

Steinacker, The Concept of National Belonging and The Practice of Determining National Belonging in Old Austrian Nationalities Law, 1932
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Many of the contested national self-descriptions as German on which the courts ruled thus cannot be considered genuine. Rather, in many cases, they were only means to the end of securing for one's children the advantage of free instruction in German.

Here the principal difficulty connected with the self-description principle shows itself clearly. As soon as national belonging is tied to any legal consequences, the individual's actual, subjective consciousness of belonging to his nation will often no longer be decisive for his national self-description. Rather, national self-description will become a means to the end of realizing those consequences. The declaration by Czech parents to be Germans was a natural reaction against the implementation by Czech national leaders of compulsory national schooling. And such declarations should not be regarded as having no significance for national belonging. In many cases, a natural consequence of the decision to have one's child educated in German was that the child was launched on a path toward assimilation, toward the other nation.

Czech nationalists demanded that parents petitioning for the erection of a national minority school have their national belonging determined. And this was granted by the Supreme Administrative Court, by means of the self-description principle. But this was no real progress. To the contrary, the many false "national self-descriptions" submitted by fellow Czechs [*Volksgenossen*] had to provoke Czech nationalists all the more. The goal was compulsion by the state of one's fellow Czechs to have their children educated in national fashion. Ultimately the sole means for achieving that goal could only be the determination of national belonging on the basis of objective markers. In the following pages, it will be shown how Czech national leaders succeeded in achieving their goal, by means of the objective principle.

The juridical and theoretical struggle between the self-declaration principle and the objective principle, and between the subjective and objective theory of the nation, presents itself as a form of the struggle between Germans and Czechs. The German view was that German culture's natural powers of attraction should be allowed free rein. Germans thus backed the self-description principle. The Czech approach was to attempt to weaken those powers of attraction, by seeking to force fellow Czechs to have their children educated in national fashion.

Until 1907, the Supreme Administrative Court oscillated between the objective theory and the subjective one.

9. The struggle over the national Municipal School Councils and the self-description principle.

In disputes over the founding of nationality schools, it was the Czech national leaders who struggled against the self-description principle, for reasons already related, and demanded the employment of an objective procedure in the determination of national belonging. In disputes over who should fill the national Municipal School Councils, the same occurred, on both sides. Both Czech and German national leaders believed that they could fill the school councils with "staunch" [*stramm*] nationally minded fellow nationals only with the aid of an objective procedure. Repeatedly, aldermen who had been elected [by the Town Council] to the German or the Czech Municipal School Council on the basis of national self-description found their election challenged by their own fellow nationals. In disputes over the nationality schools, in contrast, the challenge always came from the other national side. The school council challenges, furthermore, were always accompanied by the argument that the incorrectness of the national self-description could be proven through objective characteristics such as language of daily use and descent, as well as through the objectivization of the feeling of belonging (on the basis of national-political activity, for example). For the appellants, the convictions of those elected were simply too tepid.

This may be read clearly from the text of the challenges. Against these challenges, the Supreme Administrative Court repeatedly emphasized that it was unacceptable to equate and confuse national belonging and political conviction in this fashion.

With the aid of the self-description principle, it was also attempted to fill the Municipal School Council of the national minority with members of the national majority, and thus to prevent national supervision of the schools. Characteristic here is the ruling of November 14, 1907, Budw. 5492/A, in which the Supreme Administrative Court, for a change, once again defended the pure self-description principle. The Supreme Administrative Court granted an appeal by four aldermen who had been elected to the German Municipal School Council in Karolinenthal [in Bohemia, not Moravia], and then had seen their election annulled by the administrative authorities on the grounds that the aldermen did not belong to the German race. This decision by the administrative authorities was revoked, with the following justification:

"The appeal asserts in merito that this decision is unlawful, and points to consistent rulings of the Supreme Administrative Court to the effect that solely the concrete declaration of the relevant person shall be regarded as decisive in the question of that person's belonging to a particular nationality.

The Supreme Administrative Court considers the appeal justified. In accordance with the provisions of Clause 7 of the above-cited [Bohemian] School Supervision Law, in places where there exist both German and Czech schools, the representatives elected by the town council must be taken from among the members of the nationality for which the school represented by the Municipal School Council is meant. In the case at hand, the election was to the Municipal School Council for the German school. Thus the legality of the decision under challenge depends on whether the 4 persons named above are to be characterized as belonging to the German nationality. This question had to be answered in the affirmative. [Minor imprecisions in Steinacker's transcription of this paragraph of the ruling have been corrected.]

To which nationality a person belongs is a question of fact, and legal regulations do not exist concerning the characteristics by which the nationality of individuals is to be determined. Just as it is part of the essence of a nationality that it acts vis-à-vis others as a unit and as a closed whole, so, too, is an individual's belonging to a particular nationality a matter of consciousness and feeling. Precisely for that reason, if an individual's nationality is in question in a concrete case, then it seems that only his declaration, made before the authorities and thus presumably made with all earnestness and consideration, can decide the issue.

The appellants, in the course of their hearing by the competent offices (protocol of December 14, 1906), declared decidedly that each of them belonged to the German nationality. Thus it follows from what was said above that the electability [Eignung] of these persons, in the sense of Clause 7 of the law cited, must be accepted as given.

The decision under challenge contests that electability, making reference to official inquiries without providing detail about their results. It is clear from the direction that those inquiries took, as well as from their content, that the administrative authorities are invoking circumstances on the basis of which a compelling conclusion regarding nationality cannot be reached. The inquiries concerned the personal, home, and family relations of the elected individuals. In particular, questions were asked about origin, nationality of parents reported in the census, language of daily use of the elected individuals and their family members, national upbringing and education of children, associational activity of the elected individuals, etc. All these circumstances, however, cannot be taken into consideration in answering the question. It cannot be concluded that a person belongs to a race because he knows its language, nor because

he professes a particular language of daily use in the census. For that matter, nationality as such is not polled in the census. From the fact, perhaps, that the children of the person in question attend a Czech school or that he is or is not a member of a national association, or pursues some other activity in public life—even if such matters should contradict the nationality that he professes—no compelling conclusion can be drawn regarding his nationality. Indeed, all these circumstances, especially in mixed-language communities, can have their roots in considerations of opportunity or other matters by the person in question. They need not stand in any connection with the question of nationality. The appellants, in fact, referred repeatedly to such considerations in the course of their hearing."

From the facts of the case, it is clear that with the aid of the self-description principle, people were made members of the German Municipal School Council who at the very least were bilingual, who sent their children to Czech schools, and who contradicted their national self-description with their public activity in the community. In no case was this in the spirit of administering schools in national fashion. To be sure, the Supreme Administrative Court conceded that these objectivizations of the consciousness of national belonging could be rooted in considerations of opportunity, and have no bearing on the fact of actual national belonging. This would correspond to a pure objective theory of national belonging. On the other hand, the Court accepted national self-description, which of course can be subject to equally opportunistic considerations. Thus the Court defended an extremely subjective theory as well. The Supreme Administrative Court's concept of national belonging was becoming ever less clear.

As will be shown, this was the last time that the Supreme Administrative Court would defend national self-description from attack. In its following decision regarding the same question, it yielded to Czech national forces, fulfilling their repeated demands for the testing of national self-description for credibility.

10. The Moravian Diet Electoral Order and the introduction of an objective procedure for determining national belonging.

This fundamental change in the jurisprudence of the Supreme Administrative Court did not occur without an external impulse. That impulse came in the form of the so-called Moravian Compromise Laws of 1905. That year, a series of laws was passed in the Moravian Diet [Provincial Assembly]. As is known, they created a system of national curias for the first time. The Moravian Diet was divided into a German and a Czech curia, such that both national groups gained extensive autonomy. Simultaneously, a new electoral order was created, on the basis of which elections to the Diet and Parliament in Moravia henceforth were to take place separately, according to nationalities. Thus nationally segregated electoral lists had to be prepared, so-called national cadastres. Each voter was registered in the Czech or the German electoral list, on the basis of national belonging. Hereby was raised anew the question of determining the national belonging of individual citizens; for the first time, this question was now legally regulated. Until this point, as the rulings of the Supreme Administrative Court had always stated, there had "existed no legal regulations stating by which characteristics the nationality of individuals is to be determined."⁵⁷

Provisions "Regarding the registration of all voters according to nationality" are contained in Clauses 67 through 74 of the Moravian Diet Electoral Order (Moravian provincial law of November 27, 1905, *Moravian Provincial Legal Gazette* No. 2 of 1906).⁵⁸

⁵⁷ See the rulings of January 3, 1881 (see above, page 10) and of November 14, 1907 (see above, pp. 34ff).

⁵⁸ "Provisional registration of all voters according to nationality."

The procedure in the drawing up of national cadastres was as follows.

First, the communal authorities enrolled all persons entitled to vote in the German or Czech list, "on the basis of personal relations known to them." This was a completely new procedure, which rested on a "communis opinio" [Latin: opinion of the community] regarding national belonging that had already been emphasized by the Supreme Administrative Court in a ruling.⁵⁹ We shall return to this matter later.

The provisional lists, thus constituted, were then subjected to a correction procedure. They were placed on public display, and every voter had the right to undertake the transfer of his name from one list to the other by his own hand, or through power of attorney. Anyone who missed the 14-day deadline for appeal, however, counted as a member of the nationality to which he had been ascribed [*zugerechnet*] by the communal government. Only in such form, at a second stage, did national self-description find highly limited use. What is more, national self-description was by no means definitive and decisive, for it could be contested at the next stage of administrative appeal. The head of the communal council, if he had reservations regarding the correctness of a national self-description, had to request a decision in the matter from the political authorities—

Clause 67. ... The Governor orders a general registration of those voters entitled to participate in elections to the Diet [as opposed to the Parliament, Town Council, etc.], regarding their belonging to one of the two races that inhabit the crownland....

Clause 69. The Governor requests the town councils of towns operating under a special municipal charter [*mit eigenem Statut*] and the District Captains request the councils of all communal units within their jurisdiction to draw up lists of all enfranchised persons....

The communal councils are also requested, on the basis of personal relations known to them, to enrol the voters in two separate lists, according to whether the voters belong to the Czech or the German race.

Correction Procedure.

Clause 71. The lists drawn up by the communal councils are to be placed on display in every communal unit, in its offices, for examination and copying by all....

At the same time, the displaying of the lists is to be announced publicly in the usual local fashion, together with a request that any corrections to those lists be submitted within 14 days. The object of the correction procedure is solely to confirm the belonging of voters to one of the two races that inhabit the crownland of Moravia.

Persons not enrolled in the lists who believe themselves to have the right to vote may demand their registration; they should indicate to which of the two races they belong.

Every person enrolled in the list, by declaring that he belongs to the other nationality and not to the one in whose list he is enrolled, may have his name stricken from the other list and added to the list wished by him. To this end, he must enter his name with his own hand in the list of the nationality to which he professes himself. In such cases, no action may be taken that contradicts the declaration.

It is permissible to request correction through power of attorney.

The enrolment of a voter in a national list may also be contested by any voter who is enrolled in the same list or is of the same national belonging.

In such cases, it is the obligation of the head of the communal council to investigate the request and, if it seems justified to him, to undertake correction himself. Appeal against his decision is permissible within eight days, to the political authority hearing appeals in the first instance [i.e., the District Captainship] or in the case of towns operating under a special municipal charter, to the Governor.

Voters belonging neither to the Czech nor to the German nationality are to be enrolled in the list of that nationality to which the majority of voters in the relevant communal unit have professed. The voter also has the right to request his enrolment in the list of the other nationality.

Clause 72. The head of the communal council..., after undertaking any corrections deemed justified by him, must present the lists to the provincial authorities superior to him. He must make known any requests for correction disallowed by him, as well as any reservations regarding declarations of national belonging.

The voter is also entitled ... to submit his request for correction to the provincial authorities.

The District Captain or the Governor, after a thorough examination of all conditions, decrees [*verfügt*] the lists corrected, and returns them to the head of the communal council.

[Paragraph omitted regarding parallels to an implementation decree of 1920 for the Czechoslovak census.]

⁵⁹ See above, pp. 19ff.

which decreed the lists corrected, i.e., the national belonging of the voter, "after an examination of all conditions." [Steinacker's deletes "thorough."]

Furthermore, any person enrolled in the electoral list could demand the transfer of other persons enrolled in that same list to the list of the other nationality, on grounds of not belonging to the nationality in question. Authorized to rule in the matter were first the communal authorities and then the political authorities, once again after an examination of all conditions. When the course of appeal through the political administration had been exhausted, one could turn to the Imperial Court as a final resort; it had jurisdiction over violations of electoral law. As we see, the Moravian Diet Electoral Order of 1905 ended the dominance of the hitherto decisive self-description principle, in that it explicitly established the testability of national self-description. The first comprehensive drawing up of the original lists of the national cadastres, as well as the final decision regarding the national belonging of individual voters, now took place with the aid of an objective procedure. National self-description was conceded only a subordinate role, in the form of a right of appeal within a certain time frame. The higher authorities were not bound by this national self-description, but rather could test it at the request of the communal unit, and if necessary, could enrol the voter in the unwanted list against his will. Objective procedure thus at first meant nothing else than the determination of national belonging by communal authorities "on the basis of personal relations known to them" or by state authorities "after an examination of all conditions," i.e., more or less as they saw fit.⁶⁰

Until this time, both in the founding of nationality schools and in elections to national Municipal School Councils, individual cases had concerned the determination of the national belonging of a small number of persons. The creation of national cadastres required the determination of the national belonging of masses of people all at once. Now purely technical difficulties had to be taken into consideration as well. The Moravian Diet Electoral Order sought to simplify those difficulties by having the communal councils draw up provisional lists on the basis of personal knowledge about the national belonging of fellow members of the communal unit. This idea of an indirect determination of national belonging, on the basis of personal acquaintance at the local level, rests on the factual experience that in nationally mixed areas, within narrower social circles (the village, the small town, the factory, the company), the national belonging of the individual is clear almost without exception. In the countryside, along the language border, everyone knows to which nation everyone belongs. It is exceptional for the national belonging of a person to be disputed or uncertain in public opinion. And then it would be a question of a borderline case, a half-breed [*Mischling*].⁶¹

This personal factual knowledge regarding the national belonging of fellow members of the communal unit was employed by the Moravian Diet Electoral Order in two ways: in the drawing up of the original lists by the communal authorities, and in the right of fellow voters to object to the enrolment in their own list of a voter from the other nationality. The idea was to ensure that the original lists were drawn up in unbiased fashion.

No matter how expedient this new, indirect procedure may have been in the countryside, because of mutual personal acquaintance, it failed in the city. And it failed especially in the big city, where the personal acquaintance of inhabitants with one other does not hold and where—as a consequence of the loosening of the individual from natural ties to family and nation—denationalization and assimilation can proceed more often, more quickly, and with less notice than in the countryside, where the objective relations of the individual to his nation are much

⁶⁰ Laun, cited above, is incorrect in asserting, page 262, that enrolment in the national cadastre according to the Moravian Diet Electoral Order took place essentially on the basis of personal choice [*Option*].

⁶¹ See above, Section III, chapter 6.

stronger. These difficulties of the indirect procedure in towns surface clearly in a ruling of the Imperial Court, discussed below, regarding the national electoral cadastres in Brünn.⁶²

If we speak here of "objective procedure" for the first time, this requires clarification. In the discussion of the concept of national belonging that underpinned the Supreme Administrative Court ruling of January 3, 1881,⁶³ we concluded that as a consequence of the duality of the concept of nation, a distinction must be made between characteristics of essence and characteristics of will [*Wesens- und Willensmerkmalen*]. In its highest form of manifestation, national belonging reveals itself in descent, in the unconscious workings of the nation (for example, mores and views), in belonging to the national culture and education, and also in the individual's consciousness of national belonging. In other words, one can speak of objective and subjective characteristics of national belonging, just as some speak of an objective and a subjective theory of the nation. As was argued above, the subjective dimension of national belonging may be determined in two ways. First, one may ask the individual about his national convictions; this is the self-description principle. Second, one may derive national convictions from their "objectivizations"—from actions in which national convictions reveal themselves (for example, membership in a national association, education of one's children in a German or Czech school, etc.).⁶⁴ If consciousness of national belonging is ascertained only with the aid of national self-description, and national belonging is determined exclusively on that basis (pure self-determination principle), then this procedure is entirely subordinated to the person's will [*Parteiwillen*]. The person whose national belonging is to be ascertained determines it himself by making a declaration. The activity of the state is limited to registering the self-description. As we saw, this permits the question of "false" self-description, of abuse of self-description, to appear. When the self-description principle dominates, the procedure should be termed subjective; the individual is the subject of the procedure. The second procedure is quite different. Here it is the authorities, a second party, that ascertain national belonging, on the basis of inquiry; the individual is entirely an object of the procedure.

Thus we may speak of a subjective and an objective procedure for ascertaining national belonging, without this dichotomy [*Gegenüberstellung*] coinciding with the dichotomy between objective and subjective theory of the nation, or of national belonging.

In this sense, the procedure of the Moravian Diet Electoral Order was an objective one, because when all was said and done it was the authorities who determined national belonging, "after an examination of all conditions." The question of whether objective or subjective understandings [*Voraussetzungen*] of national belonging are meant by these conditions is left completely untouched by the law.

The significance of the Moravian Diet Electoral Order thus lies entirely within the field of procedural law. It says nothing regarding the concept of national belonging. The formula to the effect that the official ascertainment is to take place "after an examination of all conditions" is

⁶² See below, Section III, Chapter 11.

⁶³ See above, p. 10.

⁶⁴ Bernatzik, above all, has voiced reservations against determining national belonging from "objectivizations" of the consciousness of national belonging. As he explains in his above-cited work [*Über nationale Matriken*, 1910], pp. 29ff, using drastic language: "From all manner of indications, including perhaps pub conversations, theater visits, the reading of suspicious books, and who knows what other circumstances, evidence for or against the nationality is to be adduced. The 'genuine German man' will no longer be able to enjoy the Frenchman's wine without running the danger of being officially branded a 'traitor to the national cause.' There loom trials all too reminiscent of the tribunals of the Inquisition. At stake here, after all, is the ascertainment of convictions! Here it is not difficile, sed impossibile satyram non scribere" [Latin: Here it is not difficult to write satire; rather, it is impossible not to write satire]. Laun has similar reservations, p. 267, and fears "the worst of espionage and denunciation [*Angeberei*]." [Passage omitted concerning post-1918 German-Polish treaty regarding Upper Silesia.]

devoid of content, and says nothing. Juridically speaking, this is a step backward as compared to the earlier regulations of the Supreme Administrative Court. Both with the limited and with the pure self-description principle, the Court had sought conceptually noteworthy solutions to the question of how to determine national belonging.

And yet, the new procedure of indirect ascertainment of national belonging by local experts seems practically usable, given that, as noted, it was restricted to the countryside. At the root of this procedure lies the recognition that national belonging is no absolute quality of the individual in and of himself. Rather, national belonging consists of the individual's objective and subjective relations to the national whole; these relations are most clearly active and ascertainable precisely in the individual's local surroundings. Indeed, the particularly difficult question as to whether a transitional type should be ascribed to his original nation or to the nation to which he is assimilating is best answered according to the *communis opinio* of the local national communities. Thus the determination of the national belonging of the individual seems a matter decidedly within the jurisdiction of communal government, provided only that in order to avoid abuse, certain protective provisions are erected for the local minorities.

11. The decision of the Imperial Court of October 15, 1905 [ERROR: 1907], No. 503.

Both the legal significance of the procedure established by the Moravian Diet Electoral Order and its effects in practice were shown clearly in the decision of the Imperial Court of October 15, 1905 [ERROR: 1907], No. 503.⁶⁵ There the following legal principle was established:

"In the case of challenges to the parliamentary electoral lists made in Moravia on the basis of nationality, the decision of the authorities may not rest solely on a declaration regarding nationality obtained from the persons whose enrolment is contested. Rather, the decision must rest first on an investigation into those factual matters that determine nationality."

The facts of the case were as follows:

"According to administrative records, appellants Karl Hausner, Ladislaus Doležal and Wenzel Divišek were enrolled in the parliamentary electoral list of the second German electoral district of the City of Brünn. In this capacity, they submitted numerous challenges, in which they requested the exclusion of persons from that electoral list because those persons were not of German nationality, and thus belonged in the Czech electoral list.

These challenges were ... submitted to the i.r. Governor's Office, with the request that the national belonging of those in question be ascertained.

The i.r. Governor's Office sent notice to each of the persons, informing them of the challenge in accordance with Clause 13, paragraph 4 of the Parliamentary Electoral Order so that 'they might have the opportunity to express themselves regarding this matter in the Brünn Town Hall or in the i.r. Moravian Governor's Office, orally or in writing, within 24 hours.'

The result was that 89 of the persons under challenge made a declaration that they belonged to the German nationality, or that they wished to remain in the German parliamentary electoral list. The other persons under challenge, a total of 115, made no declaration...

⁶⁵ Hye-Hugelmann, *Sammlung der Erkenntnisse des k.k. Reichsgerichtes* [Collection of the Decisions of the i.r. Imperial Court], Nr. 1531, cited also in Bernatzik, *Die österr. Verfassungsgesetze* [The Austrian Constitutional Laws], second edition [1911], p. 891.

Of the basis of this information, the i.r. Governor's Office decided to deny the challenges, because it could not be ascertained that the persons under challenge did not belong to the German nationality. [Short passage omitted.]

It is against this decision that the appeal, No. 276/IC, is directed. It argues that the i.r. Governor's Office acted in contravention of the law.

According to Article 32, Paragraph 2, of the Diet Electoral Order, the enrolment of voters in this or that national cadastre is to be carried out on the basis of personal circumstances known to the authorities. From this provision, it is clear that the authorities, in making assignments to the national cadastres, must be guided by factual matters.

For this reason, it must be understood as incorrect if the authorities are guided simply by the declaration of this or that person under challenge. It is all the more incorrect if the authorities undertake no investigation of the challenge, yet proclaim that it could not be ascertained that the person under challenge did not belong to the German nationality.

Every person enrolled in the relevant electoral list has the right to seek the transfer to the other national cadastre of persons that he has determined do not belong in his own. If this right of the petitioners does not impose an obligation on the authorities to undertake a factual investigation of the challenge, then the right is a purely illusory one...

In the course of the public, oral argument of the case, the representative of the Ministry of the Interior explained that the Moravian Governor's Office had needed to render decisions regarding fully 3,000 challenges in connection with the alleged enrolment of Czechs in the German electoral list, this for Brünn alone, in a short span of time. [4 paragraphs omitted]

Reasons for the decision:

In granting the appeal, the i.r. Imperial Court was guided by the following considerations:

[2 paragraphs omitted]

Doubts in the matter arise only in connection with those who made a declaration, professing themselves in favor of the German nationality or requesting to remain within the German electoral list. But in connection with these individuals as well, it must be insisted that the i.r. Governor's Office must investigate whether they belong to the German nationality on the basis of factual matters, regardless of their declaration (Clause 69, Paragraph 2)—especially if circumstances were cited in the individual challenges which, in the view of those submitting the challenges, speak against such belonging.

Let there be no misunderstanding. The declaration of the persons challenged, to the effect that they profess in favor of this or that nationality, must be of the greatest importance in deciding the question. But it is not the only decisive fact, according to the Diet Electoral Order. This is clear from the provisions regarding the so-called correction procedure. [2 paragraphs of the decision omitted]"

The attempt of the Moravian Governor's Office⁶⁶ to abide by the legal pronouncement of the Supreme Administrative Court, which had held sway until that point and which held national

⁶⁶ Here in its capacity as administrative organ of appeal in the second instance.

self-ascription to be untestable, had been rejected by the Imperial Court. The latter had pronounced that national self-description could be challenged. National belonging, when in doubt, was to be determined by the authorities "after an examination of all conditions." The Imperial Court helped objective procedure to a victory against the self-description principle that was backed by the Supreme Administrative Court. From this point, the self-description principle disappears from Austrian nationalities law.

The decision of the Imperial Court was highly unsatisfactory. It went no further than the determination that national self-description alone was insufficient for the determination of national belonging, and rather was to be understood as only one characteristic beside other, "objective" characteristics. The Imperial Court did not give the necessary and expected interpretation of this blanket determination. It only pronounced truisms, repeating the words of the law to the effect that the determination of national belonging was to take place on the basis of "an examination of all conditions." A clear concept of national belonging was lacking. Only one thing was clear. The Imperial Court was defending an interpretation that opposed the concept of national belonging developed by the Supreme Administrative Court in its ruling of January 3, 1881. Then, the Supreme Administrative Court had pronounced that objective characteristics alone were not sufficient for the determination of national belonging. Rather, in cases of doubt, consciousness of national belonging was to be decisive. Now, the Imperial Court pronounced the opposite. In cases of doubt regarding the correctness of national self-description, "objective" characteristics ascertained by the authorities were to decide the matter.

The pure principle of self-description defended by the Supreme Administrative Court was unsatisfactory, because of the possibilities for abuse that it offered to individuals. But the unclear regulation of the Moravian Diet Electoral Order, and its interpretation by the Imperial Court, cannot be regarded as any better, for it left considerable room for abuse by the authorities.⁶⁷

In this regard, a detail from the facts of the case here under discussion is worthy of note. The total number of voters was approximately 24,000; of these, no fewer than 3,000 were challenged on the basis that their national belonging had been incorrectly determined.

12. The end of the self-declaration principle.

Two months [incorrect: three years] after the Imperial Court issued the decision discussed above, the Supreme Administrative Court once again had to decide a case involving a challenge to a Municipal School Council election based on the claim that those elected [by Town Council members] did not belong to the German nationality. The facts of the case of this ruling of December 30, 1910, Budw. 7846/A, are familiar. The Town of Trebitsch (Moravia) appealed against a ministerial decision that denied the electability to the German Municipal School Council of 4 representatives of the municipality, and disregarded their national self-description. The Supreme Administrative Court confirmed the decision of the Ministry, and rejected the appeal.

"According to Clause 40, Paragraph 7 of the School Supervision Law as revised by the law of November 27, 1905, Moravian Provincial Legal Gazette, No. 4 of 1906, section I, challenges against elections to the Municipal or District School Board are allowed, As materials [recorded in the stenographic protocols of the Moravian Diet when the 1905 legislation was under discussion] show, this right of challenge was allowed in order to give sufficient guarantee for the actual election of nationally feeling [national empfindenden] Municipal School Board

⁶⁷ See Bernatzik's criticism, p. 22, or above, page 41, note 64.

members. [Steinacker mistakenly substitutes "genuinely" (wirklich) for "actual" (wirkliche), and places the word before "nationally feeling" rather than before "election."]

[Steinacker omits 2 pages of the ruling.] From the legal provisions cited, it follows that enfranchised members of the nationality for which the school represented by the Municipal School Board is meant have the right to challenge the election of any representative of the municipality for the relevant Municipal School Board on the grounds that the elected person does not belong to their nationality. [Steinacker omits: Since this is a question of determining eligibility for a public function,] the school authorities must enter if necessary into examining whether the elected person belongs to the relevant nationality or not. In the course of such an examination, it must be determined how a given person is nationally active, and to which nationality the person feels that he belongs.

If a dispute exists over the belonging of a person to one of the two nationalities, or over the veracity and credibility of a person's declaration regarding his belonging, then the belonging must be determined according to objective [faßbaren] characteristics. For that purpose, it is permissible to take into consideration actions from private, social, and public life which seem credible and earnest manifestations of national belonging. If in the case at hand, then, the school authorities have undertaken inquiries in this direction regarding the national life of the four representatives of the Municipality of Trebitsch, and determined on the basis of the uncontested results of those inquiries that the four representatives belong to the Czech nationality [...] then no unlawfulness can be perceived therein."

With this ruling, the Supreme Administrative Court, too, abandoned the self-description principle that it had defended for decades. And indeed, given the new legal situation created by the Moravian Diet Electoral Order and its interpretation by the Imperial Court, there was no other choice—although the Supreme Administrative Court was not bound by the legal views of the Imperial Court. The demand for the testing of national self-description, raised repeatedly and with great tenacity by the Czech national side, had been fulfilled. But what had replaced the self-description principle? The Imperial Court, repeating the words of the Moravian Diet Electoral Order, had spoken only of an "examination of all conditions." In the above ruling, the Supreme Administrative Court made a somewhat clearer pronouncement, speaking of a determination of national belonging "according to objective characteristics," among which were understood "actions from private, social, and public life which seem credible and earnest manifestations of national belonging." Alongside further, unnamed "other objective characteristics," emphasis was thus placed on the objectivizations⁶⁸ of consciousness of national belonging. The Supreme Administrative Court had not yet abandoned the subjective understanding of national belonging. But the subjective consciousness of national belonging was no longer to be ascertained with the aid of national self-description. Rather, it was to be ascertained on the basis of an objective procedure. The technically simple registration of national self-description was replaced now by a very vague process that left almost as much room for administrative discretion as did the regulation of the Moravian Diet Electoral Order. For the Supreme Administrative Court did not say what the "objective characteristics" and the "credible and earnest manifestations of national belonging" actually were. To be sure, the departure from the self-description principle ruled out the possibility of deceitful or extorted, incorrect national self-descriptions. But new sources of error were also created: a broad space for incorrect decisions by the authorities, which in old Austria were being undermined [zersetzt] by the nationalities struggle in many ways.

With this ruling, the Supreme Administrative Court departed from its earlier understanding in another way as well. In a series of rulings, the Supreme Administrative Court had defended the

⁶⁸ See above, p. 12.

view that national belonging must not be confused with political convictions. But now the Supreme Administrative Court interpreted Clause 7 of the Moravian School Supervision Law⁶⁹ by adducing parliamentary material, such that the law supposedly wished to guarantee the election of "genuinely nationally feeling [*empfindenden*]" Municipal School Board members. The provision that only members of the German or Czech nationality could be elected to the German or Czech Municipal School Council was no longer understood to mean that a precondition for electability was national belonging. Rather, it was understood that "truly national feeling [*Empfindung*]" was required. This is an example of how, in the end, old Austria yielded to demands that went far beyond the framework of nationalities law today.

B. The dominance of the objective theory.

13. The lex Perek and its interpretation by the Supreme Administrative Court.

With its interpretation of the lex Perek,⁷⁰ with which it had to concern itself from 1910, the Supreme Administrative Court blazed new trails in the determination of national belonging. As was already mentioned, the lex Perek formed a part of the Moravian Compromise Laws [of 1905]. It read as follows:

"As a rule, only children proficient in the language of instruction may be admitted to an elementary school."

[5 pages omitted—much of it citations from the Supreme Administrative Court ruling of December 30, 1910 (Steinacker incorrectly gives a date of November 11), Budw. 7843/A. This ruling, Steinacker argues, regulated procedures for the admission of children to national schools almost in the fashion of an implementation decree issued by one of the imperial-royal ministries. In multiple subsequent rulings, the Court invoked 7843/A, often word for word.]

It is noteworthy that although the procedures for determining national belonging in the lex Perek were built exclusively on the objective theory of the nation, national self-description proved indispensable in the first round of registration, if only as a technical aid for national segregation.

14. The Lehár case.

The significance and practical effects of the lex Perek find clear expression in the ruling by the Supreme Administrative Court of March 19 [incorrect: April 19], 1913, Budw. 9549/A. The following are the facts of the case.

[1 1/2 pages omitted—much of it citations from the Supreme Administrative Court ruling.]

According to the regulations set by the lex Perek, the Supreme Administrative Court had to judge Johann Lehár a Czech, against his will, on the basis of the objective characteristics in evidence. Before 1907, however, the Court would have concluded on the basis of the same conditions that Johann Lehár was a German.

The concept of national belonging in Austrian nationalities law had thus completely changed. Based at first on a primarily subjective theory of the nation, it had changed, under the influence of the national gains of the Czechs, into a concept of national belonging that was rooted in a

⁶⁹ See above, page 6, note 16.

⁷⁰ See above, pp. 6ff.

purely objective theory of the nation according to which national belonging was a character *indelebilis* [Latin: inerasable quality].

In practice, the linguistic principle in the form of the *lex Perek* proved no better than the self-description principle. Application of the *lex Perek* led to bitter struggles over the national belonging of schoolchildren in Moravia. Between 1910 and 1916, the Supreme Administrative Court was called on no fewer than 60 times in order to decide cases which, taken together, involved many thousands of schoolchildren claimed by Czech or German Municipal School Councils for their schools.