Minorities and Historical Titles: the Search of Identity

Herrero y Rodríguez de Miñón, Miguel
Mayor, 70. 28013 Madrid

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Europako Estatu askoren jarduera konstituzionalaren baterako ezaugarria ikertzea du helburu azterlan honek. Baterako ezaugarri horren arabera, Estatuaren egitura plurinazionala da, bere sistema federala edo unitarioa izanda ere, identitate politikoen bidez onartutako gutxiengo nazionalei esker. Konstituzio Auzitegi aktiboak dituzten Estatu ez-federaletan oinarritzen da lana, batez ere.

Giltza-Hitzak: Gutxiengoa. Autoktonoa. Eskubide historikoak. Berdintasuna. Diskriminaziorik eza. Nortasuna.

El objeto de este estudio es una característica común de la práctica constitucional de muchos Estados Europeos. Esta característica común señala la estructura plurinacional del Estado, a pesar de su sistema federal o unitario, mediante el reconocimiento de las minorías nacionales concedido por sus identidades políticas. El trabajo se centra sobre todo en Estados no federales con Tribunales Constitucionales activos.

Palabras Clave: Minoría. Autóctono. Derechos históricos. Igualdad. No-discriminación. Identidad.

Cette étude porte sur une caractéristique commune de la pratique constitutionnelle de nombreux États européens, qui met l'accent sur la structure plurinationale de l'État, malgré l'existence d'un système fédéral ou unitaire, par la reconnaissance des minorités nationales octroyée par leurs identités politiques. Ce travail analyse principalement les États non fédéraux, possédant des Tribunaux Constitutionnels actifs.

Mots Clé : Minorité. Autochtone. Droits historiques. Egalité. Non-discrimination. Identité.

1. The issue to be approached in this presentation is a common feature of the constitutional practice of many member States of the Council of Europe. This common feature points to the plurinational structure of the State, regardless of its federal or unitary system, through the recognition of national minorities qualified by their autochthony. I will focus my analysis mainly in non-federal States with active Constitutional Courts.

As the PCIJ said in the Greco-Bulgarian Communities Case in 1930 "the existence of a minority is a matter of fact not of law" and if the definition of minorities is difficult if not impossible, their sociological existence is doubtless. A minority could be defined as a group of citizens in a non predominant situation, permanent residents of a country and who display, in relation to the rest of the population, objective and distinct characteristics that this group wishes to preserve and develop.[1]

Objective elements, such as demographic size, non dominant position, ethnic features an so on, are connected to subjective elements such as a sense of solidarity, directed towards preserving one's own identity.

The peace treaties of 1919 drafted an international system for the protection of minorities as semi-collective bodies, which at the time, were echoed in some European constitutions. Boris Mirkine Guetzevitch, in a very well known book in those days,[2] said that the protection of minorities was one of the new trends of post-war constitutionalism and an outstanding example of the reception of international law by domestic constitutional law. But this model collapsed, as the whole League of Nations' system, during the late thirties.

After the Second World War the general response to the question of minorities only favoured the protection of individual rights. Equality and non-discrimination were supposed to be enough to guarantee human rights to everybody. However, eventually, both constitution drafters and judges were forced to face a different approach to minorities as collective entities and to accentuate their guarantees. The reasons are manifold. In the first place, because the collective dimension of essential individual rights, such as religious freedom, mass meeting or labour rights, became apparent. Second, because culture is the objective of a third generation of fundamental rights and culture is, by definition, collective and increasingly appearing as the transcendental condition of possibility and development of the very individual subjectivity. The Swiss Courts illustrates this issue by recording the "unwritten freedom" to use the own language, which, at the same time, poses all the questions related to classical fundamental rights as those of expression or education. Finally, because if the incorporation to a minority group should be a free option in an open society, it is none the less true that the protection of the group itself must be undertaken to prevent, both external and internal erosion.

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1. The Polish project of Law on minority rights of 2001 under study jet gives a similar definition (art.2), probably under the influence of Capatorti Report 1979, nº 568.

2. Les nouvelles tendences du droit constitutionnel, Paris (Sirey), 1929.

This may demand measures, such as declaring compulsory a previous incorporation in such cultural horizon as the group is. For instance through linguistic immersion as the Spanish Constitutional Court said for Catalonia (S. 337/94). In the same fashion, objective factors as ascendancy or the mastering of a minority language, may also be demanded for a free incorporation into a minority group, as the Constitutional Court of Slovenia established (S. 12,2, 98) or even its irrevocability. Examples are founded, among others, in Slovenia and Finland (in relation with the Laplanders). Consequently, fundamental rights infer cultural rights. And from these arise collective rights that have given juridical shape to the minority itself.

In the light of the "Framework Convention of the Council of Europe on the Protection of National Minorities" it seems that the adherence to a minority could be a decision made at will. But domestic legislation and its interpreters made clear the difference between "assumption of" identity and "choosing" identity. The former cannot mean anything else but "testifying", by a voluntary decision of will, a given existing quality, an objective feature. By contrast the possibility of "choice" would mean that anyone has the right to choose any identity from a range of available identities. As the Hungarian Parliamentary Commissioner for the rights of National and Ethnic Minorities has underlined that "a Hungarian citizen cannot freely choose –on the basis of a possible momentary inclination– to which of the minority communities in a legal sense he wishes to belong. Still, he does have the fundamental right to have and express real self-identity".[3] The identity could be opted or rejected by the individual who has it, as the Slovak law says, but, as it happens with the language, it is not his ownership and it is not at his disposal. In a certain way he belongs to it.

Nowadays, politologists have determined two main issues. On one side, that liberalism, to be consistent, must accept collective identity as that which enables an individual to meet his or her possibilities of personal development as well as an effective exercise of freedom and fundamental rights, many of which have as well an undeniable collective dimension. The name of Kymlicka is the best known among the defenders of these theses. Furthermore, this recognition may take shape in many different ways, from multiculturalism to plurinationalism or even cosmopolitan multiculturalism.[4] On the other side, the possible risks for democracy and the rule of law that may emerge from a multiethnic society have been duly underlined. Let us remember Sartori for all others. And strong currents of the liberal ideology continue to insist on the fact that, all in all, it suffices to guarantee the equality of citizens against discrimination, both individual and collective.

This is the doctrinal framework to explain the trends of current European laws and practice in relations with minorities.

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3. Annual Report of the Parliamentary Commissioner for National and Ethnic Minority Rights, Budapest, 2001, pp. 13 ss. and Budapest, 2003, pp. 10 ss.

4. Cf. Cornewell and Stoddard (eds.) Global multiculturalism, Oxford (Rowman & Littlefield) 2000.

2. With regards to European practice three main types of minorities have been identified.

A) In the first place, the so-called classical minorities or national or ethnic groups. That is, those communities of people who share cultural, linguistics, ethnic, religious, etc. features of their own, conferring a global identification to the individual that belongs to them. The autochthonous or historical minorities, whether they are national communities or not, are those that have been settled in the Country for as long ago as it allows for presuming their stability and rooting and are opposed to "de facto groups". Such terminology has been used by the Constitutional Court of Hungary and fits in with the distinction expressed in Poland, Slovenia, Croatia, Slovak Republic and even Austria, based on the art. 7 of the Treaty of Vienna. The same may be applied to the Laps in Norway and Finland.

In the lack of constitutional definition, autochthony is interpreted by the Constitutional Court of Slovenia as immemorial presence (S 23,3, 2001) and therefore extended analogically to the Gypsies although they are differentiated in the Constitution (art. 65). Austria and Hungary, in their respective laws of 1993 share a similar situation where autochthony derives from the presence, respectively, of over a hundred years or several decades –between 25 and 90 years–. Finally the concept of national minority in the Polish law is set aside for those communities, the main body of which is to be found beyond the boundaries of Poland (i.e. Germans) and consequently are minor branches of a nation that differs from the Polish. The Silesians, for instance, are not considered a national minority but an ethnic group (Court of Appeal of Katowice, S. 24, 9, 1997).

The qualification as "national minority" has little to do with the total size of the minority population as the case of Frisians in the Netherlands shows –in relation with speakers of Low Saxon or Limburger[5]– and it is formally recognized in Slovenia (art. 64), even if its quantitative presence in local districts is relevant to obtain political rights, among others as the Austrian Constitutional Court said (i.e. SS 12836/1991, 15970/2000 and 16404/2001) The logical rationale of the distinction is that those minorities "contribute to the cultural wealth of the Country", as it is said in different Dutch instruments.[6] They "participate in the sovereign power of the people; they represent a constituent part of the State", as is stated by the Constitution of Hungary (art. 68,1) and implemented by Act. LXXVII 1993. Even then, the State is based on two peoples, as is the case of Norway with relation to the Laps.[7] The Austrian Constitutional Court underlines the value of identity from its S. 9224/1981 and the recognition and even promotion of this value is the general trend, more or less actually effective, in the new European constitutionalism.

5. Cf. Second periodical report presented to the Secretary general of the Council of Europe in accordance with article 15 of the Charter (Strasburg 26 May 2003) MIN-LANG/PR (2003) 6, pp. 25, 182, 2003.

6. Ibid. Cf. Convenant on Fryssian Language and Culture (2001).

7. Cf. 1987 Act on the Sami Parliament and other Sami matters.

The difference between those autochthonous minorities and the rest of classical minorities considered as "de facto" groups and the other types later considered is quite important when approaching the various protective techniques applied, since the right to preserve and promote collective identity which in turn depends on the strength of "national characteristics" are granted to autochthonous and historically rooted minorities. These rights include national symbols and specific linguistic, cultural and educational rights as well as political rights, practically vested in the group. On the other hand, members of "de facto" groups are only granted non-discrimination, based on general protection of fundamental rights and the principle of equality. As a matter of fact the Hungarian Parliamentary Commissioner for National and Ethnic Minority Rights has had no intervention in relation with immigrants.

Consequently, the primary question in regard to minorities designated as classical is the safeguard of their identity. As far as they are object of positive discrimination policies, the goals of those positive actions are the guarantee and promotion of their identity, said the Constitutional Court of Slovenia (ss. 12,1,1998 and 28,1, 1999).

B) A second group is made up by the new minorities which arise from the recent massive migration and who share the same ethnic origin. Looking at the U.S. experience, Kymlicka said that these immigrant groups are neither nations nor do they occupy native lands and that their specific characteristics are mainly expressed through family life and voluntary associations that do not contradict their institutional integration. Therefore, even if they assert their identity and refuse assimilation into the welcoming country, at least they do not try to establish a parallel society. According to Walzel,[8] while the New World appeared thus as the chosen land of immigrants inflow and some parts of the U.S were the best example of a polyethnic society, the Old Continent only knew classical minorities, historically settled and rooted in their territory.

However, present European experience is quite different. Migration has became accelerated and massive, a qualitative change because of its quantity and suddenness and practical assimilation of immigrant groups to national minorities is directly proportional to their homogeneity, the strength of the bonds with the "mother country" and the geographical proximity of these to the receiving State. Actually, even if the immigrant group has no specific claim to identity, its numerical size may affect or even threaten the receiving society's identity, specially, if it suffers from a special frailty, as it is the case of territories of small size or poor demography. The factual base to distinguish, on the steps of Kymlicka, between polyethnicism and multinationalism is becoming increasingly unclear. But the difference between the autochthonous minorities and the newcomers is, from many points of view, the capital issue of the legal approach to minorities. The first, as it is said above, are structural elements of the State global identity; the second is an external factor to this identity if not a threat, in spite of their economical and demographic very positive contribution. Once more economical needs clash with political requirements enacted in Constitutions and laws and implemented by the Courts.

8. The Politics of Ethnicity, (Harvard University Press) Cambridge (Mass.), 1982, p. 9.

The affirmative action or positive discrimination of the member of a minority group is based in the protection of fundamental rights and the effective guarantee of the equality principle and not on minority rights. Their goal is nor the preservation of the group's identity but the compensation of a previous situation of real inequality. In this case the aim is equality; in the previous one the maintenance of difference. The canonical interpretation of Helsinki Act does not include newly settled groups under the protection of art. 27.

C) The third group of newest minorities, also called "cross-minorities", is made up by the social movements of women, homosexual, handicapped, etc... rejected or disregarded until now when, precisely for that very reason, they claim either an official recognition or a special protection or both at the same time.

This last category is undoubtedly heterogeneous compared to the first two already described and only a excess of "politics of recognition" could confuse them and risk the frustration of their respective aspirations. To put on the same level the French-speaking minority and the Canadian deaf-mutes does not favour an adequate treatment of both issues, even if Habermas supported such an original view. Some social features may not base a global identity as it is the case for gender, sexual behaviour or even religion in a secular era. Others, such as the handicapped, should not propose to perpetuate their features, although this is not always clear for some of them and Courts could share this view. But since the problem is daily renewed with increased strength, light must be cast on the specific claims of each of these movements. Be it protection against discrimination –the tolerance principle–, promotion as the best way of integration –hypothesis of affirmative action or positive discrimination– or assertiveness and perpetuation of a different identity.

Finally and in the extent of those questions posed to the Constitutional Courts whose doctrine I have analysed, the newest minorities have been handled upon the bases of the non-discrimination principle and respect for the fundamental rights.

3. They are different criteria to classify the various constitutional techniques for minority protection. A legal approach should distinguish between repealing rights, that is the privileged immunity of the minority in relation to the general rules; promotional rights, that is positive action to create appropriate conditions enabling minority groups to preserve, express and develop their own identity and fully participate in the life of the global community; and rights of self-government.[9] But from a material point of view, the three most important to be emphasized are: cultural autonomy, which could even be territorial self-government; symbolic expression of identity; and specific political rights. I will omit descriptions of bureaucratic organs of participation of minorities in the central administration and of protective institutions such as the Ombundsman.

A) The first assumes recognition of fundamental cultural rights, not exclusively but primarily linguistic. A particular language assumes a particular culture and thereby requires the specific laying out of both, expression and educational

9. Cf. Levy, The Multiculturalism of Fear Oxford (OUP), 2000, pp. 127 ff.

rights. Chiefly, because they are instrumental for its preservation and development. Think of the Swedish language in Finland –as a "de facto" minority which is how the Finish authorities refer to it– Sami or Lap in Finland and Norway, Danish, Frisian and Sorabo in Germany, German in Denmark and Italy, Frisians and, on a different level, Lower Saxon, Limburger, Yiddish, Roma and Sinti in Netherlands, Hungarian and Italian in Slovenia and a number of languages in Poland, Croatia, Slovak Republic and, most of all in Hungary.

Recognition of a minority language usually implies that of a different culture –for instance, Swedish traditions in the Island of Äland– and this leads to the recognition of a whole field of cultural autonomy, its organisation and management by its own people, which is most relevant when addressing education. Austrian Constitutional Court has been a pioneer in this field when it declared that the right to receive education in the "mother-tongue" is a personal right transcending the frame of territorial autonomies (from S. 12245/1989 Now cf. S. 15759/2000). Other new democracies of Eastern Europe followed the example, even in most radical terms as is the case of the Sentence of 12, 2, 1998 by Slovenia's Constitutional Court.

However, since cultural and linguistic minorities tend to group together in terms of space, policies of cultural recognition are bound to apply such recognition in the shape of autonomy granted to those territories where a majority of a certain minority is found. Such is the case of German-speaking provinces of Bolzano and Trento in Italy. Specific precautionary measures have been included to this effect in some constitutions (i.e. Finland, arts. 121 in fine and 122) and the previously mentioned Hungarian law of 1993 has carried this principle on by foreseeing the self-government of a minority in a given territory when votes prove its majority presence. The Hungarian Parliamentary Commissioner has underlined, over and over again, the unsatisfactory performance of the system that frequently clashes with the local authorities.[10] The Slovenian Constitution tends directly to territorial selfgovernment of national communities (arts. 64 and 143).

On the other hand, territorial presence of minority population over a quota is the condition of different cultural rights in the Slovak legislation.[11]

Territorial devolution, not only in linguistic matters, is also practised in many other places where a national community exists as is the case of Spain, Belgium or the United Kingdom or even when non national identities are recognised as the Feroe Islands or Greenland in Denmark. But those cases went beyond the politics of recognition of minorities and should be considered as juxtaposition of different body politics in one State. Jellinek call that "Staatsfragmente".[12]

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10. Annual Report… Budapest, 1998, pp 35 ff.Budapest, 1999, pp. 11 ff. Budapest, 2003, pp. 151 ff.

11. The Act on the use of minority language 184/1999 and the Act on denomination in language of national minorities 191/1994 among others requiere that the citizens of a national minority form at least 20% of the population to get those rights.

12. Cf. Allgemeine Staatslehre, Heidelberg, 1900, chap. 19, II,3 and Über Staatsfragmente, Heidelberg (Köster), 1896.

Despite this territorial imperative, the principle is often opposed by the personality principle, whereby minority rights are carried along, wherever they go, by the members of the minority, like "the shadow follows the body", without the need of a territorial link. This personality principle is applied in all purity to a nomad community lacking a territory, such as the Gypsies, expressly contemplated in much legislation and in the Slovenian Constitution (art. 65). Many other cases may be stated, such as the already mentioned interpretation of the Austrian Constitutional Court which respect to Carinthia, specifically included in the Slovenian Constitution in relation to Hungarian an Italian minorities (art. 64) and confirmed by this country's Court (S. 12,2, 1998). The double heritage of the ancient Habsburg plurinational Monarchy and of utopian Austromarxism (Renner and Bauer) could be the roots of this generous interpretation. Along the same lines, in Western Europe, the Spanish "derechos forales" (civil law of some territories) could be mentioned, in spite of the present trend towards the territorialization of those laws as as factor of integration of a political identity which is already territorial (vd. Law 3/1992 1 July of Euskadi, art. 10).

B) This link between identity and territory raise another question: the significance of the second for the community that is settled in a particular area that may hold a special symbolism. That depends on whether the land is just a "space" to live in or a "place" qualified as "native land" or "ancestral home" or even "gifted land" by the cathartic energy of the community. I have explain many years ago the meaning of national territory as mythical space.[13]

Migratory movements can even change the autochthonous population into a quantitative minority in such a way that the fundamental rights of those who now represent the demographic majority and end up by reclaiming their collective identity –as the Albanians in Kosovo– may seriously affect those people who consider themselves qualitatively bound to a certain "place" that, for the same reason, is something more than a simple "space".

That is why constitutional and legal restrictions to the freedom of settlement and estate ownership in particularly sensitive territories not only exist, but also will probably proliferate in the future. The principle of free circulation and settlement, key to the European Union, emphatically proclaimed by legislators and judges, yields over and over before such a territorial imperative. Exceptions to the European Union general rules, justified by ecological considerations as those established in Tirol or in Island territories as is the case of Man, or the use of urban planning laws to induce demographic movements as those practised in France or under study in the Spanish Canary Islands, could actually be explained much better as policies to protect territorial identity.

Territory becomes in this sense an integration factor of collective identity, more symbolic rather than material. The reassessment of this symbolic expression of identity itself which is mentioned in rules dealing with toponymy and traffic signs (i.e Slovak law 191/1994), reaches its apex in the Slovenian Constitution

13. Cf. *Homenaje a García Pelayo*, Caracas, 1980, II, pp. 629 ff.

(art. 64) and Slovenian constitutional practice, which guarantee the use of their own national ensigns, to the Hungarians and Italians (the very Hungarian and Italian flags and colours), both inside and outside the country (S. 28, 1, 1999).

C) Finally the attribution of specific political rights to minorities follows three main guidelines. On one side, the already mentioned territorial self-government on local basis (i.e Hungary art. 68,4; Slovenia, art. 64 Cf. SS. Constitutional Court 22,3,2001 and 14,11,2002). On the other, the guarantee to practise certain rights, as expression and education on a privileged basis (i.e. Slovak Republic Constitution art 34 and laws 184/199 on the Use of minority Languages and 29/1984;184/1999; 308/2000; 619 /2003; 16/2004). Thirdly, by conferring minorities a self representation in local and even State institutions, either by facilitating their access through elimination of the minimum quotas required to obtain representation (i.e Poland Law 12/4/2001, art. 34 Cf. S. of the Constitutional Court of 30,4,1997), or by direct guaranteeing such representation (i.e Hungarian Constitution art. 68,3) or even by way of awarding their representatives a veto over such issues that may concern them specifically (i.e Slovenian Constitution art. 64,5).

SEVERAL CONCLUSIONS ARISE FROM THE PREVIOUS APPRAISAL

1. In the first place the fact that equality, non discrimination and fundamental human rights, as well as protection of minorities, are not exclusive but alternative terms of the same option. They cannot be exclusive because human rights are strongly related to the protection of minority rights, both genetically, and as limitation of collective rights. The doctrine of different Constitutional Courts that has been analysed is quite unanimous on the matter. They are alternative instead, because either way has two different objectives in view: the safeguard of individual as such in the first case, and the protection of a collective identity in the second.

The dealing with Gypsies or Roma minorities in countries as different as Hungary and Spain shows the difficult compatibility of both terms. The integration of Gypsies is a direct threat to their way of life and collective identity and as the same time the preservation of their identity, through the teaching in their own language, can induce the discrimination of this minority.[14]

2. Secondly, the rationale of the protection of classical minorities is not, as new liberalism does insist, an extension and deepening of individual rights, but the positive appraisal of particular identities in spite of its numerical importance and because of its rooting in the global identity of the State whose "components" those minorities are, as the Hungarian Constitution says (art. 68).

Those are the case of the Sorbian, Frisian and Danish minorities in Germany, of the Hungarians in Slovenia, the Slovenians in Hungary and different peoples in

14. Cf. Annual Report..., Budapest, 2001, pp. 24 ff.

the Slovak legislation. On the contrary, the Hungarians denominated "de facto groups" and "other peoples" –v.gr. Vietnamese– by the Slovak legislation, are those that, whatever their number could be, lack such valuable characteristic of historical identity, so that their members are individually protected against discrimination, but without recognition and support of their collective identity. So the Gypsies who have been settled in Slovenia since centuries are, in spite of the common negative bias of the global society, entitled to specific rights of political representation, contrary to the recent and maybe better placed immigrants (vd. S.14, 11,2002 of the Constitutional Court of Slovenia).

Many European countries follow the same criteria in their attitude to immigrants and the most recent French practise is decisive to such respect. Instead, wherever the minority in question, no consideration taken of its numerical weight, shows a historical identity incorporated to the global identity of the society into which it is inserted, it becomes worthy of the safeguard of such identity. Thus the Swabian leanguage is held under protection in Germany in the same way as the Danish representation in Schleswing, but the is not special protection for the language nor the political representation of the larger immigrant Turkish community. The social reaction to the recent resolution of the German Constitutional Court on the shador in the schools of September 24, 2003 is the best proof of it. The most polyethnicist European system, that of the Netherlands, grants a status to historically-rooted languages (Yiddish included) which contribute to the "linguistic wealth of the Country", but the languages of Asian and African immigrants lack similar situations in spite of their number.

Similar situations exist everywhere outside Europe. In large countries like Canada –in spite of its drive from initial biculturalism and later recognition of "inherent rights" of Indian natives to polyethnicism – and in microstates; in Latin America as well as in the Far East. The search of historical identity is universal, in spite of its political incorrectness. The explanation should be found not in Kant but in Herder.

3. Thirdly, it is obvious that the constitutional practice of those European countries where minorities as such are recognized allows for an increasing distinction between the State and those nations of which it is made up, even where a hegemonic nation is recognized as it is the case of Polish, Magyar or Slovenian. The Polish Constitutional Court on the art. 27 of the Polish Constitution makes a clear difference between "the State language" and "national languages" (S. 13, 5, 1997), and, as the Hungarian practice shows, the distinction is much more productive for the multinational working of the central institutions of the State (i.e. Parliament) than territorial bilingualism as it is implemented in Spain.

The distinction between one State and its different component nations whose territories, languages, and symbols are carefully safeguarded leads to plurinationality. But plurinationality has nothing to do with the split between "demos" and "ethnos" proclaimed by Habermas because the plurality of ethnical identities contribute to build up the State as its structural components and beyond them there is no "demos" at all, as the situation of new minorities shows.

Plurinationality must neither be mistaken with a generalized policy of recognition for all kind of multiculturalism. It is not the same to teach a immigrant from Senegal to read and write in Bambara than in German in Bolzano or in Catalan in Catalonia. The different nations, which are "structural components" of the same State, are only those entitled by their historical rooting to this common ownership. And this ownership is increasingly effective in many European countries.

The "historical titles" that the Spanish Constitution of 1978 recognized to some national communities, meet now an unexpected parallel in the most recent European constitutional practice. Because "Historical Titles" are the juridical version –taken from the pre-national identities of the old Habsburg Monarchy (the so-called historical-political entities)[15]– of the "political bodies" whose existence is not a creation of law but a historical fact beyond the law–.

15. Cf. Herrero de Miñón, *Idea de los Derechos Históricos*, Madrid (Austral), 1991, pp. 41 ff.