Daniel Thürer and Zdzisław Kędzia (eds.)

Managing Diversity

Internationales Zentrum für Minderheiten
Centre International des Minorités
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Protection of Minorities in International Law

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Preface

2008 brought us back to two landmark moments in the human rights history – the adoption of the Universal Declaration of Human Rights 60 years ago, and the Second World Conference on Human Rights in Vienna, since which fifteen years have passed. Anniversaries, however, always carry with them not only chances but also risks. On the upside, one can see them as an opportunity to take stock of what happened and to design the future. On the downside, they might allow the past to overshadow current needs and challenges. Although contributing to the commemoration of these important anniversaries, this book avoids possible nostalgic pitfalls. It serves the memory through addressing one of the most important present and, for sure, future issues and challenges – the protection of national minorities.

Historically, the protection of minorities has appeared in three major contexts: shielding members of minorities against suffering caused by an oppressive majority; the risk of minority-related discrimination becoming a source of an international or internal conflict; and society's well-being and enrichment due to the contribution by minorities to community life. In different historical periods one or another context came to the forefront. In fact, it was the concept of universal human rights that has brought all these considerations together, referring them to a common value denominator: human dignity.

In 1948, the Declaration of Human Rights was a solemn call for their universality. Since „all human beings are born free and equal in dignity and rights" everyone is entitled to be protected against discrimination of any kind, irrespectively of, among others, his or her race, colour, language, religion, or national origin. The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was the first successful attempt to list the relevant rights and responsibilities in one single international document. Thirteen years of negotiations preceding the adoption of this Declaration produced a striking result not only by its content but also by its spirit, reflecting the synergy of subjective and objective dimensions of its subject. While focusing on minorities' entitlements, the Declaration underlines the contribution of the protection of minorities to the stability and development of the state, as well as to the friendship and cooperation among peoples and States. Not surprisingly, the Vienna

Declaration and Programme of Action continued the same approach one year later. The Framework Convention for the Protection of National Minorities adopted shortly afterwards within the Council of Europe managed to be even more specific on the dimensions of the minorities' protection. Having recognized this protection as part and parcel of the human rights system in general, it clearly refers to „the upheavals of European history" as evidence to the essentiality of the fate of national minorities to stability, democracy, security and peace. Going beyond the political perspective, the Convention unequivocally points to cultural diversity as „a source and a factor, not of division, but of enrichment for each society."

Although the United Nations Millennium Declaration, adopted in 2000, was not very specific regarding individual rights and freedoms, it referred explicitly to minority rights in the context of the implementation of the principles and practices of democracy and human rights. It is remarkable that during the preparatory process to the 2005 World Summit, the UN High-level Panel on Threats, Challenges and Change considered the minority protection under the heading „Conflict between and within States" as one of preventive measures.[1] Nevertheless, the 2005 World Summit Outcome Document[2] took a holistic approach by noting that „the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to political and social stability and peace and enrich the cultural diversity and heritage of society."

The triangle of mutually supportive concepts related to minorities, historically developed and reinforced by the World Summit, seems to be essential: the protection of minority identity and empowerment of minority members through the protection of their rights; enrichment and development of societies by minorities; and the prevention of international and national conflicts through addressing deficits in minorities protection. Its internalization may be the most enduring and convincing factor in generating a minority-friendly mindset among societies, supportive to pro-minority policies and, eventually, leading to the empowerment of persons belonging to minorities as full members of the society and simultaneously holders of their own identity.

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1 A/59/565, § 94.

2 A/RES/60/1, § 130.

Fortunately, despite continuing xenophobia and hostilities against those who are different, the acknowledgement of the positive role of minorities and their contribution to the life of societies is increasingly spreading through our minds. One example among those which may endorse this essentially positive outlook – a few years ago, at a ceremony of naturalization, a representative of the Canton of Geneva (a canton with a large percentage of foreign residents), addressed a dozen new citizens with the following words: „While welcoming you I would like to insist that you preserve your different cultures and traditions of origin – in this way the entire Swiss society will be enriched by newcomers; otherwise, we may not benefit so much from your arrival."

But if we are to benefit from others, we need to give them an opportunity to share their culture and their traditions with us – and we, in turn, should offer an insight into our thoughts, traditions and convictions. We must, in other words, establish a dialogue. This booklet contains texts prepared for and presented at a Conference of Experts organized by the Institute of Public International and foreign Constitutional Law at the University of Zurich on 18/19 November 2005. The purpose of our meeting was to discuss the idea of creating a centre in Switzerland which would bring representatives of minority and majority groups from various countries together for a mutual exchange.

The Convivenza Foundation has been established to provide a forum for such a dialogue. Through the exchange of ideas and experiences, participants can learn from each other. Convivenza aims to gradually build up doctrines and practices in co-operation with people directly concerned. As a principle for our meetings, we chose the Canton Grisons (Graubünden) in Switzerland: Its highly diversified population provides an example of tolerance – it symbolises the ideal of different people living together peacefully. That is, as its name underlines, the ambitious purpose of Convivenza: Not just to further co-existence but co-operation, mutual understanding and support, in short, to allow people to live a live shared with each other.

The articles collected here are all concerned with this aim. Apart from papers presented at the Conference in 2005, members of the Board of Convivenza have added two contributions which deal with central questions of our subject. In addition, the history of Convivenza and its rationale are briefly explained. Finally, a position paper of a group of renowned experts on

"Minorities and Majorities: Managing Diversity – a Fresh Look at an Old Problem" is published in this book.

The Zurich Conference was supported by a grant from the Direction of Public International Law of the Federal Department of Foreign Affairs, where Dr. Jürg Lindenmann has been very helpful and supportive. We also thank the Rector of the University of Zurich for his warm words of welcome, and the staff of the Institute and all the participants for engaged contributions to a highly stimulating, successful meeting.

It seems important to us that this meeting brought together academics, practitioners, and minority representatives. For too long, minority issues have been discussed and decided over the heads of the people directly affected. Indeed, the enrichment through, and empowerment of, the members of minorities are concepts the potential of which still needs to be further explored. We are convinced that this book is an important step on this road.

Zürich/Poznań, December 2008

ZDZISŁAW KĘDZIA DANIEL THÜRER

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List of Abbreviations

art./Art.	Article/Artikel
Aug.	August
bet.	betreffend
BiH	Bosnien und Herzegowina
CERD	Committee on the Elimination of Racial Discrimination
cf.	compare
CoE	Council of Europe
CSCE	Conference on Security and Co-operation in Europe
CSO	Chief Security Officer
d.h.	das heisst
Dec.	December
ders.	derselbe
Doc.	Document
DPR	Dekret des Präsidenten der Republik
e.g.	for example
EC Treaty	Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECmHR	The European Commission of Human Rights
ECR	European Court Reports
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ed./eds.	editor/editors
et al.	und andere
etc.	et cetera
EU	European Union
f./ff.	folgend/fortfolgend
Fasc.	fasciculo
Feb.	February
FCNM	Framework Convention for the Protection of National Minorities
Fn.	Fussnote
FS	Festschrift
GFAP	Dayton Framework Agreement for Peace
GR-H	Rapporteur Group on Human Rights
HCNM	High Commissioner on National Minorities
HDIM	Human Dimension Implementation Meetings
HRC	Human Rights Commission
Hrsg.	Herausgeber
i.e.	that is
ibid/ibidem	ion beam induced deposition, ebenda
ICCPR	International Covenant on Civil and Political Rights
id.	the same

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IEMI	independent expert on minority issues
I.L.M.	Internationale Liga für Menschenrechte
ILO	International Labour Organization
insbes.	insbesondere
IWGIA	International Work Group for Indigenous Affairs
Jan.	January
KMU	Kleinere und mittlere Unternehmen
Kom.	Kommission
MRG	Minority Rights Group
NGO	non-governmental organisation
N°	Nummer
no./No.	number/Number
nr./Nr.	Nummer
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Hochkommissariat für Menschenrechte der UNO
op. cit.	from the cited work
OSCE	Organization for Security and Co-operation in Europe
OSZE	Organisation für Sicherheit und Zusammenarbeit in Europa
ÖZÖR	österreichische Zeitschrift für öffentliches Recht und Völkerrecht
p./pp.	page/pages
par.	Paragraph
para./paras.	paragraph/paragraphs
PER	Project on Ethnic Relations
ResCMN	Council of Europe: Commitee of Ministers, Resolution CM/Res CMN on the implementation of the Framework Convention for the Protection of National Minorities
Rev	Revidierung
RS	Republika Srpska
S.	Seite
seq.	folgend (lat.)
SN	Akronym für Sitzungsdokumente des Rates, die aus Gründen der Archivierung mit Sans Numero klassifiziert werden
SR.	Systemeatische Sammlung des Bundesrechts
s./ss.	Seite(n)/page(s)
SVP	South Tyrolean People Party
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	General Assembly of the United Nations
UNHCR	The UN Refugee Agency/Hochkommissariat der Vereinten Nationen für Flüchtlinge
UNMIK	United Nations Interim Administration Mission in Kosovo
UNO	United Nation Organisation
USSR	Union of Soviet Socialist Republics
v.	versus
vol./Vol.	volume/Volume

WGM	Working Group on Minorities
WWI	World War I
z.B.	zum Beispiel
Ziff.	Ziffer

Introduction: Minorities, Law, and Conflict Resolution

Daniel Thürer/Thomas Burri

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Does the law solve conflicts between minorities and majorities? If yes, how? What is the law like that solves these conflicts? In the 1990[ies] these questions resurfaced together with the traditionally multiethnic Eastern European States. But even beyond Eastern Europe pressure to find visionary, imaginative, and on the bottom line affirmative answers to these questions increased after the equilibrium between the two superpowers dissolved. All over the world differences between minorities and majorities that had been either subliminal or suppressed during the war of ideologies came to prominence again. People then turned towards the law, and international law in particular, to find guidance – guidance for the provision of which a group of internationally renowned experts gathered in Zurich in December 2005. In this opening text we introduce the contributions to this workshop in Zurich by shedding some light on the role of the law in solving conflicts between minorities and majorities. We first try to give some clarification as to the terms „minority" and „law". We then take a closer look at conflicts between minorities and majorities – all with a view to bringing some order into the imbroglio that marks the domain. Finally, we attempt to make out some typical solutions to these conflicts as well as identify the role of the law in conflict resolution.

I. Minorities?

In our context the term minority is a designation for a group of people. Basically, every group of people is to be considered a minority, if it is not in the position of the majority. This dichotomy between minority and majority is first and foremost based on numbers. It is simple: If you count more people among your group than among the other(s), you are the majority. If you count less, you are the minority. One group is bigger, the other groups are smaller.

The next step, however, is more difficult. And it is more important, as the above mentioned, purely numerical dichotomy only plays a role in traditional democratic procedures (like elections or referenda). The next step is all about determining what criteria are used to assign people to one or the other group. There are various criteria and most of them are discussed heatedly at one point or another: ethnical criteria (ethnical minorities); the nation or traditional ties to (a part of) the State or the land (traditional, national, or indigenous minorities); the fact that immigration from another State has recently taken place (new or immigrated minorities); different languages or different religious beliefs (linguistic and religious minorities), etc. The use of any of these criteria is always to a certain extent artificial and arbitrary: why should ethnicity or nationality, ties to the land, duration since immigration, or religious beliefs be taken as a yardstick? Why not the colour of hair or even shoe size? Moreover, many of the criteria usually invoked are highly ambiguous: what exactly is ethnicity, nationality, or tradition?

To be clear, by pointing to the difficulty of the selection of criteria and the ambiguities involved therein we are not advocating the so called „French approach", namely that the State should turn a blind eye on differences among its population (see *infra*). We are simply drawing attention to the fact that specific criteria are usually applied in order to delimit a group and, in particular, to close the circle of the beneficiaries of a special regime. The „traditionality" or „nationality" of minorities, for instance, is relied upon to exclude not only the majority from certain benefits granted to these minorities, but also *other* minorities, in particular the „new" and „immigrated" ones. Limitation and exclusion thus seem to be intrinsic to such designations of specific minorities.

The limitation of the term „minority" as such is, of course, a necessity. Neither good nor bad will are necessarily associated with it. It is an indispensable by-product of the *purpose* of minority regimes. Let us briefly illustrate this argument. We will use the right to self-determination and, more specifically, decolonization as an example. Decolonization began, when the idea came up that colonized people must be granted self-determination. Hence, colonisation would have to be reversed to a certain extent. Parent States, however, soon became aware that it was necessary to limit the circle of peoples: not everyone should be able to rely on self-determination and secede from the parent State. Else, the parent State, the population of which also consisted of several groups that differed from one another in various aspects, would run the risk of disintegration. One approach to solve this dilemma (the French approach) was simply to deny that there are other peoples within the nation: „La France est une République indivisible …"[1]. Another one, softer and more common, was to refer the different peoples within the parent State to other regimes, namely by declaring them not as „peoples" but as „national minorities" or groups entitled only to *internal* self-determination. In our view, the example of self-determination, even though strictly speaking only relating to peoples, also illustrates the more general point that the epithets of groups, and of minorities in particular („traditional", „national", „indigenous" etc.), are usually related to specific purposes: they often stem from purposes pursued by those in charge of establishing the respective regimes. These epithets frequently serve to single out one or more specific groups and declare them as special cases.

These reflections show that the term "minority" as such is of no great use. It is empty, because devoid of purpose. It gains significance only through its qualifications, its epithets, and the regime associated with these. This also indicates that the term „minority" as such is generic: it embraces a whole lot of different situations and regimes. It follows that the term can and should not be limited *ab initio* to specific concepts, such as the one of the „traditional" or „national" minority. At first sight, this seems paradoxical: the term „minority" is at the same time useless as well as necessary. But at

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[1] Art. 1 first sentence Constitution du 4 octobre 1958, 1958 (accessible under: <http://www.conseil-constitutionnel.fr/textes/c1958web.htm>, last visit: 5 July 2008). Note that the French approach today is somewhat attenuated: overseas populations may benefit from special regimes (for instance according to art. 74 Constitution du 4 Octobre 1958) and Corsica from a special status.

second sight, one realizes that it is necessary on a higher level, i.e. as an „umbrella term", and useless – or better: not sufficient – on a lower level, i.e. when it comes down to determining what is the purpose of a regime and hence who should benefit from it .

The *purpose* of minority regimes, however, is not always obvious. The parties who negotiate a specific regime may have different ideas about what purposes are to be pursued. The authority that establishes a minority regime unilaterally is possibly not entirely sure about the purpose of the regime. The initial purpose of a minority regime can be fulfilled or become unattainable and differences may arise about how to proceed further on. All these dynamics of motives, of change and of law itself often cause significant uncertainty about who is to be the exact beneficiary of a minority regime. This also affects the definition of *the* minority under a specific regime: the definition issue is often left unresolved – in particular in regimes based on international law. Art. 27 of the International Covenant on Civil and Political Rights of 1966, for instance, lays down specific rights for „ethnic, religious or linguistic minorities", but only „[i]n those States in which [they] exist". Disputes about the question which minorities may rely on Art. 27 have been going on ever since the adoption of the Covenant, in particular on the question whether new minorities are covered by the Covenant.[2] It is therefore not surprising that the impact of the provision has been low. The case of the Council of Europe's Framework Convention for the Protection of National Minorities of 1995 (Framework Convention) is similar: the parties negotiating the Framework Convention refrained from defining the national minorities covered by the Convention. They left the issue to the discretion of the State parties. When ratifying the Framework Convention State parties therefore usually specify which of their constituent groups they consider to be covered by the Convention or they simply submit their own abstract definition of the term minority.

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2 FRANCESCO CAPOTORTI provided a definition under Art. 27 of the Second Covenant that probably found the widest, but still far from universal acceptance: „A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language" (FRANCESCO CAPOTORTI, Study on the

However, if it is left to the States to determine the beneficiaries of a minority regime, this is not only tantamount to self-judging obligations in the sense of Hersch Lauterpacht,[3] it is also highly likely that the same general regime (for instance the one of the Framework Convention) must be applied to situations that are different in fundamental aspects. This is a serious risk. After all, are not the issues minorities face manifold? Do not the problems they encounter differ substantially? Does one not run the risk of treating equally what is in fact different? Can one really assert that there is one solution to all minority issues, one regime applicable to all minorities? Doubts as to the beneficiaries make it very hard to design norms relating to minorities (as was the case with the Framework Convention): it becomes difficult to determine the issues to be solved by the norms as well as to define the purposes to be pursued by them. In the end, there is a risk that norms are applied to situations to which they were not intended to be applied to, at least according to the initial intention.

To be clear, these basic problems are not raised here to deny the value of existing legal minority regimes, such as the one of the Framework Convention or of the Council of Europe's European Charter for Regional or Minority Languages of 1992 (the Language Charter). In our view, it cannot be argued any longer that these instruments do not have a substantial impact. The issues addressed above merely serve to show the dilemmas surrounding the term „minority" and their consequences.

II. Law?

Some international law instruments that address minority issues were already mentioned: On the universal level there is the right of peoples to self-determination (common Art. 1 of the International Covenants on Social, Economic and Cultural and on Civil and Political Rights of 1966) and Art. 27 of the latter Covenant. On the regional level, the instruments of the

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Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Add. 1-7, 1979, par. 568).

3 HERSCH LAUTERPACHT, The Function of Law in the International Community, Archon Books, Hamden, 1966 (first print 1933), p. 189-191; see also MARTTI

Council of Europe were pointed out: the Framework Convention and the Language Charter. Other legal rules relating to minorities are usually contained in soft law documents like the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted by the UN General Assembly on 3 February 1993) or the UN Declaration on the Rights of Indigenous Peoples (adopted by the UN General Assembly on 2 October 2007). Furthermore, the High Commissioner on National Minorities of the Organisation for Security and Co-operation in Europe deserves to be mentioned. His work is primarily based on preventive diplomacy. Apart from that some vague references to minority rights can be found: according to Art. 1(2) of the Treaty establishing a Constitution for Europe (which has of course not entered into force) the Union is founded *inter alia* on „the respect for human rights, including the rights of persons belonging to minorities" (the same wording can be found in the Lisbon Treaty on European Union [Art. 2 in the consolidated version]); or one of the so-called Copenhagen Criteria for Membership in the European Union is „the respect for and protection of minorities".[4] Regarding immigrant minorities, in particular, there are few substantial provisions in international law and the respective treaties are poorly ratified (such as the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [adopted by the UN General Assembly on 18 December 1990] with 37 ratifications [as of 18 July 2007]). Of course, regional systems grant rights to the people who belong to that region and who want to migrate within the region: the European Community allows its citizens to move freely within the Community (Art. 18 and 39 ff. of the Nice Treaty Establishing the European Community [in the consolidated version]). But citizens that move freely under these provisions and settle in another European State are hardly ever considered as minorities by the recipient State. Needless to say, the system is basically not open, for it is limited to persons within the system (European citizens).

It is evident from this enumeration that rules on minority rights are scarce in international law. One cannot even plausibly claim that there is an inter-

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KOSKENNIEMI, The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870-1960, Cambridge University Press, Cambridge, 2002, p. 368 and 358.

4 See Presidency Conclusions of the Copenhagen European Council, European Council, 21-22 June 1993, SN 180/1/93 Rev 1 (accessible under: <http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf>, last visit: 5 July 2008).

national minority protection regime. On the universal level there are only a few scattered provisions the content of which is subject to ongoing disputes. On the European level even the Framework Convention for the Protection of National Minorities, while representing a more ambitious, far reaching approach, seems limited: it leaves wide discretion to the States on a number of issues and its implementation mechanism lacks the power to handle State parties that are unwilling to face minority issues properly. The role of the Advisory Committee of the Framework Convention, in particular, can be seen as a forum in which issues are raised and discussed rather than being solved. While this is, of course, helpful, on the whole the Framework Convention does not seem to be an instrument that is adequate to the magnitude of the issues involving minorities. This, of course, holds true all the more for the meagre attempts at the universal level.

Three remarks must be made as to this fragmentary state of international minority protection law. (i) The roots of this state can certainly be found in the lack of agreement among States as to how minorities are to be treated. This is probably due to the multitude of implications that minority issues have and to the sensitive domains they touch upon, in particular questions of integration, culture, and State identity. Here, States are obviously unwilling to submit to any kind of international regime that would probably fail to take heed of their concerns and would limit their discretion. Hence, the single most widely, though not universally, accepted rule pertains to the basis of minority protection: the human rights of the members of minorities should be the core of any minority protection approach – a pretty limited consensus, especially in light of the fact that human rights protection is supposed to be available to any person regardless of his or her belonging to a minority. (ii) As the issues minorities face are real and complex, and need to be addressed urgently, international legal scholars try to overcome the impasse by developing solutions on their own initiative. This is, in fact, part of what is attempted under the umbrella of Convivenza. Another result of such private attempts are the Lund Recommendations on the Effective Participation of National Minorities in Public Life of September 1999, which were elaborated by a group of internationally renowned experts upon the initiative of the OSCE High Commissioner on National Minorities. The Lund Recommendations propose norm standards that States may implement, if they are

willing to enhance the protection of their minorities.[5] (iii) As international law is mostly silent on how minorities are to be accommodated, States often establish their own regime. The bulk of the regulations concerning minorities is, therefore, to be found on the national level. There is, of course, a wide variety of largely heterogeneous national approaches, the examination of which promises to be highly rewarding and to the analysis of which the discussions in the Advisory Committee under the Framework Convention for the Protection of National Minorities have already made a valuable contribution.

III. Conflicts?

The links between the law addressing minority issues and conflict resolution are, at the same time, too often invoked and too often neglected. They are too often invoked with too little reflection. A simple reference from the law to conflict resolution is made, assuming that one follows from the other. Conflict resolution as such is then often reduced to dispute settlement, and in particular questions of procedure (which jurisdiction, which claims, which rules of procedure, etc.). Too often neglected is that the law (especially in what regards minorities) and conflict resolution are truly interdependent, that there are strong interactions between them, and accordingly that they need to be harmonized. Before trying to shed some more light on this, we must first take a look at the conflicts between minorities and majorities and at the issues minorities face. The focus here is on substantial issues rather than procedural questions and an attempt is made to categorize these issues.

We already raised one problem of minority protection above: the law often fails to take into account the problems that underlie the relations between minorities and majorities. It is often neglected what a specific minority wants. And the minority is often excluded from the process of creation of law: it rarely participates *qua* minority. Furthermore, the purposes of norms regarding minorities are not always clear. We try to show a way of avoiding these pitfalls by discerning three problem clusters that are typically encountered by minorities (a-c). Of course, such an approach is reductionist.

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[5] See also the homepage of the High Commissioner: <www.osce.org/hcnm/> for other thematic recommendations.

However, it is not our intention to over-simplify complex problems, but rather we try to contribute to a better understanding of minority issues. Our categorization should only be taken as a starting point which could serve to understand minority issues better.

a) It seems that some minorities are not welcome to the society as a whole (or a large part of it). Their members are more or less outcasts. They are discriminated against and often suffer from *de facto* segregation. Members of these minorities typically encounter difficulties in finding suitable housing, employment, education and insurance. One may say that these minorities are affected by a *lack of integration*. Generally, immigrant minorities („new" minorities) are most affected by this type of problem. However, other minorities, which are regularly considered to be traditional or national minorities, may face similar problems, for instance the Roma in States where they live in significant numbers. Among refugees from armed conflicts similar problems are common after they have found asylum in a State. Yet, an important difference is that refugees typically intend to return to their home State as soon as possible. Hence, their time horizon is *ab initio* more limited.

b) What the one lacks, the other has got too much of: other minorities do not need more integration; they would rather have less of it. These minorities are often about to perish. They are more or less slowly being absorbed by the majority. Their culture is being assimilated or simply vanishes, because it is not practiced any longer. In a typical situation hardly anyone uses the minority language anymore, except perhaps for the elder generation. The members of the minority often have only a weak sense of belonging to the minority. One may say that these minorities face a *runaway integration*. Minorities affected by this phenomenon usually have resided for a long time in „their" region – normally much longer than minorities that are subject to a lack of integration. Hence, they are sometimes referred to as traditional minorities. Their members are typically scattered across a wide region (sometimes across the whole State, and further) and there are no or only a few, small, and scattered „habitats". Their members are strongly intertwined with the majoritarian society. In an advanced phase of such a runaway integration, the minority can hardly be kept apart from the members of the majority. At the limit, a conflict in the sense that two or more parties challenge each other and disagree with one another does not arise any more. Examples of minorities exposed to a runaway integration are the Germans in

Hungary or the Romansh in Switzerland. Some indigenous minorities are also subject to this phenomenon.

c) The third is a larger and more heterogeneous cluster, cumulating several issues. Here we find minorities with a strong identity. Their members have an unequivocal sense of belonging to the minority, often but not always excluding, in their own statements, a dual identity and rejecting the ties to (and in particular, the nationality of) the majority. These minorities have their own „heart land": a region in which they constitute the majority and which may reach across borders. Confrontations with the majority in the State sometimes involve violence. Even armed conflicts are frequent, the labelling of which depend on the perception of the parties involved: „liberation war" or „terrorism" are the terms that are frequently used. Examples are numerous, as almost all States at some point of their history made experiences of this kind: the Kurds in Turkey or Iraq, the Kosovars in Serbia, the South Tyroleans in Italy, the Basques in Spain, the Quebecers in Canada, the Tibetans in China, or the Chechens in Russia to make just a selective tour around the northern hemisphere. Of course, it would be a short-sighted reduction to make out one and the same issue in all of these situations. They are extremely complex and multifaceted. Many factors influence them and complicate an assessment. However, we may be able to discern a common pattern, a grouping of factors, that appears to be more evident here than in the above mentioned situations a) and b): there always seem to be two types of forces at work in such situations – forces that one may call, in allusion to physics, „centrifugal" and „centripetal" forces. One set of forces tends to pull the two groups apart; the other tends to stick them together. However, the minority is not just pulling apart and the majority holding together. It is not that simple. Usually, elements of centrifugal and centripetal forces are present in both groups. The forces are at work within the groups and opinions usually differ within the groups.

IV. Resolution?

Ideally, the law would provide a ready-made answer to each of these conflicts. The law, indeed, attempts to give a differentiated answer to each of these three challenges (even though, admittedly, remaining far from giving ideal solutions). In case a) (lack of integration), non-discrimination rules are

the principal tool. Discrimination is penalized, control mechanisms are set up (such as units in the police or in the administration). Measures promoting integration are taken (affirmative action, compulsory language courses etc.). In case b) (runaway integration), cultural autonomy is the typical approach: some free space for the minority is created, in which the members of the minority are able to live their culture, language etc. freely and in dissociation from the majority. Some sort of self-administration and some financial support from the majority are usually involved, too. This can go as far as the establishment of particular minority institutions (on the local, regional, and/or the national level). The hope is that, in this way, runaway integration can be brought to a halt and may even be reversed.

In cases a) and b) attributes of individuals are at the core of the approach. In this sense both solutions rely on the borders in the mind instead of the ones on the ground.[6] They usually have in common that they approach the problem from the perspective of the individual person and its attitude towards some specific characteristics rather than from an objective perspective. As such, both approaches can be called „personal autonomy" approaches – which shows that very different constellations are involved in the concept of personal autonomy (if a consistent concept exists at all). However, both approaches usually have to cope with a certain degree of uncertainty: at some point they involve choices of individuals which flow from their personal human rights and which are not always based on hard facts (such as language, parentage, or residency) – be it the pure choice of belonging to a certain minority or the choice of the individual to give preference to minority attributes (in the case of so-called dual or split identities). These personal choices may create a certain ambiguity, which can be tolerated only to a very limited extent, for regimes usually rely on the clear-cut identification of their beneficiaries (as well as the contributors). It is often essential for a regime that the question whether a specific person may benefit from the regime is given a clear answer. In the case of personal autonomy, this would boil down to a solution that is hardly satisfying: it would mean to attribute each person a specific identity. Furthermore, the harder it is to verify certain characteristics of an individual the easier it

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6 ASBJØRN EIDE et al., Cultural Autonomy: Concept, Content, History and Role in the World Order, in: MARKKU SUKSI (ed.), Autonomy: Applications and Implications, Kluwer Law International, Den Haag, 1998, p. 252.

becomes to manipulate the system based on them. Hence, personal autonomy regimes (and cultural autonomy regimes in particular) are vulnerable to misuse, typically by charismatic leaders that „hijack" the identity of the minority to maximize their personal gain.

As we can see, there is much common ground in the approaches to cases a) and b). However, one must be careful not to confuse the two. Experience made with cultural autonomy revealed that it worked best, when a minority is subject to runaway integration (at least, it does seem to work in the case of most minorities in Hungary). Yet, runaway integration is probably the only issue cultural autonomy is apt to address. When a minority is not sufficiently integrated (such as the Roma in Hungary), cultural autonomy apparently does not solve the issue. It may increase the awareness of a greater public of the issues faced by the minority (and as such it is, of course, of a certain use to the Hungarian Roma), but it certainly does not solve these issues. In the case of a lack of integration, limited financial means are seemingly better invested in the implementation of strong non-discrimination mechanisms. This is especially true in light of the fact that, when implementing the approach, the suitability of the approach to address the underlying problem properly is all too easily overlooked (whether intentionally or not). One may then tend to hide behind the action taken: „At least we are trying to do something." At this point, the established regime can even become an obstacle to a genuine solution.

In case c) territorial autonomy usually appears to be the adequate answer. Those who attempt to find a solution in such a case are most likely well aware of the bundles of centrifugal and centripetal forces involved. It then seems natural to accommodate diversity with unity by striking a balance between these opposing forces, by harmonizing the requests of all groups. It seems obvious to offer the middle ground of territorial autonomy to both (those seeking independence and those who downplay the difference between the groups). Hence, the idea is often to assign the minority's „heart land" to the minority together with some freedom of self-regulation, while part of the authority remains with the State. It is then not surprising that the Lund Recommendations propose that certain capacities should be exercised solely by the local, autonomous authority of the minority (education, culture, use of minority language, environment, local planning, natural resources, economical development, local policing functions, and housing, health, and other social services) and others together with central authorities (taxation,

administration of justice, tourism, and transport), implying that certain capacities are left entirely to the central authority (such as foreign policy or national defence).[7] In short, the most promising approach in case c) often seems to be the establishment of a territorial autonomy (or similarly some sort of federative solution). In this way, it is thought, both parties at least get part of what they really want.

It is hard to disagree with such a reasoning. That is why recent euphoria about territorial autonomy has gone so far as to propose a right to autonomy based on international law. However, two remarks are in order with regard to this. Firstly, a general reference to territorial autonomy as a panacea mostly overlooks that in many cases it is not the regime to be applied as such that gives rise to most disputes. It is often undisputed by most actors involved that autonomy could be the way out (although admittedly this does not hold true for the currently most prominent case, Kosovo). The crux then rather lies in the details: in finding an acceptable solution in what regards the authority that is to have the last word in contentious issues or in the distribution of competences. Disputes arise about the specific design of the regime in a given case, not about the regime as such, and in particular about control: who is to have what amount of control over which situations? It is obvious that there is no universally valid answer to this question. Tailor-made solutions must therefore be found in each individual case. Hence, little seems to be gained by the general promotion of autonomy as a way of solving conflicts.

Secondly, the role of the law in this undertaking is regularly overestimated. Of course, the above sketched minority legal regimes, once they are established, are often successful in the sense that the underlying conflicts between minorities and the majority are solved: runaway integration is stopped; integration is stepped up; or opposing forces are successfully balanced. Hence, the above described legal regimes can be seen as conflict resolution mechanisms. But it seems clear to us that neither the rule of law nor properly designed institutions as such solve the problems between minorities and the majority. Law and institutions rather seem to be the consequences of the political compromise between the parties involved – a

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[7] The Lund Recommendation on the Effective Participation of Minorities in Public Life of September 1999 (accessible under: <www.osce.org/hcnm>, last visit: 5 July 2008), nr. 20.

compromise that needs to be found between each minority and the majority; that needs not be the same for every minority; that needs regular revision; a compromise the finding of which basically depends on mutual tolerance and respect for the differentness of the other; a compromise at the heart of which must be the will of all parties involved to live together. To foster this will and to finally reach the necessary compromise is an undertaking that certainly goes beyond what the law alone can achieve. The law, hence, appears to be only one factor among many others that can contribute to a successful solution. A right to autonomy therefore unnecessarily narrows the focus to one solution by predetermining the outcome of what is in fact subject to negotiations and numerous preconditions. Thus, a right to autonomy is seemingly of no great use. Notwithstanding this, however, it is noteworthy that, once a minority regime and the law are established, they often develop a life and a dynamic of their own, shaping as „living instruments" the compromise that was reached before. As such, the law obviously does have an influence; but it is equally obvious that it is just one influence among many others.

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In the following a short overview of the contributions of the participants is given.

GUDMUNDUR ALFREDSSON gives us a *tour d'horizon* of the UN system in what regards minorities and their rights. Highlighting existing institutions and their value for minorities, especially indigenous peoples, he points to the latest developments in the UN. There is obviously no lack of norms: the standards are all set und regulations exist. What is lacking, however, is implementation: there are hardly any proceedings, courts, or supervisory bodies that minorities regularly appeal to. Furthermore, it is necessary to disseminate knowledge about minority rights and proceedings in order to allow minorities to make better use of existing mechanisms.

The overview of the universal level is supplemented by RAINER HOFFMANN's European perspective. He focuses on the advanced work of the institutions of the Council of Europe, namely the Advisory Committee of the Framework Convention, and of the OSCE, and deplores the lack of minority protection within the European Union. RAINER HOFFMANN shows that standard setting is well under way with the work of the Advisory Committee. He implies a metamorphosis from a badly worded treaty (the Framework Convention) with a weak supervisory body to an effective system of monitoring, reaching even beyond States with the submission of a report by the UN mission (UNMIK) on the situation of minorities in Kosovo.

PATRICK THORNBERRY discusses the relevance of the Committee on the Elimination of Racial Discrimination to minorities. He emphasizes that most issues minorities face come up before the Committee, but that this fact is too little known. PATRICK THORNBERRY also shows that the committee produced a number of general recommendations that are pertinent to minorities.

PETER PERNTHALER elaborates on the question whether federalism is a suitable means for the protection of minorities. His response is affirmative, when the minority reaches a certain size and settles in a close area. However, federalism seems not appropriate for small, dispersed minorities. He also points out that federalism might not be a good idea, when, in one State, there are two or three groups that take a stand against each other, and that a precondition of functioning federalism is that the will of the groups to cooperate is stronger than nationalist sentiments.

KRZYSZTOF DRZEWICKI lifts the veil of secrecy that hangs over the OSCE High Commissioner on National Minorities. In fact, the High Commis-

sioner's ways are the ones of secret diplomacy: he eases tensions between majorities and minorities at the early stage, before conflict erupts. But he also revises draft legislation and initiates instruments that are even softer than soft law (for instance the Lund Recommendations mentioned above).

PETER HILPOLD elaborates on the success of the South Tyrolean autonomy – which is almost forgotten due to the resolution of the underlying problems. However, especially the successful solutions should not be forgotten, as their study might reveal elements suitable for generalisation. PETER HILPOLD identifies a reasonable distribution of competences between the central and the autonomous authorities, the foundation of the autonomy in international law, and, most importantly, confidence building between all participants as factors conducive to the success of the autonomy in South Tyrol.

One is able to learn almost nothing and quite a lot from the Åland Islands case, says MARKKU SUKSI. The case seems unique in what regards international involvement (in fact, it shows some similarities with Kosovo) and it could probably not be re-applied today. However, too little attention generally seems to be paid to the internal solutions worked out for the Åland Islands (such as the control over the institutions by the Åland islanders), as well as for other minorities in Finland.

JOSEPH MARKO takes a closer look at institutional design and State building. His perspective is the one of a former judge of the Constitutional Court of Bosnia and Herzegovina. He shows that the Dayton Framework Agreement for Peace of 14 December 1995 establishing the State of Bosnia and Herzegovina had the unwelcome effect of ethnic homogenization. He raises the questions that are at the heart of all non-peaceful situations in which two or more territorially based groups face each other: is it possible at all to foster the will of the groups to live together? Can this be done by appropriate institutional design? JOSEPH MARKO takes a positive stance on the issue, although the case of Bosnia and Herzegovina seems to indicate the opposite.

LAURI HANNIKAINEN gives an update on what is happening in the domain of cultural autonomy. He focuses on the historic example of Estonia and on the current regime for the Sami people in Norway, Sweden, and Finland. A new Nordic Sami-Convention seems to be well under way, granting the Sami living in all three Nordic countries further rights.

GIORGIO MALINVERNI sheds some light on Switzerland. The lasting peace is largely due to the fact that the political borders of the cantons do not

coincide with the linguistic and the religious borders. This is an accidental product of history that can hardly be imitated elsewhere. What could be imitated in other federal States, however, is the creation of an additional canton by a series of referenda.

The tenth anniversary of the Framework Convention prompts ROMEDI ARQUINT's general review of the instrument and its value for minorities. He finds that, within the framework of the Convention, dialogue is *about* minorities rather than *with* minorities and he deplores that a definition of the term minority is still lacking.

The book's concluding text is the document on „Majorities and Minorities: Managing Diversity", approved by all participants, which outlines challenges to national and international law in what regards minorities and circumscribes the framework in which Convivenza will act.

Minority Rights at the United Nations

Gudmundur Alfredsson

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I. Introduction

Minority issues have increasingly become items on international human rights and peace agendas. Patterns of economic, social and political discrimination, combined with indignities and threats to identities and cultures, have generated and are likely to continue to give rise to violent ethnic and religious conflicts in all parts of the world. Even genocide occurs in this modern age. As minorities gain better knowledge of their rights and possible international remedies, they are presenting more complaints to and have higher and higher expectations of international organizations. Hopefully, governments will come to realize that respect for minority rights also serves their own interest and that of society as a whole.

Much of the new attention to minority rights is indeed security-oriented. Internal conflicts often spill across borders in terms of refugee flows and/or fighting, including possible interference by other States. Respect for human rights is one method of preventing, managing and resolving violent conflicts, and preventive action is certainly less costly than reaction after the eruption

of violence. In a 1992 report of the UN Secretary-General entitled An Agenda for Peace (document A/47/277-S/24111), it is observed about ethnic conflicts (para. 18) that one „requirement for solutions to these problems lies in commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic“. Minority rights are thus about keeping the group happy within a State.

II. The Human Rights Approach

The Universal Declaration of Human Rights was adopted by General Assembly resolution 217 (III), part A, of 10 December 1948. By the same resolution, in part C, it was decided that the United Nations could not remain indifferent to the „fate of minorities”. For the next two or three decades, to the degree the United Nations paid any attention to minority rights, the focus was on the use of individual human rights to the benefit of minorities.

As a point of departure, across the spectrum of civil and political as well as economic, social and cultural rights, equal rights provisions in the international human rights instruments apply as a matter of course to minority members. So do stipulations on the prohibition of discrimination in line with non-discrimination grounds that coincide with the objective characteristics of minority groups, like national and ethnic origins, language, culture and religion. Whenever affected, persons belonging to minorities, and occasionally minority groups, can make use of UN bodies and procedures set up for the monitoring of compliance with general human rights on equal footing with everyone else.

III. Definition of the Term ‘Minority’

Governments have been unwilling to adopt a universal definition of the term ‘minority’. This has often served as a convenient device for tactically delaying substantive discussions and decisions. It is much more comfortable to keep talking about definitions rather than about actual groups, their rights, available special measures and access to international monitoring procedures, let alone national implementation.

Notwithstanding the missing definition of the term 'minority', the necessary elements of a definition emerge quite clearly in national and international practices, as already demonstrated by a compilation of definition proposals submitted to the League of Nations and the United Nations during more than 60 years of debates (in UN document E/CN.4/1987/WG.5/WP.1). Elements therefrom have been reiterated in some of the instruments and picked up by monitoring bodies. In view of the common components, much of the time it is self-evident which groups qualify for protection. The essential components of a definition are certain objective characteristics (national or ethnic origin, language and religion), a subjective element (self-identification with the group), the numbers (less than 50% of the population of a country), and long-term presence on the territory concerned (presumably at least one or two generations, thus excluding recent arrivals).

It is important to distinguish between 'minorities' and 'peoples'. As with the term 'minorities', there is no universally accepted definition of the term 'peoples'. The latter is now part of many human rights instruments and resolutions, notably those which concern self-determination, natural resources and development. In practice, the term 'peoples' has been applied to the entire population of territorial or geographical entities, within some sort of acknowledged borders, generally without regard to the ethnic composition and cultural characteristics of the inhabitants. Minority rights, on the other hand, are about protecting a group within the borders of a State, and minorities are as a rule not entitled to the right of self-determination (at least in the external sense, with independence as an option).

IV. Minority-Specific Rights and Measures

The progress of minority rights at the United Nations and in other international organizations has been steady but slow, but important initiatives have been emerging over the last 10-20 years. The adoption of minority-specific rights and special measures and the setting up of international institutions and procedures for the realization of minority rights, including rights and representation for both individual members of the groups and the groups themselves, has now become quite common.

By setting forth minority-specific rights and special measures, the human rights instruments increasingly recognize that concrete steps are needed to

realize the equal enjoyment of all human rights and to place the groups, as well as their members, in a position comparable with the majority population of a State. The special measures do not constitute privileges; like non-discrimination they are rooted in the rule of equal opportunities and equal treatment. A minority group and its members cannot be really equal to the majority population unless and until equal conditions prevail; even then the group may continue to be disadvantaged because of the majority's dominance in national life.

When measured against human rights in general and the corresponding monitoring methods and jurisprudence, the international and regional minority-specific standards and procedures are still far from satisfactory. With increased awareness of the deficiencies, additional international and regional organizations have entered the arena, and new instruments and monitoring procedures, together with some important case-law, have come into being. Among the highlights of these developments are the quasi-judicial decisions of an international treaty body and efforts to engage governments and groups in dialogue. There follows a survey of the main instruments and procedures available and actually used for minority rights.

Amongst the main texts with minority-specific provisions adopted within the UN system are the International Covenant on Civil and Political Rights (ICCPR), General Comments No. 18 and 23 of the Human Rights Committee on non-discrimination in and on article 27 of the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child, the Convention against Genocide, the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the Convention against Discrimination in Education (UNESCO), and the Declaration on Race and Racial Prejudice (UNESCO). The treaties mentioned enjoy wide ratification.

Article 27 of the ICCPR is the best known of the minority-specific provisions. Notwithstanding the negative formulation of the article, recent case-law and General Comment No. 23 of the Human Rights Committee clearly imply the obligation of States to provide special measures of protection. In protecting minority characteristics and cultural, religious and linguistic activities, article 27 reaffirms, strengthens and adds to the equal enjoyment of the rights enumerated in the other articles of the two International

Covenants, such as the rights of individuals to take part in cultural life and to profess and practice a religion. While addressing 'persons belonging to minorities', article 27 goes beyond mere individual rights and recognizes the necessity of a group element by using the phrase „in community with the other members of their group".

The ICCPR and its first Optional Protocol are thus of particular importance because the Human Rights Committee (independent experts who monitor compliance with the Covenant) has made major contributions to the jurisprudence on minority rights. The Committee has, for example, found that traditional economic activities and land rights, if they are essential for the cultural life of an ethnic community, may fall under article 27.

The ICERD contains noteworthy and underutilized language on special measures. Article 2.2 provides that, when necessary, States shall take „special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them" in order to guarantee the full and equal enjoyment of all human rights. The Convention also states, in article 1.4, that such measures are not to be considered discriminatory.

Indigenous peoples, that is the original inhabitants of the land, are also entitled to minority rights when they count less than one half of the State population. This is confirmed by case law of the Human Rights Committee under article 27 of the ICCPR. The ILO has adopted the Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), and the United Nations in 2007 adopted a long-awaited Declaration on the Rights of Indigenous Peoples.

The UN efforts have been supplemented and sometimes preceded by regional activities. In addition to regional instruments spelling out equal enjoyment of human rights and non-discrimination, regional organizations such as the Council of Europe and the Organization for Security and Co-Operation in Europe (OSCE) have adopted instruments calling for special measures, when necessary, in order to achieve equal enjoyment in fact. This is true for two treaties adopted by the Council of Europe and several reports and documents adopted by the OSCE, notably the 1990 Copenhagen Meeting of the OSCE Conference on the Human Dimension. The post of OSCE High Commissioner on National Minorities has played a ground-breaking role in making use of dialogues between governments and groups,

not least by way of recommending and facilitating special measures to the benefit of minorities for the purpose of preventing violent conflict.

The two Council of Europe treaties, the European Charter on Regional or Minority Languages and the Framework Convention for the Protection of National Minorities (FCNM), are something of a disappointment. One would have expected more from an organization with an excellent human rights record and a strong emphasis on the rule of law and an advanced system of monitoring institutions. Instead, the two texts focus on State actions rather than the rights of minorities and their members, as is the approach in the UN instruments. While the monitoring is left to relatively weak institutions which rely on State information reports instead of individual or group complaints, the Advisory Committee set up under the FCNM has done good work under difficult circumstances.

V. National Implementation and International Monitoring

States carry the primary responsibility for implementing the human rights standards to which they have subscribed. In pushing States towards compliance, the international organizations employ a variety of institutions and methods. The methods include complaints procedures under both treaties and resolutions, investigative and fact-finding mandates, State reporting obligations, good offices undertaken by high officials of international organizations, dialogue facilitation between governments and groups, public debates with the consequent political and diplomatic pressure, and technical assistance. All of these procedures and methods have been used on behalf of minorities; furthermore, more and more institutions and procedures have been created specifically for minorities.

Some expert committees set up by treaties can receive complaints concerning alleged violations of minority rights. The Human Rights Committee has delivered a few significant decisions, as referred to above, which have lent additional meaning to the right to culture as spelled out in article 27 of the ICCPR. Under one petition procedure, the under-utilized article 14 of the ICERD, both groups and individuals can file complaints with the Committee on the Elimination of Racial Discrimination.

Other treaties and resolutions adopted under UN auspices offer complaints procedures which are available and may be relevant to minorities. In addition, petitioners can ask ILO, UNESCO, the World Bank and regional organizations to look into State compliance under their respective instruments concerning human rights or related issues.

Special Rapporteurs and Representatives of the UN Human Rights Council (previously the Commission on Human Rights) and of the Secretary-General often address minority concerns in their country-specific and thematic reports. Past and present country reports include those on Guatemala, Iran, Iraq, Myanmar, Romania, Rwanda, the Sudan and the former Yugoslavia, and the thematic reports include genocide, religious intolerance, racism, racial discrimination, xenophobia and related intolerance around the world. Groups have easy access to the Rapporteurs, and some of the reports have included excellent suggestions on minority rights.

Committees of expert members set up under international human rights treaties routinely question government representatives about minority rights when they present State reports. This is true for the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. The committees scrutinize the reports and the replies of governments and make human rights recommendations if discrepancies are found between the performance and obligations of the State concerned. The comments by the committees often touch upon minority rights. Minorities can supply relevant information to the treaty bodies or to their individual members in anticipation of the examination of relevant State reports.

The UN Secretary-General, the UN High Commissioner for Human Rights and director-generals of specialized agencies and regional organizations have undertaken good offices or quiet (non-public) diplomacy for the sake of groups in distress. These officials can also initiate and facilitate dialogues between governments and groups. Actions of this kind can be requested by both governments and groups, but it is unlikely to be used unless the monitoring procedures are deemed to be inadequate or too slow in the face of urgent or peace-threatening situations.

Apart from the more formal procedures, public debates in intergovernmental fora about human rights standards and violations can attract attention and improve compliance. Governments do not welcome institutional pressure

and criticism and would rather avoid it. Discussions about minority rights in the UN Human Rights Council (previously the Commission on Human Rights and its Sub-Commission) often embarrass governments when their records come under examination. These debates, under various agenda items, thus put political, diplomatic and public pressure on governments to mend their ways as to the treatment of minorities.

In a report to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur Asbjörn Eide of Norway dealt with constructive national arrangements for minorities based on human rights. His study on constructive national arrangements for minorities is contained in UN documents E/CN.4/Sub.2/1993/34 and Add. 1-4. Eide argued that such arrangements would improve the relations between majority and minority and inspire legislators, judges and other national leaders to achieve equal rights, particularly equal political representation, and to avoid ethnic conflicts.

In 1995, as a result of Eide's report, the United Nations established a Working Group on Minorities (WGM) that met annually until 2006 and reported to the Sub-Commission. It reviewed compliance with the 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, considered solutions to problems, promoted mutual understanding between groups and governments, and recommended measures for the protection of minority rights. The WGM considered a variety of themes, such as the facilitation of national conciliation machineries, the establishment of dialogues between the parties involved, early warning, and the prevention of violent conflict. Minorities and their representatives had free access to the WGM and could freely speak and submit documents at its meetings.

In 2005, the Working Group was supplemented by an independent expert on minority issues (IEMI) who reports to the Human Rights Council. She has already visited a few countries and written useful reports. In 2007, the WGM was replaced by a Minority Forum that is expected to meet for the first time in 2008 and is supposed to work more closely with the IEMI. It remains to be seen whether the Forum constitutes a downgrading from the WGM.

Other aspects flowing from the ongoing reform of the UN human rights program may also affect minority rights. A new universal periodic reporting system and a rearranged resolution-based complaints procedure that are

under consideration may offer additional opportunities for the monitoring of minority rights, but the outcome is uncertain. An earlier complaints procedure under Economic and Social Council resolution 1503 (XLVIII) allowed individuals and groups to submit complaints for demonstrating a consistent pattern of gross rights violations. This resolution procedure was universally applicable, requiring no ratification or acceptance of specific instruments, and was often employed by minorities or by NGOs on their behalf.

Documents adopted at OSCE gatherings contain far-reaching minority rights provisions which build upon the principles of non-discrimination and affirmative action. The texts also demonstrate a new approach which centers on dialogue, confidence-building and prevention. The OSCE High Commissioner on National Minorities and other institutions are involved both in the fact-finding process and in the facilitation of dialogue between the parties. The High Commissioner is a promising institution with a substantive mandate to involve both groups and governments in dialogue in order to prevent violent conflicts. Much of the success is also thanks to Max van der Stoel of the Netherlands, the first High Commissioner.

This new thinking has increasingly influenced the United Nations, especially as to dialogue functions and technical assistance. The 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, the first UN human rights instrument devoted solely to minority rights, states clearly in the preamble and in article 9 that organizations of the UN system have a role to play in „the full realization of the rights and principles“ set forth in the Declaration, and it expressly ties minority rights together with the „development of society as a whole and within a democratic framework based on the rule of law“.

International and regional standards with accompanying monitoring procedures are helpful only if people know about them. States are obligated to educate the public about human rights. Article 26 of the Universal Declaration, article 13 of the Covenant on Economic, Social and Cultural Rights and many other instruments all state that education, particularly human rights education, shall promote understanding, tolerance and friendship among nations and racial, ethnic and religious groups and further UN activities for the maintenance of peace. More concrete work is essential because lack of knowledge and understanding often leads to inter-communal distrust, prejudices and tensions.

Finally, non-governmental organizations are of crucial importance in promoting and protecting minority rights. The NGOs perform a wide variety of relevant functions, including research and fact-finding activities, information and education for the public and other generation of public support, contributions to policy-making and legislative debates at all levels, pressure on governments to live up to their obligations, the speaking up and speaking out on violations and abuses when governments and international organizations are ineffective or even silent, and the bringing of such issues to the attention of international and regional policy-making, standard-setting and monitoring bodies, in particular complaints and investigative procedures.

Well-known international NGOs are actively involved in minority rights. They include Amnesty International, Article 19, Human Rights Watch, the International Helsinki Federation for Human Rights, and the Minority Rights Group. While requiring independent verification, the accumulation of NGO information, together with views expressed by intergovernmental fact-finders and observers, strongly indicates that many States in all parts of the world stand in violation of the international minority rights standards.

VI. Conclusions

Governments are clearly concerned about critical debates in the public forums of international organizations and will therefore take steps to avoid such embarrassment. Governments concerned only with the preservation of national unity and territorial integrity must learn to recognize the benefits of tolerance and pluralism. The will of the people is not only the will of the majority; for governments to be representative, they must also respect the rights of minorities. This is in the interest of all parties in order to keep the peace and to further prosperity. Loyalty is a two-way street; States must be loyal to all persons within their jurisdictions, including persons belonging to minorities, who in turn should be loyal to the State in which they live. The initiative should rest with the State as the stronger party.

Democracy is good for human rights, but majority rule is not always sensitive or understanding of minority situations. Minority rights must therefore be enshrined in constitutional and legislative guarantees with available and accessible remedies, consistent with international standards as majority rule is not necessarily friendly to or understanding of minority needs.

The realization of minority rights is indeed intended to benefit all parties. States gain political and social stability and economic prosperity; the groups preserve their identities and improve the quality of life for individual members; and the international organizations maintain peace and stability which, after all, is the major reason for their existence.

Minority Protection in Europe: Standard-Setting by the Council of Europe and the OSCE

Rainer Hofmann

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I. Introduction

The first system of international protection of the rights of national minorities was created after Word War I and assumed a certain degree of unity within the framework of the League of Nations.[1] This system was built on treaties concluded by Poland, Yugoslavia, Czechoslovakia, Romania and Greece with the principal Allied and Associated Powers and pertinent provisions in the peace treaties concluded by Austria, Bulgaria, Hungary and Turkey. It was further completed by a set of bilateral treaties such as those concluded between Finland and Sweden concerning the Åland Islands, Germany and Poland concerning Upper Silesia and the Convention concerning the Territory of Memel between the Allied and Associated Powers and Lithuania as well as unilateral declarations made by Albania, the Baltic States and Iraq upon their admission to the League of Nations. This treaty-based system failed, however, due to an increasing reluctance among the states concerned to abide by their treaty obligations in a period characterized by a growing atmosphere of aggressive nationalism, and the lack of competences, and political will, of the League of Nations to enforce the implementation of this system.[2]

After World War II, the United Nations did not endeavour to recreate the League of Nations system nor to substitute it with a system of their own.[3] This absence of action reflected the prevailing attitude that international protection of minority rights, construed as group rights, could be

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1 For an overview see F. CAPOTORTI, Minorities, in: R. BERNHARDT (ed.), Encyclopedia of Public International Law, Vol. III (1997), 410 ff. (411 f.); A. EIDE, The Framework Convention in Historical and Global Perspective, in: WELLER (ed.), The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities (2005), 25 ff. (33 ff.); R. HOFMANN, Minderheitenschutz in Europa (1995), 17 ff.; and P. THORNBERRY, International Law and the Rights of National Minorities (1991), 38 ff.; for extensive treatises see A. BALOGH, Der internationale Schutz der Minderheiten (1928); G. ERLER, Das Recht der nationalen Minderheiten (1931); E. FLACHBARTH, System des internationalen Minderheitenrechts (1937); H. KRAUS, Das Recht der Minderheiten (1927); A. MANDELSTAM, La protection internationale des minorités (1931); and H. WINTGENS, Der völkerrechtliche Schutz der nationalen, sprachlichen und religiösen Minderheiten (1930).

2 See THORNBERRY, ibid., 46 ff.

3 See EIDE (note 1), 37 ff.; and THORNBERRY, ibid., 118 and 137 ff.

supplemented by an effective system of human rights protection based on a system of individual rights. Therefore, none of the 1947 Paris Peace Treaties included specific provisions on national minorities, with the sole – and well-known – exception of the peace treaty with Italy to which was annexed the 1946 Gruber – de Gaspari Treaty. Against this factual background characterized by the almost complete absence of bi- or multilateral treaties[4] on the protection of national minorities, the 1955 Copenhagen-Bonn Declarations were indeed a unique phenomenon. Although the two separate, unilateral declarations do not constitute a bilateral treaty from a legal point of view,[5] they served as the legal basis for a political development which turned the Danish-German border region into an area seen by many as an example for a successful solution to a previously problematic minority situation.

The success of these three bilateral instruments might explain why, after the demise of the socialist regimes in Europe, many bilateral treaties on the protection of national minorities were concluded by practically all Central and Eastern European states.[6] Notwithstanding this development it is interesting to note that the virtual renaissance of international minority rights protection in the post-1989 era also led to a surge in multilateral efforts in the field of minority protection.[7] This was mainly due to the international community's realization that unsettled majority-minority situations constitute a serious threat not only to the internal peace and security of the states primarily concerned, but also to peace and security in Europe as a whole. Consequently, both the CSCE/OSCE and the Council of Europe, as the two

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4 In addition to the aforementioned 1946 *Gruber – de Gaspari* Treaty the only other treaty (still) in force was the 1922 Finnish-Swedish Treaty on the Åland Islands.

5 See J. KÜHL, The Bonn-Copenhagen Declarations of 1955: Background, Context and Impact of the Danish-German Minority Regulations, in: J. KÜHL/M. WELLER (eds.), Minority Policy in Action: The Bonn-Copenhagen Declarations in a European Context 1955-2005 (2005), 31-89.

6 On the potential role of such treaties see, e.g., A. BLOED/P. VAN DIJK, Protection of Minority Rights through Bilateral Treaties: The Case of Central and Eastern Europe (1999), E. LANTSCHNER/R. MEDDA-WINDISCHER, Protection of National Minorities through Bilateral Agreements in South Eastern Europe, 1 European Yearbook of Minority Issues (2001/2), 535-564.

7 See R. HOFMANN, Menschenrechte und der Schutz nationaler Minderheiten, 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2005), 587 ff. (593 ff.).

most relevant international organizations in the human rights field in Europe, have since the early 1990s been actively engaged in stabilizing majority-minority situations that have a considerable potential to result in ethnic violence or even civil strife and war. The first step taken by the then CSCE was the adoption on 29 June 1990 of the Copenhagen Document of the Conference on the Human Dimension, Part IV of which contains detailed standards relating to national minorities. Although – like most CSCE/OSCE documents – it is not a legally binding instrument, it served as a most important basis for the further development of minority-related affairs in Europe.[8] The CSCE/OSCE member states' commitment to be actively engaged in efforts to recognize and safeguard the rights of persons belonging to national minorities was further affirmed by the adoption on 21 November 1990 of the Charter of Paris for a New Europe, which more than any other document represents the end of the cold war in Europe. The most important step, however, was taken when, in its Helsinki Declaration of July 1992, the OSCE established the position of a High Commissioner on National Minorities (HCNM) as an „instrument of conflict prevention". On 1 January 1993, the first High Commissioner, *Max van der Stoel*, took up his duties and, throughout his office, turned his attention to the many disputes between minorities and state authorities in Europe which were seen to have the potential to escalate into serious, and possibly violent tensions. On 1 July 2001 he was succeeded by *Rolf Ekéus* who continued to apply „quiet diplomacy" to help prevent such developments.[9] He also called on independent experts to elaborate recommendations on issues and themes which had been identified as particularly relevant in his work. They included minority education, linguistic rights, effective participation in public life and the use

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8 See HOFMANN (note 1), 34 ff.

9 For reviews of the activities of the HCNM see S. HOLT, The Activities of the OSCE High Commissioner on National Minorities: January 2001 – May 2002, 1 European Yearbook of Minority Issues (2001/2), 565-589; M.E. DRAPER, The Activities of the OSCE High Commissioner on National Minorities: June 2002 – June 2003, 2 European Yearbook of Minority Issues (2002/3), 475 ff.; and S. HOLT, The Activities of the OSCE High Commissioner on National Minorities: July 2003 – June 2004, 3 European Yearbook for Minority Issues (2003/4), 429 ff.; see also M. VAN DER STOEL, The role of the OSCE High Commissioner on National Minorities in the field of conflict prevention, Recueil des Cours 296 (2002), 9-23; and C. HÖHN, Zwischen Menschenrechten und Konfliktprävention – Der Minder-

of minority languages in the media. Although the outcome of these efforts, recommendations and guidelines, do not constitute binding 'hard' law, they are considered to have contributed to the setting of standards as a kind of relevant soft law. In view of the truly pan-European character of the OSCE process, they will be used in this paper to identify the substance of standards applicable to minority situations in Europe.

In contrast to this policy based on „quiet" diplomacy and the exercise of political pressure, the Council of Europe, with its strong tradition of initiating negotiations aimed at, and providing a forum for, the drafting of legally binding instruments, chose to maintain this which eventually resulted in the adoption of two legally binding treaties: the European Charter on Regional and Minorities Languages of 5 November 1992 which entered into force on 1 March 1998[10] and had, as of 1 December 2005, been ratified by 19 states[11] and the Framework Convention for the Protection of National Minorities (FCNM).[12] The FCNM entered into force on 1 February 1998 and, as of 1 December 2005, had been ratified by 37 states.[13] It is important to note that by 1 January 2002, the FCNM had already entered into force for 34 states and had thus quickly acquired one of the highest rates of membership of Council of Europe treaties.

The unequalled relevance of the FCNM as concerns the protection of minority rights in Europe is also reflected by the fact that, on 23 August

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heitenschutz im Rahmen der Organisation für Sicherheit und Zusammenarbeit in Europa (2005).

10 European Treaty Series N° 148.

11 Armenia, Austria, Croatia, Cyprus, Denmark, Finland, Germany, Hungary, Liechtenstein, Luxembourg, Netherlands, Norway, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom.

12 European Treaty Series N° 157.

13 Albania, Armenia, Austria, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Ukraine and the United Kingdom. The FCNM has been signed, but not yet ratified by Belgium, Georgia (which is, however, expected to deposit its instrument of ratification in the imminent future), Greece, Iceland, and Luxembourg. Four Council of Europe member states have not yet taken any action with a view to be bound by the FCNM: Andorra, France, Monaco and Turkey.

2004, the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe concluded an Agreement whereby UNMIK accepted to be bound not only by the substantive provisions of the FCNM, an obligation which already resulted from the pertinent unilateral acceptance by UNMIK to be found in Article 1.3 of UNMIK Regulation 1999/1, but also to be bound by the provisions on the monitoring of the implementation of the FCNM by UNMIK in Kosovo. This act is the first time ever acceptance of a United Nations Interim Administration to be bound not only by the substantive provisions of a human rights instrument, i.e. the FCNM, but also by its provisions on monitoring.[14]

In view of this high rate of membership, its character as the most comprehensive legally binding instrument in the field of the protection of national minorities in Europe, and its specific monitoring mechanism which, as will be shown below, is particularly conducive to identifying applicable standards, the FCNM and its interpretation by its monitoring bodies will serve as a major source for this paper. By contrast, the Language Charter seems to be much less relevant for this purpose: this is not only because of its comparatively low membership rate, but rather because of its limited coverage – only linguistic rights – and its very special structure which makes it practically impossible to identify any general standards: any member state benefits from a very wide margin of discretion as to the choice of measures mentioned in part III of the Charter which it wants to apply domestically to promote those languages which it has determined to be covered by the Charter.[15] Furthermore, the most important legally binding European instrument in the field of human rights protection, the European Convention on Human Rights (ECHR), will be used as a source for establishing general standards applicable to minority issues – though it must be stressed at the

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[14] On this issue, see R. HOFMANN, Protecting Minority Rights in Kosovo, in: K. DICKE/S. HOBE/K.U. MEYN/A. PETERS/E. RIEDEL/H.J. SCHÜTZ/C. TIETJE (Hrsg.), Weltinnenrecht. Liber Amicorum Jost Delbrück (2005), 347 ff.

[15] For a review of developments under the Charter see A. BULTRINI, Developments in the Field of the European Charter for Regional or Minority Languages, 2 European Yearbook of Minority Issues (2002/3), 435-443; and ID., Developments in the Field of the European Charter for Regional or Minority Languages, 3 European Yearbook of Minority Issues (2003/4), 377 ff.; see also B. PFEIL, Ziele der Europäischen Charta der Regional- oder Minderheitensprachen und Möglichkeiten staatlicher Umsetzung, 60 Europa Ethnica (2003), 24-35.

outset that the ECHR is of limited relevance in the field of minority rights, as will be shown later in this paper.

Finally, it must be emphasized that, notwithstanding the recent last-minute introduction of a reference to minority rights in the Treaty on a Constitution for Europe, the extensive legislative work of the European Union and the European Communities have, at least so far, not added considerably to the body of international law relevant to standard setting on minority issues in Europe. Therefore, European Union and Community Law will not be taken into account in this paper.[16]

II. New standards for minority issues in the Council of Europe and the OSCE

The major purpose of this paper is to identify the substantive standards for minority issues which have evolved – or are evolving – in Europe over the last 15 years as a result of the two above-mentioned developments: on the one hand, the Copenhagen Document on the Human Dimension of the CSCE of 29 June 1990 and the decision taken in July 1992 to establish the position of OSCE High Commissioner on National Minorities, and, on the other hand, the pertinent activities pursued within the Council of Europe: the – albeit still rather cautious – jurisprudence of the European Court of Human Rights (ECtHR), based on the ECHR, and the monitoring activities of the Committee of Ministers and the Advisory Committee under the FCNM. However, before identifying the substantive standards presently applicable to minority issues in Europe, it seems worthwhile to outline the main features of the procedural aspects of standard setting, both in the Council of Europe and the OSCE, since the various procedures followed have an impact on the legal and political quality of the substantive standards.

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16 But see R. HOFMANN, National Minorities and European Community Law, 2 Baltic Yearbook of International Law (2002), 159-174; T. MALLOY, Fundamental Rights and National Minorities in the European Union, in: J. KÜHL/M. WELLER (note 1), 187-216; and the various contributions in G. TOGGENBURG (ed.), Minority Protection and the Enlarged European Union: The Way Forward (2004).

1. Procedural aspects of standard setting

Before describing and assessing the procedural aspects of standard setting as concerns minority issues in the Council of Europe and the OSCE, a few general remarks on the various means of standard setting in international law and the legal implications of these different approaches seems appropriate.

At the outset, it should be recalled that standard setting in the field of minority rights as part of the international protection of human rights is effected by various actors and by different means. Firstly, there are the states as the traditional subjects of international law which, by enacting domestic legislation, create the factual and legal basis for identifying international standards which, based on a comparative analysis, might eventually constitute customary international law. Since World War II, states have increasingly bound themselves, from a legal perspective, by ratifying bi- and multilateral treaties, the contents of which contribute considerably to identifying such international legal standards.

Secondly, there are international organizations founded by states in order to pursue and implement common goals such as the international protection of human rights in general and minority rights in particular, as provided for in the respective treaties or other legal documents establishing such international organizations as independent subjects of international law. Such international organizations are often given the task of constituting a forum to draft international treaties aimed specifically at the international protection of human rights, including minority rights. Again, an analysis of the contents of such treaties, both the founding treaties of an international organization or, in particular, the treaties or other legal documents drafted within and under the auspices of such international organizations, may considerably contribute to identifying applicable international standards in the field of human and minority rights.

Identifying such international standards is made easier if the relevant treaties provide for some kind of international monitoring mechanism or other means to monitor and ensure respect for the legal obligation incurred by states parties to implement and to apply, within their domestic jurisdiction, the provisions of such treaties. The – from a legal point of view – 'strongest' kind of international supervision consists of a judicial system like the one provided for under the ECHR whereby a court, acting on individual complaints or applications by states parties, is entitled to hand down binding

judgments based on a binding interpretation of the applicable treaty provision. To put it most clearly, such systems result in hard jurisprudence based on hard law. It should be noted, however, that such systems imply a set-back in identifying standards: since judgments are concerned, by their very nature, with individual cases, it might be difficult to establish standards which, by *their* very nature, must be of a general character, unless there exists a kind of settled jurisprudence based on a number of judgments.

The (again from a strictly legal point of view) weakest kind of international supervision consists of a non-judicial system like the one provided for under the OSCE with its 1990 Copenhagen Document or under the Council of Europe with its European Committee against Racial Intolerance (ECRI), under which a body of experts either produces – legally non-binding – guidelines on specific issues (as formulated by experts at the invitation of the HCNM) or authors country-specific reports not based on a legal document and without any legally binding force (as is the case with ECRI).[17] Such guidelines and general country reports might indeed contribute to identifying international standards, in particular if they refer to binding legal instruments. Their major relevance, however, seems to consist in their potential to influence domestic policies and legislation – in other words, in their persuasive authority. A third, intermediate, kind of international supervision consists of a quasi-judicial system like the one provided for under the FCNM, under which a body of experts examines and assesses the legal and factual compliance of a state party to an international treaty with its legal obligations flowing from its membership of that treaty. The group of experts then authors a legally non-binding opinion which serves as the basis for a legally binding decision of the competent monitoring body (in the case of the FCNM, the resolutions of the Committee of Ministers). As long as such resolutions reflect the major thrust of the underlying opinion, these documents together might be considered as soft jurisprudence based on hard law and will, as a rule, considerably contribute to identifying general standards.

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17 On ECRI see D. THÜRER, L'Europe, une experience – l'ECRI, une illustration, in: BOVAY/MINH SON NGUYEN (eds.), Mélanges Pierre Moor (2005), 543 ff.

a) Council of Europe

As regards Council of Europe instruments and mechanisms of potential relevance for identifying general standards for minority issues, this paper – as explained in the introduction – focuses on two instruments: the ECHR and the FCNM.

aa) Standard setting under the European Convention on Human Rights

For many decades, the ECHR as interpreted and applied by the ECtHR and – until the entry into force of the 11th Additional Protocol in 1999 – the European Commission of Human Rights (ECmHR) had scant relevance for the protection of the rights of persons belonging to national minorities. Until the mid-1990s, the only pertinent statement was formulated by the ECmHR in the *Alta River* case[18] when it said that Article 8 ECHR might have some impact on the protection of an indigenous people's traditional lifestyle – in that case the Sami of Northern Norway. Since the judgment of the ECtHR in the *Buckley* case in 1996,[19] the situation has changed slightly: there has been a growing number of judgments mainly concerned with protecting the traditional lifestyle of national minorities, in particular British Roma and Travellers, under Article 8 ECHR[20] or the protection of the freedom of opinion and association of persons belonging to national minorities under Articles 10 and 11 ECHR.[21]

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18 ECmHR, *G and E v. Norway*, Decisions and Reports 35, 30 (35).

19 ECtHR, *Buckley v. United Kingdom*, Judgment of 25 September 1996, Reports of Judgments and Decisions 1998-IV.

20 See in particular ECtHR, *Chapman v. United Kingdom*, Judgment of 18 January 2001, Report of Judgments and Decisions 2001-I; and ECtHR, *The Gypsy Council and Others v. United Kingdom*, Judgment of 14 May 2002 (reprinted in: European Human Rights Law Review 2002, 705).

21 See in particular ECtHR, *United Communist Party and Others v. Turkey*, Judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I; ECtHR, *Sidiropoulos and Others v. Greece*, Judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV; ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of 2 October 2001, Reports of Judgments and Decisions 2001-IX; and ECtHR, *Gorzelik v. Poland*, Judgment of 17 February 2004, Reports of Judgments and Decisions 2004-I.

The substance of these decisions[22] will be taken into account in the following section on the – evolving – substantive standards concerning the protection of national minorities. At this point, it is, however, important to stress that the failure in the early 1990s of political initiatives to draft an Additional Protocol to the ECHR on the rights of persons belonging to national minorities[23] resulted in a fundamental change to the procedure and character of standard setting on minority issues in the Council of Europe. The entry into force of an Additional Protocol on Minority Rights in the ECHR had entrusted the ECtHR with the competence and task of handing down binding judgments on – most probably – a range of minority issues. In other words, hard jurisprudence based on hard law. The decision taken at the 1993 Vienna Summit of Council of Europe Heads of State and Governments to draft a Framework Convention on the Protection of National Minorities, eventually resulted in a fundamentally different procedure and character of standard setting. As was mentioned above and will further be shown in the following sub-section, standard setting under the FCNM, while based on (relatively) hard law, results in soft jurisprudence, i.e. the country-specific resolutions of the Committee of Ministers based on the pertinent opinions of the Advisory Committee.

While this is not the place to discuss the legal appropriateness and political wisdom of this decision, it should be stressed that the ECHR does provide the ECtHR, in many of its articles, with a sufficient legal basis to contribute

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22 On the jurisprudence of the ECtHR in matters concerning national minorities see, e.g., G. GILBERT, The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights, 24 Human Rights Quarterly (2002), 736 ff.; G. PENTASSUGLIA, Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee, 46 German Yearbook of International Law (2003), 401 ff.; and R. HOFMANN, Nationale Minderheiten und der Europäische Gerichtshof für Menschenrechte, in: J. BRÖHMER/R. BIEBER/C. CALLIESS/C. LANGENFELD/S. WEBER (eds.), Internationale Gemeinschaft und Menschenrechte, Festschrift für Georg Ress (2004), 1011 ff.; for reviews see also R. MEDDA-WINDISCHER, The Jurisprudence of the European Court of Human Rights, 1 European Yearbook of Minority Issues (2001/2) 487 ff.; ID., The Jurisprudence of the European Court of Human Rights, 2 European Yearbook of Minority Issues (2002/3), 445 ff. 469; and ID., The Jurisprudence of the European Court of Human Rights, 3 European Yearbook of Minority Issues (2003/4), 389 ff.

23 See, in particular, Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe on a *Draft Protocol on Minority Rights in the ECHR*.

considerably to protecting the rights of persons belonging to national minorities and, thus, produce hard jurisprudence based on hard law. This covers a limited number of issues, but they are of considerable relevance for national minorities. However, as will be shown later, the ECtHR has hitherto been reluctant to make use of this potential and has not acted as an important player in this regard. This is reflected especially in the judgments concerning aspects of the traditional lifestyle of British Roma and Travellers and, in particular the *Gorzelik* case. Although such a cautious approach may be founded on good reasons of judicial policy, it is important to stress that the ECtHR could clearly play a much more pro-active role, thereby contributing to the standard setting on minority issues by producing more hard jurisprudence based on hard law.

bb) Standard setting under the Framework Convention for the Protection of National Minorities

Since the monitoring system under the FCNM has been described in detail elsewhere,[24] a short overview is considered sufficient.

According to Articles 24 and 26 FCNM, the ultimate evaluation of the implementation of the FCNM by the states parties is entrusted to the Committee of Ministers, assisted by an Advisory Committee. Under Article 25 FCNM, the states parties are required to submit a report giving full information on legislative and other measures taken to give effect to the principles of the FCNM, within one year of its entry into force for the respective state party. Further reports are due on a five-yearly basis or at the Committee of Ministers' request.

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[24] See, e.g., R. HOFMANN, The Framework Convention for the Protection of National Minorities: An Introduction, in: WELLER (note 1), 1 ff. (6 ff.); for reviews of the practice under the FCNM see R. HOFMANN, Review of the Monitoring Process of the Council of Europe Framework Convention for the Protection of National Minorities, 1 European Yearbook of Minority Issues (2001/2), 435 ff.; ID., Review of the Monitoring Process of the Council of Europe Framework Convention for the Protection of National Minorities, 2 European Yearbook of Minority Issues (2002/3), 401 ff.; and C. PEKARI, Review of the Monitoring Process of the Council of Europe Framework Convention for the Protection of National Minorities, 3 European Yearbook of Minority Issues (2003/4), 347 ff.

Immediately after receipt of a state report[25] by the Secretariat of the Council of Europe, it is transmitted to all members of the Advisory Committee. Based on information contained in the state report and received from other sources[26] before and during a visit to the respective country,[27] at the end of such country visits the members of the specific working group set up within the Advisory Committee with respect to the country concerned identify the

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25 All state reports are available at <http://www.coe.int/T/E/human_rights/minorities/>. It should also be mentioned that the Advisory Committee decided, in the advent of the second cycle of monitoring, on a significant change of procedure in order to streamline the monitoring process: Whereas, during the first cycle of monitoring, all states parties received, well before their respective state report was due to be submitted, the same, rather general questionnaire, states parties now, i.e. starting with the second cycle of monitoring, receive a detailed questionnaire indicating specific issues which the Advisory Committee, based on the information gathered during the first cycle of monitoring and thereafter, considers to be of specific relevance for the monitoring of the country concerned. Such issues include, of course, those which, during the first cycle of monitoring, appeared to be of particular relevance for the assessment of the implementation of the FCNM in that state party. This measure reflects the wish of the Advisory Committee to engage in a continuous and constructive dialogue with all states parties.

26 Such sources include, in particular, reports of other monitoring bodies, e.g. the UN Human Rights Committee, the Committee under CERD or ECRI and of international organizations such as OSCE, and documents provided by international NGOs such as Minority Rights Group (MRG) or the International Helsinki Federation as well as national NGOs which, due to their specific insight, are of special relevance.

27 During the first cycle of monitoring, such visits have been conducted to the following states parties (in chronological order): in 1999, to Finland and Hungary; in 2000, to Slovakia, Denmark, Romania, Czech Republic, Croatia, Cyprus and Italy; in 2001, to Estonia, United Kingdom, Germany, Moldova, Ukraine, Armenia and Austria; in 2002, to Slovenia, Russian Federation, Norway, Albania, Switzerland, Lithuania and Sweden; in 2003, to Ireland, Azerbaijan, Poland, Serbia and Montenegro, the Former Yugoslav Republic of Macedonia, and Bulgaria; the visit to Bosnia-Herzegovina took place in 2004. Only the government of Spain regrettably did not invite the respective working group to conduct a visit to this country. In view of the specific situation in Liechtenstein, Malta and San Marino and the information available, the respective working groups felt that their work on the state reports could be completed without country visits. Moreover, in September 2005, the Advisory Committee visited Kosovo as provided for by the specific Agreement concluded between UNMIK and the Council of Europe (see *supra* note 14). As concerns the second cycle of monitoring which started for some countries in spring 2004, country visits to the following states parties had been conducted, as of 1 December 2005: Croatia, Hungary, Moldova, Czech Republic and Estonia in 2004; and in 2005 to Italy, Slovenia, Finland and Romania.

essential aspects of its draft opinion, which is then transmitted to the plenary for a first reading and, with the amendments agreed, put to a vote. It should be stressed that the opinions were always adopted with overwhelming majorities, quite often unanimously.[28] The opinions are then transmitted to the governments concerned and the Committee of Ministers, which, in fact, means the Ministries of Foreign Affairs of all member states of the Council of Europe. The actual discussion of the opinions of the Advisory Committee as well as of the comments which both the government of the respective state party and other governments wish to submit, takes place in the Rapporteur Group on Human Rights (GR-H), a sub-body of the Committee of Ministers. The opinions are introduced by representatives of the Advisory Committee, who are also invited to be available for an ensuing exchange of views with the members of GR-H.

It is clear from the conclusions and recommendations in the resolutions finally adopted that the Committee of Ministers was – and continues to be – particularly guided by the opinions of the Advisory Committee. Thus, it is

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[28] As of 1 December 2005, the Advisory Committee had adopted the following 34 opinions during the first cycle of monitoring: on 22 September 2000 on Denmark, Finland, Hungary and Slovakia; on 30 November 2000 on Liechtenstein, Malta and San Marino; on 6 April 2001 on Croatia, Cyprus, Czech Republic and Romania; on 14 September 2001 on Estonia and Italy; on 30 November 2001 on the United Kingdom; on 1 March 2002 on Germany, Moldova and Ukraine; on 16 May 2002 on Armenia and Austria; on 12 September 2002 on Albania, Norway, Russian Federation and Slovenia; on 21 February 2003 on Poland, Serbia and Montenegro, and Spain; and on 28 May 2004 on Bosnia and Herzegovina, Bulgaria and the Former Yugoslav Republic of Macedonia. Thus, the Advisory Committee has, as concerns the first cycle of monitoring, concluded its work on 34 out of 37 states parties – the state report by Portugal which was due on 1 September 2003, was received on 23 December 2004 whereas the first state reports of the Netherlands and Latvia are due on 1 June 2006 and 1 October 2006 respectively. On 1 October 2004, the Advisory Committee adopted its first opinions under the second cycle of monitoring, namely on Croatia and Liechtenstein; they were followed by opinions on Denmark, Hungary and Moldova (9 December 2004), on Czech Republic, Estonia and Italy (on 24 February 2005), on Slovakia and Slovenia (on 25 May 2005), and on Malta and Romania (on 24 November 2005). Finally, it should also be mentioned that, on 24 November 2005, the Advisory Committee adopted its first opinion on Kosovo. All these opinions are available at <http://www.coe.int/T/E/human_rights/minorities/>.

important to stress that all 34 country-specific resolutions[29] so far adopted by the Committee of Ministers clearly reflect the pertinent findings of the Advisory Committee. In fact, it must be emphasized that all the issues which the Advisory Committee has identified in the concluding remarks of its opinions as being most relevant are also addressed in the conclusions of the Committee of Ministers. This, taken together with the fact that the Committee of Ministers consistently recommends to states that they take appropriate account of the various findings of the Advisory Committee, continue their dialogue in progress with it and keep it regularly informed of new developments, in particular about the measures taken to implement the conclusions and recommendations set out in the resolutions,[30] not only shows the importance that the Committee of Ministers attaches to the

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29 As of 1 December 2005, the Committee of Ministers had adopted resolutions with respect to the following states parties: Denmark and Finland (on 31 October 2001); Hungary and Slovakia (on 21 November 2001); Liechtenstein, Malta and San Marino (on 27 November 2001); Croatia and Czech Republic (on 6 February 2002); Cyprus (on 21 February 2002); Romania (on 13 March 2002); Estonia and United Kingdom (on 13 June 2002); Italy (on 3 July 2002); Armenia, Germany and Moldova (on 15 January 2003); Ukraine (on 5 February 2003); Norway (on April 2003); Russian Federation (on 10 July 2003); Lithuania, Sweden and Switzerland (on 10 December 2003); Austria (on 4 February 2004); Ireland (on 5 May 2004); Azerbaijan (on 13 July 2004); Poland and Spain (on 30 September 2004); Serbia and Montenegro (on 17 November 2004); Albania and Bosnia and Herzegovina (11 May 2005); Former Yugoslav Republic of Macedonia (15 June 2005); and Slovenia (28 September 2005). On 28 September 2005, the Committee of Ministers adopted its first resolution under the second cycle of monitoring, namely on Croatia. All these resolutions are available at <http://www.coe.int/T/E/human_rights/minorities/>.

30 In this context, mention should be made of another novel feature of the monitoring process under the FCNM, the so-called follow-up procedure which consists of follow-up seminars organised by the Council of Europe and the state party concerned some time after the adoption of the pertinent resolution by the Committee of Ministers and which serve as a forum publicly to discuss, including with representatives of national minorities, the measures taken in response to opinion of the Advisory Committee and the conclusions and recommendations of the Committee of Ministers as well as current developments; as of 10 December 2005, the following follow-up seminars had taken place: in 2002, in Finland, Croatia, Estonia, Romania, and Hungary; in 2003, in Armenia, Germany, Slovakia, Ukraine, Moldova, and the Czech Republic; in 2004, in Cyprus, Italy, Russian Federation, Norway, and Lithuania; and in 2005, in Ireland, Sweden, Albania, Poland, the Former Yugoslav Republic of Macedonia, Serbia and Montenegro, and Bosnia and Herzegovina.

Advisory Committee in the context of the monitoring of the implementation of the state obligations flowing from the FCNM, but also justifies the conclusion that the findings of the Advisory Committee might be regarded as being central in interpreting the substantive provisions of the FCNM. They might, indeed, be considered as soft jurisprudence based on hard law.

b) OSCE

As mentioned in the introduction, the first OSCE High Commissioner on National Minorities, *Max van der Stoel,* decided from the outset of his activities not to limit himself to producing country-specific recommendations as a result of his insights, but to call on internationally recognized independent experts to draft recommendations and guidelines on issues and themes which had caught his attention during his work in a number of states.

The main purpose of these recommendations and guidelines is to achieve an appropriate and coherent application of relevant minority rights in the OSCE area and to serve as references for policy- and law-makers in OSCE member states. They seek to clarify the content of existing rights and aim to provide states with some practical guidance in developing policies and law which fully respect the letter and spirit of internationally agreed standards. At the same time, although they are by no means legally binding documents, they intent to reflect existing international legal standards and may be considered a kind of soft law. They are, in any case, a useful – if only additional – means of precisely identifying legally binding international standards.

As of now, the following documents have been elaborated:[31] The 1996 Hague Recommendations regarding the Education Rights of National Minorities; the 1998 Oslo Recommendations regarding the Linguistic Rights of National Minorities; the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life[32] as further developed by

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31 All accessible at http://www.osce.org/hcnm/documents/recommendations/.

32 For a discussion of the 1999 *Lund Recommendations* see K. DRZEWICKI, The Lund Recommendations on the Effective Participation of National Minorities in Public Life – Five Years After and More Years Ahead, 12 International Journal on Minority and Group Rights (2005), 123 ff.; K. HENRARD, 'Participation', 'Representation' and 'Autonomy' in the Lund Recommendations and their Reflections in the Supervision of the FCNM and Several Human Rights Conventions, 12 Interna-

the 2001 Warsaw Guidelines to Assist National Minority Participation in the Electoral Process, and the 2003 Guidelines on the Use of Minority Languages in the Broadcast Media.

c) Conclusion

Based on these considerations, it seems justified to use the following documents as sources for the subsequent task of identifying the evolving substantive standards for minority protection. Judgments of the ECtHR which constitute hard jurisprudence based on hard law are still rather infrequent and, in view of the limited relevance of the ECHR for minority issues, relate only to a small number of rights relevant for minority protection. The major source for the findings of the following section will accordingly be the opinions of the Advisory Committee which, at least insofar as they are explicitly or implicitly supported by the Committee of Ministers, constitute soft jurisprudence based on hard law and concern all rights relevant for minority protection. An additional source are the recommendations and guidelines on issues of great relevance for minority protection which are elaborated by independent experts at the request by the HCNM, notwithstanding that they constitute at best soft law.

2. Evolving substantive standards for minority protection

Based on an analysis of the aforementioned sources, this section will group the – evolving –substantive standards for minority protection into the following categories: aspects of the right of national minorities to a distinct identity; non-discrimination and effective equality; intercultural dialogue and tolerance; political rights; media rights; linguistic rights; educational rights; participatory rights; and free trans-boundary contacts. In the context of discussing these aspects, it will also approach the question of whether recent developments in the Council of Europe and the OSCE have contributed to clarifying two very basic and quasi-eternal issues of international minority protection: Who is entitled to minority rights, i.e. the issue of the definition

tional Journal on Minority and Group Rights (2005), 133 ff.; and S. HOLT, The Lund Recommendations in the Activities of the HCNM, 12 International Journal on Minority and Group Rights (2005), 169 ff.

of the term 'national minority', and are those rights individual or group rights?

a) The right to a distinct identity (self-identification, protection and promotion of the distinct identity, prohibition of forced assimilation)

The right to, and the respect for, the distinct identity of a national minority is the most fundamental right in the field of minority protection; it is its *Grundnorm*, its *conditio sine qua non*. There can be no minority protection without recognition of this right, and it seems that there is no controversy as to the existence of this rule as such. The real – and equally fundamental – problem is, however, the following: under what conditions does a group of persons constitute a national minority in the sense of international law?

aa) Definition of the term 'national minority'

This leads to the above-mentioned issue of the definition of the term 'national minority' in international law. It is well known that, notwithstanding serious efforts, there is as yet no such definition which is accepted by all concerned, in particular by the states and minorities themselves. However, there seem to be some basic elements which are common to all such definitions and which may be traced back to the proposal made by FRANCESCO CAPOTORTI in the late 1970s:[33] they usually include some objective elements and one subjective element. The basic element is, of course, constituted by the distinctive features (e.g. history, language, religion, ethnicity, lifestyle) of the relevant minority group as compared with the majority population of a given state. Additional objective elements are the numerical inferiority of minorities and their non-dominant position. The necessary subjective element could be called the common will of a group's members to preserve their distinctive characteristics, which is generally implicit in cooperative efforts to preserve and defend their ethnic, religious or linguistic identity and refusal to be assimilated by the majority. While these elements seem to be recognized, in principle, by all parties concerned, the current discussion mainly concerns the two following issues: does a

[33] F. CAPOTORTI, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1(1979).

group need to have resided for a certain minimum period of time in the territory in which they live or, in other words, do they need to have a certain historic link to that territory; and, can only those persons belong to a national minority who have the citizenship of the state in which they – and the minority in question – live? This question is also known as the issue of *old v. new minorities* and it should be stressed that the recent practice of European states within the Council of Europe and the OSCE does not allow for any answer, but only for the identification of a certain trend.

Ultimately, however, this issue seems to boil down to the question of whether the existence of the subjective element – i.e. the common will of the persons concerned to preserve what they consider to constitute their distinct identity – is sufficient, or whether state authorities have the power to deny such persons recognition as a national minority based on the argument that (some of) the objective criteria are not fulfilled. In other words, we are faced with the issue of *self-identification v. state recognition*.

An analysis of the recent practice of the European Court of Human Rights under the ECHR and Advisory Committee and Committee of Ministers under the FCNM does not provide any clear guidance. As concerns the jurisprudence of the Court, it must be pointed out that it did not need to address this problem until very in its recent judgment in the *Gorzelik* case, and even here the Court dealt with it only in the context of its control of the 'margin of appreciation' held by the national authorities when applying the provisions of the ECHR. In the series of cases involving aspects of the traditional lifestyle of Travellers in the United Kingdom,[34] the question was not whether that state had recognized this group as a national minority, but 'only' whether the measures applied (resulting in a lack of adequate halting sites for Travellers or the prohibition of the Horsmonden Horse Fair) constituted unlawful interferences with the right to private life protected under Article 8 ECHR or the freedom of assembly guaranteed under Article 11 ECHR, or whether they could be considered to remain within the *margin of appreciation*, and thus did not amount to a violation of these provisions. As is well known, the Court ruled in favour of the latter alternative.

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[34] See the judgments in the *Buckley*, *Chapman* and *Gypsy Council* cases (*supra* notes 19 and 20).

Similar questions had to be dealt with by the Court in cases involving the prohibition of a political party, the refusal to register an association, or the prohibition of a manifestation by an organization, the aim of all of which was to promote the interests of national minorities. Again, at least in the *United Communist Party of Turkey*, *Sidiropoulos* and *Ilinden* cases,[35] the issue to be decided was not the recognition of a Kurdish minority in Turkey or a Macedonian minority in Greece or in Bulgaria, but could – at least in the understanding of the Court – be limited to the question of whether the relevant measures were proportionate and, thus, compatible with Article 11 ECHR or whether the national authorities had transgressed their *margin of appreciation*; here, the Court decided in favour of the former alternative and declared that the measures constituted violations of Article 11 ECHR.

The real test, however, was expected to be the *Gorzelik* case.[36] Here, the Polish authorities had refused to register an association which, according to its memorandum of association, identified itself as an association of the Silesian national minority. The main argument of the Polish authorities, which had been accepted by the Polish Supreme Court in its judgment of 18 March 1998, was that the Silesians did constitute a distinct ethnic group but not a national minority in the sense of Polish domestic law. The Polish authorities and courts also relied on the argument that such registration would result in a non-existent national minority taking advantage of the privileges conferred on genuine national minorities, in particular under the 1993 Elections Act.[37] The Court, sitting as a Grand Chamber, began by stating that, in view of the very different factual situations of national minorities in Europe, there was no uniform pan-European definition of the term 'national minority'; therefore, the Court concluded that it was „both inevitable and consistent with the adjudicative role vested in them for the national courts to be left with the task of interpreting the notion of 'national minority' as distinguished from an 'ethnic minority', within the meaning of the Constitution, and assessing whether the applicants' association qualified as an 'organization of a national minority'".[38] Therefore, it was indeed

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35 *Supra* note 21.

36 *Supra* note 21; for a detailed discussion of this judgment see HOFMANN (note 22), 1020 ff.

37 See para. 36 of the ECtHR judgment in the *Gorzelik* case.

38 See para. 70 of the ECtHR judgment in the *Gorzelik* case.

decisive whether the refusal to register the association represented by Mr. *Gorzelik* was justified as necessary in a democratic society. In this regard, the Grand Chamber first declared that the Polish authorities had acted within their margin of appreciation: „The Court accepts that the national authorities, and in particular the national courts, did not overstep their margin of appreciation in considering that there was a pressing social need, at the moment of registration, to regulate the free choice of associations to call themselves an 'organization of a national minority', in order to protect the existing democratic institutions and election procedures in Poland and thereby, in Convention terms, to prevent disorder and to protect the rights of others."[39] The second and final point, then, was to assess whether the refusal to register the association was proportionate; in this regard the Grand Chamber stressed that this measure was not aimed at preventing the association from pursuing its goal of promoting the distinctive features of the Silesians, but only to prevent the abuse of privileges contained in Polish electoral law: „it was not the applicants' freedom of association *per se* which was restricted by the State. The authorities did not prevent them from forming an association to express and promote distinctive features of a minority but from creating a legal entity which, through registration under the Law on Associations and the description it gave itself in paragraph 30 of its memorandum of association, would inevitably become entitled to a special status under the 1993 Elections Act. Given that the national authorities were entitled to consider that the contested interference met a 'pressing social need' and given that the interference was not disproportionate to the legitimate aim pursued, the refusal to register the applicants' association can be regarded as having been 'necessary in a democratic society' within the meaning of Article 11 § 2."[40]

When analyzing this judgment, it becomes clear that the Court was not prepared to contribute substantially to the discussion on the conditions under which a distinct group of persons constitutes a national minority in the legal sense. It rather sought for ways to get around that decision – an attitude in favour of which valuable reasons of 'judicial policy' might indeed exist, although there remains a deep feeling of an opportunity missed. However, when comparing the judgments in *United Communist Party*, *Sidiropoulos*,

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39 See para. 103 of the ECtHR judgment in the *Gorzelik* case.

40 See para. 106 of the ECtHR judgment in the *Gorzelik* case.

and *Ilinden* on the one hand and *Gorzelik* on the other hand, the following conclusions might be drawn: the first three cases make it clear that the intention to take measures in favour of a national minority does not *per se* threaten national security and, therefore, does not as such justify restrictive state measures. In contrast thereto, *Gorzelik* dealt with a situation where the registration of an association would have implied the enjoyment of certain privileges, of certain positive measures, not mandated by international law. It seems that the Court is of the opinion that, at least in the latter circumstances, it is not only the primary responsibility of the national authorities to decide whether a certain group fulfils the necessary criteria to benefit from such positive measures, but that, in such situations, the Court will give the national authorities a wider margin of appreciation than in the former cases. At this time it is, of course, pure speculation, but one could imagine that the Court would only declare that a state's margin of appreciation was being overstepped if the refusal of the national authorities to register an association as an organization of a national minority would be, in light of the factual situation, clearly unjustified or arbitrary, and therefore, amounted to discrimination in comparison with other – recognized – national minorities. To give an example taken from German electoral law: to grant, e.g., a political party representing the Danish minority the privilege provided for in § 6 (6) German Federal Elections Act (exemption from the 5% threshold) but not to accord it to a political party representing the Frisian or Sorbian minority, would be clearly unjustified.

To conclude the analysis of the *Gorzelik* judgment, it is quite important to note that the Grand Chamber explicitly held that, since international law does not provide for a generally accepted definition of the term 'national minority', states are under no international law obligation to apply, in their domestic legal order, any such specific definition derived from international law but may rely on any definition provided for in their domestic legislation. This might indeed be interpreted as if the Court had joined the ranks of those who argue that *self-identification* alone is not sufficient to oblige states to recognize a certain group as a national minority – at least as long as such a status results in certain benefits, privileges or positive measures. And indeed there might be good reasons to accept that the basic decision whether a group of persons constitutes a national minority depends on the self-identification of these persons, whereas in a situation in which a state, in its legislation, accords certain positive measures to national minorities, the basic decision whether a group of persons constitutes a national minority in the

sense of this national legislation is taken by the authorities of that state (state recognition), and such a decision would be subject to only limited international scrutiny, i.e. whether it is arbitrary or not.

Now it is interesting to note that this approach of the Court reminds of the one taken by the Advisory Committee in situations in which states refuse to recognize certain groups as national minorities for the purposes of the FCNM: as has been explained elsewhere,[41] the Advisory Committee considers that, in the absence of a definition of the term 'national minority' in the FCNM, the states parties must examine the personal scope of application to be given to the FCNM in the respective countries. The position of any government, as reflected in declarations made on ratification or statements in a state report on the personal applicability of the FCNM, is deemed to be the outcome of this examination. In this respect, states parties have a certain margin of appreciation in order to take into due account the specific circumstances prevailing in their countries; on the other hand, this margin of appreciation must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3 FCNM. In particular, the implementation of the FCNM must not be a source of arbitrary or unjustified distinctions. Therefore, the Advisory Committee considers it part of its duty to verify that no such arbitrary or unjustified distinctions have been made. If, in the view of the Advisory Committee, this was clearly the case, such assessment would be clearly spelled out in the relevant country-specific opinion.[42] In other – less clear – situations the Advisory Committee calls on the states parties concerned to discuss the issue

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41 See HOFMANN (note 24), 7 f.

42 See, e.g., paras. 17-22 of the opinion on Albania in which the Advisory Committee held that the *a priori* exclusion of the Egyptians as a group which had resided for centuries in Albania from the personal scope of application of the FCNM was incompatible with Article 3 FCNM; and paras. 13-25 of the (first) opinion on Denmark where the same conclusion was reached with respect to the Roma – a conclusion which was explicitly confirmed in the pertinent Resolution of the Committee of Ministers; in view of the continued unwillingness of the Danish authorities to grant protection to the Roma under the FCNM, the Advisory Committee repeated and, thus, confirmed its above conclusion in paras. 50-53 in its (second) opinion on Denmark.

with representatives of the group concerned – as it did in its opinion on Poland with respect to the Silesians![43]

Finally, as regards the issue of 'new' minorities, i.e. whether persons who do not have the citizenship of their country of residence or who belong to a group which has only recently moved to the area in which they reside, no clear answer can be given. The situation under domestic law seems to be quite varied, as is also reflected in the pertinent statements made by states parties to the FCNM, either upon its ratification or in the relevant state report. Whereas the Court had, as yet, not been faced with this problem, the Advisory Committee consistently held that some of the provisions of the FCNM – such as Article 11 (3) with its explicit reference to areas traditionally inhabited by persons belonging to a national minority – would obviously be applicable only to 'old' minorities. In contrast thereto, it is clear that Article 6 FCNM applies to „all persons living on the territory" of a given state party and, thus, also to persons belonging to 'new' minorities.[44] Furthermore it seems possible to argue that other provisions, such as Articles 3, 5, 7 and 8 FCNM could also, at least in certain circumstances, be applicable to persons belonging to 'new' minorities. Based on this analysis, the Advisory Committee opted for a flexible approach which makes it possible to consider the inclusion of persons belonging to such groups in the application of the FCNM on an article-by-article basis. As a result, the Advisory Committee expressed its opinion that the competent state authori-

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43 See para. 28 of the opinion on Poland; see also, e.g., paras. 12-20 of the opinion on Austria concerning inhabitants of Vienna of Polish origin; paras. 14-18 of the opinion on Romania concerning the Csangos; paras. 24-25 of the (first) opinion on Slovenia concerning the German-speaking minority – a concern echoed in para. 36 of the (second) opinion on Slovenia; paras. 23-24 of the opinion on Spain concerning the population of Berber origin in Ceuta and Melilla; paras. 13-19 of the opinion on Sweden concerning the inhabitants of Scania and Gotland; paras. 24-25 of the opinion on the Former Yugoslav Republic of Macedonia concerning Bosniacs and Egyptians; paras. 13-16 of the opinion on Ukraine concerning the Rusyins; and paras. 11-16 of the opinion on the United Kingdom concerning the Cornish people.

44 See, e.g., para. 35 of the opinion on Austria; para. 76 of the (second) opinion on Denmark; paras. 137-40 of the opinion on Germany; para. 40 of the (first) and para. 78 of the (second) opinion on Italy; para. 36 of the opinion on Norway; and para. 37 of the opinion on Sweden.

ties should consider the issue in consultation with those concerned.[45] It made it clear, however, that it strongly favours an inclusive approach, and would either welcome such an approach by a government[46] or would support developments towards *de facto* implementation of such an approach.[47] The HCNM has also consistently favoured such an inclusive approach; on the other hand, it must be seen that he was mainly concerned with situation in which the 'new' minorities had only recently come into existence, usually as a result of the restoration of the independence of the Baltic states, the dissolution of the Soviet Union or the break-up of Yugoslavia. There might be good reasons to differentiate between persons who have come to a specific area as citizens of the state of which this area was then a part and – even more so – who have been born there, on the one hand, or persons who have moved to another country as migrant workers and might never have expected to develop close links with the state in which they reside. However, it seems justified to state that there is an increasing tendency to favour an inclusive approach which would make it possible, albeit on a right-by-right or article-by-article basis, to extend the personal applicability of minority rights also to persons belonging to such 'new' minorities.

Two further issues have to be briefly mentioned: in the international discussion on the term 'national minority', there is no unanimous view as to whether persons who differ from the majority population only as regards their religion, might be considered as forming a national minority and, as a result, fall under the personal scope of application of international instruments aimed at the protection and promotion of the distinct identity of national minorities. At least as regards the FCNM, this issue has been solved by the practice of the Advisory Committee: in its opinion on Cyprus, it dealt

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45 See, e.g., para. 20 of the opinion on Austria; para. 25 of the opinion on Bosnia and Herzegovina; para. 18 of the opinion on Germany; para. 14 of the (first) opinion on Hungary; para. 17 of the (first) opinion on Italy; para. 29 of the opinion on Poland; para. 24 of the opinion on Serbia and Montenegro; para. 24 of the opinion on Switzerland; and para. 25 of the (first) and paras. 40-41 of the (second) opinion on Slovenia.

46 See, e.g., para. 14 of the opinion on the United Kingdom.

47 See, e.g., para. 20 of the opinion on Azerbaijan; para. 17 of the (first) and paras. 27-30 of the (second) opinion on Croatia; paras. 25-29 of the (second) opinion on the Czech Republic; para. 17 of the (first) and paras. 25-27 of the (second) opinion on Estonia; and para. 16 of the opinion on Sweden.

extensively with the situation of the Maronites and, to a lesser extent, with other religious groups such as the Latin and Armenian communities.[48] This position was later shared by the Committee of Ministers.

Another highly controversial issue is the question of whether persons belonging to an indigenous people can be considered a national minority in the legal sense. The Advisory Committee held the opinion that the recognition of a group of persons as an indigenous people does not exclude persons belonging to that group from benefiting from protection afforded by the FCNM, since the fact that a group of persons might be entitled to a different form of protection cannot by itself justify their exclusion from other forms of protection.[49]

bb) Right to self-identification and prohibition of forced assimilation

The right freely to identify oneself as a person belonging – or not belonging – to a national minority, and the corresponding prohibition of any measures of forced assimilation, constitute further fundamental principles of international law with respect to national minorities as witnessed by para. 32 of the 1990 OSCE Copenhagen Final Document and Articles 3 (1) and 5 (2) FCNM.[50]

As yet, there do not seem to be a larger number of standards evolved in this respect. The one exception concerns the issue of collecting personal data for statistical purposes, in particular in the context of censuses. In this respect it is clear, at least as concerns Article 3 (1) FCNM, that while persons should be encouraged to identify themselves as belonging to a national minority, it would be incompatible with this provision to include in a census questionnaire mandatory questions concerning a person's ethnic or national affilia-

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48 See paras. 18-21 of the opinion on Cyprus; see also para. 19 of the opinion on Armenia with respect to the Yesidi.

49 See paras. 21-29 of the opinion on Finland (Sami); paras. 9 and 19 of the opinion on Norway (Sami); para. 26 of the opinion on Russia (numerically small nations of the North), and para. 18 of the opinion on Sweden (Sami).

50 On Article 3 (1) FCNM see the commentary by H.J. HEINTZE, in: WELLER (note 1), 108 ff.; and on Article 5 (2) the commentary by G. GILBERT, in: WELLER (note 1), 172 ff.

tion.[51] On a more general level, it was held that any collection by state officials of such data on the ethnic or national affiliation of a person without the explicit and informed consent of the persons concerned would be incompatible with Article 3 (1) FCNM.

cc) Obligation to protect and promote the distinct identity of national minorities including by positive measures

Another cornerstone of international minority rights law is the legal obligation of states to protect and promote the distinct identity of national minorities, including by positive measures, as reflected in paras. 32 and 33 of the 1990 OSCE Copenhagen Final Document and Articles 4 (2) and 5 (1) FCNM.[52]

Throughout its practice, the Advisory Committee welcomed state measures in support of cultural activities of national minorities and stressed that they should be implemented in close contact with the persons concerned.[53] Moreover, it strongly called for a solution to the Sami land rights issue[54] and

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51 See, e.g., para. 21 of the opinion on Azerbaijan; para. 30 of the opinion on Bosnia and Herzegovina; para. 19 of the (first) opinion on Estonia; para. 43 of the (second) opinion on Italy; para. 31 of the (second) opinion on Moldova (welcoming the fact that, during the 2004 census, any answers to question on ethnic affiliation were optional); para. 24 of the opinion on Poland; para. 27 of the opinion on the Russian Federation; para. 27 of the opinion on Serbia and Montenegro (welcoming the position of the authorities that any answers to questions on ethnic affiliation are voluntary); and para. 22 of the opinion on Ukraine.

52 On Article 4 (2) FCNM see the commentary by G. ALFREDSSON, in: WELLER (note 1), 145 ff.; and on Article 5 (1) FCNM see the commentary by G. GILBERT, in: WELLER (note 1), 154 ff.

53 See, e.g., paras. 24-27 of the opinion on Austria; paras. 60-67 of the (second) opinion on the Czech Republic; paras. 27 and 28 of the (first) and paras. 60-62 of the (second) opinion on Estonia; paras. 25-28 of the opinion on Germany; paras. 37-39 of the (first) and paras. 66-70 of the (second) opinion on Italy; paras. 38-40 of the (first) and paras. 52-54 of the (second) opinion on Moldova; paras. 42-43 of the opinion on Poland; paras. 30 and 31 of the (first) opinion on Romania; paras. 46-48 of the opinion on the Russian Federation; paras. 22-24 of the (first) opinion on Slovakia; and paras. 43-45 of the opinion on the Former Yugoslav Republic of Macedonia.

54 See paras. 21-23 of the opinion on Finland; para. 38 of the opinion on Norway, and paras. 30-32 of the opinion on Sweden.

noted with concern the absence of adequate stopping sites for Travellers and the effect that this has on their ability to maintain and develop their culture and to preserve the essential elements of their identity, of which travelling is an important aspect[55]. The Advisory Committee also expressed its deep concern at the forced dissolution of Horno (a municipality with Sorbian character) aimed at allowing lignite quarrying to continue, as such measures are likely to make the preservation of the Sorbian minority identity more difficult due to the resulting population displacement.[56]

dd) Minority rights: individual or group rights?

For some time, scholars and politicians discussed whether minority rights were to be construed as group rights – as was the case during the inter-war period under the system of minority rights protection established under the League of Nations – or as individual rights which, however, might be exercised in community with others. At least for the time being, this discussion seems to be closed as concerns the European level: both the 1990 OSCE Copenhagen Final Document, in its para. 32, and Article 3 (2) FCNM clearly state that persons belonging to national minorities may exercise their right individually or in community with others. They thus recognize the possibility of a joint exercise of those rights and freedoms, which is distinct from the notion of 'group' or 'collective' rights. This discussion seems to be more or less closed, which is also reflected in the fact that this issue has never been raised in the opinions of the Advisory Committee.

It should be stressed that this situation also corresponds to that in the vast majority of domestic legal systems in Europe: with very few exceptions, such as Hungary and Slovenia, OSCE and Council of Europe member states construe their domestically guaranteed minority rights as individual rights

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55 See paras. 48-55 of the opinion on Ireland; para. 58 of the (second) opinion on Italy; para. 47 of the opinion on Spain; paras. 34-38 of the opinion on Switzerland; and paras. 40-42 of the opinion on the United Kingdom. See also the ECtHR judgment in the *Buckley* case (*supra* note 19).

56 See paras. 29-32 of the opinion on Germany.

which, however, may be exercised in community with others.[57] It must be emphasized, however, that there are no international law impediments against a state according collective or group rights to the national minorities residing on its territory.

b) Non-discrimination and effective equality

The prohibition of discrimination and the right to effective equality not only constitute a fundamental element of international human rights law in general but are of obvious and special relevance for persons belonging to national minorities. In the European context, this is already well reflected in paras. 31 and 33 of the 1990 OSCE Copenhagen Final Document and Article 4 FCNM,[58] and will be further strengthened upon entry into force of the 12th Additional Protocol to the ECHR. This will add an independent right to non-discrimination as in Article 26 ICCPR, to the accessory right already provided for in Article 14 ECHR.

The Advisory Committee consistently stressed that Article 4 FCNM requires not only the enactment of legislation protecting all persons against discrimination, both by public authorities and private entities, but also effective remedies against such acts of discrimination.[59] It also noted the existence in some countries of wide discrepancies between government statistics and the estimates of national minorities themselves as to the number of persons belonging to those national minorities. Since the absence

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57 On this issue, see, e.g., R. HOFMANN, Minority Rights: Individual or Group Rights? A Comparative View on European Legal Systems, 40 German Yearbook of International Law (1998), 356 ff.

58 On Article 4 FCNM see the commentary by G. ALFREDSSON, in: WELLER (note 1), 141 ff.

59 See, e.g., para. 21 of the opinion on Austria; para. 24 of the opinion on Azerbaijan; paras. 33-36 of the opinion on Bosnia and Herzegovina; paras. 21-25 of the (first) and apara. 42 of the (second) opinion on Croatia; paras. 23 and 24 of the opinion on Cyprus; paras. 24-26 of the (first) and para. 39 of the second opinion (welcoming important improvements) on the Czech Republic; para. 25 of the (first) opinion on Denmark; para. 22 of the opinion on Germany; para. 31 of the opinion on Serbia and Montenegro; para. 17 of the (first) opinion on Slovakia; paras. 26-28 of the (first) opinion on Slovenia; paras. 25-28 of the opinion on Spain; paras. 28-29 of the opinion on the Former Yugoslav Republic of Macedonia; and paras. 26-28 of the opinion on Ukraine.

of accurate data could seriously hamper the ability of the state to target, implement and monitor measures ensuring the full and effective equality of persons belonging to national minorities, the Advisory Committee called on governments to identify ways of gathering reliable statistical data,[60] even in states where, in view of the historical context and the particularly sensitive situation, exhaustive statistical data pertaining to national minorities cannot be collected.[61] More specifically, the Advisory Committee stressed that, in many countries, Roma face a broad range of socio-economic problems to a disproportionate degree. Therefore, it welcomed pertinent government action, and stressed that when implementing such programmes, particular attention should be paid to the situation of Roma women.[62]

Finally, while refraining from addressing general issues of citizenship legislation, the Advisory Committee welcomed legislative developments which, in some states, contributed to the elimination of difficulties faced in an inequitable manner by persons belonging to national minorities, as regards attempts to invoke relevant norms in order to clarify citizenship issues.[63]

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60 See, e.g., para. 22 of the opinion on Austria; para. 27 of the opinion on Azerbaijan; para. 29 of the (first) opinion on Croatia; para. 28 of the (first) opinion on the Czech Republic; para. 69 of the (first) opinion on Hungary; para. 35 of the opinion on Poland; para. 26 of the (first) opinion on Romania; para. 44 of the opinion on Serbia and Montenegro; and para. 21 of the (first) opinion on Slovakia; and paras. 41-42 of the opinion on the Former Yugoslav Republic of Macedonia.

61 See, e.g., para. 21 of the opinion on Germany; para. 27 of the opinion on Norway; and para. 41 of the opinion on Spain.

62 See, e.g., paras. 44-51 of the opinion on Bosnia and Herzegovina; paras. 69-74 of the (second) opinion on Croatia; paras. 28-30 of the (first) and paras. 49-59 of the (second) opinion on the Czech Republic; paras. 18 and 19 of the (first) opinion on Hungary; paras. 55-60 of the (second) opinion on Italy, paras. 33-36 of the (first) and paras. 43-48 of the (second) opinion on Moldova; paras. 36-39 of the opinion on Poland; paras. 27-29 of the (first) opinion on Romania; paras. 39-43 of the opinion on Serbia and Montenegro; paras. 20 and 21 of the (first) opinion on Slovakia; paras. 62-74 of the (second) opinion on Slovenia; and paras. 31-38 of the opinion on Spain.

63 See, e.g., para. 31 of the (first) opinion on the Czech Republic; para. 27 of the (first) and paras. 28-30 of the (second) opinion on Croatia; para. 26 of the (first) and paras. 46-50 of the (second) opinion on Estonia; paras. 30 and 31 of the opinion on Lithuania; paras. 37 and 38 of the opinion on the Russian Federation; para. 32 of the opinion on Serbia and Montenegro; paras. 30-32 of the (first) and

c) Inter-cultural dialogue and tolerance

The obligation of states to promote inter-cultural dialogue and inter-ethnic tolerance belongs, in times characterized by a certain revival of acts of incitements to racial hatred, anti-semitism, xenophobia and persecution based on the victims' affiliation with particular groups, to the universally accepted norms of general international law. In European law this is particularly reflected in paras. 30 and 40 of the 1990 OSCE Copenhagen Final Document, Article 6 FCNM[64] and the work carried out by ECRI.

Notwithstanding these principles of international law, the existence of pertinent domestic legislation and the quasi-unanimous view of politicians as to the necessity of combating such incidents, the Advisory Committee identified as an apparently wide-spread and disconcerting phenomenon, the ongoing discrimination against Roma in many societal settings, such as in admission to places of entertainment and in the field of employment and housing.[65] It also noted with concern instances of physical violence or threats against Roma and the existence of anti-Roma sentiment among members of the police forces, amounting even to acts of police brutality against Roma.[66]

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paras. 56-59 of the (second) opinion on Slovenia; paras. 36-37 of the opinion on the Former Yugoslav Republic of Macedonia; and para. 29 of the opinion on Ukraine.

64 On Article 6 FCNM see the commentary by G. GILBERT, in: WELLER (note 1), 177 ff.

65 See, e.g., paras. 67-69 of the opinion on Bosnia and Herzegovina; paras. 35-38 of the (first) and paras. 96-98 of the (second) opinion on the Czech Republic; para. 33 of the opinion on Germany; para. 25 of the opinion on Finland; paras. 35-43 of the opinion on Ireland; para. 25 of the (first) opinion on Italy; para. 49 of the opinion on Poland; para. 27 of the (first) opinion on Romania; para. 39 of the opinion on Serbia and Montenegro; para. 39 of the (first) opinion on Slovenia; para. 18 of the (first) opinion on Slovakia; para. 32 of the opinion on Spain; para. 24 of the opinion on Sweden; and para. 52 of the opinion on the Former Yugoslav Republic of Macedonia.

66 See, e.g., para. 40 of the opinion on Albania; para. 70 of the opinion on Bosnia and Herzegovina; paras. 39-43 of the (first) and para. 97 of the (second) opinion on the Czech Republic; para. 85 of the (second) opinion on Italy; paras. 40 and 41 of the (first) opinion on Romania; para. 58 of the opinion on Serbia and Montenegro; para. 28 of the (first) opinion on Slovakia; para. 56 of the opinion on Spain; para. 38 of the opinion on Sweden; and para. 53 of the opinion on the Former Yugoslav Republic of Macedonia.

This serious situation was further aggravated by the fact that some media continue to present information in such a way as to strengthen existing negative stereotypes of minorities, in particular of the Roma. The Advisory Committee, therefore, again called on governments to support measures aimed at promoting accurate and balanced reporting on minority questions, while recognizing freedom of expression as a most fundamental basis for any democratic society.[67]

Finally, in line with the above-mentioned wide scope of personal applicability of Article 6 FCNM, the Advisory Committee identified a number of serious problems faced by non-citizens, including asylum-seekers and migrant workers. These pertain, in particular, to incidents of xenophobia, discrimination as concerns access to work and remuneration, and over-representation in special schools for under-achievers, and correspondingly, under-representation at institutions of secondary and tertiary education.[68]

d) Freedom of religion and political rights (freedom of assembly, association, expression, thought, and conscience)

It is a truism that freedom of religion and political rights such as freedoms of assembly, association, expression, thought and conscience belong to the very basics of any truly democratic society. Moreover, in view of the special situation of national minorities, they have great relevance for persons belonging to such minorities. Therefore, it is important that they are not only

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67 See, e.g, para. 32 of the opinion on Austria; para. 66 of the opinion on Bosnia and Herzegovina; para. 33 of the (first) and para. 84 of the (second) opinion (welcoming important improvements) on Croatia; para. 37 of the (first) and para. 90 of the (second) opinion on the Czech Republic; para. 35 of the (first) and paras. 80-82 of the (second) opinion on Italy; paras. 34 and 35 of the (first) opinion on Romania; para. 62 of the opinion on the Russian Federation; para. 61 of the opinion on Serbia and Montenegro; para. 26 of the (first) opinion on Slovakia; para. 40-41 of the (first) and para. 100 of the (second) opinion on Slovenia; para. 49 of the opinion on Spain; para. 41 of the opinion on Switzerland; and para. 55 of the opinion on the Former Yugoslav Republic of Macedonia.

68 See, e.g., paras. 33-35 of the opinion on Austria; paras. 76-84 of the (second) opinion on Denmark; para. 35 of the opinion on Germany; para. 40 of the (first) and para. 77 of the (second) opinion on Italy; para. 44 of the opinion on Lithuania; para. 49 of the opinion on Spain; para. 44 of the opinion on Switzerland; and paras. 47 and 51 of the opinion on the United Kingdom.

guaranteed in the pertinent articles of the ECHR, but also referred to in para. 32 of the 1990 OSCE Copenhagen Final Document and protected under Articles 7 and 8 FCNM.[69]

As regards freedom of religion, there seems to be little specific practice concerning the special situation of national minorities. The main point might be that, both under the OSCE principles and the FCNM, it has been recognized that 'religious' minorities constitute 'national' minorities in the legal sense.[70] Moreover, as the European Court of Human Rights held in the *Metropolitan Church of Bessarabia* case, the refusal of state authorities to register the church of a religious minority might amount to a violation of Article 9 ECHR.[71] Whereas the pertinent practice of the Advisory Committee mainly related to very specific issues often connected with disputes concerning property rights of churches and other religious monuments, it might be useful to stress that the Advisory Committee, while recognizing that Article 8 FCNM does not exclude all differences in the treatment of religious entities, was of the opinion that such differences must not result in undue limitations of the rights of persons belonging to national minorities.[72] More specifically, it held that the absence of comprehensive legislation to protect individuals from religious discrimination or religious hatred has an adverse effect on persons belonging to national minorities, in particular if blasphemy laws are restricted solely to one religion.[73] Furthermore, the Advisory Committee, while considering that a state church system is not in itself in contradiction with Article 8 FCNM and that the latter does not entail an obligation *per se* to fund religious activities, was of the opinion that, where such funding exists, it must be in conformity with the principle of equality

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69 On Articles 7 and 8 FCNM see the commentaries by Z. MACHNYIKOVA, in: WELLER (note 1), 193 ff. and 225 ff., respectively.

70 See *supra* text accompanying note 47.

71 ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Judgment of 13 December 2001, Report of Judgments and Decision 2001-XII.

72 See, e.g., para. 38 of the (first) and para 101 of the (second) opinion (welcoming important improvements) on Croatia; paras. 79-81 of the (second) opinion on Moldova (concerning difficulties to register religious organisations); and para. 67 of the opinion on Serbia and Montenegro.

73 See paras. 57-61 of the opinion on the United Kingdom.

before the law and equal protection of the law as guaranteed under Article 4 FCNM.[74]

With respect to political rights, freedom of association and assembly was of high relevance for the jurisprudence of the European Court of Human Rights relating to national minorities. From the pertinent jurisprudence in the *United Communist Party*, *Sidiropoulos* and *Ilinden* cases reported above,[75] the important conclusion may be deduced that activities of political organizations aiming at the promotion of the distinct identity of national minorities do not *per se* constitute a threat to national security and must, therefore, not be prohibited unless there are additional reasons, e.g. indications that such aims shall be achieved by non-democratic means. The same approach has been followed by the Advisory Committee.[76] Especially relevant is the view that domestic legislation prohibiting as such the establishment of political parties of national minorities raises considerable problems as to its compatibility with Article 7 FCNM.[77]

e) Media rights

Media rights including, in particular, the right to have adequate access to, and visibility in, public audio-visual media and to establish private print and audio-visual media (sound radio and television broadcasting) are obviously of fundamental relevance for the protection and promotion of the distinct identity of national minorities. In an era in which societal developments are largely influenced by the media, information on, and created by, national minorities is clearly essential for the understanding of such distinct identities both by the majority population and the persons belonging to such minorities themselves. Moreover, since most national minorities in Europe have their own, distinct language as one criterion – and one of the most important – to distinguish them from the majority population, print and audio-visual media using such languages are essential for learning such languages as well as for

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74 See paras. 29 of the (first) and para. 110 of the (second) opinion on Denmark; and para. 29 of the opinion on Finland.

75 See *supra* text accompanying note 21.

76 See, e.g., paras. 43-45 of the opinion on Azerbaijan, and para. 49 of the (first) opinion on Moldova.

77 See paras. 68-70 of the opinion on the Russian Federation.

keeping them alive. This fundamental importance of media rights is, in addition to the general provision of Article 10 ECHR, well reflected in para. 32 of the 1990 OSCE Copenhagen Final Document and Article 9 FCNM.[78] It was also identified as one of the themes to be discussed at the international conference held in Strasbourg on 30-31 October 2003 to celebrate the fifth anniversary of the entry into force of the FCNM.[79]

Media rights of national minorities have so far not been of any major relevance for the jurisprudence of the European Court of Human Rights under Article 10 ECHR. As regards the practice of the Advisory Committee, it is important to note that the bulk of its concerns relates to situations of insufficient access of national minorities to public radio and television broadcasting programmes and the uneven allocation to different national minorities of financial and other resources relating to private radio and television programmes.[80] The Advisory Committee has, however, not yet been in a position to develop clear criteria which could be used in order to determine issues, such as „insufficient" access to, or „insufficient" coverage by, public media or „insufficient" financial funding of private radio and television programmes run by national minorities. Further work in this respect is clearly called for and it is to be hoped that the Advisory Committee will find the time to embark on such thematic work which would eventually result in the express identification of good practices or the establishment of standards which might then assist states parties in developing

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78 On Article 9 see the commentary by J. PACKER/S. HOLT, in: WELLER (note 1), 264 ff.

79 See the introductory report by K. JAKUBOWICZ, Persons Belonging to National Minorities and the Media, 10 International Journal on Minority and Group Rights (2003), 291 ff.

80 See, e.g., paras. 47-49 of the opinion on Albania; paras. 47-50 of the opinion on Armenia; paras. 38-40 of the opinion on Austria; paras. 50-52 of the opinion on Azerbaijan; paras. 40-42 of the (first) and paras. 107-109 of the (second) opinion on Croatia; paras. 53 and 54 of the (first) and paras. 107-109 of the (second) opinion on the Czech Republic; paras. 116-120 of the (second) opinion on Denmark; paras. 55-57 of the (first) and para. 85 of the (second) opinion on Estonia; paras. 44-47 of the opinion on Germany; paras. 88-92 of the (second) opinion on Italy; paras. 56 and 57 of the (first) and paras. 89-91 of the (second) opinion on Moldova; paras. 62-65 of the opinion on Poland; paras. 76-78 of the opinion on the Russian Federation; para. 62 of the opinion on Spain; paras. 42 and 43 of the opinion on Sweden; para. 62 of the opinion on the Former Yugoslav Republic of Macedonia; and paras. 43-47 of the opinion on Ukraine.

their domestic legislation and practice.[81] On the other hand, it is equally important to keep in mind that the large factual and legal differences characterizing the situation of national minorities in FCNM member states might make it very difficult to draft such precise standards to be applied everywhere; this might make it inevitable that the Advisory Committee focuses on situations which it deems to be incompatible with Article 9 FCNM.[82]

If, however, the Advisory Committee should embark on the task of standard setting in the field of audio-visual media, valuable guidance might be found in the above-mentioned Guidelines on the Use of Minority Languages in the Broadcast Media which have been elaborated, under the auspices of the HCNM, by independent experts and were adopted by them in October 2003.[83] These guidelines, which might be considered as some kind of soft law, consist of an enumeration of general principles such as freedom of expression, cultural and linguistic diversity, protection of identity, and equality and non-discrimination. They are concerned with pertinent state policies which should include, *inter alia*, the establishment of independent regulatory bodies and be geared towards inclusion of persons belonging to national minorities, and they deal with the issue of regulation by emphasizing, *inter alia*, that states may not prohibit the use of any language in the broadcast media and, while promoting the use of some languages, must not discriminate against minority languages, and that any regulation should take into due account the factual situation; and contain proposals for promoting the use of minority languages in the broadcast media.

Thus, whereas it seems justified to state that there is still much potential for substantial improvement as regards the situation in the audio-visual media, a more positive assessment applies in the field of print media. There are only a limited number of critical statements concerning mainly the lack of financial

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81 Cf. JAKUBOWICZ (note 79), 304 ff.

82 See, e.g., para. 144 of the opinion on the Russian Federation where it finds that the „overall *a priori* exclusion of the use of the languages of national minorities in federal radio and TV broadcasting, implied in the Law on Languages of the Peoples of the Russian Federation, is overly restrictive and not compatible with Article 9." See also for a similar prohibition – and assessment – para. 50 of the opinion on Azerbaijan.

83 See *supra* note 30.

support for print media owned by, and catering for the needs of, persons belonging to national minorities.[84]

f) Linguistic rights

Since most national minorities in Europe are characterized by their language, linguistic rights are of essential relevance to the protection and promotion of the distinct identity of such minorities. As a consequence, both the 1990 OSCE Copenhagen Final Document in its para. 32 and the FCNM in its Articles 10 and 11 provide for guarantees of such linguistic rights.[85]

Such linguistic rights include the right to use one's own language in the private and public spheres and, to some extent, in contacts with administrative and judicial bodies; the right to use one's own name in the minority language and the right to official recognition thereof; and the right to display, in a minority language, signs of a private nature and, under specific conditions, to display topographical signs in a minority language.

At the outset, it must be stressed that the Advisory Committee has, on several occasions, expressed its view that the FCNM does not preclude the existence of a state language. It has also recognized the legitimacy of measures to promote and to protect such state language, provided that such initiatives are implemented in a way that safeguards the rights of persons belonging to national minorities.[86] With respect to several states, the Advisory Committee concluded that there were considerable problems as to the practical implementation of domestic legislation providing for the use of

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84 See, e.g., para. 51 of the opinion on Armenia; para. 52 of the opinion on Lithuania; para. 44 of the opinion on Norway; para. 64 of the opinion on Spain; and para. 46 of the opinion on Sweden.

85 For a detailed survey of the linguistic rights see R. DUNBAR, Minority Language Rights Under International Law, 50 International and Comparative Law Quarterly (2001), 90 ff.; and on Article 10 and 11 FCNM see the commentaries by F. DE VARENNES, in: WELLER (note 1), 301 ff. and 329 ff., respectively.

86 See, e.g., paras. 53-55 of the opinion on Azerbaijan; para. 39 of the (first) and para. 92 of the (second) opinion on Estonia; para. 70 of the opinion on Lithuania; para. 81 of the (first) and para. 95 of the (second) opinion (welcoming considerable improvements) on Moldova; and para. 63 of the opinion on Ukraine.

minority languages in official dealings with administrative authorities.[87] More specifically, it explicitly welcomed legislation in Austria, the Czech Republic, Romania, Slovakia and the Former Yugoslav Republic of Macedonia which allowed for such use of minority languages in areas in which the minority population represented 10% (Austria) or 20% (Czech Rebulic, Romania, Slovakia and the Former Yugoslav Republic of Macedonia) of the overall population[88] while, in contrast, it declared a quota of 50% to be too high.[89] These statements might indeed be indicative of the Advisory Committee's future approach as regards the formulation of generally applicable standards. A final point should be mentioned: the Committee emphasized that if persons belonging to national minorities also have a command of the (dominant) language, this is not decisive, as the effective use of minority languages remains essential in consolidating the presence of minority languages in the public sphere.[90]

As to the right to use one's own name in the form of the minority language, the Advisory Committee strongly welcomed pertinent legislative reforms[91] and criticized cases in which persons were forced to use versions of their

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87 See, e.g., paras. 57-59 of the opinion on Armenia; paras. 56-57 of the opinion on Azerbaijan; paras. 54-56 of the opinion on Lithuania; paras. 66-67 of the opinion on Poland; paras. 80-85 of the opinion on the Russian Federation; paras. 48-50 of the opinion on Sweden; and para. 56 of the opinion on Switzerland.

88 See paras. 44-46 of the opinion on Austria; para. 10 of the (second) opinion on the Czech Republic explicitly welcoming new legislation; para. 49 of the (first) opinion on Romania; para. 36 of the (first) opinion on Slovakia; and para. 68 of the opinion on the Former Yugoslav Republic of Macedonia.

89 See paras. 79-81 of the opinion on Bosnia and Herzegovina; paras. 43-45 of the (first) opinion on Croatia, but see paras. 111-113 of the (second) opinion on Croatia where the Advisory Committee explicitly welcomed the lowering of the applicable threshold to one third of the population of the administrative unit concerned; paras. 39-41 of the (first) opinion on Estonia, but see paras. 95-98 of the (second) opinion on Estonia where the Advisory Committee explicitly welcomed pertinent improvements; para. 62 of the (first) opinion on Moldova; and paras. 49-53 of the opinion on Ukraine.

90 See, e.g., para. 49 of the opinion on Germany.

91 See, e.g., para. 58 of the (first) and para. 122 of the (second) opinion on the Czech Republic; and paras. 58 and 59 of the opinion on Norway.

names in the state language.[92] With respect to the right to display in a minority language „signs and other information of a private nature to the public", it concluded that the pertinent Estonian legislation was incompatible with Article 11 (2) FCNM as being overly restrictive; as a result thereof, the Estonian authorities changed the implementation of the pertinent legal provision in such a way that it is no longer incompatible with Article 11 (2) FCNM.[93] As concerns topographical signs, the Advisory Committee welcomed relevant possibilities available in certain states,[94] but criticized in some instances a lack of clarity in the pertinent legislation.[95] More specifically, it explicitly welcomed a judgment of the Austrian *Verfassungsgerichtshof* (Constitutional Court) in which it had ruled that, if a national minority formed more than 10% of the total population in an area over a long time, this was sufficient to entitle the inhabitants to the display of bilingual topographical indications.[96] The same positive assessment was given to Czech legislation by virtue of which bilingual topographical signs may be displayed if 10% of the population residing in a municipality consider themselves as persons belonging to the national minority concerned, and, of these, at least 40% so request.[97] In contrast, it considered a quota of 50% an obstacle to the effective exercise of such right[98] and held – not surprisingly –

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92 See, e.g., para. 55 of the opinion on Albania; para. 37 of the (first) opinion on Slovakia; and paras. 54-56 of the opinion on Ukraine.

93 See para. 43 of the (first) and para. 104 of the (second) opinion on Estonia; see also para. 59 of the opinion on Azerbaijan; and para. 70 of the opinion on Poland.

94 See, e.g., para. 100 of the (second) opinion on Estonia; para. 35 of the opinion on Finland; para. 52 of the (first) opinion on Italy; para. 59 of the (first) opinion on Slovenia; and para. 51 of the opinion on Sweden.

95 See, e.g., para. 56 of the opinion on Albania; para. 58 of the opinion on Lithuania; para. 87 of the opinion on the Russian Federation; and para. 83 of the opinion on Serbia and Montenegro.

96 See para. 50 of the opinion on Austria.

97 See para. 126 of the (second) opinion on the Czech Republic; these figures constitute a further improvement as compared to the previous situation, cf. para. 59 of its (first) opinion on the Czech Republic; see also para. 73 of the opinion on the Former Yugoslav Republic of Macedonia welcoming pertinent legislation allowing for bilingual topographical signs in areas with a minority population exceeding 20% of the total population.

98 See para. 57 of the opinion on Ukraine; see also para. 82 of the opinion on Bosnia and Herzegovina.

the absence of any possibility to display bilingual topographical signs as incompatible with Article 11 (2) FCNM.[99] These numbers might indeed be indicative as regards the future formulation of generally applicable standards in this field.

In the process of formulating such standards, valuable guidance might also be drawn from the above-mentioned[100] Oslo Recommendations regarding the Linguistic Rights of National Minorities, elaborated by a group of independent experts under the auspices of the HCNM and made public in February 1998. Particular attention should be given to the explanatory report annexed to the recommendations.

g) Educational rights

It is a truism that education is the key for the successful protection and promotion of any cultural identity, in particular that of national minorities. Since, as stated above, national minorities in Europe are usually defined by their distinct language and culture, the right to learn one's mother tongue is an absolute *conditio sine qua non* for the survival of any national minority. Therefore, educational rights are indeed of central relevance for the international protection of national minorities. But for a state policy aimed at the preservation and promotion of the distinct identity of a national minority, it is not enough for pupils belonging to a minority to learn – and be taught – their minority language. It is equally important that they be familiarized with their history and culture – as well as with the language, history and culture of the majority population. Finally, it is also necessary to acquaint pupils – and the general public – belonging to the majority population with the history and culture of the national minorities residing in their country and to enable them, if they so wish, to learn minority languages.

Thus, it is clear that the issue of educational rights of persons belonging to national minorities ranks highly among the issues dealt with in the field of minority rights protection. This assessment is well reflected in the pertinent provisions of paras. 32 and 34 of the 1990 OSCE Copenhagen Final Document and resulted in the guarantee of educational rights in Articles 12, 13

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99 See paras. 71-72 of the opinion on Poland.

100 See *supra* note 30.

and 14 FCNM.[101] Furthermore, educational rights were the subject, already in 1996, of the above-mentioned Hague Recommendations regarding the Educational Rights of National Minorities, drafted by independent experts under the auspices of the HCNM[102] and were also among the themes intensively discussed at the (also mentioned) international conference held in Strasbourg on 30-31 October 2003 to celebrate the fifth anniversary of the entry into force of the FCNM.[103]

Whereas such rights have, as yet, not been of particular significance for the jurisprudence of the European Court of Human Rights,[104] this is, of course, different as regards the practice of the Advisory Committee. With respect to the rights guaranteed under Article 12 FCNM, it had to accord particular attention to the situation of Roma children: not only did the Advisory Committee express its deep concern about the abnormally high level of absenteeism among Roma pupils,[105] but also about an apparently widespread practice of placing Roma children in special educational groups or even schools designed for mentally disabled children, due to either real or perceived linguistic and cultural differences between the Roma and the majority. The Advisory Committee stressed that such placing should only occur when absolutely necessary on the basis of consistent, objective and

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101 On Articles 12 and 13 FCNM see the commentaries by P. THORNBERRY, in: WELLER (note 1), 365 ff. and 395 ff., respectively; and on Article 14 FCNM see the commentary by P. THORNBERRY/F. DE VARENNES, in: WELLER (note 1), 407 ff.

102 See *supra* note 30.

103 See the comprehensive paper by D. WILSON, Educational Rights of Persons Belonging to National Minorities, 10 International Journal on Minority and Group Rights (2003), 315 ff.

104 The noteworthy exception was the judgment in *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* of 23 July 1968, ECtHR Series A Vol. 6 where the Court held that the state has a right to determine the official languages of instruction in public schools and denied that there was a right to instruction in the language of one's choice. For a discussion of more recent developments concerning the ECHR and minority rights in education see WILSON (note 103), 323 ff.

105 See, e.g., paras. 88-89 of the opinion on Bosnia and Herzegovina; para. 55 of the (first) and para. 114 of the (second) opinion on Italy; para. 118 of the (second) opinion on Moldova; para. 91 of the opinion on Serbia and Montenegro; para. 70 of the opinion on Spain; para. 78 of the opinion on the Former Yugoslav republic of Macedonia; and paras. 81-83 of the opinion on the United Kingdom.

comprehensive tests.[106] More generally, it noted that, notwithstanding commendable efforts to improve the situation, shortages of available textbooks in minority languages and of qualified teachers still persists in some countries.[107]

With respect to the right to instruction of, or instruction in, the mother tongue as provided for by Article 14 FCNM, the Advisory Committee stressed that, when decisions are taken concerning the continuation or closure of schools, particular attention must be paid to the fact that schools with instruction in, or of, a minority language contribute by their very existence to preserving the distinct identity of the national minority concerned.[108] It also emphasized that, when embarking on a far-reaching reform of their educational system resulting in a decrease of instruction in minority languages, states parties should introduce detailed guarantees as to how persons belonging to national minorities will be provided with adequate opportunities for being taught the minority language or for receiving instruction in that language. It also recommended that such reforms should always be planned and implemented in close consultations with those primarily concerned.[109]

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106 See, e.g., para. 49 of the (first) opinion on Croatia, but see para. 129 of the (second) opinion on Croatia strongly welcoming the discontinuation of such practices; paras. 61-63 of the (first) and paras. 145-149 of the (second) opinion on the Czech Republic; para. 41 of the (first) opinion on Hungary; para. 77 of the opinion on Poland; paras. 57-59 of the (first) opinion on Romania; paras. 89-90 of the opinion on Serbia and Montenegro; paras. 39 and 40 of the (first) opinion on Slovakia; and paras. 63-65 of the (first) opinion on Slovenia.

107 See, e.g., paras. 63-65 of the opinion on Armenia; para. 48 of the (first) and para. 126 of the (second) opinion on Croatia; para. 117 of the (second) opinion on Estonia; para. 110 of the (second) opinion on Italy; para. 74 of the (first) and para. 117 of the (second) opinion on Moldova; para. 74 of the opinion on Poland; para. 87-88 of the opinion on Serbia and Montenegro; para. 62 of the (first) and para. 141 of the (second) opinion on Slovenia; paras. 78-77 of the opinion on the Former Yugoslav Republic of Macedonia; and para. 59 of the opinion on Ukraine.

108 See, e.g., para. 63 of the opinion on Austria; paras. 59-61 of the opinion on Germany; and para. 73 of the opinion on Lithuania.

109 See, e.g., paras. 50-52 of the (first) and paras. 138-140 of the (second) opinion on Estonia welcoming certain positive amendments of the applicable legislation; paras. 70-72 of the opinion on Lithuania; paras. 81-83 of the (first) and paras. 132-134 of the (second) opinion on Moldova; and paras. 63-65 of the opinion on Ukraine.

Finally, from a more general perspective, it should be mentioned that the Advisory Committee indicated, in some instances, that it considered a truly bilingual education to be a most appropriate way to implement the obligations flowing from Article 14 FCNM.[110] This leads to one issue which the Advisory Committee will have to deal with in the course of the second cycle of monitoring, i.e. starting an in-depth discussion in order to formulate a general approach to educational rights which, in view of the mentioned crucial importance of such rights for the protection and promotion of the distinct identity of national minorities, is certainly called for. One aspect concerns the question of whether the fundamental approach which was implicitly – and sometimes explicitly – followed during the first cycle of monitoring, and which was based on the assumption that pupils belonging to national minority should be integrated as far and as fast as possible into the general educational system while providing for sufficient possibilities to learn, or to be instructed in, the mother tongue, should be continued or modified in light of the discussion at the Strasbourg conference. Indeed, there might be situations where separate schools (or classes) constitute a viable option, provided such a system is established in accordance with the wishes of those concerned and is organized so as to guarantee sufficient knowledge of the languages of both the majority and minority and does not result in segregation. The second aspect to be discussed relates to the question of whether the article-by-article approach so far followed by the Advisory Committee should be replaced by the so-called 4-A scheme as developed by *Katarina Tomaszewski* in her capacity as Special Rapporteur on the right to education of the United Nations Commission on Human Rights and subsequently adopted by the United Nations Committee on Economic, Social and Cultural Rights in General Comment N° 13. Under this scheme, the right to education comprises four elements: availability, accessibility, acceptability and adaptability.[111] In any case, there can be no doubt that standard setting in the field of educational rights is of utmost importance for the future of national minorities and the existing monitoring systems alike.

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110 See, e.g., paras. 61-65 of the opinion on Austria; para. 51 of the (first) opinion on Estonia; and para. 72 of the opinion on Switzerland.

111 On this scheme, and for a discussion on its potential for the future work of the Advisory Committee, see WILSON (note 102), 317 ff.

h) Participatory rights

The right to effective participation in cultural, economic and social life and in public affairs is another principle essential for any democratic society. In view of the potentially vulnerable situation of national minorities, it is crucial for the survival of their distinct cultures and identities. This principle seems to be generally accepted, as is reflected in para. 35 of the 1990 OSCE Copenhagen Final Document and by its guarantee in Article 15 FCNM.[112] It has also been the subject of the above-mentioned 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life as specified by the quite detailed 2001 Warsaw Guidelines to Assist National Minority Participation in the Electoral Process.[113] This issue of effective participation had also been chosen as one of the themes to be discussed at the Strasbourg conference.[114] The importance of the issue of effective participation results from the correct understanding that only those national minorities whose members feel that the state in which they reside is also „their" state, that it also „belongs to them", will be prepared to fully integrate themselves into that state and its structures, which will in turn contribute to stability and peaceful majority/minority relations. To achieve this, effective participation is clearly another *conditio sine qua non.*

In its pertinent practice, the Advisory Committee noted that in some countries, the representation of national minorities on local, regional and central level legislative bodies was low, and recommended that governments examine ways to improve this situation.[115] In particular, they should ensure that, if advisory or consultative bodies are established, they represent national

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112 On Article 15 FCNM see the commentary by M. WELLER, in: WELLER (note 1), 429 ff.

113 See *supra* note 30.

114 See M. WELLER, Creating the Conditions Necessary for the Effective Participation of Persons Belonging to National Minorities, 10 International Journal on Minority and Group Rights (2003), 265 ff.; see also J.A. FROWEIN/R. BANK, The Participation of Minorities in Decision-Making Processes, 61 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2001), 1 ff.

115 See, e.g., paras. 69 and 70 of the opinion on Albania; paras. 76-77 of the opinion on Azerbaijan; paras. 58-62 of the (first) and paras. 161-163 of the (second) opinion on Croatia welcoming significant improvements in this sphere; and paras. 69-70 of the opinion on Ukraine.

minorities in an adequate manner.[116] More generally, the Advisory Committee underlined the importance of territorial autonomy for preserving and promoting the distinct identity of national minorities[117] which means that changes to the administrative structures of a country that might have detrimental effects on the situation of national minorities must be avoided.[118] Furthermore, the Advisory Committee found that, in a number of countries, persons belonging to national minorities were clearly under-represented in a wide range of public sector services,[119] and that unemployment rates are often higher among persons belonging to national minorities.[120] Finally, it stressed that language proficiency requirements should be carefully restricted to situations where they are necessary to protect a specific public interest; the same considerations applied to candidates running for election.[121]

Finally, the Advisory Committee expressed its concern at the shortcomings that remain, notwithstanding a number of commendable efforts made by the

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116 See, e.g., paras. 71-74 of the opinion on Albania; paras. 77-80 of the opinion on Armenia; paras. 57-58 of the (first) and para. 154 of the (second) opinion on Estonia; paras. 77-79 of the opinion on Lithuania; paras. 85-89 of the (first) and paras. 136-139 of the (second) opinion on Moldova; paras. 101-108 of the opinion on the Russian Federation; and paras. 105-109 of the opinion on Serbia and Montenegro.

117 See, e.g., para. 36 of the (first) opinion on Denmark; para. 47 of the opinion on Finland; paras. 61-62 of the (first) opinion on Italy; para. 91 of the (first) opinion on Moldova; paras. 111-112 of the opinion on Serbia and Montenegro; para. 75 of the opinion on Spain; and para. 74 of the opinion on Switzerland.

118 See paras. 158-168 of the (second) opinion on Denmark.

119 See, e.g., para. 75 of the opinion on Albania; para. 117 of the opinion on Bosnia and Herzegovina; paras. 55-57 of the (first) and paras. 156-159 of the (second) opinion on Croatia; para. 66 of the (first) opinion on Italy; para. 103 of the opinion on Serbia and Montenegro; para. 99 of the opinion on the Former Yugoslav Republic of Macedonia; and para. 96 of the opinion on the United Kingdom.

120 See, e.g., para. 79 of the opinion on Azerbaijan; para. 59 of the (first) opinion on Estonia; para. 109 of the opinion on the Russian Federation; para. 118 of the opinion on Serbia and Montenegro; and paras. 74-75 of the opinion on Ukraine.

121 See, e.g., paras. 55-60 of the (first) and para. 151 and paras. 163-166 of the (second) opinion on Estonia strongly welcoming legislation removing such language proficiency requirements with respect to elections and, at the same time, calling for a review of the still existing requirement in the private employment sector; and para. 106 of the opinion on the Russian Federation.

governments concerned, as regards the effective participation of the Roma in social and economic life, and the negative impact that these shortcomings have on the social and economic living conditions of this minority in general and of Roma women in particular.[122]

Attempts to identify precise criteria for the effectiveness of participation – procedural aspects only and/or a result-oriented assessment – should figure prominently among the issues to be dealt with by the Advisory Committee in its future work on standard setting. Specific attention should also be devoted to mechanisms related to the electoral process;[123] in this context the above-mentioned 2001 *Warsaw Guidelines* should give most valuable guidance.

i) Free transboundary contacts

In view of the geographic distribution of most national minorities, free transboundary contacts with persons belonging to the same group are of great relevance for the preservation and promotion of the distinct culture of national minorities. This assessment explains the introduction of this right into para. 32 of the 1990 OSCE Copenhagen Final Document and into Article 17 FCNM. Notwithstanding the problems connected with some aspects of activities carried out by some kin-states,[124] the assistance of kin-states, if provided in a non-discriminatory manner, might indeed contribute to an improvement of the situation of persons belonging to national minorities, e.g. in the field of education.

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122 See, e.g., para. 75 of the opinion on Albania; para. 71 of the opinion on Austria; paras. 108-110 of the opinion on Bosnia and Herzegovina; para. 65 of the (first) and para. 146-147 of the (second) opinion on Croatia; para. 71 of the (first) and para. 182 of the (second) opinion on the Czech Republic; para. 66 of the opinion on Germany; para. 54 of the (first) opinion on Hungary; para. 65 of the (first) opinion on Italy; para. 63 of the opinion on Norway; para. 69 of the (first) opinion on Romania; para. 47 of the (first) opinion on Slovakia; para. 76 of the (first) and para. 176 of the (second) opinion on Slovenia; para. 79 of the opinion on Spain; para. 77 of the opinion on Switzerland; and para. 102 of the opinion on the Former Yugoslav Republic of Macedonia..

123 See in particular WELLER (note 105), 268 ff.

124 On this issue see, e.g., R. HOFMANN, Preferential treatment of kin-minorities and monitoring of the implementation of the Framework Convention for National Minorities, in: European Commission for Democracy through Law (ed.), The Protection of National Minorities by Their Kin-State (2002), 235 ff.

Another issue highlighted in the practice of the Advisory Committee is the recent introduction, as a result of some states' accession to the European Union, of fairly strict visa regimes. In this context, the Advisory Committee called on governments to implement such visa requirements for citizens of neighbouring countries in a manner that will not cause undue restrictions on the right of persons belonging to national minorities to establish and maintain contacts across frontiers.[125]

III. Concluding remarks

The above contribution shows the existence of mechanisms to establish generally applicable standards in the field of minority protection. Some of them, in particular the monitoring system under the FCNM, need, however, additional time to be able to finalize such work; in view of the complex nature of this task, it is recommended that the Advisory Committee implement its intention to start by working on standards in the field of media, educational and participatory rights. For some foreseeable future, the resulting 'soft' jurisprudence will constitute the backbone of this procedure of standard-setting. It is further to be hoped that the European Court of Human Rights will discontinue its rather reluctant approach to dealing with minority-related aspects of its caseload and show a more proactive role in order to add some 'hard' jurisprudence to the 'soft' jurisprudence produced by the Advisory Committee and the Committee of Ministers. All three organs should take due account of the previous and future standard setting within the OSCE – although certainly not binding in any legal sense, the guidelines and recommendations produced constitute most valuable sources to formulate generally applicable standards.

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125 See, e.g., para. 63 of the (first) and paras. 171-172 of the (second) opinion on Estonia welcoming the conclusion an agreement between Estonia and the Russian Federation allowing for the introduction of a simplified visa regime; para. 56 of the (first) opinion on Hungary; para. 83 of the opinion on Lithuania; para. 92 of the opinion on Poland; and para. 50 of the (first) opinion on Slovakia.

Multiculturalism, Minority Rights, and the Committee on the Elimination of Racial Discrimination (CERD)

Patrick Thornberry

The following points in relation to the practice of CERD on multiculturalism and minority rights are intended for purposes of discussion and are in outline only.

Of the various 'UN treaty bodies' on human rights, CERD deals extensively and regularly with 'ethnic' issues, including minority rights, even if its conceptual anti- discrimination framework might appear at first glance to constrain the range of issues that can be addressed. Minority and indigenous NGOs and others may easily miss the practical expansion of concept on minority issues in the practice of CERD and fail to appreciate fully the relevance of the Convention to their concerns.

The views expressed in this paper are personal to the author in his capacity as an academic and independent expert.

1. The Committee (CERD) is charged with reviewing the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination which provides for a number of procedures: a reporting system under Article 9; an inter-State 'complaints' system under Articles 11-13 (which has not functioned as such); an individual communications procedure under Article 14; and a system for examining petitions and reports from Trust and Non-Self-Governing territories covered by General Assembly resolution 1514 (XV) – the 'Colonial Declaration'. The provision in Article 22 concerning disputes as to the interpretation or application of the Convention has recently been utilised before the International Court of Justice by Georgia against the Russian Federation.

2. Additionally, the Committee has devised further procedures based on the Convention, including an early warning/urgent action procedure for

deteriorating and serious situations, a 'review procedure' for late reporting countries, and 'follow-up' procedures for concluding observations on reports and decisions on individual communications. The follow-up procedures are relatively new to the Committee and results have yet to be thoroughly appraised. CERD also issues General Recommendations on the interpretation and practice of the Convention (thirty-one such recommendations to date, the latest of which is on racial discrimination in the administration of the criminal justice system), and organises 'thematic discussions' on particular issues which may or may not lead to a general recommendation.

3. The Convention incorporates a definition of racial discrimination as follows: 'In this Convention, the term „racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' It may be observed that the governing term is 'racial discrimination' and that there is no further elaboration of the controversial term 'race'. It is not necessary to believe in 'races' or accept horizontal narratives of separation, or vertical narratives of hierarchy, in order to combat racial discrimination. This question can be troubling, and those working in the area of combating racial discrimination – including of course States – should ask it now and again, so as to be clear that their work does not inadvertently endorse the discourses of

racial theory.[1] The Convention, unusually, also condemns theories of racial superiority as well as racist practice.[2]

4. Among the grounds, 'descent' is the widest, and the Committee has dealt with at least one aspect of it in addressing caste and related forms of social stratification.[3] BANTON has written on the potentially increased importance of paying attention to colour as a ground of discrimination in the light of globalisation and the 'mixing' of populations,[4] and the present writer has noted important evidence of this form of discrimination in a number of recent cases, including Brazil.[5] The ground of 'national origin' generated considerable discussion in the drafting of the Convention, but has not unduly troubled the Committee in practice.[6] We may add the observation that the spectrum of current discrimination includes discrimination based on culture;

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1 Race theory may not command the 'scientific' status it once did, but racist groups continue in existence, with the Internet providing a fertile source for dissemination of views. For a review of 'theory' in this sphere, see BANTON, Racial Theories, Cambridge University Press, 1987; BOXILL (ed.), Race and Racism, Oxford: Oxford University Press, 2001. For comment on the stance in the Convention, see BANTON, International Action against Racial Discrimination, Oxford: Clarendon Press, 1996), who comments that the listing of 'grounds' of discrimination 'made possible a solution to what was otherwise an intractable problem … Any method of combating discrimination which made use of a racial classification would legitimise a view of human differences which had been used to justify the denial of human rights. By defining discrimination as action on the grounds of race [etc.], it was possible to bypass any arguments about the nature of these differences in themselves' (at p. 52).

2 Paragraph 6 of the Preamble and Article 4, Convention. Neither ILO Convention 111 nor the UNESCO Convention against Discrimination in Education explicitly condemns racist theory. A more explicit and 'philosophical' approach to racist theory is set out in the UNESCO Declaration on Race and Racial Prejudice (1978).

3 For an instructive review of the 'grounds' of discrimination, see the background paper, The Definitions of Racial Discrimination, prepared by Committee member and former Chairman DIACONU, for the World Conference against Racism, 26 February 1999, E/CN.4/1999/WG.1/BP.10.

4 BANTON, Colour as a Ground of Discrimination, in: GHANEA-HERCOCK/XANTHAKI (eds.), Minorities, Peoples and Self-Determination, Essays in Honour of Patrick Thornberry, Leiden/Boston: Martinus Nijhoff, 2005, p. 237.

5 Combined 14th to 17th Periodic Reports of Brazil, CERD/C/431/Add. 8; CERD/C/SR.1632 and 1633.

6 See for example *Diop v. France* (2/89), CERD/C/39/D/2/1989 (1991); and *B.M.S v. Australia* (8/96), CERD/C/54/D/8/1996 (1999).

in this case, colour and other 'grounds' may simply be markers or signifiers of cultural differences disapproved of by those who engage in discriminatory practices.

5. It is not necessary here to review all the articles of the Convention. Suffice it to say that the responsibility of the State is engaged not simply by acts of public institutions, etc., but extends to acts of 'racial discrimination by any persons, group or organization'.[7] The Convention takes a resolute stance on racial segregation,[8] on racist propaganda and organizations,[9] on remedies for racial discrimination,[10] and envisages 'immediate and effective measures' being taken by State authorities particularly in teaching, education, culture, etc., to combat prejudice and promote understand and tolerance 'among nations and racial or ethnical groups.'[11] Among the articles of the Convention, Article 5 provides a non-exhaustive list of human rights to which the non-discrimination principle applies, and notably includes economic, social and cultural as well as civil and political rights. In current practice, a full range of human rights engages the Committee, and it devotes a considerable amount of attention to economic, social and cultural rights,[12] as well as civil and political rights, so that some or other question of economic and social rights is included in most of the concluding observations.[13] There is support for the view that the 'unclosed' nature of the

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7 Article 2.1(d).

8 Article 3.

9 Article 4.

10 Article 6.

11 Article 7.

12 For a critique of the Committee in this respect, see, FELICE, The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights, (2002) 24 Human Rights Quarterly 205. For an instructive illustration of current Committee practice, presenting a rather different picture to that offered by FELICE, see for example the 2004 concluding observations on Slovakia, A/59/18, paragraphs 385-9, which include recommendations on, *inter alia*, rights to education, employment, health and housing.

13 FELICE is particularly critical of the recommendations of the Committee in the field of economic and social rights, finding them 'uniformly unsubstantial' (*ibid.* at 223). On the other hand, the demand for more specific recommendations to governments does not always sit well with the function of the Committee in the context of

list of rights in Article 5, coupled with the promise of the Convention to eliminate 'all forms' of racial discrimination, means that 'Article 5, both alone and in conjunction with Article 2, addresses the enjoyment of all rights regardless of source.'[14] Further, while the Convention lists rights, it does not define them – thus opening out their interpretation to developments in the human rights canon. This is an important point especially in areas where there have been fresh elaborations of rights such as minority and indigenous rights. Accordingly, the Committee has utilised new and developing standards in its recommendations and observations.[15]

6. Neither minorities nor indigenous peoples are specifically mentioned in the text of the Convention, though within the 'four corners' of the definition there is ample space to accommodate them, and CERD has devoted a multitude of concluding observations to the situation of such groups. While there is no overarching general recommendation on minorities, CERD has issued general recommendations pertinent to minorities and specific to indigenous peoples, notably General Recommendation 8 (enshrining the principle of self-identification in connection with membership of racial or ethnic groups); 23 on the rights of indigenous peoples; 24 on Article 1 of the Convention; and 27 on discrimination against Roma.

7. The principle of non-discrimination is fundamental to the human rights enterprise – part of its architecture. It is a way of getting to equality in the enjoyment of human rights by addressing practices denying equality.[16] The

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constructive dialogue with governments, nor with respect to the obligation on governments to design their own implementation strategies.

14 O'FLAHERTY, Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, in: PRITCHARD (ed.), Indigenous Peoples, the United Nations and Human Rights, London and Leichhardt, NSW: Zed Books and the Federation Press, 1998, p. 162 at p. 179. DIACONU (note 3) adds the interesting point that Article 1(1) refers to human rights and freedoms in any 'field' of public life, suggesting that the Convention 'is not limited to the categories of rights enshrined in international documents.' (paragraph 24).

15 For example, in drafting General Recommendation 23 on indigenous peoples, members appear to have been influenced by, *inter alia*, the draft UN Declaration on the Rights of Indigenous Peoples, and developments in Latin America. See the comments of Committee member WOLFRUM, 5 August 1997, CERD/C/SR.1235 at paragraph 93.

16 The principle is helpfully reviewed in MORAWA, 'The Evolving Human Right to Equality', (2001/2) *2* European Yearbook on Minority Issues 157.

Convention is replete with references to equality: the Preamble refers to 'the dignity and equality inherent in all human beings', and that human beings are born free and equal in dignity and rights, are equal before the law and entitled to equal protection of the law.[17] The basic notion of discrimination is denial of human rights and equality. Substantive articles repeat the concepts in the Preamble, adding references to the enjoyment of human rights on an equal footing,[18] to equal pay for equal work,[19] and the right to equal participation in cultural activities.[20] Thus, various forms of equality are intimated and the text need not be reduced to a single conceptual scheme, although the Convention overall reaches beyond formal equality towards equality in fact or substantive equality. On the core notion of discrimination, General Recommendation 14 observes that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'. The term 'discrimination' itself does not signify uniformity if there are differences in situation between one person or group and another. Like cases are to be treated alike, and unlike cases according to the extent of the 'unlikeness'; uniform treatment is not necessarily equal treatment.

8. This nuance may be lost in appraising discrimination, but is essential to retain in responding to critics who argue the tendency of the equality principle to carry with it notions of homogeneity, essentiality, or reproduction of cultural sameness. General Recommendation 24 on Article 1 does not go against this nuanced principle of equality in its demand for uniform application of criteria to determine the existence of ethnic groups on the territory of the State, thus avoiding 'differing treatment' for various population groups. The recommendation is not a demand that in terms of policy and resources all groups are treated the same regardless of circumstances. It is instead a plea for uniformity of approach to existence criteria for groups, in the context of Committee requests for demographic informa-

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17 Reflections on the 'equality content' of the Convention are offered in McKean, Equality and Discrimination under International Law, Oxford: Clarendon Press, 1983, at pp. 152-65.

18 Article 1(1).

19 Article 5(e)(i).

20 Article 5(e)(vi).

tion,[21] who otherwise might be arbitrarily excluded by government *fiat* from the operation of the principle of non-discrimination.

9. The text of ICERD is not structured as a positive endorsement of minority rights, but rather as a non-discrimination/special measures 'package'. Key elements of the 'package' in addition to the basic definition are contained in Article 1.4. –
Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.
Article 2.2. continues this theme: *States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.*

10. The requirement that the special measures do not lead to the maintenance of separate rights for the different racial groups and they are not continued after the objectives for which they were taken have been achieved[22] may be misunderstood in the context of minority rights, the

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21 The *travaux préparatoires* make clear that the context of the draft (introduced by Committee member DIACONU) is one on 'demographic information' rather than substantive treatment. The text was introduced to the Committee in such terms in 1998, see 13 August 1998, CERD/C/SR.1281 at paragraph 27.

22 In the light of the provisions on special measures under the Convention, the relevant concluding observation of the Committee 'notes with concern the position taken by the State party that the provisions of the Convention permit, but do not require States parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic or national groups. The Committee emphasizes that the adoption of special measures by States parties when

recognition and respect for which will demand more than temporary measures. The same is true for indigenous rights.[23] In the drafting of the Convention, a number of States expressed reservations concerning the inclusion of special measures, claiming, *inter alia*, that they would perpetuate separation from the wider community,[24] and would open the door to all sorts of 'legal manoeuvring to justify various kinds of racial discrimination'.[25] The notion of special measures now sits more comfortably in the general discourse of human rights. [26]The integrationist thrust of Convention provisions[27] is mitigated by recognition in Committee practice of the legitimate interests and rights of ethnic groups of many varieties, in line with contemporary thinking.[28] Indigenous groups and minorities enjoy their own rights in international law which stand independently of the case for special measures, though some State policies for such groups may be brought within this framework. The Committee does not necessarily distinguish cases of 'recognition of specific minority/indigenous rights' from 'special measures', but recommendations to States Parties concerning indigenous groups may be

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the circumstances so warrant, such as in the case of persistent disparities, *is an obligation* stemming from article 2, paragraph 2, of the Convention', A/56/18, paragraph 399 (emphasis added). The USA attempted to clarify its position in its report examined by the Committee in 2008, acknowledging that, while Article 2.2. 'requires States parties to take special measures „when circumstances so warrant"', the decision 'concerning when such measures are in fact warranted is left to the judgment and discretion of each State party' and the special measures 'may or may not in themselves be race-based': CERD/C/USA/6 (2007), paragraph 127. For the response of CERD, see concluding observations in: CERD/C/USA/CO/6, paragraph 15.

23 CERD recognised this in its concluding observations on New Zealand in 2007, noting that aspects of the historical settlement between the Maori and incomers had been included under the rubric of 'special measures' in the report of New Zealand; CERD insisted on the distinction between 'special and temporary measures' and 'the permanent rights of indigenous peoples': CERD/C/NZ/CO/17, paragraph 15.

24 Chile, E/CN.4/Sub.2/SR.416 at paragraph 13.

25 Ivory Coast, A/C.3/SR.1306 at paragraph 23.

26 See in general the study by Bossuyt on the concept and practice of affirmative action, E/CN.4/Sub.2/2002/21, and CEDAW General Recommendation 25 on temporary special measures (2004).

27 See also Article 2(1)(e) on integrationist multi-racial organisations and movements.

28 See for example General Recommendation 21 on self-determination and General Recommendation 27 on the Roma.

made within and without the special measures paradigm.[29] In some cases the Committee's call for special measures links indigenous and other groups in a common recommendation.[30] The provisions, and limitations, on special measures show clearly the aetiology of the Convention in struggles against segregation and Apartheid. There are difficult issues here, which the Committee has not thus far addressed in a general recommendation but has at the time of writing decided to address them, commencing with a thematic discussion in its July/August session 2008.

11. The Committee tends to take it as understood that national, ethnic, linguistic and religious *minorities* or cultural groups of various kinds come within the frame of Article 1, with the caveat in the case of religion that Committee practice searches for an 'ethnic', or other, connection or 'intersectionality' between race and religion.[31] Drawing lines between ethnic/national origin and religion is not a simple classification exercise, and, for example, in the case of some indigenous peoples, it may be superfluous to distinguish culture from religion.[32] It is perhaps possible to distinguish a 'religious minority' from a 'minority religion', with the former term implying some ethnic or cultural connection. The Committee has broadly observed such a distinction, keeping out of 'purely' religious questions. In the case of Iran, it addressed discrimination faced by 'certain minorities, including the Bahai's', observing that 'certain provisions of the State Party's legislation appear to be discriminatory on both ethnic and religious grounds'. The Committee accordingly recommended that Iran permit 'students of different origins to register in universities without being compelled to state their religion.'[33] Despite the Committee's inclusion of a reference to 'ethnic' as well as 'religious' grounds of discrimination, the government of the Islamic

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29 See for example the concluding observations on Bangladesh, A/56/18, paragraph 66. For a more wide-ranging set of recommendations, including many not confined to a 'special measures' or 'affirmative action' framework, see concluding observations on Canada, A/57/18, paragraphs 315-43.

30 See concluding observations on Ecuador, A/58/18, paragraphs 47-69.

31 See the 2005 concluding observations on Ireland, 14 April 2005, CERD/C/IRL/CO/2 at paragraph 18.

32 The connection between indigenous land and spirituality is referred to in Article 13 of ILO Convention No. 169 on Indigenous and Tribal Peoples (1989).

33 A58/18, paragraph 428.

Republic of Iran took the opportunity to state that the observations of the Committee 'dealt with an issue which is totally beyond the mandate entrusted to it by the Convention',[34] deeply regretting such *ultra vires* activity.[35] There the matter rests, though CERD may in future need to engage in specifically focused work on the religion/race intersection, especially in the light of phenomena of Islamophobia, Antisemitism and Christianophobia. Recent cases under the Article 14 communication procedure in 2007 demonstrate a degree of caution on the part of the Committee in handling the race/religion intersection,[36] and the Committee stepped back from a thematic discussion on racial and religious discrimination adverted to in its annual report for 2007 – this did not take place.[37]

12. While language, education and other 'identity' rights specifically set out in designated instruments on minority rights such as the UN Declaration on the Rights of Persons Belonging to Minorities are of frequent concern to the Committee,[38] minorities continue to suffer a full range of oppressive practices. The Committee has been greatly exercised by discrimination against *the Roma*, issuing a general recommendation on this group in 2000.[39] Among many deprivations recorded or alleged, the question of so-called 'special schools' has arisen more than once: specifically, the practice of placing Roma pupils in schools or special remedial classes for mentally disabled children. Principles such as avoiding segregation while keeping open the possibility of mother-tongue education are recalled by the Committee, and among 'remedies' suggested are recruitment of more Roma teachers, and sensitization of teachers and other education professionals to the social fabric and world views of Roma children. This suggests that the roots of the

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34 Presumably the Government of Iran was not convinced by the Committee's listing of the 'ethnic' dimension in the case of the Baha'i.

35 Comments of States parties on the decisions and concluding observations adopted by the Committee and replies by the Committee, A/58/18, Annex VII.

36 P.S.N. v. Denmark, A.W.R.A.P. v. Denmark, A/62/18, Annex V.

37 A/62/18, chapter XI, paragraph 538.

38 See the helpful summary of current issues in PROUVEZ, 'Minorities and Indigenous Peoples' Protection: Practice of UN Treaty Bodies in 2003', (2003/4) 3 European Yearbook of Minority Issues 481. The author is a former Secretary of the Committee.

39 General Recommendation 27.

discrimination lie in divergent cultural assumptions concerning the role of education in the larger and smaller community,[40] and the nature of the educational structures – a matter that has come more clearly to the Advisory Committee under the Council of Europe's Framework Convention for the Protection of National Minorities.[41] In the wider world of the Roma there is some unease with the limits of the non-discrimination principle in addressing their case; hence the move by some Roma groups to declare themselves a non-territorial nation.[42] Perhaps the point about discrimination is that, by and large, it works by expecting others to reform their behaviour and it thus may be seen by a community as a passive principle; whereas the nation/self-determination line is associated with a more active 'politics of recognition'.[43]

13. Discrimination against indigenous peoples also frequently engages the Committee, which issued General Recommendation 23 on indigenous peoples in 1997. The Committee frequently invites States that have not done so to ratify ILO Convention 169. While the number of State Parties to that Convention may be limited (20 States parties at the time of writing), the text is a contemporary benchmark of indigenous rights, avoiding the troublesome language of self-determination but giving a great deal to the peoples if faithfully implemented. On occasions, the Committee has set out an expansive interpretation of indigenous rights, stretching or perhaps exceeding the boundaries of ILO Convention 169.[44] For example, the provisions of Article 14 of the ILO Convention on 'rights of ownership and possession'

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40 See point in paragraph 4 above on the cultural basis of much contemporary discrimination.

41 See WELLER (ed.), The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities, Oxford University Press, 2005; WELLER (ed.), Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Tribunals, Oxford University Press, 2007: the present author has contributed chapters on education rights to both of these volumes.

42 See Project on Ethnic Relations (PER), Roma and the Question of Self-determination: Fiction and Reality, PER, Princeton, 2002.

43 TAYLOR, Multiculturalism and the Politics of Recognition, Princeton: Princeton University Press, 1994.

44 See TOMEI/SWEPSTON, Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169, Geneva: International Labour Office, 1996, pp. 8-9 for a general elaboration of Convention principles.

may be compared with the forthright statement in paragraph 5 of the General recommendation regarding the rights of indigenous peoples 'to own, develop, control and use' their communal lands, etc. Paragraph 4 of General Recommendation 23 calls on states parties to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without informed consent,' whereas Article 6.2. of ILO Convention 169 prefers the notion of 'consultations … with the objective of achieving agreement or consent' as a general policy.[45] The subject occasioned considerable discussion in the drafting process. The General Recommendation as adopted clearly distinguishes between a 'general' right of effective participation in public life and a narrower principle insisting on informed consent when 'decisions' directly relating to the rights and interests of indigenous peoples are concerned.[46] 'Informed consent' was expressly preferred to 'informed participation'[47] and 'active participation' or 'active consultation'.[48] In concrete cases, the Committee has not always rigorously insisted on the principle of informed consent, even in cases where there was a clear opportunity to follow this principle and where General Recommendation 23 is recalled by the Committee.[49] In other cases, the principle is

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45 Paragraph 5 of the Recommendation also refers to the principle of 'informed consent', in an *ex-post-facto* way: in relation to remedies – where indigenous peoples have been deprived of their lands and territories 'traditionally owned or otherwise inhabited or used without their free and informed consent'. This may be compared with the reference to 'free and informed consent' in Article 16.2. of the Convention in the context of qualifying any relocation of indigenous and tribal peoples – the ILO paragraph envisages procedures to cover the case where consent cannot be obtained.

46 See comments by Committee members WOLFRUM, 5 August 1997, CERD/C/SR.1235 at paragraphs 67, and 74-5, and ABOUL-NASR, ibid at paragraph 72.

47 Ibid. at paragraph 60 (WOLFRUM, referring to a proposal by DIACONU).

48 Suggestions of Committee member SHAHI, ibid. at paragraph 73.

49 For example in its 2004 concluding observations on Suriname, concerning forestry and mining concessions, the Committee, while noting the State party's assertion that 'there are mechanisms guaranteeing that indigenous and tribal peoples are notified and consulted before any forestry and or mining concessions within their lands are awarded', expressed concern that 'consultation of that kind is rare.' Accordingly, the Committee invited the authorities 'to check that the established mechanisms for notifying and consulting the indigenous and tribal peoples are working, and recommends that the State party strive to reach agreements with the

expressly accorded prominence.[50] In relation to indigenous rights, CERD has intimated that a 'hands-off', or 'neutral' or 'laissez-faire' policy is not enough.[51] The question of indigenous rights is likely to remain high on the international agenda including the agendas the treaty bodies, and consciousness of the rights can be only enhanced following the adoption by the UN General Assembly in September 2007 of the Declaration on the Rights of Indigenous Peoples.[52]

14. CERD has recently had occasion to debate the question of *multiculturalism*, a matter of lively debate in a number of countries including the UK. The substance of the discussion elaborated members' thinking on minority rights and how they may be related to the principles of the Convention. Implicit in much discussion in Committee pertaining to minorities and indigenous peoples is the question of the *vision* of the Convention. In particular, to what extent can the Convention's discourse of equality be

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peoples concerned, as far as possible, before awarding any concessions', A/59/18, paragraph 192. While General Recommendation 23 is recalled in paragraph 202 of the Committee's annual report, we may note the absence of reference to a principle of informed consent in the concluding observations on Suriname.

50 In concluding observations on the US, a paragraph expressed concern, *inter alia*, about information on plans for expansion of mining and nuclear waste storage on Western Shoshone ancestral land. The Committee drew the attention of the State Party 'to General Recommendation 23 on indigenous peoples which stresses the importance of securing the „informed consent" of indigenous communities and calls … for recognition and compensation for loss', A/56/18, paragraph 400. See also the 2005 concluding observations on Australia, CERD/C/AUS/CO/14, paragraph 11: 'The Committee recommends that the State party take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its General Recommendation 23. The Committee recommends that the State party reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision-and policy-making relating to their rights and interests'. The recommendation was directly related to the abolition of the elected Aboriginal and Torres Strait Islander Commission.

51 See, for example, the element of critique in concluding observations on Suriname: 'The Committee notes that the authorities appear to limit themselves to not hampering the exercise by the various ethnic groups and their members of their cultural rights. The Committee recommends that the State party should respect and promote the indigenous and tribal peoples' cultures, languages and distinctive ways of life', A/59/18, paragraph 201.

52 Adopted by resolution 61/295, 13 September 2007.

'married' with the discourse of diversity? The question may arise in the context of recommendations on bilingual language education, on Roma or indigenous rights compared to those of the 'general' or majority population, on the treatment in cultural terms to be accorded to immigrants, on the wearing of 'Islamic' headscarves, and many other cases. It can be framed as a debate on integration and assimilation, on equality and special measures, on non-discrimination and minority rights, or – fashionably – as an exploration of the 'ism' of 'multiculturalism'.[53]

15. Differences of opinion on multiculturalism and minority rights are well brought out in the 2005 discussions in the Committee. One member[54] recalled the duty of CERD in the matter of non-discrimination and argued that some CERD recommendations have not served the cause of non-discrimination but may have served, on the contrary, to exacerbate societal differences. The member also suggested that ambitious models of minority rights 'made in Europe' may not be suitable for Africa and the Americas including for example practice in the field of multilingual education.[55] Other members stressed that the Committee's notion of integration was different from assimilation, and that processes of nation building must be based on broad respect for human rights and cultural diversity.[56] One member challenged the notion that nation-building was hindered by policies respecting cultural diversity, and distinguished, as did other members, the policy of the Convention from programmes of assimilation.[57] Distinctions between the situation of indigenous peoples and minorities were generally understood. There was broad support for the treatment of minority issues, including the area of language, on a case-by-case basis, with necessary flexibility.[58] On multiculturalism itself, the demographic reality of multicultural populations

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53 The Committee discussed the issue of multiculturalism at its 66th and 67th sessions in 2005.

54 LINDGREN ALVES, SR. 1694 (March 2005), and SR. 1724 (August 2005).

55 '… by applying the European model to Africa or Latin America, the Committee only served to foster fragmentation in countries which had been struggling to create unity' – SR.1724 at paragraph 3.

56 THORNBERRY, SR. 1724, at paragraph 7

57 PILLAI, SR. 1724, paragraphs 17-19; VALENCIA RODRIGUEZ, SR. 1694 at paragraphs 25-26.

58 For example SICILIANOS, SR. 1724 at paragraph 12.

was generally recognised with different degrees of emphasis, though the policy implications flowing from this were understood in different ways. A member criticised the notion of multiculturalism as 'limiting in that it took the politics out of race'. [59] Criticism of 'the European model' of minority rights was partly based on a perception (evident in the speeches of some members) that 'European' standards envisaged the teaching of all minority languages in the State to the same extent regardless of circumstances. This is perhaps something of a 'straw man' in view of the restrictive clauses of the Council of Europe Framework Convention or the nuances of the Charter for Regional or Minority Languages. It is also not clear in practice that CERD has adopted a 'broad brush' approach, making unreasonable demands on States with limited resources; on the contrary, it may be claimed that its approach has paid close attention to circumstances and avoided unreasonable prescriptions to resource-limited States.[60] Emerging from the debates in a mixed understanding of multiculturalism, ranging from a necessary expression of the reality of cultural diversity to a recipe for segregation and social fragmentation. It is probable however that all CERD members would recognise the pertinence to the work of CERD of the 'multiculturalism' described by Kymlicka as 'an umbrella term to cover a wide range of policies designed to provide some level of public recognition, support or accommodation to non-dominant ethnocultural groups, whether these groups are „new" minorities (e.g. immigrants and refugees) or „old" minorities (e.g. historically settled national minorities and indigenous peoples).'[61]

16. The Committee tends, *de minimis*, to insist on the reality of demographic multiculturality in countries coming before it. From this multiculturality of the *demos*, the further question is: what follows in terms of policy and practice? Internationally, the anti-multiculturalist stance can stem from either a 'right' (nationalist) or 'left' (social equality without too much attention to cultural diversity) perspective if 'right' and 'left' still have meaning. In all this, there is buried a point about equality: is the equality principle about 'undifferentiated' individuals, or does it embrace individuals in their

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59 JANUARY-BARDILL, SR. 1724 at paragraph 30.

60 The Practice of the Committee on the Elimination of Racial Discrimination with respect to Multiculturalism, CERD/C/67/Misc. 5, 3 August 2005.

61 KYMLICKA, Multicultural Odysseys: Negotiating the International Politics of Diversity, Oxford University Press, 2007, p. 16.

cultural context – the difference between a 'homogenising' universalism and a 'differentiating' universalism. The discourses of equality and diversity can be synthesised, even through such banal phrases as 'all different; all equal'; 'equality within diversity'; 'diversity within equality', or other imaginative permutations. While the Convention is *ex facie* an integrationist document, integration is not generally interpreted as assimilation, especially against the will and the power of vulnerable populations involved who revere and respect their own cultures and religions. Too much militancy in advocating a simplistic or reductionist concept of human rights can transform it from a welcoming project to a belligerent demonstration of the alleged superiority of the cosmopolitan over the local, privileging the exogamous critique over endogamous cultural development. The 'vision' question on commonality and diversity continues to trouble and perplex CERD, as in analogous terms it may also perplex and mystify other human rights bodies. CERD continues to lack a 'benchmark' general recommendation on minorities or on multiculturalism and it remains a matter of speculation whether any such recommendation will emerge in the course of time.

Federalism as the Defence of Nationalities and Minorities?

Peter Pernthaler

In order to treat this topic reasonably, one needs to have a wide understanding of the term "federalism" that is not necessarily limited to the "federal state" in the classical sense.[1]

This type of *"functional federalism"* applies to the "sovereignty" of the constituent states as well as to the autonomy of regions, if this autonomy meets certain minimum standards of legal and political independence against the central power and the possibility of (internal) self-determination. Such a *"federalistic standard"* comprises competences (that are established by the Constitution), organisational power, financial means and participation at the supra-regional level.[2] Regions that meet these standards may enter into co-operative relations with each other, with the European Union and the Council of Europe and thus further develop the dynamic system of *"European regionalism"*.[3] Examples of states where *"functional federalism"* is practised are therefore "classical" federal states like Switzerland, Germany, Austria, and "federalistic" regional states like Italy and Spain.[4]

Such an extensive notion of federalism also comprises the classical antipodes of *"homogeneous"* and *"asymmetric" ("differentiated") federa-*

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1 PETER PERNTHALER, Asymmetrischer Föderalismus als systemübergreifender Ordnungsrahmen der Regionalautonomie, in: JOSEPH MARKO et al. (eds.), Die Verfassung der Südtiroler Autonomie, 2005, p. 97 et seq.

2 PETER PERNTHALER/IRMGARD RATH-KATHREIN/KARL WEBER, Der Föderalismus im Alpenraum, 1982, p. 33 et seq.

3 PETER HÄBERLE, Der Regionalismus als werdendes Strukturprinzip des Verfassungsstaates und als europarechtliche Maxime, AöR 1993, p. 1 et seq.

4 ANNA GAMPER, Die Regionen mit Gesetzgebungshoheit, 2004, p. 80 et seq.

lism;[5] this distinction applies according to the homogeneity or heterogeneity of autonomous sub-systems as regards their powers, functions, financial means etc. If the *principle of subsidiarity* is applied – as it should be – to federal systems, it plainly depends on the real structure of the federation and the autonomous sub-systems, whether "symmetric" or "asymmetric" federalism comes into question: The autonomy of a particular people, of a particular language or ethnic group needs other powers and forms of organisation than the self-government of a *Land* within homogenous federal nation states such as Germany or Austria.[6]

In particular, it depends on the structure and size of a minority (nationality) whether federalism should be considered at all as a protective institution and which form of federal organisation would be suitable. Nationalities of a certain minimum size that settle in a *closed area* can, by being established as an autonomous region or "sovereign" constituent state within another nation's system, achieve such political and legal identity and independence that this approaches the realisation of the peoples' right of self-determination *("internal right of self-determination")*.[7] Nationalities or language groups with another structure (e.g. *spread minorities*) are not directly protected by federalism; however, the federal structure of a state with a nation or language alien to these groups may be integrated into minority protection in many ways. The reason for this is that *pluralism* and *tolerance towards minorities* generally constitute characteristics of federalism.[8] Also federal systems usually grant a two level system protecting rule of law and this may help

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5 PETER PERNTHALER, Der differenzierte Bundesstaat, 1992; ANNA GAMPER, "Arithmetische" und "geometrische" Gleichheit im Bundesstaat, FS Pernthaler, 2005, p. 143 et seq.; HANS HUBER, Die Gleichheit der Gliedstaaten im Bundesstaat, ÖZÖR 18 (1968), p. 247 et seq.

6 PETER PERNTHALER, Asymmetrischer Föderalismus als systemübergreifender Ordnungsrahmen, in: JOSEPH MARKO et al. (eds.), Die Verfassung der Südtiroler Autonomie, 2005, p. 97 et seq.

7 THEODOR VEITER, Das Selbstbestimmungsrecht als Menschenrecht, FS Klecatsky, 1980, p. 967 et seq. (p.984 et seq.); FELIX ERMACORA, Autonomie als innere Selbstbestimmung, Archiv des Völkerrechts 38, 2000, p. 285 et seq.; UN-Declaration no. 2625/XXV.

8 PETER PERNTHALER, Föderalismus – Bundesstaat – Europäische Union. 25 Grundsätze, 2000; KARL WEBER, Elemente eines umfassenden Föderalismusbegriffes, FS Klecatsky, 1980, p. 1013 et seq.

minorities to defend their rights against violations by the constituent states or local governments.

The very different forms of federalism that protect nationalities have been pragmatically developed – especially by the Ottoman Empire, the Austro-Hungarian Empire and tsarist Russia[9] – and thus shaped by a variety of structural principles. The multi-nation federal state is seen as the best concept, since nations are territorially divided into constituent states of their own, in which they constitute the majority group.[10] However, it has become evident that *dualistic federal states* that are based on two different nations are relatively unstable since a federal system, apart from distinct and autonomous institutions, needs strong elements of integration *("cross cutting cleavages")* that are often lacking in those two-partner systems. Accordingly, I cannot conceal doubts on whether a federal arrangement in Cyprus could survive without a confederal transitory period of political confidence-building.[11]

The example of the Austrian monarchy shows, however, that fierce conflicts may particularly arise between nationalities *within* the constituent states of a federal system, since majority and minority may be territorially entangled, frequently change their roles and thus suppress or fight against each other.[12] It is significant that the State Treaty of Vienna (1955) specifies those minorities that are to be protected according to the *Länder*, in which they are *autochthonous*. If nationalities mass in certain constituent states, the federal system grants them particular protection in so far as the central power legally defends minorities and their individual members against violation of rights that is committed by regional or local authorities that belong to another nation.

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9 CHRISTOPH PAN/BEATE-SIBYLLE PFEIL (eds.), Zur Entstehung des modernen Minderheitenschutzes in Europa, 2006.

10 PETER PERNTHALER, Allgemeine Staatslehre und Verfassungslehre[2], 1996, p. 60 et seq.

11 PETER PERNTHALER, A Federal or Confederal Solution to the Cyprus Problem?, in: WALDEMAR HUMMER (ed.), Europarecht im Wandel. Recht und Europa, vol. 5, 2003, p. 283 et seq.

12 GERALD STOURZH, Die Gleichberechtigung der Volksstämme als Verfassungsprinzip 1849-1918, in: ADAM WANDRUSZKA/PETER URBANITSCH (eds.), Die Habsburgermonarchie, vol. III/2, 1980, p. 975 et seq.

This type of *multi-level-protection* of minorities has proven its worth in the international legal arena as well, on the condition that special international guarantees protect a concrete minority and that the nation state on which these guarantees are imposed is willing to co-operate in minority issues. The conflict regarding municipal signs in Carinthia (Slovene minority)[13] shows as an example that also the *constituent units* of a federal state must be willing to co-operate in order to realize the legal protection of minorities. The example of Belgium further teaches us that even the most complicated legal constructions of multi-nation federalism – that is moreover connected with a regional autonomy of the German language group – can only function if the will towards legal and political co-operation is stronger than the permanent attitude for nationalistic conflicts.[14] Perhaps, however, the basic willingness to establish *consociational* (concordance) *democracy* is not only the intrinsic condition of the successful coexistence of nationalities, but also the indispensable requirement even for the functioning of federal and regional systems.[15]

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13 PETER PERNTHALER, Die Dynamik des österreichischen Minderheitenschutzes, Europa Ethnica 60, 2003, p. 75.

14 ANNA GAMPER, Belgien – Entstehung und heutiger Stand des plurinationalen Mehrebenenföderalismus mit Minderheitenschutz der deutschen Volksgruppe, in: CHRISTOPH PAN/BEATE-SIBYLLE PFEIL (eds.), Zur Entstehung des modernen Minderheitenschutzes in Europa, 2006, p. 267 ss.

15 PETER PERNTHALER, Die Identität Tirols in Europa, 2007, p. 111 ss.

Minority Protection within the OSCE

Krzysztof Drzewicki

Table of Contents

I. Introduction

The aim of this contribution is to examine minority protection within the Organization for Security and Co-operation in Europe (OSCE), formerly (1975-1994) named the Conference on Security and Co-operation in Europe (CSCE).[1] Before embarking upon these issues a few introductory points

[1] The CSCE was renamed OSCE by a decision of the Budapest Summit on 5-6 December 1994 within moves to strengthen institutionalisation of the Helsinki process from 'Conference' to 'Organization' in the circumstances of emerging

should be made on the key concepts reflected in the title. This prompts to devoting a few comments to such concepts as 'minority' and 'protection'. Examination of the issues of minority protection in the OSCE also prompts to outline briefly the most important aspects of the structure and powers of its bodies and institutions. Subsequently basic information and conclusions on extra-OSCE normative frameworks for minority rights at both universal and regional levels are provided. Against such a background specific instruments and arrangements for the protection of minorities within the OSCE can better be examined.

1. The Notion of a 'Minority'

The title term 'minority' is meant throughout this paper as an abbreviated version not for any numerical minority but for the notion of 'national or ethnic minorities'. While the term 'national minority' is largely used in the European domestic and international contexts, its universal (United Nations) equivalent is the notion of both 'national or ethnic minority'.[2] Both essentially refer thus to the same concept of national/ethnic minority groups.

Although there is no generally accepted definition of the term 'national/ethnic minority' in international law and its jurisprudence, one may nonetheless distinguish the most specific features which characterise the notion at least in its 'commonsensical' understanding. These are the following:

1) distinctive features in terms of ethnicity, language, religion, history and cultures;

2) numerical minority in a non-dominant position;

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needs of the post-Cold War developments to ensure security and democratic governance based on the rule of law and human rights.

2 The European terminology is a historical reflection of the concept of 'nation-state' which emerged in the aftermath of the Peace of Westphalia (1648), while the UN approach had to embrace more diversified groups of ethnic, racial, religious or linguistic characteristics, hence the terminology focused on both 'national or ethnic' origin of minority communities. See the list of universal and regional instruments in this field in: GUDMUNDUR ALFREDSSON/GÖRAN MELANDER, A Compilation of Minority Standards, Lund: Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 1997.

3) temporal component relating to a longer stay on the territory of the country;

4) subjective conviction and sense of belonging to and being a member of minority to preserve distinctive features. [3]

Absence of a precise definition need not be a major obstacle for the promotion and protection of minorities although in a number of situations it may create serious problems. This is manly the case with interpretation of the above features once they are taken as criteria not only for a definition as such but notably for official recognition of specific groups as national/ethnic minorities. The lack of a precise of definition of minorities may however also have positive implications since its flexibility allows accommodating dynamically certain groups which are not regarded at a given moment as traditional minorities but could in the course of time and changing perceptions be regarded as fully-fledged ethnic or national minorities (e.g. migrant communities or other unrecognized minority groups which developed their cultural identity).[4]

2. The Concept of 'Protection'

As far as the concept of 'protection' is concerned it may be proposed to refer to and apply its far broader meaning than that of strictly legal nature, thus based upon a binding legal rule and with access to a legal remedy. Modern international law of human rights, which minority rights belong to, distin-

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[3] This typology largely draws upon ARIE BLOED/SRIPRAPHA PETCHARAMESREE, Final Report, in: B. FORT/P. RYAN (eds.), Human Rights and Ethnic, Linguistic and Religious Minorities. 7th Informal ASEM Seminar on Human Rights, Budapest, Hungary, 22-23 February 2006, Singapore, Asia-Europe Foundation, 2006, pp. 35-36. For more on minority definition see Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, by FRANCESCO CAPOTORTI, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, New York: United Nations. 1991, pp. 5-12; and JOHN PACKER, Problems in Defining Minorities, in: D. FOTTRELL/B. BOWRING (eds.), Minority and Group Rights in the New Milennium, The Hague, Martinus Nijhoff Publishers, pp. 223-274.

[4] The advantages of flexibility in case of absence of legally strict definitions has already been noted in the Roman law tradition whereby '*Omnis definitio pericolusa est*' – to define anything is dangerous.

guishes between the international systems for the promotion and protection of human rights. The latter presupposes the existence of two elements: binding international substantive standards on human rights and measures or mechanisms available for monitoring implementation of human rights. [5]

The basis for a protection system can thus be either legal or political instruments. This characterisation of the human rights protection systems has been conceived in a deliberately broad way to include both the arrangements based upon treaty provisions and those undertaken as political commitments.

Consequently, human rights systems providing neither for a substantive catalogue of human rights nor for a mechanism for supervision of their compliance fail to satisfy the above requirements and may hence at best be characterised as serving for the international promotion of human rights. This distinction is not tantamount to an assessment of their efficiency. It may be so concluded since there are, on the one hand, treaty-based systems binding upon the parties, but with weak international supervisory mechanisms and, on the other hand, systems established, developed and well operating upon purely political commitments, which are supervised by means of strong and effective political instruments. The first type of a system may be illustrated by the arrangements under the International Covenant on Economic, Social and Cultural Rights, while the second by the so-called human dimension commitments of the Organisation for Security and Co-operation in Europe (OSCE).[6]

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5 KRZYSZTOF DRZEWICKI, Internationalization of Human Rights and Their Juridization, in: R. HANSKI/M. SUKSI (eds.), An Introduction to the International Protection of Human Rights. A Textbook, Second, revised edition, Åbo/Turku: Institute for Human Rights, Åbo Akademi University, 1999, p. 35.

6 On the latter system for human rights see THOMAS BUERGENTHAL, CSCE Human Dimension: The Birth of a System, in: A. CLAPHAM/F. EMMERT (eds.), Collected Courses of the Academy of European Law, 1990, Vol. I-2, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992, pp. 160-209.

II. Extra-OSCE Normative Frameworks for Minority Rights

Before the CSCE/OSCE system had emerged in 1975 minority protection at both universal and regional dimensions continued to be very weak. Certain encouraging attempts towards their protection were made after the World War I by establishing special regimes for the protection of minorities under Treaty of Versailles of 1919, other peace treaties and special conventions.[7] The special regimes developed an impressive body of substantive and procedural standards, including recourse to arbitration and judicial bodies. This contributed to the development of domestic and international jurisprudence on national minorities. For a number of predominantly political reasons those attempts proved unable to solve minority problems and did not prevent the emergence of ethnic tensions and conflicts, which were subsequently identified among the major causes of the outbreak of the Second World War.

1. The United Nations

Unlike during the Versailles Treaty system, after World War II there was a discernible reticence in both the UN system and regional organisations to set international standards on national minorities and create any special system for their protection.[8] This is why we have witnessed a situation that may be characterised as a 'deficit' of rules of international law concerning national

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7 Special regimes for the protection of minorities were mainly created for numerous new states which appeared or re-appeared in Europe after the collapse of the Russian, Austro-Hungarian and Ottoman empires.

8 One must take account of the prevailing post-war perception whereby there was a need not for the protection of minorities but protection from minorities. Such a bitter assessment stemmed from the role of the so-called 'fifth column' played by some minority groups, notably Germans resident in host-states outside Germany – see JAN HELGESEN, Protecting Minorities in the Conference on Security and Co-operation (CSCE) Process, in: A. ROSAS/J. HELGESEN (eds.), The Strength of Diversity. Human Rights and Pluralist Democracy, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992, p. 159; see also NATAN LERNER, The Evolution of Minority Rights in International Law, in: C. BRÖLMANN/R. LEFEBER/M. ZIECK (eds.), Peoples and Minorities in International Law, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 86-91.

minorities. The United Nations believed that the universal respect for human rights, as was designed by the UN Charter in 1945, would solve by itself national minority problems. In addition there was an expectation that national minorities would in the long run be assimilated into the societies.

Upon the adoption of the Universal Declaration of Human Rights on 10 December 1948 the UN General Assembly also adopted Resolution 217 C (III) 'Fate of Minorities'. The resolution explicitly admitted that although the United Nations *„cannot remain indifferent to the fate of minorities"* it is difficult to *„adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises"*. Consequently, no provision on minorities was included in the Universal Declaration. An adoption of the very basic principles and rules in this regard within the UN system needed yet several years more.[9]

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 shows certain relevance for the protection of minority rights as an attempt at addressing minority issues through the broader concept of prohibition of racial discrimination. The first specific standard on minorities appeared merely in the 1966 International Covenant on Civil and Political Rights (ICCPR) which in its Article 27 says that:

> „In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy own culture, to profess and practice their own religion, or to use their own language."

The ICCPR created thus the first explicit provision on the rights of persons belonging to ethnic, religious or linguistic minorities. This provision is subject to monitoring mechanisms provided for by the Covenant, notably reporting by states and individual communications examined by the Human Rights Committee. While reporting mechanism, by a dialogue with states on their domestic protection of minorities, brought about a lot of improvements, achievements in developing case law by the Committee have rather been a modest contribution.

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[9] ASBJØRN EIDE, The Non-Inclusion of Minority Rights: Resolution 217C (III), in: G. ALFREDSSON/A. EIDE (eds.), The Universal Declaration of Human Rights. A

After the completion of the programme of the International Bill of Human Rights (La Charte International des Droits de l'Homme) a trend has emerged and has been gaining momentum towards the so-called *'personalisation des droits de l'homme',*[10] in other words towards a more specific international standards in regard to vulnerable groups affected by international normative deficit (refugees, women, children, national/ethnic minorities, migrant workers, etc.).[11] General provisions of human rights treaties appeared to be insufficient and their further codification and progressive development was called for. An illustration of successfully focused approach has been a provision of Article 30 of the Convention on the Rights of Child (CRC).[12]

Within a next stage the UN General Assembly adopted on 18 December 1992 the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which has been 'generously' found „a significant if modest contribution to the developing discourse".[13] The Declaration became the first non-binding instrument of the United Nations on national or ethnic minorities. It was formulated in a typical UN parlance, hence in lofty language but with a weak content and yet weaker monitoring mechanism.

Common Standard of Achievement, The Hague/Boston/ London: Martinus Nijhoff Publishers, 1999, pp. 701-709.

10 The International Bill of Human Rights was made up of a declaration on human rights, a convention on human rights and measures for implementation. It is acknowledged that the programme was completed in 1966 with the adoption of both UN Covenants. For more see KRZYSZTOF DRZEWICKI (note 5), Internationalization of Human Rights and Their Juridization, pp. 32-34.

11 KAREL VASAK, Le droit international des droits de l'homme, Recueil des Cours de l'Academie de Droit International, vol. IV (1974).

12 Art. 30 CRC says that „In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language".

13 PATRICK THORNBERRY, The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update, in: A. PHILLIPS/A. ROSAS (eds.), Universal Minority Rights, Åbo/Turku and London: Åbo Akademi University Institute for Human Rights and Minority Rights Group (International), 1995, p. 62.

All in all, at the universal level of standard-setting legal basis on ethnic or national minorities evolved from initial resistance against legal regulations and thus absence of international standards up to adoption of general but binding provision in the ICCPR and more extensive but cautious formulations of the 1992 Declaration. Together with underdeveloped jurisprudence on minority rights one can submit that the UN system continues to suffer from a 'normative deficit' of rules which could facilitate practical promotion and protection of minority rights at domestic levels.

2. European dimension – the Council of Europe

European law-making endeavours on national minority rights have been developed through two different routes within two major European frameworks: the Council of Europe and OSCE. In pre-1990 Europe progress in standard setting concerning national minorities was as poor as in the United Nations and other international bodies. Europe's moves towards drawing up more extensive regulations on minority rights started merely in the 1990s.

The Council of Europe was set up in 1949 as a treaty based regional organization to develop further unity of European states but only those based on representative democracy, the rule of law and respect for human rights. The Council has developed into the most sophisticated system for the protection of human rights with the European Convention on Human Rights (1950) embracing a catalogue of substantive human rights standards and procedures for individual and inter-state applications examined by the European Court of Human Rights. There was therefore a legitimate expectation that the Council created a setting conducive for developing its own normative body of rules and mechanisms on minority issues.

Typically however of post-war period the Council of Europe was not yet ready to make a step in this direction. All attempts undertaken till 1990s to adopt a binding instrument failed.[14] The European Convention did not provide explicitly for minority rights with an exception of a reference on 'association with a national minority' among the grounds upon which

[14] On early standard-setting attempts see GAETANO PENTASSUGLIA, Minorities in International Law. An Introductory Study, Strasbourg: Council of Europe Publishing, 2002, pp. 119-120.

discrimination is prohibited in the enjoyment of the rights and freedoms set forth in the Convention (Art. 14 ECHR). Only since the entry into force of Protocol No. 12 to the ECHR in 2005 a general prohibition of discrimination on a number of grounds, including that on 'association with a national minority', became operative as an autonomous provision. It can thus generate more case law on minority issues but specifically from the perspective of non-discrimination principle. Still however in its adjudication the European Court of Human Rights can cover minority issues only partly and indirectly (through substantive rights) or through a non-discrimination clause.

In addition to the latter group of cases, the Court examined a number of applications concerning minority issues in the context of use of language upon arrest (Art. 5/2) and during criminal trial (Art. 6/3a and e) and also with regard to the enjoyment of freedom of religion, freedom of association and assembly, freedom of expression, the right to education, recognition and registration of minority groups and effective participation.[15] Altogether the case-law of the European Court of Human Rights on the rights of persons belonging to national minorities addresses a variety of circumstances and although on the whole it is still fairly modest its potentials are not yet exhausted by individuals and non-governmental organisations.

The crowning achievement of the Council of Europe became the adoption of the Framework Convention for the Protection of National Minorities (FCNM) in 1995, in force since 1998. After a few years of difficult negotiations the Council of Europe succeeded in drawing up the first comprehensive treaty exclusively devoted to the protection of national minorities. The Framework Convention created a binding 'mini-system' made up of an extensive catalogue of principles and rights of persons belonging to national minorities.

This system has also included implementation mechanism based on state reports examined first by an expert body – Advisory Committee, and then within a political mechanism of assessment by the CoE Committee of

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15 GILBERT GEOFF, The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights, Human Rights Quarterly 24 (2002), p. 780 concludes that the ECHR can protect certain aspects of minority rights but it is not designed so to do, and that resort to „legal mechanisms to address minority rights issues will never be the complete answer".

Ministers.[16] Although the whole mechanism is still in its formative period, approaching the end of the third reporting cycle, it has already been widely accepted (39 parties for 47 CoE's members) and contributed to impressive development of desperately needed jurisprudence on minority rights in spite of vague formulations of their substantive provisions. The principle of coherence has envisaged a duty to ensure conformity of the FCNM to the ECHR.[17] The importance of the Framework Convention also extends to its impact on the promotion and protection of minority rights within the OSCE. This impact however has exerted a set of mutual reactions which will be discussed below.

III. OSCE Normative Frameworks for Minority Rights

1. Evolution and mandate

The Organisation for Security and Co-operation in Europe (initially Conference of Security and Co-operation in Europe – CSCE) was set up in 1975 as a diplomatic type of regular conference arrangement without treaty basis. Its constitutive document – the Final Act of Helsinki was adopted on 1 August 1975.[18] The OSCE was the very first European arrangement or organisation which built a bridge between East and West. Its establishment and origins are deeply embedded in attempt at ending the Cold War by resolving the remaining post-war issues (relations of Eastern European states with Germany, status of West Berlin) and at building a new and com-

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16 For more see EERO J. ARNIO, Minority Rights in the Council of Europe: Current Developments, in: A. PHILLIPS/A. ROSAS (eds.) (note 13), Universal Minority Rights, pp. 123-133; and MARC WELLER (ed.), The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities, Oxford: Oxford University Press, 2005.

17 This has been envisaged, as a guiding principle, in Article 23 of the FCNM that the rights and freedoms enshrined in the Convention must conform to the respective provisions of the European Convention on Human Rights. It means that they must also conform to the jurisprudence of the European Court of Human Rights.

18 For more on the evolution of the OSCE see The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993, ed. by A. BLOED, Dordrecht/Boston/London: Kluwer Academic Publishers, 1993, pp. 92-95.

prehensive approach to pan-European co-operation and security.[19] Admittedly, the OSCE was largely instrumental in the ending of Cold War and hence transformation of Central Eastern Europe after 1989/1990 became its new challenge. Although born out predominantly of political and security considerations the OSCE also included human rights and humanitarian issues into its agenda, however not as a marginally concomitant element but as an aspect integrated on equal footing with security and political dimensions.

The Helsinki Final Act was a politically and not legally binding agreement. This practice of undertaking predominantly political commitments has been continued and constitutes a characteristic feature of the Organisation. It has been a deliberate decision to establish and maintain the OSCE as a set of flexible mechanisms of multilateral negotiations for the so-called 'European region' (USA, Canada and Europe as such). Although in the course of years, notably after 1990, the OSCE started its institutionalization but still predominantly without resorting to treaty-based instruments and obligations.[20]

Members of the OSCE, called participating States, evolved from initial 35 participating states in 1975 to 56 in 2008 largely due to an increase generated by the collapse of USSR and ex-Yugoslavia, and negotiated disintegration of Czechoslovakia. The OSCE was created as a broad 'European region' (USA, Canada, Europe proper and Central Asia). Untypically for the outreach of European organisations, the OSCE also included not only USA and Canada but also five Central Asian Republics. From its very inception the OSCE did not apply elaborate admission requirements for participating states typical for the Council of Europe or other organisations open only to democracies. In this sense and with its focus on security issues the OSCE reminds the United Nations where security

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19 However, an editorial of the *New York Times* expressed serious scepticism about the birth of the CSCE in 1975 to the effect that „The 35-Nation Conference on Security and Cooperation in Europe, now nearing its climax after 32 months of semantic quibbling, should not have happened. Never have so many struggled for so long over so little …. If it is too late to call off the Helsinki Summit … every effort must be made there, publicly as well as privately, to prevent euphoria in the West." – see Address by the Minister of Foreign Affairs of the Republic of Slovenia at the 12th OSCE Ministerial Meeting in Sofia, 5-6 December 2004. MC.DEL/25/04, 6 December 2004.

20 For more on the evolution of institutional structures and functional arrangements see OSCE Handbook. Vienna: OSCE, 2007, pp. 2-12.

considerations prevail over the requirements of democracy and human rights.[21] Unlike UN, the OSCE has however as its major objective the achievement of democratic governance in all participating states. Significantly, when in the 1990s ex-Yugoslavia was suspended in her membership it occurred so due to security considerations and not deficit in democracy and human rights.

Irrespective of its characteristics as 'conference diplomacy' the OSCE started, notably after Cold War to strengthen its institutionalisation. It developed eventually the following main structures: Summits of Heads of State and Government; Ministerial Council (once a year), Permanent Council (once a week, at ambassadorial level); missions of long duration; the Parliamentary Assembly, conferences/meetings of Human Dimension, the High Commissioner on National Minorities (HCNM), Human Dimension Implementation Meetings (HDIM); meetings of specialised bodies, and secretariats in Vienna, Prague, Hague (HCNM) and Warsaw (Office for Democratic Institutions and Human Rights – ODIHR).[22]

The rationale of the OSCE has been well embedded in ensuring security and stability in Europe. The notion however of security, broad from the beginning, has constantly become enlarged so as to embrace more and more other issues than purely politico-military matters, thus not only hard-security but also conflict prevention, post-conflict rehabilitation and building infrastructure for security, democratic governance and human rights. This reflects the so-called comprehensive approach to pan-European co-operation and security. The mandate of the OSCE has been organized in four areas or 'baskets' called nowadays 'dimensions' of security:

1) the politico-military dimension which includes arms control, transfers of conventional arms, non-proliferation, destruction of weapon systems, creation of system of verification and transparency, military reforms, combating terrorism, border management, and others issues.

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21 While Article 4 para. 1 of the UN Charter says that „Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter […]", the CoE requires of candidate states the achievement of pluralist and representative democracy, the rule of law, protection of human rights and fundamental freedoms, and a European vocation.

22 More detailed information on the institutional build-up see in OSCE Handbook (note 20), pp. 13-37.

2) the economic and environmental dimension – transportation networks, water management, protection of land, demographic trends and migrations, good governance in economic matters and other issues.

3) the human dimension – democratic governance, election monitoring, democratic policing, the rule of law, human rights and fundamental freedoms, and humanitarian issues.

4) the modalities for follow-up process on the undertaken commitments.[23]

Probably the most innovative aspect in the OSCE has become not only bringing all these distinct dimensions together but also regarding them as interdependent and inseparable whole.[24] In the course of years it appeared however that a feedback between the three baskets has been insufficient, notably by marginalisation and minimalisation of the second basket and diversification of priorities. Nevertheless on the whole the comprehensive approach to security is highly commendable policy choice as seems to be demonstrated by practical achievements.

As far as human rights and national minority issues are concerned it is of significance that they have been approached within four OSCE frameworks:

- as a politico-security principle;
- as a part of human dimension substantive commitments;
- as a part of human dimension commitments on monitoring implementation; and
- as a part of conflict prevention mandate of the High Commissioner on National Minorities.

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23 Ibidem, pp. 3-4.

24 ARTHUR H. ROBERTSON/JOHN G. MERRILLS, Human Rights in Europe, Third edition, Manchester and New York: Manchester University Press, 1993, p. 360 rightly submit that the OSCE put human rights issues firmly on the agenda of East-West relations.

2. Politico-Security Principle

Within the first framework one should note the Declaration on Principles Guiding Relations between Participating States of the Final Act of Helsinki (1975). This document, also known as the Decalogue, contains among its ten principles of modern international relations the principle no. VII – 'Respect for human rights and fundamental freedoms including the freedom of thought, conscience, religion or belief'.

The Principle VII of the Decalogue enumerated in its eight paragraphs the most important aspects making up the respect of human rights for all without discrimination, including those on the right of persons belonging to national minorities to equality before the law and to opportunities for the actual enjoyment of human rights (Para. 4).

While most of the provisions of Decalogue were re-negotiated repetitions of UN the Charter and other instruments, the inclusion of the principle on the respect for human rights, including minority rights, was a major achievement. For the first time human rights have been couched in a form of principle of international relations, and more, as the principle linked directly with security. This innovation should be seen in the light of absence of explicit formulations of the principle of respect for human rights in the 1945 UN Charter and the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970).[25] The Decalogue restored thus a balance to the interpretation of the principle of non-intervention in domestic matters which formerly regarded virtually each reference to domestic human rights violations as infringement of international law.

The content of the Principle VII is a result of a carefully negotiated deal on the provisions which largely reproduce formulations of international instruments but nonetheless reflect also special concerns about insufficient

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[25] It has been submitted nevertheless that a series of detailed provisions in the Charter argue for the international recognition of respect for human rights as a key principle of the United Nations – see KRZYSZTOF DRZEWICKI, The United Nations Charter and the Universal Declaration of Human Rights, in: R. HANSKI/M. SUKSI (eds.) (note 5), An Introduction, p. 70.

recognition and actual enjoyment of some rights, and special needs of groups articulated earlier very modestly, like notably in case of national minorities.

3. Human Dimension Substantive Commitments on Human and Minority Rights

Second framework that has integrated human rights is a set of human dimension commitments. It cannot first be overlooked that from this perspective human rights are but a part of the broader set of commitments, including also democratic governance, election monitoring, the rule of law, humanitarian and other issues. [26]

Initially (1975-1989) the OSCE was very cautious on human rights issues because a fundamental divide between East and West continued to prevail until the end of Cold War. This is why it must be seen as a progress that the OSCE had succeeded in bringing basic formulations on human rights to negotiated public documents, even if they had mainly contained brief restatements of well-known principles. The 1975 Helsinki Final Act has only two such sets of provisions. One, as mentioned above, has embraced Principle VII of the Decalogue on the respect of human rights and fundamental freedoms which includes in its Paragraph 4 provisions on the enjoyment by persons belonging to national minorities of the equality before the law and of human rights and fundamental freedoms. The second has been a set of provisions on national minorities and regional cultures in the Section dealing with 'Co-operation in Humanitarian and Other Fields' of the Final Act.[27]

After the Helsinki Final Act a modest contribution to the developments of human rights commitments was achieved during the Madrid Follow-Up Meeting (1980-1983) which came after total failure of the Belgrade Follow-Up Meeting in 1977. A prelude to profound changes was the Vienna Follow-Up Meeting (1986-1989) which already benefited from first symptoms of the

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[26] For a compiled publication of human dimension texts see OSCE Human Dimension Commitments. Volume 2 Chronological Compilation, 2nd Edition, Warsaw: OSCE/ODIHR, 2005.

[27] The first provision (Principle VII/4) of the Declaration on Principles Guiding Relations Between Participating States (the Decalogue) had admittedly its roots in the wording of and consensus on Art. 27 ICCPR.

demise of Communism.[28] As far as national minority commitments the 1983 Madrid Concluding Document contained one modest provision and the 1989 Vienna Concluding Document six provisions.

The actual eruption of human dimension commitments took place in 1990-1991. It brought about the most successful results during Paris (1989 and 1990), Copenhagen (1990) and Moscow (1991) meetings of the OSCE. The most extensive and far-reaching catalogue of human dimension commitments ever agreed upon in the CSCE/OSCE was a contribution of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. It constitutes a sort of a charter which brings together provisions on pluralist democracy, the rule of law and democracy. Its regulations are far broader than those of the ECHR and ICCPR. The Copenhagen Document is altogether the most extensive and far-reaching catalogue of human dimension commitments ever agreed upon in the OSCE.[29] They were moreover drafted in a clear, precise and detailed language with a relatively reduced number of limitation clauses (e.g. public order, national security, rights of others, etc.).

As to national minority issues the process of setting extensive political commitments started with the adoption of the Copenhagen Document in 1990 (so-called 'shopping list') and was followed by the adoption of a report by the CSCE Meeting of Experts on National Minorities in Geneva in 1991. The Copenhagen Document includes over 30 operational paragraphs, while the Geneva Report over 40. Together they contain thus the most extensive set of standards on national minorities although drawn up as binding political

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[28] See extensive comments of JAN HELGESEN, Between Helsinkis – and Beyond? Human Rights in the CSCE (Conference on Security and Co-operation in Europe) Process, in: A. ROSAS/J. HELGESEN with the collaboration of D. GOMIEN (eds.), Human Rights in a Changing East-West Perspective, London and New York: Pinter Publishers, 1990, pp. 244-258.

[29] For more comments on the Copenhagen Document see The Conference, ... A. BLOED (ed.) (note 18), pp. 92-95; and DONNA GOMIEN, Human Rights Standard-Setting and the CSCE Conference on the Human Dimension: The Contribution of the Copenhagen Document', in: Z. KĘDZIA, A. KORULA, M. NOWAK (eds.), Perspectives of an All-European System of Human Rights Protection. The Role of the Council of Europe, the CSCE, and the European Communities. Proceedings and Recommendations of an International Conference. Poznań, Poland, 8-11 October 1990, Kehl-Strasbourg-Arlington: N.P. Engel, Publisher, 1991, pp. 93-102.

commitments and not legal obligations.[30] This achievement may best be shown by comparing national minority provisions of the Copenhagen and Geneva documents with Article 27 ICCPR which was formulated in a single and modest sentence reflecting a general, rudimentary and fragmentary regulation on the rights of persons belonging to national or ethnic minorities. It can safely be concluded that a catalogue of commitments as provided for by the Copenhagen and Geneva documents constitutes so extensive regulation that deserves to be called a 'political mini-treaty' on national minority issues.

Further developments of national minority commitments after 1990/1991 have been characterised by the following trends. The first has been a continuation by the OSCE highest bodies, notably Summits and Ministerial Councils, in repeating the major commitments, assessing their implementation and sometimes also in supplementing the existing commitments with new or more detailed guidelines for action. The latter situation can be identified with regard to commitments on indigenous populations and tolerance and non-discrimination (Helsinki Document of 1992) and on Roma and Sinti (Documents of Budapest 1994, Lisbon 1996, Istanbul 1999 and Maastricht 2003).[31] The second trend can be attributed to endeavours of setting standards and recommendations and guidelines by a new body – High Commissioner on National Minorities, established in 1992 (see below section IV.).

The OSCE has thus been the very first international organisation which started to set standards in the field of national minorities going beyond the mere general statement of the principle. This comprehensive standard-setting success has brought to an end the post-war period of regrettable 'normative deficit' of international regulations on the rights of persons belonging to

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30 According to BLOED the „chapter on the protection of national minorities belongs to the major achievements of the Copenhagen CHD meeting" (The Conference, … A. BLOED [ed.] [note 18], p. 94). For more on diplomatic and legal aspects of negotiations on national minority issues in Copenhagen and Geneva see JAN HELGESEN, Protecting Minorities in the Conference on Security and Co-operation in Europe (CSCE) Process, in: A. ROSAS/J. HELGESEN (eds.), The Strength of Diversity. Human Rights and Pluralist Democracy, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992, pp. 170-183.

31 Typical of 'repetitive' provisions of the OSCE documents is a formula: „The participating States confirm their commitment …".

national minorities. The adoption notably of Copenhagen and Geneva documents exerted directly an impact on other international organisations. This was the case with the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted on 18 December 1992 and more so with the Council of Europe. Once the latter decided to draw up a binding legal instrument on national minorities it was not surprising that the OSCE normative framework provided a detailed list of provisions which made the whole treaty-making process much easier, particularly in that all the CoE members were participating States of the OSCE. The Copenhagen and Geneva documents inspired and created therefore both a normative reference system and a minimum baseline for the Framework Convention for the Protection of National Minorities.

The influence of the OSCE human dimension commitments upon the FCNM was explicitly mentioned in its Preamble. A reference to relevant OSCE commitments went beyond mere 'inspiration' what was admitted by the Convention's drafters who had pertinently emphasised in the Explanatory Report to the FCNM their desire that *„the Council of Europe should apply itself to transforming, to the greatest possible extent, these political commitments into legal obligations. The Copenhagen Document in particular provided guidance for drafting the Framework Convention"*. [32]

Consequently, not only we witnessed a transformation of the OSCE commitments into legal rules of the Framework Convention, but also within a feedback reaction an impact by the Framework Convention and its jurisprudence upon interpretation of minority standards by the OSCE. This has a potential in strengthening minority standards by developing a coherent and mutually coordinated interpretation and by extending their applicability to states which are not members of the CoE or those members which are not

[32] Preambular Paragraph 11 of the FCNM says that „Having regard to the commitments concerning the protection of national minorities in United Nations conventions and declarations and in the documents of the Conference on Security and Co-operation in Europe, particularly the Copenhagen Document of 29 June 1990". See also Paragraph 27 of the Explanatory Report to the FCNM in: Framework Convention for the Protection of National Minorities. Collected Texts, 4th edition, Strasbourg: Council of Europe Publishing, 2007, pp. 8 and 22. One may legitimately submit that the OSCE minority rights commitments were implanted into the FCNM.

parties to the FCNM but continue to be bound by the OSCE commitments (e.g. Belgium, France, Greece or Turkey).

All in all the OSCE substantive human dimension commitments constitute an impressive body of political undertakings. They create both standards concerning directly human rights and fundamental freedoms and place them in a broader environment together with the rule of law issues, democratic governance and other commitments. Consequently, as noted by BUERGENTAL,[33] the OSCE has pioneered a 'holistic approach to human rights, which proceeds on the assumption that individual rights are best protected in states which adhere to the rule of law and democratic values and are so constituted as to permit these concepts to flourish'.

4. Monitoring of the Human Dimension Commitments

From its inception the OSCE accepted its role not only in standard-setting but equally in monitoring of their compliance. In the course of decades, and notably after the Cold War, a variety of monitoring measures and mechanisms were established and developed. One can distinguish, on the one hand, measures and mechanisms which serve for wider applicability to monitor compliance with *largo sensu* human dimension commitments, including those on national minority issues, and on the other hand measure and mechanism established specifically for monitoring implementation of national minority commitments (e.g. the High Commissioner on National Minorities).[34]

As far as the first group of monitoring arrangements is concerned it should be kept in mind that they were envisaged by the Final Helsinki Act itself. After the Helsinki Conference in 1975 next three meetings were convened

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33 THOMAS BUERGENTAL, International Human Rights in A Nutshell, Second Edition, St. Paul, Minn.: West Publishing Co., 1995, p. 167.

34 For an extensive study of monitoring arrangements and their practical application see ARIE BLOED, Monitoring the CSCE Human Dimension: In Search of Its Effectiveness, in: A. BLOED, L. LEICHT, M. NOWAK and A. ROSAS (eds.), Monitoring Human Rights in Europe. Comparing International Procedures and Mechanisms, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 45-91.

with the view to following up commitments.[35] However, only at the end of Cold War it became possible to work out a more comprehensive system of supervisory arrangements both in terms of building and developing the institutions and mechanisms which had to serve rapid increase of substantive human dimension commitments. This is why the post-1989 extension of the OSCE mandate made it indispensable to create operational infrastructure for performing new tasks within human dimension. The best illustration is the establishment in 1990 (Paris) of the Office of Free Elections, subsequently renamed the Office for Democratic Institutions and Human Rights (ODIHR) as a result of extension of its mandate in 1992. The ODIHR has a relatively autonomous role. Its major focus is election monitoring and electoral assistance for the improvement of democratic electoral process. Years of election monitoring enabled to accumulate a vast experience and the ODIHR gained an authority of highly professional entity. The ODIHR has been also empowered to deal with such issues as the rule of law, democratic governance, human rights, gender equality, migration and freedom of movement, tolerance and non-discrimination, Roma and Sinti and others.

Human dimension commitments are also discernible within the mandates of main organs and special bodies of the OSCE and their monitoring mandates. All these commitments appear regularly on the agendas of the Summit, Ministerial Council and Permanent Council. Particularly the latter, assisted by its Human Dimension Committee, devotes a lot of time to human dimension issues at its weekly meetings. Importantly, a part of the OSCE's success is the presence of its missions in the field. They are either of short or medium-term duration but there are also long-term missions with broader or more focused mandates.[36] Their role in integrating human dimension into their activities cannot be underestimated since on the spot observation of developments and implementation of specific projects or programmes proved more effective than those arranged remotely.

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35 The three Follow-Up Meetings were held in Belgrade (1977-1978), Madrid (1980-1983) and Vienna (1986-1989).

36 In 2008 the OSCE maintained 17 long-term missions usually called as missions ('to' or 'in' a specific country or territory) but also 'OSCE Presence in Albania', 'Spillover Monitor Mission', 'Office', Centre', Project Co-ordinator' and others – see OSCE Handbook (note 20), pp. 39-74.

A significant step in the post-1989 endeavours to strengthen monitoring procedures was made when a Human Dimension Mechanism was established during the Third Follow-Up Meeting in Vienna (1989). The Vienna Mechanism provided for a number of stages:

- response to requests for information on a situation concerning human dimension made by another participating state;
- holding a bilateral meeting to discuss a situation;
- bringing a situation to the attention of other participating states; and
- discussing the issues raised at OSCE meetings.

This Mechanism was frequently used in bilateral relations as a reaction to human rights violations, particularly in Central and Eastern Europe, but its value has been reduced by improvements of human rights situation in the region. The Vienna Mechanism was further complemented by the Moscow Mechanism in 1991 by a system of missions of independent experts or *rapporteurs* to facilitate the resolution of a particular question related to human dimension.[37] It provides for five separate procedures and two have been linked to the Vienna mechanism:

- an initiating state may suggest another state should invite a mission of experts;
- in case of refusal by that state to do so, the requesting state may propose, if supported by five other states, to establish a mission of experts against the will of the state.

Three other procedures for establishing missions under the Moscow Mechanism, which are not linked with the Vienna Mechanism, entail the following arrangements:

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[37] For more details of both procedures and their practical application see The Conference... A. BLOED (ed.) (note 18), pp. 40-44; OSCE Handbook (note 20), pp. 91-92; and MAGDALENA SEPULVEDIA, THEO VAN BANNING, GUDRUN D. GUDMUNSDOTTIR, CHRISTINE CHAMOUN, WILLEM J.M. VAN GENUGTEN, Human Rights Reference Handbook, Third revised edition, Costa Rica: University for Peace, 2004, pp. 177-179.

- voluntary invitation of a mission of experts by a participating state;
- decision by the Permanent Council (formerly Committee of Senior Officials) to establish a mission of experts or *rapporteurs*;
- establishment of an 'emergency' mission of *rapporteurs* in cases of a „particularly serious threat" to the fulfilment of human dimension provisions.

The Moscow Mechanism has been activated on a number of occasions but also there were cases of failures to have them activated.[38] Its innovative aspect was a resort to missions of independent experts or *rapporteurs*. However, both insufficient will of states and complicated and meticulous character of procedural arrangements contributed to infrequent use of the Moscow Mechanism.

In 1993 a new arrangement was introduced – Human Dimension Implementation Meetings (HDIM). These formerly bi-annual meetings are presently held annually for two weeks. It is a forum for governments and NGOs for a periodic monitoring debate.[39] This body has a chance to evolve towards a major body for reviewing implementation of human dimension commitments. Such an evolution can perhaps become even more commendable in case of failure of the United Nations reform of human rights sector, notably of the Universal Periodic Review (UPR). As an extension of the HDIM the OSCE developed Supplementary Human Dimension Meetings and Human Dimension Seminars focused on specific human dimension issues (e.g. on freedom of the media, defence lawyers, democracy and effective representation, human rights defenders, etc.).

A special case and framework related to human dimension but preoccupied with national minorities is the OSCE High Commissioner on National Minorities (HCNM).

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38 See conclusions drawn upon a mission to Turkmenistan – EMMANUAL DECAUX, 'The Moscow Mechanism Revisited', Helsinki Monitor, 2003, No. 4, pp. 355-370.

39 See MARIA AMOR MARTIN ESTABANEZ, The OSCE and Human Rights, in: R. HANSKI/M. SUKSI (eds.) (note 5), pp. 339-346.

IV. High Commissioner on National Minorities

1. Mandate of HCNM

The post of the High Commissioner on National was established by the 'CSCE Helsinki Document 1992: The Challenges of Change' as a highly autonomous and independent political body working in confidence as „an instrument of conflict prevention at the earliest possible stage" (Paras. 1-2 and 4 of the mandate).[40] To achieve this end, the High Commissioner is required to provide „early warning" and, as appropriate „early action" at the earliest possible stage „in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but, in the judgement of the High Commissioner, have the potential to develop into a conflict within the OSCE area, affecting peace, stability or relations between participating States, requiring the attention of and action by the Council or the CSO" (para. 3).[41] Later the latter bodies were renamed, respectively, the Ministerial Council and the Permanent Council.

Consequently, the High Commissioner's function is both to identify – and seek early resolution of – ethnic tensions, which may threaten peace and stability. In other words, the High Commissioner's mission is basically twofold: „first, to address and de-escalate tensions before they ignite and, second, to act as a 'tripwire', meaning that he is responsible for alerting the

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40 See Concluding Document of Helsinki – The Fourth Follow-up Meeting, 10 July 1992, Chapter II. For more on the background of the post see ROB ZAAGMAN and HANNIE ZAAL, The CSCE High Commissioner on National Minorities: Prehistory and Negotiations, in: A. BLOED (ed.), The Challenges of Change. The Helsinki Summit of the CSCE and its Aftermath, Dordrecht-Boston-London: Martinus Nijhoff Publishers, 1994, pp. 95-111.

41 For more on the content of the mandate see ROB ZAAGMAN, The CSCE High Commissioner on National Minorities: An Analysis of the Mandate and the Institutional Context, in: IBIDEM, pp. 113-175; JOHN PACKER, The OSCE High Commissioner on National Minorities, in: G. ALFREDSSON et al. (eds.), International Human Rights Monitoring Mechanisms. Essays in Honour of Jacob Th. Möller, The Hague-Boston-London: Martinus Nijhoff Publishers, 2001, pp. 641-656, and YEORGIOS I. DIACOFOTAKIS, Expanding Conceptual Boundaries. The High Commissioner on National Minorities and the Protection of Minority Rights in the OSCE, Athens: Ant. N. Sakkoulas, and Brussels: Bruylant, 2002, pp. 15-29.

OSCE whenever such tensions threaten to develop to such a level that he cannot alleviate them with the means at his disposal."[42] In other words, the HCNM is expected to contribute to de-escalation of emerging tensions. One may thus conclude that the position of HCNM was created as an instrument for international security; hence he does not become engaged in all minority-related issues but only in those with security aspects or implications.

A good part of the mandate of High Commissioner is his/her independence above all from the States concerned. The HCNM's involvement does not require the approval of the Permanent Council or of the State concerned; otherwise his/her reaction may come too late from conflict-prevention objectives. Likewise, his/her actions as of a third party require of him to preserve impartiality at all times, so that he/she would not be identified with one or another party.

For the achievement of his tasks and to gain indispensable confidence of all parties involved in the tensions the HCNM applies methods of quiet diplomacy. This makes the HCNM to resort to the rules of confidentiality, notably with regard to his direct negotiations with a state concerned, exchange of letters, individual country recommendations, reports to the Chairman-in-Office and others. It may thus be inferred that not all his acts will need to remain entirely confidential and forever. For instance, under Paragraph 22 of the Helsinki mandate the HCNM, with due regard to the requirements of confidentiality, may be requested to provide information about his/her activities at implementation meetings on Human Dimension issues.

The prevailing politico-security status of the mandate of the High Commissioner has further been underlined by explicit stipulation of negative competence whereby the HCNM will not consider violations of CSCE commitments with regard to an individual person belonging to a national minority. For this and other reasons it is widely accepted that his mandate does not permit him/her to act as an ombudsman type of mechanism. This is why it was a deliberate decision in 1992 to create a post of High Commissioner 'on' and not 'for' national minorities.

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[42] See Annual Report on OSCE Activities 2003. Security and Co-operation for Europe, p. 138. More information on the HCNM's mandate may be found at: <www.osce.org/hcnm>.

Within this unique mandate the High Commissioner can employ instruments for his/her actions among which the most typical are country recommendations. They actually are suggestions by the HCNM addressed to a state concerned with the aim of changing its policy and legislation in regard to national minorities. The High Commissioner has also developed another type of instrument – general recommendations (see subsection below).

It may be concluded that the concept behind the mandate of the HCNM is of innovative character. Its great potentials exist in effective conflict prevention in regard to tensions involving national minority issues. This essentially diplomatic mechanism cannot however ignore a larger background of international and domestic principles and standards on human rights, including minority rights, the rule of law and democratic governance.

2. HCNM and standard-setting on minority rights

The mandate of the High Commissioner was built into the institutional and functional arrangements of the OSCE. Consequently, his mandate is 'based on CSCE principles and commitments' (see para. 4 of the Helsinki mandate). These principles and commitments constitute thus both a reference system and a set of tools for the involvement by the Commissioner. In other words, the HCNM is obliged to act in accordance with the OSCE principles and commitments, refer to them and promote their application by domestic authorities.

Formally however in virtue of his/her mandate the High Commissioner on National Minorities has no explicit powers with regard to standard-setting or interpretation of OSCE commitments in the field of the human dimension and democratic governance. Notwithstanding these restrictive parameters there are at least two compelling reasons for the HCNM to undertake certain actions which could facilitate the process of application and implementation of the OSCE commitments in general and notably in regard to minority standards.[43]

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[43] KRZYSZTOF DRZEWICKI, The Lund Recommendations on the Effective Participation of National Minorities in Public Life – Five Years After and More Years Ahead, International Journal on Minority and Group Rights, 2005, vol. 12, no. 2-3, pp. 123-131.

First are practical demands for clarification of standards in the field of national minorities, particularly when the HCNM discusses with governments specific modalities and recommendations for their domestic regulations, policy-making and administrative decision-making. The need for clarification largely stems from the malaise of the above-mentioned deficit of minority standards. A commendable progress in standard-setting by the adoption of Copenhagen and Geneva documents has substantially reduced but not eliminated entirely the normative deficit. These documents have thus been insufficient to respond to numerous detailed questions on the scope of minority rights. Only such actors, like the HCNM, who actually applies, construes and refers to the minority standards on daily basis accumulate a practical and profound sense of their content and gaps.

Second are practical demands for effective application and implementation of minority standards. This is not a question on clarifying the content but the one of modes of implementation to be recommended. As has been submitted above the HCNM suggests the domestic authorities adopt specific measures which should serve for as effective as possible improvement of practical operation of the minority standards.

Such practical and concrete considerations were at the root of drawing up by the HCNM with the help of independent experts of the following recommendations:

1) The Hague Recommendations regarding the Education Rights of National Minorities in 1996;
2) The Oslo Recommendations regarding the Linguistic Rights of National Minorities in 1998;
3) The Lund Recommendations on the Effective Participation of National Minorities in Public Life in 1999; and
4) The Guidelines on the Use of Minority Languages in the Broadcast Media in 2003; and
5) The Recommendations on Policing in Multi-Ethnic Societies (2006).[44]

[44] For the texts of all thematic recommendations of the HCNM together with explanatory notes see National Minority Standards. A Compilation of OSCE and

All these recommendations and guidelines do not set new standards, but they are expressions of good practice. They constitute a set of rules of both hard and soft law with a number of more detailed issues addressed and proposals recommended for domestic application. To a large extent these instruments reflect proposals addressed in country recommendations. Their usefulness makes the HCNM to formulate them as recommendations of general nature, thus having a wider spectrum of potential applicability. According to the first High Commissioner from the conflict-prevention perspective the Recommendations were to „*try to show that there are other ways to find a mutually acceptable balance between the interests of majority and minority*".[45] The HC needs these recommendations and guidelines above all to guide him in his dialogue with governments. They may thus be helpful as parameters for policy- and law-makers.

It may therefore be said that the HCNM's recommendations and guidelines do not reflect a typical standard-setting activity even if some of their provisions seem to be formulated like a 'delegated legislation'. All their provisions are mere recommendations or guidelines aimed at facilitating practical implementation of minority standards in such specific areas as education, use of minority languages, public participation, use of minority languages in the broadcast media and policing in multi-ethnic societies. Although thematic recommendations do not set new standards, but they are nonetheless an influential instrument in the hands of the High Commissioner.[46]

Council of Europe Texts, Strasbourg: Council of Europe Publishing, 2007, pp. 45-152.

45 MAX VAN DER STOEL, The Hague, Oslo and Lund Recommendations Regarding Minority Questions, in: M. BERGSMO (ed.), Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjørn Eide, Leiden-Boston: Martinus Nijhoff Publishers, 2003, pp. 505-512.

46 According to STEVEN R. RATNER, Does International Law Matter in Preventing Ethnic Conflict?, New York University Journal of International Law and Politics, 2000, Vol. 32, No. 3, pp. 668-673, the HCNM is a 'normative intermediary' as he promotes observance of a norm and induces 'compliance through a hands-on process of communication and persuasion with relevant decision-makers' (at p. 668).

3. Minority-rights aspects and implications of the HCNM's mandate

All the above prerequisites and considerations have contributed to characterising the mandate of the High Commissioner as a conflict-prevention rather than a human dimension instrument. Such a conclusion seems however to be overly categorical and overlooks the momentum accumulated in the course of the operational activities carried out by the HCNM, notably when high-level tensions have been seriously reduced in recent years in comparison to the tensions and conflicts, including fully-fledged armed conflicts of the 1990's.

The mandate of the High Commissioner cannot be confined itself to a narrow understanding of conflict prevention. This is why the HCNM has never ignored the potential of the concept of „comprehensive security" which defines security and co-operation within a broader formula of all three baskets, including the human dimension (democratic governance, the rule of law, human rights and fundamental freedoms and humanitarian issues).[47] The assessment of the HCNM's activities demonstrates that the human-dimension approach has become an integral part of the „tool-box" for conflict-prevention diplomacy, which in turn often brings with it indirect protective effects. It is a logical assumption since national minority tensions usually emerge in situations of acute and large-scale deficit of democratic governance, the rule of law and human rights.[48] Furthermore, under umbrella of the OSCE 'principles and commitments' it is also relevant what has been a contribution of the Charter of Paris for a New Europe of 1990, whereby it was agreed that 'questions related to national minorities can only be satisfactorily resolved in a democratic political framework' and that 'the rights of persons belonging to national minorities must be fully respected as part of universal human rights'.

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47 For more details see THOMAS BUERGENTHAL, CSCE Human Dimension: The Birth of a System, in: A. CLAPHAM/F. EMMERT (eds.), Collected Courses of the Academy of European Law, 1990, Vol. I-2, Dordrecht- Boston-London: Martinus Nijhoff Publishers, 1992, pp. 160-209.

48 In this respect, some scholars conclude, in no less stronger terms, by pointing out that „it goes without saying that the HCNM is deeply involved in the monitoring of minority rights in those states where he has become active." – see ARIE BLOED, Monitoring the Human Dimension of the OSCE, in: G. ALFREDSSON et al. (eds.), International (note 41), p. 636.

The focus of the mandate on conflict prevention has neither deprived him of nor prevented him from being involved in the concomitant monitoring human dimension commitments, most notably those on minority rights. This largely stems from the interpretation of Paragraph 6 of the Helsinki mandate, whereby the High Commissioner „will take fully into account the availability of democratic means and international instruments to respond to it, and their utilization by the parties involved". The potentials of Paragraph 6 can also be seen from the perspective of the achievements of the sets of Recommendations the HCNM has been instrumental in producing in regard to minority commitments in the fields of education, use of languages, participation in public life, access to broadcast media and, most recently, policing in multi-ethnic societies. Furthermore, this new role of integrating conflict-prevention with human dimension commitments was boldly demonstrated by the High Commissioner in his eventually successful diplomatic advocacy for introducing a clause on minority rights into the Draft European Constitution.[49] The High Commissioner has thus demonstrated the intrinsic potential of the concept of „comprehensive security".

One may tentatively submit that the HCNM mandate has undergone a gradual transformation under an impact of changing situation in Europe which desperately needed more of his direct conflict-prevention involvement in the first decade than in the second one. During the first decade human dimension commitments constituted 'merely' a toolbox for the HCNM in his mainly role of 'fireman' extinguishing focuses of conflicts. In the present decade the HCNM slowly shifts his focus from short-term conflict prevention to medium-term activity which transforms human dimension commitments from a mere toolbox to a broader area of involvement as such. This is coupled with increasing role of the HCNM in exerting influence on delegated standard-setting by continuation of work on further sets of general recommendations.[50]

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[49] For more on the successful intervention by the High Commissioner to have a minority rights provision included in the European Constitution in spite of strong initial resistance see KRZYSZTOF DRZEWICKI, A Constitution for Europe: Enshrining Minority Rights. Words Can Make Worlds of Difference, OSCE Magazine, March 2005, pp. 19-21.

[50] See KRZYSZTOF DRZEWICKI, The OSCE High Commissioner on National Minorities – Confronting Traditional and Emerging Challenges, in: S. PARZYMIES (ed.),

Yet another manifestation of the changing role of the HCNM in regard to linking human dimension with conflict prevention is a 'permeation effect'. As has been submitted above, the Framework Convention reflects predominantly the minority commitments of the Copenhagen and Geneva documents. Since then the permeation effect has continued by a regular inter-agency consultation on further standards and their interpretation.[51] On the one hand, the High Commissioner have been regularly studying and applying the jurisprudence of the Advisory Committee (opinions on country reports, resolution of the Committee of Ministers and general commentaries). On the other hand, the Advisory Committee took account of the views by the HCNM in the course of its interpretation of the Framework Convention.

Thematic recommendations and guidelines mentioned earlier have already been largely integrated into the opinions issued by the Advisory Committee of the Framework Convention. This extends to opinions concerning the scope of the very notion of minorities, the consequences of the distinction between citizens and non-citizens for the enjoyment of minority rights and freedoms, the extent of involvement or engagement of the kin-State towards kin-minorities in the light of the primary role of the State where the minority resides in protecting minorities rights, and the socio-economic aspects of inter-ethnic relations, particularly in the field of employment, and a number of other issues. The more these guidelines overlap and are consistent with opinions of the Advisory Committee and resolutions of the Committee of Ministers the greater the synergy generated between the two.

The strength of resulting and potential synergy becomes even more important once we realise that while the HCNM's mandate requires him to intervene at *„the earliest possible stage in regard to tensions involving national minority issues"*, the implementation mechanism under the Framework Convention (opinions followed by resolutions) are more reactive measures relating to implementation of that particular treaty. If consistent guidelines and interpretations stem from two different bodies and, furthermore, are

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OSCE and Minorities. Assessment and Prospects, Warsaw: Wydawnictwo Scholar, 2007, pp. 14-16.

51 On the scope of this co-operation see KRZYSZTOF DRZEWICKI/VINCENT DE GRAAF, The Activities of the High Commissioner on National Minorities: June 2004 – June 2005, European Yearbook on Minority Issues, 2005/5, vol. 4, pp. 600-603.

addressed at completely different stages of their application, they reinforce and complement each other as legitimate messages. In this way the protective role of the Framework Convention also brings about preventive effects, while at the same time the HCNM's mandate, imbued with the philosophy of conflict prevention, exerts strong impact upon the protection of national minorities.

V. Conclusion

The OSCE was established as a first European arrangement or organisation bridging East and West to address politico-military issues together with economic and human dimension questions. This arrangement has also been characteristic of being developed and operating not upon legally binding obligations but politically binding commitments. Quite surprisingly, national minority issues have appeared on the agenda of the OSCE bodies from the very outset, unlike the agendas of other international organisations which maintained for decades their reticent approach to standard-setting in this field.

It has been very instructive to note that a dormant problem of minorities was so deliberately overlooked in the United Nations and the Council of Europe for decades. Both Organisations 'woke up', of sort, of their passive policies only when accumulated national minority issues had generated tensions, notably those that had led to disturbances, riots and armed conflicts in Europe of the 1990s.

An added value in the OSCE was thus to dare to address minority issues within the diplomatic environment as an all-European question and more, in direct link with both human rights and politico-security considerations. This unique approach has been subsequently formulated in official terms as the overarching principle of comprehensive security.

National minority issues have been addressed in the OSCE as a politico-security principle, as a set of human dimension substantive and monitoring commitments, and within a conflict prevention mandate of the High Commissioner on National Minorities. Until the end of Cold War national minority questions received modest attention through fundamental formulations of the Helsinki Final Act within a human rights political approach

(Principle VII/4) and few other commitments. Only with gradual demise of East-West divide after 1989/1990, when larger consensus emerged, a genuine eruption the OSCE human dimension commitments took place. Within those provisions a catalogue of commitments on national minority issues envisaged by the Copenhagen and Geneva documents brought about so extensive regulation (over 70 paragraphs) that it deserved to be called a 'political mini-treaty'. Furthermore, this has been a set of standards not exclusively for the OSCE since it had also created a basis for the Council of Europe work on the Framework Convention for the Protection of National Minorities.

Parallely to building a system of substantive commitments the OSCE developed a variety of monitoring measures and mechanisms. They have been accommodated into the agendas of regular meetings of the main bodies of the OSCE, including institutions (e.g. ODIHR) and field mission of long duration. In addition special arrangements were established, like the Vienna and Moscow Mechanisms. Among the monitoring mechanisms it has been the Human Dimension Implementation Meetings which has developed the most extensive and regular arrangement for monitoring the compliance of human dimension commitments.

This evolution of the OSCE human dimension permits to answer the question (see section I/2 above) whether in case of the OSCE we have to with a system for the promotion or also for protection of human rights. Admittedly, the OSCE has created, notably after the Cold War, a normative system of human dimension commitments accompanied by a variety of measures and mechanisms for monitoring of their implementation. Thus the prerequisites for the emergence of a system for the protection of commitments (standards and mechanisms) may be said to have been satisfied. Importantly however this conclusion relates to a system made up of political commitments and not of legally binding standards. Although a good number of human dimension commitments are equally legal standards as laid down by international human rights treaties and domestic legislation, the OSCE has focused on their political formulations and diplomatic mechanisms of monitoring which were carefully negotiated and agreed upon. This can in part be an explanation why political commitments have appeared in many instances no less effective than legally binding human rights standards.

In the field of national minority issues the OSCE established yet another approach – preventive diplomacy of the High Commissioner on National

Minorities. Its innovative components permitted to extend the OSCE's mission beyond the mere promotion and protection of minority rights and to focus on conflict prevention in regard to tensions involving national minority issues. In the course of time the mandate of the High Commissioner evolved to embrace also addressing medium and long-term issues of the infrastructure for democratic governance, human rights and minority rights both in domestic law and practice. All these needs and accumulated experience in conflict prevention and in promoting democratic governance and minority rights prompted the High Commissioner to develop detailed recommendations and guidelines in such areas as participation, education, use of languages, media and policing in multi-ethnic societies.

All in all, the OSCE has demonstrated a comprehensive approach to national minority issues by developing political standards and pursuing policies aimed not only at promoting and protecting minority rights but also by investing in preventing conflicts stemming from ethnic-based tensions. On a larger plane it is true that the liberal democracies eventually prevailed over fascism and later communism but 'those victories were not inevitable, and they need not be lasting'.[52] The same is equally true with successful progress in maintaining peace and security in the OSCE area by elimination of ethnic-based tensions and conflicts.

[52] See KAGAN ROBERT, The End of the End of History, The New Republic, April 23, 2008, pp. 47.

South Tyrol: Arrangements in International and Constitutional Law

Peter Hilpold

Inhalt

I. Introduction

South Tyrol is often cited as a successful model for the solution of minority problems[1]. The success of this model is so far-reaching that more and more it disappears from general studies on minority issues. In a certain sense it

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[1] If in the following reference is made to the minority question in South Tyrol attention is focussed on the German speaking population of this region. It should, however, never be forgotten, that a further minority is living in South Tyrol, the Ladins. Due to the special focus of this contribution and its required brevity the particular situation of this group could not be further elucidated. See on this issue P. HILPOLD, Modernes Minderheitenrecht, 2001, p. 134 ss. and P. HILPOLD/CH. PERATHONER, Die Ladiner – Eine Minderheit in der Minderheit, 2005. For the sake of completeness is shall also be mentioned that the present South Tyrolean autonomy statute distinguishes itself from traditional minority regulations as it provides equal protection to all linguistic groups present on this territory, the German, the Ladin and the Italian one in order to make them identify with this order and to avoid any form of old or new discrimination.
Generally on the South Tyrolean autonomy see L. BONELL/I. WINKLER, Südtirols Autonomie, 9th edition 2006. See also J. MARKO et al. (eds.), Die Verfassung der Südtiroler Autonomie, 2005.

becomes a victim of its own success. Regulations that work find little attention on the international level while those which do not are far likelier to attract international care. Studying the literature on the minority protection of the interwar period published at the time when these rules were in force one might be surprised to notice which importance was attributed to the South Tyrol problem. It was portrayed as an urgent minority situation crying out for international consideration[2].

In present days, on the other hand, the fact is often lost that the South Tyrolean autonomy represents an arrangement which gives clear expression to the commitment of the Italian constitutional order to human rights and minority rights as well as to international law obligations. The smoothness with which the autonomous order has been adapted to those higher-ranking obligations and directives often obscures the sight for the fact that the peaceful cooperation of different ethnic groups in this region is not the result of a spontaneous development and of a general insight on the merits of minority protection taking hold at a grass-roots level but the consequence of a well-structured process having its very foundations in international law. In the following these foundations of the South Tyrolean autonomy shall be evidenced. It shall be brought to mind that these guarantees though having lost visibility are still present and constitute an important driving force for the every-day functioning of the autonomy. In this context also the much discussed question on the exportability of the South Tyrolean minority regulation can be addressed. It will be shown that highly sophisticated autonomous orders such as the South Tyrolean one are always very much context-dependent in their factual implementation but nonetheless there are elements suitable for generalization.

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2 See, for example, L.P. MAIR, The Protection of Minorities, 1928, p. 208 ss.; C.A. MACARTNEY, National States and National Minorities, 1934, p. 252 s.; P. DE AZCÁRATE, League of Nations and National Minorities, 1945, p. 56 and P. HILPOLD, Minderheitenschutz im Völkerbundsystem, in: CH. PAN/B.S. PFEIL (eds.), Zur Entstehung des modernen Minderheitenschutzes in Europa, Handbuch der europäischen Volksgruppen Bd. 3, Springer: Wien/New York 2006, pp. 156-189.

II. Some historical remarks

As it is known the South Tyrolean question was created as a consequence of the First World War. Making part of the victorious Allied Powers Italy pretended the fulfilling of the secret London agreement of 1915 where this country was promised large territorial concessions as a price for her participation in the war. Italy justified her claim for the Brennero frontier with historical and geographical considerations which were by no means convincing[3]. Austria opposed the self-determination principle so eloquently proposed by the US president Woodrow Wilson in his speech before the Congress on 11 February 1918[4]. It is known, however, that this principle was applied absolutely arbitrarily[5]. The post-war frontiers were far away from reflecting ethnic borders. In many cases the decisive criterion was power politics. While at first the Italian government was rather uncertain how to handle the new minority problems[6] with the Fascists coming to power in 1922 the situation changed dramatically and a violent policy of persecution and oppression set in. In 1939 even a (voluntary) transfer of the German

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3 See V. STADLMAYER, Die italienischen Argumente für die Brennergrenze, in: F. HUTER (ed.), Südtirol – Eine Frage des europäischen Gewissens, 1965, p. 254-267.

4 „National aspiration must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statemen will henceforth ignore at their peril. [...] [P]eople and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game. [...] [A]ll well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world".
56 Congressional Record, at 8671 (11 February 1918), cited according to H. HANNUM, Self-Determination in the Post-Colonial Era, in: D. CLARK/R. WILLIAMSON, Self-Determination – International Perspectives, 1996, p. 12-44, at 13.

5 On the development of this principle see D. THÜRER, Das Selbstbestimmungsrecht der Völker; mit einem Exkurs zur Jurafrage, 1976.

6 The Italian Emperor even declared on the 1 December 1919 before the Italian Parliament the following:
„The newly annexed territories create new problems for us. Our liberal traditions will show us the way to solve them under the strictest respect for the local institutions of self-government and for the local traditions." Cited according to

speaking population residing in South Tyrol to Hitler Germany was agreed between Hitler and the Italian dictator Mussolini. As it is known, in the first half of the 20th century population transfers were very much on vogue as an instrument for the solution of minority problems[7].

Often they were carried out in an extremely inhuman way and today measures of this kind are rightly rejected as being in contrast to fundamental human rights. It was only the beginning 2nd World War that impeded a full implementation of this agreement which would probably have led to the elimination of the German minority in South Tyrol.

There can be no doubt that this experience influenced strongly the political background against which after World War II again a solution had to be looked for.

Again the demand for self-determination was brought forward, both by Austria and by the local population. 156.000 signatures were collected; practically the whole German and Ladin speaking population adhered to this petition[8]. At the end, however, the post-war situation – especially with regard to the beginning Cold War – stood in the way of any border changes in this region. A qualified minority protection regime was the utmost that could be achieved.

On 5 September 1946 the Foreign Ministers of Austria and Italy Karl Gruber and Alcide De Gasperi signed an agreement that seemed to be short and meagre at first sight. Accordingly, Karl Gruber had to face staunch criticism at home where he was accused of having traded in the right to self-determination for an insufficient protection regime.

G.H.J. ERLER, Das Recht der nationalen Minderheiten, Münster: Aschendorffsche Verlagsbuchhandlung 1931, p. 255 (translated by this author).

7 On the issue of population transfers see, for example, C. PALLEY, Population Transfers, in: D. GOMIEN (ed.), Broadening the Frontiers of Human Rights, 1993, p. 219-254; E. KOLONDER, Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination, in: 27 New York University Journal of International Law and Politics 1/1994, pp. 159-225; A.-M. DE ZAYAS, Population, Expulsion and Transfer, in: Encyclopedia of Public International Law, vol. III, 1997, pp. 1062-1068; M. BARUTCISKI, Les transferts de populations quatre-vingts ans après la Convention de Lausanne, in: XLI The Canadian Yearbook of International Law 2003, pp. 271-303.

8 See H. MIEHSLER, Südtirol als völkerrechtliches Problem, 1962, p. 387.

In hindsight, however, this criticism proved wrong. Apart from the fact that self-determination was not obtainable at that time[9] two considerations are of central importance for any evaluation of this agreement:

- First of all, these times were not very favourable for the protection of minorities. It should never be forgotten that towards the end of World War II and in the immediate aftermath hundreds of thousands of persons belonging to minorities were expelled from Eastern European countries. They were often treated in an inhuman way. Many were murdered[10].
- The provisions of the Gruber-De Gasperi treaty demonstrated over the time an enormous flexibility and strength. Maybe it was exactly their lack of determination, which was initially so much criticized, that proved to be an advantage for the respective minority in the end. As the socio-economic reality in that region has changed dramatically over the last sixty years so did the living conditions for the minorities and the requisites for their survival as distinct socio-cultural entities. The Gruber-De Gasperi agreement proved to be a very strong anchor on which an autonomous order on continuous need for change to fix.

The main guarantees contained in this agreement were the following:

- elementary and secondary teaching in the mother-tongue;
- a „parification" of the German and Italian language in public offices and official documents, as well as in bilingual topographic naming;

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9 For a present day analysis of a possible right to self-determination for the people of South Tyrol see G. HAFNER, Das Selbstbestimmungsrecht und Südtirol, 123 Wiener Blätter 2005, pp. 1-21. See also P. HILPOLD, Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte?, 54 ZÖR 1999, pp. 529-602 and P. HILPOLD, Self-Determination in the 21th Century – Modern Perspectives for an Old Concept, in: 36 Israel Yearbook of Human Rights 2006, pp. 247-288.

10 See on the problem of ethnic cleansing in general A. DE ZAYAS, Das Recht auf die Heimat, ethnische Säuberungen und das Internationale Kriegsverbrechertribunal für das ehemalige Jugoslawien, 35 Archiv des Völkerrechts 1/1997, pp. 29-72.

- „equality of rights as regards the entering upon public offices, with a view to reaching a more appropriate proportion of employment between the two ethnical groups“;
- the establishment of an autonomous regional order with legislative and executive powers.

Initially the Italian government was very reluctant to put in practice these international commitments. In 1948 an autonomous region was created but it comprised also the neighbouring province of Trento with a mostly Italian speaking population. Within the newly created region, the German speaking population was, therefore, again in the minority. Furthermore, the new democratic governments were as a rule not very enthusiastic about minority protection and, more generally, on cultural diversity. Although the Constitution of 1948 foresaw the creation of 20 regions – 15 with ordinary statute, 5 with special statute – initially only the latter were created. For a long time Italy remained a centralized state.

According to Article 6 of the Constitution Italy protects her minorities on the basis of specific provisions. Only in 1999, however, a general law on the protection of minorities was adopted[11]. With regard to the role of regions in Italy only in 1970 the regions with normal statute were introduced. Their powers were, however, so limited that Italy still had to be characterized as a centralistic state. A major change occurred only beginning with the reforms which started in 2001 and which are still under way. In the meantime it can be said that the federal elements in the Italian constitution are remarkable and local realities can be protected and fostered far better than in the past.

Returning to the South Tyrolean question it can be said that the political process for the further development of the autonomy gained momentum only after Austria had regained her full sovereignty as a consequence of the State Treaty of 15 May 1955. Soon after petitions, verbal notes and memoranda concerning the South Tyrol question were issued[12]. The unsatisfactory situation prompted mass demonstrations and bomb attacks. Finally, Austria

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[11] Statute Law No. 482 of 15 December 1999. See on this issue P. HILPOLD, Modernes Minderheitenrecht, Vienna/Baden-Baden/Zurich 2001, pp. 82 ss.

[12] On this process see A. v. EGEN, Die Südtirol-Frage vor den Vereinten Nationen, pp. 32 ss.

brought the South Tyrol question before the General Assembly of the United Nations (UNGA). Both in 1960 and in 1961 the UNGA urged Italy and Austria to solve their dispute about the implementation of the Paris agreement with peaceful means. Soon after the Italian government established a commission of 19 experts which should elaborate a series of proposals for an extension of the autonomy. This was an internal commission but at the same time negotiations went on between the Italian and the Austrian government. The interplay between negotiations on the national level (i.e. between the government and representatives of the local minority) and on the international level (between Italy and Austria) brought far-reaching results. It was this unique and favourable situation that led to an internationally unique agreement.

To recapitulate, these special circumstances were the following:

- the existence of an international framework agreement (the Paris agreement of 5 September 1946) which notwithstanding its vagueness contained important promises;
- a clear pronouncement by the UNGA in favour of a peaceful solution of the controversy between Austria and Italy and of an effective implementation of the Paris agreement;
- the presence of a minority settling in a territory where it formed the clear majority, which spoke more or less with one voice and which strongly insisted on the concession of more autonomous rights;
- the formation of governments in Italy that were much more open for minority questions than those in power before.

All these aspects have to be kept in mind if considerations are undertaken whether the autonomous order for South Tyrol could operate as an example for other regions with minority conflicts.

In 1969 negotiations came to a formal end when the results of the talks conducted over years were approved by the South Tyrolean People Party SVP and afterwards reconfirmed by the Foreign Ministers of Austria and Italy, Kurt Waldheim and Aldo Moro. They did not, however, conclude a new agreement.

The results of this agreement were structured in two documents: the so-called „package“ and the so-called „operations calendar“. While the first

document consisted of 137 measures by which the autonomous order should be greatly enlarged and enriched the operations calendar contained the procedural order according to which these rules should be put into practice.

III. The implementation of the autonomy

In 1972 a new autonomy statute was issued[13]. Formally this statute has the status of a constitutional law. It is, therefore, more resilient than an ordinary law and it can be modified only according to a very demanding procedure. In contrast to the previous situation the second autonomy statute had at its core the province to which the bulk of the competences were attributed. The region, comprising both the provinces of Bolzano and Trento, was kept alive but maintained only competences in marginal areas.

South Tyrol (the province of Bolzano) now had primary legislative power not only in areas that are crucial for the sheer survival of a minority but also for subjects that go far beyond these immediate needs such as agriculture and forestry, tourism, transport of provincial interest, mines, nursery schools, school buildings and school welfare, public works and vocational training. Secondary (or concurring) legislative power was attributed in regard to teaching in primary and secondary schools, trade and commerce, apprenticeships, promotion of industrial production, hygiene and healthcare, sport and leisure[14].

As a consequence of the principle of parallelism between the legislative and the administrative powers the generous extension of legislative powers had as a result an enormous growth of the administrative apparatus which is often criticized for the increase in bureaucracy it has engendered. On the other hand this apparatus constitutes surely also an important stabilizing factor for the autonomy and in the last consequence for the minority protection system. In fact:

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13 DPR No. 670 of 31 August 1972. See also A. ALCOCK, The South Tyrol Autonomy, Bolzano 2001.

14 See the articles 8 and 9 of the DPR 670/1972. For an English translation of these concepts and a good introduction in this subject see A. ALCOCK (note 13).

- it represents the largest employer of the province;
- it employs people of very different qualifications and in particular also a large number of academics thereby keeping the highest educated members of the minority in the country;
- it employs people from all local linguistic groups according to their proportional strength and
- it requires employees to be bilingual thereby emphasizing the value of plurilingualism and at the same time permitting the local inhabitants to enter into contact with the local administration in their own language.

The last two elements require some more considerations. With regard to proportional employment it has to be said that this principle finds application for all forms of public administration: state, province, municipalities and semi-state. With regard to language knowledge this has to be demonstrated through a public examination of different difficulty according to the characteristics of the job aspired at. In the meantime, also other certificates obtained abroad are accepted as equivalent[15].

The South Tyrolean autonomy presents many other characteristics that cannot be illustrated here in detail but which on a whole form a sophisticated system of protective measures unique in their nature. Only a few additional elements can be mentioned here:

- The Italian and the German language enjoy the same status in the province. Ladin plays a somewhat minor but still relevant role[16].
- South Tyrol has its own administrative court whose members are nominated in an accorded political process through the central and the provincial government and which has an important function in the implementation of the autonomy.

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15 This is a consequence of the ECJ judgement in the „Angonese“ case. See Case C-281/98, Angonese, [2000], ECR I-4139.

16 With the last reform of the autonomy statute the position of the Ladin group was further strengthend, also in the neighbouring province of Trento. See P. HILPOLD/ CH. PERATHONER, Die Ladiner. Eine Minderheit in der Minderheit, 2005.

- The further development of the autonomy takes place primarily[17] through negotiations within two special commissions, the Commission of the six and the Commission of the twelve which are responsible for the measures regarding the province or, respectively, the region. Again, these commissions are constituted according to a well-thought system which makes sure that representatives of the central and of the local governments have to cooperate and that both major linguistic groups find themselves equally represented in these bodies.
- A special guarantee mechanism assures that no legislative measures can be deliberated in the provincial and in the regional assembly against the will of the majority of a single linguistic group[18].
- Such a highly developed autonomous order is, of course expensive. Great part of the taxes raised in this province remains there. If account is taken of special funding by the State and also general expenditure by the State is considered it can be argued that South Tyrol is – with regard to its financial resources – in a privileged position[19]. As a consequence it can also be argued that Italy considers minority protection an asset worth a price.

IV. Conclusive remarks

As already mentioned at the beginning, the Paris agreement has displayed an extraordinary force over more than half a century. This agreement has laid the basis for the involvement of the UNGA in 1960/61 and finally Italy was convinced to turn an obligation into an asset. Italy has refused initially to

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17 The constitutional reform of 2001 demonstrates that, of course, major reforms can only be undertaken by constitutional amendments but they are totally exceptional.

18 See Article 56 of the Statute. In the case of persisting controversy the final decision is taken by the Constitutional Court. It shall also be mentioned that a similar provision is in force for deliberations on the budget: A majority of each linguistic group can ask for individual chapters of the budget to be voted on separately. If an attempt to find a compromise in a joint committee fails, the final decision is taken here by the Regional Administrative Court. See Article 84 of the Statute.

19 This holds, however, also true for other regions with special statute such as the Valley of Aosta and of Sicily.

consider the package of 1969 as legally binding. In 1992, however, at the time Austria issued the declaration that the controversy of 1960/61 had been terminated, a procedure was found that should provide a sufficient guarantee for the whole package (and therefore for the new autonomy statute) to be taken into consideration by the International Court of Justice should it become necessary one day to refer this issue to this body. Therefore, it can be said that the long discussed question whether the present South Tyrolean autonomy is guaranteed by international law can be answered in the meantime in the affirmative[20].

It shall be mentioned furthermore, albeit only very briefly, that in the meantime also the European Union and the Council of Europe are intervening in an ever more incisive way in the formation of the South Tyrolean minority law. For example in „Bickel and Franz"[21] the ECJ has extended the application of the special language rules before judicial organs in South Tyrol also to other EU citizens[22].

In „Angonese"[23] it has affirmed – as already mentioned – that the language skills necessary for a public post in South Tyrol can be demonstrated by equivalent certificates from abroad. Recently the EU Commission has demanded and finally also achieved that the rules regarding the declaration of affiliation to the various linguistic groups in South Tyrol are brought into conformity with EU rules on data protection[24].

Within the Council of Europe the Framework Convention for the Protection of National Minorities (FCNM) has become an important instrument for the

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20 See extensively on this issue P. HILPOLD, Modernes Minderheitenrecht, 2001, p. 167 ss. See also P. HILPOLD, Der Südtiroler Weg völkerrechtlicher Stufenlösung im europäischen Vergleich, in: S. CLEMENTI/J. WOELK (eds.), 1992: Ende eines Streits, Baden-Baden: Nomos 2003, pp. 109-117.

21 Case C-274/96, Bickel and Franz [1998], ECR I-7637.

22 See P. HILPOLD, Unionsbürgerschaft und Sprachenrechte in der EU, 122 Juristische Blätter 2/2000, p. 93-101.

23 Case C-281/98, Angonese, [2000], ECR I-4139.

24 See P. HILPOLD, Minority Census and Declaration of Membership to a Minority – A Pillar of the South Tyrolean Autonomy under International Scrutiny, in: Italian Yearbook of International Law, vol. XV, 2005, pp. 81-109.

assessment of national minority situations in Europe. Also the South Tyrolean situation has come under close scrutiny[25].

Does the autonomy of South Tyrol constitute an example for the solution of other minority controversies in Europe and beyond?[26] Probably, this system cannot be transferred as a whole to other regions but nonetheless it is of international relevance. First of all, single rules and provisions are – without doubt – suitable for generalization. But what is more the success of the South Tyrolean model demonstrates the importance of specific international law provisions that should at the one hand be strong enough to survive over longer periods and at the same time be flexible enough to adapt to new

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25 Unfortunately, in this regard the statements by the Advisory Committee established on the basis of FCNM – whose task is to assist the European Council's Committee of Ministers in monitoring the compliance of the FCNM by the Contracting Parties – were not very convincing. In its opinion adopted on 14 September 2001 the Advisory Committee criticized strongly the so-called declaration of linguistic affiliation which finds application in South Tyrol and which is of pivotal importance for the practical implementation of the rules underpinning the South Tyrolean autonomy. The main element of criticism regarded an alleged conflict between the system of declaration of linguistic affiliation and Art. 3 para. 1 of the FCNM which requires that every person belonging to a minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice (para. 18 ss. of the opinion).
This position was, however, corrected by the Council of Europe Committee of Ministers (see ResCMN 2002 10, adopted on 3 July 2002) where the South Tyrolean autonomy is not only presented as a model but specific reference is made to the system of proportional allocation of public post and funds in this province (called „Proporz" or „la proporzionale"). By this way, indirectly, also the Declaration of affiliation was hailed as an instrument of particular value. Nonetheless, there was still space for an improvement of all these rules, in particular with the aim to further enhance individual liberties and data protection – issues that are always topical when a census has to take place. These improvements were finally introduced by the Legislative Decree of 23 May 2005 no. 99.
For a detailed analysis of this issue see P. HILPOLD, Minority Census and Declaration of Membership to a Minority (note 24).

26 For a thorough analysis of the relationship between minority protection and the granting of autonomous rights see recently Z.A. SKURBATY (ed.), Beyond a One-Dimensional State: An Emerging Right to Autonomy?, Martinus Nijhoff: Leiden/Boston 2005. See further R. LAPIDOTH, Autonomy: flexible solutions to ethnic conflicts, United States Institute of Peace Press: Washington D.C. 1997; D. THÜRER, Autonomie statt Sezession? Sieben Prinzipien zur adäquaten Lösung von Minderheitenkonflikten, in: D. THÜRER/E. LEDERGERBER (eds.), Regional- und sicherheitspolitische Aspekte Europas, Zürich 1995, pp. 165-171.

needs. The most important prerequisite for success was, however, confidence building between Italy and Austria and between the minority and the central government. The negotiations process briefly mentioned above is rich of ingenious instruments of this kind and for the present autonomous order they are probably the most characteristic elements and much more important than the rich financial endowment of the province which is often seen as the primary factor for success. It is argued here that beyond material values it is the institutionalized process of bringing together previously diffident groups that constitutes in reality the most important lesson to be learnt from this situation. This does not mean that everyday-cooperation between those groups is without problems. Difference is considered an enrichment but constitutes often also a source of misunderstanding and distrust. But the many instruments of communication and cooperation created over the time have permitted to solve any problem arisen so far and the impression is that alongside the original national identity strongly defended by each group a second identity of belonging to a multilingual and multicultural social reality is coming to life.

What Can We Learn From the Åland Islands Case?

Markku Suksi

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I. Introduction

When discussing territorial autonomy and minority protection, the model of the Åland Islands is often brought to the fore, and not without good reason.[1] However, solutions of this kind may not be universally relevant and applicable, but are often tied to the particular circumstances surrounding the case in question. Therefore, instead of speaking about a model of autonomy one should probably mention the Åland Islands as a laboratory of autonomy.

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[1] For a treatise of the self-government of the Åland Islands, see MARKKU SUKSI, Ålands konstitution – en sammanställning av material och tolkningar i anslutning till självstyrelselag för Åland, Turku/Åbo: Åbo Akademi University Press, 2005. For the coverage of similar issues as the present article, see also LAURI HANNIKAINEN, The Territorial Autonomy of the Åland Islands and the Cultural Autonomy of the Indigenous Saami People, pp. 175-197, Baltic Yearbook of International Law, Vol. 2, 2002. Kluwer Law International/Dordrecht, 2002.

It also has an important internal dimension, because the autonomy of the Åland Islands was created by the Parliament of Finland already in 1920, one year before the Åland Islands Settlement was concluded before the Council of the League of Nations. However, the Åland Islanders were not convinced at that point about the usefulness of the arrangement.

In the context of Finland, the existence of the Åland Islands is a pointer to the fact that there may, within one state, exist several mechanisms designed for the protection of groups or minorities. On the top of the Åland Islands arrangement, described by way of reference to the Act of Self-Government in Section 75 and Section 120 in the Finnish Constitution resulting in territorial autonomy for the population of the Åland Islands, it is possible to discern at least three other minority protection mechanisms. One of them is the cultural autonomy of the Sami under Section 121.4 of the Constitution and their linguistic and cultural rights under Section 17.3 of the Constitution. These constitutional provisions are in principle fulfilled by means of two pieces of legislation, the Sami Parliament Act (No. 974/1995) and the Sami Language Act (No. 1986/2003).

The *travaux preparatoires* leading up to the enactment of the 1920 Act of Self-Government were originally intended to create a cantonal self-government of some sort for all the Swedish-speaking population in the coastal regions of Finland, including the Åland Islands. At least partly because of the separate solution for the Åland Islands, the overall plan was dropped and another starting point was adopted for the regulation of the use of the two national languages, Finnish and Swedish, on an equal basis before courts and administrative authorities. The starting point for the use of Swedish as one of the two national languages of Finland is now established in Section 17.1 and Section 17.2 of the Finnish Constitution and sustained in Section 122.1 by a pledge to deliver public services of the state in the two languages. One of the pieces of legislation fulfilling these provisions is the Language Act (No. 423/2003), but the principles are also fulfilled by means of other legislation, such as that on education, church, administrative organisation, court organisation, etc. The latter areas of law often lead up to special organisational solutions that could be described in terms of functional autonomy, where the aim is to provide adequate linguistic services to a minority population in respect of a certain public function (such as education) by means of creating special linguistically identified units at different

administrative levels inside the general line-organisation charged with the national administration of the public function.

Finally, it is possible to mention other groups, such as the Roma and those who use the sign language, which under Section 17.3 of the Constitution should have the right to preserve and develop their language and culture. Especially with a view to those who use the sign language, it is worth mentioning that the Finnish legislation contains no general piece of law covering the use of that language, but a number of provisions in relevant contexts aimed at catering for the special needs of the deaf using the sign language.

Hence the autonomy of the Åland Islands can be viewed as one of the four minority arrangements in the Finnish legal order. Historically, it was the first one to be instituted, but it became effective more or less at the same time as the first Language Act on the mainland. The other two arrangements have been created much later. Taken together, the four different arrangements, designed for the specific needs of each of the groups, make up a patchwork of arrangements for minority protection. The creation of one arrangement does not have to exclude the creation of another. On the top of the four minority protection arrangements involving territorial, cultural and functional autonomy, it is, of course, possible for persons belonging to the minorities in Finland possible to avail themselves of personal autonomy by means of creating associations of different kinds for themselves under the freedom of association.

II. Fundamental features of the arrangement

Self-determination of the Åland Islands had originally a secessionist objective: the inclusion of the Åland Islands in the Kingdom of Sweden. When the autonomy arrangement was created in 1920, the legislative proposal of the Government of Finland contained a comparative outlook to other arrangements in the world, mainly federative ones,[2] but because none

[2] Isle of Man, Guernsey, Jersey, the dominions which at the time formally still belonged to Great Britain (Canada, Australia, South Africa, New Zealand, India), Iceland (which at the time belonged to Denmark), Croatia and Bosnia and Herzegovina (as parts of the Austro-Hungarian Empire which collapsed after the

of the examples corresponded to the conditions in Finland and the Åland Islands, the arrangement was developed internally. In the contemporary world, its appeal seems to depend on its close relationship with the international law concept of self-determination and its two dimensions, external and internal self-determination. This concept, again, has various interrelated dimensions, some of which are relevant for areas which form parts of a state. After the consolidation of the position of the Åland Islands as an autonomous part of Finland, the issue of self-determination through secession disappeared, with certain smaller exceptions of a mainly internal character.[3] It should be pointed out that already the 1920 Act of Self-Government contained the provision that Åland Islanders are exempted from the civic duty to carry out military service.[4]

The conflict between Finland and Sweden was defused through the action of the League of Nations, and attention turned from exercise of self-determination by secession to internal self-determination and its realisation through the exercise of law-making powers. The three Acts of Self-Govern-

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First World War), and Elsass-Lothringen (while it was a part of Germany). See the proposal of the so-called Tulenheimo-Committee, Kom.bet. 24/1919, p. 19.

3 It deserves to be mentioned that in the current composition of the Legislative Assembly of the Åland Islands, two out of 30 members are representatives of a political grouping advocating independence of the Åland Islands. This is more or less the first time ever such a position is entertained in the official fora of the Åland Islands.

4 It is possible to refer to several possible reasons for this early exemption from military service. In the report of the *Tulenheimo*-committee, Kom.bet. 24/1919, pp. 13, 27-29, reference is made to the traditional aversion amongst the Åland Islanders to carry out military service, the reliefs in the performance of the military duties that the Åland Islanders had enjoyed since the 17th century in exchange of duties in maintaining the mail service between the two parts of the Kingdom of Sweden, that is, between Sweden and Finland, the foreign command language (which would be Finnish), the low number of conscripts, the practical difficulties for the military to organise the training, the peripheral geographic location of the Åland Islands, and the attention the area had drawn to itself from an international point of view. The last reason could be a reference to the Convention of Paris of 30 March 1856 on non-fortification and prohibition of maintenance or creation of any military or naval base (which was an argument against creation of military units on the Åland Islands) and to the discussions at Versailles in 1919 and to the discussion that would be held at the League of Nations. One possible reason, although not an explicit one, is also the separatist endeavour the Åland Islanders had shown according to the preparatory documents of the 1920 Act on Self-Government. It would have been illogical from a military point of view to train soldiers in (or for) a separatist area.

ment, those of 1920 (supplemented in 1922 with the so-called Guaranty Act incorporating the contents of the Åland Islands Settlement), 1951 and 1991 have all consolidated, developed and expanded the law-making powers of the Legislative Assembly of the Åland Islands. The Act of Self-Government is an Act of the Finnish Parliament which makes certain exceptions to the text of the Constitution, as outlined in Sections 75 and 120 in the Constitution of Finland. At the same time, the Act of Self-Government is entrenched in several ways in the legal order (general entrenchment, regional entrenchment, special entrenchment, international entrenchment).[5] Because the Act is to be enacted and amended in the same order as the Constitution and with the consent of the Åland Islands, the Act is of a constitutional nature but is not a constitution proper.

In addition, the Constitution of Finland is valid on the Åland Islands to the extent no exception to the Constitution is made by means of the Act on Self-Government. This means that, for instance, in relation to the constitutional rights in Chapter 2 of the Finnish Constitution, the Legislative Assembly of the Åland Islands is under an obligation to give effect by means of its legislation to most of the constitutional rights of the Finnish Constitution (*e.g.*, Section 6 on equality, Section 12 on publicity of documents, Section 16 on cultural rights in the field of education, Section 18 on the right to work, Section 19 on the right to social security, Section 20 on responsibility for the environment) to the extent they are relevant for the exercise of the legislative competence of the Legislative Assembly of the Åland Islands, with the exception of those few albeit important rights which the Act on Self-Government delineates as special rights of the Åland Islanders and ties to the possession of regional citizenship (see part III. below). Because the Åland Islands joined the European Union together with Finland and because the Åland Islands is a special jurisdiction in Finland, such EC law which is not automatically directly applicable, that is, directives, have to be implemented in the Ålandic jurisdiction by the Ålandic authorities, in many cases by the Legislative Assembly. Membership in the EU has affected the legislative powers of the Åland Islands very much by carving out certain key powers, leaving the Legislative Assembly of the Åland Islands with less influence

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5 On the different forms of entrenchment, see MARKKU SUKSI, On the Entrenchment of Autonomy, in: MARKKU SUKSI, Autonomy – Applications and Implications, Kluwer Law International/Dordrecht, 1998, pp. 169-171.

than before EU membership. At the same time, the Finnish EU accession treaty recognizes at the level of primary EC law the concept of regional citizenship and grants exceptions to key areas of EC law by recognizing limitations to non-holders of regional citizenship in the area of possession of real property, right of establishment and provision of services.[6]

The law-making powers of the Åland Islands are enumerated, and with a view to a separation between public law and private law within the framework of the legal order, the legislative powers of the Åland Islands are predominantly in the area of public law, covering such fields as education, social affairs, traffic, agriculture, etc. (see Appendix). The law-making powers of the Finnish Parliament are enumerated, too, and cover mainly areas of private law, such as the traditional constitutional freedoms and rights (freedom of speech, association and assembly, right to life, liberty and physical integrity, etc.), contracts, damages, etc. It seems that in federations, the powers of the national parliament are often enumerated while those of the states in the federation are often residual. In autonomies, the situation might be the reverse, with the powers of the autonomy arrangement being enumerated and those of the national parliament being residual. In this respect, the Åland Islands arrangement can be placed in a middle ground, where both the powers of the Finnish parliament and the powers of the Legislative Assembly of the Åland Islands are enumerated. The electoral system is proportional according to the d'Hondt model, using open lists. The Government of the Åland Islands is politically accountable to the Legislative Assembly (on parliamentary accountability, see also the *Memel* case[7] of the PCIJ). The political system is home-grown, with little or no contact to the political parties of the mainland.

The Legislative Assembly of the Åland Islands enacts laws proper, that is, pieces of law which are exclusive in nature in relation to laws passed by the Parliament of Finland and at the same hierarchical level. Of course, the Ålandic acts only apply on the Åland Islands, while those acts which have been enacted by the Parliament of Finland within its sphere of competence under the Act on Self-Government also apply on the Åland Islands. Because

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6 See Protocol no. 2 about the Åland Islands in the Treaty concerning the accession of Finland to the European Union, OJ 94/C241/08.

7 Interpretation of the Statute of Memel Territory, Permanent Court of International Justice of 4 February 1931, Series A/B-Fasc. No. 44.

of the division of competence between the Legislative Assembly of the Åland Islands and the Parliament of Finland, there is a need to control the exercise of legislative powers. The system of control of competence directs itself primarily to the legislative decisions of the Legislative Assembly of the Åland Islands, and involves the Åland Delegation as a joint conciliatory body as the first stage and thereafter a final control of competence by the President of Finland.[8] The veto power in respect of Ålandic legislation functions *ante legem* and is exercised by the President on the basis of a judicial determination of the Supreme Court. Under Section 19, sub-section 2, of the Act on Self-Government, those veto powers can only be exercised if the Legislative Assembly of the Åland Islands has exceeded its legislative powers according to Section 18 of the Act on Self-Government, that is, if the Legislative Assembly of the Åland Islands has passed legislation that encroaches into the matters defined in Section 27 of the Act as competencies of the Parliament of Finland, or if the Ålandic Act relates to the internal or external security of the state.[9] A reference to the latter (internal or external security of the state) has been used only once (in 1951, in relation to the flag issue) to veto an Ålandic act. The former, a reference to the distribution of legislative powers, is used as a basis for either partial or complete veto of an Ålandic Act in 3-4% annually of the acts that the Legislative Assembly of the Åland Islands has passed. Because of the introduction of the partial veto, the use of the complete veto in relation to an Ålandic act through the 1991 Act on Self-Government has almost ceased.

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8 The system is rather confusing, because the exercise of the legislative powers of the Parliament of Finland within the framework of the Act on Self-Government is not controlled by the Supreme Court and the President in the same way. Instead, the Constitutional Committee of the Parliament claims, under Section 74 of the Constitution of Finland, authority to interpret the legislative powers of the Parliament under Section 27 and 29 of the Act on Self-Government. The control of division of legislative competence is therefore asymmetrical and divided, although the control in principle deals with provisions of the same Act on Self-Government.

9 It should be mentioned that Section 29 of the Act on Self-Government, too, includes an enumeration of legislative powers of the Finnish Parliament (see Appendix below). However, these powers can be transferred from the Parliament of Finland to the Legislative Assembly of the Åland Islands by an Act of the Finnish Parliament enacted by simple majority. The mechanism does not necessitate the use of the arduous amendment procedure of the Act on Self-Government, involving, inter alia, qualified majorities of two-thirds in both law-making bodies.

The competence to regulate courts and legal protection is according to Section 27 of the Act on Self-Government vested with the state, and therefore the courts exercising jurisdiction on the Åland Islands are state courts. In addition, under Section 35 of the Act, the administration of justice in Åland shall be conducted by the courts and officials as provided by State legislation The courts nevertheless try cases not only on the basis of Acts of the Parliament of Finland, but also on the basis of Acts of the Legislative Assembly of the Åland Islands. Formally speaking, there are two court jurisdictions in the Åland Islands, the Court of First Instance for civil and criminal matters and the Administrative Court for administrative matters. Appeals concerning decisions of the Court of First Instance are tried at the Court of Appeals in Turku/Åbo in the mainland, with the possibility of final review by the Supreme Court of Finland in Helsinki. Prosecution in criminal matters is a state function, but the criminal investigation is mainly a task of the Police of the Åland Islands. The cases of the Administrative Court originate, for instance, in the administrative decision-making in the Ålandic municipalities or in the bodies subordinate to the Central Government of the Åland Islands. The decisions of the Administrative Court can be appealed at the Supreme Administrative Court of Finland in Helsinki. It should be noted that decisions made by the Government of the Åland Islands, such as decisions on the right of domicile and right to possess real property, are generally appealed directly at the Supreme Administrative Court.

III. Special rights of the Åland Islanders

Although the Åland Islands arrangement can be said to be a minority protection arrangement in respect of the Swedish-speaking population,[10] it should be mentioned that there has always existed in the Åland Islands a 5% or so minority of Finnish-speakers. With the competence to make laws proper, the minority in minority situation may be accentuated, because laws in the formal sense can be used to circumscribe the freedoms of individuals.

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[10] It is debatable whether the Åland Islanders constitute a separate minority or if they are a part of the Swedish-speaking population of Finland. The total Swedish speaking population is 296'000 and constitutes 5.6% of the population of the whole country, while the population of the Åland Islands is 26'000, which is 8.7% of the Swedish-speaking population and 0.5% of the population of the whole country.

This was not the position of the majority opinion in the *Ballantyne et al. v. Canada* case before the Human Rights Committee,[11] but the opinion of the minority pointed this out. A similar idea concerning the minority in minority issue may lie behind the comment of the Advisory Committee on the Framework Convention on National Minorities, when it pledges to follow up the situation of the Finnish-speakers on the Åland Islands.[12] Because the purpose of the Åland Islands Settlement is to discourage Finnish-speakers from the mainland to move over to the Åland Islands, the specific rights guaranteed to the Åland Islanders may become problematic:

- the language of education in public schools shall be Swedish (in this area, the Åland Islands legislation seems to lack provisions on how a private school could operate in the Finnish language);[13]
- only persons with the regional citizenship of the Åland Islands can purchase real property in the area;[14]
- only persons with the regional citizenship of the Åland Islands can vote in the elections to the Legislative Assembly (and previously also to the Municipal Councils).[15]

It would probably be very difficult to create such national exceptions to international human rights in the current world, although the *Gillot v. France* case from the U.N. Human Rights Committee[16] and the *Py v. France* case

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11 *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, Report of the Human Rights Committee, vol. II, GAOR 48, Suppl. No. 40 (A/48/40).

12 Advisory Committee on the Framework Convention for the Protection of National Minorities. Opinion on Finland, adopted on 22 September 2000.

13 See MARKKU SUKSI, Ålands konstitution, pp. 46-47.

14 See MARKKU SUKSI, Ålands konstitution, pp. 326-336.

15 See MARKKU SUKSI, Ålands konstitution, pp. 61-74.

16 *Marie-Hélène Gillot et al. v. France*, Communication No. 932/2000, decision on 15 July 2002. The matter dealt with the imposition of up to 20 years of residence requirement for the right to vote in a referendum concerning the self-determination (independence) of New Caledonia. The HRC did not find that such a requirement violated Article 25 of the U.N. Covenant on Civil and Political Rights.

from the European Court of Human Rights[17] as well as the *Polacco and Garofalo v. Italy* case from the European Commission of Human Rights[18] and the *Belgian Linguistics* case from the European Court of Human Rights[19] indicate that certain limited exceptions might pass the test because of local requirements, at least in the areas of the right to vote (delineation of the electorate) and education. However, the creation of exclusive arrangements inside a state stands in principal contradiction with the inclusiveness of human rights. These cases also have an international dimension which has been used to justify an exclusive determination of the right to vote. Nonetheless, although the special features of the Åland Islands arrangement are discriminatory in nature, it should be underlined that outside the area of the special rights of the Åland Islanders, the system is not discriminatory.

The international settlement is not carved in stone but the features can change, and they indeed have changed, subject to the consent or action of the Åland Islanders themselves. As concerns the right to own real property, the system is not anymore based on a possibility of public authorities to redeem

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17 *Py v. France*, European Court of Human Rights, judgment of 11 January 2005. The matter dealt with the imposition of a 10 years residence requirement for the right to vote to the law-making body of New Caledonia. The ECtHR did not find that such a requirement violated Article 3 of the First Protocol to the European Convention of Human Rights.

18 *Nicoletta Polacco and Alessandro Garofalo v. Italy*, Application No. 23450/94, Decision of 15 September 1997 on the admissibility of the application, which was declared inadmissible. The Commission found that the requirement of four years' continuous residence in the region of Trentino-Alto Adige in order to be eligible to vote in elections to the regional council pursued a legitimate aim of protecting linguistic minorities and could be regarded as proportionate to that aim. On the issue of the legitimate aim, the Commission noted, *inter alia*, that „the requirement at issue was adopted by Italy through Law No. 1 of 10 November 1971 as a solution to the controversy between Italy and Austria concerning the protection of the German and Ladin linguistic minorities in the Province of Bolzano (i.e. Alto Adige)".

19 Case relating to certain aspects of the laws on the use of languages in education in Belgium, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, of 23 July 1968. In the case, the Court agreed to an educational arrangement of a similar kind as on the Åland Islands, but the margin in the vote was the slimmest possible when it concluded that the arrangement could be justified with reference to objective and reasonable grounds and with reference to the fact that the French-speaking children could, without obstacles, participate in the education in the Flemish schools.

property sold to a non-Åland Islander, but the system is nowadays instead based on the possession of the regional citizenship, which in principle has to be proven each time a person concludes a deal. As concerns the right to vote in elections to the Legislative Assembly and Municipal Council, the arrangement has been changed due to Nordic co-operation and European Union membership so that, under a provision of the Act of Self-Government, the Legislative Assembly may adopt legislation which permits the right to vote for such persons resident in the Åland Islands who do not have the regional citizenship. This has resulted in the adoption of Ålandic legislation lifting the requirement of regional citizenship in municipal elections, but in elections to the Legislative Assembly, the requirement is still effective. Originally, the Åland Islands had the right to use for their needs 50% of the revenue of the land tax, besides the revenues mentioned in Article 21 of the Act of Self-Government of 1920. These state taxes became old fashioned already in the 1920s, and they were abolished in the mainland by the Parliament of Finland. Their application continued, however, on the Åland Islands for some time, until the Legislative Assembly itself towards the end of the 1920s decided to repeal the legislation and thereby more or less by default submitted itself to the tax legislation of the Parliament of Finland and to the collection of taxes by the State. As concerns the possibility of the Legislative Assembly of the Åland Islands to present complaints to the Council of the League of Nations, the system became a *desuetudo* when the United Nations refused to assume the role of the League of Nations in this respect (for an indication of how the complaints mechanism could have worked in case the Council would have requested an advisory opinion from the PCIJ, see *Memel* case, *supra*, and also the *Polish Nationals in Danzig* case[20]).

All the rights the Åland Islanders have under the Act of Self-Government can not be traced back to the Åland Islands Settlement, but are instead a result of legislative action taken by the Parliament of Finland. The exemption from conscription to military service was included already in 1920 in the Act of Self-Government.[21] The 1951 Act of Self-Government created a new legal institution in this respect, namely the regional citizenship, which is

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[20] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of the Permanent Court of International Justice of 4 February 1931, Series A/B-Fasc. No. 44.

[21] See MARKKU SUKSI, Ålands konstitution, p. 55.

passed on along the principle of *ius sanguinis* but which can also be granted by the Government of the Åland Islands upon application, provided that certain conditions are met, such as uninterrupted residence during five years and sufficient knowledge of the Swedish language.[22] In addition, the 1951 Act created a new right, the right to carry out business on the Åland Islands, which is premised on the possession of regional citizenship.[23] The Finnish law-maker has therefore by its own decisions broadened the scope of the special rights of the Åland Islanders beyond what is actually required by the original Åland Islands Settlement. In addition, it should be mentioned that since amendments in election legislation in 1948, the Åland Islands have, for the purposes of elections to the Parliament of Finland, existed as one of the constituencies. Under Section 25.2 of the Finnish Constitution, the Åland Islands are one constituency for the election of one Member of Parliament, which thus means that the Åland Islands have one guaranteed seat in the 200-member parliament. The Ålandic MP is not a representative of the Legislative Assembly of the Åland Islands or the Government of the Åland Islands, but is elected by all those Finnish citizens of 18 years or older who are resident on the Åland Islands. Hence the requirement of regional citizenship does not apply in this context as a qualification for the right to vote.[24]

IV. The stable nature of the principle of sovereignty and territorial integrity[25]

It is interesting that the rules of international law regarding secession have, in practice, not changed much since 1920-1921, although new norms concerning the right to self-determination were adopted at the international level in the 1960s. The report of the *ad hoc* International Committee of

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22 See MARKKU SUKSI, Ålands konstitution, pp. 25-57.

23 See MARKKU SUKSI, Ålands konstitution, pp. 336-341.

24 See MARKKU SUKSI, Ålands konstitution, pp. 96-98.

25 This section is based on MARKKU SUKSI, Keeping the Lid on the Secession Kettle – a Review of Legal Interpretations concerning Claims of Self-Determination by Minority Populations, International Journal on Minority and Group Rights 12: 2005, pp. 189-226.

Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Åland Islands question concluded the following about the principle of self-determination and the rights of peoples in their post-World War I context:[26]

> Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.
>
> On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other states to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted. A dispute between two States concerning such a question, under normal conditions therefore, bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term 'State', but would also endanger the interests of the international community. (…)

This was the starting point of a review of the claim of secession from Finland by the population of the Åland Islands and a request to be incorporated in Sweden. The internal constitutional arrangement in Finland, the principles of which were established already before the decision at the League of Nations, could be characterised as devolution of one part of the internal self-determination of Finland to the Åland Islands, because the Legislative Assembly of the Åland Islands was given exclusive law-making powers in certain areas. The measure meant that the Finnish Parliament at the same

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[26] Report of the Committee of Jurists, Official Journal of the League of Nations, Special Supplement No. 3, October 1920, p. 5.

time lost some of its law-making powers in respect of the territory of the Åland Islands.

The Committee of Jurists concluded in the context of the Åland Islands question that the „principle recognising the rights of peoples to determine their political fate may be applied in various ways; the most important of these are, on the one hand the formation of an independent State, and on the other hand the right of choice between two existing States".[27] The Committee went on to state that the principle of self-determination must, however, „be brought into line with that of the protection of minorities; both have a common object – to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics". After concluding that the protection of minorities is already provided for in many constitutions and that the international law under the auspices of the League of Nations has resulted in the creation of special legal régimes for certain sections of the population of a State, the Committee of Jurists said indicated that there may be for a minority a middle ground between formation of a new and independent State on the one hand and the choice between two existing States on the other: „Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace."

On the basis of a review of the historical development from different points of view and by taking into consideration that the Ålandic claim of secession and unification with Sweden were presented at a time when Finland was undergoing transformation, the Committee concluded that the „fact that Finland was eventually reconstituted as an independent State is not sufficient to efface the conditions which gave rise to the aspirations of the Aaland Islanders and to cause these conditions to be regarded as if they had never arisen".[28] It was therefore necessary to take into consideration the factual situation on the Islands, such as the homogeneous nature of the inhabitants of the territory, the geographically distinct circumscription of the Islands, the racial, linguistic and traditional links between the Islands and Sweden, and

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27 Official Journal of the League of Nations, Special Supplement No. 3, October 1920, p. 6.

28 Official Journal of the League of Nations, Special Supplement No. 3, October 1920, p. 12.

the forcible separation of the Islands from Sweden in 1808-1809. On the basis of, inter alia, these considerations, the Committee of Jurists concluded that the Åland Islands question was not, under public international law, left entirely to the domestic jurisdiction Finland and that the Council of the League of Nations was competent, on the basis of paragraph 4 of Article 15 of the Covenant of the League of Nations, to make any recommendations which it deems just and proper in the case.[29]

After these conclusions, the League of Nations appointed a Commission of Rapporteurs on the Åland Islands question, which concluded on its part that the „right of sovereignty of the Finnish State over the Aaland Islands is (…) incontestable and their present legal status is that they form part of Finland. To detach the Aaland Islands from Finland would therefore be an alteration of its status, in depriving this country of a part of that which belongs to it".[30] The main point for the purposes of this presentation is made by the Commission of Rapporteurs when it asks whether it is possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or to declare its independence:

> The answer can only be in the negative. To concede to minorities, either of language or of religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.[31]

Already at that point, the position was formulated that the „separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a

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29 See Official Journal of the League of Nations, Special Supplement No. 3, October 1920, p. 14.

30 The Aaland Islands Question, Report submitted to the Council of the League of Nations by the Commission of Rapporteurs. Document du Conseil B7, 21/68/106, of 16 April 1921, p. 25.

31 The Aaland Islands Question (note 30), p. 28.

last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.[32]

Because the Commission of Rapporteurs could not find evidence of any gross violations of the rights of the Åland Islanders and because the application of the Wilsonian principle of self-determination for deciding on the national affiliation of a population group was not a rule of positive public international law, the Commission did not find any immediate reason to recommend either a decision of secession or a referendum on the Åland Islands to that effect. The Commission also refrained from recommending a transitory arrangement:[33] „A transitory expedient has also been thought of, which would consist of leaving matters as they are for a number of years, five or less, at the end of which a plebiscite should take place. This arrangement, in the opinion of its sponsors, would have the advantage of ending the state of tension which exists at present and giving time for matters to calm down and for the inhabitants to reflect more dispassionately over the guarantees which union with Finland would offer for the preservation of their Swedish individuality." Instead, the Committee of Rapporteurs, and, as it seems, also the Åland Islanders and the Finnish government, preferred a final solution.[34] The solution was at the end based on a conditional maintenance of the sovereignty of Finland.

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32 The Aaland Islands Question (note 30), p. 28.

33 The Aaland Islands Question (note 30), p. 32.

34 The strategy has been different in the case of Kosovo, where, according to UN Security Council Resolution 1244/99, an international administration and substantial autonomy and self-government was instituted, with a view to reaching a final settlement of the issue at some future point of time. The current UNMIK-led administration of Kosovo can therefore be viewed as such a transitory arrangement which the League of Nations wished to avoid in the Åland Islands case. Whether or not this deferral of the final decision on the status of Kosovo was a good or a bad thing is not a question to be answered in this context, but the negotiations on the final status have now started. For a comparison of the international decisions behind the Åland Islands case and the Kosovo case, see MARKKU SUKSI, Autonomy by International Decision: the Cases of the Åland Islands and Kosovo, in: HARRY JANSSON/JOHANNES SALMINEN (eds.), The Second Åland Islands Question – autonomy or independence, Mariehamn/Julius Sundbloms Minnesstiftelse, 2002, pp. 75-96, on procedural and participation issues and its sister article MARKKU SUKSI, The Protection of the Rights of Minorities by Means of Autonomy: the Cases of the Åland Islands and Kosovo, in: ZELIM A. SKURBATY (ed.), Beyond

The final solution recommended by the Committee of Rapporteurs involved the Act on Self-Government of 1920, which the Finnish Parliament had enacted in order to defuse the tension surrounding the Åland Islands question. Apparently, the Commission of Rapporteurs was relatively satisfied with the Act itself, which enjoyed an entrenched position in the legal order of Finland comparable to that of the Constitution. Nonetheless, the Commission recommended certain additions to the Act, which aimed especially at the preservation of the Swedish language as the language of schools on the Åland Islands. In addition, the maintenance of real property in the hands of the natives was recommended, and in the area of politics, measures against the premature exercise of the franchise granted to new inhabitants were put forward. The Commission also suggested conditions for the nomination of a governor of the Åland Islands who has the confidence of the population.[35]

In the event that Finland would forfeit the trust placed in her by the Commission by acting against the expectations of the Commission by refusing to grant to the population the guarantees recommended, there would, according to the Commission, exist another possible solution, that is, the one which it explicitly wished to eliminate. „The interest of the Aalanders, the interests of a durable peace in the Baltic, would then force us to advice the separation of the islands from Finland, based on the wishes of the inhabitants which would be freely expressed by means of a plebiscite."[36] Here the issue of the referendum nonetheless pops up, as an ultimate method of resolving the matter, in case Finland would not act according to the expectations, although the Commission had stated earlier that the referendum is not a mechanism of decision-making that could be applied in this particular context. The Åland Islands question was resolved along the lines recommended by the Commission of Rapporteurs.

It is rather surprising that the legal pronouncements from the 1990s concerning self-determination and secession (*Katanga*,[37] *Tatarstan*,[38] *Quebec*[39])

One-Dimensional State: an Emerging Right to Autonomy?, Leiden & Boston/ Martinus Nijhoff Publishers, 2005, pp. 379-399, on rights issues.

35 The Aaland Islands Question (note 30), p. 32.

36 The Aaland Islands Question (note 30), p. 34.

37 *Katangese Peoples' Congress v. Zaire*, African Commission of Human Rights and Peoples' Rights, Comm. No. 75/92 (not dated).

show a great degree of similarity with the argumentation in the international solution of the Åland Islands case. In all three cases, the legal pronouncements tried the applicability and consequences of the international law principle of self-determination and arrived at the same material result: unilateral secession is not legal. In addition, the pronouncements indicated that the solution to the problem of self-determination should be sought in the field of internal self-determination.[40] Two of the cases (*Tatarstan* and *Quebec*) also deal with the internal constitutional rules applicable to the claim of secession.

V. Concluding observations

So what can we learn from the Åland Islands case? Almost nothing and quite a lot, depending on the point of view. International law is still today protective of the sovereignty of the state and does not look favourably upon secessionist attempts. Instead, self-determination should be worked out in the internal sphere, and there, federal solutions and autonomy are the natural institutional frames to be looked at, although territorial solutions are not the only ones possible in a situation. However, the principle of self-determination in its internal mode does not have much to say about the way in which the group to which self-determination is granted should be organized and what sort of institutional appearances internal self-determination should assume. The Åland Islands case is evidence of the fact that it is worthwhile to try to resolve a bilateral conflict between two countries by means of international involvement in the seeking of the optimal solution for internal self-determination. When internal self-determination has been achieved, *e.g.*, by means of an autonomy arrangement registered in the constitution of the

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38 *Case concerning the Independence of Tatarstan*, the first Constitutional Court of Russia, Decision No. 671 of 13 March 1992.

39 Secession of Quebec, the Supreme Court of Canada, 20 August 1998, No. 25506 S.C.C.

40 The principle of self-determination would, however, accept a secessionist outcome in a case where the territorial unit attempting a separation from the state it is attached to assumes a colonial position in relation to its „motherland" and possibly also if the population of a territorial unit has suffered from grave human rights violations.

state, the international law concept of self-determination could offer a measure of protection for the arrangement against attempts to weaken the arrangement.[41]

The Åland Islands can, against this background, offer scores of examples of institutional and constitutional design. Some of the examples are universally adaptable, but the specific rights ensured to the Åland Islanders, some of them introduced as late as in 1951, are mainly of a nature that probably cannot be created anymore under the current human rights regime. As such, the Åland Islands arrangement has functioned fairly well, although certain problematic issues are debated from time to time between the Åland Islands and the Government of Finland, such as the somewhat confusing system for the control of legislative competence. This, however, should be understood as a completely normal discourse between two jurisdictions that may in certain situations compete with each other.

What is often not observed when the Åland Islands arrangement is studied is that the Constitution of Finland applies also on the Åland Islands, except to the extent the Act on Self-Government introduces an exception which may or may not be based on the Åland Islands Settlement from 1921. What is also often not observed is that the implementation of the Settlement has changed and all the features originally included in it are necessarily not anymore in effect but have been set aside with the consent of the Legislative Assembly of the Åland Islands. In addition, later amendments to the Act on Self-Government have introduced certain new special rights for the Åland Islanders and improved the arrangement beyond what is required by the Settlement. In addition, there exist in Finland many parallel forms of minority protection which do not lead up to the creation of exclusive territorial sub-divisions, but which result in other forms of minority protection.

It should be possible to claim that the purpose of the arrangement, as expressed in the decision of the Council of the League of Nations of 24 June 1921, to ensure the „prosperity and happiness of the Islanders themselves" has been achieved: the GNP per capita of the Åland Islands is 36'000 US$, and the higher level of health at the Åland Islands in comparison with

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41 See MARKKU SUKSI, On the Entrenchment of Autonomy, in: MARKKU SUKSI, Autonomy – Applications and Implications, Kluwer Law International/Dordrecht, 1998, pp. 164-168.

surrounding regions in Finland and Sweden has been attributed to the fact that the Åland Islanders govern themselves.

Appendix:
Legislative powers of Åland and the State/Sections 18, 27 and 29 of the Act on Self-Government.

Section 18
Legislative authority of Åland

Åland shall have legislative powers in respect of

1) the organisation and duties of the Åland Parliament and the election of its members, the Government of Åland and the officials and services subordinate to it; (30 January 2004/68)

2) the officials of Åland, the collective agreements on the salaries of the employees of Åland and the sentencing of the officials of Åland to disciplinary punishment;

2a) the employment pensions of the employees of Åland and the elected representatives in the administration of Åland, as well as of the head teachers, teachers and temporary teachers in the primary and lower secondary schools in Åland; (12 July 1996/520)

3) the flag and coat of arms of Åland and the use thereof in Åland, the use of the Åland flag on vessels of Åland and on merchant vessels, fishing-vessels, pleasure boats and other comparable vessels whose home port is in Åland, without limiting the right of State offices and services or of private persons to use the flag of the State;

4) the municipal boundaries, municipal elections, municipal administration and the officials of the municipalities, the collective agreements on the salaries of the officials of the municipalities and the sentencing of the officials of the municipalities to disciplinary punishment;

5) the additional tax on income for Åland and the provisional extra income tax, as well as the trade and amusement taxes, the bases of the dues levied for Åland and the municipal tax;

6) public order and security, with the exceptions as provided by section 27, subparagraphs 27, 34 and 35; the firefighting and rescue service;

7) building and planning, adjoining properties, housing;

8) the appropriation of real property and of special rights required for public use in exchange for full compensation, with the exceptions as provided by section 61;

9) tenancy and rent regulation, lease of land;

10) the protection of nature and the environment, the recreational use of nature, water law;

11) prehistoric relics and the protection of buildings and artifacts with cultural and historical value;

12) health care and medical treatment, with the exceptions as provided by section 27, subparagraphs 24, 29 and 30; burial by cremation;

13) social welfare; licences to serve alcoholic beverages;

14) education, apprenticeship, culture, sport and youth work; the archive, library and museum service, with the exceptions as provided by section 27, subparagraph 39; (12 July 1996/520)

15) farming and forestry, the regulation of agricultural production; provided that the State officials concerned are consulted prior to the enactment of legislation on the regulation of agricultural production;

16) hunting and fishing, the registration of fishing vessels and the regulation of the fishing industry;

17) the prevention of cruelty to animals and veterinary care, with the exceptions as provided by section 27, subparagraphs 31-33;

18) the maintenance of the productive capacity of the farmlands, forests and fishing waters; the duty to transfer, in exchange for full compensation, unutilised or partially utilised farmland or fishing water into the possession of another person to be used for these purposes, for a fixed period;

19) the right to prospect for, lay claim to and utilise mineral finds;

20) the postal service and the right to broadcast by radio or cable in Åland, with the limitations consequential on section 27, subparagraph 4;

21) roads and canals, road traffic, railway traffic, boat traffic, the local shipping lanes;

22) trade, subject to the provisions of section 11, section 27, subparagraphs 2, 4, 9, 12-15, 17-19, 26, 27, 29-34, 37 and 40, and section 29, paragraph 1, subparagraphs 3-5, with the exception that also the Åland Parliament has the power to impose measures to foster the trade referred to in the said paragraphs;

23) promotion of employment;

24) statistics on conditions in Åland;

25) the creation of an offence and the extent of the penalty for such an offence in respect of a matter falling within the legislative competence of Åland;

26) the imposition of a threat of a fine and the implementation thereof, as well as the use of other means of coercion in respect of a matter falling within the legislative competence of Åland;

27) other matters deemed to be within the legislative power of Åland in accordance with the principles underlying this Act.

Section 27
Legislative authority of the State

The State shall have legislative power in matters relating to

1) the enactment, amendment or repeal of the Constitution and an exception to the Constitution; (28 January 2000/75)

2) the right to reside in the country, to choose a place of residence and to move from one place to another, the use of freedom of speech, freedom of association and freedom of assembly, the confidentiality of post and telecommunications;

3) the organisation and activities of State officials;

4) foreign relations, subject to the provisions of chapters 9 and 9 a; (30 January 2004/68)

5) the flag and coat of arms of the State and the use thereof, with the exceptions provided by section 18, subparagraph 3;

6) surname and forename, guardianship, the declaration of the legal death of a person;

7) marriage and family relations, the juridical status of children, adoption and inheritance, with the exceptions provided by section 10;

8) associations and foundations, companies and other private corporations, the keeping of accounts;

9) the nation wide general preconditions on the right of foreigners and foreign corporations to own and possess real property and shares of stock and to practice a trade;

10) copyright, patent, copyright of design and trademark, unfair business practices, promotion of competition, consumer protection;

11) insurance contracts;

12) foreign trade;

13) merchant shipping and shipping lanes;

14) aviation;

15) the prices of agricultural and fishing industry products and the promotion of the export of agricultural products;

16) the formation and registration of pieces of real property and connected duties;

17) mineral finds and mining, with the exceptions as provided by section 18, subparagraph 19;

18) nuclear energy; however, the consent of the Government of Åland is required for the construction, possession and operation of a nuclear power plant and the handling and stockpiling of materials therefor in Åland; (30 January 2004/68)

19) units, gauges and methods of measurement, standardisation;

20) the production and stamping of precious metals and trade in items containing precious metals;

21) labour law, with the exception of the collective agreements on the salaries of the Åland and municipal officials, and subject to the provisions of section 29, paragraph 1, subparagraph 6, and section 29, paragraph 2;

22) criminal law, with the exceptions provided by section 18, subparagraph 25;

23) judicial proceedings, subject to the provisions of sections 25 and 26; preliminary investigations, the enforcement of convictions and sentences and the extradition of offenders;

24) the administrative deprivation of personal liberty;

25) the Church Code and other legislation relating to religious communities, the right to hold a public office regardless of creed;

26) citizenship, legislation on aliens, passports;

27) firearms and ammunition;

28) civil defence; however, the decision to evacuate residents of Åland to a place outside Åland may only be made with the consent of the Government of Åland; (30 January 2004/68)

29) human contagious diseases, castration and sterilisation, abortion, artificial insemination, forensic medical investigations;

30) the qualifications of persons involved in health care and nursing, the pharmacy service, medicines and pharmaceutical products, drugs and the production of poisons and the determination of the uses thereof;

31) contagious diseases in pets and livestock;

32) the prohibition of the import of animals and animal products;

33) the prevention of substances destructive to plants from entering the country;

34) the armed forces and the border guards, subject to the provisions of section 12, the actions of the authorities to ensure the security of the State, state of defence, readiness for a state of emergency;

35) explosive substances, as to the part relating to State security;

36) taxes and dues, with the exceptions provided by section 18, subparagraph 5;

37) the issuance of paper money, foreign currencies;

38) statistics necessary for the State;

39) archive material derived from State officials, subject to the provisions of section 30, subparagraph 17;

40) telecommunications; however, a State official may only grant permission to engage in general telecommunications in Åland with the consent of the Government of Åland; (30 January 2004/68)

41) the other matters under private law not specifically mentioned in this section, unless the matters relate directly to an area of legislation within the competence of Åland according to this Act;

42) other matters that are deemed to be within the legislative power of the State according to the principles underlying this Act.

Section 29
Delegation of legislative authority to Åland

In addition to the provisions of section 27, the following matters come under the legislative power of the State:

1) the population registers;

2) the trade register, the association register and the shipping register;

3) the employment pensions of the employees of the municipalities and the elected officials of the municipalities, and the employment pensions of other persons, with the exceptions as provided by section 18, subparagraph 2 a, as well as other social insurance; (12 July 1996/520)

4) other alcohol legislation than that referred to in section 18, subparagraph 13;

5) the banking and credit services;

6) employment contracts, with the exception provided for apprenticeship by section 18, subparagraph 14, and co-operation in enterprises. (12 July 1996/520)

With the consent of the Åland Parliament an Act may be enacted to the effect that the legislative authority referred to in paragraph 1 be delegated to Åland in full or in part. Such an Act shall contain provisions on the measures consequent on the delegation of authority.

A person whose contract of service with the State is affected by the delegation of authority referred to in paragraph 2 shall with his consent be transferred to the service of Åland to comparable duties and with his former benefits, as further provided by Decree.

Bosnia and Herzegovina: Some Reflections on State- and Nation-Building in Ethnically Divided Societies

Joseph Marko

Table of Contents

I. Introduction

After four years of terrible war accompanied by massive ethnic cleansing, the Dayton Framework Agreement for Peace (GFAP),[1] having been concluded in December 1995, provided the institutional basis for the cease-fire on the ground. Throughout the first half of 1996, the Council of Europe had asked the member states to nominate candidates for the position of one of the three international judges to sit on the bench of the Constitutional Court of the state Bosnia and Herzegovina as foreseen in Annex 4 of the

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[1] The General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75, available at <www.ohr.int/dpa/default.asp?content_id380>.

GFAP, the so-called „Dayton constitution." In late 1996 I was finally appointed as one of these three international judges by the President of the European Court of Human Rights.[2] After the election of the six Bosnian judges by the Parliaments of Republika Srpska and the Federation of Bosnia and Herzegovina, the so-called „Entities" of the state of Bosnia and Herzegovina according to the constitution, the Court was established in May 1997 and started to render judgements by September of the same year. According to the Constitution, the mandate of the first bench of judges lasted five years without any possibility of re-appointment or re-election. These five years on the bench from May 1997 until April 2002 gave me a unique experience in tackling problems of state- and nation-building in an ethnically diverse society which I would like to expound here.[3]

II. The Theoretical Background: Models of Ethnic Group Relations

Unlike the American context with conceptions of a „melting-pot" or „salad bowl" stemming from the experience of an immigrant society, the historical background of state formation and nation-building in Europe[4] is quite different. By generalisation we can differentiate two basic models: the „French" model of a „state-nation" based on the notion of ethnic indifference

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2 Having been trained in both law and political sciences I had started an academic career at Graz University. In 1994 I had reached the position of a „Dozent" by publishing a book with the programmatic title „Autonomy and Integration. Legal Instruments of Minority Protection from a Comparative Functional Perspective." In the years before I had already started to work also as a legal expert for the Council of Europe's Commission for Democracy through Law (so-called Venice Commission) dealing with studies on former ex-Yugoslav Republics including Bosnia and Herzegovina. Hence, my academic background in comparative constitutional law and comparative government and politics must be taken into consideration when discussing the case-law of the Court.

3 For a detailed overview on the constitutional jurisprudence of post-war Bosnia and Herzegovina see JOSEPH MARKO, Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance, 7 European Diversity and Autonomy Papers (2004), available at <www.eurac.edu/edap>.

4 See, above all, LIAH GREENFELD, Nationalism: Five Roads to Modernity, Cambridge: Harvard University Press, 1992.

and the „German" model of the „nation-state"[5] based on the political and legal institutionalization of cultural diversity. What are the underlying normative principles and empirical effects of these two models?

The French model, following the experience of the French revolution, is based on the legal fiction of popular sovereignty whereby the term „people" as an abstract category serves the function of legitimation of the democratic exercise of all state power. In stark contrast and stemming from German philosophy, the German model is based on the idea of the primordial existence of a „people" as a cultural community, defined by cultural characteristics such as a common language, religion or tradition. Going hand in hand with these conceptualisations the individual person in the French model is legally defined as an ethnically indifferent citizen with the consequence that „ethnic diversity" is legally not recognized whereas for the German model the individual person is not only a citizen, but must additionally be seen as a member of a certain culturally defined group. This difference has also consequences for the understanding of the constitutionally enshrined equality principle: whereas this French model of „ethnic indifference" is based on the normative principle of strict individual equality before the law with the legal proposition of treating all citizens regardless of gender, age, or ethnic origin the same, the German model cannot uphold this rule: there are citizens belonging to the cultural community which is de facto in a majority position so that – in effect – „others" belong to a „minority" community. Moreover, the German model is combined with a third normative principle, the nationality principle. According to this principle, every „people" has a right to its own state. What does this then mean for persons not belonging to such a „state-forming" people? Not belonging to the „state-forming" or majority group by definition means „exclusion" with all forms of being treated differently: being discriminated against in access to education, housing, the labour market, in particular the civil service, and effective participation in political decision-making in general; institutional segregation, ethnic cleansing, i.e. expulsion from a given territory, and in the end genocide as experienced in European history of the 20th century from

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5 See predominantly ROGERS BRUBAKER, Citizenship and Nationhood in France and Germany, Cambridge: Harvard University Press, 1992. BRUBAKER contrasts the histories of the French understanding of nationhood, which is one of „[p]olitical inclusion" and „cultural assimilation," and the German understanding of nationhood, which is „ethnocultural".

Sarajevo to Auschwitz and back to Srebrenica.[6] But neither the French model of the „civic" state-nation, by replacing ethnic difference through legal homogeneity, can effectively manage problems of cultural diversity but sweeps them only under the constitutional carpet with anti-pluralist and assimilative effects. The price for equality as citizen remains assimilation and/or prohibition, for instance, to use your mother tongue before courts or show your religious affiliation in public schools. Hence, also the civic model does not successfully reconcile (legal) equality with (cultural) difference.[7]

In political theory, as I have shown elsewhere[8], any approach to reconcile equality with difference must be based on a triadic structure of identity – equality – difference avoiding the unilinear equation of the epistemological binary codes of identity/difference, the normative binary code of equality/ inequality and the empirical binary code of inclusion/exclusion in forming the structures of identity = equality = inclusion, and, *vice versa* – difference = inequality = exclusion as structural code of all forms of the ideologies of racism and ethno-nationalism. Only by avoiding the trap of equating identity with equality can we de-construct these ideologies and underlying primordial theories of ethnicity and recognise the functional pre-requisites for the institutionalisation of equality and difference. The following matrix gives an overview on the „idealtypes" of group relations to assess the functional prerequisites:

	Equality	Inequality
Unity	Integration	Assimilation
Diversity	Autonomy	Segregation

Hence, instead of assimilation and all forms of separation based on the non-recognition of ethnic difference, only the functions of autonomy *and*

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6 See generally MICHAEL MANN, The Dark Side of Democracy: Explaining Ethnic Cleansing, Oxford 2005.

7 See the chapter in Islam in France by ROBERT J. PAULEY, jr., Islam in Europe. Integration or Marginalization?, Aldershot 2004, pp. 33-64.

8 See JOSEPH MARKO, Diversity Management: A Neo-Institutional Approach, in European Yearbook of Minority Issues, Volume 6, 2006/07, forthcoming;

integration allow for the possibility of institutional arrangements which can provide for both equality and difference. A quick glance at comparative constitutional law can reveal that „autonomy" can be found in various constitutions either in the form of cultural respectively „personal" autonomy or in the form of territorial autonomy or a mix of both as in the case of Belgium. Integration is legally institutionalised through instruments for political representation and participation in laws on elections and the composition of state authorities.[9]

However, despite of the fact, that these models and conceptualisations are based on historic developments and particular countries such as Switzerland or Belgium, one problem remains to be seen for constitutional engineering and conflict resolution as such: is it possible to re-construct state and economy and to overcome the ethnic divide of a society by simply imposing a theoretical model or by „exporting" the experience from one country to another? If majority rule, strict individual equality and the ban of „reverse" or „benign discrimination" would be replaced through institutional arrangements of consociational democracy and the recognition of group and special rights, i.e. proportional ethnic representation, mutual veto rights and/or language rights, could this help to overcome the effects of such a war in a deeply divided society such as Bosnia and Herzegovina? Are the institutional arrangements of a multi-national state viable to create or re-create a multi-ethnic society, i.e. not only ethnic co-existence based on the absence of war, but inter-ethnic co-operation based on mutual trust?

In the following I will try therefore to reflect my experience from having been able to influence the constitutional and political development in Bosnia and Herzegovina as a judge of the Constitutional Court.

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9 Elaborated in much more detail in JOSEPH MARKO, Autonomie und Integration: Rechtsinstitute des Nationalitätenrechts im funktionalen Vergleich, Graz-Wien-Köln 1995; a summary in English can be found in JOSEPH MARKO, Equality and Difference: Political and Legal Aspects of Ethnic Group Relations, in: F. MATSCHER (ed.), Vienna International Encounter on Some Current Issues Regarding the Situation of National Minorities, Kehl 1997, pp. 67-97.

III. The Dayton-Constitution and Its Effects

1. The territorial and institutional arrangements

From the very beginning, the Dayton-Constitution institutionalised the model of consociational democracy based on the territorial de-limitation of ethnicity.[10] The warrying factions, the Republika Srpska (RS) which had seceded from the newly formed Republic of Bosnia-Herzegovina in 1992, waging a war of independence against this state and her legitimate government and then against the Federation of Bosnia-Herzegovina (the Federation), which had been created in 1994 after the Washington Agreement on the territory not under rule of the secessionist military and paramilitary forces of the RS, were constitutionally recognised as „Entities" of the state Bosnia and Herzegovina thereby also recognising the military front line as Inter-Entity-Boundary Line of the state. In doing so and not interfering into the internal order of the new „Entities" from the very beginning, the ethnic homogenisation of the institutions of the Entities and their territories – achieved by ethnic cleansing during and immediately after the war – were not touched upon. There was only a vague phrase in the Constitution that the Entities had to bring their constitutions in line with the Dayton-Constitution within three months after this Constitution had entered into force. Thus, in effect the ethnic pillarisation of society and the identification of ethnicity and territory were upheld. Following the model of consociational democracy, most institutions on state level, the collective Presidency, the House of Peoples in the bi-cameral parliamentary system, and the Council of Ministers were composed according to the principle of proportional ethnic representation of the so-called three „constituent peoples", Bosniaks, Serbs, and Croats. In addition, a complex system of mutual veto powers in the decision-making process of the Presidency and Parliament were foreseen. A look into the allocation of powers between the institutions at state level and the Entities reveals that Bosnia and Herzegovina was one of the weakest federations in comparative perspective leaving central powers for a state such as defence to the Entities.

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[10] For a detailed description see also JOSEPH MARKO, „United in Diversity"?: Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina, Vermont Law Review, Vol. 30, 2006, pp. 503-550.

However, the territorial delimitation and institutional power-sharing mechanisms along ethnic lines were contrasted by several mechanisms for the protection of human and minority rights, in particular strict individual non-discrimination, guarantees for the return of refugees and displaced persons including the restoration of their property combined with an „affirmative duty" for state and Entity authorities to establish the necessary preconditions, as well as provisions mirroring the four freedoms of movement of persons, good, capital, and services of the EC Treaty for the establishment of a „common market." In addition, the Constitution provided for a mechanism to transfer powers from Entity level to state level by mutual agreement.

In conclusion, the entire Dayton framework was – on the one hand – resembling the political compromise in order to stop the war, as can be seen from the static elements of territorial delimitation and consociational institutional arrangements to keep the balance of power. On the other hand, dynamic elements such as the provisions for the return of refugees and restoration of properties for the re-establishment of the multi-ethnic society – which had existed before the war – kept the channels open for further development for re-construction and reconciliation. Also the four freedoms and provisions for the transfer of powers were obviously a vehicle to overcome the territorial barriers and thereby the disintegrative forces at work.

2. The power-sharing mechanism in practice

How did these territorial and institutional arrangements work in practice?

On the state level, power-sharing did not work. Instead of elite co-operation for re-construction, a negative elite consensus of *divide et impera* prevailed blocking the necessary enactment of laws for the re-construction of the state and the war-torn economy. After 1997, based on his so-called „Bonn powers"[11] the High Representative started to intervene into day-to-day politics by decreeing laws instead of the Parliament and banning politicians, obstructive to the implementation of Dayton, from office. The OSCE, responsible for the organisation of elections, totally failed to transform the

[11] For a critical evaluation see CHRISTIAN J. EBNER, The Bonn Powers – Still Necessary?, in: PREDRAG JUREKOVIC/FREDERIC LABARRE (eds.), From Peace Making to Self Sustaining Peace – International Presence in South East Europe at the Cross-Roads, Vienna 2004, pp. 120-146.

mono-ethnic parties representing the constituent peoples into a multi-ethnic party system through election-engineering. Hence, the learning curve of the ethno-nationalist parties was shallow: the more they obstructed and the High Representative intervened, the more they could blame the international community for failures and double standards creating the image of staunch defenders of the national interest of their electorate and thereby reinforce their grip on the already ethnically pillarised society.[12]

On the Entity level, ethnic homogenisation went on even after the adoption of the GFAP. Until 2000 there were no substantive „minority" returns, i.e. Serbs returning into the Federation and Bosniaks or Croats returning into the RS. Moreover, schools remained segregated based on the right to „mother-tongue" instruction, despite only minor differences between the Bosnian-Serbian-Croatian languages. Most obvious, however, was the ethnic homogenisation of the administration and judiciary. In the RS, there were virtually no „non-Serbs" represented in the government, police, and judiciary and almost no Serbs in the respective institutions of the Federation. At the same time, the decentralisation of power to the Entities created a huge state apparatus with 13 prime ministers, 180 ministers, around 750 elected representatives, and 1200 judges and prosecutors for a population of 4 million. However, this massive state apparatus covering 65% of the entire budget was not able to establish rule of law and secure basic public services.

Due to the disintegrative political forces, also the reconstruction of the war-torn economy failed. This was camouflaged in the years after Dayton by massive foreign aid. Only after 2000 it became obvious that the economy remained totally aid-dependent without any substantive foreign investment since there was no effective rule of law.[13]

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[12] See in general also DAVID CHANDLER, Bosnia. Faking Democracy after Dayton, London: Pluto Press, 1999 and CHRISTOPHE SOLIOZ/TOBIAS K. VOGEL (eds.), Dayton and Beyond: Perspectives on the Future of Bosnia and Herzegovina, Baden-Baden: Nomos, 2004.

[13] See N. TZIFAKIS/C. TSARDANIDIS, Economic Reconstruction of Bosnia and Herzegovina: The Lost Decade, in Ethnopolitics, 5/2006, pp. 67-84.

In conclusion, ethnic power-sharing did not produce the results foreseen in theory.[14] The territorial strongholds of ethno-nationalist forces and their obstructionist and disintegrative politics could not be overcome so that mutual trust and an ensuing feeling of security could never be achieved as a necessary prerequisite for inter-ethnic cooperation. The lack of this cooperation, in turn, prevented the establishment of representative democratic government, based on feelings of civic loyalty to the state and not only to the own ethnic group, rule of law and the return to a multi-ethnic society as well as a functioning market economy viable to be integrated into the EU.

IV. The role of the Constitutional Court in a process of transformation

The case, where all these problems of reconstruction of state, economy, and society were brought before the Constitutional Court, was the land-mark case U 5/98.[15] In a so-called „abstract" review-procedure after Article VI.3.a. of the Constitution, in February 1998 then President Alija Izetbegović brought a claim before the Court to review more than twenty provisions of the Entities' constitutions after the parliaments of the Entities had remained inactive to bring these constitutions in line with the Dayton constitution within three months as this had been foreseen in Article XII.2.

The major problems raised in this request were the problems of the legal status of constituent peoples, the use of official languages as defined in the Entity constitutions, the legal status of the Orthodox Church in the RS, the „civilian command authority" of the members of the Presidency, the

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[14] AREND LIJPHART, Consociational Democracy, World Politics, Vol. 21, 1969, pp. 207-225 and ID., Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries, Yale 1999, pp. 31-47.

[15] Constitutional Court of Bosnia and Herzegovina, Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH, Case U 5/98, Partial Decision I (Jan. 30, 2000), Partial Decision II (Feb. 19, 2000), Partial Decision III (July 1, 2000), Partial Decision IV (Aug. 19, 2000), available at <www.ccbh.ba/>. Compare also JOSEPH MARKO, Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance, 7 European Diversity and Autonomy Papers (2004), available at <www.eurac.edu/edap>.

allocation of powers, and the upholding of the form of „socially owned property" in the RS as a legacy of the Titoist communist regime. The request was finally adjudicated in four partial decisions published in the Official Gazettes of BiH, RS and the Federation in the course of 2000.[16]

In particular Partial Decision III on the legal status of constituent peoples became of central concern insofar as the territorial delimitation and the power-sharing mechanisms were affected. Izetbegović's claim was rather simple: if Bosniaks, Serbs and Croats are declared constituent peoples of BiH in the preamble of the Dayton constitution, they must be „constituent on the entire territory of BiH." Since Article 1 of the RS Constitution declared „RS the state of the Serb people and of all her citizens" and Article 1 of the Federation Constitution designated only Bosniaks and Croats as constituent peoples of the Federation, he alleged a violation of the Dayton Constitution responsible for the low figures of minority return due to ongoing discrimination against the respective „other" constituent peoples in the Entities.

When I was appointed judge rapporteur in this case by the President of the Court in order to prepare the legal and factual determination of the case through a draft decision, I was confronted in the very beginning with the problem to take the easy way out by following the example of the American Supreme Court and declare the entire problem raised a „political question" which cannot be resolved through a court. However, with one exception among the ranks of the international judges, the case was declared admissible in a pre-trial decision. The next problem thus raised was, of course, how to substantially analyse and resolve the request since neither the Constitution nor any other legal text contained a legal definition of the meaning of the phrase „constituent people."

Again the alternative was raised in the deliberations of the Court by one of the international judges to simply declare the phrase „constituent peoples" without any normative substance and to reject the claim to declare both Articles 1 of the constitutions unconstitutional. However, such an approach

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[16] The case U 5/98 was published in the official languages in 2000 in four partial decisions: Constitutional Court, Case U-5/98, 30 January 2000, Službeni glasnik BiH [Official Journal], No. 11/00, 17 April 2000; 19 February 2000, Službeni glasnik BiH, No. 17/00, 30 June 2000; 1 July 2000, Službeni glasnik BiH, No. 23/00, 14 September 2000; 19 August 2000, Službeni glasnik BiH, No. 36/00, 31 December 2000.

would have resulted in relying only on the static elements of the Constitution and thereby to constitutionally legitimise the effects of ethnic cleansing through territorial separation and institutional segregation. Hence – certainly determined by my academic training as both lawyer and political scientist – I insisted on a thorough dogmatic and empirical analysis against, in particular, fierce resistance of the Serb and Croat judges who argued that an „abstract review" procedure can only be based on the interpretation of the text.

My research as judge rapporteur was thus two-fold, a dogmatic and an empirical analysis. Instead of elaborating a „theory" on the specific meaning of the adjective „constituent" from domestic and foreign legal literature thereby following not only my own reservations, but also the objections of the other international judges, I first tried to establish the legislative history through a three hours telephone call across the Atlantic with one of the American legal advisors in drafting the Constitution. However, this ended without a result to determine the „will of the parties." The phrase „constituent peoples" had been inserted into the text of the Preamble on proposal of one of the Bosnian parties without any of the other Bosnian parties and therefore also the Americans objecting or even asking for its „meaning." The advice given to me as judge rapporteur was therefore in the classical American tradition of Marbury v. Madison, 1803: „You are the judge. You say what the law is!"

I therefore decided to go on with a contextual and functional interpretation of the text in light of the entire GFAP. When one sees the phrase „constituent peoples" in the Preamble not only isolated but in the entire context, it becomes quite clear that Bosniaks, Serbs, and Croats are treated the same in the composition of all state institutions and their right to participation in the decision-making process including their veto powers. Seen from the background of the institutional mechanisms enshrined in the provisions of the Constitution, I finally developed from the „vague, indeterminate"[17] phrase „constituent peoples" in conjunction with the equivalently vague notions of „democratic state" and „pluralist society" in the text of the Constitution the following „inter-mediary" concretising rules:

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[17] WOJCIECH SADURSKI, Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, Dordrecht, The Netherlands: Kluwer Academic Publishers, 2005, p. 203.

a) Effective participation of ethnic groups is an important element of democratic institutional structures in a multi-ethnic state. However, this principle would be transformed into ethnic domination of one or even more groups if, for instance, absolute and/or unlimited veto-power would be granted to them, thereby enabling a numerical minority represented in governmental institutions to forever enforce its will on the majority.

b) From the text of the Constitution in conjunction with the text of the Race Discrimination Convention and the Framework Convention on the Protection of National Minorities which are directly applicable law in constitutional rank in BiH, I concluded that not only assimilation respectively ethnic homogenisation, but also segregation are prohibited in the context of a multi-ethnic state so that territorial delimitation must not serve the aim of ethnic separation.

c) As can be seen from these two „inter-mediary rules", the term „constituent peoples" is understood in terms of „collective equality" to give these groups an equal right to representation and participation in decision-making processes, but no „preferential treatment" to dominate others through exclusion from representation, i.e. segregation based on territorial delimitations into Entities or unlimited veto rights, since this would transform democracy into ethnocracy.

From a functional perspective my assessment was that by relying only on the static elements of the Constitution, i.e. power-sharing and territorial separation, it would not be able to secure a „positive" peace in the long run, but this would only legitimise and thus strengthen the disintegrating forces in state and society. Due to my training as an Austrian constitutional lawyer, I am, however, of the strong opinion – following thereby the authority of HANS KELSEN – that a Constitutional Court, as a „Guardian of the Constitution"[18], must uphold the Constitution and thereby the state. In conclusion, a Constitutional Court must stand for integration and not strengthen the

[18] Compare CARL SCHMITT, Der Hüter der Verfassung (1931) (proposing a powerful presidency and reform of the Weimar Republic), with HANS KELSEN, Wer soll Hüter der Verfassung sein?, 1931 (responding to SCHMITT in support of Austria's first-of-its-kind constitutional court, established in 1920 with a monopoly for judicial review of legislation).

disintegration of state and society. This could be done only by basing the judgement on the dynamic elements of the constitution, i.e. the provisions on return of refugees, restoration of property and individual anti-discrimination in balancing the effects of the power-sharing system.

This required, however, a sound empirical basis to give evidence of the discriminatory, segregationist and disintegrative effects of the Constitutional mechanisms on Entity level. Based on a narrow 5:4 pre-trial decision to be allowed to do that I collected figures from the OSCE and the UNHCR which finally demonstrated – together with „circumstantial evidence" from several decisions of the Human Rights Chamber, the Ombudsperson, and reports of other reliable sources – the discriminatory effect of the monoethnic governmental structures in both the RS and the Federation which had in turn their basis in the respective Articles 1 of the Entities' constitution. In a narrow 5:4 decision with the two Serb and two Croat judges dissenting and one international judge concurring, these Articles were finally declared unconstitutional with a reasoning of the majority based on the contextual and functional interpretation elaborated above. In doing so the majority not only tried to find a proper balance under the auspices of autonomy and integration, but also to shift the balance from strict consociational arrangements for constituent peoples, i.e. the ethnic principle, to the civic principle by emphasising also the individual non-discrimination principle.

V. The Need for Reconceptualisation in State and Nation-Building

The failure of the international community in Bosnia and Herzegovina to establish „good governance" through a stable multi-ethnic democratic state based on an effective rule of law and a functioning market economy stems not the least from the application of old concepts and wrong alternatives.

First, the idea of a multi-national state based on the combination of theories of federalism and consociationalism did not produce the results referred to in the previous paragraph. Territorial delimitation along ethnic lines led to regional mono-ethnic homogenisation and a cementing of ethno-national identities with the effects of upholding and ensuing large-scale discrimination and segregation. Institutional power-sharing on state level blocked the decision-making process and endangered the state as such. None of the

institutional arrangements led to mutual trust and security enabling any form of co-operation either on the elite or mass level.

But should the model of legal recognition of ethnic diversity through federal and consociational arrangements simply be replaced by the civic „French" model of ethnic indifference banning all ethnic criteria from the public sphere, in particular from institutional arrangements? This is simply not feasible in a severely divided society and is in itself an illiberal and utopian concept. I am firmly convinced that all concepts of a „withering away" of ethnicity, after the Marxist model of withering away of state and law, are as utopian as the communist ideal. The modern world – even perceived through the lens of post-modern concepts – will remain characterized by the „social reality" of ethno-cultural pluralism. This is not to herald a new „end of history", but quite the opposite; history will go on! We must recognize that the ideology of ethno-nationalism cannot simply be overcome by a strict separation of the political, i.e. civic, and cultural, i.e. ethnic identities and thereby the spheres of state and society through banning all cultural-ethnic manifestations and thereby uprooting cultural pluralism through law.[19] As can be seen from the jurisprudence of the European Court of Human Rights with regard to Articles 9 and 11 of the ECHR, such an approach is a violation of the „principle of pluralism" which is an „essential" element of democracy, or in the wording of the ECHR „necessary in a democratic society."[20] Moreover, it would simply be impossible in Bosnia and Herzegovina, but also in Austria, Germany, Switzerland and even France, to start telling people in a campaign: „Forget your national identity, you are a citizen of the Republic who will be treated like any other citizen." People know from deep-rooted collective memory that not every citizen is treated the same way due to various status hierarchies.

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[19] KYMLICKA similarly argues that every modern state is engaged in a form of nation-building that can never be ethnically neutral insofar it requires „adaptation" to the linguistic and cultural standards of the majority in the public sphere, and/or it creates ghettos based on parallel societies. WILL KYMLICKA, Contemporary Political Philosophy: An Introduction, Oxford University Press, 2002, pp. 343-44.

[20] See, for instance, *Supreme Holy Council of the Muslim Community v. Bulgaria*, App. No. 39023/97 [2004], where the Court argues as a rule at § 96: „The role of authorities in a situation of conflict between or with religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".

It is therefore necessary to reconceptualise our notions of a multi-national state and the seemingly wrong dichotomies civic v. ethnic and individual v. collective rights.

Against the conundrums of liberal political and legal theory, i.e. majority rule and individual as well as formal equality, we have to learn first from empirical evidence that a concept of strict individual and formal equality before the law is not sufficient to effectively prevent societal discrimination in all spheres of life. It is particularly insufficient in the fields of housing, education and the labour market, which, in fixed parallel societies, end up endangering social cohesion, rule of law, and political stability. Hence, in order to paraphrase Ronald Dworkin, equal protection has to take ethnic differences „seriously" by taking the group perspective into account and recognising group rights as an effective instrument.[21] Secondly, if cultural pluralism is taken seriously as an „added value" instead of being conceived as conflict-prone, identity-formation cannot be left to the respective ethnic group and their leaders. They will always try to monopolise it. It is therefore an obligation of the state through public education to keep identity-formation relative and situational, inclusive and multiple against any absolute loyalty claims. This requires also a new perception of „minority protection" or the protection of „vital national interests" which need not be defensive any longer. If cultural diversity and bilingualism are perceived as positive values, there is no longer a need for territorial and/or institutional exclusion. Accordingly, territorial and institutional arrangements could be redesigned so that ethnic representation is guaranteed, but does no longer allow for domination and discrimination.

In conclusion, against the old, from Western European history inspired concept of the multi-national state, a new concept of multi-ethnic democracy requires, on the one hand, institution-engineering with the effect of fostering multi-ethnic cooperation on all territorial levels, from the municipalities to the European level. Mono-ethnic regions – the pillars of the multi-national states in Western Europe – can therefore be de-homogenized through the concept of cultural autonomy in a first step.[22] Multiple identities must then

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21 RONALD DWORKIN, Taking Rights Seriously. Cambridge, Massachussets: Harvard University Press, 1977.

22 The concept of cultural autonomy as an alternative to territorial autonomy was invented by the Austro-Marxist thinkers KARL RENNER and OTTO BAUER under the

be enforced through desegregation of housing, the labour market, and the educational system. This requires, of course, not only a top-down approach through institutional engineering, but also a bottom-up approach by supporting respective NGOs and civil society, and by triggering inter-cultural learning processes in secondary socialisation and the media through the development of narratives of successful inter-cultural cooperation. In addition, within the frame-work of EU policies of regional cohesion and the conditionality of regional co-operation, cross-border and trans-regional co-operation also beyond the borders of the EU must be fostered in order to overcome the historic legacies of the ethnic nation-state in South East Europe. Finally, only through a complex set of cultural autonomy and social, economic, and political integration through effective representation and participation on the various municipal, regional, national, and supra-national levels can the functions of every political system – stability, efficiency, and democracy – be achieved. In addition, the traps of ideological dichotomies and their either – or logic have to be avoided by – as I learned in the practice on the bench – balancing different concepts and competing interests. Hence, instead of territorial and institutional separation based on the belief in ethnic homogeneity and the identification of ethnicity and territory, only pluri-ethnic autonomy and integration based on multiple identities and loyalties and the de-coupling of territory and ethnicity can serve as guidelines for state- and nation building in post-conflict societies. And probably not only those in Europe.

conditions of the Habsburg Monarchy. However, this concept was not widely used in Europe after WWI. See ERICH FRÖSCHL et al. (eds.), Staat und Nation in multiethnischen Gesellschaften [State and Nation in Multi-ethnic Societies], Wien: Passagen, 1991.

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Cultural Autonomy – and Some Related Aspects of Territorial Autonomy

Lauri Hannikainen

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There are ethnic and linguistic minorities and indigenous peoples who form the numerical majority of the population in a given geographical area, for example, a region or municipality, but there are also minorities and indigenous peoples which live mixed with the national majority population without forming a majority in any administrative territory. If such a minority living mixed with the majority population wants to manifest its uniqueness and to have some autonomy/self-rule, it hardly should call for territorial self-government which is based on majority rule. Then a lesser possibility, cultural autonomy, should be examined as a possible form of realization of a limited self-rule. It is characteristic of cultural autonomy that it covers all persons belonging to the said ethnic or linguistic minority but no one else. Those members of the minority may live dispersed in various parts of the territory of the State.

Persons belonging to any group can exercise their right to freedom of association by forming an association to take care of their common interests. In fact, the right to freedom of association makes a limited autonomy possible for any group as long as the association does not infringe national

security, public order, morals or health in the society or infringe the rights of persons not belonging to that association. It is for every individual to decide whether she/he wants to seek membership of the association and it is for the governing organ of the association to decide which applicants are accepted to the membership. The association can determine its powers which can be fairly far reaching; to give an example, the association may decide that every member has to give monthly ten percent of her/his income to the association. However, the powers assumed by the association over its members do not limit the powers of the State and other public organs vis-à-vis the members of the association. In such a case one should not speak of any specific autonomy of the association or the minority group but simply of freedom of association.

For an ethnic or linguistic minority group to have autonomy, this autonomy has to have following consequences: 1) the State must undertake not to impose its own regulations in the field covered by autonomy and 2) the State obliges itself to treat as authoritative the decisions made by the institutions of that minority.[1] Thus, the institutions of the autonomous arrangement have public powers.

No individual can be obligated to submit to a cultural or religious autonomous arrangement. However, the minority in question can regard that only persons agreeing to submit to the autonomous arrangement are members of that minority.

I. A Prominent Example of Cultural Autonomy from Estonia in the Inter-War Period

The cultural self-governments in Estonia between 1925 and 1940 are good examples of cultural autonomy. The 1925 Estonian Law in Cultural Autonomy prescribed that national minorities entitled to create their cultural self-governments were the Germans, Russians, Swedes and other nationalities who lived within the boundaries of Estonia and whose number was not less

[1] See A. EIDE in cooperation with v. GRENI and M. LUNDBERG, Cultural Autonomy: 'Concept, Content, History and Role in the World Order', in: M. SUKSI (ed.), Autonomy – *Applications and Implications*, The Hague, 1998, p. 252.

than 3,000 persons. Such cultural minorities were given the right to establish their own schools and cultural institutions, governed by elected councils with legislative and taxing powers. The jurisdiction of those cultural councils was defined in terms of membership in a cultural community regardless of geographical residence.

Two minorities took the advantage to set up their Cultural Councils – the German and Jewish minorities. Why didn't the Russian and Swedish minorities take this advantage? They were geographically concentrated and could use normal local self-government institutions. That served well their purposes. The Germans and Jews were more scattered and found the possibility to set up cultural autonomy as advantageous.

A national minority which wanted to set up its cultural self-government had to submit through its representatives an application to the Government of Estonia. The application had to include a list of at least 3,000 Estonian citizens who belonged to the applying minority. Any individual citizen had the right to ask for the enrolment of her/his name. Anyone who had been enrolled had the right to announce that her/his name be deleted from the list. Elections to the Cultural Council were arranged, when the number of persons enlisted was not less than one half of the persons of the corresponding minority according to the last census held. When at least one half of the persons enrolled had participated in the elections, the Cultural Council met for its first session. As soon as the Council, with two-thirds vote, made the decision to create the cultural self-government, the Estonian Government declared it established.

The Cultural Council was the highest decisive and legislative organ of the Self-Government. It, inter alia, issued by-laws, adopted the budget, imposed taxes upon the members, and elected members of the executive organ, Cultural Government. The latter represented the Self-Government in dealings with the Estonian Government, managed the properties, operated and supervised the schools and cultural activities.

The Cultural Self-Government ran its own schools up to the level of university. The minority schools were accredited in the same way as the other schools in Estonia. For educational and cultural purposes the Self-Government had the right to pass by-laws which had binding force upon the members. For the same purposes the Self-Government could impose taxes upon the members.

The finances of the Self-Government were based on 1) the subsidies of the Estonian Government for elementary and secondary education, 2) the expenditures and other obligations of the local self-governments toward the elementary and secondary education, c) subsidies of the State and local self-governments toward the cultural development of the people, d) the taxes imposed by the Self-Government and 5) gifts, collections, endowments and income from the property and undertakings of the Self-Government. The expenditures for compulsory elementary education were paid exclusively by the State and local self-governments.[2]

II. The Contemporary Scene

Whereas in the inter-war period, i.e. the League of Nations period, minority questions (including new autonomy arrangements) were paid much attention to, in the first decades of the United Nations they were superseded by the policy of protecting and promoting individual human rights on equal basis for every one (including every person belonging to minorities). To protect their existence and collective identity, minorities could appeal to three international rules: 1) the criminalization of genocide, 2) the prohibition of discrimination, and 3) Article 27 of the Covenant on Civil and Political Rights which obligates the States parties not to deny from persons belonging to ethnic, religious or linguistic minorities the right, in community with the other members of their group, to enjoy their own culture, practise their own religion, or to use their own language.

Minorities and indigenous peoples demanded more rights to protect their identity, culture and language – and even their existence. Their calls 'won the day' in the years of the ending of the Cold War and subsequent years. A universal declaration on the rights of persons belonging to minorities was adopted by the UN General Assembly, two conventions on minority rights

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2 A good description on the Estonian cultural autonomy system can be found in an article by K. AUN, The Cultural Autonomy of National Minorities in Estonia, in: Yearbook of Estonian Learned Society, 1951-1953, p. 26-41. A shorter version leaning on AUN's article can be found in EIDE's article, p. 253-255, see note 1 above.

were adopted in Europe and the International Labour Organization (ILO) adopted a new and updated convention on indigenous and tribal peoples.

With the exception of the above-mentioned instruments on minorities do not speak in terms of collective rights, none of them even mentions the institution of autonomy. Primarily they call upon States to respect, protect and promote minorities and the rights of persons belonging to them. The ILO Convention goes further in favour of even indigenous collective rights. It does not use the term 'autonomy' or 'self-government', but the right to substantial cultural autonomy – even limited territorial autonomy – can be interpreted from its terms.

In many States different new minority and indigenous arrangements were established, including autonomy arrangements. Among autonomy arrangements most attention have attracted territorial autonomies, for example, in Scotland, Crimea and Tatarstan. Less is known of new cultural autonomy arrangements. However, there are such arrangements; especially well known is the Hungarian cultural autonomy system.[3] It should be pointed out that these autonomy arrangements are not primarily based on international law but are choices opted for by different States.

The international community has stressed the importance of the right of effective participation of minorities and indigenous peoples in public matters, especially in decision-making processes affecting their vital interests. A good collection of this contemporary approach is the Lund Recommendations on the Effective Participation of National Minorities in Public Life.[4] It was prepared upon the initiative of the High Commissioner on National Minorities of the Organization for Peace and Security in Europe by an expert group convened by the Foundation on Inter-Ethnic Relations in cooperation with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in 1999. The document is divided into four main parts:

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3 A short description on the complicated Hungarian cultural autonomy system can be found in K. MYNTTI, A Commentary to the Lund Recommendations on the Effective Participation of National Minorities in Public Life, Turku/Åbo, 2001, p. 43-47.

4 A booklet entitled The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note has been published in June 1999 by the Foundation on Inter-Ethnic Relations in the Hague. For a broader approach, see also MYNTTI (above in note 3).

1) General Principles, 2) Participation in Decision-Making, 3) Self-Governance, 4) Guarantees.

In the third part on self-governance the Recommendations state that effective participation of minorities in public life call for non-territorial or territorial arrangements of self-governance or a combination thereof. States should devote adequate resources to such arrangements. (Recommendation 14) Non-territorial forms of governance are regarded as useful for the maintenance and development of the identity and culture of national minorities. (Recommendation 17). The issues most susceptible to regulation by these arrangements include education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities. Taking into account the responsibility of the governmental authorities to set educational standards, minority institutions can determine curricula for teaching of their minority languages and cultures. (Recommendation 18)

One may conclude on the Lund Recommendations that both participatory rights and autonomy rights are favoured in them – not as alternatives but as parallelly operative rights. Their combined use produces the best result for minorities.

Below I will concentrate on one contemporary set of cultural autonomy arrangements – the cultural autonomies of the indigenous Sami people in Finland, Norway and Sweden. There are also some aspects of territorial autonomy involved. This is no surprise, when one knows the importance their traditional lands and waters, and their natural resources, to indigenous peoples; this is emphatically recognized by the ILO Convention.

III. The Sami Cultural Autonomy

The Sami people is the indigenous people of three Nordic States. The Sami is the only indigenous people in the European Union. The traditional lands and waters of the Sami are located in the northernmost parts of Finland, Norway and Sweden. The number of the Sami in Finland is about 8,000, in Norway about 40,000 and in Sweden about 20,000. They live foremostly mixed with the majority populations. They are ethnically clearly distinct from the majority populations and have their own language(s). However,

their dominant religion is the same as that of the national majorities, Lutheran Christianity. They all command the national language of their home State. On one hand, they are members of the national society but, on the other hand, they form a distinct group – indigenous people.

The nucleus of the three Sami communities in Finland, Norway and Sweden are the Sami Parliaments which are elected by the Sami – all those who are included in the register of the electorate of the national Sami Parliament. Whereas the nucleus of the Sami community is in the traditional areas, a notable part of the Sami live outside those areas. Even those living outside are entitled to vote in the election of the Sami Parliament. Otherwise, their Sami rights are in fact very limited.

The Sami Parliament is the uncontested representative of the Sami in each of the three Nordic societies. Let us, in the following, take especially the Finnish Sami Parliament as the basis of the examination below and make, when needed, references also to the other Sami Parliaments.

The Finnish Act on the Sami Parliament (974/1995) gives content to the linguistic and cultural autonomy of the Sami. The general role of the Sami Parliament is to safeguard the Sami language and culture, and to take care of matters relating to the status of the Sami as an indigenous people. The financing of the work of the Sami Parliament is the responsibility of the State. This financing includes a certain sum for the maintenance and development of the Sami language and culture. The Sami Parliament shall decide how the funds designated for the common use of the Sami are allocated.[5]

However, the Finnish Sami Parliament has no legislative powers, nor taxation powers. This is true with the other Sami Parliaments as well. This fact is a clear indication that the Sami Parliaments have weaker powers than what the Estonian cultural autonomy system of the inter-war period had.

What kinds of aspects of Sami autonomy can one identify in the Nordic countries? In the following, I address essential fields of Sami activities to see the role (if any) of autonomy. I make a division between the cultural side and the – at least partially – territorial side:

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5 See closer L. HANNIKAINEN, Autonomy in Finland: The Territorial Autonomy of the Åland Islands and the Cultural Autonomy of the Indigenous Saami People, Baltic Yearbook of International Law, Vol. 2, 2002, p. 188-197.

1. The cultural side

X Minorities are usually masters of their culture, linguistic minorities are masters of their language even without formal powers.[6] An important thing naturally is what kinds of financial resources a minority has for its culture and language. The situation of the Sami is fairly good in this respect, because in all three countries the State supplies financial resources to the Sami.

One aspect of a minority's mastering of its language and culture is the production of teaching materials in the minority language. There exist in each of the three States Sami schools where the principal language of instruction is Sami. The Sami have autonomous powers in producing teaching materials in Sami.

X Regarding Sami schools, the Swedish Sami Parliament has autonomy powers. In 1993 the State delegated to the Sami Parliament the authority to appoint the members of the Sami School Administration. This organ acts as a State organ and administers Sami schools and the education of the Sami pupils. In Finland and Norway the powers of the Sami Parliaments are less formally authoritative.[7]

X There is a common Sami Radio for the Sami of the three Nordic States.[8] The Sami Radio operates in cooperation with the national broadcasting corporations of the three States and has substantial autonomy in running its programs and affairs. Sami media, using the Sami language, has understandably effective internal autonomy. The sufficiency of resources is the main question, but there is limited financial aid from the State.

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6 See U. AIKIO-PUOSKARI/M. PENTIKÄINEN, The Language Rights of the Indigenous Saami in Finland, Rovaniemi, 2001.

7 See U. AIKIO-PUOSKARI, Raportti saamelaisopetuksesta Pohjoismaiden peruskouluissa, Inari, 2006.

8 See Sami and Greenlandic Media, ed. by F. HORN, Rovaniemi, 1999.

2. The territorial side[9]

X The Sami have in Norway and Sweden exclusive rights of reindeer herding in the northernmost parts of Norway and Sweden. This right has already existed for a long time. This exclusive right means that the Sami have substantial autonomy in administering reindeer herding. To some extent this autonomy has territorial significance.

Reindeer herding is a vital part of Sami livelihood and of Sami culture. This is generally admitted. However, since reindeer herding requires vast territories for the reindeer to seek and find their nourishment in different seasons of the year, it goes beyond the normal cultural autonomy scheme, because it requires strong rights to use those territories – pointing to the need of territorial autonomy or something comparable arrangement. This has been realized in Norway and Sweden, but not in Finland where reindeer herding is not an exclusive Sami right. The Finnish Sami reindeer herders have continuously disagreements with the State whose organs engage in the exploitation of the natural resources of the Sami Homeland (where the Sami are only a numerical minority, about one third of the population).

X The land rights question has proved to be the most difficult problem to be solved in the northernmost Nordic area, i.e., in all three States where an overwhelming part of the land is under the ownership of the State. Predominantly the Sami live mixed with the majority population, in most territories as numerical minorities. The Sami have demanded the recognition of their collective land rights, but have not won the support of the State and the other elements of the local population. A model has now been established by the Norway in the northernmost Finnmark County. A new act, the so-called Finnmark Act[10], creates a new entity, the Finnmark Estate (Finnmark-seijendommen) to control the use of the State-owned lands in Finnmark.

The Estate has three main organs:

1. The Board (styre) of six members to control the use of the Finmark lands and especially of their renewable natural resources. The Sami

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9 See International Journal on Minority and Group Rights, Vol. 8, 2001, Issue 2-3.

10 LOV 2005-06-17 nr. 85: Lov om rettsforhold og forvaltning av grunn og naturressurser I Finnmark fylke (finmarksloven).

Parliament and the Finnmark County Council each shall elect three members to the Board.[11]

2. The Finnmark Commission (Finnmarkskommisjon) to examine land claims of collective and individual ownership and usufruct rights in Finnmark.

3. The Finnmark Land Court (utmarksdomstolen for Finnmark), a special court, to solve land claims regarded as relevant by the Finnmark Commission.

Thus, the solution for Finnmark is not Sami autonomy but joint administration by the representatives of the Sami Parliament and County Council – this brings the non-Sami population to the picture.

The creation of a joint organ of the Sami and other local population to control the use of the lands, waters and natural resources is a realistic choice in the Nordic case. One may suppose that among the three members of the Finnmark Board elected by the Finnmark County Council there would be at least one Sami. Thus, the Sami would have a de facto majority in the Estate. However, the Sami among themselves may well have divergent interests – for example the Sami engaged in reindeer herding and the Sami engaged in tourism or logging. Another important question is the powers granted to the new Finnmark organs. On paper, these powers do not appear disappointing, but I would withhold my opinion before seeing, how the system operates in practice.

IV. Draft Nordic Sami Convention

In late 2005 a respectable expert group published its draft for a Nordic Sami convention.[12] The membership of the expert group consisted of one

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[11] Similar kinds of proposals have been made also in Finland and Sweden. If the proposal has contained strong powers for the joint organ and strong representation by the Sami, the non-Sami population has rejected the proposal, and, vice versa, if only advisory powers and weaker Sami role has been proposed, the Sami have opposed the proposal.

[12] *Nordisk samekonvensjon – Utkast fra finsk-norsk-svensk-samis expertgruppe,* published on 26 October 2005 in Oslo. The unofficial English translation of the

representative of each of the three governments and of each of the three Sami Parliaments. The group was unanimous in its adoption of the draft. The draft appears to be a well-thought text. In the following I explain some draft articles of special interest.

The purpose of the convention is to strengthen the rights of the Sami in developing their language, culture, livelihoods and social life regardless of State boundaries. (Art. 1) The right of self-determination of the Sami includes their right to dispose of their economic, social and cultural development, including their natural resources. (Art. 3) The Sami Parliaments can take independent decisions in all matters where they have the mandate to do so under national or international law. (Art. 15)

Before a public authority makes a decision in a matter which is of essential importance for the Sami, it shall negotiate with the Sami Parliament. These negotiations shall take place at a sufficiently early phase in order to make it possible for the Sami Parliament to have influence in the decision-making process. The States shall not, without the consent of the Sami Parliament, take or permit any such measures which can cause significant damage to the fundamental conditions of the Sami culture, livelihoods or societal life. (Art. 16)

Article 36 specifies that the State shall not permit such use or exploitation of the natural resources of those areas which are owned or used by the Sami, if those measures made impossible or seriously complicated the continuous use/exploitation of those areas and this use/exploitation is essential for the Sami culture, unless the Sami Parliament or those Sami whom the matter concerns give their consent. The article mentions as examples of such use or exploitation logging, water or wind power stations, building of roads and leisure buildings, as well as military exercises and permanent training camps. Article 37 stipulates about the compensations to be made to the Sami.

The criteria spelled out in draft articles 16 and 36 read: ‘significant damage to the fundamental conditions’ and ‘made impossible or seriously com-

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Draft Convention text can be found on the Saami Council website <www.saamicouncil.net/includes/file_download.asp?deptid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20(Unofficial%20English%20Translation.doc>.
For an analysis of the Draft Convention, see T. KOIVUROVA, The Draft for a Nordic Saami’ Convention, European Yearbook of Minority Issues, Vol. 6, 2006/7, p. 103-136.

plicated the continuous use/exploitation of those areas [...] essential for the Sami culture' appear to be *very low*. The experiences of the Sami point to the outcome that the economic penetration of the national society to traditional Sami areas can continue – resulting in the weakening of the economic conditions of traditional Sami livelihoods.

The draft convention has interesting provisions on the implementation. Two organs are established: the Council of the Ministers responsible for Sami affairs and of the Presidents of the Sami Parliaments, and the Board. (Articles 44-45)

The three Nordic States shall enact the text of the convention directly applicable as a national law. (Art. 47) The convention does not enter into force, before all three Sami Parliaments have accepted the convention. (Art. 48)[13]

V. Concluding Remarks on the Sami Parliaments and Sami Autonomy

In fact, the draft convention reflects the predominant Nordic approach to the Sami question as expressed by Kristian Myntti, my colleague in Turku/Åbo: the Sami Parliaments are rather policy organs than masters of autonomy, having the right to participate in the process of public decision-making and administration.[14] Indeed, they participate in many ways in the societal life

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13 From the perspective of late 2008, the process for the conclusion of the Nordic Sami Convention has proceeded slowly. In the autumn of 2008 the Finnish Government notified the other parties that it is not yet ready to start formal negotiations for the conclusion of the Sami Convention. It may be that if the Nordic Sami Convention were accomplished, its final text would not be as courageous as that of the present draft. KOIVUROVA's final comment on this project is as follows: "even though it may suffer blows in later stages, when the actual negotiations commence, it will have a lasting inspirational impact upon indigenous peoples all over the world"; see his article in note 12 above, p. 136.

14 K. MYNTTI, The Nordic Sami Parliaments, in: P. AIKIO/M. SCHEININ (eds.), Operationalizing the Right of Indigenous Peoples to Self-Determination, Åbo, 2000, p. 203-221. MYNTTI and JOHN B. HENRIKSEN, a Sami legal expert from Norway, have compared the status of Sami Parliaments in the three Nordic States. First, they note that no Sami Parliament is vested with legislative

and decision making processes. It is true that the Sami are quite well listened to by the authorities, but that does not mean that they would have significant influence on the contents of the final decisions – especially this is true in questions relating to the use of land and exploitation of the natural resources of the traditional Sami territories. Finland and Sweden should take increased efforts to solve the Sami land rights problems which so far have prevented these States from ratifying the ILO Convention on indigenous peoples.

Evidently the Norwegian Sami are in the best position to protect Sami interests. They are more numerous than the Sami in Sweden and Finland.

powers or other far-reaching decision-making powers. When HENRIKSEN compares the Sami Parliaments in Finland and Norway, he finds that in Finland it has greater formal political authority, i.e., stronger rights according to law. However, in reality the Sami Parliament in Norway has developed into a central political body. Its economic resources are far better than those of the Finnish counterpart. The Swedish Sami Parliament has a formal administrative position that is stronger than in Finland and Norway, because it is a State authority with administrative powers in a number of matters. However, in fact its role has been rather meager. Its future „will depend on whether the Swedish authorities exhibit the same degree of political will for development as has been witnessed in Finland and Norway". See J.B. HENRIKSEN, Saami Parliamentary Cooperation, IWGIA Document No. 93, Copenhagen, 1999, p. 29-48. MYNTTI agrees with the analysis of HENRIKSEN and concludes that the Norwegian and Finnish Sami Parliaments are more effective than the Swedish Sami Parliament, because they are genuinely independent political bodies. In fact, MYNTTI continues, on a more general level the rights of the Norwegian and Finnish Sami are farther reaching than the corresponding rights of the Swedish Sami.

Switzerland as a Model for the Protection of Minorities?

Giorgio Malinverni

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I.

„Switzerland as a model?" When I was asked to answer this difficult question, my answer was „yes" and „no". Indeed, to some extent, one can say that Switzerland is a model, but in other aspects it is not, precisely because not all elements of the Swiss model can be exported. In a sense, the success story of Switzerland in relation to the protection of minority groups, often cited as an example, mainly belongs to the peculiarities of Swiss history, and this, of course, cannot be exported.

I would first like to give you the main elements of these Swiss peculiarities.

1. The first point is that Switzerland is a federation and Swiss federalism is federalism by aggregation. At the beginning there were only three cantons. Now there are 26. The last one was the canton of Jura, about which I will speak at the end of my presentation. The aggregation of cantons does, of course, create a strong tie between them.
2. The second point is that Switzerland is divided into four linguistic groups which are compact, and, most importantly, geographically concentrated: there is a German-speaking population in the north-eastern part of Switzerland, a French-speaking one in the western part, an Italian one in the southern part of the Alps and a Romansh one in some valleys of the canton of Graubünden.
3. As to the third point, religion, there are two main religions: Catholicism and Protestantism, each taking almost equal parts (about 50:50), but, contrary to the language partition, this partition is not compact; one finds Catholics and Protestants in all linguistic areas. This situation is

very different from the one that prevails in Bosnia-Herzegovina, for instance. Thus, of the French-speaking area, covering six cantons, three are mainly catholic (Fribourg, Valais and Jura), two are mainly protestant (Neuchâtel and Vaud) and in one (Geneva) there is an approximately 50-50 division.

An observation to be made is that the division of the linguistic and religious groups are no coincidence. This is an important point. Switzerland is made up of a great number of minorities, and this situation creates an equilibrium between them. Each Swiss citizen belongs, in one way or another, to a minority, and at the same time to a majority. German-speaking people, for instance, form a minority at the cantonal level in the cantons of Fribourg and Valais, but they belong to the majority at the federal level. For that reason they do not really feel as part of a minority.

Some people may belong to the minority from a linguistic point of view, but to the majority from a religious perspective.

Switzerland would definitely not function as well if it were divided into only four cantons which would correspond to the four linguistic areas of Switzerland. Indeed, three cantons are bilingual and one, the canton of Graubünden, is trilingual,

4. The fourth important factor that has contributed to the success story of Switzerland is the fact that the political borders of the cantons do not coincide with the borders of the four linguistic regions of the country. The consequence of Switzerland's political division into 26 cantons rather than into four regions (corresponding to the linguistic ones), is that the country is not divided into cultural, religious or linguistic entities. In other words – and this is also an important point – the political borders of the cantons do not correspond with the cultural borders.

As a result one can find minorities, not only at the federal level but also within the cantons. Four cantons have minorities: the cantons of Bern, Fribourg, Valais, and Graubünden. Thus, the situation in Switzerland is influenced by the political and administrative borders of the cantons on the one hand, and by the linguistic and cultural borders on the other, making it difficult for one group to dominate others. This, in my opinion, is due to

history and could therefore not be exported to other countries. However, if in a given canton – and this concept could be exported – a minority wanted to have more autonomy, federalism such as in Switzerland is a tool which does allow a minority to obtain such autonomy, as is shown by the creation of the canton of Jura.

I will not insist on the fact that in Switzerland minorities are represented in the government and in Parliament, as they are in many other countries. Our government includes, as you know, seven members, at least two of whom belong to the Latin minority. Sometimes there are three ministers from the Latin minority and four from the German speaking area.

II.

Now, a few words on the history of the canton of Jura. During the congress of Vienna, the Jura districts were attributed to the canton of Bern. The problem was that this canton was a German-speaking one, with a mainly Protestant population, whereas the Jura was inhabited by French-speaking people, mainly Catholics. There was, within the Bern canton, both a linguistic minority and a religious one, and for many years the population of the Jura wanted to secede from the rest of the canton. There were many separatist movements, troubles to public order and even some bomb explosions, a rare occurrence in Switzerland. In the early seventies, a procedure was established to give more autonomy to the seven Jura districts, three of which later became part of the canton Jura: the process ended in the separation of three of the seven Jura districts from the Bern canton and the creation of a new canton, which entered the Swiss Confederation as the 26th canton on 1 January 1979.

The whole procedure had been characterised by a series of referenda. The first step – in a positive direction – was the amendment of the cantonal constitution of the Bern canton on 1 March 1970. By this constitutional amendment, the entire population of the Bern canton, including the seven Jura districts, accepted, by referendum, that the francophone and mainly Catholic districts of the Jura, located in the north of the canton at the French border, could secede from the canton of Bern. Thus, the canton accepted that part of its territory could secede. It is worth noting that at this first referendum, the German-speaking voters, who formed the majority, could

have refused the whole procedure. Yet they did not. The first referendum was followed by a series of other referenda. During the second one, held in June 1974, the inhabitants of the seven Jura districts were asked if they were in favour of or against the creation of a new canton. There followed a dispute about who should be asked to vote, which resulted in a vote for only those living on Jura territory, not those originally from the Jura but living outside what would be the new Jura canton. On the whole, the answer was positive, but only by a slight majority: about 36.000 in favour, and 34.000 against. Among the seven districts there was a difference, however: the three in the north answered „yes", but the four in the south voted „no" to the creation of the new canton. The latter wished to remain within the Bern canton

In March 1975 another referendum took place in the four southern districts in order to verify whether their inhabitants really wanted to remain within the Bern canton. The referendum showed that the four southern districts confirmed their earlier decision.

At a fourth referendum in October 1975, the municipalities on the border between the northern and the southern districts were called upon to decide which canton they wanted to join. Eight municipalities opted to join the future canton while the others (six) decided to remain with the canton of Bern. At last, after this fourth referendum, the borders of the new Jura canton were established, and indeed, three districts were for separation from the Bern canton, while four decided to remain with it.

In conformity with the procedure established by the Bernese cantonal constitution, the citizens of the Jura adopted a constituent assembly. This assembly adopted the cantonal constitution of the Jura canton in 1977, and during a referendum held in the same year the citizens of the Jura canton accepted the new constitution. This ended the procedure at the cantonal level, which was followed by the procedure at the federal level.

All cantonal constitutions in Switzerland must be approved by the federal parliament in order to verify that they are in conformity with federal law; this, too, was done in 1977. The next step was to amend the federal constitution, because a new canton had been created which wanted to enter the Swiss Confederation. Article 1 of the federal constitution, providing a list of the cantons, and article 80 of the former constitution, giving the number of the deputies to the senate, had to be amended. During this last referendum, held in 1978, the majority of the people, and all the cantons, accepted the creation

of a newcomer. The inhabitants of the canton elected their own parliament and the cantonal government, and the new canton officially came into being on 1 January 1979.

What can be concluded from this story is that for the creation of the new canton two principles had been respected, and in that regard the Swiss model may be exported.

1. The first of these principles adhered to was democracy. Of all the referenda, the first one was the most important one: indeed, if the canton of Bern had voted against separation right at the beginning, the whole procedure would have been stopped. I remember that, at the time, there was a discussion on where to start: should one start at the federal level or at that of the Bern canton? I think it was wise to start at the cantonal level, and the Bernese population had a very progressive attitude, in the sense that they accepted the eventuality that they would lose a part of their territory. Indeed, one could have started by first asking only the population of the Jura districts, and not the entire population of the canton. This is what usually happens during the plebiscites in international law and also with regard to former colonies: those who were asked about independence were only the people concerned. But in the case of the Jura, we were in a federal system and the federal government, according to our constitution, has the duty to protect the territory of the cantons, and thus adhere to the principle of the integrity of cantonal territory. In that respect it would have been difficult to accept the principle that the Jura might unilaterally secede from the canton of Bern without asking the latter's 'permission'. But if the population of the canton Bern had said „no", the whole procedure would have ended there.

2. The second principle that was respected was that of federalism, in that both the people and the cantons accepted a newcomer. What is interesting is that the whole operation lasted less than ten years. It started in 1970 and ended in 1978. The procedure which led to the creation of a new canton was not written down in the constitution: it was constructed especially for the creation of the canton of Jura and is now officially recorded in the new constitution of 18 April 1999, under article 53, paragraph 2. In the case of Jura, federalism has allowed the protection of a minority group in the sense that this minority group – the new canton Jura is French-speaking and mainly catholic – now has the same

> autonomy as the other cantons, while remaining within the Swiss confederation, of course. It would be difficult to apply the same procedure at the international level. However, one could export this model to other federal states and even to unitary states if a region wished to have more autonomy, like for instance the Aaland-Islands, or the Crimea in Ukraine.

I think it would be fair to conclude that in Switzerland the solution to the problem of minorities lies first and foremost in the fact that Switzerland is a political entity more than a cultural one; Bosnia-Herzegovina, for instance, would be a country where the entities are mainly cultural. Switzerland is built upon common political values such as federalism, direct democracy and the rule of law, and as long as minority groups do not challenge these values, they will be respected. When, contrary to what happens in Switzerland, a State defines itself not through common political values but primarily through its linguistic, cultural or ethnic characteristics, like in Bosnia-Herzegovina, minorities will have more difficulties to be accepted.

The second factor that has contributed to the success of Switzerland is that it is made of political entities, the cantons, which already existed before the creation of the federal State. The cantons as such are also political entities, and cannot always be defined by either their linguistic or their religious characteristics, as I said earlier. There are four bilingual cantons, and even a trilingual one (Graubünden). The reason why Swiss federalism worked so successfully, though the institutions have played their part, lies primarily in the long tradition of respect for others, respect for minorities, regarding minorities as an enrichment rather than something which disturbs the majority. As was mentioned before, I myself belong to two minorities: to the Italian-speaking minority and to the French-speaking one, but when I am in the company of my German-speaking colleagues, the majority, they always make the effort to speak to me in French. Although they could speak in German they speak in French, thus showing their respect for the minority.

Discussion

summarized by Corsin Bisaz and Thomas Burri

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Between presentations, the participants of the meeting had several animated discussions. This chapter gives a short overview of the main topics discussed.

Minorities do exist almost everywhere. One participant once counted from country to country the number of groups to which the UN working definition of minorities would apply. On the whole, he counted between 12,000 and 14,000 minority and indigenous groups. This corresponds to a population of 1.5 billion individuals, about 25% of the world’s population. Looking at what is done about the issues in this domain, the inadequacy of the approach becomes obvious – in other words: there is huge potential.

Two main obstacles seem to impede progress in the domain of minority issues. One obstacle is the established states, especially the big and powerful states which, of course, are afraid of losing power, especially to potentially independent groups. The other obstacle is those who use minority groups as their vehicle to promote personal interests, so-called charismatic leaders who pretend to be advocates of minority issues.

Highlighting the normative binary code of equality/inequality and the empirical question how to accommodate political unity with cultural diversity, one participant distinguished four basic types of ethnic group relations: integration, assimilation, autonomy and segregation.

It was noticed that in international minority law, too much attention is given to problems and too little to existing solutions. The South Tyrolean minority issue, for instance, has fallen victim to the successful solution of the underlying problems. It has nearly disappeared from discussions on minority issues; however, attention is just being redirected to South Tyrol via a new publication: JOSEPH MARKO/SERGIO ORTINO/FRANCESCO PALERMO/LEONHARD VOLTMER/JENS WOELK (ed.), Die Verfassung der Südtiroler Autonomie, Baden-Baden 2005. See also PETER HILPOLD, Minderheitenschutz in Italien, Vienna 2009 (forthcoming). The same point can be made with regard to other minorities, e.g. when it comes to the self-government of the Åland Islands. See therefore the following treatise: SUKSI MARKKU, Ålands konstitution – en sammanställning av material och tolkningar i anslutning till självsty-relselag för Åland. Turku/Åbo: Åbo Akademi University Press, 2005.

I. The Term „minority"

Discussions continue concerning the definition of the „national minority" under the Council of Europe's Framework Convention for the Protection of National Minorities of 1995. For lack of agreement and in order to remain as flexible as possible, the term was not defined when the Convention was drafted. The term therefore remains vague. This can sometimes be an advantage, as the discussion concerning "new minorities" in Europe reveals.

The Swiss constitution, in contrast, does not mention „national minorities". The term seems to be a product of the nation state. The Swiss approach

seems to be a relict of the time „before nation state ideology", as it refers only to language and cultural communities. The problem faced by many minorities of Eastern Europe may be seen in this perspective: In their tradition they have always been able to maintain their national identity, even if they were deported: „I know that I am Georgian even if I am in the Ukraine"; they never spoke about national minorities, only about nationalities. The recent idea of reducing their own status of nationality to that of a national minority is not very appealing to them since it implies a loss of identity. Members of such nationalities opposed the Framework Convention based on these grounds.

The subject of minorities usually includes the topic of indigenous peoples. Seen from a legal perspective, indigenous peoples are treated differently. They enjoy a higher level of protection under international law, partly because their claim to be separate from the national society is widely accepted. Their right to have things their own way, to preserve their own lifestyle and livelihood, seems widely recognized. It appears that, if they feel that they receive fair treatment or are not really discriminated against, they in turn usually want to be part of the national society.

Looking at the UN, one can see that attempts to address indigenous issues are more successful than the ones to address minority issues. One reason for this is that indigenous groups are better organised than minority groups. They attend the UN meetings, and they lobby governments and other organisations.

The working group on indigenous populations was mentioned as an example. It is a unique forum for bringing governments and minority groups together. There are no restrictions on minority participation in terms of permission or pre-registration, and the UN facilitates dialogue between governments and groups. Practice has shown that this often works. There are concrete examples from different corners of the globe where indigenous peoples tell us that they are more successful at meeting higher level government officials in Geneva than they ever were at home. Things are happening at home as a result of UN attention to issues even in terms of new legislation, recognition of groups, etc. This is a role which the working group can play, and one which it has in fact partially played, but only to a limited extent, because minority groups are generally absent from the conference room. The governments outnumber the minority representatives.

With regard to minority protection in the UN, there have been encouraging success stories. However, participants were more pessimistic when it came to UN reform. In particular, there is no guarantee that minority rights institutions would be better off should a broader reform of UN human rights institutions take place one day.

II. New Minorities

There is a general tendency towards a broader understanding of the term 'minority'. It is becoming more widely accepted to include „new minorities" in this definition. Even the OSCE High Commissioner on National Minorities considers whether to interpret the term as being within his area of responsibility.

Although the term „new minority" may be new itself and its content not entirely specified, it is certain that migrant groups should be considered as new minorities. These groups seem to constitute the greatest challenge for further development of minority law. It is important that the situation of these new (migrant) minorities be discussed. However, at the same time, it is questionable whether the standards developed for so-called older or traditional minorities can be applied to those new minorities. With regard to the integration of new minorities, at least a partial application of traditional minority rights seems possible, because there are many similarities.

In the case of new as well as traditional minorities, states aspire to be protective powers for groups abroad that share the same ethnicity as their own population. But they are still reluctant to accept their own minorities.[1]

III. Integration

Integration is a complex issue that is gaining importance, and it must be faced in today's globalising world. Migrants often face difficulties in both the housing and labour markets. One result of this is the ghettoization which

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[1] See PETER HILPOLD/CHRISTOPH PERATONER, Die Schutzfunktion des Mutterstaates im Minderheitenrecht, Vienna 2006.

can be observed in certain multicultural cities. Migrants often need support in order to integrate into the school system and to find housing. This is mainly a problem of language and cultural rights and not so much of territorially-based rights. In light of this, anti-discrimination measures should focus not only on individuals but also on the group as such.

Often a distinction is made between the East and the West. The West seems to have legal and democratic procedures to address and solve minority problems. However, recent occurrences in Western Europe, such as the riots in France, have relativised this perception since procedures turned out to be insufficient. A great deal of work has to be done in this field, *inter alia* in constitutional law.

The issue becomes even more complicated when some countries' migrants slowly gain more rights than national minorities. As they are not seeking autonomy or secession, migrants seem to be less of a threat to the state. Teaching them their own language and helping them maintain their own religion could make it even easier for them to return at some point (especially in the case of refugees). In any case, in some countries it is easier for a migrant to benefit from language education, religious education, and support for an association than it is for members of traditional minorities.

IV. Dispute Resolution

Several examples demonstrate that international law is important in the domain of minorities. Among others the success of the South Tyrolean model was mentioned as a case that demonstrates the importance of specific international law provisions. The difficulty in international law-making in the domain of minorities is that regulation must be both strong enough to survive over a longer period of time and yet flexible enough to adapt to new needs.

In some instances, non-traditional means of conflict settlement, e.g. mediation and dialogue, might be more promising ways to handle minority issues than legal processes. Politically sensitive topics often require alternative approaches to dispute resolution. One only needs to consider the situation in Russia, for example, where there is legislation prohibiting the foundation of a political party based on national affiliation – which is inconsistent with

article 11 of the European Convention on Human Rights – to see that minority issues can sometimes only be handled outside the legal process.

Are minority rights part of human rights? When we think about human rights, we instantly think of justifiability, incorporation at home, adjudication. Would this not be helpful and useful for minorities and their rights, too? However, there are differences between human rights and minority rights. When it comes to violations of individual human rights, individual complaints are raised. In such cases, a court is a good institution: the individual case can be decided. Minority rights are politically very sensitive and it is doubtful whether a court on minorities would be accepted by the states.

In any case, decisions on semi-political minority questions would require a different court and different procedures. It should probably be more a type of conciliation court which would include members of all the parties involved (of the state as well as of the minorities). It would probably take a long time for such an institution to be accepted.

V. Existing Solutions as Models?

Historical examples exist and can probably teach us a lot for the future. Few modern issues are actually new. The political and legal experience gained over many centuries should be taken into consideration. Historical research may help handle minority issues.

Solutions to minority issues depend very much on the context. However there are often elements suitable for generalisation, lessons to be learnt from existing solutions; although it is difficult to say to what extent those are possible: „almost nothing and quite a lot" can be learnt from existing solutions. In any case, the political surrounding must be taken into account.

One should also avoid thinking in terms of one-dimensional or two-dimensional solutions. In Finland, three or four different models are being applied concurrently to different minority situations. Thus, a combination of different models may be the proper solution to a specific minority situation.

VI. Switzerland as a Model

Switzerland is an interesting case regarding minorities. One expert once addressed an audience of about 200 leading politicians in Moscow in 1991 on the topic of the Swiss way of living together. The minority issue was on the table. At that time, Switzerland was celebrating its 700th anniversary and the President of the Swiss federation, Flavio Cotti, belonged to the Italian in Switzerland a "minority"? or rather a "group"? One question that came up in the discussion was whether the Swiss were crazy to have a minority representative as a president in the anniversary year. According to that logic, the Swiss were supposed to have a lead nation, a lead culture (a *Leitkultur),* and it should have been the strongest part of the whole that dominated and influenced all the other groups. The expert was not able to convince the participants of the Moscow group that living together means taking care of minorities and giving them more than their proportionate share of power and of means. Apart from that, what approach to minority issues have the Swiss chosen?

Linguistic and religious groups do not coincide in Switzerland – in contrast to Bosnia for example. Switzerland is rather made up of a great number of minorities. Each inhabitant of Switzerland belongs to a minority in one respect or another and at the same time to a majority in some other respect. Neither do the political borders of the cantons coincide with the borders of the four linguistic regions of the country.

As Switzerland is not divided into regions that correspond to the four linguistic groups, but rather into 26 cantons, the state is not divided into cultural, religious or linguistic entities. If in a given canton a minority wants to have more autonomy, federalism as known in Switzerland is a tool which allows a minority to obtain that autonomy.

This was shown by the creation of the canton of Jura. Two principles were then respected at the same time: The first principle was democracy, a whole series of referenda were conducted. The second principle was federalism, since the people and the cantons accepted a new canton. In this regard the Swiss model may probably be exported abroad.

In Switzerland, the key to the minority issue is that Switzerland is a political rather than a cultural entity. In contrast, in many other countries, Bosnia-Herzegovina for instance, the entities are mainly cultural. Switzerland also

rests upon common political values such as federalism, direct democracy, and rule of law. As long as minorities do not challenge these values, they will be respected as groups. If – in contrast to Switzerland – a state defines itself primarily through its linguistic, cultural or ethnic characteristics rather than through political values, it seems likely that minorities will have a more difficult time being accepted. The most important experience of this with regard to Bosnia is that group rights based on exclusion do not offer a means of solving the problems. However, many questions remain: what is democracy in such situations? Who has the right to decide whether a part of a country should attain political independence? What if the population of the Canton of Berne had not allowed the Jura-region to secede?

It might prove difficult to apply this way of proceeding at the international level or in other national cases. Still, it might be considered in other federal states and even in unitary states, if a region strives for more autonomy.

VII. Federalism

Federalism, a broad notion of which seems to prevail at the moment, is a topic that is very closely connected to minority issues. However, it is doubtful whether federalism is always the right thing for minorities. The dividing and integrating factors of this theoretical construction, which has developed pragmatically in history, would have to be taken into account. A federal system usually encounters difficulties in states with only two or three groups, as can be seen in Belgium. It is rare that enough integrative elements can then be developed which means that such states are often unstable.

VIII. Willingness

A basic willingness to establish concordance/consociational democracy is not only a pre-condition of minority protection, but also a condition for the functioning of federal and higher developed regional systems.

A negative example is the Dayton Agreement. It fostered neither willingness nor cooperation on the part of either the political parties or the political elite. The arrangements of the Dayton Agreement failed to achieve consensus at the elite level through inter-ethnic cooperation and the aim of mutual trust. –

Quite to the contrary: there was a negative elite consensus, similar to the old famous formula of „divide et impera". External pressure cannot change the unwillingness to live together. This may be one field where Convivenza could work: to start at a very early stage to bring people and leaders of groups together, to make them feel that it is possible to live together; to get people to sit down around a table; to talk to each other; and to find out that they have some common interests.

IX. Territory

There is no doubt that territory is important, even though it may have lost some importance due to globalisation. It still matters even though concepts have been developed that strive to solve minority conflicts without reference to borders and territory. In the end, Kosovo, for instance, is a dispute about territory. Such disputes cannot be solved by a simple reference to future enlargements of the EU, a framework in which borders are supposed to matter little. Neither Serbs nor Kosovo-Albanians can be convinced by such a solution.

Nevertheless, globalization is a reality, frontiers are continuously losing relevance, and cross-border cooperation is becoming more important. People become more flexible; they look for jobs outside their traditional territory. It is necessary to seek new approaches to minority protection which take heed of this reality and are adapted to the needs of the globalising world.

Perhaps a mix of personal autonomy and territorial autonomy is needed. With no reference to territorial autonomy at all, a system would probably not work. Besides, there are minorities which simply have no territorial base – for example, the Jews in many countries.

There are over 100 countries around the world which have autonomy regimes under various labels. They delegate power to minority groups. Most of these autonomies are in fact territorial, but there are several personal autonomy regimes as well. In some cases, there is a combination of territorial and personal autonomy; in some cases minority influence reaches across borders.

X. Standard setting

There is a lack of rules for managing diversity. Most rules in international law are too general. Against this background, the OSCE High Commissioner on National Minorities initiated the drafting of different recommendations on participation, education and on questions concerning the linguistic rights of minorities. In 2003, guidelines were created to regulate the use of minority languages in the broadcast media. Further work revealed yet another domain in which rules, codes of conduct, and patterns of good practice were missing: the police forces. A group of experts – largely consisting of policemen and lawyers – has begun to work out recommendations and guidelines on police in multi-ethnic societies.[2] This shows that minority issues are taken very seriously in the OSCE. This can also be seen, for example, in the 'enhanced cooperation' which was enacted in 2005 between the Council of Europe and the OSCE and which includes minority issues.

XI. Language

Language is more than just a means of communication or an instrument of expression. It is also a way of being and has strong symbolic value. In minority situations, language frequently becomes an issue with regard to the school system: should the school system be bilingual? It seems that solutions depend very much on the context. The relevance of the minority language in the specific region must be kept in mind. Austria is one example: in Carinthia, the Slovenes are allowed to institute minority schools in which Slovene is used as the primary language. There are also other models where instruction is given in German, but students are offered the possibility to learn Slovene, too. Unfortunately, no Slovene school has been created so far. Parents seemingly do not want their children to attend such schools for fear of them having problems later when searching for a job. In South Tyrol, in contrast, there are no minority schools: the school system is divided in German schools and Italian schools. This system works well because

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2 The HCNM Recommendations on Policing in Multi-Ethnic Societies have been adopted in February 2006. See <www.osce.org/documents/hcnm/2006/02/17982_en.pdf> (last visit 14 May 2008).

Austria/Germany and Italy, of course, have very large economies, which offer perspectives to German and Italian speakers, respectively.

Zum 10jährigen Geburtstag der Europäischen Konvention zum Schutz nationaler Minderheiten – Versuch einer Bilanz

Romedi Arquint

Inhalt

I. Vorgeschichte

Die Europäische Rahmenkonvention zum Schutz nationaler Minderheiten stellt das erste multilaterale, politisch verpflichtende Instrument zum Schutze der nationalen Minderheiten in Europa dar. Sie wurde vom Ministerkomitee des Europarates am 1. Februar 1995 zur Unterschrift freigegeben und trat am 1. Februar 1998 in Kraft. Gegenwärtig haben 34 Staaten die Konvention ratifiziert. Die Konvention ist die Folge des Wien-Gipfels von 1993, wo die Minister als Reaktion auf die blutigen Bürgerkriege in Ex-Jugoslawien die schnelle Erarbeitung einer entsprechenden Rahmenkonvention gefordert hatten. Derselbe Gipfel hatte als weitere Massnahme die Erarbeitung eines Zusatzprotokolls zu den Menschenrechten vorgesehen, welches den nationalen Minderheiten einklagbare Kollektiv-Rechte hätte zusichern sollen. Letztere Option ist bis heute eine von der parlamentarischen Versammlung des Europarates immer wieder vorgebrachte politische Forderung geblieben, die

vom Ministerkomitee jedoch schubladisiert bleibt. Dies hat mit den divergierenden staatsphilosophischen Ansätzen innerhalb des Europarates zu tun, die sich nicht unter einen Hut bringen lassen. Staaten wie Frankreich und Griechenland betonen das Gleichheitsprinzip aller Bürger und sind nicht bereit, ethnische Vielfalt auf ihrem Staatsgebiet anzuerkennen. Mit der Konvention wurden die staatsphilosophischen Differenzen innerhalb der „alten Demokratien" nicht etwa aufgehoben; man „ahnt" die Kompromisssuche in den verklausulierten Formulierungen der Konvention zwar auf Schritt und Tritt. Aber selbst die eingegangenen Kompromisse reichten nicht aus, um Frankreich, Griechenland und andere westeuropäische Staaten dazu zu bringen, die Konvention zu ratifizieren. Die Unvereinbarkeit der Positionen war es schliesslich auch, die alle Versuche, Minimalstandards in Bezug auf den Minderheitenschutz in die Verfassung der EU aufzunehmen, scheitern liessen.

Es überrascht deshalb nicht, dass Minderheitenfragen in den ersten 40 Jahren seiner Existenz für den Europarat ein Tabu-Thema blieben. Dies, obwohl Minderheitenkonflikte das ganze 20. Jahrhundert bestimmt und auch in der Zeit nach dem 2. Weltkrieg für innenpolitische Konflikte in zahlreichen Mitgliedstaaten des Europarates gesorgt haben. Der Europarat sah sich jedoch mit dem Hinweis auf das Selbstbestimmungsrecht der souveränen Nationalstaaten zu keinerlei politischen Massnahmen veranlasst. Und nun – zu Beginn der 90er Jahre – legte der Europarat in einem ungewohnten Tempo den Entwurf zu einer Konvention vor, der in umfassender Weise Rechte und Schutzbestimmungen zugunsten der nationalen Minderheiten umschreibt. Der Schluss drängt sich auf: Es war nicht die allgemeine Einsicht, dass Minderheitenfragen nach multilateralen, europaweit gültigen Standards rufen, die zur Rahmenkonvention führten. Die Beschäftigung mit dem Thema wurde aufgrund der Ereignisse nach der Wende mit spezifischem Blick auf die neuen Demokratien mit ihren ethnischen Auseinandersetzungen aktuell, „für sie" wurde die Rahmenkonvention vom Europarat erarbeitet.

II. Inhalt, Stärken und Schwächen

Die Rahmenkonvention umschreibt alle für die Erhaltung einer Sprach- und Kulturgemeinschaft, eines Volkes oder einer Ethnie bzw. einer nationalen Minderheit wichtigen Bereiche: Neben den „Selbstverständlichkeiten" wie

dem Recht auf freies Bekenntnis zur Sprache, der Versammlungs- und Organisationsfreiheit werden Forderungen für den Bildungsbereich, die Medien, die öffentliche Verwaltung und das Gerichtswesen formuliert; es werden das Recht auf Eigennamen, traditionelle Orts- und Flurbezeichnungen ebenso geltend gemacht wie die Pflege kultureller grenzüberschreitender Beziehungen.

Die meisten der Forderungen sind „Kann-Formulierungen" und demnach äusserst flexibel und interpretierbar; sie geben der Implementierung durch die Staaten einen weiten Spielraum. Dies mag auch der Grund sein, weshalb die meisten Mitgliedstaaten des Europarates die Konvention ratifiziert haben.

Weiter postuliert die Konvention ein Recht der nationalen Minderheiten auf „effektive Partizipation" in kulturellen, sozialen und öffentlichen Angelegenheiten, die sie besonders betreffen. Diese Bestimmung ist nicht Ausdruck des Geistes, der die Konvention beseelt, es hat eher den Anschein eines Zugeständnisses, das die Staatsgewalt „in Gottes Namen" zu machen habe. Denn es sind letztlich die Staaten, die für die Implementierung der Konvention zuständig sind. In der Praxis sind es denn auch in erster Linie die Staaten mit ihren Experten und wissenschaftlichen Instituten, die einbezogen werden. Gesamthaft gesehen, wird eher *über* die nationalen Minderheiten als *mit* ihnen gearbeitet. Damit wird eine grosse Chance verpasst, die zivilgesellschaftlich organisierten Minderheitenorganisationen in die Pflicht zu nehmen und die Partnerschaft zwischen Staatsorganen und den direkt Betroffenen zu fördern. So waren an einem kürzlich durchgeführten Auswertungsseminar zur Konvention in Strasbourg von den 25 zivilgesellschaftlichen Organisationen nur gerade drei direkte Vertreter nationaler Minderheiten eingeladen. Auf lauter Absagen stiessen bisher die Vorschläge, dass im Expertenkomitee zur Konvention auch Vertreter der Internationalen Organisationen der nationalen Minderheiten einbezogen werden sollten. Die offizielle Haltung des Europarates in Bezug auf die zivilgesellschaftlich organisierten Minderheitenorganisationen hat den Trend in den neuen Demokratien bestärkt, wonach die nationalen Minderheiten einen engen Anschluss bzw. die Integration in die Staatspolitik suchen. Die meisten Minderheiten etablierten sich als politische Parteien und förderten damit die Gefahr einer Ethnisierung der Staatspolitik, eine Entwicklung, der sich die multinationale Schweiz immer hat erwehren können und die wesentlich ist für die gesamtstaatliche Loyalität der Bürgerinnen und Bürger. Es sei allen kritischen Bemerkungen

zum Trotz auch darauf hingewiesen, dass Staaten wie die Bundesrepublik Deutschland ein ausgeklügeltes System der gleichwertigen und partnerschaftlichen Behandlung nationaler Minderheiten bei minderheitsrelevanten Fragen entwickelt hat, welches den Namen einer „echten Partizipation" der nationalen Minderheiten an ihren eigenen Angelegenheiten auch verdient.

Als weitere Schwäche ist der Umstand zu werten, dass die Konvention keinerlei Definition dessen, was mit einer nationalen Minderheit gemeint ist, formuliert. Die Staaten sind frei, die Schutzbestimmungen auf die Gruppierungen anzuwenden, die sie möchten. Aufgrund der unterschiedlichen staatsphilosophischen Ansätze ist auch der Anspruch auf kollektive Rechte zugunsten der Individualrechte fallen gelassen worden. Dieses staatsphilosophische Dilemma konnte jedoch nicht verhindern, dass in der Praxis die nationalen Minderheiten doch als Kollektivgrössen auftreten und auch als solche behandelt werden.

Immerhin: Das Expertenkomitee, das aus 18 Sachverständigen besteht, hat seine Aufgabe ernst genommen und sich dafür eingesetzt, dass der Konvention nicht dem Buchstaben nachgelebt wird, sondern dass diese mit dem Geist der Schutzbestimmungen gefüllt wird. Es hat sich für seine Beurteilungen nicht mit den Staatenberichten zur Lage der nationalen Minderheiten begnügt. Es hat NGOs zu eigenen Berichten aufgefordert und sich durch Besuche vor Ort und Gesprächen auch mit Vertretern der nationalen Minderheiten ein eigenes Urteil zu bilden versucht. Allerdings sind aus verschiedenen Gründen die Möglichkeiten der nationalen Minderheiten, sich in diesen Prozess mit personeller und fachlicher Kompetenz „einzuklinken", doch eher beschränkt. Mit seiner offenen Informationspolitik und Empfehlungen an das Ministerkomitee ist dem Expertenkomitee jedoch gelungen, sich ein politisches Prestige anzueignen und schrittweise Verbesserungen der nationalen Minderheitenpolitiken zu erreichen. Es hat zudem auch Fragestellungen aufgegriffen, die so in der Konvention gar nicht enthalten sind. So bezieht sich die Konvention hauptsächlich, auf Gemeinschaften, die eine territorial gebundene Geschichte in einem Staatsgebiet haben. Das Expertenkomitee hat hingegen versucht, die Frage nach Schutzbestimmungen auch auf die sogenannt „neuen Minderheiten" auszuweiten.

III. Export von Minderheitenproblemen des „alten Europa“ in die neuen Staaten

Das eigentliche Problem der Konvention beruht darauf, dass sie auf dem Fundament ungelöster Probleme des Nationalstaatskonzeptes der westeuropäischen Staaten beruht. Westeuropa hat es auch in der zweiten Hälfte des 20. Jahrhunderts nicht geschafft, der Nationalstaatsidee ein neues staatsphilosophisches Kleid zu geben, das den Staat im ethnischen Bereich zu einer Politik der Differenz verpflichtet und Abschied nimmt von der Betonung der Homogenität. Dies beginnt schon bei den Begriffen: Während die Schweiz als „mittelalterliches Relikt“ eines multinationalen Staatswesens in der Verfassung und in der Gesetzgebung von den Sprach- und Kulturgemeinschaften spricht, ist der Begriff der *„nationalen Minderheit“* das Kind einer Nationalstaatsidee, die idealiter die Einheit von Staat und Volk mit dem einen sprachlichen und kulturellen Hintergrund anstrebt; damit werden die „andern Völker“ auf dem Staatsgebiet bewusst oder unbewusst disqualifiziert. Zudem umfasst der Begriff der „nationalen Minderheit“ einzig die zumeist durch künstliche Staatsgrenzen vom Mutterland getrennten Gemeinschaften, nicht aber die autochthonen Völker wie etwa die Rätoromanen, die Krimtataren und Katalanen, die über keinen eigenen Staat verfügen. Auch in Mittel- und Osteuropa kannte man diese Begrifflichkeit nicht, hier redete man von Völkern; einige Staaten und die so genannten „nationalen Minderheiten“ wehren sich teilweise bis heute mit Recht gegen diese Bezeichnung und fordern für sich ein, als gleichwertiges Volk wie die Angehörigen der Mehrheitsbevölkerung akzeptiert zu werden. Wie nachlässig man mit dem Begriff der nationalen Minderheiten umzugehen gewohnt ist, zeigt auch der Umstand, dass kein Unterschied gemacht wird zwischen grossen, territorial homogenen Völkergruppen (Völkern wie den Katalanen oder auch den Ungarn in Rumänien) und den zahlreichen kleinen, allesamt in ihrer Existenz gefährdeten autochthonen Völkern (wie den Sorben oder den Samen).

In den ehemals kommunistisch regierten Staaten kennt man die Unterscheidung zwischen *alten und neuen Minderheiten* kaum. Die vor allem in der Sowjetunion und in Rumänien vollzogenen willkürlichen Bevölkerungsverschiebungen und Deportationen, und selbst die Ideologie der Erziehung des Menschen zum Homo sovjeticus konnten nicht verhindern, dass jeder Mensch gewissermassen als Rest seiner subjektiven und kollektiven Identität den Anspruch auf die eigene Nationalität hatte. So trifft man in den neuen

Demokratien Minderheitenangehörige aus aller Herren Länder, die allesamt den Anspruch auf Schutzbestimmungen erheben. In Narva (Estland) beispielsweise zeigte mir der Stadtpräsident mit Stolz eine Liste, in der die 52 Angehörigen nationaler Minderheiten aufgezeichnet waren, die in der Stadt lebten, darunter 1 Amerikaner.

IV. Territorialitätsprinzip und Personalitätsprinzip

In der Theorie besteht auch in den „alten Demokratien" kein Zweifel darüber, dass der Schutz der traditionellen Minderheiten nicht auf das historisch traditionelle Gebiet beschränkt bleiben sollte, sondern sich angesichts der Mobilität auch das Personalitätsprinzip als Schutz-Instrument aufdrängt. Trotzdem hat diese Einsicht in den meisten Staaten Westeuropas – und selbst in Schweiz – zu keiner Überprüfung der bisherigen Lehre und Praxis geführt. So ist bspw. Zürich zwar das grösste „rätoromanische Dorf", die Rätoromanen haben hier aber keinerlei Rechte auf öffentliche Unterstützung zur Pflege und Förderung der eigenen Sprache und Kultur. Als Kuriosität sei erwähnt, dass der italienische Staat seinen in Zürich lebenden Bürgerinnen und Bürgern auf privater Basis Einführungskurse in die italienische Sprache und Kultur anbot.

Die Freiheit und das Recht auf eine gewisse sprachliche und kulturelle Autonomie waren hingegen den Angehörigen der verschiedenen Nationalitäten im Osten auch ausserhalb der angestammten Wohngebiete zugesichert. Davon zeugen heute noch die Kulturhäuser in den grösseren Städten, aber auch die „Autonomiekonzepte" der Sowjetunion.

Ungarn hat in dieser Hinsicht in Bezug auf den Schutz der nationalen Minderheiten ein interessantes Konzept umgesetzt, das das Personalitätsprinzip zur Grundlage hat. Obwohl an der strikten Trennung zwischen „alten" und „neuen" Minderheiten festgehalten wird, zeigen sich in verschiedener Hinsicht gleiche Interessen und Bedürfnisse, was die Unterscheidung zwischen autochthonen Minderheiten und den Migranten, an der die westeuropäischen Staaten stark interessiert waren, zunehmend künstlich werden lässt.

V. Ausblick

Zusammenfassend lässt sich überspitzt sagen, dass der Europarat zu Beginn der 90er Jahre ein Schutzinstrument geschaffen hat, das zu einem guten Teil die ureigenen ungelösten westeuropäischen Probleme auf die neuen Staaten in Mittel- und Osteuropa sowie auf den Balkan exportiert und diese dadurch mit ihnen bisher unbekannten neuen Problemen belastet hat.

In diesen Regionen war die Erinnerung und das Bewusstsein einer multikulturellen Gesellschaft nicht derart zerstört worden, wie dies die Nationalstaatsidee in Westeuropa es geschafft hat. Insofern stellt auch die Konvention ein Instrument der sprachpolitischen Kolonisierung Europas durch die westeuropäische Nationalstaats-Tradition dar.

Sie ist nicht das Ergebnis eines Dialogs zwischen gleichwertigen Partnern. Gerade hier könnte die Schweiz, die sich als eine der wenigen multinationalen Demokratien in Westeuropa etabliert und erhalten hat, eine gewichtige Brückenfunktion einnehmen. Dies, obwohl zuzugeben ist, dass auch die Schweiz den mächtigen Einflüssen der Nationalstaatsideologie teilweise erlegen ist, vor allem durch kantonale „sture" Einsprachregelungen, die durch die „Delegation" der sprachpolitischen Elemente der Nationalstaatsidee an die Kantone erfolgte.

Als Werte eines multinationalen modernen Staates – das am europäischen Horizont aufleuchten könnte – wären zu nennen: Eine Bildungspolitik mit einer positiven Wertung und Förderung der Mehrsprachigkeit, die Sensibilisierung der Öffentlichkeit für die sprachliche Vielfalt als Bereicherung statt als Gefährdung der Staatsloyalität und damit verbunden eine „Entpolitisierung" der ethnischen Frage. Staatspolitisch stabilisierend war es sicher auch, die Rechte und Kompetenzen der Sprach- und Kulturgemeinschaften föderalistisch in Sinne der kulturellen Autonomie sowie durch zivilgesellschaftliche Organisationsformen der staatlichen Bevormundung (und möglichen Instrumentalisierung für politische Zwecke) zu entziehen. Zum multinationalen Konzept eines modernen Staates gehören weiter – und dies berücksichtigt die Rahmenkonvention überhaupt nicht – nicht nur Schutzbestimmungen zugunsten der „kleineren" Sprach- und Kulturgemeinschaften, sondern auch Anforderungen an die Mehrheit: Hier ist die Sprachenpolitik im Bildungsbereich zu nennen mit der selbstverständlichen Pflicht aller Bewohnerinnen und Bewohner, eine zweite Landessprache zu lernen, aber auch der Auftrag

an die Medien, die Minderheitensprachen nicht zu ghettoisieren, sondern den Mehrheiten Möglichkeiten zur Begegnung mit der sprachlich-kulturellen Vielfalt des Landes zu bieten.

So notwendig es war, erste international bindende Massnahmen zum Schutz der bedrohten Sprach- und Kulturgemeinschaften zu beschliessen, so dringend wäre es heute, diese aufgrund der veränderten politischen Landschaft Europas neu zu überprüfen. Notwendiger Ausgangspunkt ist jedoch, die der Nationalstaatsidee zugrunde liegenden Homogenitätsillusionen zu überdenken. Dabei könnte die Erinnerung an die multinationalen Staatskonzepte, zu denen auch die Schweiz gehört, hilfreiche Dienste leisten.

CONVIVENZA

Über ein nicht spektakuläres, aber innovatives kleines Projekt des internationalen Minderheitenschutzes

Daniel Thürer*

„Un diplômé qui invente ou pratique quelque chose qu'il n'a pas appris à l'école devient heureux. Un diplômé qui ne connaît que ce que l'école lui a enseigné, sera sans doute esclave toute sa vie."
(BENJAMIN FRANKLIN)

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* Ich danke sehr herzlich dem Vizepräsidenten von CONVIVENZA, Herrn Romedi Arquint, dem Organisator und Inspirator der (nachfolgend erwähnten) Aromunen-Tagung in Disentis, für viele Anregungen und wertvolle Unterlagen.

Es geht mir in diesem Beitrag darum, die kleine, aber neuartige und ambitiöse Stiftung CONVIVENZA vorzustellen, die am 11. Mai 2006 als Zentrum des internationalen Minderheitenschutzes im Kanton Graubünden gegründet wurde. Nach einem Blick auf den Hintergrund des internationalen Minderheitenschutzes sollen Idee und Konzept von CONVIVENZA dargestellt werden. Auch möchte ich eine erste Veranstaltung der Stiftung vorstellen sowie einige methodische Reflexionen anfügen.

I. Zwei politische Landschaften

In unserer gegenwärtigen Welt gibt es mehr als 3'000 sprachliche, religiöse oder ethnische Minderheiten. Wir denken an Mitteleuropa (z.B. an das Baltikum und an die ungarischen Minoritäten in Nachbarstaaten), an den Balkan mit seinem explosiven Gemisch von Völkern und Religionsgemeinschaften, an die stark fragmentierten Staaten des Kaukasus oder Zentralasiens, aber auch an die vielen zerrissenen Länder der Dritten Welt. Auch in Westeuropa bestehen – teilweise entschärft durch Prozesse der wirtschaftlichen und politischen Integration – Minoritätenkonflikte, so etwa im Baskenland, in Nordirland oder in Korsika. In vielen Fällen manipulieren Machthaber und demagogische Wortführer die Gefühle von historisch-ethnischen Gemeinschaften. An vielen Orten der Welt drohen Gewalt und Zerstörung, ja selbstmörderische Kriege. Extreme Spannungen zwischen Volksgruppen, Stämmen und Völkern können Genozide auslösen. Friedliche Bürger können gleichsam über Nacht zu Verbrechern gegen die Menschlichkeit werden.

Das *Völkerrecht* enthält nur ungenügende Mittel zur Einbettung von kulturellen, religiösen oder ethnischen Gruppen und Gemeinschaften von Menschen in die internationale Ordnung. Im Rahmen des Völkerbundes bestanden besondere Verfahren und Mechanismen des Minderheitenschutzes. Die UNO setzte demgegenüber – unter dem starken Einfluss von Immigrationsländern wie den Vereinigten Staaten – einseitig auf den individual-rechtlichen Schutz von Menschen vor Diskriminierung, z.B. nach Massgabe der Rasse, der Sprache oder der Religion (Art. 1 Ziff. 3 der UNO-Satzung von 1945 und Art. 2 der Allgemeinen Menschenrechtserklärung von 1948). Mit dem Ende des Kalten Krieges brachen, vor allem in Mittel- und Osteuropa, alte und unter der kommunistischen Herrschaft eingefrorene Konflikte erneut hervor. Gibt es Möglichkeiten, mit den Mitteln des Dialogs und des „institution-

building“ das zerstörerische Potenzial, welches in den Menschen steckt und in ethnischen Konflikten ausbrechen kann, einzudämmen, zu zähmen und in produktive zivilisatorische Werte und Energie zu verwandeln? Im Rahmen europäischer Institutionen wurden Ansätze von Regelregimen entwickelt.[1] Die internationalen Ordnungsstrukturen sind im Bereiche des Schutzes von Minderheiten im Allgemeinen aber dürftig und wenig nachhaltig.

Anders aber in der *Schweiz*. Ihre kommunalistischen, zivilgesellschaftlichen Traditionen der Staatsgestaltung ragen, wie mir scheint, noch immer in die Moderne hinein als ein Relikt und Ausläufer von Epochen, in denen der universalistische Reichsgedanke und später multikulturelle und multinationale grenzübergeifende Ordnungen die politische Szene beherrschten. Auch ist das schweizerische Staatsgefüge geprägt von durchaus partikularen, subtilen Überschneidungs- und Gleichgewichtsverhältnissen zwischen konfessionellen, sprachlichen und politischen Minderheiten und Mehrheiten, wie sie sich innerhalb der Kantone und über diese hinweg in langen Prozessen entwickelt und wie sie in komplexen Konfliktvermeidungs- und -regelungsmechanismen eine einmalige Ausgestaltung erfahren haben. Könnte die schweizerische Ordnung als Inspirationsquelle für die Ausgestaltung zukunftsträchtiger Sprachregime in anderen Ländern und Weltregionen dienen? Die Schweiz ist ja – so die Präambel ihrer Bundesverfassung von 1999 – bestrebt, „in gegenseitiger Rücksichtnahme und Achtung ihrer Vielfalt in der Einheit zu leben“ und „den Bund zu erneuern, (…) um Frieden in Solidarität und Offenheit gegenüber der Welt zu stärken“.[2]

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1 Vgl. Framework Convention for the Protection of National Minorities, Strasbourg, 1.2.1995; European Charter of Regional or Minorities Languages, Strasbourg, 5.11.1992; Document of the Copenhagen Meeting of the Conference on Human Dimension of the CSCE, Copenhagen, 29.6.1990.

2 Im Gegenzug zu diesem ausgreifenden verfassungsrechtlichen Regelungsanspruch beschränken sich auch Völkerrecht und Völkerrechtspraxis nicht mehr auf die rein zwischenstaatliche Ordnungsebene, sondern widmen sich zunehmend auch innerstaatlichen Vorgängen. Klassische Themen der innerstaatlichen Rechtsordnung (z.B. Demokratie, Förderalismus, Rule of Law) rücken zusehends in die Interessenfelder der Diplomaten und internationalen Funktionäre. Anschauungsmaterial dazu liefern die Reformpläne des Hochkommissariats für Menschenrechte der UNO (OHCHR), welcher mit „Action 2“ und „The High Commissioner’s Plan of Action“ eine verstärkte Zusammenarbeit mit und ein vermehrtes „Capacity-“ und „Institution-Building“ in den Mitgliedstaaten vorsieht; vgl. Working with OHCHR: A

II. Etappen der Inszenierung

Vor diesem Hintergrund internationaler und schweizerischer Gegebenheiten ist die Idee entstanden, im Kanton Graubünden ein internationales Zentrum für Minderheiten zu schaffen. Das Projekt erhielt in der Folge den rätoromanischen Namen CONVIVENZA und entwickelte sich in drei Phasen von einem schlichten Grundgedanken über ein wissenschaftlich fundiertes Konzept zu einer praktisch tätigen Institution.

1. Grundidee

Im Herbst 1999 hielt ich auf Einladung der „Schweizerischen Arbeitsgemeinschaft für Demokratie" im Zürcher Oberdorf im Gasthaus zum „Weissen Wind"[3] einen Vortrag, bei dem es mitunter um die Frage nach den Möglichkeiten und Modalitäten ging, innenpolitische Stärken der Schweiz aussenpolitisch zur Geltung zu bringen. In diesem Zusammenhang wurde der Vorschlag zur Schaffung einer Stiftung für die Förderung des internationalen Minderheitenschutzes entwickelt.

Die *Grundgedanken* und *Elemente* des Planes waren:

- Die grösste Stärke und Glaubwürdigkeit, welche die Schweiz aus der Sicht des Auslandes besitzt und die sie im Ausland einsetzen kann, sind ihre föderalistischen Staats- und Gesellschaftsstrukturen und ihre Erfahrungen des friedlichen Zusammenlebens von Sprachgemeinschaften im Rahmen einer politischen Gemeinschaft. Es ist für die Schweizer selbstverständlich, für auswärtige Beobachter aber erstaunlich, dass in ihrem Vokabular das Wort „Ethnie" nicht existiert. Das Staatswesen beruht

handbook for NGOs, 8, abrufbar unter <www.ohchr.org/Documents/Publications/NGOHandbooken.pdf> (besucht am 18.12.2007).

[3] „Nomen ist omen" und nur deswegen nenne ich den Ort jener Vortragsveranstaltung: Ich erinnere mich an einen Mythos aus West-Kanada, von dem der französische Ethnologe Claude Lévi-Strauss berichtete. Schreckliche Winde wehten – so die Geschichte – vor urdenklichen Zeiten unablässig über die Küste. Das Leben der Menschen war unerträglich. Da gelang es einem Rochen, den bösen Südwind gefangen zu nehmen. Der Wind wurde erst wieder freigelassen, nachdem er versprochen hatte, nur noch zu bestimmten Zeiten zu wehen, und er liess das Leben gedeihen. Entsprechend ist es auch Aufgabe rechtlicher und gesellschaftlicher Institutionen, Energie zu sammeln, zu steuern und für grösseres Ganzes fruchtbar werden.

vielmehr auf Basis-Prinzipien wie Menschenrechte, Demokratie und Nicht-Zentralisierung.

- Aussenpolitik kann auch „von unten nach oben" („bottom up"), d.h. von den Menschen, Bürgern und kleineren Gemeinschaften in die Felder von Staat und internationaler Politik hinein gestaltet werden. Sie kann auch „von aussen nach innen" („inward out"), d.h. von peripheren Landesteilen zum Zentrum wirken. Dabei haben im Grunde genommen wie der Begriff „Ethnie" so auch die Begriffe der „Peripherie" und der „Hierarchie" politischer Systeme im schweizerischen Selbstverständnis kaum einen Platz.
- Zur Verwirklichung der genannten Ziele sind praktische Partnerschaften zwischen Wissenschaft, Kultur und Politik sowie von Spezialisten und Generalisten, Betroffenen und Aussenstehenden zu bilden.

Als Wirkungsort des vorgeschlagenen Minderheiten-Zentrums drängte sich der Kanton *Graubünden* auf. Graubünden – der in 150 Täler gegliederte grösste und vielfältigste Kanton der Schweiz und ein einzigartiger Mikrokosmos des Zusammenlebens sprachlicher und kultureller Gruppen[4] – weist eine interessante Geschichte auf. Das Gebirgsland war zur Zeit des Dreissigjährigen Krieges Schauplatz eines Bürgerkrieges von entsetzlicher Grausamkeit und ränkevollen Mächtespielen der grossen europäischen Dynastien. In Graubünden, das zum Spielball der Grossmächte geworden war, herrschten anarchische, ja oft chaotische Zustände. CONRAD FERDINAND MEYER schilderte in seinem Roman „Jürg Jenatsch", es sei in den Bündner Tälern Krieg geführt worden „Mann gegen Mann, List gegen List, Frevel gegen Frevel". Graubünden war im Dreissigjährigen Krieg ein „Failed State", und der „Held" jenes Romans würde heute als „War Lord" bezeichnet. Graubünden ist in der Folge aber ein stolzer, loyaler Kanton der Eidgenossenschaft mit hochentwickelten, gelungenen Formen der Autonomie und der Kooperation von Gemeinschaften geworden. Heute stellt das Bündnerland ein auf der Welt wohl einmaliges Gefüge rechtlicher und politischer „Regime" zum Schutz von Minderheiten sprachlicher und kultureller Natur dar.

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4 Vgl. DANIEL THÜRER, Recht und Sprache: Von Bivio bis Babylon, in: DERS., Kosmopolitisches Staatsrecht – Grundidee Gerechtigkeit, Band 1, Zürich/Berlin 2005, S. 239 ff., insbes. S. 258 ff.

Der Kanton gibt einen prächtigen Hintergrund ab für den Versuch, Vertreter von Volksgruppen in Ländern, in denen Spannungen zwischen Minderheiten und Mehrheiten bestehen oder die gar von dämonischen, geschichtsschweren Feindbildern besessen sind, zum Dialog und zum vertrauensvollen Zusammenwirken zu bringen.

2. Von der Idee zum Konzept

Die Idee, wie sie am Vortragsabend im „Weissen Wind" vorgestellt wurde, fand eine gute Aufnahme in den Medien.[5] Die Bündner und Zürcher Regierungen griffen sie auf. Es wurden der Zürcher Verein „Internationales Zentrum für Minderheiten mit Sitz in Graubünden" und dann das „International Cultural Forum in Disentis/Mustér" gegründet, die als Partner die Strukturen des Projektes erarbeiteten.

Zur Erschaffung der wissenschaftlichen Grundlagen veranstaltete das Institut für Völkerrecht und ausländisches Verfassungsrecht und das Europa Institut an der Universität Zürich am 18./19. November 2005 in Zürich ein Treffen hervorragender Experten des internationalen Minderheitenschutzes aus sechs europäischen Ländern und des UNO-Hochkommissariats für Menschenrechte (Genf) und des OSZE-Hochkommissariats für Minderheiten (Den Haag)[6], in dessen Zentrum der Gedanke eines „Ethos der Diversität" stand. Am Ende der Tagung verabschiedeten die Teilnehmer einen Text mit dem Titel „Minorities and Majorities: Managing Diversity – A fresh look at an old problem", der in der Folge in einer wissenschaftlichen Zeitschrift veröffentlicht wurde.[7] Auf Grund dieser Gedanken und Konzepte sollte eine empfindliche Lücke im modernen Völkerrecht geschlossen werden, das nur Einzelmenschen,

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5 Vgl. Verfassungswerte in Staat und Wirtschaft, in: Neue Zürcher Zeitung vom 5. November 1999, Nr. 258, S. 15; Projekt – nicht blosse Hausordnung, in: Tages-Anzeiger vom 29. Dezember 1999, S. 2; Der irreführend Blick aufs Sofa, in: Die Weltwoche vom 4. November 1999, S. 23.

6 Es waren dies die Professoren Gudmundur Alfredsson, Krzysztof Drzewick, Lauri Hannikainen, Peter Hilpold, Rainer Hofmann, Dzidek Kedzia, Giorgio Malinverni, Joseph Marko, Peter Pernthaler, Markku Suksi, Patrick Thornberry und Daniel Thürer.

7 Vgl. DANIEL THÜRER, Minoritites and Majorities: Managing Diversity – A Fresh Look at an Old Problem, Schweizerische Zeitschrift für internationales und europäisches Recht 2005, S. 659 ff.

nicht aber Gruppen als solche schützt. Das Zentrum CONVIVENZA würde – so die Meinung der Experten – im Zuge einer solch neuen Strategie einen echten Mehrwert („added value") bedeuten. Als in der heutigen Landschaft einzigartig wurde hervorgehoben, dass hier ein Forum geschaffen würde, auf dem Angehörige von Minderheiten als die eigentlichen „stakeholders" selber auftreten und nicht nur Fachleute, die über deren Sorgen reflektieren. Die Gefahr einer reinen Objektivierung und wissenschaftlichen Katalogisierung der Probleme sollte vermieden werden und die schutzbedürftigen Menschen und Gruppen selbst sollten als Subjekte und Hauptakteure auf der CONVIVENZA-Bühne stehen.

3. Eine realistische Utopie? Oder: Wege zur praktischen Konkretisierung

Am 11. Mai 2006 wurde die Stiftung errichtet.[8] Der Gedanke, von dem die Gründer von CONVIVENZA ausgingen, war, dass eine Institution mit gleichsam zwei Häuptern geschaffen würde: einem formellen Sitz in Disentis, wo die Stiftung verurkundet ist, und dem Geschäftssitz beim „Europa Institut an der Universität Zürich". Die Stiftung sollte ihre Tätigkeit im ganzen Kanton – sei dies im Bündner Oberland, im Engadin, in den Valli, in Davos und weiteren Walsergebieten, in Chur und im Bündner Rheintal und in anderen Gegenden – aber auch über den Kanton hinaus und im Ausland entfalten können. Sie sollte, zumindest vorerst, nicht durch ein „Gebäude" und „Funktionäre" symbolisiert werden, sondern als „Netz" wirken: ein Netz in einer Vielfalt von Netzen. Die Stiftung ist vom Idealismus geprägt, dass in unserer Gesellschaft – um ein Konzept der Wissenschafter ROBERT D. PUTNAM[9] und PIERRE BOURDIEU[10] aufzugreifen – wertvolles „Sozialkapital" angereichert ist und dass dieses Kapital der Schweiz als öffentliches Gut auch jenseits der Landesgrenzen genutzt werden soll.

Basis der Arbeit sollte der folgende „Code of Conduct" sein:

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8 Vgl. etwa die Berichterstattung von CLAUDIA SCHOCH, Eine Stiftung für Minderheiten, Neue Zürcher Zeitung vom 12. Mai 2006, Nr. 109, S. 17.

9 ROBERT D. PUTNAM, Bowling alone: the collapse and revival of American community, New York 2000, S. 19 ff.

10 PIERRE BOURDIEU, Sozialkapital, in: Peripherie, Zeitschrift für Politik und Ökonomie in der Dritten Welt, Nr. 99 (2005), S. 263 f.

1. Die Teilnehmer sind offen für den Dialog ohne Vorbehalt und für eine Kooperation nach Treu und Glauben.
2. Grundlage unserer Arbeit sind die allgemein anerkannten Menschenrechte, Grundsätze des Schutzes von Minderheiten, der Erhaltung kultureller Vielfalt und Toleranz.
3. Die Teilnehmer betrachten Kultur in ihren verschiedenen Erscheinungsformen als Brücken der Verständigung, des Friedens und des Gedeihens von Menschen, Gesellschaften, Staaten und Werken der internationalen Kooperation.
4. In ihrem Zusammenwirken konzentrieren sich die Beteiligten auf ihre gemeinsamen Anliegen, nicht ihre Positionen; auf ihre gemeinsamen Interessen, nicht auf die Personen; auf Chancen der Zukunft, nicht auf vergangene Lasten.
5. Der Dialog ist die erste Etappe auf dem Weg zu tieferen Formen, Verfahren und Institutionen der Kooperation.
6. Die Beteiligten betrachten die erzielten Ergebnisse als Kapital, das sie durch weitere Zusammenarbeit erhalten und vermehren wollen.

III. Aktivitäten: insbesondere das Aromunen-Projekt

CONVIVENZA hat ihre Tätigkeit gleich nach ihrer Gründung mit einem Seminar in der Bündner Gemeinde Laax zur Gemeindeverwaltung in Kosovo begonnen; es ging um einen Erfahrungsaustausch von Praktikern, und auch die schweizerische Aussenministerin Micheline Calmy-Rey nahm am ganzen Seminar teil.[11] Es folgte ein vom Theologen Romedi Arquint, Vizepräsident von CONVIVENZA, organisiertes Seminar in Disentis (Graubünden) zur Aromunenfrage, und weitere Veranstaltungen sind in Planung. Es sei hier zur Beleuchtung des Selbstverständnisses der Stiftung das Aromunenseminar vom November 2007 in Disentis ins Zentrum gerückt.

[11] Bündner Lehren für Kosovo, Neue Zürcher Zeitung vom 20. Mai 2006, Nr. 116, S. 19.

Bei den Aromunen handelt es sich um eine alte Volksgruppe, die heute ums Überleben kämpft.[12] Die Aromunen leben verstreut in den sechs Balkanländern Albanien, Mazedonien, Serbien, Griechenland, Bulgarien und Rumänien. Sie sind Nachkommen der romanisierten, vor allem thraktischen und illyrischen Bevölkerung der Balkanhalbinsel, die nicht slawisiert wurde. Sie reden eine romanische Sprache und gehören der orthodoxen Kirche an. Westliche Wissenschafter schätzen die Zahl jener, die noch über gewisse aktive und passive Sprachkenntnisse verfügen und sich selbst als Aromunen bezeichnen, auf 150'000 bis 300'000. Sie hatten auf dem Balkan einst eine grosse Bedeutung. Sie waren Wanderhirten, zur Zeit des Osmanischen Reiches spielten sie aber vor allem als Kaufleute eine wichtige Rolle. Im Jahre 1905 hatte der Sultan Abdul Hamid in einem Dekret den Aromunen ausdrücklich das Recht auf kulturelle Autonomie und regionale Selbstverwaltung zuerkannt.

Heute befinden sich die Aromunen in einer sehr prekären Situation. Allein in Mazedonien sind sie als Volksgruppe anerkannt. Ein Beobachter schrieb: „Der Abstieg der Aromunen begann, als die Ideologie und der Wahn des Nationalstaates auch auf dem Balkan zur politischen Religion wurde." Und er fuhr fort, das 20. Jahrhundert habe den Aromunen in allen Ländern, in denen sie siedelten, und zumal in Bulgarien und Griechenland, Zwang, Verfolgung, Tod gebracht: „Sie wurden", erläuterte der Autor, „umgesiedelt, amtlich mit neuen Namen ausgestattet, durften ihre Sprache in der Öffentlichkeit nicht mehr gebrauchen, ja nicht einmal sagen, dass es sie überhaupt gibt, viele ihrer Dörfer wurden verwüstet und hunderte ihrer Lehrer, Pfarrer, Intellektuellen inhaftiert, in Lager gesteckt, auf entlegene Inseln verfrachtet. Dabei haben sie (sc. die Aromunen) selbst einen eigenen Staat niemals angestrebt, schon die Idee des Nationalstaates musste ihnen fremd bleiben, weil sie von jeher weitverstreut siedelten und als Händler wie als nomadisierende Besitzer von Schafherden die grossen Räume, die durchlässigen Grenzen

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[12] Die nachfolgenden Ausführungen stützen sich weitgehend auf den Artikel von CYRILL STIEGER, Kritische Lage der aromunischen Minderheit auf dem Balkan – Hoffnungsschimmer im Kampf um die Bewahrung der eigenen Sprache und Kultur, in: Neue Zürcher Zeitung vom 1. November 2007, Nr. 254, S. 9 f. Vgl. auch KARL-MARKUS GAUSS, Die sterbenden Europäer – Unterwegs zu den Sepharden von Sarajevo, Gottschler Deutschen, Arböresten, Sorben und Aromunen, 3. Aufl., München 2006, insbes. S. 183 ff.; VASILE BARBA, Das Drama der Aromunen, <www.

brauchten. Dass seit dem Zerfall des Osmanischen Reiches neue und viel mehr Grenzen durch den Balkan, durch ihre alte Siedlungs- und Wandergebiete schnitten, war für sie existenzbedrohend (…) Nein, nationale Staaten, die den freien Verkehr von Gedanken und Gütern behinderten, waren nichts für die Aromunen."[13]

Im Rahmen von CONVIVENZA haben sich Vertreter von Nichtregierungsorganisationen aus allen Ländern, in denen es eine aromunische Minderheit gibt, Repräsentanten staatlicher Institutionen und des Europarates sowie Wissenschafter zur Beratung über die Zukunft der Aromunen eingefunden. Auch Angehörige der aromunischen Diaspora in verschiedenen Ländern Europas und ausserhalb Europas waren anwesend. Die Zusammenkunft war mitgeprägt durch kulturelle Darbietungen wie Gesang, Volkstänze und Lesungen. Die Verständigung erfolgte – wie typisch für ein multikulturelles Europa – gleichzeitig in verschiedenen Sprachen. Die Aromunen haben hinsichtlich Geschichte, Kultur und Schicksal viel mit den Bündner Rätoromanen gemein, deren Sprache sie in grossen Zügen verstehen. Vasile G. Barba prägte denn auch den Satz, das Gebirge sei die Wohnung und das Haus sowohl für die Räto-Romanen wie auch für die Balkan-Romanen.

Immer geht es bei Minderheitenfragen einerseits um die Erhaltung von kultureller Eigenständigkeit von Gruppen, die sich als zusammengehörig fühlen, und insgesamt den Respekt vor der Vielfalt von Kulturen als Reichtum; wie in der Ökologie soll Diversität des kulturellen Erbes erhalten und für das umfassende Ganze nutzbar gemacht werden.[14] Auf der andern Seite sind Menschenrechte und die politisch-demokratischen Rechte der Bürger zu achten. Wichtig an der Zusammenkunft in Disentis war, dass unter Bekräftigung und Weiterentwicklung eines schon bestehenden Projektes eine Resolution verabschiedet wurde mit dem Ziel, einen grenzüberschreitenden Rat der Aromunen zu bilden. Dessen Aufgabe sollte darin bestehen, Massnahmen zur Bewahrung der bedrohten aromunischen Sprache und Kultur (in Erziehung, Bildung, Literatur und Medienwesen) sowie ein langfristig angelegtes

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gfbv.de/popup_druck.phb?doctype=inhaltsDok&docid=194> (besucht am 20. Dezember 2007).

13 GAUSS (Fn. 12), S. 190 f.

14 Es ist wie mit einem Wald: verschwindet einer seiner markanten Bäume – sei es, dass er vom Blitz getroffen wird oder dass er abstirbt –, so ist der Wald nicht mehr derselbe.

Aktionsprogramm auszuarbeiten. Es sollte dem Arumenischen Rat auch ermöglicht werden, beim Europarat als NGO anerkannt zu werden. Die Resolution bezieht sich aber auch auf die Empfehlung 1333 (1997) der Parlamentarischen Versammlung des Europarates, die daran erinnerte, dass die aromunische Kultur und Sprache, die über zweitausend Jahre auf der Balkanhalbinsel bestanden, sich heute in einer kritischen Lage befänden, ja vom Aussterben bedroht seien.[15]

Dem Selbstverständnis von CONVIVENZA entsprach es, dass sie sich mit dem Aromunen-Projekt nicht ins Getümmel von im Rampenlicht stehenden, hoch medialisierten Konflikten begab, sondern sich einer notleidenden Minderheit annahm, von der nur wenige wissen, und bestrebt ist, konkrete Massnahmen zur Verbesserung ihres Daseins zu entwerfen und in Szene zu setzen, also einen spezifischen Mehrwert zu schaffen. Hierin zeigte sich der menschenrechtliche, aber auch praktische Sinn der neu errichteten Stiftung. Dass an der Versammlung in Disentis der grenzüberschreitende parlamentarische Rat der Samen als Vorbild herangezogen werden konnte, war der Tat-

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[15] Die Parlamentarische Versammlung empfahl dem Ministerkomitee insbesondere:

i. to encourage Balkan states which comprise Aromanian communites to sign, ratify and implement the European Charter of Regional or Minority Languages and invite them to support the Aromanians, particularly in the following fields: a. education in their mother tongue; b. religious services in Aromanian in their churches; c. newspapers, magazines and radio and television programmes in Aromanian; d. support for their cultural associations;
ii. to invite the other member states to support the Aromanian language, for instance by creating university professorships in the subject and disseminating the most interesting products of Aromanian culture throughout Europe by means of translations, anthologies, courses, exhibitions and theatrical productions;
iii. to introduce fellowships for artists, writers, researchers and students from Aromanian minority groups throughout the Balkans, so that they can engage in appropriate creative work in the fields of Aromanian language and culture;
iv. to request the Council of Cultural Co-operation, working together with recognised Aromanian academic centres, to ensure co-ordination of Aromanian cultural activities throughout Europe;
v. to invite the education ministers of member states to include the history of Aromanian in European history books;
vi. to seek to establish co-operation and partnership with organisations, foundations and other interested bodies in the private sector with a view to implementing these recommendations;
vii. to take account of Aromanian culture in its follow-up to Recommendation 1291 (1996), particularly where the „laboratory for dispersed ethnic minorities" is concerned.

sache zu verdanken, dass mit Prof. Lauri Hannikainen (Turku Universität, Finnland) ein Kenner paralleler Probleme im nördlichen Europa dem wissenschaftlichen Beirat von CONVIVENZA angehört und er über die Stiftung in der Lage war, sein reiches Wissen und seine politische Erfahrung in das Projekt einfliessen zu lassen. Das Unternehmen hatte sich als viel versprechendes Laboratorium des Austausches und des gegenseitigen Lernens erwiesen.

IV. Ein wissenschaftlich-praktisches Unikum?

Unser heutiger Wissenschaftsbetrieb ist stark fragmentiert: immer mehr Wissenschafter verstehen immer weniger, was diejenigen unternehmen, die noch vor kurzem ihre Kollegen und Gesprächspartner waren. Auch weist moderne Wissenschaft zusehends die Tendenz auf, von den Wirklichkeiten des Lebens abzuheben und sich in Wolkengebilden abstrakter Formeln und Fachsprachen zu verlieren. Die Intention der Gründer von CONVIVENZA war es, Gegensignale zu setzen. Das Wissenschaftsverständnis, das in der am 11. Mai 2006 gegründeten Stiftung eine praktische Verkörperung gefunden hat, zeichnet sich – unkonventionell – durch drei Eigenschaften aus, nämlich 1) eine Verwurzelung („enraciment“, „rootedness“) in den Ideen und realen Bedürfnissen der Menschen und der Gesellschaft; 2) „Transdisziplinarität“ oder „transversale“ Lösungsansätze zwischen den wissenschaftlichen Fächern und 3) eine Ausstrahlung („rayonnement“, „engagement“) über die Kreise der Wissenschaft hinaus in weite Kreise von Staat und „civil society“; dabei sind mit „Ausstrahlung“ Prozesse der gemeinsamen Lösungssuche von Wissenschaft, Politik und den direkt betroffenen Menschen als „active players“ gemeint.

Wir sind weit davon entfernt, die Bedeutung unserer Initiative zu überschätzen. Noch handelt es sich um einen kleinen „Kosmos“ von Ideen und Einrichtungen, von Menschen und Mitteln. Es ist aber doch grundsätzlich bemerkenswert, dass CONVIVENZA, soweit ich sehe, die zurzeit einzige Institution auf dem Gebiete des Minderheitenschutzes ist, welche die betroffenen Volksgruppen unmittelbar in ihre Arbeit einbezieht. Sie erfasst ihren Gegenstand nicht, um einen Ausdruck von PAUL FEYERABEND abzuwandeln, „klar und wohldefiniert“ wie „tote Schmetterlinge in einer

Sammlung".[16] So berief sie eine Konferenz von Aromunen aus verschiedenen Ländern auf ihr Forum ein, um das gemeinsame Selbstverständnis dieser alten, heute vergessenen und vom Untergang bedrohten Sprach-, Kultur- und Volksgruppe und ihren Willen zu stärken, gemeinsam ihr Schicksal in die Hand zu nehmen und zu gestalten. Methodisch wichtig scheint sodann – gerade für Juristen – die Erkenntnis, dass wir es im Bereiche des Minderheitenschutzes nicht mit der simplen Anwendung von mehr oder weniger präzise gefassten, abstrakten Regeln auf konkrete Sachverhalte und auch nicht mit Verfahren von Normkonkretisierungen zu tun haben, wie sie etwa im Staats- und Völkerrecht die Grundrechtepraxis prägen. Hierfür sind die Normierungen des internationalen Minderheitenschutzes viel zu offen und zu wenig strukturiert. Vielmehr geht es hier häufig um Prozesse, bei denen Normanwendung und Normkreation in einander überfliessen: ein Vorgang, den die alten mechanisch-dualistischen Dogmen des juristischen Syllogismus nicht zu erfassen vermögen. Auch als Juristen befolgen wir, wie FEYERABEND in Bezug auf die Naturwissenschaften festhielt, nicht nur Regeln, sondern modifizieren sie auch durch die Art und Weise, wie wir vorgehen, so wie Musik durch Komposition, nicht durch die Anwendung von Regeln entstehe.[17] Das Zusammenfliessen von Normerzeugung und Normverwirklichung ist im Minderheitenschutz vielleicht besonders augenfällig. Doch begegnen wir ähnlichen Phänomenen in vielen weiteren Feldern der Rechtspraxis, und unsere Beobachtungen dürften, so gesehen, auch im grösseren Zusammenhang der Rechtstheorie von Interesse sein.

Formel und Format von CONVIVENZA sind also, über die Beschränktheit des Projekts hinaus, praktisch und methodisch wohl nicht uninteressant sein. Es ist zu hoffen, dass die Stiftung in der Lage sein wird, sich mit Energie und Elan ergiebige neue Aufgabenfelder zu erschliessen. Vielleicht wird das „Unternehmen"[18] grösser werden und einen wichtigen Platz neben anderen Institutionen erlangen. Eine Utopie? Bald einmal Realität? Zunächst eine realistische Utopie? Ich halte mich an die Ermunterung meines seinerzeiti-

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16 PAUL FEYERABEND, Die Torheit der Philosophie – Dialoge über die Erkenntnis, Hamburg 1995, S. 147.

17 FEYERABEND (Fn.16), S. 68 f.

18 CONVIVENZA könnte, in der Sprache der Wirtschaft, als eine Art KMU (Kleine und mittlere Unternehmen) bezeichnet werden, ein Organisationstyp, der sich durch Kleinheit, aber oft auch durch besondere Innovationskraft auszeichnet.

gen Professors an der Harvard Law School, im Leben aktiv und offen zu sein „and to let all flowers bloom".

* * *

Die hier präsentierte Facette des schweizerischen Föderalismus hat keinen streng dogmatischen Charakter. Es wird hier nur ein kleines Stück wissenschaftlich-praktischer, ja über die Wissenschaft im strengen Sinn hinausgehende Arbeit präsentiert. So schliesse ich denn auch, unter Aufnahme des eingangs zitierten Mottos, mit einem Bekenntnis von Nobelpreisträger SAUL BELLOW, dessen Sinn für viele an CONVIVENZA Beteiligte wegweisend ist:

> „I have never viewed the university as a sanctuary or shelter from 'the outer world'. Life in a strictly academic village, in isolation from a great turbulent city, would have been a torment to me. So I have never been … a 'campus writer'."[19]

[19] SAUL BELLOW, Foreword, in: ALLAN BLOOM, The Ceasing of the American Mind, New York 1982, S. 17.

Minorities and Majorities: Managing Diversity

A Fresh Look at an Old Problem

A Position Paper adopted at a conference organised by the International Institute for Public Law, together with the Europa Institute at the University of Zurich, on 18/19 November 2005[*]

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The greatest political and cultural resource of Switzerland is her multilingual character. The country is also renowned worldwide for the peaceful co-existence of linguistic communities. Internationally, however, the legal provision for minorities is underdeveloped. The Institute for Public International Law, together with the Europa-Institute at the University of Zurich, therefore convened on 18/19 November 2005 a group of renowned experts to develop a new concept for international minority rights. At the end of the meeting, the experts agreed the following position paper. „Minorities and

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[*] Reprinted in: SZIER Schweizerische Zeitschrift für internationales und europäisches Recht/RSDIE Revue suisse de droit international et européen 15/5, 2005, p. 659-663.

Majorities: Managing Diversity" argues that the enhanced protection and promotion of ethnic, religious and linguistic minorities might contribute to a world with less violence and poverty and shows how the present-day regime might be made more effective and how it might be supplemented. The paper is intended to serve as a basis for further activities in this field by the group and otherwise.

I. Inadequacy of the present-day regime

Our international order is based on premises that are no longer adequate.

The main pillars of the international legal architecture are States, which are defined by their People, Territory and Power. States are conceived of as unitary concepts: international law seems to be blind to realities and tensions of internal diversity. Governments often shy away from recognising, within their jurisdiction, collective identities. Many States are afraid of the loss of power through decentralisation, disruption, secession, secession from secession and, in the extreme case, anarchy. Indeed, States sometimes behave like „cartels" seeking to protect their power and shielding it off from external interference. Human rights have been gradually recognised since the Second World War, but their subjects are, as a rule, individual persons: these are protected from being discriminated against for simply belonging to a cultural, ethnic, linguistic, religious or other group. *There is strong resistance to recognising and effectively protecting group rights under international law*.[1] A prohibition of negative discrimination is not enough. If diversity is to be promoted and identities are to be freely developed, the

[1] However, the Genocide Convention of 1948 is a basic protection in international law for minorities. Other protective instruments include Art. 27 International Covenant on Civil and Political Rights, UN-Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art. 14 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 34 Protocol No. 11 and Art. 1 Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, European Charter for Regional or Minority Languages, Framework Convention for the Protection of National Minorities and Central European Initiative Instrument for the Protection of Minority Rights.

focus should be on creating chances for groups by recognizing their specific status as groups.

The view that we adopt is that of independent members of civil society: we are neither defenders of State power interests nor are we advocates of exclusive or specific minority interests. The challenge facing us is a new balancing of values and interests. Our aim is to take a fresh view from a general perspective.

II. An affirmative view is needed: an „ethos of diversity"

Most States have a multiethnic character. We regard pluralism in an affirmative sense rather than as a threat to state unity. It is a source of richness, exchange and creativity. The ethos of our modern world should be to embrace difference and diversity as a positive value and as social capital. This means for instance:

- We reject the idea of a „Clash of Cultures". Humanity is not made up of homogeneous cultural blocks but of a wide variety of individuals and groups, most of which possess plural identities. We consider transcultural development as a value to be safeguarded and promoted.
- International environmental law might be alluded to, as it contains an exemplary spirit of openness that should also be prevalent within pluralistic societies, namely to protect living heritage and to let it grow. A living cultural system enables society to learn, to experiment, to compete, to create and to take advantage of the dynamic forces and tensions contained in it.[2]

[2] The UNESCO Universal Declaration on Cultural Diversity is formulated in the same spirit and states in its first article: „Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations".

- In our view, diversity enriches democratic institutions and procedures and enables a society to respond more effectively to the challenges of the multicultural world.

III. Managing diversity

Our central concern is to find means to manage diversity, on the basis of a dynamic and broad understanding of self-determination, rather than to defend existing social conditions. These means may be:

- Recognising autonomy (territorial, personal, functional, cultural): international supervisory and monitoring bodies might be created within European and other international organisations analogous to those created under the aegis of the League of Nations.
- Giving a 'voice' to groups within overarching political processes, for example through special representation in local, regional, and national structures.
- Creating a spirit of inventiveness through for example, the introduction of schemes favouring multiculturalism in state basic laws (see South Africa, Canada, Switzerland)[3]; the creation of transborder regions; the

[3] „We, the people of South Africa, […] believe that South Africa belongs to all who live in it, united in our diversity." (Preamble, Constitution of South Africa).
„[…] We, the Swiss People and the Cantons, […] determined, with mutual respect and recognition, to live our diversity in unity, […]" (Preamble, Constitution of Switzerland). – „The Swiss Federation […] promotes common welfare, sustainable development, inner cohesion, and cultural diversity of the country." (Art. 2, Para. 2 Constitution of Switzerland)
A broad framework of laws and policies supports Canada's approach to diversity. At the federal level, these include the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act, the Employment Equity Act, the Official Languages Act, the Pay Equity Act and the Multiculturalism Act. Art. 3, Para. 1 of the Multiculturalism Act states: „It is hereby declared to be the policy of the Government of Canada to
(*a*) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage;

foundation of multilingual universities; and the recognition of „new minorities" and their strong protection in law and politics.

IV. Adjusting tensions between equality and diversity through sustained dialogue on the basis of institutional equality

Human beings are at the same time equal and different. Formal equality may generate inequality of chances for minority groups to develop their identities, to be heard in the political process and to have access to resources.[4] Differentness may also generate discrimination. Depriving persons of any of these three chances severely undermines their dignity. In the final analysis, minority protection embodies the principle of equality in a substantive sense. Tensions between equality and diversity need to be resolved carefully, which is only possible through sustained dialogue among all parties concerned.

V. Protection and promotion of minorities as a collective trust

The minimum standards of every system for the protection of minorities are:

- Human rights
  Policies based on ethno-nationalism in its inclusive sense (forced assimilation, repression) and its exclusive sense (isolation, discrimina-

(*b*) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future;
(*c*) promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation;
(*d*) recognize the existence of communities whose members share a common origin and their historic contribution to Canadian society, and enhance their development […]".

tion, arbitrary deprivation of or exclusion from citizenship, persecution, deportation, massacres and, in the extreme, genocide) are negations of human rights.

- The primacy of citizenship over ethnicity
  Regardless of whether it is also conceived of as an ethnic, cultural or linguistic community, the state must always be conceived of as a political community. Political freedom and collective responsibility of 'active citizens' are at the centre of such a concept of the state. The State must therefore, according to the political culture of each country, carefully balance ethnic identities with (ethnically indifferent) citizenship.

In order to ensure that these minimum standards are upheld and to create favourable conditions for an „ethos of diversity", institutions and procedures protecting and promoting minorities are indispensable.

The violation of minority rights has been a root cause of international and internal conflicts, terrorism, poverty and low human development. If we wish to build a safer and more prosperous world, we must make minority rights a reality.

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[4] Experiences with majoritarian rule demonstrate that formal equality like „one man-one vote" may lead to misrepresentation and to the permanent overruling of minorities.

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