

Sovereignty of *Völker*: The German Nationalist Takeover of the ENC and the New Nationality Paradigm, 1933-1938

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My paper will discuss the last phase in the development of the European Congress of Nationalities (ENC), which commenced after the Nazi takeover of power in Germany in 1933. It signified its gradual demise as a truly international and pluralist representation of European national minorities and, *ultimately*, a transformation into an instrument of German revisionism. ENC, giving space for intellectual exchange between minority politicians and activists and various legal and other experts engaging with issues of minority and ethnic diversity, simultaneously represented an important place for mediation and spread of new ideas. During the discussed years these were prominently marked by the endeavors of the German experts on nationality law (*Nationalitätenrecht*, *Volksgruppenrecht*) such as Hermann Raschhofer, Karl Gottfried Hugelmann, Theodor Veiter, Ernst Swoboda and Rudolf Thiele, to name just a few. Stemming from the rejection of the existing provisions for minority protection based on individual rights, the aim of these legal scholars was to develop special legal frameworks for ethnic collectivities that were to be ultimately integrated into international law.¹

The aim of this paper is to show how German nationalist takeover of the ENC went hand in hand with the gradual establishment of a new ideological paradigm. This paradigm change implied a reconceptualization of the relationship between the Nation and the State – as well as that between the national community and its individual members - and resulted in a shift from a constructively critical stance towards the existing system of minority protection to the one of outright rejection. The new paradigm also practically materialized in the autonomist legal proposals, put forward by the Sudeten German Party (SdP) in April 1937, which foresaw transformation of Czechoslovakia into a federation of largely autarchic ethno-national communities.

In the first part of the paper I will provide a general overview of the ENC's transition during the years 1933-38, thereby highlighting some of the key turning points. This will be followed by a more focused analysis of the new ideological paradigm with special attention being paid to the theory of nationality law, developed by Hermann Raschhofer. While aiming at radical reform of

¹ For an extensive discussion of this topic see: Samuel Salzborn, *Ethnisierung der Politik. Theorie und Geschichte des Volksgruppenrechts in Europa* (Frankfurt/Main, New York: Campus, 2005).

the existing European state order as a whole, particularly in Central Europe, these theories acted as one of the key intellectual sources behind the 1937 SdP autonomist proposals. These will be discussed in the third part of the paper.

I.

In September of 1936 issue of the journal *Nation und Staat*, the unofficial ENC mouthpiece, an article appeared, written by the ENC Secretary General Baron Ferdinand von Uexküll-Guldenband. It bore an interesting and telling title: “Reform of Nationality Law – With or Without the League of Nations?”² Critically commenting on the future prospects of international protection of minorities and the League of Nations capacity to implement it, Üxküll restated the main demands that the Nationalities Congress had been voicing through the preceding decade and which aimed at enhancing the existing provisions by universalizing the minority protection, empowering the minorities to appeal directly to the League and - most importantly – integrating nationalities law into international law and making the League of Nations act as its guarantor, for which a permanent Minorities Committee should be created. Üxküll attributed great value to the existing minority treaties, giving credit to the League of Nations and stressing that minorities should continue seeking solutions within its framework. At the very end, however, he made a sudden turn, delivering a grave warning: “Should the League of Nations fail to develop a more serious will in this respect” - to enforce minority protection, that is – “the following will need to be stated: from the standpoint of a satisfactory political order of nationalities in Europe it would have been better, if there had never been a League of Nations.”³

An even more categorical critique was contained in the ENC Memorandum to the House of Commons, submitted right after its thirteenth meeting in London in July of 1937. There it stood that the League of Nations, having been “posted as an important sentry on the boundary line between Right and Wrong” had “neither watched not defended that line” making “no use of the rights and powers with which he was invested.” This failure, the memorandum warned, was “bound to encourage the policy of intervention. [...] When the situation grows worse, a dreadful reckoning will be presented for the unjust treatment of the minorities.” European peace was in “grave danger” which “might lead to upheavals similar in kind to those caused by the disregard of the sovereign rights of a foreign state.”⁴

While the references to the “danger zones” and “certain groups of which number up to 2-6 millions”⁵ may clearly be interpreted as alluding to the then already pressing Sudeten German

² Ferdinand von Uexküll-Guldenband, “Reform des Nationalitätenrechts mit oder ohne Völkerbund?,” *Nation und Staat* 9/12 (1936): 744-747.

³ *Ibid.*, 747.

⁴ “Memorandum on the Legal Status of European Minorities, and the dangers to European Peace, arising through their Oppression” in *The Congress of the European National Minorities. London Meeting 14th-15th July 1937* (Wien-Leipzig: Wilhelm Braumüller, 1938), pp. 90-91.

⁵ *Ibid.*

problem, both quoted texts gave clear signs that the ENC had been breaking away from its traditional position of acknowledging the fundamental tenets of the post-WWI European order that also dictated a policy of cooperation with the League of Nations. Although the ENC at no point made an official break with that policy, the 1937 congress gave a clear rise to voices, preferring other solutions such as bilateral agreements and case by case solutions within individual states. It was quite clear that the two organizations had been going separate ways. The main factor had beyond doubt been the rapidly changing situation on the stage of international politics, revealing changed relationships of power and clearly leading towards a state of affairs, in which the exact forms of new European order were not yet known, but it was clear that the *Versailles* system was crumbling. This process also concerned the League of Nations, whose significance as an international body and guarantor of peace was radically waning during a decade, marked among other by a sharp decline in minority rights.

The process was to a considerable extent catalyzed by the rise of a new totalitarian power in the middle of Europe – *the Third Reich* – and its re-armament. The Germany's departure from the League in October of 1933 thereby presented an important turning point. The German minority organizations, being both numerically and economically the strongest within the Congress had namely simultaneously been coming under increasingly direct control of their kin state's foreign policy – which in turn also influenced the course of the ENC as a whole. A rather clear sign of the vanishing interest for the League of Nations was that the 1934 decision by the ENC to create an experts' committee for issuing complaints to the League remained a dead letter and was never implemented.⁶

By 1938/39 ENC became largely subordinated to the Nazi Germany's foreign policy, at the same time losing most of its previous international character. The basic condition that enabled this was the increasing financial dependence on Germany. Reliance on German funds was not something new. Already since 1928/29⁷ the German Foreign Ministry contributions channeled to the Congress via the Association of German National Groups in Europe had represented a major part of the means that the ENC had at disposal. Especially after 1935, however, this financing became absolutely crucial,⁸ whereas the regime change in 1933 also meant that there were clear strings attached. The active factor, however, that largely propelled the ENC's transformation was the movement's takeover by radical nationalist forces from the ranks of German minority activists. Combined, these two factors steered the ENC towards subordination to the Nazi foreign policy. The combination of both expressed itself on a number of occasions, which signified the breaking points of the ENC's final phase.

Particularly important was the 1933 congress, during which a fierce debate ensued concerning the anti-Semitic acts of the new German government, particularly addressing the question of forced dissimilation of those persons of Mosaic faith that did not consider themselves Jewish in the

⁶ Sabine Bamberger-Stemman, *Der Europäische Nationalitätenkongreß 1925 bis 1938. Nationale Minderheiten zwischen Lobbytendum und Großmachtinteressen* (Marburg: Herder Institut, 2000), p. 296.

⁷ *Ibid.*, 254.

⁸ Martyn Housden, *On Their Own Behalf. Ewald Ammende, Europe's National Minorities and the Campaign for Cultural Autonomy 1920–1936*. (Amsterdam, New York: Rodopi, 2014), p. 348.

national sense but as members of the majority nationality.⁹ The final resolution gave tacit approval to the policies of dissimilation.¹⁰ This was presented as standing in line with the ENC's views on assimilation¹¹ – and, theoretically speaking it was. However, in this matter the speakers completely overlooked the more basic dimension of individual rights, ignoring the forceful nature of dissimilation of Jews in Germany and the fact that it was tied to legal discrimination, violence and stripping of basic political and human rights.¹² As a consequence of this, the Jewish groups, having beforehand pressured the Congress to explicitly condemn the treatment of Jews in Germany, ceased attending the Congresses and never returned. Also important was the 1935 congress. That year the German representation became dominated by the members of the Sudeten German Party. At the same time, the congress resolution regarding nationalities in authoritarian states, expressed readiness to cooperate with authoritarian regimes. While the resolution itself gave no preference either for authoritarianism or for democracy,¹³ some of the preceding speeches contained substantial amount of endorsement of the former and critique of latter.¹⁴

Increasing dependence on German funds and gradual alignment with the Third Reich foreign policy however present only one part of the story. The takeover of ENC by the radical nationalists namely represented a process that had already been in motion in 1933, being linked to a gradual change in the prevailing ideological paradigm. This change *did not* take place *because* of the Nazi takeover of power in Germany.¹⁵ The latter merely gave it a firmer swing – and ultimately a more fixed direction. Last but not least, the ENC also after 1933 and up to 1938 continued to represent quite an internally plural society, uniting a number of nationalities and still representing a plurality of political orientations,¹⁶ whereby even within the German nationalist camp there were notable nuances present.

The ideological change within the ENC and its German representation in particular was simultaneously personal, partly being also a generational one.¹⁷ Between 1928 and 1935 many minority activists from the older generation that shared the experiences of the pre-war efforts to

⁹ See: Bamberger-Stemman, *Der Europäische Nationalitätenkongreß*, 275-292; Housden, *On Their Own Behalf*, 296-324.

¹⁰ Bamberger-Stemman, *Der Europäische Nationalitätenkongreß*, 278.

On the concept of dissimilation see: Alexander Korb, "Dissimilation, Assimilation and the Unmixing of Peoples: German and Croatian Scholars Working towards a New Ethno-Political Order, 1919-1945," *Transactions of the RHS* 24 (2014): 183-203.

¹¹ See for instance: "Kundgebungen Hitlers und v. Papens zur Volkstumspolitik," *Nation und Staat* 6/9 (1933).

¹² Cf. Housden, *On Their Own Behalf*, 280-281, 321-324.

¹³ *Sitzungsbericht des Kongresses der organisierten nationalen Gruppen in den Staaten Europas. Genf 2 bis 4 September 1935* (Wien-Leipzig: Wilhelm Braumüller, 1936), p. 101.

¹⁴ *Ibid.*, 32-38, 41-44, 51-53.

¹⁵ Cf. Housden, *On Their Own Behalf*, 271 and Bamberger-Stemman, *Der Europäische Nationalitätenkongreß*, 200-201.

¹⁶ Cf. Housden, *On Their Own Behalf*, 348-349.

Although the percentage of German representatives among the Congress participants had risen from 25 in 1931 to 42 in 1934, it continued having a fairly multi-national character. The 1936 congress, for instance, was attended by participants representing 7 different nationalities from 10 different states.

¹⁷ Ulrike von Hirschhausen, "From Minority Protection to Border Revisionism: The European Nationality Congress, 1925-38" in *Europeanization in the Twentieth Century. Historical Approaches*, M. Conway and K. Patel eds. (London: Palgrave Macmillan, 2010), pp. 87-109, pp. 98-99.

accommodate national diversity within multi-ethnic empires passed away. The crucial breaking point took place during years 1931/32 being closely connected to the appointment of Estonian German politician Werner Hasselblatt as legal counselor to the Association of German National Groups in Europe.¹⁸ Hasselblatt belonged to the younger generation of more radically nationalist minority activists, who only had the experience of being a minority in post-war nation states and often fostered revanchist sentiments. During the 1930s many of these became Nazi fellow travelers or – *as in case of Hasselblatt himself* – Nazis.

Fully revealing itself by 1937 the new tendency, had been sensed already at the beginning of the 1930s by Paul Schiemann, who warned against what he called “The new nationalist wave”¹⁹ posing a threat to the European peace. His warnings were largely overheard. Schiemann stopped participating in the Congresses after 1932, ultimately leaving it in 1934. While at least until 1937 the official ENC documents continued to be framed in the old spirit of international cooperation,²⁰ the new tendency was nevertheless tolerated and occasionally even given tacit support by traditionalist leaders such as Ewald Ammende. In particular, its expressions abounded on the pages of the journal *Nation und Staat*, whose editor-in-chief from 1933 was Werner Hasselblatt. Schiemann’s withdrawal and the rising power of Hasselblatt, with whom they were ideologically and otherwise at odds, coincided. After 1932 Hasselblatt established himself as the central personality in the German minorities movement, and especially after the death of Ammende became the most influential person behind the Congress with powerful connections in Berlin.

Nationalists of the younger generation - ideologically belonging to diverse strains of the Right but mostly gravitating towards ideas of conservative revolution – shared an outlook of the ethnic community or *Volksgemeinschaft*, uniting all the members of a given nation regardless of political borders, as an entity that was more fundamental than states – *also in political and not merely in cultural terms*. Actively promoting terms “Volksgruppe” and “Volkstum” instead of “minority”²¹ – which they saw as denigrating and belonging to the language of Western democracy - they advocated solutions to the European minority question that were in numerous ways incompatible with the system, represented by the League of Nations. In contrast to the earlier ENC majority platform of exclusively cultural autonomy for minorities within the existing framework of nation states, the new one questioned the very basis of the Versailles order. Ultimately it aimed at thorough restructuring of existing states - and for constituting *Volksgemeinschaften* as trans-border entities. Coupled by rejection of liberal democracy, this vision also entailed a fundamentally illiberal conception of collective rights, in which the rights of the national group came before those of their individual members.

¹⁸ Cf. Bamberger-Stemman, *Der Europäische Nationalitätenkongreß*, 188-189 and Hirschhausen, *From Minority Protection to Border Revisionism*, 102.

¹⁹ Paul Schiemann, “Die neue nationalistische Welle,” *Nation und Staat* 5/12 (1932): 799-811.

²⁰ Cf. Bamberger-Stemman, *Der Europäische Nationalitätenkongreß*, 316.

²¹ Cf. Hirschhausen, *From Minority Protection to Border Revisionism*, 100.

II.

As ENC was a place of intellectual exchange between minority politicians and activists and legal experts, it also represented the space, in which new, illiberal adaptations of national autonomy and collective national rights were being forged. Here, the key carriers of the new paradigm were the mostly German-speaking legal scholars, engaged in developing legal special legal frameworks for ethnic collectivities that were to be ultimately integrated into international law.²² Rejecting the existing minority protection based on individual rights, the “new nationality law,” (*Nationalitätenrecht, Volksgruppenrecht*) strove to accommodate national diversity within European states and the multi-ethnic reality of East Central Europe in particular on a collective rights basis. Instead of “minorities,” they rather employed the term *Volksgruppen*, a notion which not only dissolved the majority : minority and “state nation” : national minorities relationships within states but also enabled a transborder conceptualization of ethnic groups. While fighting the post-Versailles order of unitary nation states and criticizing the existing system of minority treaties was by no means necessarily and always linked to illiberal standpoints, the *Volksgruppenrechtler* combined their endeavors with the critique of Western “formal” democracy and parliamentarism.

Informed by contemporary *völkisch* thought, particularly the ideas of “independent *Volk*,” championed by the sociologist Max Hildebert Boehm,²³ the understanding of nationality underlying their legal concepts namely centered on the notion of *Volkspersönlichkeit*. The latter implied an organicist understanding of nationality, which conceived nation as special “being” (*Wesen*) with own “soul”, “purposes” and “will” - or in the words of the key Sudeten German Party ideologist Walter Brand a “living whole” with “vital necessities and natural life rights” of its own.²⁴ A collectivity which is in itself and for itself substantially more than a sum of its members, whose individual rights and interests are furthermore fully subordinated to those of the group. This nicely reflected in the words by Heinz Rutha, the *de-facto* foreign minister of the Sudeten German Party, at the 1937 European Nationalities Congress, as he commented increasing curtailing of civic rights by European states, *particularly freedom of association*:

“Diese Freiheitseinschränkung trägt jeder gern, wenn es ein Opfer für das eigene Volk ist, und leidet bitter unter ihr, wenn er als Angehöriger einer Minderheit aus der Selbstbetätigung und der Mitgestaltung des öffentlichen Lebens ausgeschaltet wird.“²⁵

What bound the illiberal reconceptualization of collective nationality law along *völkisch* lines to the earlier conceptions, conceived for the framework of liberal state, was the basic underlying critique of the nation state model, expressed through distinction between the notion of “nation”

²² See: Samuel Salzborn, *Ethnisierung der Politik. Theorie und Geschichte des Volksgruppenrechts in Europa* (Frankfurt/Main, New York: Campus, 2005).

²³ Max Hildebert Boehm, *Das eigenständige Volk. Einführung in die Elemente einer europäischen Völksoziologie*. Göttingen: Vandenhoeck & Ruprecht, 1932.

On Boehm see: André Postert, “Der »Ruf der Jungen«: Max Hildebert Boehm und der junge Konservatismus in der Weimarer Republik,” *INDES* 4/3 (2015): 29-37.

²⁴ Cf. Walter Brand, “Volksgruppe, Volksgemeinschaft und Staat,” *Nation und Staat*, Vol. 9 (1935/36), Nr. 1, p. 11

²⁵ H. Rutha, “Gemeinschaftsrecht und Selbstverwaltung der Volksgruppen,” *Nation und Staat* 10, no. 11-12 (1937): 710-714, 711.

from that of the state” and separation between their respective domains. The famous Rennerian distinction²⁶ had been taken over also by numerous interwar minority activists and thinkers, reflecting in its clearest form in Paul Schiemann’s idea of “a-national state.” In clear analogy with the secularist argument, the aim of both Renner and Schiemann had been to de-nationalize the central institutions of the state via institutional separation between matters of particular nations (conceived as essentially cultural entities) and those of the state as political community. While by no means aiming to de-nationalize the young Estonian nation state, the Estonian cultural autonomy law of 1925,²⁷ also essentially operated along the lines of divorcing the particularly *national* matters, confined to the sphere of culture and education, from the common matters of *state* politics. In all the listed cases national affiliation was furthermore a matter of free individual decision.

In contrast to the *state* as a territorial entity, the *nation*, conceived as group of people of shared culture and national belonging, acted as an essentially non-territorial one, constituted on the basis of the personal principle. For this reason, the central and recurring demand common to Austromarxist, liberal, as well as *völkisch* theoreticians of nationality law had been the constitution of national groups within states as persons of public law. What however crucially distinguished the former two from the latter, was the sphere of discretion that these legal persons were to be granted, the range of affairs that they were meant to deal with as well as their relationship towards the state and its institutions. This was all connected to the radically different underlying idea of nationhood. On the one hand the purely culturalist understanding of nation went hand in hand with the aim of its depoliticization – and simultaneous containment of sub-state nationalisms and elimination of nationality conflict from the state politics. In clear contrast to this, the interwar *völkisch* re-development of nationality law attributed the nation an essentially political character. What distinguished this line of thinking from the “western” nation-state idea was that the ethnic nations (*Völker*) were conceived as the primary carriers of political will that preceded the state, thus also acting as the basic agents of statehood. The states derived both their legitimacy and sovereignty from the *Völker* inhabiting them, whose independent political existence could however never be fully dissolved through merger into one *demos*. If they were to preserve their uniqueness, indeed their very existence, they had to maintain autonomy in all spheres of life or, as one of the participants in the 1937 Sudeten German Congress in Leitmeritz/Litoměřice put it: “*Das Fundamentale und Primäre ist die Volksgemeinschaft, das Sekundäre die Staatsgemeinschaft.*”²⁸ Perhaps the most important consequence of all this was that the notion of popular sovereignty was

²⁶ Karl Renner [Synopticus], *Staat und Nation. Zur österreichischen Nationalitätenfrage. Staatsrechtliche Untersuchung über die möglichen Principien einer Lösung und die juristischen Voraussetzungen eines Nationalitäten-Gesetzes* (Wien: Dietl, 1899), pp. 13-16.

²⁷ On the Estonian nationalities law see: David James Smith, “Estonia: a model for interwar Europe?” *Ethnopolitics* 15 (2016): 89-104; Martyn Housden, M. “Cultural Autonomy in Estonia: One of History’s “Curiosities”?” in D. Smith (Ed.). *The Baltic States and Their Region: New Europe or Old?* (Amsterdam: Rodopi 2005), 227-249 ; Michael Garleff, “Die kulturelle Selbstverwaltung der nationalen Minderheiten in den baltischen Staaten,” in *Die baltischen Nationen. Estland Lettland Litauen*, ed. Boris Meissner (Köln: Markus Verlag, 1990)., pp. 87-107; Cornelius Hasselblatt, *Minderheitenpolitik in Estland. Rechtsentwicklung und Rechtswirklichkeit 1918-1995* (Hamburg: Bibliotheca Baltica, 1996).

²⁸ Eduard Westphalen-Fürstenberg, “Die staatsrechtlichen Lösungsversuche des Nationalitätenproblems” in *Dritte sudetendeutsche Tagung für öffentliches Recht in Leitmeritz am 16. und 17. Oktober 1937. Vorträge und Wechselrede* (Brünn: Rudolf M. Rohrer Verlag, 1938), pp. 47-65, p. 51.

transposed from citizenry (*Staatsvolk*) to individual ethnic groups (*Völker, Volksgruppen*) within states and potentially also beyond their borders, as their carriers.

A paradigmatic case example of a *Volksgruppenrechtler*, whose ideas resonated within the ENC, while also crucially informing the later autonomist programs of the Sudeten German Party, was Hermann Raschhofer, an expert of nationality law at the Kaiser-Wilhelm-Institut in Berlin (1934-37) and University of Göttingen (1937-1939). Having earlier served as an assistant to Boehm at the Berlin *Institut für Grenz- und Auslandsstudien* in Berlin, his legal conceptions had been formed before and independently from the advent of National Socialism. As his career development during 1930s intertwined with alignment to the National Socialist standpoints, they also experienced some degree of adaptation after 1933. In turn, Raschhofer's legal theory came to essentially characterize the Third Reich policy on German minorities up until the beginning of 1938, particularly regarding the Sudeten question.²⁹ In its core stood the pseudo-Rousseauian notion of „sovereign *Völker*,“ entities of essentially political character, whose existence came before those of states. It was thus *Volk* as *ethnos* and not *Volk* as *demos* (*Staatsvolk*), that acted as the primary carrier of sovereignty and political will. In Central Europe, according to Raschhofer, Rousseau's "abstract people" took a *völkisch* concrete shape – “*Nun hat sich aber das abstrakte Volk Rousseaus im Mitteleuropa des 20. Jahrhunderts völkisch konkretisiert.*”³⁰ While in mononational states the two conceptions of *Volk* largely corresponded to each other, this essentially meant that the multinational one consisted not of one sovereign *Volk*, but of a number of sovereign *Völker*.

Encompassing the entirety of *Volksgenossen*, regardless of their place of residence, the sovereign *Völker* also acted as essentially non-territorial entities - subjects, which were not territorially ascertainable – *territorial nicht erfassbar*.³¹ Raschhofer had for a longer time been an advocate of non-territorial autonomy. In his 1931 monograph on the nationality law he wrote that “lacking compact territorial settlement cannot be a sufficient reason for denying the constitution of a nationality as a legal body.”³² This automatically created the necessity for its ascertainment on a personal basis -- *die Notwendigkeit der Erfassung und Geltungsbegrenzung personeller Art*.³³ For that same very reason Raschhofer stressed the necessity of constituting nationalities as bodies of public law, as well as introduction of institutions such as national cadasters and national curiae in multinational states.³⁴ Raschhofer's 1931 monograph furthermore made direct references to Renner and Bauer, especially the former, whom he extensively cited, also pointing out important

²⁹ Cf. Jana Osterkamp, *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920-1939). Verfassungsidee - Demokratieverständnis - Nationalitätenproblem* (Frankfurt Main: Vittorio, 2009), p. 205.

³⁰ Hermann Raschhofer, "Wechselrede," in *Dritte sudetendeutsche Tagung für öffentliches Recht in Leitmeritz am 16. und 17. Oktober 1937. Vorträge und Wechselrede* (Brünn: Rudolf M. Rohrer Verlag, 1938), 90.

³¹ Hermann Raschhofer, *Hauptprobleme des Nationalitätenrechts*, (Stuttgart: Stuttgart : Enke, 1931), p. 78.

In his 1931 monograph and other theoretical pieces written up to 1937, Raschhofer employs the term "Nationalität" and not "Volksgruppe," when referring to national minorities, whereas "Volk" always implies the ethnic group in its entirety.

³² *Ibid.*, 61.

³³ *Ibid.*, 78.

³⁴ *Ibid.*, 79, 132-134, 155.

parallels between his own and Renner's theories.³⁵ He moreover made numerous, mainly positive references to the old Austrian national compromises, particularly the Moravian one, which he deemed „the hitherto most complete design or arrangement [*Ausgestaltung*] – of the nationality law.“³⁶ On the other hand, Raschhofer however deemed the pre-war compromises a half-way solutions, stressing the need for a more developed nationality law on the basis of „*Volksgruppenverfassung*“ that would have provided all the nationalities in multiethnic states with a fair amount of „*volkspolitische Handlungsfähigkeit*.“³⁷

This line of thinking was clearly present in the autonomist demands that the Sudeten German Party put forward in April of 1937 and in whose genesis Raschhofer had taken part as one of the key mediators of ideas. Important to mention in this connection is his strong and lasting attachment to the Bohemian lands and a profound interest in the nationalities question there. Having acted as legal advisor to the SdP leadership at least since 1934,³⁸ Raschhofer publicly supported its 1937 autonomist bills,³⁹ and also participated in the working committee that was preparing the materials for negotiations with the Czechoslovak government during 1938. During WWII he was appointed at the German University in Prague, where he in 1943 became a professor for international law.

III.

All the main tenets distinguishing the interwar *völkisch* re-development of the nationality law, discussed in the previous section, were present also in the demands for national autonomy that the Sudeten German Party in April 1937 put forward for discussion in the Czechoslovak parliament. Jointly known as *Volksschutzgesetze* after the official title of the first one of them, these legal bills contained the proposal for a far-reaching re-organization of the state along national lines conceived on a purely non-territorial basis. As such they represented a clear example of non-territorial autonomy (NTA), however of a markedly different kind than its earlier modern versions, designed for the framework of a liberal state.

The demands came as a reaction to the so-called February 1937 Agreement⁴⁰ between the German activist parties and the Czechoslovak government. SdP leader Henlein announced the intent of his party to develop and put forward a more substantial and lasting solution to the nationality problem in the form of “national self-rule” (*völkische Selbstverwaltung*). Whereas the government promises to the activist parties entailed purely administrative measures, which could easily be revoked by any future government, Henlein accentuated the need for a legal solution. In his speech at the party

³⁵ Ibid., 81-82, 145.

³⁶ Ibid., 81.

³⁷ Raschhofer, Wechselrede, 90-91.

³⁸ Karl Hermann Frank an den Reichserziehungsminister Bernhard Rust am 12. 4. 1939 in Václav Král, *Die Deutschen in der Tschechoslowakei 1933-1947* (Praha : Československá akademie věd 1964), pp. 387-388.

³⁹ Hermann Raschhofer, "Die nationalitätrechtlichen Gesetzanträge der Sudetendeutschen Partei," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 7, no. 1 (1937): 536-549.

⁴⁰ Francesco Leoncini, *Die Sudetenfrage in der Europäischen Politik : Von Den Anfängen bis 1938* (Essen: Hobbing, 1988), p. 118 and Elisabeth Wiskemann, *Czechs and Germans* (London: Oxford University Press 1938), p. 257.

rally in Aussig/Ústí nad Labem on February, the 28th,⁴¹ he delineated the key tenets that such a solution was to be based on. Each national group of Czechoslovakia was to be legally recognized and instituted „as a body of public law with unified representation.“ Particularly he emphasized the need for national cadasters enabling „inclusion of [all] the members of a nation on the basis of personal ethnic affiliation (*Zusammenfassung der Angehörigen einer Nation auf Grund persönlicher völkischer Zugehörigkeit*).“ as the „indispensible precondition for a just organization of self-rule.“⁴² He thereby specifically emphasized that this kind of self-rule did not contradict the unity of the state as it did not demand any kind of special status for any part of its territory.

Two months later Henlein’s announcement came true as demands were formally put forward in the Czechoslovak Parliament in form of six draft laws. Coming to be jointly known as *Volksschutzgesetze* after the official title of the first of them, the bills were meant to constitute the national groups inhabiting Czechoslovakia as separate legal entities. While the last three of the bills⁴³ more or less aimed at legally instituting the main promises of the February Agreement, such as participation of nationalities in public institutions, proportional to their share in entire state population and the right to appeal to the Constitutional Court in cases concerning minority rights, it was the first three that contained the crucial provisions for national autonomy, at the same time also representing the main subject of dispute with the Czechoslovak government and Czech legal experts.⁴⁴

The most important was the “Law on the protection of the national rights [*Volkstumsrechte*] through formation of associations of public law” or shortly “*Volksschutzgesetz*” proposed by Ernst Kundt.⁴⁵ In line with it, each of the main national groups of Czechoslovakia would form a national association (*Verband*), representing a person of public law. These would initially be founded by the parliamentary representatives of each nationality, which would at the same time form the association Board, or *Vorstand*. The Board of each national association would in turn elect a Speaker (*Sprecher*) and his Deputy, who – while themselves not being members of parliament (this being explicitly forbidden) – would be given the mandate to represent their national communities and their interests towards the state organs, as well as the other national associations. Through their ruling organs the national associations would therefore be given the full mandate to represent their national communities and to co-rule the state, while having broad, far-reaching and not clearly limited powers in administering the “internal” life of a given nationality in the fields of culture, education, social policy and economy. This would among other be done via numerous compulsory organizations of corporatist character. The rather vaguely delimited authority of the

⁴¹ “Völkische Selbstverwaltung für das Sudetendeutschtum! (Haupttagung in Aussig am 28. Feber 1937)” in Konrad Henlein, *Heim ins Reich: Reden aus den Jahren 1937 und 1938*, ed. Ernst Tscherne (Reichenberg: NS Gauverlag Sudetenland, 1939), pp. 7-21.

⁴² *Ibid.*, 18-19.

⁴³ *Gesetz über die Haftung des Staates und anderer öffentlich- rechtlicher Verbände für Schäden, die durch ihre Organe bei Ausübung der Amtswirksamkeit verursacht werden gemäß § 92 der Verfassungsurkunde* proposed by Karl Hermann Frank; *Gesetz zur Verwirklichung des in den §§ 106 und 128 der Verfassungsurkunde ausgesprochenen Grundsatzes der Gleichberechtigung in allen Zweigen des öffentlichen Dienstes* proposed by Karl Hermann Frank; *Gesetz über das Klagerecht vor dem Verfassungsgericht* proposed by Ernst Kundt.

⁴⁴ Andrej Tóth, Lukás Novotný, and Michal Stehlík, *Národnostní mensiny v Československu 1918-1938 : od státu národního ke státu národnostnímu?* (Praha: Univerzita Karlova v Praze, Filozofická fakulta : Togga, 2012), p. 366.

⁴⁵ Poslanecká sněmovna N. S. R. Č. 1937. IV. volební období. 5. zasedání. Překlad. 897. Návrh poslance E. Kundta na vydání zákona na ochranu národnostních práv zřízením veřejnoprávních svazů (zákon na ochranu národností).

Speaker, accompanied by weak democratic legitimation⁴⁶, lack of control mechanisms and accountability towards membership clearly hinted at “*Führerprinzip*.”⁴⁷

After being consolidated, the national associations would legally comprise all the citizens of a given nationality. According to the “Law concerning national belonging of the state citizens and the national cadaster”, the second bill put forward by Fritz Köllner,⁴⁸ every adult citizen would have the right and the duty to declare his or her nationality and enroll into the corresponding national cadaster. This decision was meant to be a one-time and irrevocable one. It was furthermore not an entirely free one, as it had to be “truthful,”⁴⁹ corresponding to the language, used in family and could ultimately also be decided by a special Cadaster court. In the words of the senior scholar on nationality question, Karl Gottfried Hugelmann, this meant an “overcoming of the subjective and the objective theory in a higher synthesis.”⁵⁰ The ultimately involuntary manner of determining nationality might also be understood as a legacy of the Moravian. Yet, the crucial difference lay in the one-time and irrevocable character of the declaration, which was only to be done by the current generations of adult citizens. After being formed, the national cadasters and thus the membership in the national associations were to be fixated and sealed, with nationality of all the future generations being determined in advance by that of their forefathers.⁵¹

Lastly, the “Law concerning the protection against any kind of denationalization”, put forward by Rudolf Sandner,⁵² thereby also included provisions for protecting the “national property.” The old nationalist battle slogan *Nationaler Besitzstand*, thus gained fresh force, now for the first time being framed as a legal category, designating a concrete object, to be protected by criminal law. It was thus not merely the souls, but also material property, that was to be prevented from being denationalized. The latter again encompassed not merely land, factories and other enterprises, but extended even to jobs. Had a certain workplace for a given amount of time already been occupied by a member of a given nationality, it should have been recognized as *belonging* to that nationality

⁴⁶ Osterkamp, Verfassungsgerichtsbarkeit in der Tschechoslowakei, 218.

⁴⁷ Cf. René Petráš, *Menšiny v meziválečném Československu : právní postavení národnostních menšin v první Československé republice a jejich mezinárodněprávní ochrana* (Prague: Karolinum, 2009), p. 250 and Jörg Kracik, *Die Politik des deutschen Aktivismus in der Tschechoslowakei 1920-1938* (Frankfurt am Main: Peter Lang, 1999), p. 350.

⁴⁸ B Poslanecká sněmovna N. S. R. Č. 1937. IV. volební období. 5. zasedání. Překlad. Návrh poslance dr Köllnera na vydání zákona o národnostní příslušnosti státních občanů a o národnostních katastrech.

⁴⁹ Ernst Swoboda, professor of Law on the Prague German University and probable co-author of the bills, explained the purpose of the second bill as follows: “Um die Ehrlichkeit des Rechtes zu sichern, muß dafür Sorge getragen werden, daß sich auch jeder Volksgenosse ehrlich zu seiner Nation bekenne, daß er darin nicht nur nicht behindert, sondern dazu *verpflichtet* wird. Dazu soll das Gesetz über den nationalen Kataster dienen.“ - Ernst Swoboda, “Ehrliches und volksnahes Recht,” in *Dritte sudetendeutsche Tagung für öffentliches Recht in Leitmeritz am 16. und 17. Oktober 1937. Vorträge und Wechselrede* (Brünn: Rudolf M. Rohrer Verlag, 1938).

⁵⁰ Karl Gottfried Hugelmann, “Verbände öffentlichen Rechtes zum Schutze der Volkstumsrechte,” *Nation und Staat* 10, no. 9 (June 1937): 566-571, 566.

⁵¹ Cf. Cristoph Boyer and Jaroslav Kučera, “Alte Argumente im neuen Licht,” *Bohemia. Zeitschrift für Geschichte und Kultur der böhmischen Länder* 38, no. 2 (1997): 368. – Boyer and Kučera rightly point out the irrevocable character of national affiliation, yet go too far by stating that this necessarily implied conceptualization of nationality as “racial community” in the Nazi vein.

⁵² Poslanecká sněmovna N. S. R. Č. 1937. IV. volební období. 5. zasedání. Překlad. Návrh poslance dr Köllnera na vydání zákona o národnostní příslušnosti státních občanů a o národnostních katastrech.

-- as part of its *Besitzstand*. The foreseen legal institutionalization and protection of *nationaler Besitzstand* implied a major hampering of the market, as it would have created a peculiar kind of national autarchy, “which would furthermore not be defined territorially but personally.”⁵³

Taken together, the *Volksschutzgesetze* thus combined provisions for broad and far-ranging national autonomy with consociationalist arrangements (*de facto* national sectioning of the parliament, strict national proportionality in all state institutions and public enterprises). In some of their aspects they might offer the appearance of a mere retour towards provisions that had already been in force in Austrian times, such as the right of nationalities – and not solely individuals - to appeal to the Supreme Court.⁵⁴ In the same vein they might also be interpreted as aiming to secure what various legal theoreticians and national activists of old Austria had longed for, but had never fully achieved (recognition of *Volksstämme* as legal persons). The SdP proposals however went considerably further. Their “package” indeed included considerably more than any of the previous modern examples of national autonomy, containing novel elements that were clearly illiberal and also potentially undemocratic. As such they bore substantial and far-reaching implications concerning the inner structure of the state, its mode of functioning and its very foundations.

Apart from the fact that they effectively negated the Czechoslovakia’s official nation-state character, their “revolutionary character” lay in that they implicitly posited nationalities as basic carriers of political will and sovereignty. These were attributed an essentially political character as basic agents of statehood. Or - in words of Hugelmann, who gave his support to the SdP bills, these did not imply merely (broad) autonomy but something more:

“Hier begegnet uns eine Zuständigkeit des Volksgruppenverbandes, welche neuartig ist. Hier handelt es sich nicht um Autonomie im engeren oder weiteren Sinn, um mit dem Titel des Gesetzes zu sprechen, sondern um Vertretung der Volksgruppe in ihrem Volkstumsrecht innerhalb des Staates und gegenüber seinen Organen. Hier wird also die Volksgruppe als solche *in das staatliche Leben eingeschaltet*.”⁵⁵

Whereas it remains unclear whether the national associations were envisaged to bear direct legislative and executive powers⁵⁶ - the bills spoke only of “*übertragener Wirkungskreis*” – it was clear that in practice they would come to indirectly control both branches.⁵⁷ The SdP bills left the question concerning powers of central government institutions and their future role entirely unaddressed. It was certain, however, that these were to be significantly curtailed: in particular, the state parliament, while still nominally existing in its envisaged form of a central representative body, would become factually divided into national representations that would simultaneously form the Boards of autonomous national associations. The Parliament would thus be transformed from popular representation of one, indivisible *Staatsvolk* or *demos* into a place of institutionalized

⁵³ Petráš, *Menšiny v meziválečném Československu*, 251.

⁵⁴ See: Gerald Stourzh, *Die Gleichberechtigung der Nationalitäten in der Verfassung und Verwaltung Österreichs 1848 - 1918* (Wien: Verl. d. Österr. Akad. d. Wiss., 1985), p. 195-196.

⁵⁵ Hugelmann, *Verbände öffentlichen Rechtes zum Schutze der Volkstumsrechte*, 568.

⁵⁶ Osterkamp, *Verfassungsgerichtsbarkeit in der Tschechoslowakei*, 217.

⁵⁷ *Ibid.*, 220.

Nationalitätenkampf between particular *Völker* (in the sense of ethnicities). In words of Schiemann this essentially meant “putting nationalism against nationalism.”⁵⁸

The national group, perceived as a body of an essentially political character, was furthermore to be constituted on a binding and essentializing definition of nationality, which would, in contemporary verdict by Elisabeth Wiskemann, have created such barriers between particular nationalities as did not exist even between citizens of different states.⁵⁹ The most outstanding specificity of *Volksschutzgesetze*, however, was the all-encompassing nature of the foreseen national autonomies, which stretched far beyond the spheres of culture and education and was coupled by virtual omnipotence of the national associations as their executors towards their individual members. The latter, possessing dual legal status as „citizens-conationals“ (*Staatsbürger-Volksgenossen*)⁶⁰ would thus be turned into „passive objects of care.“⁶¹ Theodor Veiter, a renowned expert on nationality law from Austria, endorsed this as an expression of what he termed “*neue Volkstumsauffassung*,” in line with which the national community possessed an “absolute claim” over its individual members, who could also be coerced into putting themselves at their communities’ disposal.⁶² The essential subordination of the individual to the national group, expressed via lack of accountability of the national associations towards their members was furthermore coupled with unclear delimitation of competences between the national associations and central government.

While the SdP bills were swiftly rejected by the Steering and Constitutional Law Committees of the Czechoslovak House of Representatives⁶³ and the Parliament kept postponing their discussion,⁶⁴ they received a wide resonance in both Czechoslovak and foreign press. Emil Sobota, the Czechoslovakia’s leading legal expert on the nationalities question for instance wrote a series of expert opinions for the government and in 1938 also published a book *Národnostní autonomie v Československu?*⁶⁵ There, he singled out all those features that made them incompatible with the liberal state. distinguishing the SdP proposals from previous modern examples of NTA, devised for the framework of a liberal state. An interesting verdict thereby was the one by the French envoy in Prague De Lacroix, who paralleled the *Volksschutzgesetze* to the Ottoman Millet system.⁶⁶

⁵⁸ Paul Schiemann, “Nationalismus gegen Nationalismus. Zu den Anträgen der Sudetendeutschen Partei.” *Der Deutsche in Polen*, 25. 7. 1937.

⁵⁹ Wiskemann, *Czechs and Germans*, 258-259.

⁶⁰ Rudolf Thiele, “Die Volksschutzgesetzanträge der Sudetendeutschen Partei vom Standpunkt der Verfassungsgrundsätze der Tschechoslowakei,” *Zeitschrift für osteuropäisches Recht* 4, no. 8 (1938): 487.

⁶¹ Tóth, Novotný, and Stehlík, *Národnostní menšiny v Československu*, 361-362; Petráš, *Menšiny v meziválečném Československu*. 250.

⁶² Theodor Veiter, *Nationale Autonomie: Rechtstheorie und Verwirklichung im positiven Recht* (Wien ; Leipzig: Universitäts-Verlag Wilhelm Braumüller, 1938, 1938). p. 216-217.

⁶³ Tóth, Novotný, and Stehlík, *Národnostní menšiny v Československu 1918-1938 : od státu národního ke státu národnostnímu?*, 367.

⁶⁴ Wiskemann, *Czechs and Germans*, 259.

⁶⁵ Emil Sobota, *Národnostní autonomie v Československu?* (Praha: Praha : Orbis, 1938).

⁶⁶ Detlef Brandes, *Die Sudetendeutschen Im Krisenjahr 1938* (München: Oldenbourg, 2010), p. 70.

The illiberal traits that distinguished the SdP proposals from previous modern examples of NTA were on the other hand recognized as virtues by bulk of their supporters both within and outside Czechoslovakia. Apart from enjoying considerable resonance in the political and scholarly press in the German Reich,⁶⁷ they caused a particular echo among German-speaking legal and experts, dealing with nationalities' problem. Theodor Veiter for instance, for whom personal autonomy represented the genuine form of autonomy,⁶⁸ deemed *Volksschutzgesetze* "die bisher vollkommenste und dem Wesen von Volk und Staat gemäße rechtliche Ausgestaltung nationaler Autonomie."⁶⁹ Most tellingly, he saw in them an expression of what he termed "*neue Volkstumsauffassung*," in line with which the national community possessed an "absolute claim" over its individual members, who could also be coerced into putting themselves at their communities' disposal.⁷⁰ The bills were furthermore thoroughly discussed during the Third Sudeten German Congress on Public Law, taking place in October 1937 in Leitmeritz/Litoměřice, in which prominent guests from outside Czechoslovakia such as Hugelmann, Hasselblatt and Raschhofer took part.⁷¹

Especially great was the degree of positive attention that the bills attracted on the international level, particularly within the framework of the German minorities' representation in the *Verband der deutschen Volksgruppen Europas* and in the ENC. *Nation und Staat* devoted an entire issue⁷² to them in which Hugelmann, Hasselblatt, Ernst Swoboda and Ernst Kundt published supportive analyses of the bills.⁷³ While the latter characterized the bills as a general platform for accommodating national diversity, relevant for all states and containing principles for "a just international order,"⁷⁴ Hasselblatt, argued that the demand for "Zusammenfassung der einzelnen Völker und Volksgruppen [...] als organisierte Volksgemeinschaften und Träger öffentlich-rechtlicher Funktionen" inherent to them, represented "die stärkste Widerspiegelung aller Bestrebungen und EntschlieÙungen der Europäischen Nationalitätenkongresse."⁷⁵

Involvement of all the key protagonists in the ENC, along with their claims that the *Volksschutzgesetze* provided a general template for solving the European minorities' question,

⁶⁷ See for instance: Thiele, "Die Volksschutzgesetzanträge der Sudetendeutschen Partei; Raschhofer, Die nationalitätrechtlichen Gesetzanträge; "Gleiche unter Gleichen," *Frankfurter Zeitung*, 29. 4. 1937; "Volksgruppenrecht," *Frankfurter Zeitung*, 30. 4. 1937; "Henlein fordert die Autonomie," *Chemnitzer Tageszeitung*, 19. 10. 1937.

⁶⁸ Veiter, *Nationale Autonomie*, p. 59.

⁶⁹ *Ibid.*, 221.

⁷⁰ *Ibid.*, 216-217.

⁷¹ *Dritte sudetendeutsche Tagung für öffentliches Recht in Leitmeritz am 16. und 17. Oktober 1937. Vorträge und Wechselrede* (Brünn: Rudolf M. Rohrer Verlag, 1938).

⁷² *Nation und Staat* 10, no. 9 (1937).

⁷³ Hugelmann, *Verbände öffentlichen Rechtes zum Schutze der Volkstumsrechte*.; Werner Hasselblatt, "Die sudetendeutschen Gesetzanträge und die Nationalitätenbewegung," *Nation und Staat* 10, no. 9 (1937): 560-565; Ernst Swoboda, "Die Verfassungsmäßigkeit der von der Sudetendeutschen Partei eingebrachten Gesetzentwürfe zur Regelung der nationalen Verhältnisse," *Nation und Staat* 10, no. 9 (1937): 572-577; Ernst Kundt, "Entwicklungsgründe, Bedeutung Und Inhaltsgrundsätze Unserer Gesetzesanträge." *Nation und Staat* 10, no. 9 (1937): 550-59.

⁷⁴ Kundt, *Entwicklungsgründe, Bedeutung und Inhaltsgrundsätze*, 559.

⁷⁵ Hasselblatt, *Die sudetendeutschen Gesetzanträge und die Nationalitätenbewegung*, 560.

reflecting “Erkenntnisse aller bisherigen Europäischen Nationalitätenkongresse,”⁷⁶ directly hints at the possibility that they were a product of a broader endeavor, in which the German *Volksgruppenrechtler* had played a crucial role. Raschhofer also wrote in open support of *Volksschutzgesetze*, and, while his ideas regarding sovereignty of ethnic groups largely resembled the omnipotent national associations, foreseen by the *Volksschutzgesetze*, there was also another crucial commonality present. It lay in the relationship and dynamic between the territorial and non-territorial elements – that is the territorial and the personal principle. In Raschhofer’s autonomy conception, the latter acted as fundamental and the former as potential addition - should the specific circumstances allow for and demand it. If the conditions were favorable enough – as in case of Sudeten Germans for instance – territorial autonomy may be introduced as a higher, more developed form, which however does not negate the non-territorial basis. Constitution of collective body, comprising all the members of a given nationality, regardless of their place of residence within state borders, would always be there as the primary and basic form. This was the case because nationality law (*Nationalitätenrecht*) as such was something, essentially non-territorial:

“Kennzeichnend für jedes Nationalitätenrecht ist sein personeller Geltungsbereich, [...] Das liegt in der Natur des rechtlich zu regelnden Gegenstandes begründet. [...] Dadurch ergibt sich die Notwendigkeit der Erfassung und Geltungsbegrenzung personeller Art von selbst.”⁷⁷

⁷⁶ Kundt, *Entwicklungsgründe, Bedeutung und Inhaltsgrundsätze unserer Gesetzesanträge*, 552.

⁷⁷ Raschhofer, *Hauptprobleme des Nationalitätenrechts*, 78.

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