

**Felix Hanschmann, Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft**

## Summary

### The Concept of Homogeneity and its Usage in Constitutional Law and Community Law

#### – On the Thesis of the Necessity of a Homogeneous Community –

#### I. Introduction

1. “Homogeneity” can be synonymously translated with similarity, uniformity, or closeness. However, concepts of homogeneity rely on a reference point of comparison. In order to identify a multiplicity of individuals as a unity it is necessary to specify the similarities that the individuals have in common and that, thus, constitute their unity. Homogeneity, in other words, implicates a three figured relation: Saying that two objects are homogeneous makes sense only if one can say in what respect these two objects are homogeneous. Mainly as a result of the idiosyncratic conditions of the development of the German nation state and the corresponding idea of a “culture state”, often mentioned criteria of homogeneity in German Constitutional and European Law Scholarship are a common history, culture, religion, or language.

2. Even though the notion of a homogeneous people seems to be precarious at least since the national-socialist perversion of a “Volksgemeinschaft” (ethnic community), the concept of Homogeneity is still being widely used in German Constitutional Law and Community Law Scholarship. It stands for the thesis that the homogeneous structure of a community is an essential precondition for the democratic organization of a community. From the perspective of authors who argue in favor of the concept of homogeneity the majority rule cannot successfully be implemented if there is no socio-structural homogeneity. Furthermore, the homogeneity of a community is being made responsible for the stabilization of a political unity as well as for the emergence of a psychosociological phenomenon in the sense of a feeling of togetherness and a collective identity, respectively. But to focus on homogeneity and to link homogeneity with far reaching legal and political effects is increasingly confronted with developments that not only undermine the idea

of a homogeneously structured society, but that, ultimately, erode a constitutional theory built upon the ostensibly indispensable requirement of homogeneity.

## II. Challenging Developments for Concepts of Homogeneity

All positions that refer to a socio-structural homogeneity anchored either in a common past, a shared culture or in a joint language need to face at least three objections.

1. First of all, most attempts to analyze the particular composition and structure of modern societies lead to the insight that heterogeneity rather than homogeneity can function as a formula to adequately describe modern societies. While traditional and relatively stable communities like the family, the township, political parties or the church lose their ability to integrate individuals into solid communities, particular modern processes of pluralization and diversification exhibit their dramatic potential. In modern societies individuals are being released from socially and morally homogeneous environments and strong collective ties. Values, norms and behavioral guidelines become diffuse and overarching contexts are increasingly questionable in a society that is composed of several autonomous social subsystems operating with different rationalities and logics. Not surprisingly, observers from different scientific disciplines describe modern societies in terms of integration, acculturation, assimilation, syncretism, pluralism or multiculturalism. Rather than being homogeneous entities, even the societies of the nation states are complex patchworks of different – sometimes overlapping, sometimes colliding – cultural identities.

2. Secondly, the large quantities of immigrants that have been coming into the European countries since the end of the Second World War have already dramatically changed the structure of the national societies. Furthermore, demographic calculations forecast a scenario in which the Member States of the European Union will have an enormous demand of immigrants in the forthcoming decades. It is primarily the low birth rate as well as the increased life expectancy that leads to a reduction of younger generations in the European countries. Because this diminution of the autochthonal population will concern the economically active population, i.e. the people in the age between 20 and 60, it is likely that an increasing number of non-Europeans will permanently take residence within the European countries in the near future.

But permanent residents with different cultural backgrounds will undoubtedly intensify the erosion of homogeneous structures in modern societies.

3. Lastly, processes of Europeanization and globalization put pressure on concepts of homogeneity. In the last years many observers have ascertained both the emergence of trans- and supranational institutions and the transfer of competences from the nation states to these new organizations. One reason for this development is the insight that the nation state as a particular model of political organization is increasingly incapable of adequately reacting to economic, ecologic, military, scientific or technical problems that transcend national borders. In order to regain regulation competences, it seems indispensable to create political units at a trans- and supranational level. But if these organizations exercise sovereignty at least in a limited realm of competence and enact directly applicable law, the question of legitimization arises. Therefore, the search for a people on a trans- or supranational level has begun. But unlike the national level, the lack of a homogeneous collective is obvious. Thus, positions that link the homogeneity of a collective to democratization face difficulties when the question arises of how to legitimize the legislation of trans- or supranational organizations.

### III. Alleged Effects of Homogeneity

In the legal discourse one can find several effects that are linked with the existence of a socio-structural homogeneity. The latter is allegedly an indispensable precondition for the implementation of the majority rule. It has also been made responsible for the emergence and the stabilization of a political unity, for the formation of a feeling of togetherness or rather a collective identity, and, finally, for the absence of violent conflict.

1. According to the proponents of concepts of homogeneity, the minority will only follow the majority decision if the community is not disrupted by elementary conflicts. Although the minority cannot achieve acceptance for its views, the homogeneity of the community ensures that the existence of the political unity is more important for the minority than the defeat in the particular vote. The answer to the question why the minority is willing to accept a decision against its interest and voting is therefore not to be seen as a consensus concerning the procedural rules but rather as the social-homogeneous structure of the com-

munity. However, the preconditions for the successful usage of the majority rule are not anchored in a common culture, shared history, or in the fact that the citizens speak the same language. Of greater significance are the prevention of the emergence of structural minorities, the protection by constitutional rights, may they be either individual or collective, a pragmatic distribution of competences among several political levels as well as a pragmatic weighing of votes and, finally, the opportunity to effectively participate in the political decision process.

2. Furthermore, concepts of homogeneity tend to found the unity of a community on cultural, religious, ethnic, linguistic or historical commonalities. In this view, a multiplicity of isolated individuals can be considered as a unified community only because there are extra-legal facts that work as the driving force for collectivization. As a compensatory condition these substantial similarities should limit and mitigate modern individualist tendencies that are perceived as being destructive. Political unity is thus not the result of a deliberate consensus concerning basic legal requirements but rather a pre- and extra-legal phenomenon. But to ground the unity of individuals on such allegedly ontological resources becomes questionable exactly at the moment when societies increasingly lose their homogeneous substance. Neither on the national nor on the European level can the unity of fragmented and plural societies be explained by reference to unidentifiable similarities. Moreover, two other arguments speak against the thesis that political unity is dependent on socio-structural homogeneity. First, modern societies are not only plural and heterogeneous, they are also a system of functionally differentiated subsystems, each operating as an autopoietic system, which permanently observes its environment and creates its own imagination of unity. Instead of providing *one* unity, functionally differentiated societies thus produce a multiplicity of different *unities*. Thus, the viewpoint from which *the* unity can be observed has been lost in modern societies. From this it follows that the assertion of homogeneity can only be seen as a semantic strategy trying to suggest a unity where we can observe nothing but differences. Second, concepts of homogeneity are prone to deduce normative implications from supposedly empirical facts. Concepts of homogeneity consider the function of the democratic process to be the representation of the will of an allegedly pre-existing social unity that is based on certain commonalities rather than the constructive production of a particular decision out of numerous conflicting interests and opinions.

3. Homogeneity is further considered to be an indispensable precondition for the emergence of what is often called a »collective identity« in

the sense that the members of a community share a feeling of togetherness. The assumption is that such socio-psychological phenomena are a result of, but are also conditioned on, some, though not necessarily all, of the following objective elements: Common language, common history, common cultural habits and sensibilities, common ethnic origin and common religion. However, collective identities do not automatically arise from such similarities. Indeed, they are artificial narratives, perpetually reproduced anew by various actors in dynamic processes. Their construction takes place in a complex environment in which identity claims are continuously being articulated and contested. Social identities are, in other words, not the immediate result of an objective homogeneity but rather an unstable imagination in an ongoing and infinite process.

4. Finally, homogeneity is often linked with the pacification and stability of a community. In this context the term »homogeneity« obviously functions as a semantic figure that is designed to counter or to hide modern processes of disintegration and dissociation. The dissolution of traditional communities, the release of individuals from strong ties as well as the related appearance of a multiplicity of different values and mentalities seemingly triggers the demand for a diametrical fiction of a harmonic community without self-destructive conflicts. The assumption reads as follows: A framework shaped by homogeneity allows communities to prevent conflicts from escalating. Only within this kind of framework the procedural resolution of conflicts is even possible. As examples for this thesis proponents of homogeneity-concepts often mention countries like Belgium, Cypress, Bosnia, Albania, Chechnya, Tibet, Pakistan, South-Africa, Nigeria, Somalia, Sudan, India, Sri Lanka, Malaysia, or the Philippines. Frequently one can also find reference to the downfall of the Habsburg Empire or the collapse of the Soviet-Union. But to identify the reasons for such conflicts only in cultural, religious or linguistic diversity means on the one hand to ignore their complexity. On the other hand, social interaction and peaceful co-existence is not necessarily precluded by the heterogeneity of a community.

#### IV. History and language as criteria of homogeneity

##### A. History

1. Concepts of homogeneity often refer to a common past or a 'community of history'. The underlying assumption is that the members of a collective not only share *one* history. Exactly this crucial element is being made responsible for the aggregation and unification of isolated individuals into a particular entity as well as for the peculiarity and individuality of this entity. From an internal perspective, the concept implies the assumption that successful social integration, either thought of as an intersubjectively shared feeling of togetherness or as an objective bond between individuals, is – to a remarkable extent – the result of the ostensibly given fact that individuals share the *same* history with others. This refers not only to the joint experience of history, but rather to the idea that every individual is inevitably exposed to a stream of narratives about the past that transcends generations. According to Carl Schmitt "common historical destinies, traditions and memories" and "the commonness of historical life" are understood as elements existing prior to any political organization and functioning as the substantial or organic basis for the equality of the citizens. Exclusions and inclusions are justified, collective particularities are marked and demarcation lines between "us" and "them" are drawn with reference to a common history. Among other characteristics, like ethnicity, culture, religion or language, it is the specific historical experience from which a homogeneous and definable individual community emerges. Finally, one can clearly see the assumed connections and interdependencies between history, a community of history and the homogenous structure of a collective. To some authors the sharing of *one* history ultimately appears as the decisive condition both for the creation of "political unity" and its persistence and stability, for the compliance with majority decisions as well as for the acceptance of redistribution measures. In order to integrate the individuals into a collective, to pacify and stabilize the latter, a relative or effective homogeneity as a joint base stock of similarities, which in turn finds its basis in a jointly experienced political history, becomes an essential element. Within this context history is partly described as a 'cultural *fact*' that constitutes community or, as an 'objective given fact,' to which individuals are bound regardless of their own deliberate decision. This objectivity and pre-existence of history ascertains or at least renders it likely that a will to political unity evolves.

2. Taking into account the described functions and effects both attributed to the term “history”, it is anything but a surprise that the focus of attention in German Constitutional Law and in European Law has generated a far-reaching search for a genuine European history. In so doing the reference to history can, depending on one’s attitude towards a further intensification of the European integration process, either accentuate the historical similarities or emphasize the peculiarity, dominance and significance of the respective national histories. Without questioning the doubtful plausibility of the concept of a community of history even on a national level, it is taken for granted that the need for a European history increases with the deepening of the European integration. To have a future, these authors suggest, Europe must have a past and it needs to transform itself into a community of history.

3. What is continuously overlooked, however, is that neither theoretically nor practically can a European community of history be deduced from the point of view of the science of history or from the perception of the population. The certainty with which many authors today speak of the self-evidence of a European history (as origin and prerequisite of a community of history), is drawn from a particular use of scientific knowledge: this becomes evident in formula such as “from the point of view of the historiography” or, “from the perception of the population.” Such affirmations stand in striking contrast to the otherwise manifold and contradictory statements concerning the existence and non-existence of a European community of history. Of course, the present political, social, economic and cultural life of a collective is always and significantly coined by the past. Historical experiences and narratives affect the thinking of human beings and play a more than negligible role for the creation of individual and collective self-conceptions. And obviously there is also an integrative and legitimizing impact that discourses on history as well as the particular historical „pictures” framed and used within these discourses may develop. But the concept of history, which is used in judicial discourse and implies a „community of history”, is perceived in a significantly different way. Here an understanding of history appears that can be described as holistic, objective and hermetically sealed. Holistic, because the concept of a community of history tacitly includes the message that history not only supplies the members of a particular collective with a sense of togetherness, but above all is capable of constituting a particular collective as a political unity. However, the development of such an effect strongly suggests that there is *one* history that is the very same for all members of a collective. Closely linked with this assumption, and this seems to make it

legitimate to speak of a hermetically sealed perception, history is often explicitly understood as an objective fact existing before any individual cognition as well as before any form of political organization. Every political organization, as this perspective suggests, can refer to a consolidated reference point in terms of an arsenal of objective statements about the past. Skepticism towards whether the demands with which historians are confronted can be met, i.e. to reflect the past like a mirror, is legitimate. In light of the epistemological and theoretical as well as methodological challenges to historical recording, it becomes highly doubtful whether the task posed to historians by the famous German historian – often considered the founder of “scientific” history: Leopold von Ranke – to write history “as it actually was”, can actually be performed. On the one hand, *the* historical truth that there “can only be one” will not appear immediately and pure, on the other hand, it causes remarkable difficulties to think of history as a (total) object being opposed to the discerning subject. Insights from epistemology, the theory of history as well as nationalism research have revealed the untenability of a holistic, objectivistic and hermetically sealed understanding of history. Historians know for sure that there neither is nor will be *the* historical truth. In contrast, this totalizing perception of the *one* history has to be replaced by an irreducible variety of differentiating interpretations of history: *histories* instead of *history*. Furthermore, hermeneutically inspired approaches could show that respective political, religious, social and intellectual imprints of the interpreter play a decisive role not only in the work of historians but also for the public sphere in which historical aspects and narratives are discussed. The interpretation and the result of the interpretation, historical terms and statements are inevitably affected by different prejudices in a positive hermeneutical sense, i.e. the question how sources are interpreted is always dependent on the ideological or political character of the exegete and his social background.

4. As a result, the above described understanding of history as it is widely used in contemporary legal discourse, the fiction of the *one* history is to be abandoned. Rather, the term ‘history’ is to be used as a metaphor describing a space where a plurality of competing histories prevails, a plurality that permanently irritates and undermines existing identities, considered as self-evident and prone to consolidation. In this space various actors are engaged in ‘working on the historical memory’ and arguing about the interpretation of the past. Under these conditions, a liberally and democratically organized and pluralistically structured society has to provide for spaces in which history remains a con-



tentious issue. The yardstick of democratic culture becomes society's capacity to remain aware of the "particularity" and contestedness of historical interpretation. Scientific and public discourses on history need to be structured in a way that they can resist state-aided official interpretations of history. They must be capable of unmasking such interpretations as dangerous attempts to legitimize and stabilize political power with reference to alleged historical continuities. Conflicts between numerous and irreconcilable interpretations of the past reflect the political and cultural situation of a pluralistic society. In this sense they are always an expression of the republican openness and tolerance that can be found in a society. A European community of history cannot be, like some German Constitutional and Community Lawyers obviously seem to believe, the result of something given or of an objectivity which Europeans are born into, but rather a "European community of history" can and should be understood as a metaphor for a decentralized place where Europeans discuss and argue about the infinite multiplicity of their histories.

### *B. Language*

1. Language is another criterion of homogeneity to which judicial discourse often refers. In the debate on Europe's political future, it was particularly the German lawyer Dieter Grimm who related a shared language with the constitutionalization and democratization of the EU's institutional framework. According to Grimm the European Union suffers from a shortage of democratic legitimacy that is in turn caused by the linguistic diversity in Europe. In his view democracy in general and the acceptance of the majority principle in particular presuppose the existence of a community of communication. Based on an ambitious theory of legitimization, Grimm doesn't reduce democracy to periodic elections and the work of the representatives but rather includes the existence of a public as an essential element of democratic legitimacy. However, due to linguistic diversity, there are no newspapers, journals, and radio or television networks available Europe-wide that can trigger the emergence of a specific European public. If both information and participation as basic requirements of democracy are dependent on the fact that all citizens speak the same language the democratization of the EU is impossible as long as there is no linguistic homogeneity. To put Grimm's argumentation in a nutshell: There can be no European democracy as long as there is no European public sphere.

There can be no European public sphere as long as there is no common European language.

2. Obviously, Europe is a linguistically heterogeneous place. 23 languages are approved as an official language, some other languages are officially approved as minority languages within specific Member States. Despite the increasing language skills observed particularly in younger generations, French and English as the languages that prevail the Union's institutions continue to appear as foreign languages to more than 80 percent of the European population. Both legal and factual reasons render a transformation of Europe into a homogeneous language area highly unlikely in the foreseeable future. Furthermore, the common objection that countries like Switzerland, Finland, Canada, Spain or Belgium constitute democratic states even though their citizens speak more than one language, is not qualified to refute Grimm's thesis. Most of the countries mentioned are not comparable with the European Union in quantitative and qualitative terms. Moreover, in some of these countries the linguistic diversity does cause serious friction. However, the frequently made proposal to restrict the official languages of the Union is a sign that Grimm's arguments have been misconceived, because his interest is not directed towards a communication among European elites but instead towards a broad public discourse with potentially no limits of accession.

3. In opposition to Grimm's assumption, the linguistic heterogeneity is by no means an insurmountable obstacle on the way to a European public sphere. Although it is true that there is no Europe-wide media yet, this is not an absolute condition for the emergence of a European public capable of satisfying the functions usually attributed to the public sphere. Indeed, on the grounds of linguistic homogeneity communication among the members of a particular community might be easier and might render the formation of a functioning public sphere more likely. But other factors are of far greater significance. First, the Europeanization of the national public spheres can happen in two ways: either as the emergence of an autonomous European public sphere with media published and receivable in all European countries, or as the transmission of issues by the national media. Only the first possibility is dependent on a shared language while the second scenario, in which the national press and television would translate political and social issues into the respective language, can take place under conditions of multilingualism just as well. In this scenario the role of the media would lie in the synchronization of the coverage. Thus, all European Citizens would be informed about identical issues at the same time and a

Europe-wide discourse would emerge. Even today journalistic and sociological analysis shows that the coverage of particular issues is not restricted to national boundaries. Second, strengthening the influencing capabilities of European citizens is of essential importance for an intensified European public sphere. If citizens recognize that the decisions of particular institutions significantly affect their lives, debates on the legitimacy and convenience of these decisions are inevitable. Third, another important impetus towards the expansion of a European public sphere is to be seen in the transparency of European policies. Fourth, transparency implies the clear allocation of competences and responsibilities. Both political parties and European politicians must act as a point of crystallization for particular policies, i.e. to act in such a way as to enable European citizens to identify political programs with concrete parties and persons. Fifth, the socio-structural foundation that is demanded by Grimm is more likely to emerge when an »institutional advance« is granted. Any argument that highlights the meaning of pre-legal conditions for the democratic organization of a political body results in a vicious circle: Either, due to the slow formation of the socio-structural requirements, the democratization is postponed into the far future, or the lack of democracy is declared unrecoverable. Although it is not unobjectionable from the perspective of an ambitious theory of democracy, an institutional advance seems capable of triggering social developments similar to what concepts of linguistic homogeneity demand.

4. If the public sphere is not to be thought of as a unitary space but rather as a complex network of multiple and decentralized public spheres, the demand for linguistic homogeneity becomes untenable. In this case, a Europe-wide communication does not rely on a centralized media system. European communication can be situated in a widely ramified network of different fora with various actors. Within this kind of network each national media system would mutually refer to the coverage in the other Member States. Under these circumstances news, commentaries, attitudes and opinions would be translated, transferred, reproduced, and criticized by each medium. As a result, monolingualism is neither an absolutely necessary precondition for the emergence of such a condensed communication nor for the democratic participation of the citizens.

## V. “Homogeneity” in the Primary Sources of European Community Law

### *Article 6 (1) and 7 TEU: “Constitutional Homogeneity”*

1. According to many lawyers Articles 6 (1) and 7 TEU guarantee a minimum of constitutional homogeneity within the EU. At first sight, the meaning of homogeneity as the term is discussed with reference to Community Law is different from those concepts of homogeneity that refer to a pre-legal substance either founded in a common history, common culture, or in a shared language. First, homogeneity is, as both the prefix “constitutional” and the point of reference indicate, considered as a legally based homogeneity. The reference point of homogeneity is not to be seen in extra-legal factors like history, religion, culture or language but rather in common legal principles and rights. Second, the term homogeneity in Community Law discourse is an integrating element of the debate on European federalism. In the latter sense, homogeneity stands for the indispensable consensus among the Member States on the one hand and between the Member States and the EU on the other. Pursuant to Article 6 (1) TEU, the Union “is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Article 7 TEU provides a sanctioning mechanism for the case of serious and persistent breaches of the principles mentioned in Article 6 (1). But even such a less ambitious concept of homogeneity is questionable insofar as the principles laid down in Article 6 (1) TEU find a different specification in each Member State. Moreover, these principles that historically originated in the Nation States will necessarily change their meaning when being transferred to the supra-national level. Only in consideration of these objections it does make sense to speak of a constitutional homogeneity within the European Union.

#### A. Article 6 (1) TEU: “Homogeneity of Values”

1. Beside assumptions of a constitutional homogeneity in judicial discourse on Community Law one can find an understanding of homogeneity that characterizes the legal principles as values, the primary law as a system of values and the EU as a community of values. Although the

inflationary usage of the term 'value' is harmless, it is striking that the effects attributed to a community of values are the same as those linked with the existence a socio-structural homogeneity. The former is understood as something that exists before any juridification. Furthermore, a feeling of togetherness is build upon a common value base; the 'values' laid down in Article 6 (1) TEU shall be responsible for the development of a European consciousness and the constitution of a European citizenry. Finally, shared common values shall enable the implementation of the majority principle. The willingness of the minority to accept majority decisions is anchored not in a socio-cultural homogeneity but in a common basis of values.

2. To assume a social consensus on the basis of shared values is plausible only as long as these values do not come into conflict. In cases of conflict between two or more values it becomes clear that the integrative effect of values is a fiction, which cannot be verified empirically. Moreover, to speak of a value consensus carries the risk of disregarding the plurality and diversity of modern societies. But the thesis that the integration of individuals is mainly a result of preexistent values not only underestimates the radically plural structure of modern societies but also the integrative meaning of institutionalized procedures provided by the constitution. Again, the focus is directed towards the representation of something that is already there rather than towards the inventive construction in legal procedures. The imprudent usage of the term 'value' and the corresponding moralization of conflicts furthermore triggers the risk that conflicts escalate to a level where they cannot longer be solved. Finally, one can get the impression that the rhetoric of values officially propagated is designed to distract from the problematic lack of legitimacy. Instead of giving citizens effective rights of participation, the solemn appeal to European values seem to work as a substitute for an actual exercise of influence.

#### B. Article 49 TEU: "European State"

1. In a disguised manner, concepts of homogeneity enter the judicial discourse on Community Law through Article 49 TEU. According to this Article 'any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union.' Particularly the debate on the potential EU-membership of Turkey has shown that this provision is one of the most important legal windows for assertions of or claims for homogeneity. In contrast to authors who consider 'Europe' as an indefinable term, some German constitutional lawyers

do not refuse to define alleged characteristics of Europe. In their view, a European State is a State that participates in a homogeneity rooted in specifically European commonalities in culture, history, or religion. Often mentioned characteristics of this kind of socio-structural homogeneity are Greek philosophy and mythology, Christianity, the power struggle between the Catholic Church and the secular rulers, the Reformation and the Counter-reformation, the eras of the Renaissance and of the Humanism, the Secularization and the Enlightenment, the European Rationalism and the corresponding emergence of sciences, the Industrial Revolution as well as individualism.

2. However, every attempt to define a substantial homogeneity with reference to culture, history or religion is doomed to failure. Every narrative will be countered and undermined immediately by a different narrative. Neither geographical nor historical, neither cultural nor religious narratives are 'objective' and, therefore, intersubjectively convincing. Comprehensive listings of allegedly indispensable characteristics are not only semantically vague but they also conceal the antagonisms, interdependencies, flexibilities, inconsistencies, and discontinuities among the mentioned characteristics. Finally, if the accession to the EU is dependent on the question whether a particular State shares a diffuse socio-structural homogeneity, legal conditions of accession become insignificant.