

NATO RESEARCH PROGRAMME 1996/1998

***PREVENTING ETHNIC CONFLICTS AND PROTECTING MINORITY RIGHTS
IN DEMOCRATIC SYSTEM; OPTIONS AND IMPLICATIONS***

BY

DR HAB. BOGUSŁAWA BEDNARCZYK /POLAND/

**JAGIELLONIAN UNIVERSITY
1998**

JUNE

CRACOW, POLAND

FOREWORD

The author of this paper, the recipient of the NATO Research Fellowship 1996/1998 is Dr Hab. Bogusława Bednarczyk, of the Institute of Political Science at Jagiellonian University in Cracow, Poland.

The paper, „Preventing Ethnic Conflicts and Protecting Minority Rights in Democratic System; Options and Implications“ was undertaken from June 1996 through June 1998. It is a historically based study in which the author analyses the very mixed picture of minority issue in the post-Cold War era.

This paper is a result of a major two-year research programme based on a set of recommendations drawn from the debate of several international groups of experts and also on internationally agreed standards.

In this report the author has deliberately omitted discussion of moral issues such as ‘Whether, as a question of ethics all minorities *ought* to be accorded certain legal rights in the states in which they live and international legal rights to complain to international bodies?’ Such moral issues raise vexing philosophical and political difficulties, in particular the argument that rights for groups are not justifiable or necessary, being best covered by individual human rights including the right to membership of a group.

The author would like to express her very sincere gratitude to the NATO Research Fellowship Programme 1996/1998 Committee. The writing of this paper would have been impossible were it not for the Fellowship the author was awarded.

The Fellowship Programme provides a unique opportunity for scholars from Central and Eastern Europe to carry on their academic research work in an international forum.

PREVENTING ETHNIC CONFLICTS AND PROTECTING MINORITY RIGHTS IN DEMOCRATIC SYSTEM; OPTIONS AND IMPLICATIONS

INTRODUCTION

The extensive changes in Central and Eastern Europe have brought minority and nationality issues right to the top of the international agenda. Yet these issues, many focused on cross-border areas, have not appeared only recently. They have been present since the Second World War and many from long before. In general, the post-war configuration of Europe kept these issues within the constraints of certain legal and political frameworks. Those frameworks did allow for a degree of coexistence and mutual respect under the law. This does not mean that there have not been significant abuses of minority rights. Families and cultural and linguistic groups have, in many cases, been separated by political borders which were often hermetically sealed for decades. With the recent political changes across the region those communities have sought to come together again. For some it has been a straightforward process. Others have found themselves the focus of new political border disputes. Some enclaves have become battleground and new majorities, with little international or national control over their actions, have resorted to violent removal of minorities. Large numbers have been killed or wounded in armed fighting. Others have died through starvation or illness from majority imposed states of siege.

National and ethnic identities have come to the fore. Therefore the rights and obligations of minorities have become an acute question for minority peoples, for the states in which they dwell and for the European order generally. In particular, the rise of nationalism has brought the issue of minority rights to the top of the European agenda.

It is not surprising that nationalism has found a fertile breeding-ground in the particular circumstances of the post-communist transition. It affects minorities in two ways. First, there has been a strong tendency to consolidate the state by appealing to the nationalism of the majority people: most west European states, after all, are based on a similar alliance between the state and the majority nation. The appeal to ethnic nationalism, however, threatens to exclude minorities and encourages counter-nationalism. Secondly, demands for self-determination may lead minorities to attempt to secede from the host state and create a state of their own. The potential for conflict is apparent when those in power perceive minorities as unreliable and when minorities have no confidence that states will respect their needs for identity and security.

The salience of the minority problem in Central and Eastern Europe should not obscure the persistent difficulties west European societies have experienced in managing their own minorities. Some of the more severe conflicts are now in the past, but others (notably in Northern Ireland) testify to the failure to integrate different national, religious or linguistic communities within a single state. This is not to mention the related issue of extra-European minorities in western Europe, which this study does not attempt to cover.

Establishing minority rights - that is, the rights of minorities to receive equal treatment, to practice their culture, religion and language, and to participate fully in the political and economic life of the state - appears to be one of the more promising approaches to this

problem. It avoids the extremes of secession and assimilation, and offers a way forward which is compatible with civic, democratic pluralism. But when democracy is absent or weak, and when minority issues deeply divide societies, how can minority rights be effectively established, and how can the international community take useful measures to encourage their implementation?

The problems over minorities which have arisen in the wake of the dissolution of the Soviet empire mirror those which followed the collapse of the Russian, Austro-Hungarian and Ottoman empires after the First World War. At that time the efforts of the peacemakers reflected an uneasy mixture of principle and pragmatism. On the one hand, the peacemakers used the principle of self-determination to establish a large number of small new states in Eastern Europe. On the other hand, they adjusted borders in accordance with the power of states and the interests of the Great Powers. The victors intended to weaken Germany and the placed German-speaking minorities under the rule of weak Central and East European states. This was eventually to undermine the international order. The peacemakers' attempts to enshrine protection for minorities in the Paris treaties and the League of Nations system were not without significant successes: the settlement of the Aland Islands dispute in 1920 and 1922 was notable, and some of the new states, such as Estonia, included exemplary protection for minorities in their constitutions. Nevertheless, the system foundered when the Paris treaties came under attack and the democratic order in Eastern Europe buckled under the pressures of consolidating the new states. The League of Nations minorities regime could not work in the absence of both democratic systems and the international will (and means) to protect beleaguered minorities in other states.

A transnational regime for minority rights does exist in the 1990s, but it is still relatively weak. It consists of the protection offered under international law and international conventions such as the European Convention on Political Rights, and the political commitments entered into by member states of the Organisation for Security and Cooperation in Europe (OSCE). Together these constitute a code of good practice. States are encouraged to comply by making observance of OSCE commitments a condition of participation in European institutions. OSCE member states accepted a mutual right of minority compliance with these standards, and the OSCE is entitled to send fact-finding and preventive diplomatic missions to their territories. However, there is no formal system for imposing sanctions on member states which breach these standards, unless the international community decides to use economic or military sanctions through the UN or NATO.

This study analyses approaches to minority and group conflicts in the light of the ongoing search for a world order based on justice and the rule of law. In terms of legal theory, the discussion is situated in the vague border area between *de lege ferenda* (the law as it should be) and *de lege lata* (the law as it is), but closer to the former than to the latter. General principles of law, as they have evolved on the basis of the Charter of the United Nations (UN), will be given priority attention. The purpose of this study is to promote new approaches to minority protection.

The basic questions of minority rights will be addressed here: should there be universal standards for the treatment of minorities? If so, should they be expressed in political as well as cultural institutions? To what extent should local culture be autonomous? What if a minority demands protection but oppresses its own members?

Chapter I attempts to offer a balanced look at the minority issue placing contemporary problems in an historical perspective. In doing so the author seeks to dispel some of the myths surrounding this phenomenon as it manifests itself in Central and Eastern Europe today.

Chapters II and III address minority rights from the point of view of the international political order and the international legal system. In Chapter II the author discusses the clash

between sovereignty and self-determination in the new international system after the Cold War, drawing parallels with the situation after the First World War and with periods of decolonization. It has been argued that elements of a transnational regime for protecting minorities have come into existence in Europe, but cautions that their distinctiveness from other parts of the world, in terms of capacity to protect, should not be exaggerated. The author explores three proposals which could offer minorities more assurance that their interests would be protected: the development of an additional layer of governance at the European level, linked to stronger regions; a system of multilateral surveillance, to monitor abuses; and an international capability to intervene to prevent massive abuses of human rights.

In Chapter III the present legal status of minority rights has been discussed. The role of the United Nations and the role of European institutions form the subject of this chapter. With the reference to the United Nations it has been pointed out that it was not until 1966 that the UN General Assembly adopted any legal provision specifically dealing with minority rights, in Article 27 of the International Covenant on Civil and Political Rights. Its cautious and limited provisions remained the main measure of international law in this area until 1992, when the UN General Assembly adopted the 'Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities'. This mandates states to protect minorities and gives minorities rights to practice in decisions affecting them at national and regional levels. It also introduces obligations on states to promote education in the mother-tongue and knowledge of minority cultures. Reciprocally, it encourages minorities to understand the states in which they find themselves. The rights remain limited to 'persons belonging to national minorities' (although they can be exercised in community with others of the same group) and the document eschews any attempt to define what a minority is (a stumbling-block of previous legislation). This part of Chapter III has been concluded with a set of general observations suggesting a framework for further legislation in this area. It has been stressed that the core of minority rights is the right to existence and identity; that non-discrimination is only the first step towards minority protection; and that while minorities do not have a right to self-determination (that right is vested in *peoples*), they should be able to participate in the self-determination process. With the reference to the European institutions the role of the OSCE and the Council of Europe has been considered subsequently. The OSCE has developed a responsibility for minorities throughout Europe, including the whole territory of the former Soviet Union, as a result of its concern with both the 'human dimension' and security aspects. As an intergovernmental organisation operating by consensus, the OSCE has had to develop political commitments that take into account the views of states which deny that they have minorities, and of states which perceive their minorities as an active security threat. Despite these constraints, the OSCE has developed an extensive set of standards, together with four means of implementing them. It has shown progressive initiative in preventive diplomacy. The creation of the High Commissioner on National Minorities is one of the OSCE's most significant innovations. The High Commissioner contributed to a significant easing of inter-communal tensions in Estonia in 1993. The work of the Council of Europe has been reviewed at both the legal and the practical levels. In its legal work, the Council of Europe contributes to a European regime for human rights, particularly through the European Convention on Human Rights, which enables states party to the convention, as well as individuals and organisations, to appeal against violations to the European Commission of Human Rights. The rapid growth of membership of the Council of Europe has extended this regime into Eastern Europe. Some of the Council of Europe's pilot projects and confidence-building measures have been analysed in this part. They offer a 'bottom-up' approach to the development of trust between minority and majority communities, which has a vital part to play in easing potential tensions.

Chapter IV has been based on the assumption that constitutional law is the best place for a state to anchor its human rights, for this will prevent even a democratically elected legislature from making laws which will violate the human rights of its inhabitants. And that can happen, especially in countries which contain unpopular minorities whose votes are of no great value for most candidates in parliamentary elections, who, therefore, could be more concerned with attracting the favours of the majority group. Democracy may be a powerful safeguard against individual tyrants, but it may not provide enough protection against the „tyranny of the majority“. The author examines the effect on minority groups of constitutional and legal rules with special emphasis on their protective aspect. Finally there also an attempt has been made , despite the multiplicity of variables, to assess whether, where particular legal arrangements are made, these are accompanied by harmonious or accommodating relationships between majority and minority groups.

CHAPTER I: MINORITY RIGHTS: A HISTORICAL PERSPECTIVE

1. Minorities in History

The resurgent ethnic disputes in Central and Eastern Europe appear much as they were when they were suppressed by Soviet power 45 and 70 years ago. It is almost as though we had simply tuned back the clock or, to change the analogy, as though they were the patients described by Oliver Sacks, who came back to life after medication had released them from the strange disease that had frozen them. The prospects for international politics in this region are worrisome at best.¹ „ If we look carefully, what is striking is not the strength of intolerant nationalism but its weakness . . . There have been any number of nationalist conflicts that so far have failed to materialise in the former Soviet bloc.“²

Since the end of the Cold War, a debate has developed among practitioners and analysts of European security on the kind of political, economic and military threats posed by a resurgence of nationalism and ethnic conflict in Central Europe, Eastern Europe, the Balkan states and Central Asia. As the two above quotations suggest, thus far the ‘core debate’ has been dominated by what could be referred to as ‘purists’ of either an optimistic or pessimistic persuasion, mostly anxious to promote or refute the idea that tackling nationalist and ethnic problems in these regions should be at the heart of post Cold War ‘Grand Strategy’.

The pessimists, who have enjoyed a preponderant position in this debate, have written articles and given presentations that have predicted almost apocalyptic nationalist and ethnic dangers in a Europe deprived of the bipolar sureties of the pre-1989 security landscape.³ For example, among leading Central European politicians, Vaclav Havel has emphasised the potential threat that a significant resurgence of nationalism and ethnic conflict represents to the stability and security of Europe. Douglas Hurd has said that ‘nationalism in some places is out of hand’.⁴

¹ Jervis, R., ‘The Future of World Politics: Will It Resemble the Past?’, *International Security*, vol. 16, no. 3 (winter 1991/92), pp. 39-73.

² Fukuyama, F., ‘States can brake up, democracies can grow up’, *International Herald Tribune*, 10 Feb. 1992, p. 4.

³ To a certain extent, the whole debate was started by Brzezinski, Z., in ‘Post-Communist Nationalism’, *Foreign Affairs*, vol. 68, no. 5 (winter 1989/90), pp. 1-25.

⁴ See the speech by Douglas Hurd, ‘The New Disorder’, to Chatham House, London, 27 Jan. 1993, p.1.

Among US scholars, Jack Snyder has written that ‘the possibility of a rising tide of nationalism and ethnic unrest poses the greatest challenge to the security of the new Europe.’⁵

More interestingly, in some respect, a number of analysts and academics, although naturally cautious in their judgements on possible future developments, seem to have chosen to distance themselves from the tide of apocalyptic prediction. Timothy Garton Ash has warned all ‘cartographers of emancipation’ that the popular rediscovery does not necessarily represent a resurgence of nationalism: ‘the lack of normal access to the national past was a form of deprivation; the recovery of it is a form of emancipation’.⁶ Similarly, Stephen Van Evera has pointed out that: ‘the risk of a return to the warlike Europe of old is low . . . The nuclear revolution has dampened security motives for expansion, and the domestic orders of most European states have changed in ways that make renewed aggression unlikely. The most significant domestic changes include the warning of militarism and hyper-nationalism.’⁷

Such has been the polarisation of opinion that it has been mostly impossible to reach a consensus on any of the key issues connected with the subject. Nevertheless, minority problems are not solely a function of the end of the World War or of multicultural dilemmas, however, much these developments throw them into relief. In their different blends of religious, ethnic and national ingredients, they are more often than not both old and new. So some historical orientation is useful.

How the genesis of „minority problems“ has been understood in the West? Five centuries ago, Europe conceived itself as universal Christendom; faith provided a glue for feudalism’s decentralised, corporate society. One’s place in it depended on one’s social estate, although minorities were defined chiefly in relation to the dominant creed. National categories and the idea of equality before the law had, as yet, little meaning. They would come forth as twins; centralising monarchies and the rising commercial classes were their unknowing midwives. And then those who had been subjects of the crown, bound by social stratum, would become equal citizens composing a nation.

This was a deeply democratic movement, and France is commonly considered its historical archetype; the revolution began when the Third Estate declared itself the National Assembly in 1789. But politics does not tell the whole story. With these new citizens also came a new *national* „Frenchness“, grounded especially in linguistic culture. Linguistic pluralism was a feature of the *ancient regime*, which had defined itself famously by „One faith, one law, one king“. According to the sixteenth century jurist Michael de L’Hopital, „Division of religion and laws, not languages, sunders kingdoms“⁸ He asserted this in an era of religious persecution, notably of Huguenots - a minority that raised no problem of ethnicity or language, but of „one faith“.

When the „rights of man“ became the issue in the eighteenth century and „the Republic, One and Universal“ became the ideal, political and cultural questions blurred. The Jacobins sought to standardise the national language on the basis of Parisian French; the republic would be assimilated into Frenchness. An advocate of this, B.Barère, captured the mood : „Feudalism and superstition speak Breton; emigration hatred of the Republicspeak German; the counter-revolution speaks Italian and fanaticism speaks Basque. ... The monarchy had its reasons for being like a Tower of Babel, but a democracy leaving citizens ignorant of the

⁵ Snyder, J., ‘Controlling Nationalism in the New Europe’, eds. A. Clesse and L. Ruhl, Beyond East-West Confrontation: Searching for a New Structure in Europe, Institute for European and International Studies, Luxembourg (Nomos Velags-gesellschaft: baden-Baden, 1990), p. 58.

⁶ Ash, T. G., The Uses of Adversity: Essays on the Fate of Central Europe, (Granta Books/Penguin: Cambridge, 1989), p. 242.

⁷ Van Evera, S., ‘Primed for peace: Europe after the Cold War’, *International Security*, vol. 15, no. 3 (winter 1990/91), p. 9.

⁸ Lodge, R. A., French: From Dialect to Standard, (New York and London: Routledge, 1993), pp. P. 210.

national language and incapable of checking those in power is treason to the fatherland (*la patrie*); it is to misunderstand the benefit of the printing press, each printer being an elementary teacher of language and law. ... In a free people, language must be one and the same for all".⁹ The republic decreed that French teachers be sent to every town „where inhabitants normally express themselves in Breton, Italian, Basque and German“. ¹⁰

A forceful democratic impulse thus came with a homogenising drive that easily lent itself to illiberalism. Still, these developments had a liberal axis: the citizen was conceived in individual terms. When it came to minorities, modernity harboured a paradox. Group status in a corporate society had been the basis of pre-modern discrimination; come modernity, the relevant categories became nation and state on one hand and the individual citizens on the other. Intermediate forms of collective identification were suspect. Hence Count Stanislas de Clermont-Tonnerre declared in the French National Assembly in 1789, „One must refuse everything to the Jews as a nation but give everything to them as individuals, they must become citizens „. ¹¹ He meant to permit this minority entry into the nation, but his formulation disclosed that as one prejudicial burden lifted, a new problem of intolerance was posed.

If we turn here to a different part of the world and consider the transformation of the Ottoman Empire into the contemporary Mideast, we find some interesting parallels. The status of minorities under the Ottomans was a function of a corporate structure, the „millet „ system fashioned after the capture of Constantinople in 1453. In it, millets (confessional communities) had far-ranging autonomy to run their own internal affairs (e.g. education, social welfare, personal matters such as marriages). The head of each community - for example, the respective patriarchs for the Armenian and Orthodox Christian millets, and the chief rabbi for the Jews - represented it to the Sultan. The latter ruled by religious right, not just as head of the Islamic millet, but as caliph, titular leader of all Islam. While this system sharply distinguished non-Muslims from the *Ummah*, the community of believers, it provided, until its end in the twentieth century, for considerable tolerance. This was in marked contrast to much of Christian Europe's history and it rested on religious sufferance and not any Western concepts of rights.

2. Social Democratic Alternative

Another minority-filled empire ended with the World War I - Austria-Hungary. Since 1989, there has been considerable nostalgia for its polyglot sprawl, especially among intellectuals dismayed by some of the ugly nationalist outbursts that came after the communism's fall. The nostalgia, however, rests on a myth: here, once, was a tolerant multicultural realm that, alas, was undone by nationalism. Myths are rarely groundless - just forgetful. Nationalism, some of it quite nasty, did help bring down the Habsburgs. But, as historian Hugh Seton-Watson has written, this was a dynasty „paralysed by its ignorance and fear of the people whom it ruled. It could only work through the aristocracy and was unable to understand the needs or wishes of the rest of the population“. ¹² If it could not fend off minority nationalism this was partly because it had played them off one another rather than truly liberalising and democratising itself.

It was Social Democrats - the „Austro-Marxists“ - who provided the most innovative approach to „the nationalities problem“. Such theorists as Otto Bauer and Karl Renner proposed that the empire become a democratic and socialist federation in which minorities

⁹ Ibid., p.215.

¹⁰ Ibid., p.218.

¹¹ Crawford J., ed., *The Rights of Peoples*, (Oxford University Press, 1992), p.164.

¹² Seton-Watson, H., *Eastern Europe Between the Wars, 1918-1941*, (New York and Evanston: Harper Torchbook, 1967), p.235.

would have „national cultural autonomy“ on a „personal“- not residential or territorial basis. Even if individuals did not live in a compact community with minority compatriots, they would still be joined to them in cultural confederation. Concurrently, everyone would, as democratic citizens, share in the country's politics as a whole.¹³

Austro-Marxists did not follow the Marxist proposition that the state would „wither away“; instead, they suggested it would endure together with national cultures in classless society. Finally, by defining cultural membership as personal but also endowing this person with democratic citizenship in a general sense, they incorporated an individualist dimension into the scheme. So while it bore similarities to the millet system, their design was also different: in proposing national, not religious, autonomy; by its link to social egalitarianism and political democracy.

It also assumed the survival, albeit in new form, of the empire's reach. That, of course, was not to be. An Austrian republic arose on its ruins. It was now the hour of „self-determination“ This was a liberal idea, espoused famously by Woodrow Wilson at the Paris conference, but summarised some sixty years before when John Stuart Mill wrote, „One hardly knows what any division of the human race should be free to do if not to determine with which of the various collective bodies of human beings to choose to associate themselves“.¹⁴

Mill believed free government required that nationality and state boundaries be coextensive, a rule that also guided Wilson and his collaborators. But as empires were carved up and previously subject nationalities became independent, a fear arose - for good reason - that the new states would be as uncharitable to their minorities as their imperial masters had been to them. So recognition by the League of Nations was conditioned on acceptance of treaties aimed to shield minorities.

The use of treaties to protect minorities has a long lineage, going back at least to the Reformation. The emergence then of contesting Christianities posed anew basic questions of tolerance in the West. No longer was it the older medieval problem of adjusting the status of say, Jews or heretics or homosexuals scattered within Christendom. Now, opposing churches fought bloody wars. When Catholics and Lutherans finally agreed to mutual recognition, practical matters were resolved with a territorial principle: *cuius regio, eius religio* (whoever rules, imposes his religion). Were you in the minority - if the prince's faith was not yours - you had the option to leave.

Battered holy warriors thus conceded some license to a religious Other. This was pragmatic tolerance, compelled by circumstances; principled acceptance of internal minorities was yet to come. And in the meantime, not all minorities actually quit dominions dominated by other confessions. So in this or that kingdom one found mixed populations - sometimes scattered, small communities; sometimes communities that were more compact; sometimes minorities lived along borders that marked them off from a neighbouring principality of religious compatriots.

In ensuing centuries, similar patterns of majorities and minorities materialised as national states consolidated, adding ethnic or national contours. In the nineteenth century, beginning with the Treaty of Vienna, provisions for national minorities are found increasingly in international accords. Clauses concerning civil and political rights of minorities, not just religious tolerance, also appear in efforts „to extend to Eastern Europe what had become

¹³ Ibid.,

¹⁴ Quoted by Smith, A. D., National Identity, (London: Penguin Books, 1992), pp. 171-172.

accepted in the West“, though they were ineffectually implemented, as Patric Thornberry, a scholar of international law, notes.¹⁵

The system of minority treaties fashioned after World War I aimed to be more effective, but in a circumscribed way. The guarantor was to be the League of Nations, not the Powers. President Wilson wanted the League’s Covenant to obligate every signatory - not just new states - „to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security ... that is accorded to the racial or national majority.¹⁶ However, Wilson’s own terminology tended toward collective and not just individual rights, the minority treaties that were adopted did the opposite. They were, as Thornberry summarises, „not principally group centred, but ascribed rights to individuals: nationals, inhabitants, and persons belonging to racial, religious or linguistic minorities“¹⁷ In the Polish Minority Treaty, the prototype for the others, we read, „Polish nationals who belong to racial religious, or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals“.¹⁸

The Minorities Treaties represented an attempt by the Western powers to find a solution to the problem of nationalism in Eastern and Central Europe by drawing on the historical experience of nation-building in the West. By applying the idea of rule of law on an international scale, it was hoped to displace in Eastern and Central Europe ethnographic criteria of nationhood in order to protect minorities. Rule of law, however, which had been instrumental in creating the political nation in Britain, France and the United States, lacked the same resonance in this part of Europe. Law had been an instrument of oppression in the region: the supranational empires used it in their efforts to quash national identity. From the perspective of Eastern and Central Europe, the Minorities Treaties were an international legal mechanism designed to thwart the realisation of national aspirations.

The retreat from involvement in the affairs of Eastern and Central Europe in the interwar years by the liberal Western powers did nothing to buttress the international treaty structure intended to mitigate against the excesses of nationalism. With the American return to isolationism, the British unwillingness to undertake continental commitments (particularly those involving Central and Eastern Europe) and French unease over enforcing the terms of the Versailles settlement without British support, the inter-war European environment undermined the entire Minorities Treaty edifice constructed in Paris in 1919.

The Minorities Treaties, of course, failed, and most observers ascribe this to the same reasons as the League’s failure. Only new states were compelled to sign them, and this was resented mightily, especially stipulations subordinating their own laws to the treaties and giving jurisdiction over disputes to the Permanent Court of International Justice. Poland summarily annulled its obligations in 1934. In the meantime, the most ardent petitioners to the Court were minorities with „kin-states“ to back them, such as Sudeten Germans and Transylvanian Hungarians. More vulnerable minorities were reticent, for example, Jews, scattered across Europe without a kin-state.

During World War II, Seton-Watson, an astute observer of Central and Eastern Europe, wrote that „if the minorities problem is not faced with realism and courage at the end of this war, it will be an important . . . cause of another European war.“¹⁹ There was another war - a

¹⁵ See Thornberry, P., *International Law and the Rights of Minorities*, (Oxford: Oxford University Press, 1991).

¹⁶ *Ibid.*, p.79.

¹⁷ *Ibid.*, pp. 128-129.

¹⁸ Quoted by Anderson, M. S., *The Eastern Question*, (London: St Martin’s Press, 1966), p. 388.

¹⁹ *Supra* note 12, p.174.

cold one, and the status of minorities in the Soviet bloc became a function of it ²⁰ Minorities as well as national sentiments were, depending on the case, manipulated or thwarted, often in the name of „internationalism“

Still, Communist delegates at post-war forums defended minority rights - in principle, anyway. When the Universal Declaration of Human Rights was debated, Moscow's ambassador called for a specific article on minorities; their rights were „fundamental human rights“. Yugoslavia's representative proposed that minority rights were „a condition for the enjoyment of human rights“. Belorussia's envoy berated U.S. treatment of American Indians and Australia's aborigines. None of them objected to Stalin's savage policies. On the other side of the cold war, Washington's delegate retorted that regard for human rights in general was „the best solution of the problem of minorities“.²¹ Rights, for the Americans, pertained to individuals, not groups.

Consider the ironies. These exchanges came just after a war in which a minority had been marked out, stalked, and slaughtered like none before. Yet the champions of minority right included regimes with their own appalling records on rights of any sort. And the United States, whose president, after the previous World War, had backed off from the language of collective minority protections, now framed matters solely as individual human rights - as if Brown shirt had shouted „*Menschen raus*“ rather than „*Juden raus*“. In the end, the declaration made no provision for minorities beyond reproving discrimination.²² Some later international statement do go a little beyond this: The UN's 1966 Covenant on Civil and Political Rights and The 1975 Helsinki Final Act are the most significant.

But such declarations are famous for being just declarations. During the cold war minorities were pawns in larger strategic games. Nowadays, the bigger powers, perceiving few vital interests to be at stake for them any longer, seldom have the will to protect any besieged populations abroad - though they are sometimes prodded or shamed into doing so, often too late.

Yugoslavia's calamity represents one possible consequence. Our post-cold war world is both new and old and does not seem so well equipped to cope with its tempests, either organisationally or intellectually. The UN and regional organisations have proven largely ineffectual. Liberalism (partly) disables itself by its individualist prejudices; communitarianism, on the other hand, could use some prejudice of that sort.

Changing times are inevitably nervous times for minorities. When all the signposts shift (not to mention when societies experience „shock“ therapies), majorities become anxious and minorities, not surprisingly, become queasy. Consequences may range from distemper t pogroms.

At the same time, a somewhat different „minority problem“ has arisen in various Western societies - the challenge of multiculturalism. Migran populations test past meanings of acculturation, posing new dilemma of minority rights, pluralism, and tolerance.

²⁰ As a consequence of war, Poland emerged as an homogenous nation-state moved westward and shorn of its national minorities; Czechoslovakia lost its German population and Carpathian Ruthenia to the Soviet Union; Hungary returned to its Trianon borders; Romania lost Bukovina and Bessarabia to the Soviet Union but kept its Hungarian minority; Bulgaria remained largely as it was, with few minorities; and Tito reconstructed a 'federal' Yugoslavia that retained its complicated ethnic-religious mosaic. Apart from lingering Hungarian diaspora and the restoration of the multinational constructs of Czechoslovakia war had been a promoter of the ethnographic nation-state.

²¹ Quoted in Study on the Rights of Persons belonging to Ethnic, religious and Linguistic Minorities, The Human Rights Study Series published by the Centre of Human Rights in Geneva, (new York: United Nations, 1991), pp.28-31.

²² Quoted in Thornberry, P., International Law and the Rights of Minorities, (Oxford: Oxford University Press, 1991), pp.132-137.

CHAPTER II: SOVEREIGNTY AND SELF-DETERMINATION IN THE NEW EUROPE

1. Some Historical Remarks

The principle of self-determination of peoples is rightly considered to be a successor to the political principle of nationality, which became widely recognised in nineteenth Europe and related to the emergence of nation states.²³ Since then hardly any political or legal principles have been a highly praised and supported by some and a strongly denied by others as has that of self-determination.

²³ Brownlie, 'The Rights of Peoples in Modern International Law', in Crawford, J., ed., The Rights of Peoples, (Oxford: Clarendon Press, 1988), p.5.

After World War I the principle received a new boost. In 1917, in the Famous Decree on Peace, Lenin wrote: "If any nation whatsoever is retained within the boundaries of a given state by coercion, and despite its expressed desire it is not granted the right by a free vote, . . . with the complete withdrawal of the forces of the annexing or generally more powerful nation, to decide without the slightest coercion the question of the form of state existence of this nation, then it is an annexation . . ." ²⁴

President Woodrow Wilson was an ardent proponent of the principle. In his 'Fourteen Points' he enunciated that "peoples and provinces must not be bartered about from sovereignty to sovereignty as if they were chattels or pawns in a game", and that territorial questions should be decided "in the interest of the population concerned". ²⁵

But at the same time Secretary of State Lansing wrote in a note of 30 December 1919: "The more I think about the President's declaration as to the right of 'self-determination', the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace congress and create trouble in many lands . . . The phrase is simply loaded with dynamite. It will raise hopes which can never be realised. It will, I fear, cost thousands of lives." ²⁶

Senator Moynihan quotes Frank P. Walsh to whom President Wilson himself had acknowledged that when he had uttered the words on the right to self-determination he had done so without any knowledge that nationalities existed which were coming to them day after day. ²⁷

Already at that time proponents of the principle interpreted it not only differently, but also interpreted it as being not simply an end in itself but as a means of achieving different ends. For Lenin this principle was subordinated to interests of socialism and was considered as a stage and condition of the final merger of all nations into one socialist society. ²⁸ Hurst Hannum is quite right that it "should be underscored that self-determination in 1919 had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers." ²⁹

By the turn of the millennium the principle of the self-determination of peoples has travelled the long road from its origin political slogan to being one of the fundamental principles of international law. But as Hannum writes: "Yet the meaning of and the content of that principle remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and the others in Versailles". ³⁰

In the 1990s the self-determination of peoples is once more not only a topical subject for dissertations, but has become a slogan of political struggle in different parts of the world. I after World War I the principle was applied only to Eastern European nations which had hitherto been parts of the Ottoman and Austro-Hungarian empires, and in the 1960s determined outcomes of the anti-colonial struggle in Africa and Asia, at the end of the 1980s came the turn of the Russian (Soviet) Empire.

The present situation has much in common with previous periods of de-colonisation and state-creation. As with the withdrawal of British and French imperial power from Asia and Africa, the end of the Soviet empire has been accompanied by a reassertion of national aspirations and also national animosities. The similarities do not stop there. Then, as now,

²⁴ Dokumenty Vneshnei politiki SSSR, /Documents on the Foreign Policy of the USSR/, vol. I, (Moscow, Gospolitizdat, 1957), p. 11.

²⁵ Quoted in Mee, C. L. Jr., *The End of Order*, (New York, Elsevier Dutton, 1980), pp.53-54.

²⁶ Lansing, R., *The Peace Negotiations. A Personal Narrative*, (London: Constable & Company, 1921), p.87.

²⁷ Moynihan, D. P., *Pandaemonium, Ethnicity in International Politics*, (Oxford: Oxford University Press, 1993), p. 85.

²⁸ See Lenin, V., 'Theses on the Socialist Revolution and the Right of Nations to Self-Determination (March 1916)', in Lenin, V., *Selected Works*, (London: Lawrence & Wishart, 1969), p. 37.

²⁹ Hannum, H., *Autonomy, Sovereignty, and Self-Determination. The Accommodation of Conflicting Rights*, (Philadelphia: University of Pennsylvania Press, 1990), p. 28.

³⁰ *Ibid.*, p. 27.

optimists hoped that de-colonisation would usher in a new democratic order, pessimists feared that order would be overwhelmed by the forces of anarchy. The problem is that it is not clear whether democracy and nationalism are compatible or antithetical ways of grounding a political community. Some, like Enoch Powell, believe that a nation is a necessary precondition of democracy, since only where a people share an underlying sense of community and values will the minority be prepared to acquiesce in rule by the majority. Others, like Lord Acton in the nineteenth century or Sir Ralf Dahrendorf in the twentieth, saw the ethnic claims of nationalists, whether they belong to the majority or the minority community, as undermining the most basic principles of civil society and democratic government. Either way, unless minorities are prepared to view themselves primarily as citizens rather than as members of an ethnic group, the potential for conflict will always be present³¹

Towards the end of *The Anarchical Society*,³² one of the most influential contemporary texts on international relations, Hedley Bull introduced the idea of a 'new medievalism' to suggest the possibility of a different order from the one which he described in the 1970s. Very broadly, he envisaged circumstances under which the jurisdictional monopoly of the sovereign state would have been broken. States would no doubt survive, but new overlapping and/or competitive forms of jurisdiction would have developed alongside them. Some such idea - suggestive rather than very clear - is one to which minority leaders might be expected to be attracted, if a way forward from their present unenviable plight is to be found. The concept might also be expected to have some resonance in a part of the world which has already devised the hybrid legal and political forms of the European Union, the European Convention on Human Rights, with its optional protocols, the OSCE, the Council of Europe and other institutions which blur traditional distinctions between domestic and foreign policy.

There is a case, in other words, for holding that Europeans have already begun to fashion a new regional order in which minority protection could have place, despite the reluctance of governments to surrender their sovereignty in any formal way. But although the European experience may be different from that of other parts of the world, this difference should not be exaggerated. Indeed, the European response to the Bosnia crisis suggests that, in the limited case, European governments and institutions are no more capable of protecting threatened minorities than those in any other continent. What, then, are the prospects for developing a European transnational regime for minority protection? Before we attempt to answer this question by examining the institutional response to the challenge of minority protection, it may be useful to ask why minority protection in general has proved such an intractable problem for international society

2. Self-determination

A number of references are made in this work to the concept of self-determination. It is not, however, a major focus of the enquiry. Self-determination is usually described as a right of peoples,³³ not minorities. But self-determination and minority rights are locked in a relationship which is part of the architecture of the nation state, since whenever a state is forged, the result is the creation of minorities. This applies in the twentieth century as it did in the nineteenth; indeed the many contemporary exercises in nation building have produced man

³¹ See the analysis in Hobsbawm, E., *Nations and Nationalism Since 1780*, (Cambridge: Cambridge University Press, 1990).

³² See for further details Bull, H., *The Anarchical Society: A Study of Order in World Politics*, (London: Macmillan, 1977).

³³ In particular, in Chapters on the UN Covenant on Civil and Political Rights, and on indigenous populations.

new minorities; the boundaries of the new states are not based on any concept of ethnic homogeneity³⁴ While secession from Western Empires has resulted in the creation of states, the same states deny the possibility of further secession by disaffected groups, which are required to accept the dogma of the territorial integrity of states.³⁵ Self-determination is now an accepted principle of international law, but a restricted principle for minorities.

As it has already been pointed out in this paper, the idea of self-determination was championed by European liberals from the French Revolution onwards, but it was only with the defeat of the Romanov, Ottoman, Hohenzollern and Habsburg dynasties that a principle of popular sovereignty was substituted for prescriptive right as the legal basis of the international order.

This substitution had disturbing implications for the national, as well as the dynastic empires. The French and the British discovered at the Paris Conference in 1919-20 that while it was possible to oppose the principle of national self-determination in particular cases and on pragmatic grounds - in Ireland, India or Alsace - they had no alternative principle to put in its place. From the point of view of national minorities, however, this was a hollow victory. It proved notoriously impossible to redraw the European political map without creating politically marginalised and often disenfranchised minorities in virtually every state.

Woodrow Wilson had originally conceived Article 10 of the League Covenant in a way which would qualify the permanent freehold of the European successor states. He envisaged circumstances arising, either as the result of demographic change or as a consequence of a major shift in public opinion, which would justify a change in territorial boundaries. This idea was so radical that it was opposed even by his own delegation and would certainly have been strongly resisted by the other major powers at the Peace Conference. The draft was quickly forgotten and the final version of the Article asserted the primacy of territorial integrity, although an attempt was made to soften the impact of this major concession to the sovereignty principle by including a system of minority guarantees.

The League's experience with minority protection has generally been judged a failure. Moreover, the concept of minority rights fell into disrepute after Hitler had invoked it as a justification for his expansion into Central and Eastern Europe. Consequently it was abandoned in the UN Charter of 1945, which instead pledged governments to uphold individual rights. From a minority rights perspective, the Charter thus represents a retreat from the legal position, if not the practical one agreed after 1918. Under the Charter, the principle of state sovereignty is reaffirmed as the basis of international order, but this is combined with the assertion of inalienable human rights. These were separately codified in the Universal Declaration of Human Rights, including the right of all peoples to self-determination.

So much for the formal position. Who in practice would be able to exercise the right? In Europe, the understandings reached at Yalta in 1945 effectively stopped the question being put to the test. The Cold War subsequently froze the political map, incidentally bequeathing to the continent the most stable borders it has enjoyed since the French Revolution. Simply put, self-determination was not a real issue between 1945 and 1989. States were sovereign, or if they were not, there was nothing that could be done about it. As for self-determination, it was implicitly assumed that the peoples of a state had exercised their right at some point in the past.

Outside Europe, national self-determination came to be understood as synonymous with de-colonisation by the European imperial powers, combined with a reaffirmation of the

³⁴ Crawford, J., *The Creation of states in International Law*, (Oxford: OUP, 1979; Day, H., ed., *Border and Territorial Disputes*, (Harlow: Longmans, 1982); Johnson, G.W., *Self - Determination Within the Community of Nations*, (The Hague: M. Nijhoff, 1973).

³⁵ The territorial integrity rule is forcibly summed up in the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514(XV).

principle of territorial integrity within the boundaries inherited from these powers. Indeed, over the past forty years, there has been a rare international consensus across both the east/west and north/south divides that no secessionist right of self-determination should be recognised. Under this formula, states were protected by Article 2(7) of the UN Charter from interference in their internal affairs, including interference on behalf of oppressed minorities.

From a contemporary perspective, it may seem that many of the constraints which currently hinder the effective protection of minorities can be traced to this post-war settlement. It may be worth stressing that the conventional interpretation of self-determination nonetheless has three strong supports, apart from any appeal to cynical self-interest.

The first is practical. The ambiguity of the principle of national self-determination is notorious. Sir Ivor Jennings summed it up in 1956 in a famous remark concerning the UN debate on de-colonisation: „On the surface it seemed reasonable: let the People decide. It was in fact ridiculous because the People cannot decide until someone decides who are the People“.³⁶ Tying self-determination to an existing administrative unit at least has the merit of overcoming this difficulty.

The second justification is philosophical. Its most famous exponent was Abraham Lincoln, who defended the idea of democratic order against the inevitable anarchy which he believed would flow from accepting a right of secession. In his view, in a free society the only way in which a minority could exercise its right of self-determination was by mobilising public opinion. If successful, in time, and through democratic elections, the minority would become the majority.

The third justification for the conventional interpretation is diplomatic. Statesmen in general fear opening a Pandora's box of secessionist and irredentist claims by conceding the legitimacy of a particular case. Western politicians were extremely reluctant publicly to endorse the break-up of the Soviet Union, even including the secession of the Baltic republics whose incorporation in the USSR they had never recognised. Similarly they persisted in supporting the maintenance of the Yugoslav Federation long after it had become clear that the state had already disintegrated in the face of a vicious inter-ethnic civil conflict. On several occasions the former British Foreign Minister, Douglas Hurd, urged the Yugoslav leaders to follow the example of the Africans, who constructed the Organisation of African Unity on the basis of respect for colonial boundaries. Given the enormous human cost of this achievement, it was a strange analogy to choose, but in a view of the subsequent events in Bosnia, the diplomatic logic cannot be lightly dismissed.

The conventional interpretation has three obvious weaknesses which mirror these advantages. First, by confining the principle to de-colonisation, an open invitation was extended to secessionists and irredentists to challenge the basis of international order whenever opportunity offered. International law does not acknowledge a right of minority secession, but since minorities believe, rightly or wrongly, that they have been denied a fundamental human right, they are likely to view the existing legal regime with contempt.

Second, in deeply divided societies, particularly where there are no entrenched democratic traditions, the introduction of a democratic constitution without special provisions for minority protection makes the problem worse rather than better. This is because, as John Stuart Mill was probably the first to point out, where two politically self-conscious national communities share the same polity, the stronger will be tempted to capture the state by democratic means, and then to discriminate against the weaker minority community. In a kind of mirror image of these arguments, opponents of the Maastricht Treaty insisted that we

³⁶ The citation is from Sieghard, P., The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights, (Oxford, New York: Oxford University Press, 1985), Chap. 5, p.362.

European democracies are likely to be undermined by over-liberal policies on mobility and immigration.

Third, under the conventional interpretation which equates state with nation, the international community is inhibited from intervening against governments that engage in the systematic abuse of the human rights of sections of their own population. Under Chapter 7 of the Charter, such intervention is permitted only to repel aggression across international frontiers. Not only is there no right of minority secession, there is also no right of humanitarian intervention.

There seems little likelihood that any formal derogation from the principle of state sovereignty will be negotiated in the foreseeable future. Indeed, any attempt to introduce fundamental changes in the Charter would almost certainly be vetoed by China and opposed by many third World countries. Moreover, the fact that neither the European powers nor the world international community had been able to prevent ethnic cleansing in Bosnia and parts of the former Soviet Union on a scale not experienced since the 1940s makes it difficult to be confident that legal guarantees alone will be any more effective than in the past.

On the other hand, the creation of safe havens for Iraqi Kurds and Shi'ites after Operation Desert Storm, the humanitarian intervention in Somalia and the former Yugoslavia, and the development within the OSCE of an early-warning mechanism designed to alert European countries to minority problems before they deteriorate into open conflict, all suggest that the international environment is now more amenable to political initiatives for minority protection than during the Cold War.

3. A New Transnational Regime?

What, then, are the political prerequisites of a new transnational regime in which national minorities would have some measure of confidence that their interests and rights will be protected? The most important prerequisite will be flexibility, a willingness to differentiate between cases and needs, since neither states nor the minorities within them are all in the same situation. Beyond this there are three possibilities which deserve further consideration.

The first might be called the Maastricht option. A form of European unification in which some powers are progressively transferred to the centre while others are devolved to the regions could possibly provide a way by which minorities could gain autonomy without opting out of either the state or the open economy. It is notable that most ethnically based regional parties in western Europe have always been enthusiastic supporters of European integration, although at present their enthusiasm tends to get stuck at the level of generalities. There seems no reason in principle why the Committee of Regions provided for under the Maastricht Treaty should not in time develop mechanisms to support minority identities as well as economic development. The problem is that the most threatened minorities in contemporary Europe are in countries whose accession to the European Union is not likely to be on the political agenda in the foreseeable future.

A second possibility is suggested by analogy with the few peaceful secessions that have occurred during the twentieth century, such as Sweden and Norway in 1905, Britain and the Irish Free State in 1922, and, most recently, Czechoslovakia in 1993. In these three cases it is clear that the political elites, despite their conflict over identity, nonetheless shared fundamental political values which in the end made peaceful separation possible. Where such residual common values can be identified, it may be possible to reinforce systems of power-sharing - it would not be necessary in all cases to opt for secession - but a system of multilateral surveillance. In economic affairs, countries have gradually come to accept that their economic policies are the legitimate interest of their trading partners, and it is conceivable that through the OSCE and the Council of Europe they might similarly come to regard the protection of minorities as a joint concern.

The pursuit of multilateral surveillance is like the debate about preventive medicine in many Western countries. It is an admirable goal for a reformed international society, but it will not be achieved overnight. In the meantime, as with any disease, there is a real need for an improved capacity for diagnosis and dealing with the symptoms. In the present circumstances, when there is a high probability of a succession of 'post-colonial' crisis, it would be folly concentrate exclusively on long-run planning. Many of the worst threats to minorities that have arisen since 1989 fall into this category. In such crises proposals for consensual democracy or other forms of power-sharing are sadly academic. What is needed is a strengthened international capacity for rapid and politically robust intervention to prevent the massive abuse of human rights.

CHAPTER III: INTERNATIONAL AND EUROPEAN STANDARDS ON MINORITY RIGHTS

1. A Framework of Analyses of Possible Approach

The protection of ethnic, religious, and linguistic groups is one of the oldest concerns of international law. The rise of the state system in the sixteenth and seventeenth centuries and the emergence of an international law reflecting that system necessitated concentration on minority groups. The ideals of national unity, manifested by centralisation of power, a common language, culture, and religion, fundamental to self-identification of the states, tended to express themselves in intolerant attitudes, and repression of those who were perceived as 'others'. Unity in this context seems to correlate with exclusiveness and there was a natural necessity to regulate some of its consequences. For pragmatic as well as humanitarian reasons, international law has been a protective instrument, because the minorities question has never contained itself entirely within national boundaries. Minorities in some states were majorities in others, and the latter states might assert interest in their co-nationals or co-religionists. Pragmatic wisdom required that this transnational effect did not produce international conflict hence the instigation of treaty protection among interested powers. In so far as not all minorities relate to kin states, the mainsprings of international action have also been humanitarian. That the pragmatic and the humanitarian coexist can be seen in the Universal Declaration of Human Rights,³⁷ the standard-bearer of rights in the present age; the Declaration recites in its preamble that „it is essential . . . if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.“ This is a sensible and practical proposition.

The minorities also concern international law in the second half of the twentieth century. A cursory glance at the spectrum of internal and international disputes reveals that a minority of one kind or another is frequently the focus, which justifies the need for continuing corpus of rules.

In summary, the issue for international law, and internal law in a democratic state is to assist in the achievement of justice and order faced with widely different factual situations, demands, attitudes, policies, and possibilities for regulation. For much of the period after the World War II, the minorities issue was elbowed aside by the international community³⁸ because it appeared to raise too many problems, the response to which did not command international consensus. The issue is a complex one. Analysis of the effort of law to deal with the existence of ethnic, religious, and linguistic groups, provided in this chapter, implies reflection on individual and collective rights and duties; the rights and duties of the state and those of the group; on whether minorities are to be eliminated or encouraged, or repressed or tolerated; on the separation of groups or their integration into the state; on rights to equality against special privileges for groups; on the uniformity among citizens of a state or the acceptance of cultural and religious differences; on universal rules of international law or the acceptance of regional laws or principles dealing with minorities on a non-uniform pattern.

³⁷ UNGA Res. 217§ (III), 1948.

³⁸ Thornberry, P., 'Is There a Phoenix in the Ashes: International Law and Minority Rights', *Texas International Law Journal*, 15 (1980), 421.

Should their traditions be preserved or allowed to undergo processes of natural change? What are the respective roles of the state, the international community, and the groups themselves?

At present there has been a widespread feeling in the international community that the age of standard-setting in human rights is over. But this can never be completely the case. New issues and categories of human deprivation constantly impress themselves on us and demand remedial action in the form of more specific international and domestic legal standards. In the area of minority rights, much of the current discussion centres on mechanisms rather than standards. But mechanisms need the support of coherent principles; the two are interconnected.

The coverage of minority rights in the era of the United Nations has been very thin, in sharp contrast to the range of treaties and declarations safeguarded by the League of Nations.

As it has been already pointed out above, there is no reference to minorities in the UN Charter or in the Universal Declaration of Human Rights. To put it another way, the principle of universal human rights on the basis of non-discrimination on racial, ethnic, religious and other grounds was deemed to be sufficient protection for minority groups. The term 'minority' was even omitted from the lists of prohibited grounds of discrimination, though Article 14 of the European Convention on Human Rights and Fundamental Freedoms constitutes a notable exception to the general trend:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. The International Covenant on Civil and Political Rights (1966)

Until recently, the main burden of minority rights in general international law was borne by Article 27 of the International Covenant on Civil and Political Rights:

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 their own culture, to profess and practice their own religion, or to use their own language.

This is a cautious and tentative article which reflects the very limited space that states were prepared to allow minority rights. The text prompts the following observations:

- (1) Rights of minorities may not be universal rights: since the groups may not 'exist' in all states;
- (2) The text refers to the rights of persons and not of groups, thus limiting the community or collective dimension of the rights;
- (3) The members of minorities are not described as *having* the rights - rather the rights 'shall not be denied' them
- (4) The article does not clearly implicate state action or resources to benefit minorities.

Patrick Thornberry, in *International Law and the Rights of Minorities*³⁹ offered an interpretation of Article 27 which tried to overcome some of the above mentioned limitations. The basis of his argument is that a purely negative reading of Article 27 does not correspond with the principle of effectiveness in the interpretation of treaties, which assumes that the article must add to other treaty principles, notably freedom of religion, equality and non-discrimination. Accordingly, the state should act to support minority cultures and not simply take the role of passive bystander if the groups desire the continuation and flourishing of their specific characteristics and contribution to the wider society. It is also proposed that the existence of minorities is a question of fact rather than law and should not be denied by states

³⁹ Thornberry, P., *International Law and the Rights of Minorities*, (Oxford: Clarendon Press, 1991 and 1992).

contrary to fact. Most, if not all, states in the world have minority groups that wish to maintain their distinctiveness in the face of assimilationist pressure.

In my opinion, Article 27 requirements have become a part of universal customary international law. The first requirement of Article 27, that minorities must not be discriminated against, is also covered by Articles 2 and 26 of the same Covenant, as the prohibition of discrimination based on grounds such as race, colour, language, religion and national origin is absolute. This prohibition is enshrined in the Universal Declaration of Human Rights, as well as in the International Convention on the Elimination of All Forms of Racial Discrimination of 1956 and in many other universal and regional instruments. The work of the UN Commission on Human Rights also confirms the universal character of the non-discrimination requirement. The general Comments of the Human Rights Committee on non-discrimination says that „Non-discrimination together with equality before the law and equal protection by the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.“⁴⁰

The situation is less clear with the second requirement of Article 27: that persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. This right does not have such clear support as the non-discrimination requirement in international documents or in practice. Nevertheless I would argue that this aspect of minority rights also has the character of a customary norm of international law of a universal nature and my arguments are the following.

A close look at Article 27 and its practical implementation by different states permits the conclusion that Article 27 does not grant any privileges to minorities in comparison with the majorities. As Gudmundur Alfredsson and Alfred de Zayas write: „special rights of minorities should not be seen as privileges since such rights are rooted in the principle of equality just as in non-discrimination.“⁴¹ The only exception is indigenous peoples, whose protection may need some special measures giving them certain privileges or advantages in specific areas. The second requirement of Article 27 appears to be simply another aspect of the requirement of non-discrimination. Majorities and minorities have an equal right to their identity. Non-discrimination means that everybody should be equal with everybody else to his or her rights and this also covers the right to remain different and to preserve and develop one's identity.

A special provision aimed at the protection of the right of minorities to preserve and develop their identity is needed because the majority may (and in practice often does) threaten the identity of the minority, even if the majority does not pursue a special policy aimed at the assimilation or exclusion of the minority. And as the majority and the minority have an equal right to their identity, this part of Article 27 is in essence a prohibition of discrimination by a stronger party against a weaker one in the right to their identity.

Confirmation of my view that Article 27 is a customary norm of international law may be found in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. In this document the participating states reaffirmed: „that respect for the rights of persons belonging to national minorities as part of universally recognised human rights is an essential factor for peace, justice, stability and democracy in participating States.“⁴²

One very important element of the protection of minorities under Article 27 is the issue of whether states fulfil their obligations by simply not denying minorities their right to identity,

⁴⁰ UN Doc. HRI /GEN/ 1, 4 September 1992, p.25.

⁴¹ Alfredsson G: And de Zayas, 'Minority Rights: Protection by the United Nations', 14 (1-2), *Human Rights Law Journal*, no. 2, 1993.

⁴² 29 ILM 1318 (1990).

or whether states have to take positive action in order to guarantee the implementation of that right. This issue was partly clarified in the Copenhagen Document of the CSCE as well as in the UN Declaration on Minorities.

3. The UN Declaration on Minorities of December 1992

In adopting Resolution 47/135 on December 18 1992, the General Assembly of the United Nations completed an important phase of standard-setting in minority rights. The resolution contains the 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities'. The text can be regarded as a new 'international minimum standard' for minority rights, transcending some of the limitations of Article 27. The major points in the text of the Declaration are:

- (1) *Article 1*: states are mandated to protect the existence and identity of minorities within their respective territories and to take appropriate measures to that effect.
- (2) *Article 2.1*: the provisions of Article 27 are effectively restated and elaborated to insist that basic rights may be exercised 'in private and in public, freely and without interference or any form of discrimination'.
- (3) *Articles 2.2 and 2.3*: members of minorities have wide-ranging participation rights, including the right to participate in decisions affecting them at national and regional level.
- (4) *Article 2.4*: members of minorities have the right to establish and maintain their own associations, without any specific limitation as to type of association.
- (5) *Article 2.5*: members of minorities have the right to maintain contacts with other group members and other minorities, as well as with kin-groups across frontiers. The safeguard for the state is that the contact must be 'free and peaceful'.
- (6) *Article 3*: rights may be exercised individually as well as in community with other members of the group, thus preventing the 'individualization' of rights by the state (e.g., through stipulations that private use of language or exercise of religion is sufficient to meet obligations to minorities).
- (7) *Article 4*: deals crucially with the measures to be adopted by states to support minority rights. Despite being expressed in qualified terms, the obligations to take measures overcome much of the passivity implicit in Article 27. Among the measures are important provisions on mother-tongue instruction (Article 4.3) and injunctions to promote knowledge of minority cultures and religions existing in the state. In turn, members of minorities are encouraged to gain knowledge of the wider society, thus discouraging entirely selfish concentration on minority affairs.
- (8) *Article 5, 6 and 7* provide for minority interests to be duly accounted for in state programmes and exercise in international co-operation. The articles also touch on confidence-building and mutual understanding between states in the matter of minorities, and (in somewhat ambiguous terms) between states and groups.
- (9) *Article 8* tries to link minorities rights with general principles of equality, respect for the rights of other human beings, and concern for territorial integrity of the state. It is very clear that the aim of the measures in the Declaration is not to promote secession or enhance self-determination - such questions are kept off the agenda.
- (10) *Article 9* indicates that the UN system as a whole is expected to contribute to achieving the purposes of the Declaration. In practice, since the intention is to mobilise UN resources behind the Declaration, this is potentially a very important provision.

Apart from the above mentioned remarks a number of general points can also be made. Firstly, the title of the Declaration adds 'national' to the list of minorities in Article 27 of the

Covenant, but it is not clear that this signifies any rule about whether members of minorities must have the nationality or citizenship of the state in which they 'exist'. Such a restriction, however, may flow from the minority concept itself. Germany has insisted that the Declaration is limited to nationals/citizens, but states such as Nigeria envisage a role for the Declaration in combating hostility and prejudice against immigrants or foreigners by suggesting that it applies also to non-nationals. Secondly, there is no definition of minorities at any point in the text; the Human Rights Commission Working Group which drafted the Declaration advised that the adjectives 'national, ethnic, religious and linguistic' constituted sufficient descriptions in themselves. The search for a definition stalled work on the Declaration for a number of years in the mid-1980s. Thirdly, suggestions for including a right to autonomy for minorities were rejected during the drafting. Even lower-level right of 'self-management' was not accepted. Any concept of rights for minorities prefaced by 'self-' was unacceptable to states. Concern for state sovereignty was prominent in the debate on these points. And finally, the rights apply to 'persons belonging to' minorities, not to minorities as such: they remain individual rights, though their collective dimension is slightly more elaborate than is the case for Article 27. For example, Article 1 of the Declaration insists that states protect the existence and identity of 'minorities' and not just 'persons belonging to' minorities.

4. Recent European Initiatives

Besides this 'global' exercise in setting human rights standards, the various European organisations have been attempting to develop appropriate sets of principles in a previously neglected field of law. In terms of their scope, the European instruments tend to concentrate on the single category of 'national' minorities and indicate that the nationality/citizenship element is pre-eminent in the minority concept

A. The Role of the OSCE

The CSCE (since 1994 Budapest summit OSCE) has developed pragmatically, in response to changing conditions in Europe. It fills a gap in the activities of European and transatlantic institutions by being able to act collectively, through diplomacy, with reference to its set of high standards on security relations and human rights. This part assesses its strengths and weaknesses in dealing with problems affecting minorities.

OSCE instruments contain important principles for minority rights and reflect the fundamental notions that minorities are a permanent feature of states as well as a source of enrichment of European society.

From a legal viewpoint, the OSCE instruments are generally progressive. But they often lack internal consistency and are not free from elements of regression. For example, the reference in the 1992 Helsinki Follow - Up Meeting to 'persons belonging to indigenous populations'⁴³ is below the level of current international standards on two counts. First indigenous rights are also collective rights and not purely individual rights; and, second, UN terminology refers to indigenous 'peoples' and not just 'populations'. The OSCE has nonetheless raised the profile of minority rights in the European framework, and its rather loose and unstructured set of standards contains a range of fundamental principles which considerably advance the minorities' case.

With the reference to standard-setting all OSCE work on minorities stems from the 1975 Helsinki Final Act. Principle VII of the Declaration on Principles Guiding Relations between participating States lays down that:

⁴³ CSCE. *From Vienna to Helsinki: Reports of the Inter-Sessional Meetings of the CSCE Process*, prepared by the Staff of the CSCE, Washington, DC, April 1992, p.152.

The participating states on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.⁴⁴

This cautious, compromise language covers the position of those states which maintain that they have no minorities, emphasises that rights are to be enjoyed and protected individually (hence the ‘persons belonging’ formula), and offers less to minorities than the UN Covenant on Civil and Political Rights, which lays down the right of persons belonging to minorities to enjoy their culture, to practice their religion and to use their language. The champion of the entry of minorities into the Helsinki process in those days was Yugoslavia. Most states preferred not to deal with the subject as a separate matter.

The first major change in this trend took place at the Vienna follow-up meeting, which began in 1986. The concluding document, adopted in January 1989, promised sustained efforts to implement the provisions of the Helsinki Final Act in respect of minorities. States ‘will refrain from any discrimination against such persons and will contribute to the realisation of their legitimate interests and aspirations in the field of human rights and fundamental freedoms’. States will also ‘protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory’.⁴⁵ These commitments introduced to the CSCE the idea of positive action to assist minorities in the four areas generally recognised as indicating the existence of a separate group.

That was as far as the process went before the fall of communism. The leap forward took place at the Human Dimension Conference in Copenhagen in 1990 and Moscow in 1991. The principles enunciated there were elaborated at a meeting of experts on minorities in Geneva in July 1991, and were added to in certain respects at the Paris summit in November 1990 and at the Helsinki follow-up meeting in 1992. The result is a set of standards, comprising both rights and questions of public and international policy. The Charter of Paris of the CSCE Summit Conference (21 November 1990) affirmed that: ‘the ethnic, cultural, and linguistic identity of national minorities will be protected and the persons belonging to national minorities have the right freely to express, preserve and develop the identity without any discrimination and in full equality before the law’.⁴⁶

The Charter of Paris expresses curtly what is expressed at greater length in the Document of the Copenhagen Meeting of the Human Dimension (5 to 29 June 1990) in 11 substantive articles with multiple subdivisions. No definition of ‘minority’ is attempted in the text, which confines itself to ‘national’ minorities. The rights are those of ‘persons belonging to’ groups, rather than groups as such, reflecting a familiar wariness about collective rights for minorities. Some articles go far in relation to existing international law: for example, in the rather peculiarly worded Article 35: ‘. . . The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities in establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with policies of the State concerned.’⁴⁷

However, the above reference to ‘international law’ conceals some of the difficulties inherent in the CSCE (at present OSCE) process. These principles are political commitments: they are not legally binding. It means that the instruments do not have the hard and fast quality

⁴⁴ Conference on Security and Cooperation in Europe, Concluding Document, Helsinki, 1975, p. 23.

⁴⁵ Conference On Security and Cooperation in Europe, Concluding Document, Vienna, January 15, 1989, Journal no. 397, p. 7.

⁴⁶ The Charter of Paris For A New Europe, Europe Agence Internationale D’ Information Pour La Presse, Bruxelles, Europe/Documents, no. 1672, 14 December, 1990, p.2.

⁴⁷ Document of the Copenhagen Meeting of the Conference of Human Dimension of the OSCE, MAE Contez. Diplomatico, October 3, 1990, p.11.

of treaties and represent a set of political obligations rather inconsistently related to customary international law. They appear to represent a less demanding regime compared to that of the Council of Europe, though their immediate advantages are:

- a) 'political' agreements or not, they commit States to a broad prospectus of obligations to minorities, while the Council of Europe standards have not been finalised; and
- b) the OSCE net is cast wider than the Council of Europe which has less member States. The OSCE implementation process have been already dealt with a number of cases involving minorities.⁴⁸

The period of standard-setting is largely over. In responding to the problems of minorities the OSCE is trying to fill two gaps: scrutiny of the record of states in putting agreed principles into practice; and intervention in areas of tension and conflict within and between states involving minorities.

Success will depend largely on the degree of commitment by states. Commitment will show itself in willingness to adjust domestic law and administrative practice, and in readiness to commit resources in terms of people and money to OSCE activities. The OSCE will have a struggle, like the United Nations, to achieve a degree of loyalty and commitment.

At present the issue of main importance is the process of implementation. The OSCE has developed four means of encouraging observance of its principles: periodic review of states' adherence to their obligations under the human dimension of the OSCE, including their behaviour towards minorities; the human dimension mechanism - an intergovernmental complaints procedure; the High Commissioner on National Minorities; and ad hoc responses to particular crises involving minorities.

(a) *Implementation review*

This was a major feature of the CSCE during the Cold War. States outside the Soviet bloc used the follow-up meetings to raise particular issues and to press for improved behaviour - not that treatment of minorities featured largely in the process. Since the end of communism, the emerging democracies have usually been given the benefit of the doubt, and there has been little public criticism. However, this trend has been changing: at the Helsinki follow-up meetings there were calls for a more intensive review of states' performance, and for less effort to be spent on the formulation (or re-formulation) of standards. The meeting provided for annual implementation review meetings, the first of which took place in Warsaw in September 1993. This meeting led to criticisms of the performance of a number of states, and at its Rome Council in December 1993 the CSCE asked its Committee of Senior Officials (CSO) and its Permanent Committee to follow these up.

(b) *The human dimension mechanism*

This has been used very often, mainly in 1989 and 1990, but also more recently. For example, Hungary invoked the mechanism against Romania in respect of the position of the Hungarian minority in Transylvania. The Rome Council (December 1993) agreed to streamline the mechanism and to promote its use. But the evidence, such as it is, suggests that states are less interested in pursuing it than they might be, perhaps they are more interested in the activities of the High Commissioner on national Minorities.

(c) *The High Commissioner on National Minorities*

The delegations present in Helsinki in summer 1992 and in Budapest in December 1994 understood that the OSCE, with its comprehensive political structure, its joint commitments and its broad mandate is the right forum for co-operation in the field of human rights. The Budapest Review Conference emphasised the role of the OSCE as a primary instrument for

⁴⁸ Mc Goldrick, 'Human Rights Developments in the Helsinki Process', *International and Comparative Law Quarterly*, no. 39, 1996.

early warning, conflict prevention and crisis management. The place of human dimension in this context was upgraded. It was felt that OSCE norms and human rights principles should be understood as abstract goals but also as a basis for national practices.

The post of High Commissioner on National Minorities was established - a most successful tool for early warning - to provide a mechanism for warning and early action on tensions resulting from ethnic conflicts and involving national minority issue. An impressive system of gathering and receiving information about national minorities - a permanent and constant monitoring arrangement - was set up to identify at the earliest possible stage those situations requiring attention and action. Through direct contacts and political persuasion with governments and minorities the High Commissioner can be instrumental in preventing disputes from flaring up.

Two examples of the High Commissioner's work can be cited. In Estonia, the proposed introduction of the new Law on Aliens in June-July 1993 inflamed opinions among the Russian-speaking community. President Yeltsin and other leading Russian politicians spoke rhetorically against the proposed law. After an intervention by Max van der Stoep, President Meri of Estonia agreed to modify the proposed law and opened round-table talks with the Russian community. Max van der Stoep also intervened with the positive effect in the disagreement between Albania and Greece in 1993 over the Greek minority in Albania.

(d) The advantage of the High Commissioner's operation are that he can operate swiftly and confidentially anywhere in the OSCE within his mandate. If the participating states will not let him enter or travel freely, the matter is to be discussed by the CSO. This is a long-term exercise, and only time will tell to what extent the considerable potential of the office will be realised.

(e) *Crises*

The OSCE sent its first fact-finding mission to an area of conflict in February 1992 - to Nagorno-Karabakh, Armenia and Azerbaijan. Since then, it has become deeply involved in trying to broker a cease-fire and a long-term solution to the dispute. It has also sent resident missions, among others, to Georgia, Estonia, Kosovo, Latvia, Macedonia. Common threads are to foster improved relations between communities by mediating in local difficulties and by making known the facts of particular incidents; to help negotiate political solutions (Moldova and Georgia); to be the eyes and ears of the international community; and to contribute to efforts to prevent the spread of fighting.

(e) *OSCE options and implications for future*

As far as options and implications for future are concerned it is clear that the OSCE will not take action in four specific areas. First, it will not agree to prescribe a single set of policies on the form of government for minorities as a panacea. It will recognise the diversity of situations and the need to treat each one on its merits and to find the solution which fits and which can be negotiated. It is not in the business of promoting a regime for minorities based on a supposed group right to self-determination or autonomy, whether cultural or territorial. But it should respect the right of individual groups and states to advocate solutions based on a form of autonomy and it is likely to find itself promoting regional devolution or autonomy as a basis for settlements where appropriate, as in Nagorno-Karabakh, South Ossetia and Transdniestria.

Second, the OSCE will try to emulate the large-scale co-operation programmes of the Council of Europe. The Office of Democratic Institutions and Human Rights in Warsaw will remain relatively small, though with a variety of tasks ranging from organising the observation of elections on behalf of the OSCE, through servicing OSCE human rights missions and mechanisms, to the organisations of seminars involving all OSCE states.

Third, the OSCE will not seek to establish a judicial or treaty-based system for the protection of members of minorities. It will leave this to the UN Human Rights Committee, which supervises the Covenant on Civil and Political Rights, and to the Commission Court which do the same for the European Convention on Human Rights. There are no takers in the OSCE at present for the idea that there should be a treaty-based body which can call states to account for infringements of a body of law on the treatment of minorities.

Fourth, the OSCE will not be endowed with mandatory powers to impose sanctions or take enforcement action, on the line of Chapter 7 of the UN Charter, in order to help end crises involving minorities. Further, states are too attached to a founding principle of the OSCE - the sovereign equality of states - to wish to move rapidly to a limited membership body, taking decisions by vote, on the lines of an European Security Council. At present the OSCE is in a process of seeking, as it did in 1992, to improve decision-making by other means while retaining the consensus principle.

In sum, one may say that OSCE will continue to be a means of achieving international political co-operation. As such it will help to deal with the problems affecting minorities. With the former Yugoslavia issue still unsolved, and the lives of millions ruined, it is hard to be optimistic. But the OSCE should be welcomed and encouraged for the modest progress it has made. It has picked up speed: to maintain momentum it needs to be seen to have succeeded - or at least to have made a difference - in the territories in which it has chosen to involve itself.

B. The Role of the Council of Europe.

After the Second World War the creation of the Council of Europe was the first political and institutional reply to the urgent need to overcome divisions and conflict in Europe. The organisation's statutory mission was to achieve a greater unity between its member countries, not only on the basis of a wide network of practical co-operation measures but, above all, on the basis of a specific political project: the commitment of member countries and their people to the principle of pluralistic democracy, human rights and the rule of law. This transnational concept of peaceful coexistence under a guaranteed regime of common values aimed in particular at gaining respect for the dignity of all human beings regardless of their racial, religious and other differences, and at sustained efforts towards reconciliation between peoples.

This project deliberately took into account the most striking characteristics of Europe as a continent: its diversity of peoples determined to maintain their own traditions and culture and at the same time its common experience of state-building on a territorial basis. There exist in Europe many different types of states: those made up of a population with identical traditions and cultures; multinational states within which the composite elements were given a large degree of autonomy, for instance on the federal model; and, in many cases, states made up of groups of various national, cultural or religious origins.

These situations inevitably lead to certain tensions and to differences in the search for adequate guarantees of everybody's rights. There are two main attempts at a solution:

- (a) the model of society based on the universality and equality of rights for all its members, the enjoyment of these rights being the responsibility of the state;
- (b) the attempt to establish one's identity through belonging to a community with its own specific culture, religion, ethnic origin and way of life - that is, the right to be oneself.

Both these approaches are legitimate and need democratically agreed solutions.

A society without conflict has always been a fiction of various shades of totalitarian doctrines and regimes. At present we are again living through a terrible example of such a friction on the territory of the former Yugoslavia. The perpetrators of the ideology of 'ethnic cleansing' are pursuing a totalitarian policy not only by changing arbitrary borders on the basis of ethnic criteria, but by committing ethnically motivated acts of murder.

This situation also illustrates how closely human rights are linked to the minorities issue. It is perfectly clear that the notion that the continued existence of a state might be possible only if its population is ethnically, culturally and religiously homogenous is in itself a violation of human rights. The basic legal definition of human rights necessarily includes a multicultural, multiethnic and multi-denominational vision of what constitutes a state. This also applies to regions and to the individual constituent states in a federal state.

In developing its basic concept of promoting reconciliation, mutual understanding and increased co-operation by respecting the diversity of peoples and their traditions, the Council of Europe has, over the past 45 years, contributed considerably to improving the situation of minorities within its member countries. Its aims include:

- (a) the observance of human rights for all without discrimination on any ground such as race, colour, religion, national or social origin, or association with a national minority;
- (b) the development of the scope for freedom of action in civil society, allowing groups of people to shape their own cultural, social and religious destiny.
- (c) increasing opportunities for transfrontier and regional co-operation, thus reducing the divisive effect of frontiers.

The structure of the organisation has facilitated the successful combination of these different but complementary approaches. Its two statutory organs are the Committee of Ministers, responsible for intergovernmental co-operation, including standard-setting activities in the field of human rights protection; and the Parliamentary Assembly, in which the representatives of national parliaments are associated with the development of European co-operation. The activities of the Council of Europe are, moreover, associated with those of representatives of local and regional authorities in the member countries as well as of international non-governmental organisations (NGO). This structure has established a climate of genuine partnership, which is one characteristic of an open society.

Until 1989 a similar process was not possible in the closed societies of Central and Eastern Europe. The difficulties stemming from this fact are all more serious in that, for various historical reasons, peoples of many different origins and cultures lived together in a more complex pattern in this part of Europe than anywhere else. Furthermore, the newly achieved freedom brought into the open frustrations and dissension which for a long time had been artificially stifled by ideological constraints.

Today, the Council of Europe has been gradually opening up its structures and activities to all these new democracies in Central and Eastern Europe; some have already become full members. At the same time the organisation is faced with a question that is now more acute than ever: what contribution towards solving minority issues could be made by its fund of standard-setting instruments and its experience in other contexts in strengthening confidence between members of distinct groups

(a) *The legal protection of minorities*

In the standard-setting field the Council of Europe's main contribution to the protection of minorities still lies with the achievements of the European Convention on Human Rights. The member states of the Council of Europe, all being Contracting Parties or signatories to the European Convention on Human Rights, recognise a number of fundamental human rights. This Convention is important in several aspects for the protection of minorities,

First of all, the human rights recognised by the Convention are guaranteed to all persons coming under the jurisdiction of one of the contracting states. The Convention therefore protects not only the nationals and citizens of a state, but also any other persons affected by a measure taken by the authorities of that state.

Several of the rights thus secured are of obvious interest for the protection of minorities:

- (a) the right of everyone to freedom of thought, conscience and religion, including the freedom to manifest one's religion or belief, either alone or in community with others, in public or private, in worship, teaching, practice and observance (Article 9);
- (b) the right of everyone to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers (Article 10);
- (c) the right of everyone to freedom of peaceful assembly and to freedom of association with others (Article 11);
- (d) the right to education, including the right of parents to ensure such education and teaching in conformity with their own religion and philosophical convictions (Additional Protocol, Article 2).

Moreover, the enjoyment of rights and freedoms set forth in the Convention must be secured without discrimination on any ground such as sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14).

It should be pointed out that some of these rights entail for those enjoying them the possibility of exercising them in community with others, that is to say collectively. This may be relevant to the situation of ethnic, national or religious minorities, particularly in the case of freedom of religion and freedom of peaceful assembly and association with others. The enjoyment of these rights must therefore also be guaranteed when their holders exercise them in a community.

Lastly, the importance of the Convention lies not only in the scope of the rights protected, but also in the machinery of protection established in Strasbourg to investigate alleged violations and to ensure respect for the obligations under the Convention.

However, it must be pointed out here that the European Convention on Human Rights does not contain a positive 'minorities article'. *The Belgian Linguistics Case* before the European Court of Human Rights in 1968 effectively brought to an end the attempted development at the Council of Europe of an additional protocol to the Convention regarding the rights of persons belonging to minorities. The Council of Europe has occasionally expressed interest in the situation of minorities in a number of countries: the Parliamentary Assembly has passed a number of recommendations and resolutions on the situation of, *inter alia*, minorities in Romania, minorities in Bulgaria, and ethnic Germans in the former USSR.⁴⁹ Recommendation 1134 (1990) addresses some general principles on the rights of minorities.

European developments since 1989 have shown that the protection of national minorities has become a matter of extreme urgency. The Parliamentary Assembly of the Council of Europe feels that the definition and effective guarantee of the rights of national minorities are an unavoidable obligation of the international community. Effective legal protection of minorities' rights are considered to be one of the paths that must be followed in order to try to defuse ethnic conflict and lay lasting foundations for peace on the European continent.

Within this context, the European Commission for Democracy Through Law, known as the Venice Commission - a body of eminent constitutional experts set up in 1989, as a partial agreement, under the aegis of the Council of Europe - took the initiative in working out the proposal for a draft European Convention for the Protection of Minorities. This proposal was submitted for consideration to the Committee of Ministers, the organisation's decision-making body.

⁴⁹ Parliamentary Assembly of the Council of Europe Resolution 830 (1984), and recommendation 1114 (1988) on the situation of minorities in Romania; Resolution 846 (1985) on the situation of ethnic and Muslim minorities in Bulgaria; Recommendation 972 (1983) on the situation of the German ethnic minority in the Soviet Union.

In fact, at present, in terms of general regulation, two instruments deserve attention. The first is the Charter on European Regional or Minority Languages. The idea of the Charter was first proposed by the Standing Conference of Local and Regional Authorities in Europe, which drew up the draft for such a Charter in 1988. The initiative received the full support of the Parliamentary Assembly. The Committee subsequently instructed an intergovernmental Committee of experts to prepare a draft text. In June 1992, the Committee of Ministers adopted, as a Convention, the European Charter for Regional or Minority Languages. This aims to ensure, as far as possible, the use of regional or minority languages in education and the media, and to permit their use in judicial and administrative setting, economic and social life, and cultural activities. The Charter, on which legislation in Council of Europe states should be based, will also be able to give guidance to many other states on a difficult and sensitive subject because it can benefit minorities whose most distinctive feature is, in fact, their language.

The second initiative was the proposal adopted by the European Commission for Democracy Through Law (the Venice Commission) in February 1991 for a European Convention for the Protection of Minorities. The field of action of the Commission, which consists of experts appointed by 20 states⁵⁰ of the Council of Europe, is the guarantee offered by law in the service of democracy, and this includes the protection of minorities. The Convention was adopted by the Committee of Ministers of the Council of Europe on 10 November 1994 and opened for signature by the member States of the Council of Europe on 1 February 1995. Non-member states have also been invited by the Committee of Ministers to become Party to this instrument.

It is an ambitious document in the rights envisaged and the procedures for implementation, which centre on a European Committee for the Protection of Minorities. The overall thrust of the Convention is clearly to favour the protection and development of minority identity in cultural, religious and linguistic terms, free from attempts at forced assimilation. Minority participation in public national and regional affairs is foreseen, as well as cross-border contacts between groups. Public use of minority languages under certain limitations is also referred to, and linguistic educational rights.

(b) Practical on-the-spot measures through pilot projects

Apart from its contribution to the legal protection of individual freedom in general and minority rights in particular, the Council of Europe has been working on establishing a climate of confidence by promoting mutual understanding and strengthening confidence in human relations. Any steps to establish a climate of confidence must primarily be taken on the spot through measures specially designed to promote relations between minorities and the majority in given situations.

One method already used by the Council of Europe - in the field of multicultural education and community relations - has been to conduct pilot projects in sites chosen for their practical interest with regard to minority problems. In the context of its contacts and co-operation with countries of Central and Eastern Europe, the Council of Europe has developed similar pragmatic pilot projects with the following aims:

- (a) to promote mutual acquaintance and understanding with a view to peaceful coexistence;
- (b) to combat racism, intolerance and xenophobia through the application of non-violent solutions;
- (c) to break down barriers between different communities through schemes based on a shared experience, encompassing human rights and peace studies, and intellectual activities.

⁵⁰ Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey.

The initiators of the pilot project may be member or non-member countries, regions or local authorities, schools or universities, NGOs or the media. The fields covered by such projects are mainly education, culture, media, youth, legal, political and social questions, local democracy and the environment.

A special impact has been put on the issue of education. Education is an important source of the bias and prejudices which play a significant part in determining perceptions of other people. The teaching of history is, therefore, another priority project, and, in fact, has always been a priority activity in the Council of Europe's educational programmes, since it is so important in shaping young people's attitudes towards other countries, races and religions. The discovery of 'others' must be the discovery of a relationship and not a barrier. The aims and content of such a pilot project in a given geographical area (for example, Austria, Hungary, Slovenia, Slovakia and Romania) would be to study prejudices in the teaching of the history of the countries concerned, with a view to dispelling them; to work out a tolerant, impartial approach to history and hence to strengthen mutual confidence.

In sum, the Council of Europe's activities in the standard-setting field, together with its whole activity as a multilateral co-operation network at governmental, parliamentary, regional and local levels, undertaken in close collaboration with NGOs, are directed at fostering mutual understanding and reinforcing confidence in human relations. Today the organisation - which operates on a pan-European level - contributes to legal and democratic security, to domestic stability and to the improvement of relations between countries and peoples in the humanitarian, social and cultural fields. For the countries of Central and Eastern Europe, which still suffer considerable identity problems, this concept of European co-operation, in preparation for future European integration, has become increasingly attractive. It is seen as a vital alternative to the concept of the all-sovereign nation-state which is being presented again by those who want to maintain or acquire political power by undemocratic means, as the ultimate justification for political self-determination. For the sake of pluralist democracy, individual freedom and the respect for minority rights in Europe, therefore, it seems essential to maintain and to strengthen the scope for a transnational regime through the Council of Europe and its activities.

CHAPTER IV: LEGAL SYSTEM AS A MEANS OF PROTECTING RIGHTS OF MINORITIES: COLLECTIVE RIGHTS IN THE CONSTITUTIONS

1. Constitutional Devices and Legal Arrangements

An important issue is how the policies and responses of governments and international actors affect the extent and the outcomes of ethno-political conflict. This chapter has been focused on two issues: what legal rights have national minorities in a democratic state, and on

the ways in which changes in government policies shape the internal processes of mobilisation and conflict

The new democracies in Central and Eastern Europe have been trying to induce and regulate social changes by reconstructing their political and economic institutions to embody and to promote innovation, and to enhance their efficiency by decentralisation. They have engaged themselves in conflict management. They have tried to use language to draw the nation together (Latvia, Estonia). They have tried to direct the economy and national wealth for national objects. This approach has had sometimes a flavour of authoritarianism. The history of such attempts is relatively short in Central and Eastern Europe, and in some cases (Hungary/Slovakia, Hungary/Romania, Latvia - Estonia / Russia) an intensification of ethnic conflict and exacerbation of minorities problems have occurred. To integrate attempts, the minorities often respond by (having in mind the communist past experience) using similar approach - they rely on the ideology of self-determination, they consolidate a consensus as the result of suffering discrimination, and they point to the economic advantages of independence for their region.

Where the new states are being created, there is a need of willingness to allow the certain degree of self-determination to minorities. Law has the potentiality of affecting conduct, of creating new patterns of conduct, of shaping attitudes, and of providing a framework for political competition, compromise and accommodation. Obviously, it would be a legal megalomania to imagine that legal regulation can stem powerful political, economic and social forces, but law can, particularly in the long run, affect the framework in which these forces operate, and can reinforce or weaken the claims of particular groups in society, whether these claims be political, economic, social or cultural.

A convenient starting point for the analysis of the effect of the law on minority groups is a catalogue of existing constitutional practices examined from the functional aspects, i.e. listed on the basis of who does what to whom. In the context of a study of majority/minority group relations the functional aims will either be integration of the groups and individuals into the larger society, or maintenance of difference between groups and individuals in that society. The techniques for furthering integration fall into two main categories: first, benign approaches, which allow the minority the choice of joining the dominant group and which are usually labelled assimilationist approaches; and the second domination devices, where the integration is to be achieved by the imposition of the political, economic and cultural standards of the dominant groups. In contrast the technique of pluralism is usual where differences are sought to be maintained. Then groups will, in addition to their participation in some common and compulsory institutions, be permitted or accorded also 'alternative or 'exclusive' institutions for particular purposes so that they, as a sub-nation, can fix their norms. If these arrangements are recognised by law there is formalised pluralism. If in contrast, groups are not recognised as such, but institutional arrangements are made effectively to give the groups, without specifically designating them, then there is informal pluralism. Seldom is one technique alone applied - the same elite may apply some assimilationist, some pluralist and some techniques of domination simultaneously

In this chapter we deal only with decision-makers in nation states and the discussion is confined to national legal arrangements. The question this chapter seeks to raise is: what can be done by internal laws in regard to minority groups

A. Assimilationist approaches

The aim of such approaches is to eliminate differences of treatment between group and group, and individual and individual. Differences are not recognised by law - although there is usually an informal toleration of social groupings, and formal toleration to the extent that freedom of association is recognised by law. Assimilationist techniques create formal equality

before the law, and, where group members have rights, it is in their individual capacities, and not as part of a majority or as part of a minority of the population. There are in fact two complementary principles involved in this approach: the first is the equality principle where all are to be treated equally; and the second is the non-discrimination principle, reinforcing the former by negative prohibition on treating different persons in the same circumstances less favourably than other persons in those same circumstances are or would be treated.

An idea of the numerous techniques to secure equality and non-discrimination and ultimate assimilation can be obtained from the catalogue that follows:

1. *Bills of Rights* - enumerating civil and political rights; conferring social, economic and cultural rights; protecting citizens only; protecting all persons within the jurisdiction.
2. *Special anti-discrimination constitutional provision* - rendering laws and executive action contrary to them invalid.
3. *Constitutional protections for the enactment of certain laws* - special procedures specified in order to amend constitutional protections e.g. weighted majority (say 2/3), or a referendum, and in federal states a requirement additionally of the assent of a majority of the regional units.
4. *Parliamentary control* - to ensure fairness, equality and non-discrimination, and justice.

These techniques are designed to ensure good government in the sense of fairness, justice, equality and non-discrimination for all individuals and formally recognised group organisations (e.g. trade unions, clubs) in democratic society. They are certainly not designed to enhance or to reduce the relative power position of particular minority groups. Nonetheless the cumulative effect of such measures is in the long run to integrate individuals and groups in the greater society, for individuals' group allegiance to fade, and for the relative influence of groups as a whole to be diminished. Competing claims for scarce resources then tend to be couched in individual, class, political, or economic terms rather than in language of minority cultural group claim. Consequently the minority cultural groups as such become less significant politically. Indeed, in an assimilationist society, the long run tendency is to political elimination of minority groups.

B. Domination Devices

Domination as a technique may be scaled along a range of attitudes from the most extreme position, where the majority group seeks absolute hegemony within the state, to a situation where the élite of the dominant group is seeking to strengthen its own position relative to other groups by giving their own group members greater access to resources of political, economic and cultural power, or to situations where the aim is to maintain the *status quo* by supporting their own groups' current power position.

This paper does not deal with states where the controlling élite have extreme domination or purification approaches. In such situations, if the power holders have sufficient force, they will exclude the minority groups by partition, or secession, or boundary redrawing, or by mass population expulsion whether directly imposed or indirectly ensured by the creation of intolerable living conditions for the minority. There may even be genocide. For the cultural minority within such a state there is no 'future'.

In the standard domination situation there are noticeable departures from the equality and non-discrimination principles. To the naive observer it is less obvious that when the *status quo* in a state is maintained there is equally domination in the form of an attempt to freeze existing power patterns. Failure by non-minority group members to perceive domination is even more frequent where existing state institutions do not formally recognise the cultural

distinctiveness of minority communities. Such societies are often described as assimilationist. If the situation is analysed it is apparent that 'forced assimilation' is domination, whether this is implemented by the provision only of majority-determined linguistic schooling or religious facilities, or by state preservation only of majority cultural symbols. It is domination in the sense of maintaining current political, economic and cultural predominance of the majority group, and domination in that it denies alternatives to the other groups whose members are subjected to enforced integration.

All departures from the equality and non-discrimination principles are not necessarily designed to confer economic and cultural benefits on the majority group and its members. Although this is the most frequent reason for departure from such principles, the dominant group's élite may instead adopt a strategy of destroying minority groups' motives for larger scale political change by encouraging political stability through altering disadvantageous patterns or imbalance in the economic and cultural spheres as between different group members. (Many of the élite may have moral as opposed to merely Machiavellian motives). In such an event legal arrangements will be used to improve the position of group members from the minority groups whose economic and social position has been selected for upgrading such a strategy to remedy imbalances resulting from preceding structural patterns in society is termed 'affirmative action'. This is discussed under the heading of domination, not merely because it is brought about by the same techniques used to further the interest of one group and its members as opposed to another, but also because the following of such policy is in essence coercive, being employed at the behest of the élite of the domination group, which has decided to manipulate the positions of groups and individuals for whatever reason.

It is artificial to distinguish between institutional arrangements in the political, economic and cultural spheres, institutions being multifaceted with impact in all spheres. It is equally artificial to distinguish institutional arrangements which shape ideology from those which are concerned with material force. Nonetheless for the purpose of exposition it is convenient to analyse domination techniques as being applied in four major spheres of state action viz. the political, the economic, the cultural, and that of order backed by physical force. Within these spheres the legal techniques a dominating élite can select can be catalogued as follows:

1. *The Political Sphere*

The major technique employed to limit the political power of minority groups has been electoral manipulation. There are many variations. Potential voters may be disenfranchised by combination of restrictive citizenship law and electoral law. There may be voting registration procedures applied effectively against minority groups members. There may be residential requirements to exclude potential supporters of minority etc.

Much more drastic than these manipulative methods is the authorisation by law of population transfer of minority communities to areas where they are not regarded as a political threat.

A more sophisticated approach, but which equally effectively denies all political rights (and many economic rights which are not accorded to aliens) is the enactment of restrictive citizenship laws. This techniques has been applied to the Russians under the new constitutions in Latvia and Estoni ⁵¹

2. *The Economic Sphere*

⁵¹ Bungas, D., Girnius, S. and Klonka, R., Citizenship Legislation in the Baltic States, RFE/RL, Research Report, vol. 1, no.50, 1992, p. 38.

The legal mechanisms designed to secure economic advantages for one ethnic group as opposed to another are the same irrespective of the motivation for their enactment. They may of course be designed to perpetuate the economic power of one group or they may be designed to remedy what is seen by the dominant élite as imbalance in patterns of economic power as between the various groups. Such imbalance may have occurred in respect of minority community which has a disproportionately low share of national wealth and has had economic opportunities denied to it.

Whether laws and administrative action designed to remedy such imbalance are described as 'affirmative action' or 'reverse discrimination', or as 'national development' or 'discrimination', will depend upon whether the commentator is a beneficiary of the laws or not. If the emphasis is on remedying disadvantage and lack of opportunity (such as special educational programmes, special technical assistance programmes, special loan programmes for help in setting up co-operatives) it can be more readily tolerated by non-recipients. If it becomes an instrument of economic attack on other communities by denial of the right to engage in their traditional occupations, then it is proper to describe the technique as one of domination. In contrast, if the economic advantages are a 'plus' in the system, an increment, rather than something already in existence being transferred from one group to another in a zero-sum game, then it would be unfair to describe the new laws as primarily being oriented to domination. However, although, non-zero sum transfers are less open to criticism, even those involve departure from the equality of access principle from the standpoint of an individual denied access to the newly available resources.

Another technique for changing the economic structure is frequently employed where a minority group has hitherto monopolised the roles of middleman in trade or of small scale industrialist. Administrative discretion to refuse or grant trading or business licences and import or export permits is used on racial grounds or on grounds of non-citizenship.

Economic nationalism throughout the world has resulted in policies stipulating that work permits are required before any alien can be employed. Such a policy is justifiable to protect the inhabitants of the state against unemployment and unfair competition from migrant workers willing to accept lower wages and a lower standard of living.

The power of private employers to discriminate has in most states been permissible in terms of the law of contract and is widespread in countries with majority/minority ethnic and religious divisions. If law does not prohibit, it authorises. In the United States and in the United Kingdom such discrimination is unlawful, and a variety of mechanisms, both conciliatory and adversary, have been set up to prevent discrimination.

Perhaps equally important in determining employment patterns are trade union rules and practices about membership and provisions of union facilities, especially representation. If unions discriminate, minority groups are likely to be denied vocational employment opportunities because many employers prefer unionised labour as they then have to deal only with union representatives. In the United Kingdom since 1969, racial discrimination by unions has been unlawful, while the same results have been achieved in the United States by judicial development of the 'equal protection' doctrine combined with the statute.

3. *The Cultural Sphere*

To discover whether cultural laws are used to secure domination would require study of the administrative practices of particular state. There is often variance between the legal provisions and the practice, which may be tolerant and accommodating. Furthermore laws in this area are differently perceived from different viewpoints: what is described by a minority as forced assimilation is seen by the majority as preservation of national identity. Language, schooling and cultural habits and traditions can be explosive issues in multiethnic states.

Various possibilities are open in respect of official language policy. There may be one language only; there may be multiple languages on an equal basis; and there may be a hierarchy of preferable languages. In federal and pre-federal states the situation may be complicated by different official languages at the federal and the regional level. The significance of official language is that it is usually necessary to speak that language to advance economically. Consequently parents from other linguistic groups tend to educate their children in official language schools, thereby in the long run downgrading the significance of their own language.

Adoption of a single official language is a policy seen as domination by majority group (as in Estonia and Latvia). Specification of use of the majority language seems to be particularly contentious in the context of the conduct of government business, including letter writing, or in the context of requirements that civil servants pass language examinations, or in the context of a particular language being specified for use in the courts, or if a particular language is specified as the medium of school instruction. Another context in which single official language use (or, conversely, limited use of a minority group language) is seen as designed to weaken the minority's cultural inheritance is that of language use on national radio and television networks. Unless minority languages are used by the media, their proponents fear that they will not remain living languages. Language used in public places may also be regarded as symbolically significant: this is the case in connection with demands for road traffic signs and public notices to be in a minority language (as demanded by Hungarian minority in the Slovak Republic, or in Romania in Transylvania).

In multiethnic countries there are many aspects of and issues in education which can become the focus for intense antagonism. There are major questions to be decided. Should there be a monopoly of state education, or should voluntary schools be permitted to continue in existence; be permitted to increase in numbers; or have their educational programmes carefully directed by the state? If there are voluntary schools, should these receive financial support; if so, how much; should they be permitted to charge fees? By the way in which an education system answers these questions can it be judged. Poland, with separate voluntary schools state-funded, is the example of the state where the state education authorities have compromised and implemented policies countenancing pluralism.⁵²

In the sphere of cultural habits and traditions there are contexts which give rise to perceptions by minority groups that they are being dominated. National holidays, the national flag, and national dress may reflect only the traditions of the majority group. In the context of religious observance denial by law of freedom to conduct rituals, to observe dietary rules and to observe religious holiday requirements will be seen as weakening the cultural traditions of minority groups. In the present century with increasing state funding as the major source of support for cultural activities, if adequate state funds are not made available for minority groups' cultural activities and for public facilities for communicating knowledge of the groups' history and cultural traditions (through museums and libraries) the culture of the groups will be more easily displaced by other elements in the national culture and which are more frequently put before group members in the form of entertainment or educational activity.

Access to the public opinion process is essential for the transmission and maintenance of group cultures. The traditional civil liberties of freedom of expression and association have always been important in enabling minorities to perpetuate their cultural or ideological identity. Freedom of expression has become even more important with the rise of literacy, the growth of newspaper circulation, and the technological developments of radio and television with its powerful direct and immediate impact. Important issues are: to what extent does a minority

⁵² Brzezinski, M. Z., 'Constitutionalism within Limits', *East European Constitutional Review*, vol.2, no.2, 1993, p. 38.

group have an access to the media to put across its point of view? What controls are there on freedom of expression? (Such controls may be negative, preventing the group from furthering its ideology, or positive, protecting the group from the stirring up of feelings of racial or religious hatred.) Is there freedom of association, both by means of ability to establish a political party to articulate minority demands, and in the form of trade unions primarily identified with one minority group

Not in all post-communist new democracies these questions can be answered to the satisfaction of minority groups. In some instances the denial of facilities for communication can be ascribed to a wish to integrate and to remove sensitive issues from public debate, but in other cases it is occasioned by a wish to impose the nationalistic ideology of the majority.

4. *The Sphere of Public Order and Lawful Force*

In the last resort political and legal systems are maintained by force or the threat of force. That force is, in a modern state, bound down in rules as to how it is organised, when it may be used and when others may use countervailing force. Also significant in this context (since it governs situations which are a prelude to the eruption of force) is public order law. Those who seek to maintain the current order use legal rules governing public processions, meetings, sit-ins and trespass, unlawful assemblies, obstructions of the highway, public nuisance, conspiracy, seditious speech-making and literature, preventive detention and the whole panoply of 'offences against the state' to keep protest within bounds determined by the judicial machinery and by legislative provision. Both statutes and judicial precedents are subject to change whenever it appears to the power holders in a society that protest may threaten the current order. In such circumstances traditional civil and political liberties are relegated, and coercive public order law will be used, or will be changed, to facilitate continued domination by the current power holders.

The notion of 'institutionalised violence' is not easily accepted by the average citizen who has been socialised into accepting the legitimacy of law and the legal system. Generally he or she does not perceive either public order law or the public agents of law enforcement as manifestations of the power of the dominant group. If the aim of those in control is to seek an integrated and stable society, the last thing they will wish is that the law enforcement agents of the state (and here the reference is to the police and in exceptional cases the armed forces) be seen as the tools of one group. It is therefore not only because rulers are aware of possible abuses by law enforcement officers,⁵³ but also because the acceptability of the regime to minorities and the likelihood of peace in society will be influenced by the degree to which minorities perceive themselves as being 'oppressed' by state officials, that rulers take action to ensure that police forces behave with propriety. The awareness of the wisdom of such an approach began in the United States with attempts to recruit and promote Black policemen and then extended into areas of professional training. Obviously politically aware members of a minority realise that in the last resort the police are upholders of the existing political order. (The sociologically sophisticated will speak of 'repressive tolerance'). Nonetheless hostility can be moderated by adoption of such techniques and better group relations maintained. Everything said about public perceptions of the behaviour of the police force applies with equal emphasis to the armed forces.

C. Pluralist Techniques

⁵³ Where there is a discretion i.e. choice as to whether to adopt alternative courses of action, whether it be in respect of search, interrogation, arrest, prosecution, judicial decision-making or sentencing, it is possible for officials not merely to make wrong decisions, but also to abuse their position.

This was well argued by Wirsing, R.G., *Protection of Minorities, Comparative Perspective*, (Pergamon Press, 1981); Remington, Th. F., eds., *Parliaments in Transition: The New Legislative Politics in the Former USSR and in Eastern Europe*, (Oxford: Westview Press, San Francisco, Boulder, 1994).

In a plural society separate institutions are provided for different ethnic groups. Pluralist policies range along a scale of degree of 'separateness'. Groups will share some common and compulsory institutions e.g. the courts, but will be accorded differing exclusive institutions in other spheres e.g. separate representation in legislature. Usually the aim is to recognise and protect the special and peculiar interests of the minority. Thus positive rights in the cultural sphere may be recognised e.g. language rights, protection of communal schools or distinctive rules of family law. In a tolerant plural society, where there is a desire to accord full participation as well as protection to the minority, there are often not only formal plural institutions and arrangements effectively but informally securing pluralism, but also conventional political practices which are plural in character e.g. conventions in Switzerland and Canada as to the ethno-linguistic composition of the cabinet.

1. *Group Autonomy on Territorial Principles*

Constitutions have been classified in terms of the balance between centralising and decentralising forces as manifested in the state structure. If the powers of government are organised under a single authority, while whatever powers possessed by local units are held at the sufferance of the central government, which can exercise supreme legislative authority, the constitution is described as unitary. If the powers of government are distributed between central and local government and the central authority is limited by the powers secured to the territorial units, the state is federal. In Dicey's words the „federal state is a political contrivance intended to reconcile national unity and power with the maintenance of state rights“. ⁵⁴

There is a spectrum of federal societies varying according to the relative strength of the demands for unity and regional autonomy. There may be little practical difference between federal states with unitary tendencies and unitary states with massive devolution: the essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces - economic, social, political, cultural - that have made the outward forms of federalism. ⁵⁵ Indeed administrative devolution can provide an alternative to a technically federal state.

(a) *Federalism*

The factors distinguishing federations from decentralised unitary states are: a retention of some sovereignty both in the units and the central unit; the fact that units and centre are in some respects co-ordinate and not subordinate to each other; the fact that some fields are within the exclusive competence of the units and some of the centre; and a constitutional guarantee of autonomy ensuring relative permanence to the existence of centre and units. The federal principle of constitutional organisation is designed to allow integrative and divisive forces to co-operate simultaneously: with two levels of government in each unit and operating upon each citizen the central government wields the unifying forces, while the separate local (provincial, central, state) governments in territorial regions provide the diversity. In such a system units and centre are committed to working together and to compromising in a common framework rather than to disagreeing and fragmenting. The differing groups can make their views known and have a say in decision making, facilitated by channels for communication and for compromise. A federation is not a fixed and immutable framework: it is subject to change and development, both formal and informal. Obviously a federal constitution does not in itself ensure that there will be genuine federalism, or toleration of real diversity amongst the units.

⁵⁴ Dicey, A. V., *The Law of the Constitution*, (Mac Millan, 10th ed., 1965), p. 143.

⁵⁵ See, for example, Livingston, W. S., *Federalism and Constitutional Change*, (Oxford, 1956); Elazar, D. J., ed., *Federalism and Political Integration*, (University Press of America, Lanham, 1984).

The prognosis for successful federalism depends upon the circumstances under which the federal state has been created. The histories of two European federations, created after World War II in nation states which came into existence after World War I on the dissolution of the Austro-Hungarian monarchy set an example of an artificial federalism. Both states had faced constant tendencies to fragmentation, several times making major amendments to their federal arrangements (Yugoslavia and Czechoslovakia) and finally broke up, although in the different ways. Only if a federation has arisen out of organic growth, supported by a need for common defence and a desire to exploit opportunities, has it in a long run been successful (Switzerland).

(b) Regionalism or Devolution

Similar to federalism in distributing power territorially, is the principle of regionalism or devolution. Here a unitary state provides for the delegation of executive and legislative governmental powers to a locally elected body. It differs from federalism in that a devolved legislature and administration are not independent of the central legislature, while the central body can override the regional body's decisions by legislation, and sometimes even by administrative veto. Nor does this region enjoy the same degree of financial autonomy as a federal territory. However, depending upon the degree of supervision in practice and its freedom once revenues have been allocated to it, a devolved administration may determine its spending priorities as freely as a state in federation.

2. *Electoral Laws and Composition of the Legislature*

Group divisions may be formally recognised, either by establishing separate voter's qualifications and communal voters' rolls for each group or by establishing specially designated seats for each minority group whether or not proportionate to the size of the group in relation to other groups. The principle of proportionality, implemented by proportional representative voting systems, or the provision of bicameral legislature with regionally composed upper house, methods of informally ensuring that minority groups are represented.

The demand of communal institutions is occasioned by fear of domination by other communities, particularly marked where there is a majoritarian approach by the dominant community. Communal electoral systems are significant not only because they determine the composition of the legislature and thence affect the likelihood of constitutional change, but also because they determine the composition of the government, unless there is a presidential system.

The danger of formal communalism is that it encourages political patterns reinforcing ethnic lines and cuts down the occasions for communal interaction among the ordinary voting members of the community. The effect on the élites is not so marked, but, even in their case, vested interest in respect of their own power and their relationship with their own community tend to cause a reluctance to compromise or to act counter to communal loyalties as currently perceived.

Proportional representation system may be considered as the best solution for answering numerous problems faced by the new democracies dealing with the issue of minorities civil and political rights. The arguments in favour of proportional representation are based on fair shares, the right of minority groups to be heard, the prevention of large electoral swings entirely removing minority representation, the right of voters that their votes should count fully and not be wasted, the fact that it gives individual voters more freedom of choice, that it allows flexibility and crossing of party lines, that it encourages coalition-type governments in which each party has to compromise with other parties, thus tending to the emergence of a centre grouping, and that it encourages parties to have regard to the interests of voters other than their own supporters so as to secure later preferences votes. In contrast, objections of complexity and cost are relatively insignificant. The system has some difficulty in dealing with by-elections, but the major objections, that it results in multiplicity of parties and instability of

government, can, paradoxically be used in its favour, in situations where one party has had the monopoly of power. (e.g. Northern Ireland)

There are many variations on proportional representation. In the list systems, control of candidate selection is entirely in the hands of political parties uninfluenced by voter choice, the top candidates nominated by the parties being elected. Seats are filled from party lists or preferred candidates in such a way that the seats filled by that party in proportion to the total number of seats is the same as the proportion between the votes cast for that party and the total number of votes cast. Methods of calculating the quota, which will secure a candidate election, result in other variations. The larger the constituencies are, with greater numbers of seats, the more proportional will be the results. Multimember constituencies with 2 or 3 members are unlikely to result in representation for many minorities. Arguably the adoption of proportional representation in Holland and in Belgium has been a factor in keeping communally mixed states together.

Proportional representation systems cannot affect the situation where a country contains a monolithic majority group united against the minority group. The proportional representation systems will result in majority rule with the number of majority representatives being elected in proportion to the size of the majority electorate.

3. *The Civil Service*

Administrative practice, rather than abstract legal provision, is the key both to individual liberty and protection of the minority rights in the democratic system. In a plural society the composition and behaviour of the Civil Service are crucial to the real and perceived positions of minorities.

Civil Service employment opportunities favouring members of particular minority group can be done either by according them preferences in employment or by fixing quotas. Such quotas or preferences are designed to maintain the proportional power balance between groups, and to encourage minority groups at the receiving end of the state services to perceive the distribution of the spoils of the state as fair and as being likely to ensure that they will themselves be fairly handled by the administration. To avoid fears of domination by a Civil Service, staffed in the main by a majority group, some constitutions have imposed quota requirements in respect of patterns of Civil Service membership (e.g. Belgium).

4. *Protection for Immigrant Communities*

States wishing to fit immigrant communities and migrant workers successfully into the host society have adopted a number of legal administrative provisions. It has been argued that the attitude of the élite in the minority community and whether it is oriented towards giving economic opportunities and social assistance to its own community may be more important than such somewhat paternalistic legal arrangements.⁵⁶ Nonetheless such legal arrangements are necessary to provide a framework for protecting immigrants against abuse of power by officialdom or by private entrepreneurs in host countries. Indeed, some such measures may assist the immigrant community to become self-sufficient and self-sustaining.

After this catalogue of constitutional styles tentative generalisations are possible. Distinctive geopolitical, attitudinal and institutional factors appear to accompany the treatment of minorities in a particular state. One geopolitical factor is the relative size of majority and minority groups. If more or less equal in size, groups are in a 'no win' situation and compromise is the only alternative to constant battle. There is no mutual deterrence and little

⁵⁶ See Sowell, T., *Race and Economics*, (McKay, 1975). For general surveys see Rose, E., *Colour and Citizenship: A Report on Race Relations*, ((Oxford: Oxford University Press, 1968), pp. 675-765; and Abbot, S., *The National Committee for Commonwealth Immigration, the Community Relations Committee*, and Rose, H., and Levy, M., *The Local Committees* in Abbot, S., ed., *The Prevention of Racial Discrimination*, (Oxford: Oxford University Press, 1971).

inducement to compromise or to enter into co-operative arrangements where they are unequal in size or power.

Another factor is whether a country is adjacent to a neighbouring state which supports the minority, or which is perceived as a threat to the majority. Then majority and minority are unlikely to reach an accommodation. The changing state of economic development is also crucial. If the country is industrialised and scarcity of resources does not trigger group competition, relative harmony is more likely. If, by contrast, resources are scarce, or the country is undergoing rapid economic modernisation (as in the new democracies in Central and Eastern Europe) with population migration, conflict is more likely.

Another major factor affecting attitudes is the kind of cultural differences between majority and minority groups. Religious, ethno-linguistic, tribal, caste and nationality differences are divisive. If they coincide, they are more likely to result in an ideology, and if this is developed, compromise is less likely. Nationalism is an exclusive ideology: if the majority are chauvinistic they seek unchallenged hegemony, adopt majoritarian attitudes and are unwilling to make concessions; if the minority are nationalistic they prefer secessions and their own rule.

In this chapter the author has not attempted to provide nostrums for societies in Central and Eastern Europe with cultural or ethnic minorities. No formula for a mix of constitutional devices can be decided on in the abstract when so many variables are present. Minority group leaders may, however, obtain some guidance as to the kinds of constitutional arrangements they should strategically pursue if they wish to protect the group as such, as well as its individual members - remembering always that leadership and aims change. Similarly group leaders may obtain guidance as to the kind of arrangements which tend to encourage stability and satisfied minority groups in a multicultural society. The arrangements actually adopted will, however, depend on power and political considerations: law is always the product of politics.

CONCLUSIONS

1. Measures within States

The present legal order places the main burden for protecting rights on measures within the state. The obligation not to discriminate against persons belonging to minorities and to respect their identity is crucial. In order to reach a workable political accommodation between minority and majority communities, measures for effective political participation are usually the key issue.

The first conclusion based on the author's research is that there need to be a bargain between states and minorities, to reduce the risks and increase the benefits of living together. This implies making special political arrangements for minorities. Therefore, it is necessary to make the distinction between the 'common domain', in which the same rights should apply to all citizens, and the 'separate domain', in which special measures to protect the identity of the minority are justified. In the 'common domain', states are obliged to uphold all relevant international standards. But measures in the 'separate domain' may also be necessary, for example to guarantee the development of cultural expression and education in the minority's language and provide for minority self-administration in policy areas affecting its special interests.⁵⁷

In considering political arrangements within the state the second conclusion follows: it is necessary to be sensitive to the diversity of ethnographic and political conditions. Minority situations vary, depending on the size, nature and dispersion of the minority and on the political culture of the majority community. Certain measures may be appropriate where the minority forms only 5 or 10 per cent of the population, and different measures where it forms

⁵⁷ See Elster J., 'Constitutionalism in Eastern Europe: An Introduction', *University of Chicago Law Review*, vol. 58, no. 2, (1991).

40 or 50 per cent. The seriousness of the situation may range from, for example, inadequate provision for native language in schools, to threats to the very survival of the minority. In some societies a full democratic system is operating, in others the preconditions for minority protection are scarcely in place.⁵⁸

It is possible to identify a range of general measures to assist minorities, many of which are in force in the new constitutions and bills of law adopted by the former communist states in Central and Eastern Europe. Protection of minority languages, provision of education in minority languages, the right of the minority to its own media and to have access to publicly controlled media, participation in advisory and decision-making bodies, national representation, and economic and social protection (including affirmative action if necessary to redress inequalities) are among them.⁵⁹

The third conclusion concerning the status of minorities within the state is that in order to preserve equality, it is essential that persons belonging to minorities have full citizenship rights in which they dwell. A number of new states in Central and Eastern Europe have established an ethnic, or partly ethnic, qualification for citizenship. Such restrictions should be challenged on the basis of international agreements, and existing members of the EU and the Council of Europe should take steps to remove ethnic criteria from their citizenship law.

Measures to redress the balance between minorities and states will naturally be difficult to carry out in practice, especially in post-communist societies and societies which lack democracy. In a climate of rampant nationalism, and in nations which bear historical grievances against their neighbours, it is understandable that a spirit of compromise and pluralism will take time to develop.

The author's concluding argument is that the conflict between majorities and minorities has a psychological component. If majorities stigmatise minorities, it is often because the majority feels insecure. A response which seeks to make post-communist societies more secure, while pressing for measures to accommodate minorities, is therefore needed. Support for economic development and democratisation are probably preconditions for assisting minorities. Within this broad framework, there are a number of more specific ways in which the international community can seek to promote minority rights.

2. Transnational Measures

With the reference to transnational measures four conclusions may be presented. First there is no doubt that the developing body of international law and European political standards can benefit minority groups. They have made a contribution, for example, to the easing of the conflicts in the Baltic states over citizenship. They provide a yardstick for citizens to hold their own states to account. They also offer a means for states to appraise constitutional practice and domestic legislation. The adoption of minority rights is a criterion that has been taken into account by the European Union in considering membership applications and by international financial institutions in considering loans gives a certain 'bite' to the standards which applicants cannot readily afford to neglect.

Second, the Council of Europe already plays a valuable role in advising states on minority issues and human rights, commenting on laws, and assisting and advising national minorities. The Council of Europe also develops initiatives which address minority issues locally and in regions. Such 'bottom-up' measures are important and could be much expanded.

⁵⁸ See Ludwikowski R. R., 'Constitution Making in the Countries of the Former Soviet Dominance: Current Developments', *Georgia Journal of International and Comparative Law*, vol. 23, no. 2, 1993.

⁵⁹ *The Rebirth of Democracy: 12 Constitutions of Central and Eastern Europe*, ed. By The International Institute for Democracy, (Council of Europe Press, 1995).

The OSCE High Commissioner for National Minorities also intercedes between states and minorities, and encourages dialogue.

Third, 'Euroregions' are a valuable innovation which can assist minorities to 'maintain unimpeded contacts . . . across frontiers'. The Council of Europe supports them; and there is scope for expansion. If European patterns of jurisdiction are to become richer and overlapping, the regional level of development has an important part to play

Fourth, there is no doubt that minority rights lay within European responsibility. However, the present situation of minorities in many parts of Europe is bleak. The appalling situation of 'ethnic cleansing' has opened a chapter of forced population movements which starkly illustrates one alternative to a civilised regime for minority rights. In politically unstable and economically insecure societies, where exclusive nationalism gets a ready hearing, the vulnerability of minorities is evident

Nevertheless, there have been positive steps in recent years to develop the beginnings of transnational regime to protect minority rights. It is all the more urgent now to consolidate and strengthen it. While for the time being the main burden of adjustment will have to lie with measures within the state, stronger transnational measures are necessary to encourage such adjustment. Developing a stronger regime for minority rights is possible if Europeans are serious about supporting democratic consolidation within their own countries and across European frontiers.

3. Final Concluding Observations: Options and Implications for Future

Minority rights and co-operation between communities are now understood to be essential for European security. However, significant resources have not been made available to promote minority rights or peaceful coexistence in Europe. The expenditure needed would be low compared to the military costs inherited from the Cold War era. Or the tragic burden which may ensue in some of these situations through violent conflicts and refugee movements.

Seven general conclusions emerge from this study. First, further research, analysis, discussions and dissemination of information should be undertaken to establish a much more detailed picture of the situation facing the European minorities at the end of twentieth century. The aim would be to provide a steady flow of evidence about the changing situation at a local and state level. This might help to provide early warnings of potential conflicts, as well as models of good practice that may help others.

Second, the international legal and political standards on minorities and human rights, agreed by the OSCE, the Council of Europe and by the United Nations, should be translated into minority languages. These translations should be widely disseminated among relevant communities by participating OSCE states.

Third, a handbook should be developed, to be made available to minority communities, to describe how to seek redress both through domestic and international bodies.

Fourth, descriptions of good practice towards minorities and examples of peaceful and fruitful coexistence of minority and majority communities should be widely disseminated by OSCE and the Council of Europe.

Fifth, the very work of the Council of Europe itself, regarding the protection of minorities - in setting standards, building confidence and promoting cultural and educational values - deserves greater support and should be publicised more widely. Special attention should be given to the Council of Europe's efforts to develop pilot projects designed to improve relations between majority and minority communities.

Sixth, both donors and lenders should give equal priority to programmes which adopt equal opportunities practices, which advance co-operation between communities and which redress previous structural injustices towards minorities. The example of major inter-

governmental institutions, such as the European Bank for Reconstruction and Development, which has incorporated specific policy on these issues in its founding 'Agreement' and its interpretations, should be made more widely known.

Seventh, governments, United Nations Treaty bodies and UN agencies should take into account the UN Declaration on Minorities. Special Attention should be given to Article 4 (5) and 5 (2).⁶⁰ Minority communities should be encouraged to provide information to the relevant UN human rights bodies and the OSCE High Commissioner on National Minorities.

Therefore the final conclusion is clear: the minorities question is a specific question within the general field of human rights. Minority rights are part of human rights but, like other categories and issues in human rights, they need their own particular focus.

There has been a gradual realisation that the principle of non-discrimination is only a first step in the protection of minorities, but is not sufficient in itself to deal with the question.

The core of the rights of minorities in international law is their right to existence and identity. Special measures to favour the flourishing of this identity are not to be regarded as discriminatory.

International legal instruments manifest a growing respect for diversity, for the right to be different. Deliberately assimilationist policies are increasingly discouraged. A richer, more participatory concept of democracy which reflects this diversity is in the process of evolution.

The minorities issue in international law still needs to be distinguished sharply from that of self-determination. Minorities as such do not have the right to self-determination - that right for 'peoples'. But minorities should participate in the self-determination process and not be excluded from it.

Although it is sometimes resorted to as a means of reconciling the minority and the state, the right to autonomy is not a specific right of minorities in contemporary international law. An evolution may be under way in this respect towards greater recognition of autonomy in international law. For the time being, however, we are faced with the paradoxical situation that states practising generous policies of autonomy in their internal law may be very reluctant to translate this into binding or even hortatory international norms.

There is no generally accepted definition of minorities in international law. The concept of self-determination is increasingly respected by international instruments, as is the idea that the existence of groups is a question of fact rather than law. Both of these concepts were in fact recognized under the regime of the League of Nations and are in the process of being 'rediscovered'.

Progress on the rights of minorities has been achieved more through the elaboration of a collective dimension to individual rights than through the growth of collective rights. The apparently greater readiness to allow collective rights to indigenous peoples may reflect a view that indigenous claims do not threaten states in the same way as the claims of some minorities to self-determination: in the indigenous context, self-determination is only rarely about secession.

International law is beginning to understand the minorities question better. The architecture of any eventual regime for minorities may be glimpsed as a distant building, even if the details and intricacies are not yet clear.

⁶⁰ Article 4 (5): States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country; Article 5 (2): Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities .

TABLE OF CONTENTS

FOREWORD	1
INTRODUCTION	2
CHAPTER I: MINORITY RIGHTS: A HISTORICAL PERSPECTIVE	6
1. Minorities in History	6
2. Social Democratic Alternative	8
CHAPTER II: SOVEREIGNTY AND SELF-DETERMINATION IN THE NEW EUROPE	12
1. Some Historical Remarks	12
2. Self-determination	14
3. A New Transnational Regime ?	16
CHAPTER III: INTERNATIONAL AND EUROPEAN STANDARDS ON MINORITY RIGHTS	18
1. A Framework of Analyses of Possible Approach	18
2. The International Covenant on Civil and Political Rights (1966)	19
3. UN Declaration on Minorities (1993)	20
4. Recent European Initiatives	22
A. The Role of the OSCE	22
B. The Role of the Council of Europe	25
CHAPTER IV: LEGAL SYSTEM AS A MEANS OF PROTECTING RIGHTS OF MINORITIES: COLLECTIVE RIGHTS IN THE CONSTITUTIONS	30
1. Constitutional Devices and Legal Arrangements	30
A. Assimilationist Approaches	31
B. Domination Devices	31
C. Pluralist Techniques	35
CONCLUSIONS:	40

1. Measures within States	40
2. Transnational Measures	41
3. Final Concluding Observations: Options and Implications for Future	41