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MULTILINGUALISM OF SWITZERLAND – SELECTED LEGAL PROBLEMS

The observation of the European Union integration process, including the EU law-making hypertrophy, entering various spheres of life in an extended and objectively more detailed way, can lead one to the conclusion that a creation of one state or rather a confederation of the European states is inevitable, though it is a matter of time difficult to determine. Certainly, the economic factor is a key element in this process being connected with the need for preservation of a significant place in Europe which is competitive with the economies of not only the United States, but also the Asian tycoons, especially China, India and, continually, Japan. Moreover, the potential and ambitions of Russia are not to be neglected. Finally, important, perhaps even urgent, is the question of the European security in the context of the terrorist threat and dynamic political changes taking place currently in the countries of North Africa.

The efficiency of the activities undertaken within the European Union is limited (by the high cost and time) to a large extent by the difficulties in communication between its individual members (currently there are 23 languages functioning in the EU as official languages: English, Bulgarian, Czech, Danish, Estonian, Finnish, French, Greek, Spanish, Irish, Lithuanian, Latvian, Maltese, Dutch, German, Polish, Portuguese, Romanian, Slovak, Slovenian, Swedish, Hungarian and Italian). Certainly, this is not a matter of typical relations (political, economic or cultural) between the partners in the international arena. The problem tackles the basic tool to regulate a social reality – the law which should be established and applied in relation to its recipients in the language understandable to them. One can probably assume that similar difficulties are likely to appear in the possible future in the “United Europe”. This article aims at presenting constitutional state solutions in the related field adopted in the Swiss Confederation, which is a multilingual country. For well over 7 million in-

habitants, more than 4.5 million citizens speak German as their first (native) language, about 1.5 million people use French, 0.5 million inhabitants speak Italian, over 100 thousand citizens use the Serbo-Croatian language, about 90,000 people speak Albanian and Portuguese, about 70 000 inhabitants communicate in Spanish and English, more than 40 thousand people speak Turkish, and Romansh is used by about 35 thousand. More than 150 thousand inhabitants speak their first languages other languages than those mentioned above.¹

Switzerland is often described as “Europe in a nutshell,” where, as in lens, issues specific to the whole continent are focused, and where, what is interesting, proper solutions have been found to keep a complete democratic freedom of citizens (while maintaining law and order and a high standard of living). Let us, therefore, briefly follow the Swiss Confederation historic development and discuss the adopted issues regarding normative language regulations in the state.

Before considering the above mentioned issues in detail, in the first place, let us focus on the characteristics the Swiss legal literature gives to the notion of language.² Language is a cultural system based on signs, phones, gestures and symbols which allows for making and transmitting the outcome of social experience; it is on the language that the intellectual processes of human beings are based. It provides a basis for shaping their views, expression, as well as intellectual development of man individually and collectively. Language allows an individual for the conscious reception of events, as well as feelings; it also makes it possible to determine one’s relationship to a given community, including the issue of belonging to its culture. Language in the sphere of intersubjective communication is a tool of communication. Finally, it is a device allowing a (peaceful or non-peaceful) coexistence of people. Last but not least, language is an immanent element of the community culture. It allows for human integration; through language people are able to identify their group identity and shape their sense of community belonging.

The creators of the first Federal Constitution of 1848 did not treat the issue of language in the category of human freedom which would require a separate constitutional regulation apart from defining national languages

¹ Data according to the Swiss Federal Statistical Office: <http://www.bfs.admin.ch/bfs/portal/de/index/infotehke/lexikon/lex/0.topic.1.htm> (Assessed 31.03.2011).

² Compare M. Borghi, *La liberté de la langue et ses limites*, in: D. Thürer, J.-F. Aubert, J. P. Müller (ed.), *Verfassungsrecht der Schweiz – Droit constitutionnel suisse*, Zürich 2001, p. 608 as well as the literature referred to there.

in the country.³ The issue was not a subject of a particular debate. Freedom to communicate in the language was seen as something obvious.⁴ Also in the Federal Constitution of 1874⁵, (used before the present Constitution was established), it was initially indicated in the art. 116 that there were only three “major” languages being the official languages in the Federation; the issue of language was not treated through the prism of freedom and individual rights. In the late 30-ies of XX century the revision of the Constitution took place, and in the article 116 there was made a record that German, French, Italian and Romansh were the national languages of Switzerland (not the Federation) and a sentence making German, French and Italian languages the official languages was added; freedom of language was pointed out as being of individual importance – “It is unthinkable to have true freedom of soul without freedom of the mother tongue.”⁶ Nonetheless, a constitutional provision referring to the issue directly was not made. It is necessary to notice that those changes were realized thanks to the initiative of the canton of Grisons (Graubünden)⁷ on the eve of World War II and the growing risk of German domination. Ultimately, the view that the freedom of language was connected with personal liberty and did not require additional adjustments prevailed.⁸ Art. 107, updated in 1938, stated that the representation of all the three official languages should be considered during the selection of the Federal Supreme Court members and the Federal Assembly should take into account the representation of each of the three official languages.

³ Compare art. 109 of the Federal Constitution of the Swiss Confederation of September 12, 1848 “The three major languages of Switzerland – German, French and Italian – are the official languages of the Federation.” The German text of the Constitution of 1848 in: A. Kölz (ed.), *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*, t. 1, Vom Ende der Alten Eidgenossenschaft bis 1848, Bern 1992, p. 479.

⁴ Compare Botschaft des Bundesrates an die Bundesversammlung über die Anerkennung des Rätoromanischen als Nationalsprache. (Vom 1. Juni 1937.) (The Proclamation of the Federal Council to the Federal Assembly dated June 1, 1937 on the recognition of the Romansh language as the official language), BBl 1937 II 13 and following.

⁵ The original text of the Constitution of the Swiss Confederation of 29 May 1874 in German in: A. Kölz, *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*, Vol. 2, Von 1848 bis in die Gegenwart, Berno 1996, p. 151 and following. The Constitution of 1874 in the last version before it was changed according to its state in April, 20, 1999: http://www.ofj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/bundesverfassung_Par.0006.File.tmp/bv-alt-d.pdf.

⁶ “Ohne Freiheit der Muttersprache ist eine wirkliche Freiheit des Geistes undenkbar” – The proclamation of the Federal Council dated June 1, 1937, BBl 1937 II 13.

⁷ Die Eingabe des Kleinen Rates des Kantons Graubünden (motion of the Small Council of the Canton Graubünden), BBl 1937 II 2–12.

⁸ Compare R. Kägi-Diener, Kommentar zu Art. 4 BV, in: B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (ed.), *Die schweizerische Bundesverfassung – Kommentar*, Zürich – Basel – Genf 2002, pp. 44–45.

Therefore, the Constitution of 1874 did not directly intervene in the issue of language freedom (at the cantonian constitution level such freedom was established only by the constitution of Bern⁹). Of course, it did not mean that this freedom did not have guarantees in the sphere of the constitutional law. For the first time, freedom of language was recognized as the unwritten constitutional law¹⁰ by the Federal Court in 1965¹¹, stating that it made an important prerequisite for allowing the general use of such rights of freedom (*Freiheitsrechte*) as well as freedom of expression or freedom of the media. It is necessary to add that the doctrine has repeatedly stressed that freedom of language is the basis for a democratic order, leading to full implementation of not only the freedom mentioned above, but also to freedom of religion.¹² Interesting is the fact that the partial amendment of the Constitution of 1874 made in the 90-ies of the last century did not introduce a direct provision on the freedom of language. The changes were limited only to the issue of guarantees and official national languages of Switzerland¹³ and the obligation to take into account the representation of the linguistic regions in the process of creating personal composition of the Federal Council.¹⁴

The Constitution of the Swiss Confederation of 18 April 1999¹⁵ (entered into force on January 1, 2000) makes several comments on the issue of language. Accordingly, the art. 4 states that *the National Languages are German, French, Italian, and Romansh*. Art. 8 law 2 proclaims the prohibition of discrimination on the grounds of language. Art. 18 states that *the freedom to use any language is guaranteed*. Article 31 is devoted to the problem of the liberty deprivation. The first sentence of the law 2 states:

⁹ Compare art. 15 of the Constitution of the Canton of Bern of June 6, 1993, BSG 101.1.

¹⁰ For the concept of the constitutional rights of citizens in Switzerland as well as unwritten constitutional rights see M. Aleksandrowicz, *Kontrola prawa miejscowego przez szwajcarski Sąd Federalny*, in O. Bogucki, S. Czepita (eds.), *System prawny a porządek prawny*, Szczecin 2008, p. 390 and following.

¹¹ The Federal Court Judgement dated March 31, 1965, BGE 91 I 480.

¹² Compare R. Kägi-Diener, *Kommentar zu Art. 18 BV*, in: B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (eds.), *Die schweizerische...*, p. 271 and the literature referred to there.

¹³ See art. 116 of the Constitution of 1874 – changed March 10, 1996, AS 1996 1492. The recognition of the Romansh language as the official language in relations with people who speak this language was a novelty.

¹⁴ Compare art. 96 par 1 of the Constitution of 1874 – introduced February 7, 1999, AS 1999 1239.

¹⁵ Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101. An English version of the Swiss Constitution: <http://www.admin.ch/ch/e/rs/1/101.en.pdf> (Assessed 31.03.2011).

Anyone deprived of their liberty has the right to be notified without delay and in a language they can understand of the reasons for their detention and of their rights. According to art. 69 law 3, the Federation is obliged to take into consideration *linguistic diversity of the country* during the realization of its tasks in the sphere of culture. Art. 70 is entitled “Languages”. Interesting is the fact that it has been placed in *Section 3* devoted to *Education, Research and Culture* of the *Chapter 2 – Powers*, in the *Title 3 – Confederation, Cantons and Communes*. This provision concerns the definition of Switzerland’s *official languages* (these are German, French and Italian, with the provision that, when dealing with people who speak the Romansh language, that language is the official language of the Federation). *The Cantons shall decide on their official languages. In order to preserve harmony between linguistic communities, the Cantons shall respect the traditional territorial distribution of languages and take account of indigenous linguistic minorities). The Confederation and the Cantons shall encourage understanding and Exchange between the linguistic communities. The Confederation shall support the plurilingual Cantons in the fulfillment of their special duties. The Confederation shall support measures by the Cantons of Graubünden and Ticino to preserve and promote the Romansh and the Italian languages.* Finally, art. 175 point 4 obliges the *Federal Assembly* to make sure that *geographical and language regions of the country are appropriately represented* while selecting the *Federal Council*. It should be added here that since January 1, 2007 there has been adopted a constitutional order to consider the official languages of the Federation while choosing the judges of the Federal Court.¹⁶

Constitutional regulations on the issue of language can be classified according to the category of the language used: any language (Article 8 par. 2, Art. 18 and. 31 par. 2) and one of the four “Swiss languages,” German *Schweizersprachen* (Article. 4, Art. 69 paragraphs. 3, Art. 70 and. 175 paragraph. 4), or a criterion type of the social relationships: between individuals and between individuals and the state bodies.

Constitutional guarantees of freedom in the sphere of language relate to its use by the individual in any form (orally or in writing), both for their own use (writing a diary, taking personal notes), as well as to communicate with others. The use of language is possible while maintaining two fundamental premises: it should be learnt (cognition) and used. An active aspect

¹⁶ Bundesbeschluss über das vollständige Inkrafttreten der Justizreform vom 12. März 2000, (The Federal Resolution dated. 8 March 2005 regarding a complete introduction of the justice reform adopted March 12, 2000), AS 2006 1059.

of the language freedom is manifested in the guarantee to freely choose the language in which an individual wants (or can) communicate regardless of one's nationality. In its passive aspect, freedom of language is the claim of the (physical¹⁷) person for the use of language that is understandable for him/her, or the use of which s/he claims in relation to oneself (or – often – a person is required to use a particular language because of other people's freedom of language established by the principle of territoriality – this principle is going to be discussed later). The protection regarding the ranges indicated above includes primarily natural languages (both in the versions of literary language, as well as any existing dialects), and potentially artificial languages (eg. Esperanto), including professional languages (eg. computer languages).¹⁸

While the question of the use of any language in private relations does not raise doubts¹⁹, the situation is different in the contacts of a public nature since it is ambiguous. In the sphere of lawmaking at the federal level there applies the principle of simultaneous publication of normative acts (different categories of these acts are specified by the statute²⁰) in German, French and Italian, with the proviso that all versions are equally binding for the authorities applying the law. Hence, while interpreting the language, the authority applying the law should refer to the three equivalent official texts.²¹ Both administrative and jurisdictional procedures should be conducted in the official languages (Art. 31 paragraph 2 of the Constitution is only applied to inform a detainee about the grounds of the state and his rights). Therefore, according to this principle, freedom of language in the sphere of legal application requires the obligation to use one of the official languages in the relations with the authorities. On the other hand, an indi-

¹⁷ However, the Federal Court judgment dated October 31, 1990 acknowledged the legal person's right (here, a joint stock company' rights) to raise claims to restrict freedom of language because of the constitutionally guaranteed principle of economic freedom (the case concerned the necessity to translate an Italian commercial billboard hanging on a building in the municipality with the official Romansh language) BGE 116 Ia 345. Hence, according to the doctrine, the possibility of legal persons' relying on freedom should not be excluded. Compare U. Häfelin, W. Haller, *Schweizerisches Bundesstaatsrecht*, Zürich 2001, p. 150.

¹⁸ Compare R. Kägi-Diener, Kommentar zu Art. 18 BV, in B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (eds.), *Die schweizerische...*, p. 273.

¹⁹ Compare U. Häfelin, W. Haller, *Schweizerisches...*, p. 151 and the literature cited there.

²⁰ Art. 14 Bundesgesetz vom 18. Juni 2004 über die Sammlungen des Bundesrechts und das Bundesblatt (Federal Act of 18 June 2004 regarding the Collection of Federal Laws and Federal Official), SR 170.512.

²¹ Compare U. Häfelin, W. Haller, *Schweizerisches...*, p. 31 and following

vidual may claim the right to manage the affairs in his native language.²² Let us, therefore, explain the meaning of the mother tongue (German – Muttersprache) in the Swiss framework.

Freedom of language is seen primarily as the right to use one's mother tongue. It should be emphasized that this power is related to the principles of territoriality, including the (relative) homogeneity of the various linguistic regions of Switzerland.²³ Not only do the Swiss citizens protect their national languages, but they also preserve a kind of traditional balance between them. This specific quality is maintained through keeping the status quo in terms of territorial distribution of languages in the cantons (including municipalities), which manifests itself in their powers to regulate the relations of language in their territories. Cantons themselves define their own official languages (there may be more than one).

A particularly delicate issue within the sphere of the language freedom is the possibility of its teaching. The already mentioned sentence of the Federal Court in 1965 stated that the cantons are free to regulate issues of the language use in education (the case concerned the administrative discretion to limit the admissibility of the French language in the German-speaking canton of Zurich by imposing a duty to continue their education after two years of teaching in a private French school in the German-speaking schools). With time the adjudication line has evolved²⁴ towards a wider understanding of the mother tongue in Switzerland. This was perfectly expressed by the Federal Court Judgement of 15 July 1996²⁵, which repealed a decision obliging a child residing in the German-speaking local municipality Möri-gen to attend to a local German school, and not to a French school in another municipality. The Federal Court held that this decision violated the freedom of the mother tongue spoken by the person (as opposed to the official language in the municipality of his residence), which resulted in giving the priority to his individual freedom of language at the expense of the principle of territoriality and linguistic uniformity of the individual areas (municipalities here.) Finally, it was indicated that education authorities do not have power to order an individual to attend a school with the language of instruction official in this region. On the other hand, a school in another

²² Compare *ibid.*, p. 414.

²³ Compare R. Kägi-Diener, Kommentar zu Art. 70 BV, w: B. Ehrenzeller, P. Mastro-nardi, R. J. Schweitzer, K. A. Vallender (eds.), *Die schweizerische...*, p. 811 and following

²⁴ Compare the proclamations: ZBl 83/1982 356, BGE 100 Ia 462, BGE 106 Ia 299; BGE 121 I 196.

²⁵ BGE 122 I 236.

municipality with a different language of instruction is not required to offer a place to the student in such a situation. Nevertheless, this situation is not banned – in this case the costs of education even at primary level will be handled by parents/guardians of the student.

It should be clearly stressed that the above mentioned cases concern only the possibility to apply the mother tongue protection towards the languages situated in the catalogue of the Federation official languages (German, French, Italian, Romansh). In relation to non-official languages, such protection is not guaranteed.

The above remarks on the constitutional regulation of the major languages of the Swiss Confederation may lead to the conclusion that the guaranteed freedom of language is subjected to important limitations due to the functioning of the official languages categories in the public sphere. As a result, this freedom can be practised fully only by the people speaking German, French, Italian, or Romansh (only to a limited extent in this case) with the consideration of the territoriality principle.

The above presented historical outline as well as contemporary solutions regarding the issue of language in Switzerland, which is frequently called “Europe in a nutshell” as it was already mentioned in this paper, leads to a rather skeptical conclusion regarding a possible future language unification of the “United Europe”. Such unification has never been introduced in Switzerland. Jealously guarding their language differences (which is shown by a significant preference of the Swiss four languages), they have repeatedly noticed that the “Swiss nation is not a product of the language community. It is rather a community of spirit, the fruit of the will of multilingual ethnic communities who wish to live as a nation that is willing to preserve and defend their historically acquired freedom and mutual community of interconnectivity to preserve and defend it. A peaceful coexistence of the multilingual nation within a single nation in the federal state is guaranteed by the principle that everyone should be free to develop their national language in accordance with its distinctiveness preservation”.²⁶ Building a community of “the spirit of Switzerland” has been taking place for over 700 years. Even after such a long time, there have been no attempts to blur the linguistic diversity of the country. What is more, during the German threat in the 30-ies of the last century, it was decided to strengthen the normative position of the minority language, that is, Romansh.

²⁶ Compare the Proclamation of the Federal Council dated June 1, 1937, BBl 1937 II 12–13.

It can be presumed that the problems faced by modern Europe, especially economic and terrorist threats as well as fears of immigration from non-European countries, will contribute to the nationalist feelings intensity, including a consistent defense of the linguistic distinctiveness of the individual EU Member States, as well as to attempts to preserve a diversity within them.

S U M M A R Y

The article aims at the presentation of the selected political solutions of Switzerland as a multilingual body in the background of the similar problems faced by the integrating European Union. A historical development outline of the Swiss regulations and current Federal Constitution basic provisions have been presented. A special consideration has been given to the issue of the so-called native languages in Switzerland, which have special privileges in relation to other languages used by the inhabitants of this country. A direct reference is also made to several decisions taken by the Federal Court that clearly reflect the importance of resistance towards weakening of “the Swiss languages” position as related to each other. At the same time, the importance of the territoriality principle as a solid basis for the preservation of the linguistic diversity of Switzerland has been highlighted.

