MINORITY CENSUS AND DECLARATION OF MEMBERSHIP IN A MINORITY – A PILLAR OF THE SOUTH TYROLEAN AUTONOMY UNDER INTERNATIONAL SCRUTINY

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1. INTRODUCTION

In the second half of the 20th century, at the end of a long and tortuous road, Italy has gained much international praise for her handling of the minority issue in South Tyrol. Bound by an international treaty concluded in the aftermath of World War II, the De Gasperi – Gruber Treaty of 5 September 1946,[1] and exhorted by two GA Resolutions,[2] the Italian Government after several years of reticence took the lead and embarked on a negotiating process – both with the Austrian Government and representatives of the local government of South Tyrol – that laid the foundations of an autonomous order that is often cited as an example for a successful minority protection regime. An important characteristic of this regime is its dynamic nature as it is both suited to adapt flexibly to new needs and to be improved continuously through ongoing discussions between the central and the local power.[3]

Over time it has become clear that the main challenge to this system would not come from a change of policy by the central government (at least not directly), but possibly from European institutions. These could be, first of all, the European Union, inherently opposed to protective regimes by its very foundational mission. Although this institution has its roots in a purely economically oriented organization (the European Economic Community) the continuous extension of its competences and the exercise of these competences in an ever-more far-reaching way meant that the economic area could no longer be neatly separated from other fields of social life. A second institution which impressed its characteristics deeply onto the legal reality of the European continent is the Council of Europe. In this context,

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[1] Annex IV to the Peace Treaty between Italy and the Allied and the Associated Powers, concluded at Paris on 10 February 1947 and published in GU Suppl. to No. 295 of 24 December 1947.

[2] Cfr. Res. GA 1497 (XV) of 31 October 1960 and Res. GA 1661 (XVI) of 28 November 1961, reprinted in: Autonome Provinz Bozen, Südtirol Handbuch, Bozen-Bolzano 2005, p. 34 ff., also available at www.provinz.bz.it/lpa/publ/ (last visited on 16 October 2005).

[3] These discussions are taking place primarily in the so-called "Commission of the Six" (competent for issues regarding the Province of Bolzano) or in the "Commission of the Twelve" (competent for issues regarding the whole Region of Trentino-South Tyrol). These commissions are composed of representatives of the Government and the Province/the Region according to a well thought-out system.

the Framework Convention for the Protection of National Minorities proves to be of particular relevance.[4] It represents the first multilateral treaty dedicated only to the protection of minorities. Since it has come into force on 1 February 1998 the supervisory activities carried out by the Committee of Ministers with the help of the Advisory Committee and concerning the implementation process by the various contracting parties has given an enormous boost to the further development of principles for the protection of minorities.[5] The parties adhering to particular minority protection regimes can thus no longer act in any given case as though they were belonging to an absolutely independent, self-contained regime.[6] They rather have to follow closely the findings of the treaty organs of the Framework Convention. An overarching institution has been created that controls also the development of the protection regimes in force between countries adhering to the Framework Convention. A central parameter of control is the conformity of the rules applied locally to the general principles which can already be inferred from the Convention. The influence deriving from the Framework Convention is, however, not only direct, but also indirect in character. In fact, the principles developed within this treaty regime are flowing also in the broader reservoir of human rights provisions which have to be obeyed by the European Community as general principles of law on the basis of Art. 6 of the Treaty on European Union.[7]

It is also worth to mention the activities of the OSCE in this field which became prominent in the 1990s of the last century. Of special relevance are the Copenhagen Document of the Conference on the Human Dimension of the CSCE of June 1990 and the Report of the Geneva Meeting of Experts on National Minorities of July 1991.[8] The OSCE has played in the past an important role in the area of standard-

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[4] ETS 157.

[5] See, for example, the Commentary by WELLER (ed.), *The Rights of Minorities*, Oxford, 2005. See, further, BARTOLE, "La convenzione quadro del Consiglio d'Europa per la protezione delle minoranze nazionali", Rivista italiana di diritto e procedura penale, 1997, pp. 567-580.

[6] See, in particular, Art. 22 of the Framework Convention. In this regard Hannikainen observes: "The parties to the Framework Convention are welcome to establish minority rights based on higher standards than those spelled out in the Convention, whether by national legislation or bilateral treaties. Since the Convention is a broad framework convention, states have a lot of space to move in this respect. However, states have to be wary that the outcome of such an arrangement is not an infringement of any provision of the Convention. One potential example would be if a state gave preferential treatment to a particular minority, which had the effect of discriminating against other minorities". See HANNIKAINEN, "Article 22", in WELLER (ed.), *ibidem*, pp. 557-560, p. 560.

[7] On the role played by the European Union in the protection of minorities see DE WITTE, *Politics Versus Law in the EU's Approach to Ethnic Minorities*, Florence, 2000; TOGGENBURG, "A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (Its) Minorities", in TRIFUNOVSKA (ed.), *Minority Rights in Europe: European Minorities and Languages*, The Hague, 2001; HILPOLD, "Minderheiten im Unionsrecht", AVR, 2001, pp. 432-471; TOGGENBURG, *Minority protection and the Enlarged Union: The Way Forward*, Budapest, 2005.

[8] The first document is particularly important in our context because it contains a specific reference to the role autonomy rules are playing for the protection of minorities (see para. 35

setting. The resulting commitments were of a rather political nature and it was the great challenge for the Council of Europe to translate them (or at least part of them) into legally binding rules.[9]

On the whole, these developments have come to be felt also on the level of the South Tyrolean autonomy. It is no longer the Central Government which is seen as the main opponent in the further development of the autonomous status, but the picture has become more variegated whereby the activities of the Council of Europe and the European Union constitute important elements. Of course, neither of these institutions is institutionally opposed to the protection of minorities, quite the contrary. Within the European Union, however, the goal of minority protection has to be balanced with other aims and in two cases in the 1990s[10] the ECJ has taken a very strong stance against limitations of basic freedoms supposedly justified by minority protection considerations while, at the same time, generally upholding also this latter aim.[11] The Council of Europe is even giving paramount importance to minority protection considerations, especially through two specific instruments, the Charter on Regional and Minority Languages of 1992 and the above mentioned Framework Convention on the Protection of National Minorities of 1995. These instruments may, however, follow a somewhat different philosophy in minority protection in comparison to older national regulations as they are influenced by a stronger individualist conception.[12] Therefore, it is possible that minority protection provisions at different levels enter into conflict with each other. At first sight, one would have to conclude in such cases that the international norm has to be given the precedence over the national one,[13] but upon closer inspection the situation becomes more complicated as the international norms mentioned are still in the process of being clarified. Due to their vagueness they seem to allow for several options and it is often not yet clear which one is to be preferred, even if one adopts a strongly minority-friendly perspective.

In the following, a particular element of the South Tyrolean autonomy which is considered to be a cornerstone of the whole system of protective measures of this

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of the Copenhagen Document). The Geneva Report, on the other hand, states: "Issues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective State". (Chapter 11, 3rd paragraph of the Geneva Report 1991).

[9] See on this topic BLOED and VAN DIJK, "Bilateral Treaties: A New Landmark in Minority Protection – An Introduction", in BLOED and VAN DIJK (eds.), *Protection of Minority Rights through Bilateral Treaties*, The Hague, 1999, pp. 3-15, p. 12.

[10] Cf. the cases C-274/96, *Bickel and Franz*, ECR, 1998, p. I-7637 ff., and C-281/98, *Angonese v. Cassa di Risparmio di Bolzano*, ECR, 2000, p. I-4139 ff.

[11] See, for more details on these cases HILPOLD, *cit. supra* note 7, p. 468 ff.

[12] See, extensively on this subject, HILPOLD, *Modernes Minderheitenrecht*, Vienna, 2001.

[13] This is true independently from the adoption of a monist or a dualist vision of the relationship between the national and the international legal order.

Italian province, the rules on the general census, will be closely scrutinized. Over the last years, these rules have been the subject of strong criticism, both on the local level as on the international one.[14] The ensuing developments give an informative picture not only of the content of the protective provisions here at issue but also of their adaptability to modern needs and, generally, of the impact, provisions on minority protection in seemingly not very restrictively worded international instruments can have on the national legal order.

2. The Procedures

The various procedures aiming at evaluating the compatibility of the measures on the general census for the population in South Tyrol (Italy, Province of Bolzano) with the National and European measures relating to the protection of individuals and the processing of personal data have been engendered by complaints of a private association ("Convivia").[15] This association operating in the province of Bolzano expressed doubts on the political propriety and the legality of some of the rules regarding the general census which find application in this province. Over a period of two years, Convivia seized different national and international institutions which could influence in one way or the other the further application of the census rules. In particular, the following bodies were asked to express their opinion on this issue:

– the County Tribunal of Bolzano;

– the Monitoring Bodies of the Framework Convention for the Protection of National Minorities;

– the European Commission; and

– the supervisory authority ("Garante") set up in pursuance of Article 30 of Act No. 675 of 31 December 1996 on the protection of individuals and other subjects with regard to the processing of personal data.[16]

Due to their different responsibilities – but also because of a different approach to this matter as a whole – the conclusions reached by these institutions and organs did not fully coincide. They ranged from statements that no reason for action was given to heavy criticism of the relevant measures.

All in all these various orders, judgments and opinions were strongly interrelated. Under the surface of different technical issues much common ground could be identi-

[14] It is, however, also the case that it were the local critics of these rules that drew the attention of the relevant international institutions to this issue.

[15] "Convivia" can be called a civil rights pressure group fighting, amongst others, for the rights of children from "mixed language" families and, in general, for a more open society. For the activities of this association see Winkler, in Bonell and Winkler (eds.), *Südtirols Autonomie*, Bozen, 2002, p. 134.

[16] Once these institutions had been seized, however, a larger number of entities joined the discussion.

fied when it came to answer the question of the real function of the various provisions and the outcome of the proportionality test when different goals had to be reconciled. The final step could have been an infraction procedure before the ECJ. The European Commission seemed determined to act accordingly and the results of the previous findings on the European level did not bode well for the South Tyrolean census provisions to remain free from criticism. At the same time it was clear that a negative finding of the ECJ could have had repercussions for the South Tyrolean autonomy going far beyond the issues immediately at stake. A finding that a central element of the South Tyrolean autonomy was not compatible with EU law would have threatened this system as a whole. In the following the specific purpose of the provisions on the general census in South Tyrol will be evaluated from the viewpoint of public international law, Community law and Italian constitutional law. It will be shown that census provisions like those applied in South Tyrol are not only tolerated within the legal orders mentioned but – if continuously fine-tuned to new needs – they are best suited to pursue primary goals of the legal orders mentioned. Subsequently it will be examined how the measures relating to the general census are to be judged from the perspective of the provisions on data protection. Next, the solution agreed upon in the end will be evaluated. It will be shown that the whole controversy was part of a dialogue between a minority and the majority, between national States and European institutions and between the most representative group of the minority and the so-called civil society. Lastly, general conclusions from this debate will be drawn.

3. The General Census of the Population in South Tyrol (Province of Bolzano)

3.1. The Provisions of Art. 18, Presidential Decree No. 752 of 26 July 1976

The Presidential Decree No. 752 of 26 July 1976 is entitled "Implementation Measures to the Special Charter of the Region Trentino-South Tyrol in the field of the proportional attribution of governmental posts in the province of Bolzano and knowledge of both languages in the public sector". The proportional attribution of posts, funds and other public benefits to the traditional linguistic groups residing in the province of Bolzano is a cornerstone of the whole South Tyrolean autonomy and it can well be said that this instrument has been of essential importance for the success of this model for the protection of minorities, a success recognized on a world-wide scale.

The origins and legal foundations of this instrument can – in its essence though not in all its details – be traced back to the Gruber-De Gasperi Treaty of 1946 mentioned above.[17] This treaty assured equalisation of the German and Italian languag-

[17] On the historical development of this autonomous order see in detail Alcock, *The History of the South Tyrol Question*, London, 1970, and Alcock, *Die Geschichte der Südtirol-Frage*, Vienna, 1982.

es in public offices and official documents, and "equality of rights as entering upon public offices with a view to reaching a more appropriate proportion of employment between the two ethnic groups".[18] While the implementing measures of those provisions in the first Autonomy Statute of 1948 were unsatisfactory, the attempts in the second part of the 1960s to achieve full compliance with the Gruber-De Gasperi Treaty opened the way for a more thorough response to this legal obligation.

The result of intense negotiations between representatives of the Italian Government and South Tyrolean politicians, conducted with the purpose to achieve an overall improvement of the South Tyrolean autonomy, resulted in a "package of measures" to be adopted by various legal instruments. Among these measures was the obligation, spelled out in the Articles 94 and 95 to "apply ethnic proportions in the individual administrations effectively represented in the Province of Bolzano [...] on the basis of the existing proportions between the Italian and German linguistic groups in the Province (approximately one-third and two-thirds)".[19] These provisions were implemented by Art. 89 of the new Autonomy Statute of 1972[20] which stated that the proportional attribution of posts to members of the single linguistic groups would take place on the basis of the strength of the single groups resulting from the declarations of linguistic affiliation given at the time of the decennial census.

As has been shown amply in literature the possibility for members of a minority to have equal access to public posts on their territory is a pivotal element for their effective protection. For the survival of a particular linguistic group it is important that their members can obtain – secure and decently paid – jobs in the region they live in. Equally important is that the group as a whole is administered by members of their community.[21]

The results of the decennial census are, however, not only important for the attribution of public posts, they rather influence a series of mechanisms governing the administration of the autonomy such as public housing or certain language rights of citizens residing in the province of Bolzano in judicial procedures where the province administration is a party.[22]

It can, therefore, well be said that the declaration of linguistic affiliation is not only a device to assure an equal distribution of public posts, but it rather charac-

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[18] Art. 1(d) of the Treaty.

[19] For the Ladin group Art. 92 of the package foresaw "proportional representation in public offices along the lines, in so far as applicable, laid down for German-speaking personnel".

[20] DPR 670/1972.

[21] See, for example, ALCOCK, "Proportional Representation in Public Employment as a Technique for Diminishing Conflict in Culturally Divided Communities: The Case of South Tyrol", Regional Politics and Policy, 1991, pp. 74-87, p. 76 ff.

[22] See Art. 15, para. 2, of the Autonomy Statute which states that in this province the means for social and cultural measures are distributed in accordance with the strength of each linguistic group and the needs of these groups. Only in exceptional situations which require urgency measures this principle has not be obeyed.

terises essential parts of the South Tyrolean autonomy. This autonomy has been conceived, on the basis of the "package" and of the second Autonomy Statute not only as a regional system granting specific rights to two linguistic minorities (the German-speaking and the Ladin-speaking group), but as a system assuring rights to all groups residing in this territory.

In view of the pivotal importance of the proportional system and – as a further consequence – of the declaration of linguistic affiliation for the defence of the characteristics of this autonomous order it was small wonder that opponents of this system – being such for political or ideological reasons or even out of the conviction that assimilation is the necessary and worthwhile destiny of each minority – for now more than two decades have concentrated their criticism on this mechanism pointing thereby at the very heart of the autonomous system. This criticism did not remain without response. On the contrary, it seems that the census procedure evolved very closely along the lines of the changing requirements of modern liberal society in the field of individual guarantees. A closer look at this evolution offers a good overview of the main interests here at issue and of the way competing goals in this area can be reconciled. It may be, therefore, useful to recall briefly the salient lines of this development.

The most far-reaching attack on the census system and on the obligation for Italian citizens resident in the province of Bolzano to give a declaration of linguistic affiliation was launched before the Council of State.[23] By Judgement No. 439 of 17 April 1984[24] the Council of State upheld the recourse of the plaintiffs insofar as it stated that individuals cannot be obliged to choose only between an Italian, German or Ladin linguistic affiliation as it was known that in the meantime, especially in the main centres of South Tyrol, also different linguistic realities can be encountered, in particular as a result of mixed marriages. Though not very numerous, there are people who see themselves as of "mixed language" or of "other language" and those people cannot be constrained to declare the untruth. Though it could be argued that even in these cases it should usually be possible for the individual to state which elements of its own linguistic identity are to be considered as preponderant or, in the remaining cases, it could perhaps be reasonably expected that the respective individuals should, in view of the important goals at issue, freely choose an affiliation, the Council of State took the view that such a position was unacceptable and that the right to issue a declaration that should exactly correspond to the individuals conscience should be given absolute priority. Just in time for the new census of 1991, the modalities for the declaration were changed by the Government in close cooperation with the Provincial Government. These rules now required the Italian citizens residing in the province of Bolzano to fill in a form consisting of

[23] *Consiglio di Stato*, Sez. IV, 7.6.1984, No. 439, Foro Amministrativo, 1984, p. 1128 ff. See, in this regard, BONELL and WINKLER (eds.), *cit. supra* note 15, p. 131 ff. See also REGGIO D'ACI, *La Regione Trentino-Alto Adige*, Milano, 1994, pp. 478 ff.

[24] Deposited on 7 June 1984.

three copies bearing the codes A/1, A/2 and A/3.[25] While copy A/3 remained with the declarer and gave proof of the fact that the declaration has been given, copy A/2, which had not to bear any sign of recognition, had to be put by the declarer in a white envelope containing also the name of the town of residence. This envelope was forwarded to the provincial census authority and only there these envelopes were opened. At the centre of any possible concern of individual rights activists stood, however, copy A/1 from which both the name of the declarer and his affiliation to a language group were evident. Here, the judgment of the Council of State has been taken into consideration in the following sense. In case the declarer was not in the position to opt for a single specific linguistic group he could declare himself as a member of the groups "others" and only to be able to take advantage of the rights associated with the proportional system he had to aggregate himself to one of the three linguistic groups. Ticking the respective boxes on copy A/1 of the declaration form determined both the affiliation and – if the case – the aggregation. As the form A/1 was a copy paper the choice made resulted also from copy A/2 and A/3. Name, date and signature, however, resulted only from copy A/1: the respective fields of copy A/1 and A/2 were not self-copying. Copy A/1 was put in an envelope bearing the name of the declarer and was originally consigned to the local court (*Pretura*, *Bezirksgericht*) where the declarer could obtain a copy if necessary (for example, application for a public post). A copy could be required also by judicial organs in the cases referred above where the linguistic affiliation became relevant.

Therefore, the only really delicate information was contained on the copy A/1 stored originally in a closed envelope at the local court. In practice, the only third person obtaining knowledge of the content of this declaration was the officer responsible for issuing a copy of the declaration. This officer was bound to secrecy.

The declaration remained valid for a period of ten years, until the next census. In certain cases (in particular, absence from the province of Bolzano during the counting period) this declaration could be filled in also outside the period indicated and in this case the declaration had no influence on the official statistic data taken as a basis for the proportional attribution of public posts.[26]

The declaration had to be filled in by all Italian citizens residing in the province of Bolzano over the age of 14.[27] For children under 14 years of age a special declaration had to be given by their parents enabling the authority to take account of these children calculating the proportional strength of the single linguistic groups. As there was no need for children to present a personal declaration (they are, in particular, not admitted to public posts) these declarations were completely anonymous: the names of the persons to be counted were not registered. These declarations, to be made on the so-called sheet B, were inserted in a rose-colored envelope.

[25] See Art. 18, DPR 752/1976.
[26] See Art. 18, para. 6, DPR 752/1976.
[27] See Art. 18, para. 1, DPR 752/1976.

The parents were not obliged to fill in this sheet B[28] in case they could not decide to which linguistic group their children belonged, being they themselves of different linguistic origin.

3.2. The Respective Attempts to Further Reform or Abolish the South Tyrolean Census System

In general this whole procedure, as it applied to the census of 1991, seemed to be endowed with far-reaching guarantees for the protection of individual liberties, while, at the same time, offering an efficient way to measure the strength of the single groups. "Convivia", however, tried hard to avoid that the census procedure of 1991 should again find application in 2001. The respective initiatives aimed at a radical change of the relevant provisions if not at the total abolition of this particular instrument characterised by being a unique combination of census procedure and device ensuring a fair proportional system.

It is not for the present article to rehearse the detailed discussion about the legality of this census system measured against the Italian legal system. It may suffice to recall that the Provincial Tribunal with ordinance of 16 October 2001 rejected all the arguments brought forward and upheld the present system. In its reasoning the Tribunal gave central attention to the question whether this whole instrument was proportional to its main aim, i.e. the protection of minorities, or, to put it differently, to assure the peaceful coexistence and collaboration of all groups living on this territory. In this context it has to be emphasized that minorities are protected in Italy by Article 6 of the Constitution and that the South Tyrolean Autonomy Statute itself enjoys constitutional status. In view of the particular scope of the South Tyrolean census provisions their proportionality was plainly confirmed. This was cause of some hope for the remaining procedures.

3.3. First Adaptations

While the opponents of the South Tyrolean census system did not achieve its complete repeal, some "concessions", though surely not fundamental in nature, could be obtained. The concessions regarded the question who should be the depositary of the declarations, or more precisely, of Form A/1 containing the most sensitive information. It was agreed that these documents should no longer be deposited with the local Court but with the Department of the Government Commissioner (*Commissariato del Governo*), a local organ of the Ministry of the Interior. Alternatively, the declarer could choose to have its declaration deposited

[28] See Art. 18 bis, para. 3, DPR 752/1976.

with the municipality of residence.[29] Again, the respective administrations were bound to secrecy.[30] It was immediately questioned whether these modifications had really brought about an improvement. First of all, one was left to wonder why the Department of the Government Commissioner or the municipality of residence should be able to grant a higher degree of confidentiality (or, to put it differently, data protection) than an office of a Court. It was argued that this reform has reduced the size of the sensitive data.[31] The size of a data base is surely an element that compounds the data protection problem or, to put it differently, by reducing the size of single data bases, the protection problem loses urgency. The new provisions in Art. 18 of the Decree 752/1976 seemed to prefer, however, the storage of this data with the Government Commissioner and only subsidiarily with the municipality of residence. Only insofar as the declarers exerted explicitly their choice for this second alternative the size of the data base was reduced. There may, on the other hand, be worries that at the municipality of residence this data becomes more sensitive. Perhaps a real "improvement" may be identified in these legal developments when a broader, political perspective is adopted. In fact, the local Government, by accepting these modifications, has demonstrated its willingness to dialogue and its preparedness to accept legal change even if it is subject to debate whether this change has meant a real progress. It seems that the necessity for change was less a material one than one prompted by the interplay of the political forces which required some form of change, no matter what would be its real content, in order to be able to demonstrate that the central authorities are sensitive to political criticism. At the same time, this development demonstrated also that the margin for action in this field is very small if one is not to jeopardize the South Tyrolean census system and – as a further consequence – the South Tyrolean autonomy as it stands now and as it has shown such beneficial effects to the coexistence, collaboration and reciprocal understanding of the linguistic groups in this province.

4. The Procedure before the Council of Europe

Before entering into a detailed discussion of the specific considerations which apply to the South Tyrolean census procedure from the perspective of the Italian and European provisions on data protection a further field of the whole controversy merits closer examination. It refers to the monitoring process with regard to the Framework Convention on the Protection of National Minorities. Italy has signed

[29] See Art. 18, para. 3, DPR 752/1976.

[30] All these modifications find application retroactively, i.e. also for the census of 2001.

[31] See, in this sense, the Comments of the Government of Italy on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Italy of 31 January, GVT/COM/INF/OP/I(2002)007 reported, more extensively, below.

this Convention on 1 February 1995 while the ratification followed on 3 November 1997. It entered into force for Italy on 1 March 1998. On the basis of the monitoring process provided for in Articles 24 ff. of the Convention Italy had to present within a period of one year following the entry into force of the treaty "full information on the legislative and other measures taken to give effect to the principles set out in this framework Convention".[32] In fulfilling this obligation Italy presented its report on 3 May 1999.[33] Therein the South Tyrolean autonomy was qualified as "a significant example of an understanding among various linguistic groups settled in the same territory, achieved, in particular, by means of a series of legal provisions adopted after the representatives of the populations concerned had expressed their views".[34]

According to Art. 26, para. 1, of the Framework Convention

> "[i]n evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognised expertise in the field of the protection of national minorities".

This Advisory Committee has preparatory functions for the final evaluation of the legal and factual situation of the minorities in the various Contracting Parties.[35] According to para. 95 of the Explanatory Report to the Framework Convention "[t]he task of this advisory committee is to assist the Committee of the Ministers when it evaluates the adequacy of the measures taken by a Party to give effect to the principles set out in the framework Convention".

Convivia has presented its objections against the South Tyrolean census system also to the Advisory Committee. These objections were mainly based on Art. 3, para. 1, of the Framework Convention which reads as follows: "Every person belonging to a national minority shall have the right to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice".

While the exact content of the allegations presented by Convivia is not known the contours of the various points of criticism can be desumed from the response of the Advisory Committee. It may as well be assumed that the documents filed with the various national and international bodies mentioned in the introductory part of this opinion largely coincide while the emphasis on the various points may differ.

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[32] Art. 25 of the Convention.

[33] ACFC/SR(1999)007.

[34] *Ibid.*, p. 9.

[35] On this monitoring mechanism see TOPIDI, "Articles 24-26", in WELLER (ed.), *cit. supra* note 5, pp. 573-587.

In any case, the criticism against the South Tyrolean census system and the connected declaration of linguistic affiliation is pivotal.

To the surprise of many, the Advisory Committee, otherwise known for its balanced reasoning and its role as an advocate for minority interest, espoused the position of Convivia thereby, however, strongly misreading and misinterpreting the Convention. In its opinion adopted on 14 September 2001 the Advisory Committee, first of all, expressed its general concern about the declaration of affiliation:

> "18. [...] The Advisory Committee acknowledges that the measures in 'the package' have led to a commendable level of protection for the German-speaking minority with the result that on 17 June 1992 the representatives of Italy and Austria informed the United Nations of the end of their dispute on this issue. However it is important that the measures in 'the package' also allow for developments over time and not be rigidly set in time.[36] The Advisory Committee considers that the individual declaration of linguistic affiliation, in its current form, gives rise to deep concern from the standpoint of Article 3 of the Framework Convention".

Subsequently, it tried to describe the legal nature and function of this declaration resulting in the first misinterpretations, as will be shown below:

> "19. At each nationwide general population census, the Ladin and German-speaking communities in Bolzano province are also covered by a statistical census by the State authorities, unlike Italy's other national minorities. The statistical census of the Ladin, German-speaking and Italian communities in Bolzano province is used in particular to ensure equitable distribution of political mandates and public sector posts between these three communities [...]".

The most evident misinterpretations can be found in the following para. 20:

> "The Advisory Committee stresses that the individual declaration of linguistic affiliation is compulsory and that there is no sufficient guarantee of its confidentiality. As it remains valid following the census, each individual's choice is effectively firmly made and cannot be changed for a period of 10 years. Failure to declare one's linguistic affiliation has clear disadvantages since, in the province of Bolzano, all public service posts – at national, regional, provincial and municipal levels – are allocated among the three linguistic communities in

[36] In this context, see also ECJ, Case C-281/98, *Angonese*, *cit. supra* note 10.

> proportion to the size of each community. Accordingly, only those who have made their declaration of linguistic affiliation can occupy a public service post reserved for their linguistic group. Refusal to declare one's linguistic affiliation also means that the person concerned is unable to exercise certain political rights. One example is the right to stand as a candidate in municipal, provincial and regional elections, since a candidate's linguistic affiliation is checked so as to guarantee the strict allocation of political offices among the three communities. The system of individual declaration of linguistic affiliation also poses problems on account for the limited freedom of choice it offers. Admittedly, the declaration has a category labelled 'other' in addition to the Ladin, German-speaking and Italian-speaking groups. However, anyone choosing 'other' must also be affiliated to one of the three aforementioned groups in order to be eligible for a public service post or to stand as a candidate in an election".

Finally, the consequences to be drawn from these findings are set out in para. 21:

> "In view of the foregoing, the Advisory Committee is of the opinion that the current system of individual declaration of linguistic affiliation in the province of Bolzano does not adequately safeguard the principle of free affiliation and protection of ethno-linguistic data. It is of the opinion that the authorities should review this matter to make sure that the methods used to determine linguistic affiliation are fully in keeping with the right of every person to choose to be treated or not to be treated as someone belonging to a minority, also bearing in mind the principles set out in Committee of Ministers' Recommendation No. (97) 18 concerning the protection of personal data collected and processed for statistical purposes".

On the whole, these rather extensive elaborations on the South Tyrolean census system were flawed both with regard to the description of the factual situation and as with respect to the legal evaluation of this situation.

First of all, one fails to see why there should be no sufficient guarantee of the confidentiality of the declarations of linguistic affiliation. It is not true that "the failure to declare one's linguistic affiliation had clear disadvantages" as there was also the possibility to declare oneself as a member of the group "others" and to make only a declaration of linguistic aggregation.

The statement that "anyone choosing 'other' must also be affiliated to one of the three aforementioned groups in order to be eligible for a public service post or to stand as a candidate in an election" is also misleading as this possibility of aggregation has been created appositely to avoid any inner conflict. There is no necessity

of identification with these groups. On the contrary: this possibility of choice has been introduced to allow the citizens to avail themselves of the advantages of the autonomy without necessity of explicit identification with one group. This system entails only advantages and no disadvantages for the individual.

Finally, the statement that the statistical census was used to ensure equitable distribution of political mandates between the three communities has to be further qualified. It is true when it is intended to express the rather innocuous fact that the strength of each linguistic group in the bodies of political representation has also repercussions on the composition of the executive organs. Simply put the way it was formulated it could, however, imply that political mandates were distributed *ex ante* – before the election had taken place – along ethnic or linguistic lines. This would be totally wrong and it would constitute a severe misinterpretation of the South Tyrolean autonomy.

The lack of knowledge about the details of the South Tyrolean autonomy may be excusable, at least to a certain extent. In fact, this system is rather complicated and this is necessarily so as it has to provide guarantees for a large number of interests which are also partly conflicting. This system cannot be expected to be known in all its details at an international level. Furthermore it seems probable that the misinterpretation of the relevant provisions and mechanisms has been influenced by partial information coming from South Tyrol. More serious appears to be the incorrect reading of Art. 3 of the Framework Convention.

Art. 3 is surely one of the most important provisions of the whole Convention. It consists of two parts. The first part states a principle which is known as the principle of subjective declaration. Among all the principles developed in minority law it is probably one of the most high-ranking ones as it ensures not only implicitly that minority law may never have a discriminatory nature (as otherwise the single members of a minority could easily opt out of its application), but it vigorously emphasizes also the very nature of modern minority law as a part of human rights law. The principle of subjective declaration implies furthermore that minority law has to be predominantly individualistic in nature. It is for the individuals to form the group and not for the group to decide who may or may not become a member.[37]

The second part of this provision is of somewhat subordinate nature: the free choice taken by the individual must not lead to disadvantages for the individual. It should be clear at first sight that this provision does not stand in the way of a census system whose aim is to determine both the strength of the single linguistic groups and the potential beneficiaries of the protective measures characterizing the whole South Tyrolean autonomy. Why was it necessary to state this principle? Because of negative experiences in the past in which there was not a minority group claiming the right for special protection but in which the minority was created by the major-

[37] As it is known, the Human Rights Committee has elaborated extensively on this principle in *Sandra Lovelace v. Canada*, Communication No. 24/1977, views in A/36/40 (1981).

ity in a process of marginalisation. In some extreme cases the individualization of the minority group was effectively directed at their annihilation. As an example one can refer to the so-called "Gypsy-files"[38] created in Austria in the 1930s of the 20th century. In those files all people in Austria considered to be of Gypsy origin were registered. Afterwards these data which were handed over to the Nazis were used for the extermination of this group.[39] Also in the genocide of the Jewish population the individualization of the group against their will played a crucial role. Individualizing and counting in order to discriminate is, however, a fundamentally different thing from a census system created to allow for greater efficacy of measures of so-called positive discrimination, i.e. promotional measures, measures of affirmative action. It is not a coincidence that in the past these measures of positive discrimination and the instruments to put them into effect (census and declaration of affiliation) were most strongly opposed by declared enemies of any form of minority protection.

Of course, also those census systems which are openly in favour of minorities have to be tailored in a way that individual rights are infringed as little as possible. This is exactly the case with the South Tyrolean census system as described above. It is hardly imaginable to conceive a census system which is, on the one hand, thus far-reaching with regard to its consequences on the level of the application of protective measures and, on the other hand, less intrusive with regard to individual rights and the protection of privacy. We have also to keep in mind that neither modern human rights law nor minority law in particular do require that objective elements for the definition of the beneficiaries of protective measures have to be totally disregarded. Neither is it true that the individualistic aspirations are the only ones to be relevant while the collective dimension of minority protection, the protection of the minority as a group, has to be neglected totally.[40]

In fact, para. 35 of the Explanatory Report to the Framework Convention states that Art. 3, para. 1, of the Convention "[...] does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity".

Usually, requiring objective criteria is considered to be a useful device to forestall abuse. In this direction goes the argumentation by Patrick Thornberry, a renowned expert of international minority law and advocate of the individualistic approach:

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[38] In German "Zigeunerkartothek".

[39] See HILPOLD, *cit. supra* note 12, p. 329, as well as THURNER, *Nationalsozialismus und Zigeuner in Österreich – Veröffentlichungen zur Zeitgeschichte*, Vol. 2, Vienna, 1983.

[40] It is true that the Framework Convention does not recognize collective rights explicitly. There are, however, various provisions in the Convention that reflect elements of collective rights. See, i.e. Arts. 5, 6, 7, 11, para. 3, and 12.

> "It seems logical to premise membership of a minority on the definition of the minority, incorporating subjective and objective criteria. While some States take a generous view of membership, allowing it to be determined by subjective preference uncontrolled by objective criteria, this cannot be said to be demanded by Article 27. In so far as the rights set out in Article 27 are rights for only some of a State's nationals in many cases, it can hardly, in logic and in fairness to the State, be regarded as a right of individuals to be included in a special category with which they have no obvious connection. If States permit this, they are exceeding their obligations".[41]

To this statement, which is probably one of the most liberal to be found in literature, it has to be added that the right of the State to impose the respect of some objective criteria should not only be seen as an expression of the sovereign powers of the State to be parsimonious with the concession of unilateral grants. Prudence in this field is rather commended in the immediate interest of the minorities concerned as there is necessarily competition for promotional measures and the minority and its members have the right to preserve their identity. There is even the danger that the possibility of an unlimited access to group membership could be abused by the majority in the way of putting the minority in a minoritarian position even within their own (limited) autonomous areas.

In this sense, the introduction of some objective elements in the way membership to the various linguistic groups in South Tyrol has to be determined was not only within the faculty of the Italian government. It was required in order to permit effective protection and to avoid abuse. Furthermore, as has been shown, the system created is thus attentive to the individual rights that the precautionary measures taken are not really to be felt. In any case, they are proportional in view of the goals to be attained. This seems to be the prevalent opinion. In fact, the criticism against the South Tyrolean census system, which is directed, as already shown, ultimately against core elements of the South Tyrolean autonomous order was very clearly confuted by the Italian Government in its Comments on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Italy of 31 January 2002 which, first of all, addresses the issue of thrust and scope of Art. 3 of the Framework Convention:

> "[...] The first point to be noticed is that Article 3 of the Framework Convention for the Protection of National Minorities would not appear to be relevant to this case, but deals with a separate issue. For Article 3 presupposes that the citizen is able to choose whether to be

[41] See THORNBERRY, *International Law and the Rights of Minorities*, Oxford, 1991, p. 175 ff.

> treated as belonging to a minority or to the majority, while Section 18 of Presidential Decree No. 752 of 26 July 1976 provides that citizens may choose to belong to one of the three linguistic groups living in the Bolzano Province, one of which (the Italian linguistic group) does not, however, belong to a linguistic minority. This specific safeguard mechanism is designed to protect the minority; the decision not to choose affiliation to a particular linguistic group does not fall within the scope of the aforementioned Article 3, and therefore any disadvantage to the citizen envisaged by this Article as deriving from such a decision cannot be attributed to that choice. It should also be noted that Section 18 of Presidential Decree No. 752/1976, which is the target of particular criticism, implements specific statutory provisions of Constitutional rank (Article 15(2) and Article 89). These specific provisions take up the measures contained in the so-called 'package' and form part of the organisation model for the Alto Adige community, which is structured in terms of linguistic affiliation. This organisational model was one of the decisive elements in achieving peaceful coexistence in that area between the Italian-speaking and the German-speaking groups".

With regard to the issue of the confidentiality of the census data the Italian government pointed out that a revision of the relevant provisions in Section 18 of the Presidential Decree No. 752/1976 was already under way and would soon enter into force:

> "The intention is, firstly, to gradually reduce the size of the sensitive data base, which is currently of huge proportions because it comprises the individual declarations submitted by all the citizens resident in the Bolzano Province; and secondly, to govern the way this data is processed when providing benefits under the Statute, to ensure compliance with European law on the privacy and confidentiality of sensitive data. [...] Under this Legislative Decree the declarations of affiliation to a linguistic group are to be held, at the request of the declarer, by the government Commissioner of by the municipality of residence (and no longer by the courts) and the declarer may only be asked to produce this certification when applying for the benefits available under the law, or in the other cases provided by the law".

According to the Italian Government these amendments would make it possible

> "to overcome any possible contradiction between Article 3 of the Framework Convention, which provides that the Declaration should

> not be mandatory and, not explicitly, that personal data is to be treated as confidential, and the need for this information to be known in order to protect the minority.
> In addition, the aforementioned amendment should deal with the Advisory Committee's concern that 'measures in the 'package' [should] also allow for developments over time and not be rigidly set in time': which is precisely the case".

The final verdict on this whole controversy before the Council of Europe was given by the Committee of Ministers, the organ which is, as shown above, responsible in the first place for the monitoring of the implementation of the Convention.[42]

In Resolution ResCMN(2002)10 adopted on 3 July 2002 the Committee of Ministers refers to various minority problems in Italy already mentioned in the opinion of the Advisory Committee. With regard to South Tyrol there is no hint at any problem. On the contrary, the South Tyrolean autonomy is not only presented as a model but specific reference is made to the proportional system (and, indirectly, to the declaration of affiliation) as an instrument of particular value. The relevant passage follows:

> "The series of measures taken in favour of the German-speaking minority of Trentino-Alto Adige have led to a commendable level of protection for this minority, and the system of allocating public posts strictly according to the size of the Italian-speaking, German-speaking and Ladin communities in the province of Bolzano has contributed to making the participation of these groups more effective".

The rejection of any criticism against the main pillars of the South Tyrolean autonomy, the proportional system and the declaration of affiliation, could not be more thorough.

The South Tyrolean census system as well as the declaration of linguistic affiliation has been accepted without reservation as instruments for the protection of minorities. Possible points of criticism with regard to the problem of data protection have not even been mentioned. For the Committee of Ministers, therefore, it was not only the case that the problem of data protection could be ignored as a result of a weighting process regarding all the goals and interests here at issue and as a result of the application of the principle of proportionality. These findings imply rather that in reality for the Committee of Ministers this problem does not even exist.

[42] See Art. 24 of the Convention.

5. The South Tyrolean Census System and the Protection of Data

5.1. Introduction

In the following the South Tyrolean census system will be examined under the more specific viewpoint of the Italian and the European provisions on data protection. To this aim all the considerations made before had a preparatory scope for the final evaluation of this mechanism. In fact, data protection is not to be considered an end in itself and isolated from all other values characterizing the modern society but a value closely interconnected with other values of a liberal legal order. Among these values it is often not possible to sort out a clear hierarchy; they often constitute autonomous goals and preconditions for the realization of other values at the same time. In this sense, data protection is an integral part of the goals and values which make up a liberal society and which cannot be pursued in isolation, but must be aspired simultaneously and under consideration of their reciprocal influence and conditioning. This specific function of data protection is clearly reflected in the respective instruments: they not only differentiate according to the interests at issue, but the principle of proportionality is a fundamental element of them. Proportionality requires the consideration of the different values that come here into play and their structuring according to the constitutional principles (national and European) presently in force. This leads us to the next question to be tackled in the introductory part of this section: what are the relevant provisions on data protection to be considered? Is it the European Directive 95/46/EC[43] or is it the national Act No. 675/1996 adopted to implement the Directive previously mentioned? They are both to be taken into consideration. On the one hand this directive is to be considered as directly applicable[44] and, as a consequence, conflicting national law cannot be applied. On the other hand, the national act is not only the primary point of reference for the national legal practice – which has to trust in the regularity of this act – but the directive leaves also open a considerable margin of appreciation for the transposition of the general principles stated in this instrument into national law.

[43] OJ, 1995, L 281/31.

[44] On the concept of direct applicability see Case 148/78, *Ratti*, ECR, 1979, p. 1629, and Case 8/81, *Becker*, ECR, 1982, p. 53, in which the Court stated as follows: "Whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define the rights which individuals are able to assert against the state".

5.2. Data Protection as an Instrument to Protect Fundamental Rights

In the recitals of the Directive 95/46/EC the conflicting aims and goals to be pursued in this field are described very clearly and, with regard to the subject to be treated here, especially recitals 2 and 3 have to be cited:

> "(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;
> (3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded [...]".

These considerations confirm the thesis advanced before that data protection is not in itself an ultimate goal to be pursued unconditionally but it has to serve man – the same as data processing on a whole. The reasons given for possible limitations to data processing are – at the same time – justifications for data protection. If the free flow of information – *prima facie* a *desideratum* in a liberal economic order – has to be limited to safeguard fundamental rights of individuals, then it must also be taken care that these limitations are really furthering the ultimate goals, the fundamental rights. In other words: data protection is for large parts nothing else than an auxiliary instrument in the service of broader fundamental rights considerations. Therefore, when evaluating measures aiming *per se* at the protection of fundamental rights against the yardstick of data protection the reasoning process will be based on a difficult balancing process involving the simultaneous consideration of a rich panoply of rights and aspirations. If this aspect is missed one risks not only to realize object and purpose of the relevant instrument in an incomplete way but to miss them altogether.

5.3. Are the Directive 95/46/EC and Act No. 675/1996 Applicable on the South Tyrolean Census System?[45]

Art. 3 of the Directive defines the scope of this instrument. According to this provision the directive shall apply to the processing of personal data wholly or part-

[45] A detailed analysis of this question can also be found in OBWEXER, *Stellungnahme – Die Vereinbarkeit der Sprachgruppenerhebung in Südtirol mit den Vorgaben des Gemeinschaftsrechts*, 23 November 2001 (on file with author).

ly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

According to Art. 2 ("definitions"), lit. a), "personal data" shall mean any information relating to an identified or identifiable person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

According to lit. b) of this article "processing of personal data" ("processing")

> "shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaption or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction".

"Personal data filing system" ("filing system") (Art. 3 lit. c) "shall mean any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized, decentralized or dispersed on a functional or geographical basis".

The first paragraphs of Art. 2 of Act No. 675/1996 read as follows:

> "a) 'data bank' shall mean any set of personal data, divided into one or more units located in one or more places, organized according to specific criteria such as to facilitate their processing;
> b) 'processing' shall mean any operation, or set of operations, carried out with or without the help of electronic or automated means, concerning the collection, recording, organization, keeping, elaboration, modification, selection, retrieval, comparison, utilization, interconnection, blocking, communication, dissemination, erasure and destruction of data;
> c) 'personal data' shall mean any information relating to natural or legal persons, bodies or associations that are or can be identified, even indirectly, by reference to any other information including a personal identification number".

These definitions bear evidence of the very broad scope of application both of the Directive and of the Act 675/1996. In the literature it has been emphasized that with regard to "personal data" *any information* relating to persons is considered as such.[46]

[46] See DAMMANN and SIMITIS, *EG-Datenschutzrichtlinie – Kommentar*, Munich, 1997, p. 109.

With regard to "data processing" it has been stated that this concept has been used in a very broad sense.[47] It suffices that the relevant information is read by a responsible officer from a monitor or even a sheet of paper.[48]

With regard to the concept of "data bank" or "personal data filing system" the essential element is the "structure" or the "organization of the data". This means that the relevant data must not be put together only in a casual sequence but must evidence some logical, intellectually planned order.

On the basis of these definitions the South Tyrolean census system, and, in particular, the collection, statistical evaluation, storage and organization for later consultation of declarations of linguistic affiliation fall, without doubt, under the purview of the data protection instruments.

We are confronted here with a form of data processing which has to be lawful (Art. 5 Directive). Single elements of these obligations are set out in Art. 6 of the Directive, according to which personal data must be:

> "(a) processed fairly and lawfully;
> (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
> (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
> (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
> (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further proposed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use".

Practically the same conditions can be found in Art. 9 of Act 675/1996.

It can hardly be doubted that the South Tyrolean census consists in the collection of data for specified, explicit and legitimate purposes and that they are not further processed in a way incompatible with those purposes.

It was, however, argued that the relevant personal data would not be accurate as the single declarer, even if he regarded himself as pertaining to the group "oth-

[47] *Ibid.*, p. 110.
[48] *Ibid.*

ers", had to aggregate himself to one of the existing linguistic groups. This criticism is totally misleading as this aggregation is made only to take advantage from the proportional system. There are no ulterior consequences whatsoever associated with this declaration. Furthermore it was objected that this declaration could be inaccurate in a number of cases because some subjects could act opportunistically. Also this criticism misses the point as a basic premise of modern minority law consists exactly, as already stated, in the freedom to decide whether to belong or not to belong to a minority. In this field there is hardly room for challenges of opportunism.

The next point of criticism regarded the aspect of excess. It was sustained that 420,000 residents had to present the declaration of linguistic affiliation while only 55,000 would really need it (especially because being a public employee or aspiring to become one). This criticism could be countered by reference to the fact that it was a deliberate choice not to resort to so-called "spontaneous declarations" in the event of need as in this case there would really be a danger of abuse. The fact that this declaration had to be given in fixed intervals and in advance to its immediate, subjective usage had led, together with the long period of its binding to a situation of subjective "ignorance" which usually prompts individuals to declare the – subjective – truth.[49] It could further be said that in view of the importance the proportional system had for the further continuation of the South Tyrolean autonomy model, a model widely praised for its positive effects on the inter-ethnic relationship between the single groups in South Tyrol, precautionary measures taken to ensure that the declarations are not merely opportunistic and which lead at the same time to an extension of the data base cannot be considered as excessive.[50] This statement would not stand in contrast to the statement made before according to which it is not permissible to second-guess the sincerity of the declarations made. The only intention has been to reduce the opportunistic elements, which could influence this declaration, to a minimum. Notwithstanding these considerations, however, there was still some point in this criticism in the sense that a system able to achieve a comparable result with less extensive obligations of declaration was to be preferred. As we will see later on, exactly this result was achieved with the recent reform.

Even if the way in which the data processing takes place corresponds to the conditions and goals set out in Art. 6 of the Directive it must furthermore be permissible according to Art. 7 of the same directive. Among the various causes enlisted in this article which may permit data processing the one mentioned in lit. c) regarding "compliance with a legal obligation" appears to be the most relevant one for the case here under examination. There can be no doubt that the South Tyrolean

[49] Here we can find operating, in a certain sense, the "veil of ignorance" described by John Rawls.

[50] In this sense OBWEXER, *cit. supra* note 45, p. 8.

census is based on a legal obligation and that it is, therefore, permissible according to Art. 7.

In some cases, however, where the danger of abuse is very pronounced and where the fundamental rights involved appear to be especially vulnerable the fulfilment of the conditions set by the Articles 6 and 7 of the Directive is not sufficient. We are confronted here with so-called "sensitive data" the processing of which is basically prohibited and allowed only if special conditions of permissibility occur. The definition for sensitive data can be found in Art. 8, para. 1, of the Directive: "Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life".

Prima facie it could be argued that the South Tyrolean census system is directed to process data revealing the ethnic origin and therefore the specific conditions set out in Art. 8 of the Directive (or, respectively, in Art. 22 of Act 675/1996) have to be met. On the other hand, this could also be contested with the argument that the South Tyrolean autonomous order is not about protection of ethnic groups but about the granting of certain rights to linguistic groups and, in particular, to their members. This is not only a semantic distinction as the instruments to protect these groups are only in part overlapping. Furthermore, it could well be the case that measures to identify the ethnic origin of a person are undertaken with a discriminatory purpose, as has been shown above in more detail. For instruments differentiating between linguistic groups this will be far more unlikely. In order not to be accused of rejecting criticism on merely formal grounds and for the sake of evidencing that the criticism brought forward can in any case be confuted totally the term "ethnic" characteristics shall be applied here in an analogous way to "linguistic" characteristics and, as a consequence, it shall be assumed that Art. 8 (Art. 22 of Act 675/1996) finds application also on the South Tyrolean census. Therefore, this form of data processing is permissible only if one of the specific causes of justification mentioned in Art. 8 occur. The most important exception it mentioned in para. 4 of Art. 8: "Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority".

These exceptions have to be notified to the Commission.[51]

Art. 22, para. 3, of Act 675/1996 provides in a similar way:

> "Processing of the data as per paragraph 1 by public bodies [...] shall only be allowed where it is expressly authorised by a law specifying the data that may be processed, the operations that may be performed and the particularly important instance of public interest served by

[51] Art. 8, para. 6, of the Directive.

> the processing. Failing an express authorisation provided for by law, and apart from the cases referred to in the legislative decrees amending and supplementing this Act in pursuance of Act No. 676 of 31 December 1996, public entities may request the Garante to determine, until this is specified by law, the activities that serve particularly important instances of public interest among those they are required to carry out under the law. Processing of the data referred to in paragraph 1 shall be authorised with regard to said activities in pursuance of paragraph 2 above".

Before entering into a detailed discussion whether the South Tyrolean census procedure corresponds to these conditions the basic rationale standing behind these provisions has to be sorted out. Why are the data mentioned in Art. 8, para. 1, of the Directive (Art. 22 para. 1 of Act 675/1996) called "sensitive"? Because it is supposed that they are particularly suited to be used for discriminatory purposes. Here we reach a further pivotal point of the whole controversy.[52] The reason why the processing of data revealing ethnic origin is subject to stricter rules is to be found in the fact that in the past this data has been used to discriminate against minorities. It can generally be said that the processing of data referring to the ethnic origin of the subjects concerned can have two different aims which are diametrically opposed to each other: either these data can be used to introduce specific protective measures which should target those most needy of protection or they can be used to single out possible subjects of discrimination. It is this second situation Art. 8 points at. As this norm aims at combating qualified forms of discrimination, i.e. discrimination against minorities and their members it would be completely contradictory to use it to contrast measures of positive discrimination, i.e. promotional measures, measures of affirmative action. We have seen here again that we have always to keep in mind object and purpose of the various provisions on data protection. A mere formalistic application of these provisions would betray their very essence and, in the end, led to results totally opposite to those at the core of the Directive. Of course, these findings do not exempt us from further examinations as to whether the conditions of the Directive (or, respectively, of Act 675/1996) are fulfilled with regard to the South Tyrolean census provisions, but any finding of a contrast should be judged in its consequences against the background of these considerations.

If we proceed further we have to examine whether the conditions for the exemption of this data processing system from the generic prohibition seen before are given. In this regard it has to be pointed out that Art. 22, para. 3, of Act 675/1996 requires that the express authorization by law should contain also a specification of the data that may be processed, the operations that may be performed and the particularly important instance of public interest served by the processing. These

[52] See DAMMANN and SIMITIS, *cit. supra* note 46, p. 161.

provisions cannot be found in all these details in the Directive but nonetheless the Italian lawmaker has not in this way added inadmissible substance to the system of data protection as it was conceived by the European Union. In fact, Art. 8, para. 4, of the Directive begins with the clause "subject to the provisions of suitable safeguards", a condition which leaves some leeway for concretisation. Now it could be argued that the Presidential Decree 752/1976 is insufficiently precise as it does not make expressly reference to the "particularly important instance of public interest served by the processing". This criticism is, however, misleading, as the Presidential Decree as a whole is directed at developing further the South Tyrolean autonomy, a system which is clearly aiming at the protection of minorities.

Finally it has to be noted that according to Art. 8, para. 6, in case the elaboration of sensitive data should be allowed by national law for reason of substantial public interest (as provided for in Art. 8, para. 4, this exception has to be notified to the European Commission. It seems that this has not happened, first of all because the census provisions predate the provisions on data protection and the awareness of the need to control also the existing legislation with regard to notification requirements has taken some time to develop. In any case the wording of the relevant provision is not such as to impose the notification as a condition for the legality of the provisions allowing the processing of sensitive data. No further indication is given as to the effects of a violation of the obligation to notify. It appears, therefore, that Article 8, para. 6, constitutes a *lex imperfecta*. To assume that these notification requirements constitute a condition of validity of all the relevant norms could be particularly problematic with regard to the existing legislation as the Directive fails to mention even a term within which these notifications should be made. It seems therefore that the sanction of an invalidation of provisions allowing for a derogation to Art. 8, para. 1, would be excessive and even in contrast to wording and structure of the Data Protection Directive. This finding does, however, not bear any influence on Italy's obligation to notify these provisions to the European Commission. Failure to live up to this obligation could result in an infraction procedure according to Art. 226 EC Treaty.

6. The Solution of the Controversy

Bearing in mind the above considerations we have to ask what remains of all the criticism against the South Tyrolean census system and the declaration of affiliation. It could be argued, not much. We have to keep in mind that the protection of minorities is a fundamental principle of the Italian Constitutional order[53] as well

[53] See art. 6 of the Italian Constitution. See on this subject extensively Pizzorusso, *Le minoranze nel diritto pubblico interno*, Milano, 1967. See, furthermore, Palici di Suni Prat, *Intorno alle minoranze*, Torino, 1999, and Stipo, *Minoranze etnico-linguistiche*, EG, Vol. 20, Roma, 1990, p. 3.

as a well-established principle in international law.[54] The Framework Convention for the Protection of National Minorities has added further weight to this obligation and the monitoring process has shown that the proportional system as well as the declaration of linguistic affiliation are instruments that are not only tolerated by international law but they can be taken even as a case study for successful minority protection. It has also to be emphasized that even within the law of the European Union the protection of minorities has been qualified as a "legitimate goal".[55]

It has been shown that it can hardly be argued that the South Tyrolean census system or the declaration of linguistic affiliation as they were in force in the past violated the provisions of European and Italian data protection law. Even if there are – to a certain extent – conflicting goals it is important to remember that data protection is only one of many elements characterizing the Italian (and all other European) systems of fundamental rights where reciprocal (partial) incompatibilities are common. These conflicts are solved taking recourse to principles such as proportionality and margin of appreciation. On the basis of this study it appears that the relevant measures taken in South Tyrol as they were in force at the time the whole controversy had started were surely proportional.

Nonetheless, some reform was needed and there are two sets of reasons that can be mentioned for this need. First of all, again, like in the previous case of reform, this need was engendered by the requirement to show that the autonomy is a flexible one and that there is a continuous dialogue with all subjects and institutions interested in this branch of law. Secondly, it became apparent that there was leeway for a further improvement of the relevant provisions in the sense that the underlying values and goals had to be weighted differently as in the past. In fact, the strong disincentive to cheat set by the provisions in force in the past had been motivated by a stern commitment to protect the minority as a group. The cases – surely rare in number – where an individual was uncertain about his or her group membership,

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[54] Of course, specific obligations to protect members of minorities flow, first of all, from Article 27 CCPR. A particularistic view of this treaty obligation, does not seem, however, to be any more appropriate. First of all, the number of ratifications of this treaty is expanding continuously. As of 13 December 2005 we reached the number of 154 ratifications. Second, a growing tendency can be noticed that reference is made to this obligation independently from its hard law basis. See in this context, in particular, the UN Declaration on Persons belonging to Minorities, GA Resolution 47/134 of 18 December 1992. See HILPOLD, "Minderheitenschutz im Rahmen der VN – Die Deklaration vom 18. Dezember 1992", Schw. ZIER, 1994, pp. 31-54. Finally, there is an ever-tighter network of regional (and bilateral) instrument for minority protection. This holds in particular true for the European region.

[55] See case C-274/96, *cit supra* note 10. On this judgment see TOGGENBURG, "Der EuGH und der Minderheitenschutz", European Law Reporter, 1999, pp. 11-15; GATTINI, "La non discriminazione di cittadini comunitari nell'uso della lingua nel processo penale: Il caso *Bickel*", RDI, 1999, pp. 106-119; HILPOLD, "Unionsbürgerschaft und Sprachenrechte in der EU", Juristische Blätter, 2000, pp. 93-101. On the position of the European Union towards minorities see HILPOLD, *cit. supra* note 7, pp. 432-471.

or wanted to change it over the years or felt incapable of aggregating himself to a certain group were considered as of secondary importance. Taking regard of the fact that in modern rights thinking the needs and the ambitions of the individual are considered to prevail more and more over those of the group – even in cases, where there are sound arguments for group protection – it seemed, however advisable to use the chance of reform to give greater impetus to satisfy these aspirations. This reform was further facilitated by the fact that the group(s)[56] in consideration seemed now to be strong enough to survive even with a less incisive mechanism. The most important measure in this regard was to separate the declaration made for statistical reasons from that regarding the individual position.

The new provisions were negotiated within the so-called "Commission of the Twelve" which is responsible for the further development of the regional autonomy through the emanation of measures of implementation. After the European Commission had expressed its informal agreement in the sense that these new rules would fulfil the requirements set by the European Union, the Italian Council of Ministers enacted finally the Legislative Decree of 23 May 2005, No. 99 containing "Measures of implementation to the Special Statute of Region of Trentino-South Tyrol with regard to the Presidential Decree No. 752 of 26 July 1976 in the area of the declaration of pertainance or the aggregation to linguistic groups in the province of Bolzano".[57]

As already mentioned the new system of declaration is characterized by a clear severance between the declaration made for statistical reasons and that valid for individual purposes.

For statistical reasons in the ambit of the general census every ten years Italian citizens over the age of fourteen residing in the province of Bolzano have to declare anonymously their membership to the Italian, the German or the Ladin group or – if they feel they cannot make such a declaration – to aggregate themselves to one of these groups. This declaration is made on the form A/2 which is sent by the Municipal organs to the statistical institute at Bolzano. Also inhabitants under the age of 14 are counted, but in this case their linguistic group membership is declared by their parents.

Totally independent from this declaration is the one made for individual purposes, i.e. to take advantage of autonomous rights associated with group membership. The individual over the age of eighteen can declare to pertain to one of the officially recognized linguistic groups living in South Tyrol or to aggregate himself to one of these groups. This declaration is given voluntarily, at any time and in principle only once in a life-time. This form A/1 is kept again at the County Tribunal (or the local affiliation of this Tribunal). The way in which this declaration can be rendered has been made more flexible but at the same a new mechanism to counter

[56] The plural is used here to evidence that minority protection in South Tyrol is not only aimed at the German speaking group but also on the Ladin speaking one.

[57] Published in GU No. 135 of 13 June 2005.

the risk of abuses has been set in place. First of all, the declaration of individual membership (or aggregation) takes effect only 18 months after it has been rendered. Thereby, it shall be avoided that a certain declaration is given primarily for immediate, opportunistic reasons. Furthermore, the declaration can be modified, but only five years after it has been rendered. Moreover, this modification takes effect only two years after it has been given. Again, this is designed to avoid opportunism as far as possible.[58]

7. CONCLUSIONS

With the adoption of Legislative Decree No. 99/2005 a long procedure which involved numerous institutions and which seemed to threaten the structure of the South Tyrolean autonomous system has come to an end.[59] It may be legitimate to ask whether this result was worth the efforts. Without doubt many critics of the former system were motivated in their actions by a sincere intent to improve the autonomous order and to render it more open, more flexible and more responsive to the needs and the ambitions of the individual. With regard to some critics, however, one can gain the impression that they were wholly opposed to the autonomous order and that it was for this motive that they tried to eliminate a central cornerstone of this edifice. In the end, however, the abusive recourse to concepts such as data protection or the attempt to misread the Framework Convention and thereby to turn a minority protection instrument into its contrary did not pay off and exactly the position of those who were sincerely interested in an improvement of the autonomous rules prevailed. In hindsight, this discussion which has been led for some time in a very contentious way did not do damage to the cause of minority protection. It can even be said that the relevant institutions have gained a more solidified form and that they have clearly benefited from this discussion. First of all because this discussion has given proof that the relevant rules are not relics of a distant past but they still make sense today. Secondly, the improvements enacted, though not being very far-reaching, seem to make sense and they can give further strength to a set of rules which still have to fulfil an important role in the 21st century notwithstanding the fact that they have been conceived decades ago.

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[58] See Art. 2, para. 2, of the Legislative Decree No. 99/2005. See also BONELL and WINKLER (eds.), *cit. supra* note 15, p. 140 ff.

[59] It has to be mentioned that in the last opinion of the Advisory Committee on Italy, published on 25 October 2005, the improvements in the census system applying in South Tyrol are praised but at the same time they are considered not to be sufficient (para. 43). As this opinion was adopted already on 24 February 2005 it could not take into consideration the latest developments. It seems probable that the Committee of Ministers will consider this issue as definitely settled.