, one on the language law of the Federation (Chapter 6) and one on the federal culture and media law (Chapter 7), the latter referring to regional structures and thus standing in between federal and cantonal law. They are followed by chapters on the Canton of Jura (Chapter 8) and Bern (Chapter 9), the former having seceded from Bern in 1979 after a long period of conflict, accompanied even by acts of violence. Applying modern concepts of self-determination to the historic case, the author proposes not to differentiate between "external" and "internal" self-determination but between the political and democratic elements of self-determination on the one hand and its national or ethnic elements on the other hand. As the Jura case shows it is characteristic for the Swiss system to ignore ethnic affiliation in the field of democratic participation and to hold "cascade plebiscites" starting with the more general and ending up with the more specific issues. Accordingly, the people decide not only whether there should be a new constituent State but also where its borders will be drawn, even if that results in the partition of a certain region.

The Results Obtained from the Comparative Analysis

Chapter 14 undertakes a comparison of the language laws and administrative practices identified in the preceding chapters – Chapters 6 (Federation), 8 (Jura), 9 (Bern), 10 (Fribourg), 11 (Valais), 12 (Grison) and 13 (Ticino). The aim of this comparative analysis is wherever possible to draw out any similarities in approach to formulate underlying principles and general rules. This chapter profiles the available answers to specific questions such as how multilingual cantons (Bern, Fribourg, Valais, Grison) and the Federation regulate the language of a civil court procedure. Comparing the relevant norms and practices, the author determines whether there is a common principle, e.g. the principle that the defendant's language will govern the procedure. She also discusses which language must be used on appeal to the second instance, if the second instance offers more official languages than the first instance. Is there a principle that the language of the first instance will continue to govern the procedure through all the instances? Is there a principle of "one language only" which excludes all other official languages from the same procedure? The solutions to specific issues of language use which can be identified in Switzerland have turned out to be a valuable source of general principles. Some issues seem to be of vital importance for the co-existence of the Swiss language groups and thus even for the survival of Switzerland as a state, namely the controversy on whether a

language of the land must be given priority as the so-called second language ("langue deux") being taught as the first foreign language in school. The author has also dealt with policies such as the "culture of practical understanding" or "immersion" (using a second language as a teaching language in school) as well as legal concepts such as "inconsistent multilingualism" ("inkonsequente Mehrsprachigkeit"), legal principles such as the "helvetic principle" in parliament (every member uses his or her preferred language), the "principle of non-regulation" in the field of representation, the principle of "creative translation" in the law-making process or the "historic principle" in topography. Some of these concepts and principles are well-known in the Swiss doctrine, while some of them are newly created by the author on the basis of comparative research.

Additionally, the author has looked for "rules of development" ("Entwicklungslinien") and found that the territorial principle has become more and more limited by the requirements of minority protection; that constitutional language law has continuously been de-nationalized and systematized; that law-making has changed its method and switched from the "language of origin" ("Ursprache") to simultaneous creation; that the concept of assimilating the children of immigrants was replaced by the concept of integration, etc. Considering the development of law over time often makes clear that differences which can be found in the language laws of the cantons are not due to differences in legal culture but to the fact that they were enacted in different periods of time.

There are differences which can be explained by the concept of relativity: The language laws of the cantons seem to depend on conditions such as whether the canton serves as a "reservation" for a certain language group, the nature of the language concerned and the linguistic esteem it has, the stability of the language border or changes from the position of a majority into a minority and vice versa.

Switzerland as a Model State?

The last chapter (Chapter 15) considers the role Switzerland has been playing in the international context concerning issues of language or minority rights with particular regard to the question whether there has been or still is a political culture of self-restraint or rather an activist policy of assuming a model function. Switzerland, indeed, has become a State party to the relevant international treaties such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social,

and Cultural Rights, the Convention on the Rights of the Child, the European Charter for Regional or Minority Languages, the Framework Convention on the Protection of Minorities, etc. The accession to a certain treaty regime and the way in which it is accomplished, e.g. with or without reservations, warrants conclusions on the compatibility of the Swiss law with the international legal framework and also on the self-assessment of the Swiss political organs in this respect. Reservations which were originally made to certain provisions of relevant international treaties and later withdrawn show that Switzerland faced major problems trying to bring its linguistic order, which was originally based on a strict territorial principle, in line with international human rights instruments. The more sophisticated the territorial principle became the easier it was to integrate Switzerland fully into international treaties on language law and the protection of minorities.

The European Union Perspective

Concerning the language law of the European Union/European Community the book deals with two different aspects. First, it compares major provisions on the use of languages in the EU/EC on the one hand and in Switzerland on the other hand in order to determine similarities and differences in the area of institutional language law. Secondly, it examines whether the Swiss language order would be compatible with European law if Switzerland joins the European Union. As regards the institutional language law it is interesting to see that the EU/EC distinguishes between "languages of the treaty" and "official languages" in a similar manner as Switzerland distinguishes between "languages of the land" and "official languages". Like Switzerland, the EU/EC does not recognize as official all languages which are official in the member states. Additionally, both of the systems distinguish between official languages which are to be used in communication with individuals or external institutions and working languages. While Switzerland tends to adjust the different categories the EU/EC, due to an enormous increase of languages, tends to diminish at least the number of working languages. Comparing the systems there are many similarities, e.g. the way multilingual laws are to be interpreted or the practice not to reduce the working languages of Parliament with respect to democracy. However, if one compares rules and practices in detail it becomes clear that the European language law, in contrast to Swiss language law, still lacks a leading principle like the territorial principle which, modified by the freedom of language, could provide for a comprehensive language order. Without such a legal framework European

law will not be able to justify exceptions from its all-languages principle implying the equality of languages.

Conclusion

The study does not seek to propagate the simple transfer of certain Swiss provisions or principles into any other legal system. The author rather tries to show the variety of legal problems which language law comprises and she concludes that the manifold provisions and concepts which have been developed in Switzerland must be regarded as the products of specific conditions which *may* exist in other parts of the world. In contrast, the general conclusion of the study is that the fruitful antagonism of "territoriality principle versus linguistic freedom" could serve as a model structure for any other multilingual state as well as for the European Union.