

The participation of minorities in public life

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The Venice Commission is the Council of Europe's advisory body on constitutional matters. It is composed of independent legal experts from member states of the Council of Europe, as well as from non-member states. At present, 57 states participate in the work of the Venice Commission.

Introductory address

Mr Gianni Buquicchio
Secretary of the Venice Commission

Ladies and Gentlemen,

Dear Friends,

I am delighted to welcome you all to this UniDem seminar, which our Croatian friends had the wonderful idea of holding in the magnificent setting of Zagreb's Old City Hall.

For several years, the Venice Commission has been seeking to focus academic debate on various aspects of democracy through the UniDem seminars.

As you are aware, our theme this year will be "the participation of minorities in public life", which I am sure will give rise to high-quality reports and fruitful exchanges.

Indeed, over 17 years after the fall of the Berlin Wall and in spite of the resulting reunification of Europe, the issue of minorities is still a very topical one. It is not therefore surprising that the Action Plan adopted at the Warsaw Summit in 2005 calls for the continuation of the Council of Europe's activities in this area, as, and I quote, "Europe's chequered history has shown that the protection of national minorities is essential for the maintenance of peace and the development of democratic stability".

From the point of view of the Venice Commission, it is particularly interesting to consider the topic of the participation of minorities through the prism of the various constitutional models that co-exist in Europe. This is because these models have a significant impact on the solutions adopted in this area by individual states, either because of the constraints they impose or, alternatively, the flexibility they involve.

This brings us to the very core of the expertise developed by the Venice Commission since it was set up, and this expertise will be decisive in understanding the extent to which further progress in terms of participation is possible or, alternatively, likely to be more difficult for constitutional reasons.

For instance, it is a fact that unitary, centralised states will continue to exist alongside federal or regionalist states with varying degrees of territorial solutions to the problems of minorities. It is therefore necessary to seek to draw maximum benefit from what unitary states can offer in terms of taking account of social

and cultural diversity while ensuring the harmonious co-existence of groups with specific identities.

In spite of the conceptual barriers to the recognition of minorities within the community of citizens in unitary states, the reality of pluralism will increasingly make itself felt in them, if only because of the obligation they have to effectively combat discrimination which, in practice, usually affects vulnerable minority groups.

It is therefore essential to seek to show that promoting effective equality, both in the socio-economic and in the cultural and linguistic fields, is entirely compatible with the requirements of a unitary state, whose sovereignty and territory are, by definition, indivisible.

In the case of regionalist or federal states, it would probably be wrong to assume that they have settled, once and for all, the issue of the protection and the participation of minorities through territorial arrangements, which are sometimes generous but are often historically intended – sometimes actually following conflicts – to respond to the needs of groups which are in the majority or, at the very least, present in large numbers at local level. There again, contemporary social reality, which is marked by increased diversity, including in federate or regional entities, will lead the states concerned, facing a whole range of demands, to seek fresh responses to cultural, linguistic and social needs extending far beyond the conventional protection of historically threatened minorities.

In short, the challenge for regionalist or federal states will be to move from a static system of protecting minorities traditionally present in given parts of their territories to a more dynamic, multifunctional system offering graded and adaptable solutions to the necessarily more complex aspirations of diverse minorities whose identity is no longer formed by mere reference to states.

The seminar will also provide an opportunity for considering the current state of the international standards governing the participation of minorities, which have been expanded spectacularly in recent years, through the efforts both of the Council of Europe and of other international organisations such as the Organisation for Security and Co-operation in Europe (OSCE). In this connection, I am delighted that the Office of the OSCE High Commissioner on National Minorities has accepted our invitation to take an active part in the seminar, as its work regarding the participation of minorities, in particular through the preparation of what is known as the Lund recommendations, has shed valuable light on the relevant international standards. Moreover, the Venice Commission is delighted to continue its discussions with the Office of the OSCE High Commissioner on “special measures to promote minority representation in elected bodies”, a topic which will be dealt with in greater depth at the second session of the seminar.

Lastly, thanks to the expertise of the University of Glasgow, an entire session will look at the cultural autonomy of minorities and should give us an idea of the real practical significance in modern Europe of this model which was developed

by the visionary Austrian thinkers and politicians, Karl Renner and Otto Bauer, at the beginning of the 20th century. The examples closest to cultural autonomy are to be found in east European countries, where various problems and shortcomings have, however, tarnished the reputation of this potentially promising model for strengthening the participation of minorities.

It is therefore instructive to stop and look briefly at the case of Belgium, whose constitution has for over 30 years granted the Flemish and French-speaking communities non-territorial cultural autonomy applicable in the Brussels-Capital region. Modelled on the theories of the above-mentioned Austrian politicians, this system is not the same as real personal autonomy, as it does not involve the recognition of sub-nationalities, but it does succeed in functioning by taking as its basis the various institutions such as schools or museums, whose activities concern only one or the other community. However, the operation of the system is extremely complex and poses many problems of overlapping responsibilities, which do not appear to have been entirely resolved.

Before we begin our discussions, I should like to underline that it is no coincidence that this UniDem seminar is being held in Croatia: for several years, the country has been making most deserving efforts to reform and move closer to its goal of full integration into the Euro-Atlantic structures. The Venice Commission will continue to stand by Croatia and help it along this road with any assistance that may be useful here.

Our co-operation with Croatia, which dates back to the early 1990s, has been extremely wide-ranging and has involved many areas, including the status of the Constitutional Court, electoral issues, local democracy and, of course, the constitutional law on the rights of national minorities. The latter, no doubt, was an essential stage in the consolidation of the rights of minorities in Croatia and the advances it involved were rightly welcomed by the Venice Commission. I am therefore particularly pleased that today's seminar offers an opportunity to find out how the implementation of the constitutional law is perceived in the country, in particular by the representatives of minorities.

In broader terms and going beyond the example of Croatia itself, the whole Balkan region has a duty to strengthen democracy and the rule of law as a means of reconciling more effectively the aspirations of the many population groups which live together in this part of Europe. In future, the Venice Commission will continue to support and encourage corresponding developments, in particular in Montenegro, in Kosovo, in Albania and in "the former Yugoslav Republic of Macedonia", as that will help to increase the stability of the region, which remains vital to Europe as a whole.

Before wishing you all an excellent seminar and stimulating discussions, I must now extend my sincere thanks to our hosts and joint organisers from Croatia, namely the Presidency of the Republic, the Ministry of Foreign Affairs and European Integration and the University of Zagreb. Their efficiency and

helpfulness has enabled us to stage this promising event under the best possible conditions.

I would also like to thank the University of Glasgow for its help with organising one of the seminar sessions.

Constitutional non-recognition of minorities in the context of unitary states: an insurmountable obstacle?

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Introduction

In principle, the question of minorities should not arise in the constitutional framework of unitary states. In its traditional sense the term “unitary state” implies a single state. This unity is above all territorial. It means political as well as geographical unity, with political power being exercised in identical manner throughout the country. It follows from this that the unity is also sociological: the unitary state seeks to unify its population sociologically and legally.

Thus defined, the unitary state is the fullest realisation of the nation-state political model, an ideal expression of its political and legal aim, which is an actively brought-about coincidence of single nation and single state: “the state forms a single legal system in which the same instruments (the constitution, laws, decrees, etc.) are to apply everywhere and to everyone in exactly the same way. The unitariness of the state precludes having different rules for groups with particular characteristics or differentiating between groups according to concrete data”.¹ That is why constitutional affirmation of the state’s unitariness often goes hand in hand with assertion of the state’s national character, as in the case of Romania,² and indivisibility, as in French constitutions (with the notable exception of the present 1958 constitution, which drops the reference to unity).³ Similarly, the Turkish Constitution provides that: “The Turkish State, with its territory and nation, is an indivisible entity” (Article 3).

Unity is a characteristic of the state, while indivisibility is a characteristic of sovereignty. Sovereignty is an essential characteristic of the state, which, however, explains why unity and indivisibility are usually linked, or indeed treated as identical. As an attribute of sovereignty – that is, in constitutional democracies, sovereignty of the nation or people⁴ – indivisibility involves the nation’s sovereignty or the people’s collective unity and is therefore basic to the nation as a

1. Constantinesco V., Pierré-Caps S., *Droit constitutionnel*, Paris, PUF, 2nd edition, 2006, p. 290.

2. Article 1: “Romania is a sovereign, independent, unitary and indivisible National State”.

3. Article 1 lays down: “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis”.

4. Article 3 of the French Constitution, Articles 1-2 of the Bulgarian Constitution, Articles 2-1 of the Romanian Constitution and Article 6 of the Turkish Constitution.

constitutional law construct. And as this legal nation is identified with the state,⁵ indivisibility also becomes a characteristic of the state. So while indivisibility relates in the first instance to the sovereignty of the nation or people and to how the political power which it authorises is apportioned, it also affects the form of the state in being closely linked with the unitary state. In that it reflects the unity of the legal nation, the unitary state guarantees and preserves the indivisibility of national sovereignty through the unity of impetus supplied by the political and law-making power.

The point here is that French constitutionalism's construction of the one and indivisible state from the late 18th century onwards should above all be seen in the context of promoting the nation as holder of sovereignty – as the new embodiment of political legitimacy and main organ of power. Originally, therefore, the concept of nation had nothing to do with the make-up of the national population, with its human substratum. It had to do with the new legitimacy of power deriving from the French Revolution: as the sole holder of sovereignty, and being essentially indivisible, the nation necessarily expressed a single will. It was not until much later that the holder of sovereignty was also presumed to be homogeneous and that the Constitutional Council used the "legal concept of the French people" to reject any differential treatment of the national population.⁶ The singleness of sovereignty required homogeneity of its holder: no one "section of the people" (Article 3.2 of the constitution) could be allowed to arrogate to itself the exercise of sovereignty and no component of the "French people" could be set apart. The "French people", as the concomitant of the unitary state, was a unified and homogeneous community with no differentiation between its members, who were therefore equal citizens "without distinction of origin, race or religion" (Article 1 of the constitution).

This reasoning, which the Constitutional Council based on a concept that has recurred in French constitutions for two centuries, that of the "French people", nonetheless rests on a confusion in that the concept of the "French people" has more to do with where sovereignty lies than with describing the national population. In other words, the Constitutional Council's reasoning lumps together two different things: it "treats the status of the groups of individuals that make up the French people in terms of that people's oneness".⁷ This rules out the unitary nation-state's constitutionally recognising specific rights to any minorities as such, of whatever kind, a situation which can be seen in Bulgaria, Roma-

5. In French public law theory this is what is conveyed by Esmein's famous century-old dictum, "The state is the legal personification of a nation" (*Éléments de droit constitutionnel français et comparé*, 6th edition, 1914, reprinted Editions Panthéon-Assas, 2001, p. 1). Carré de Malberg said that it "followed ... from the principle of national sovereignty that the state was none other than the nation itself" (*Contribution à la théorie générale de l'Etat*, Paris, Sirey, 1920, p. 14).

6. Cons. Const, Decision No. 91-290 DC of 9 May 1991, Statut de la Corse, Rec. p. 50; Decision No. 99-412 of 15 June 1999, European Charter for Regional or Minority Languages of the Council of Europe, Rec. p. 71.

7. Haquet A., *Le concept de souveraineté en droit constitutionnel français*, Paris, PUF, 2004, p. 90.

nia and Turkey as well as France. In those states the national community and the community of citizens are one and the same, forming a single state community. Minorities cannot be recognised as distinctive legal communities. At most they will exist only through the community of citizens, as in Romania, where Article 6-1 of the constitution recognises the right to identity “of persons belonging to national minorities”.

This approach nonetheless lacks solidity, particularly in France, where it involves a narrow, sovereignty-oriented interpretation of the concept of the “French people”: “the people ... becomes the almost mystic focus of a whole series of attributes that it owes, not to its actual make-up or strength of numbers, but to an imponderable abstraction, its sovereignty”.⁸ This is an approach designed to underpin political and constitutional democracy, and it cannot accommodate the requirements inherent in contemporary social democracy, which is centrally about the “situated individual” or individual in actual context. Social democracy “endeavours to establish among individuals a de facto equality that their theoretical freedom is powerless to bring about”. In social democracy human rights are “the gauge of a necessity”⁹ and it is no longer enough for the unitary state to promote a national community in which citizens are simply so many atoms, establishing the institutions of political power through purely arithmetical representation and decision-making processes. It requires that the unitary state now address the question of the identity of its own human substratum and see the individual as someone with a variety of everyday allegiances: “alongside the people in the traditional sense of the community of citizens or voters, another people emerges – a group of contextualised human beings”, the “people as society”.¹⁰

Consequently constitutional non-recognition of minorities in the context of unitary states is not the insurmountable obstacle it once was, despite the apparent durability of the principles that justified the non-recognition. Those principles are increasingly being adapted so that the law takes into account an extremely wide range of manifestations of minority, whether ethnic, linguistic, cultural, religious, or (more recently) immigrant, as in France. In this last case we are witnessing the sudden emergence, in the public sphere, of a “minority policy” that “subjects to critical scrutiny the social norms which allow the discrimination the law itself prohibits”.¹¹

This development is by no means clear-cut. It takes various forms which reflect the sociological features and diversity of the national population. Nor is it unambiguous, in that recognition by the unitary state may also have the objective of

8. Burdeau G., *La démocratie*, Paris, Seuil, 1966, p. 27.

9. Burdeau G., *ibid.* See pp. 63, 65, 68.

10. Koutsoubinas S., *Le peuple dans la Constitution hellénique de 1975*, Presses universitaires de Nancy, 1989, p. 5.

11. Fassin E., “Pourquoi et comment notre vision du monde se racialise – Grand entretien”, *Le Monde*, 5 March 2007.

reducing the particular group's difference from the community at large, thus, paradoxically, promoting its assimilation. At all events the trend can be verified in two areas. The first is law-making, with, in particular, internationalisation of national constitutions – the tendency of international influences to shape and relativise constitutional provisions, especially in minority matters. The other area is at once sociological and legal and has to do with basic shifts within society and within the national population: in particular there is “growing acknowledgment of discrimination of various kinds, acknowledgment which compels action and raises minority issues”.¹² While in the first case a standard supranational model is being put forward for incorporation into unitary systems, in the second it is the configuration of the “people as society” which is forcing them to adjust their law.

I. An obstacle eased by the internationalisation of national constitutions

The phenomenon is sufficiently well-known for there to be no need to describe it in detail. It results in particular from the process of democratic transition in central and eastern Europe and the effect on constitution-makers of international treaty law and especially European human rights law. This was initially a question of meeting the prerequisites for admission to the Council of Europe: “The wish to conform to the liberal-democracy constitutional model operating in the countries that were going to be taking the decision on their admission, the desire to assert their Europeanness ... led the applicant countries to include in their constitutions elements of what may be called the *European constitutional heritage*”.¹³ This includes the Statute of the Council of Europe and the Council of Europe conventions, in particular the European Convention on Human Rights and the case law interpretation of it. It also includes national constitutional traditions insofar as they help a single democratic society take shape.

Law on minorities is a further component of this European constitutional heritage, in the form of a general obligation to protect minorities or the “principle of minority protection”. “The principle amounts to a general obligation on states to guarantee a degree of protection for minorities on their territory. Commonly accepted by them as being a legal duty, it has entered European law through the usual law-making channels, although the multilateral agreements on the subject have also helped establish it”.¹⁴

Constitutional non-recognition of minorities is in fact neutralised, as it were, by this general obligation to protect minorities which sets a “minimum standard”,

12. Fassin E., *ibid.*

13. See Constantinesco V. and Pierré-Caps S., *op. cit.* pp. 246-7. On the concept of “European constitutional heritage”, see European Commission for Democracy through Law, “European Constitutional Heritage”, Strasbourg, Council of Europe Publications, 1997.

14. Boev I., “Le règlement européen des problèmes minoritaires en Europe de l'Est: formation d'un *corpus juris* relatif aux minorités et institutionnalisation de ses mécanismes d'application”, law thesis, Nancy, 2003, p. 313.

“guaranteeing not only general human rights and fundamental freedoms as being relevant to minorities, but also specifically minority rights and freedoms protecting particular aspects of identity”.¹⁵ What is precluded is protection measures for minorities which involve special territorial arrangements conferring territorial and/or personal autonomies incompatible with unitariness, these being prerogatives of the state by virtue of the principle of constitutional autonomy.

The general obligation self-evidently applies to states that have acceded to the relevant treaties. This is the case with Bulgaria. Its Constitutional Court¹⁶ approved Bulgarian accession to the Framework Convention for the Protection of National Minorities precisely on the ground of compliance with international human rights law. The court held that Bulgarian law had taken over the concept of the national minority by virtue of Bulgaria’s accession to the European Convention on Human Rights (Article 14). On that same ground Bulgaria has also incurred several adverse judgments of the European Court of Human Rights under Article 11 (freedom of assembly) in connection with its treatment of the “Macedonian minority”.¹⁷ The concept of the national minority has been given practical expression in Bulgarian anti-discrimination law through various legislation since 2000 to bring Bulgaria into line with EU law ahead of EU membership.¹⁸ For the first time, this legislation explicitly prohibits discrimination (as well as xenophobic and racist acts) against national minorities. These prohibitions have been included in the Criminal Code.

Romania recognises minorities through its participation in a wide range of treaties. The Romanian Constitution suggests recognition of humanitarian conventions as having supra-constitutional authority.¹⁹ The Advisory Committee on the Framework Convention, in its two rounds of monitoring since the framework convention came into force in Romania (1998), has accepted that the country has an appropriate framework for protection of minorities. This encompasses the rights, fundamental freedoms and principle of non-discrimination that people belonging to minorities enjoy in ordinary law – that is, indirectly and not specifically – together with rights and freedoms directly and specifically applying to members of minorities in language, religion, culture and other spheres. However, the committee also said that the legal framework was being less than adequately implemented, particularly with regard to the Roma.

15. Boev I., *ibid.*, p. 326.

16. Decision No. 2, 18 February 1998.

17. Stankov and the United Macedonian Organisation (UMO) Ilinden, 2 October 2001; *UMO Ilinden and Ivanov v. Bulgaria*, 20 October 2005; *UMO Ilinden and others v. Bulgaria*, 19 January 2006.

18. The cornerstone is the Prevention of Discrimination Act (2003).

19. Article 20: “(1) Constitutional provisions concerning the citizen’s rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between national law and the covenants and treaties on fundamental human rights which Romania is a party to, the international law shall take precedence unless the Constitution or national law contain more favourable provision.”

In Turkey the treatment of minorities has been making progress since 2001. This is a result of the national programme of incorporation of EU law in order to meet the political requirements for possible future EU membership, although, like France, Turkey is not a party to the Framework Convention or the European Charter for Regional or Minority Languages (signed by France on 7 May 1999, but not ratified). However, any suggestion of indirect, non-specific protection of minorities in terms of fundamental rights has to be qualified. This has to do less with the national, unitary nature of the state, which is inviolable and is not subject to constitutional amendment (Article 4 of the constitution), than with certain constitutional provisions' incompatibility with EU membership despite the reforms of 3 August 2002,²⁰ which were affected with EU membership in mind. In addition to the question of protection for minorities, there is the specific problem presented by the policy of forced displacements in regions with Kurdish population, a policy for which the European Court of Human Rights has frequently found against Turkey.

Lastly, France, arguably, does not escape this general obligation to protect minorities resulting from international and European law, although the obligation does not extend to minority situations arising from recent immigration or to foreign minorities. This is because, in addition to arising from treaties, the general obligation has a customary dimension and therefore applies to European countries which have neither acceded to the relevant conventions nor recognised minorities within the meaning of the European *corpus juris*. This customary dimension is not geographically restricted to central and eastern Europe. It applies to all countries involved in the process of European integration in the broad sense, including France. This can be inferred from France's comment on the general observation of the UN Human Rights Committee of 2 November 1994 concerning Article 27 of the International Covenant on Civil and Political Rights.²¹ The comment was that Article 27 was declaratory in nature and reflected a minimum of rights recognised in customary law. In fact, France's refusal to accept that provision is not an obstacle to its wish to conform to it through customary law. At the European level, support for the customary thesis may be found in an *obiter*

20. For example, the punishment of any "wrongful" use of human rights in the meaning of Articles 13: "Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant Articles of the Constitution", and 14: "None of the rights and freedoms embodied in the Constitution may be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, of destroying fundamental rights and freedoms, of placing the government of the State under the control of an individual or a group of people, or establishing the hegemony of one social class over others, or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas".

21. United Nations Human Rights Committee UN Doc. CCPR/C/2/Rev/1/add.6, p. 930. France had drafted a declaration interpreting Article 27 when it acceded to the covenant in 1980 and the Human Rights Committee then classed the declaration as a reservation. Article 27 requires states in which there are minorities not to deny them the exercise of rights relating to their identity.

dictum of the European Court of Human Rights in its *Chapman v. United Kingdom* judgment of 18 January 2001 concerning the right of a British national of Gypsy origin to live in a caravan on land belonging to her. The Court observed that there was an emerging consensus among Council of Europe member states "recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle".²² This consensus can be inferred from Council of Europe conventions as well as non-binding documents adopted by various Council of Europe bodies. In the *Chapman* case, the general duty to protect minorities was held to imply the applicant's right "to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition".

Lastly, it may be noted that Article I-2 of the Treaty Establishing a Constitution for Europe introduces respect for "the rights of persons belonging to minorities" as one of the values of the European Union. Article I-59 provides for suspension of certain rights resulting from EU membership when there is found to be "a clear risk of a serious breach by a Member State of the values referred to in Article I-2". As regards protection of minorities, Article I-2 thus codifies customary practice as established by EU enlargement into central and eastern Europe. In its decision of 19 November 2004 preliminary to possible ratification of the treaty by France, the Constitutional Council observed that the Union's values were to be interpreted in harmony with the constitutional traditions common to the member states. The provisions concerned were not contrary to the French Constitution so long as there was no "recognition of collective rights of any group, whether characterised by shared origin, culture, language or belief".²³ This cannot be regarded as an interpretative reservation, such reservations being ruled out anyway "in the case of international conventions, which require uniform application by all the States Parties".²⁴ The Constitutional Council freely chose to consent in a general clause²⁵ to the transfer of powers necessitated by the treaty, although this should not be seen as in any way recognising a right of minorities as such to protection, for which the treaty does not provide in any case.

In reality this question can be looked at from another angle, in terms of the emergence, in the unitary states we are concerned with, of the people as society alongside the people as political entity.

II. An obstacle eased by the emergence of the people as society

Although constitutional non-recognition of minorities in the context of unitary states is tempered by internationalisation of national constitutions, this internationalisation still limits law on minorities to protection of fundamental rights in the

22. § 93 ff.

23. Decision No. 2004-505 DC, Rec. p. 173, §16.

24. Schoettl J.-E., "La ratification du traité établissant une Constitution pour l'Europe appelle-t-elle une révision de la Constitution?", *Les petites Affiches*, 29 November 2004, p. 7.

25. Article 88-1-2: "The Republic may participate in the European Union in the manner provided for by the Treaty Establishing a Constitution for Europe, signed on 29 October 2004".

individual sphere, which unitary states already recognise to a greater or lesser extent. As the Romanian Constitution puts it: what is involved is the individual right to identity. However, the general obligation to protect minorities under the European constitutional heritage extends to rights and freedoms directly and specifically established on the basis of membership of a minority, and it necessitates recognition of a special link with minority identity. But minority identity poses a challenge to the oneness of the national community of equal and identically treated citizens and to identification of that community with the unitary state because it raises issues as to the status of the groups of individuals of which the people is composed, issues which the supposed oneness of the people chooses to disregard, as we have seen in relation to France.

However, factual considerations are now forcing unitary states to take minority identity into account. Because such considerations have to do with features of national population they differ considerably from country to country. While in central and eastern Europe the issue is a political one, resulting from the plural make-up of the national community, in France there is more of a social or even economic issue stemming from a need for real equality of citizens. In the former case it is national minorities that challenge identification of the national community with the community of citizens; in the French one it is racial or immigrant minorities intent on making the community of citizens a reality and not a meaningless abstraction.

A. The challenge to identifying the national community with the community of citizens

This particularly concerns Bulgaria and Romania.

Bulgaria is a particularly innovative example of adapting the rigour of the unitary state's constitutional principles to national realities. Although involvement of minorities in public life is a matter of ordinary law for lack of constitutional recognition of minorities, the political reality is significantly different because of the prominence of the Movement for Rights and Freedoms (MRF), a party representing the Turkish minority.²⁶ For the third time since 1991 the MRF is part of the governing coalition and is helping to stabilise Bulgarian political life. MRF participation in national and local elections was the subject of a Constitutional Court decision of 21 April 1992 (Article 11-4 of the constitution prohibits the formation and operation of parties on an ethnic, racial or religious basis). In view of the MRF's importance on the Bulgarian political scene, the Constitutional Court adopted a conciliatory interpretation of Article 11-4. It held that Article 11-4 did not seek to prohibit a specific group or specific groups of people who were distinct ethnically, racially or with regard to religion. What it

26. Mention should also be made of the Democratic Justice Party, which also represents the Turkish minority in local authorities. In addition, many municipalities and some regions are run by coalitions led by the MRF.

disallowed was formation and operation of political parties according to ethnic, racial or religious criteria which excluded those who did not share those characteristics. Parties of the latter kind were devoted solely to defending a narrow minority identity and thus were incompatible with political pluralism. Although ambivalent, this reasoning made it possible to retrospectively validate MRF participation in the local elections, the law in this case yielding to the realities of political life.

A comparable situation is to be found in Romania. After the 2004 parliamentary elections, the Democratic Alliance of Magyars of Romania (DAMR), with its 22 MPs and 10 senators, entered the governing coalition following a political agreement.²⁷ The right of association forms the basis of national minorities' participation in public life.²⁸ Similar participation exists at local level under the law of 25 May 1991 on local public administration and local autonomy. Members of national minorities living in an administrative area where the national minority accounts for more than 20% of the population can obtain the agendas and decisions of local council meetings in their own language. When municipal councillors speaking a minority language represent at least one third of the council, they can ask for the minority language to be allowed in council meetings. The 2004 law on the election of administrative municipal authorities defines "national minority" as any ethnic group represented on the Council of National Minorities (Article 7). The council is attached to the Department for Interethnic Relations, which has itself been attached to the prime minister's office since July 2003. Both have an advisory role and deliver opinions, in particular on draft legislation concerning rights and duties of people belonging to national minorities, while the council is also responsible for defending and co-ordinating minority interests. In 2004 it comprised 19 organisations representing a total of 20 minorities. The Department for Interethnic Relations also includes a National Roma Agency.²⁹ There is a comparable consultative body in Bulgaria, the National Council for Ethnic and Demographic Questions, established in 1994 as part of the Cabinet office. This body does not exclusively represent the interests of people belonging to national minorities, however.

27. National minority political organisations have majorities on some municipal councils.

28. Article 40 of the constitution: "(1) Citizens may freely associate into political parties, trade unions, employers' associations, and other forms of association. (2) The political parties or organizations which, by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania shall be unconstitutional". In addition, Article 62-2 provides: "(2) Organizations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each, under the terms of the electoral law. Citizens of a national minority are entitled to be represented by one organization only". It is the law on election of the Chamber of Deputies that implements this provision by assigning at least one seat to any party that obtains 20% of the votes cast.

29. Nevertheless, the Advisory Committee on the Framework Convention noted that the impact of the Council for National Minorities on government decisions was fairly limited: it has no legal personality and inadequate human and material resources. In fact, its influence is more apparent through the prominent people who are members of it. Over-representation of the Hungarian minority should be noted.

B. From de jure equality to de facto equality: minorities and the fight against discrimination

This is a matter mainly, but not solely, concerning France, where the constitution's affirmation of the oneness of the French people is entirely based on the principle of all citizens' equality before the law. As a token of a unitary, uniform and homogeneous society, the equality principle, which goes right back to Article 1 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789, can be said to be the very foundation of the French legal order. The equality in question is abstract and formal, as indicated by Article 6 of the declaration.³⁰ Being equally subject to the rule of law, citizens are to be treated identically.

The equality principle thus has the function of unifying the national community, which it identifies as the community of officially recognised citizens. Clearly, however, this function of unifying society, this formal conception of equality, has only ever applied to the one category and that is why it is also part of a dialectic of unification and differentiation. This can be put down to the looseness of the principle, which "does not say wherein equalness consists and simply states that what is equal must be treated equally".³¹ In other words, while the equality principle prohibits legal discrimination, it has never been an obstacle to catering for differences of situation, as the Constitutional Council has pointed out: "while the principle of equality before the law does not prevent legislation's laying down different rules for categories of people whose circumstances differ, this is only the case when the difference in treatment is justified by the difference in circumstances and is not incompatible with the purpose of the legislation",³² with the legislation having to derive from some inherent general interest objective. The principle of differential equality is therefore well established in France, but the Constitutional Council ensures that it is non-discriminatory in character and regards this as the *raison d'être* of its own review function.

In this context it has always taken care to demarcate the scope of differential equality so as not to affect the legal homogeneity of the French people and thereby create minority situations – other, of course, than those acceptable to French constitutional law ("parity" principle, Article 3, paragraph 5, of the French Constitution; recognition of "overseas population forming part of the French people", Article 72-3; autonomous status of Polynesia, LO 27 February 2004; interim provisions on New Caledonia, Title XIII; special status of Corsica). In this approach differential equality can be seen, if anything, as a "requirement of equity applying to all policies that break with equality of rights in order to

30. "[The law] must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes ..."

31. Moutouh H., "Recherche sur un 'droit des groupes' en droit public français", law thesis, Bordeaux, 1996, p. 314.

32. Decision No. 78-101 DC of 17 January 1979, Rec., p. 23.

restore equality of opportunity for disadvantaged individuals or groups".³³ As thus applied, differential equality has made most impact, within the French legal system, in the economic and social field since the object is above all to reduce de facto inequalities. Although it has not given any more prominence to minority situations, it has allowed some regionalisation of the French legal system.

For example, in its decision of 26 January 1995 on the outline Regional Planning and Development Act, in connection with the introduction of regional planning guidelines for adapting regional and urban planning legislation to local geographical factors, the Constitutional Council stated: "their application solely to certain parts of the national territory meets a need to take differences of situation into account but they cannot then ignore the principle of equality or contravene the principle of indivisibility of the Republic".³⁴ Article 1 of the Act (the law of 4 February 1995) accordingly states that its objective is to "guarantee equality of opportunity for all citizens throughout the territory". Consequently, it says, regional planning and development policy seeks to rectify the inequalities in people's lives that result from geographical location and to offset regional handicaps. It therefore makes certain exceptions so that the burdens on the individual can be adjusted.

But there is also some ambivalence to this "regionalisation" of the law, especially given Article 1 of the constitution. It is a euphemism to talk of "regional handicaps" and, more generally, "regional discrimination". In reality, the differentials are less about the regions than about the people who live there, have links with them and are socially defined by those links. As Dominique Schnapper has highlighted in relation to urban policy: "the declared refusal to take into account any 'ethnic' dimension is being circumvented by the use of social and regional criteria".³⁵ In other words, legislative provision for the regions involving adjustments to the equality principle becomes a pretext for singling out certain groups according to geographical origin, the regions concerned being designated on account of the population groups who live there.

In short, in French public law we are now seeing the equality principle mutate into a non-discrimination principle, with non-discrimination being seen as a prerequisite when action is taken to bring about real equality: "over and above a desire for rule-making to take into account differences of situation as a matter of 'justified' discrimination, the actual purpose of the legal rule is changing, and the rule is now expected to help reduce inequalities".³⁶ It is precisely to meet that objective that the authorities are not only countenancing differences in treatment,

33. Stasse F., [Considérations générales] Sur le principe d'égalité, Conseil d'Etat, Rapport public, 1996, p. 85.

34. Decision No. 94-358 DC, JO, 1 February 1995, p. 1706.

35. Schnapper D., *La démocratie providentielle, Essai sur l'égalité contemporaine*, Paris, Gallimard, 2002.

36. Calvès G., "Egalité (Principe d')", in *Dictionnaire des droits fondamentaux* (ed. Chagnollaud D. et Drago G., Paris, Dalloz, 2006, p. 380.

but actually putting the emphasis on discrimination law. This necessarily involves designating the groups who are to be discriminated in favour of, though in fact those groups self-designate by complaining of being discriminated against in some respect.

Firstly, membership of an ethnic, national or religious group exists negatively in French public law in the form of a criterion for prohibiting negative discrimination.³⁷ Its legal effects are nonetheless indisputable. But secondly and mainly, it was the riots of October and November 2005 that changed the law's purely negative approach to discrimination by establishing a link between the social issue and the identity issue in that the places where there was urban violence combined economic inequalities and racial segregation. This is evident from Law 2006-396 of 31 March 2006 on equality of opportunity.³⁸ The explanatory memorandum submitted to the National Assembly in January 2006 stated: "There is particular discrimination, whether direct or indirect, against people living in disadvantaged neighbourhoods and those of immigrant origin or from the overseas French territories ... a person from a North African immigrant background is five times less likely to obtain a job interview than a person who is not". On the basis of this finding, Title 2 of the Act introduced a series of measures on equal opportunity and combating discrimination: a national agency for social cohesion and equal opportunity was established to take action on behalf of groups in difficulty,³⁹ and the powers of the Anti-Discrimination and Equality Authority were reinforced.

But in another area of French public law – the so-called right to remembrance⁴⁰ – we can see a similar mutation of the equality principle towards a "principle of equal dignity between groups",⁴¹ the right in this case being more a matter of declaration than legislation and its subject matter being "commemoration or recognition of the difficulties or sufferings of a particular group of human beings". While the objective here is to integrate into the community "members of groups whose past differs from that of most French people",⁴² it also involves taking into account the distinctive identities of which the nation is composed. Article 5 of the Law of 23 February 2005, for example, penalises "any insult or defamation of a person or group of persons for being or being taken for *harkis*."⁴³

37. Article 225.1 of the Criminal Code; Article L 122-45 of the Employment Code. Law 2004-1486 of 30 December 2004 establishing the Anti-Discrimination and Equality Authority should also be mentioned.

38. Official Gazette, 2 April 2006.

39. Article 38 of the law explicitly refers to "immigrant communities and those of immigrant background" as the focus of the agency's integration work.

40. Law 2005-158 of 23 February 2005 on national recognition and a national contribution on behalf of repatriated French people; Law 2001-434 of 21 May 2001 recognising slavery and the slave trade as crimes against humanity.

41. Calvès G., *op. cit.*

42. Frangi M., "Les 'lois mémorielles': de l'expression de la volonté générale au législateur historien", *Revue du droit public*, 2005, p. 255.

43. The *harkis* were native North African troops who served in back-up units alongside Frenchmen.

Here, the singling out of particular identities results from circumstances peculiar to the French nation: we are dealing not with national minorities but ethnic identities linked to the consequences of decolonisation and, more broadly, immigration. Nor is it a matter of institutionalising particular identities. On the contrary, the strategy here involves integration into the community – “taking the Republic at its word and its motto and principles at face value”.⁴⁴ Moreover, it explains why the French courts have not followed European case law on non-discrimination. The European Court of Human Rights regards non-discrimination as involving a duty to treat differently people who are in different situations, which is the most direct way to improve minority situations: “The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.⁴⁵ In France, there is still no duty to apply different rules to different situations. To do so is still an exception to the general rule, which continues to be the norm simply by virtue of being general.

Nonetheless, minority situations are increasingly making their way into French law concerning the unitary state. Because of sociological change the reiteration of traditional republican principles, encapsulated in the constitutional principle of oneness of the French people, is beginning to sound a little like lip service. While minority situations still too often get a paralipsical mention in French public law, the fact is that it can no longer ignore them, since the discriminations noted and denounced by the groups affected challenge the very effectiveness of republican principles. Social reality is serving notice on the French Republic to bring its principles into line. That particular reality cannot be replicated elsewhere and we now have to get used to the proteanness of law on minorities, to its adjusting to the specific features of each “people as society” rather than espousing a single model. The unitary state can no longer ignore the diversity of its own human substratum.

44. Fassin E., interview, op. cit. (note 11).

45. Judgment of 6 April 2000, *Thlimmenos v. Greece*, Application No. 343669/97, §44.

Territorial solutions for managing diversity and their changing role

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1. Introduction: minorities and territories

Article 1.2 of the Ohrid Framework Agreement between the Macedonian Government and representatives of the Albanian minority of 13 August 2001 reads: "There are no territorial solutions to ethnic issues". Conversely, 2007 is the 30th anniversary of a landmark manifesto book, which argues that federalism is the best instrument for minority protection and for permanent conflict settlement.⁴⁶

These two opposite formulas represent the two poles of a complex and not yet resolved dilemma: to what extent does minority protection require territorial arrangements for self-government? How can minority self-government be achieved without jeopardising the state's unity? Moreover, further and more modern fundamental questions arise when dealing with territorial arrangements for ethnic issues: how can self-government be applied to dispersed or territorially non-concentrated groups? What are the consequences of territorial arrangements on the minorities within the autonomous territory (minorities in the minorities or "minoritised" majority population)? And, above all, in which direction is the relationship between minorities and territories evolving?

As a matter of fact, it cannot be ignored that, in a comparative perspective, most of the solutions to ethnic conflicts are indeed territorial; on the other hand, territorial self-government cannot be a panacea, since it can never be "pure" but it is rather a compromise between self-rule and shared rule.⁴⁷

This paper deals with the legal issues arising from a comparative analysis of territorial responses to questions regarding taking these diversities into account. The focus will be on the different legal models that can be observed, trying to examine the approaches underpinned by the various autonomy arrangements

46. Esterbauer F., Héraud G. and Pernthaler P.(eds.), *Föderalismus als Mittel permanenter Konfliktregelung*, Wien, Braumüller, 1977. For this reason, the book has often been considered the theoretical foundation of ethno-federalism. The book still represents a challenge for contemporary conflict scenarios – see Woelk J., "Föderalismus als Mittel permanenter Konfliktregelung. Der Fall Bosnien-Herzegowina", in Weber K., Wimmer N. (eds), *Vom Verfassungsstaat am Scheideweg. Festschrift für Peter Pernthaler*, Wien New York, Springer, 2005, pp. 467-92.

47. According to the famous definition of federalism provided by Elazar D. J., *Exploring Federalism*, Tuscaloosa, University of Alabama Press, 1987.

(section 2). Furthermore, attention will be paid to the modern challenges posed to territorial solutions as instruments for the consideration of ethnic issues, including the evolving concept of territory (section 3). Against this background, the main features of a new and more flexible law of diversities will be sketched (section 4), leading to some concluding remarks (section 5). It will be argued that territorial solutions are still the most effective and unavoidable devices to address ethnic issues, although in the present context several new elements must be carefully considered, such as the overall framework of territorial arrangements, the issue of the addressees of these arrangements and the evolution that minority related concepts (including territory) are facing in the present era marked by the challenge of diversity.

Prior to any further consideration, however, a preliminary, fundamental remark is necessary in order to clarify the close relationship between minorities and territories. It has been correctly pointed out that “minorities as such do not exist. Rather, there exist large and small, numerous and otherwise, social groups. In abstract, all groups, each endowed with its own identity, equally represent the natural and cultural diversity of the human species. A social group may be seen as transformed into a minority when, on the basis of a shared and single feature of reference, it establishes relations with another group which, by virtue of a largely (but not solely) quantitative criterion comes to constitute the majority”.⁴⁸ Quantitative and qualitative elements to determine a minority status have thus to be referred to a specific territory where specific numerical and power relations exist. In principle, even the whole world is a territorial dimension and thus even a “universal” approach to minorities is in the end territorial. Legally, a minority can be identified only in relation to the scope of application of a law, which is necessarily territorial.

The logical connection of the very idea of a minority to a territory explains why:

- a) the usual reference point for the identification of a minority is the state,⁴⁹
- b) in recent times, increasing attention has been devoted to non-state entities that might determine the formation of minorities within the respective territory,⁵⁰

48. Toniatti R., “Minorities and Protected Minorities: Constitutional Models Compared”, in Bonazzi T., Dunne M. (eds), *Citizenship and rights in multicultural societies*, Keele University Press, 1995, p. 200.

49. The well-known attempt to define a minority by Francesco Capotorti focuses on the following distinctive elements of minorities as groups: “numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly a sense of solidarity, directed towards preserving their culture, traditions, religion or language” (emphasis added); Capotorti F., “The Protection of Minorities under Multilateral Agreements on Human Rights”, in *The Italian Yearbook of International Law*, 1976, Vol. II, p. 14 and *ibid.*, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, Geneva, UN Center for Human Rights, UN Doc. E/CN.4/Sub.2/384/Add.1-7.

50. See below, section 3.

c) in any event, non territorial (that is, personal) forms of autonomy for minorities and groups are in the end different means to the same end: to determine a territorial scope of application of minority protection and participation mechanisms.⁵¹

It is thus fair to say that territory is the fundamental, unavoidable reference and context for the application of minority rights. Rephrasing the famous statement of former OSCE High Commissioner on National Minorities, Max van der Stoel, one could argue that: "Even though I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one – *within a specific territory*".⁵² The relationship between groups and territories, however, is far from being uniform. In other words, the meaning of territories to groups and of groups to territories depends on several variables, which in the end goes back to the very ideological approach that inspires the different legal attitudes vis-à-vis the minority challenge.

2. Constitutional models compared

2.1. Approaches to minority issues

Having clarified that territory is a necessary and logical precondition for the very identification of a minority and thus for the protection of minority rights, a second step should now be made, analysing the different territorial solutions for managing minority issues.

An analysis of the legal treatment of national minorities in different constitutional systems from a comparative perspective,⁵³ shows that at least four general,

51. The concept goes back to the so-called Austro-Marxists, who elaborated it between the end of the 19th and the beginning of the 20th century (see Renner K., *Der Kampf der österreichischen Nation um den Staat*, Leipzig/Vienna, Deuticke 1902; *ibid.*, *Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung auf Österreich*, Leipzig/Vienna, Deuticke 1918). The most developed example is given by the Hungarian Law on the Rights of National and Ethnic Minorities of 1993 (Act LXXVII, 1993), which provides for the establishment of minority self-governments at municipal, county and national level. In other words, it makes the territorial scope of application of minority rights dependent on (variable) territorial dimensions. See on this law Vermeersch P., "Minority Policy in Central Europe: Exploring the Impact of the EU's Enlargement Strategy", in *The Global Review of Ethnopolitics*, 3:2, 2004, 3-19; Kussbach E., "Das ungarische Minderheitengesetz 1993", in Hengstschläger J. et al. (eds), *Für Staat und Recht*, FS Schambeck, Berlin 1994, 729 ff.; Küpper H., *Das neue Minderheitenrecht in Ungarn*, München, Oldenbourg, 1998. The fundamental aspect of non-territorial arrangements as regards cultural autonomy is dealt with by David J Smith in this volume (The revival of cultural autonomy in certain countries of Eastern Europe: were lessons drawn from the inter-war period?) and is therefore not given further attention in this paper.

52. The emphasised words have been added by the author. The sentence of Max von der Stoel was pronounced during his address given at the CSCE Human Dimensions Seminar "Case Studies on National Minority Issues: Positive Results", Warsaw 24.5.1993 (www.osce.org/hcnm/documents/speeches/1993/24may93.html). This draws on the famous definition of obscenity given by Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (1964): "I know it, when I see it".

53. See Frowein J. A. and Bank R., "The Participation of Minorities in Decision-Making Processes", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 2001, 1 ff., based on a report for the Committee of Experts on Issues Relating to the Protection of National Minorities of the Council of Europe (DH-MIN).

obviously ideal and abstract models can be identified, which might serve as an overall frame of reference.⁵⁴

A first model can be called the “repressive nationalist state”. It is reached when the uniform national identity and homogeneity of the population is ideologically over-inflated in terms of its exclusiveness and superiority, to the point of legitimating policies which officially deny the existence of minorities (the banning of the use of minority languages in schools and in public offices, but also in private relationships, the enforced translation of names, surnames and place-names, etc). Violent degenerations of this model have led to “ethnic cleansing” and deliberate genocide. In such systems, minority rights are thus denied and the territorial dimension is instrumental to the repression⁵⁵ or to the dilution of minorities.⁵⁶

The second approach is inspired by an “agnostic liberal” ideology. It envisages the coincidence between nationality and citizenship, therefore being indifferent to the existence and to the development of the national (and religious, cultural, linguistic, etc.) identities of minorities. Typically, there is prohibition of ethnic organisations and especially of political parties⁵⁷ and the territory is formally neutral in ethnic terms. Even if this model is liberal in its provision of substantive rules and judicial instruments for the protection of the fundamental freedoms of individuals with usually explicit regard to all forms of discrimination based on membership of a minority group (language, religion, nationality, etc.), it shows

54. The following description of the four ideal-type models is based on Toniatti R., *Minorities and Protected Minorities: Constitutional Models Compared*, cit. 206 et seq. See also the pattern of “four models of acculturation” developed by Marko J., *Autonomie und Integration*, Böhlau Vienna 1995, 531: (a) “*cuius regio, eius lingua*” (one people – one nation); (b) ethnicity as “private matter” (following the pattern of institutional separation between Church and State – civic nation); (c) model of de-ethnicisation (“colour-blind constitution”); (d) multicultural society: institutionalisation of conflict through law, consociational type of democracy.

55. Without going back to more or less recent violent cases of ethnic cleansing in specific territories where minorities were concentrated (among the most recent, think of the Balkan wars in the 1990s or of the deportations in Darfour), the present case of Tibet could be mentioned. China’s territorial organisation provides for the establishment of the Tibet Autonomous Region (where the Tibetans are now minoritised, although some fundamental rights have been granted, such as the religious freedom), which does not coincide with the historical and ethnic borders of Tibet.

56. An example of such an approach within a democratic society is represented by the first Autonomy Statute for the region Trentino-South Tyrol in Italy (1948-1972). Even though the Paris peace agreement of 1946 provided “the German-speaking inhabitants of the Bolzano Province [with] a complete equality of rights with the Italian-speaking inhabitants within the framework of special provisions to safeguard the ethnical character and the cultural and economic development of the German-speaking element” (Article 1), Italy established in 1948 the autonomous region of Trentino-South Tyrol, vesting it with substantial autonomy. The territorial dimension, however, was conceived in a way that Italians were the majority in the region. This led to upset and bomb attacks by the German-speaking population. After Austria’s intervention at UN level, the Autonomy Statute was changed (1972) and almost all the powers were transferred to the provincial level, where the German speakers are in a majority position. For further details and literature see Lantschner E., “History of the South Tyrol Issue”, in Marko J., Palermo F. and Woelk J. (eds), *Tolerance Established by Law*, Brill, Leiden/Boston 2007.

57. For example in Bulgaria, where Article 11.4 of the constitution (1991) prohibits the establishment of ethnic parties. Many other countries have adopted rules banning parties on several grounds, including ethnic affiliation.

all the problems of a merely formally-based concept of equality.⁵⁸ The denial of any relevance of territories in ethnic terms can thus in the end reveal itself to be discriminatory because unequal aspects are treated equally.⁵⁹

A third model is the “national State of multinational and promotional inspiration”, which is typified by the predominance of a national group (the majority) and the presence of one or several minority groups. The recognition, protection and promotion of minorities are an integral component of the constitutional order and its fundamental values.⁶⁰ This is mirrored in arrangements entirely similar to those of the multinational state – at least in certain areas of the national territory (that is, those inhabited by the minority) – and apart from the different numerical ratios between the groups.⁶¹

In the fourth and last model, the “paritarian multinational state”,⁶² the constitutional order aims at institutionally integrating the multinational society on a parity basis by means of territorial organisation as well as through substantive legislation. In consequence, from a legal perspective, there are neither national majorities nor national minorities. Paradoxically there are hardly any promotional and affirmative legislative actions towards its own multinational components to be found, as differentiation is the general law and the exception becomes the rule.

The most relevant examples for our purposes do of course derive from the third (promotional) and the fourth (multinational) model, due to the fact that in these models the territory is expressly dealt with as a reference point for positive minority protection, being basically its main instrument.

58. See, for example, Glazer N., *Affirmative Discrimination, Ethnic Inequality and Public Policy*, Cambridge, Mass., 1987 and (on the US-American model) Norgren J. and Nanda S., *American Cultural Pluralism and Law*, Westport, Praeger, 3rd edition, 2006.

59. For an example take the case of Corsica in France. Even though it is no longer true that Corsica (as well as several other French territories, particularly in the *outré-mer*) has no special treatment in legal terms in order to address its cultural and linguistic difference vis-à-vis the rest of France, such an approach led to some well-known and problematic decisions of the Constitutional Council as far as Corsica's languages were concerned (see Dec. No. 99-412 DC of 15 June 1999) or special status (see Dec. No. 2001-454 DC of 17 January 2002). Further on the French context the analysis by Pierré-Caps S., “Constitutional non-recognition of minorities in the context of unitary states: an insurmountable obstacle? ”, in this volume.

60. In Italy, for example, not only the constitution mandates the protection of linguistic minorities (Article 6), but also a special constitutional law (the Autonomy Statute for Trentino-South Tyrol) expressly affirms in Article 4 that minority protection is an integral part of Italy's national interest. Such a provision has a considerable impact on the judicial interpretation of minority rights, since it obliges the judge to permanently reconcile state (that is, majority) and minority interests, without seeing them as opposed values to be balanced against each other.

61. Positive historical examples of this model are to be found in the constitutions of Italy, Spain, Finland and most of the other European countries (particularly in central, eastern and South-Eastern Europe) as well as in many other parts of the world.

62. For example, Switzerland, Belgium and, to a certain extent, Canada, Bosnia and Herzegovina, in theory Cyprus under the Constitution of 1960 still formally in place and – even though not a state – the European Union.

2.2. Three different relations between ethnicity and territory

Within the promotional and multinational arrangements, a variety of approaches can be observed as to the relationship that the legal system imposes between minorities and territories.⁶³ Simplifying, three main abstract approaches can be identified for our purposes, on a scale ranging from maximal emphasis of the ethnic dimension to maximal emphasis of the territorial one.

(1) A first model vests territories with the exclusive task of being the framework for the self-government of specific minority groups. Due to geographic or historical reasons, territorial autonomy is in these cases conceived as the exclusive instrument for protection, representation and participation of groups within a broader national framework. Typical examples are islands where a population different from the rest of the state is settled and which belong to a nation-state due to specific historical events, such as the Åland Islands (*vis-à-vis* Finland), Greenland (*vis-à-vis* Denmark), New Caledonia (*vis-à-vis* France) and so on. These cases of territorial autonomy are quite exceptional in today's world, since their population is all in all homogeneous, and therefore territorial self-government – mandatory for obvious geographical reasons – fully overlaps with self-government of the concerned groups. However, it is worth noting that the coincidence *ope legis* between a territory and a group is also increasingly pursued in non-homogeneous contexts, with many more problems attached. Leaving aside controversial, violent and not yet fully settled contexts, such as in several eastern and South-Eastern European states, a seminal example in this regard can be observed in Quebec, which aims at (exclusively) representing the French-speaking component of Canada, even though several other French-speakers are settled outside the province and, conversely, many non-French-speakers have always lived in Quebec (English-speakers and natives). Recently, the Canadian Parliament adopted a motion recognising that Quebecers “form a nation within a united Canada”,⁶⁴ and several legal rules attribute to Quebec the exclusive role of representing “French-Canada” on the federal scene.⁶⁵ Such an approach

63. As the European Commission for Democracy through Law (Venice Commission) pointed out, there is “no common practice in the matter of territorial autonomy, even in general terms” – CDL – INF (1996)4, Opinion on the interpretation of Article 11 of the draft protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, § 3c.

64. Motion of 27 November 2006. Though not legally binding, the motion aims at resolving the long-lasting and still open wound of the role of Quebec within Canada. It culminates a process marked by the failure of two proposed constitutional amendments (1987 and 1991), by two provincial referenda on the proposal of unilateral secession (1992 and 1995) and by a fundamental opinion issued by the Canadian Supreme Court (Reference re. Secession of Quebec [1998] 2 S.C.R. 217). One of the open issues regards the concept of “Quebecker”, whether this should be intended in territorial or in ethnic terms. It is worth notice that the English term “Quebecker” or “Quebecer” is normally used to refer to any resident of the province, regardless of his/her language, whereas in French the word “Québécois” is used both in civic/territorial (that is, all residents) and in ethnic sense (that is, only French-speaking inhabitants). See also the entry “Quebecois” in the Oxford English Dictionary.

65. An interesting example is Article 6 of the Canadian Supreme Court Act 1985, according to which three justices out of nine must come from Quebec. This provision conventionally excludes

is to a large extent the simplest from the legal point of view, since it requires dealing with only one side of the problem – autonomy – which is supposed to include any other diversity issue.

(2) A second type of relationship between ethnicity and territory is to be observed when ethnic and territorial elements do co-exist and interplay with each other, with the consequence that a broad margin of discretion is left in determining the prevalence of one or the other principle depending on the subjects at stake as well as on variable political priorities. Unlike in the previous category, in these cases the autonomy arrangements do take into account the heterogeneity of the population settled in a territory, although territorial self-government is in first place conceived for the protection of one (or more) specific (minority) groups. The examples are manifold.

A first group of cases rely on the principle of territoriality, such as in Belgium,⁶⁶ Switzerland⁶⁷ and to some extent also in the European Union.⁶⁸ This principle means that a territory is identified with a language and a culture that are the sole official language and culture of that territory. Within the framework of a multinational polity, this means that the territories cannot change their cultural identity because this is guaranteed by the central constitution, which therefore provides

non-French-speakers from Quebec from being appointed. On the issue of non-dominant regional peoples see below.

66. See De Bruycker P. et al., “Mécanismes institutionnels et droits individuels dans la protection des minorités de la Belgique fédérale”, in Levrat N. (ed.), *Minorités et Organisation de l’État*, Brussels, Bruylant, 1998, pp. 189-230; Peeters P., “Federal Conflict Regulation. The Case of Belgium” in Bächler G. (ed.), *Federalism against Ethnicity? Institutional, Legal and Democratic Instruments to Prevent Violent Minority Conflicts*, Zurich, Rüegger, 1997, pp. 195-204; and Swenden W., “Personality versus Territoriality: Belgium and the Framework Convention for the Protection of National Minorities”, in *European Yearbook for Minority Issues*, Vol. 2, 2002/03, p. 331-356. See also Pas W., “A Dynamic Federalism Built on Static Principles: The Case of Belgium”, in Tarr G. A., Williams R. F., Marko J. (eds), *Federalism, Sub-National Constitutions and Minority Rights*, Greenwood, Praeger, Westport, 2004, 157-175 and de Witte B., “Regional autonomy, cultural diversity and European integration: the experience of Spain and Belgium”, in Ortino S., Žagar M., Mastny V. (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West*, Manchester Univ. Press, 2005, 202-225. The evolution of the Belgian system after the constitutional transformation that culminated in the new constitution of 1993 shows some tendency towards the first model. Significant in this respect is the institutional merging that took place in Flanders between regional and community institutions, where the latter basically “absorbed” the first.

67. The principle of territoriality in Switzerland was first elaborated as an unwritten constitutional corrective to the freedom of language by the Federal Court (see judgment of 31 March 1965, *Association de l’Ecole française*, BGE 91, I, 480 and judgment of 25 April 1980, *Brunner*, BGE 106, Ia, 299) and was subsequently formalised in the (Con-)federal constitution (Article 70 of the Swiss Constitution).

68. Unlike any other international organisation, the EU recognises the official status of all languages that are official at national level in the various member states (since January 2007, when Irish was accorded the status of a full official language of the Union, the sole exception is represented by Letzeburgesch, which is official in Luxemburg but not in the EU) – see Article 290 TEC and Regulation No. 1/1958. See further Palermo F., *Linguistic Diversity within the Integrated Constitutional Space*, European Diversity and Autonomy Papers 2/2006, www.eurac.edu/edap.

for the stabilisation of groups, but also for the guarantee of forced co-operation among them within the national frame.⁶⁹

Other and not less numerous cases of this kind are those where self-government for groups was the driving force for territorial autonomy too, but self-government also developed beyond the original scope, seemingly becoming a priority per se and (gradually) losing the “original intent” of an ethnic group protection, moving towards a territory-centred system where ethnicity becomes recessive to autonomy as such. Examples of this kind of evolution are to be found, among others, in New Brunswick in Canada,⁷⁰ in Macedonia,⁷¹ in South Tyrol in Italy,⁷² etc.

(3) A third typology of link between territorial autonomy and group protection is represented by the contexts where ethnicity is certainly important in determining the reasons for the development of territorial autonomy,⁷³ but the legal design of the autonomy regime emphasises the territorial dimension more than the ethnic one. One could think of the Spanish autonomous communities of the historic nationalities.⁷⁴ Beside the clear attempts to identify the autonomous

69. An example of this is the mentioned Article 70 of the Swiss Constitution. It provides that “(1) The official languages of the Federation are German, French, and Italian. Romansh is an official language for communicating with persons of Romansh language. (2) The Cantons designate their official languages. In order to preserve harmony between linguistic communities, they respect the traditional territorial distribution of languages, and take into account the indigenous linguistic minorities. (3) The Federation and the Cantons encourage understanding and exchange between the linguistic communities. (4) The Federation supports the multilingual Cantons in the fulfilment of their particular tasks. (5) The Federation supports the measures taken by the Cantons of Grisons and Ticino to maintain and to promote Romansh and Italian”. From these provisions, the balance between cultural self-government of the Cantons and federal guarantees in support of the smaller groups clearly emerges.

70. In the Province of New Brunswick the Francophone and English-speaking populations are by and large equal in size. The powers of that province, however, are largely the same as any other Canadian Province except Quebec.

71. After the Ohrid Agreement of 2001 and the subsequent constitutional amendments, “the former Yugoslav Republic of Macedonia” has established a strongly promotional minority protection system, which nevertheless basically only concerns the Albanian community. Apart from the rules adopted at state level for the representation of the Albanian minority, the referendum of 2004 should be mentioned. In 2002 a law on local self-government was adopted, whose aim was to maximise the number of municipalities where Albanians make up 20% of the population (and thereby make Albanian an official language at local level). The subsequent referendum held in 2004 failed because of insufficient participation in the ballot and the law was therefore confirmed: accordingly, a much higher number of municipalities than before became bilingual. See further Marko J., “The Referendum on Decentralization in Macedonia in 2004: A Litmus Test for Macedonia’s Interethnic Relations”, in *European Yearbook for Minority Issues*, Vol. 4, 2004/05, pp 695-721.

72. The autonomy for South Tyrol was definitely conceived as an instrument for the protection of the German (and the Ladin) minority. However, the process of reconciliation and normalisation which has taken place in that area in the last fifteen years has emphasised the territorial elements of the autonomy regime vis-à-vis the ethnic ones. For further analysis see Palermo F., “L’Alto Adige tra tutela dell’etnia e governo del territorio”, in *il Mulino* 4/1999, pp. 671-84.

73. According to Spanish constitutional terminology, this pre-legal element as a precondition for autonomy is called “differential factor” (*hecho diferencial*).

74. Article 151 of the Spanish Constitution of 1978 provides for a “fast track to autonomy” for the pre-existing nationalities, even though this term never appears in the constitution. As a matter of fact, the communities that achieved autonomy this way were those where the national character is most developed: the Basque Country, Catalonia, Galicia and Andalusia.

territory with one nation (or nationality),⁷⁵ this concept is inclusive in terms of belonging to the group,⁷⁶ which is normally defined by a free choice of individuals who commit themselves to a culture and a language.⁷⁷ The same is true for Scotland, which has developed a civic, territorial identity protected through self-government.⁷⁸ Similarly, one can think of the Croatian region of Istria,⁷⁹ as well as of the Serbian Autonomous Province of Vojvodina:⁸⁰ in the last two cases regional autonomy has a clear territorial emphasis, because national minorities are numerically inferior to the national population even at regional level. Similarly, other examples of ethnic-originated, but substantially territorially-managed self-government can be observed in all cases in which forms of autonomy (additional competences, etc.) for territories where minorities are settled are subject to numerical clauses: in these cases, it is up to the same minority groups to set self-government in motion.⁸¹

In terms of participation, all these territories are vested with some form of guaranteed representation in the national institutions: this is especially relevant for the smaller territories that must rely on forms of affirmative representation, since otherwise they would not reach the numerical ratio necessary to be represented in the national institutions.⁸² For the big territories, guaranteed representation is

75. The terminological issue (nation v. nationality) recently emerged during the process of adoption of the new autonomy statute for Catalonia (adopted in 2006 and approved by popular referendum in June, 2006). In the case of Catalonia, the (merely political) issue was resolved with a compromise: the (legally non-binding) preamble affirms that "in reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority", whereas the (legally binding) text of the statute only contains the word "nationality".

76. See Poggeschi G., *Le nazioni linguistiche della Spagna autonómica*, Cedam, Padova 2001, at 51 et seq.

77. See again the new autonomy statute for Catalonia. Its Article 1 states that "Catalonia, as a nationality, exercises its self-government constituted as an autonomous community". Moreover, the preamble affirms that "The contribution of [Catalan] citizens has shaped an integrating society...". Also the Basque identity is, by and large, defined in cultural/linguistic (thus basically voluntary) rather than in ethnic terms. See for a historical perspective Rubio Pobes C., *La identidad vasca en el siglo XXI*, Madrid, Biblioteca nueva, 2003.

78. Cohen A. P., *Nationalism and Social Identity: Who Owns the Interest of Scotland?*, in *Scottish Affairs* 18, 1997, pp. 95-107.

79. See Seppi M., "Lo statuto istriano, vecchie e nuove problematiche", in Piergigli V. (ed.), *L'autocrazia divisa. La tutela giuridica della minoranza italiana in Istria*, Fiume e Dalmazia, Padova, Cedam 2005, pp. 383-407 and Poggeschi G., "Le minoranze nazionali nei paesi dell'Europa Centrale ed Orientale", in Pfössl, E. (ed.), *Valorizzare le diversità: tutela delle minoranze ed Europa multiculturale*, Roma, Istituto di studi politici S. Pio V, 2003, especially pp. 232-48.

80. Articles 182-187 of the Serbian Constitution of 2006. For the situation prior to the new constitution see Poggeschi G., *Le minoranze nazionali*, cit., at 233.

81. The examples range from the Finnish "prototype" (at local level, only municipalities inhabited by more than 8% of Swedish speakers can be officially bilingual – see Language Act of 1922, recently replaced by Language Act No. 423/2003) to more recent cases making use of the same principle. See, for example, the Italian law No. 482/1999 (which provides for the establishment of forms of municipal self-government upon request of one third of the members of the municipal council) and the Czech law on regions No. 129/2000, § 78, providing that minority self-governments can be set up in the regions where at least 10% of the people belong to a recognised minority.

82. There are, for example, reserved seats for Bougainville in Papua New Guinea's Parliament, for Greenland in the Danish Parliament, for the Aosta Valley in the European Parliament, for the Åland Islands in the Finnish Parliament, etc.

the outcome of their size and numerical strength and they do not normally need derogative rules on territorial or ethnic representation.

3. Territory and titular groups. The paradox of territoriality, ways out and ways back

From the above, what we can call “the territorial paradox” emerges. On the one hand, all forms of minority self-government are in the end territorial: the overlap between territory and its “ownership” by a national, ethnic or linguistic group can be more or less intense, but the legal instruments to address minority issues are by and large all territorial, because they are applicable only to a specific territory and also because they confer certain self-government powers within that territory to minority groups. On the other hand, however, the conferment of a territorial self-government for minority groups does not address the whole matter and might even be detrimental to an overall management of complexity, as it risks replicating the state pattern at lower level. Territoriality alone is thus a far too simple solution for a far too complex problem.

In fact, the ultimate rationale of territorial solutions is to transform minority issues into deliberative processes based on the majority rule: playing with the territorial scope of legal norms, minority issues are addressed through the classical logic of majority-based democracy, as it turns (national) minorities into (sub-national, territorial) majorities, or at least into much more consistent minorities.

Overall, such an approach has proved to work very well. Its immense strength lies not only in it being a viable alternative to external self-determination (thus preventing possible conflicts), but also, and even more so, in its ability not to derogate from the fundamental element of western constitutionalism (majority rule) in addressing minority issues. By so doing, minority issues do not jeopardise the democratic foundations of the legal systems and can be pragmatically accommodated (although with some difficulties and compromises) within the classical deliberative procedures. Like a wizard, the legal system transforms minorities into majorities and incorporates them into a majority-based decision-making process. It could provocatively be said that territoriality changes (or at least aims to change) the very nature of minority groups since it turns them into (potential) majorities. Such an approach – efficient as it can be – might turn majority-minority relations upside down, but it cannot completely resolve them for the simple reason that it is still based on a principle that is ultimately at odds with minority rights: majority rule.

In recent times, at least three factors have contributed to make minority issues much more complex than a purely territorial approach suggests: a) the emergence of power-sharing as a counter-majority mechanism; b) increasing attention to the rights of the groups sharing a territory with a territorial majority which is a minority at state level, as well as to the rights of minorities within minorities;

c) the decreasing importance of the state as the exclusive territorial reference for determining minority positions.

(a) Power-sharing or ethnic consociational democracy is a governmental technique that aims at overcoming the majority-minority spillover by obliging all involved groups to institutional co-operation beyond their numerical ratio.⁸³ It can be paritarian (that is, the groups have the same number of representatives in the power-sharing institutions)⁸⁴ or proportional (that is, the groups' representation is proportional to their numerical consistency, but anyway guaranteed irrespective of their numerical strength).⁸⁵ Power-sharing follows a different pattern than territorial self-government: although of course applied to a territory, it does not try to turn minorities into majorities, but it rather develops a form of government which is based on a different rationale than majoritarian democracy. John Stuart Mill has already pointed out that there cannot be democracy in multi-ethnic states:⁸⁶ Power-sharing is an instrument that enables one to go beyond the classical democracy paradigm (based on rule of majorities) by enforcing more sophisticated decision making (based on the rule of law) so that none of the groups may be outnumbered within the institutions of the state or sub-national unit. The recent proliferation of power-sharing agreements⁸⁷ testifies to the insufficiency of a "pure" territorial model to exclusively address minority issues by simply "majoritarising" them.

(b) The second critical element that shows the limits of territorial solutions clearly emerges from the considerations already put forward in part 2. Besides some exceptional and comparatively less relevant cases of ethnically homogeneous, small and/or less inhabited territories (the Åland Islands, Greenland, etc.), territories are (and will be less and less) all but homogeneous in ethnic terms. Territorial self-government, by transforming national minorities into regional majorities (or at least into consistent minorities) does not address the fundamental issue of the rights of regional minorities, that is, of persons belonging to the national majorities which are numerically inferior in the autonomous territory or smaller minorities within that same territory (so called minorities within minorities). Scholars have recently paid increasing attention to the phenomenon,⁸⁸ starting

83. For a comprehensive analysis and the detailed illustration of several case studies see Weller M. and Wolff S. (eds), *Autonomy, Self-governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies*, London, Routledge, 2005.

84. Such as, for example, in the case of the Belgian Government and of the Cour d'Arbitrage, in Bosnia and Herzegovina for the Presidency, the Council of Ministers and the House of Peoples, etc.

85. Such as in, for example, South Tyrol for the composition of the provincial and regional governments, in Canada for the composition of the Supreme Court, in Belgium for the Senate, in Switzerland for the Federal Council as well as for the Federal Tribunal, etc.

86. John Stuart Mill, *Considerations on Representative Governments*, New York, 1874, pp. 146 and 151.

87. From Northern Ireland to "the former Yugoslav Republic of Macedonia", from Mindanao to Bougainville, from Bosnia and Herzegovina to Kosovo to Moldova, just to quote examples from the last decade.

88. See on the various meanings of the concept Eisenberg A. and Spinner-Halev J. (eds), *Minorities within Minorities: Equality, Rights and Diversity*, Cambridge University Press 2005.

from a substantive approach to rights: according to such an approach, minorities are not a stable artefact, but rather a dynamic, relational factor, whose very nature as minority groups largely depends on the applicable law.⁸⁹ In sum, belonging to majorities and minorities resembles a revolving door rather than being a permanent factor.⁹⁰

So, for example, vegetarians might not be a minority in general, since they are not recognised as such by the legislator, but they can become a minority vested with enforceable rights in some contexts, where specific regulations apply (for example, in prison, if the menu is not differentiated).⁹¹ Similarly, English speakers in Quebec cannot be considered a national or ethnic minority in the traditional sense,⁹² nor are they with respect to subject matters decided by the federal government, but they are a functional minority when it comes to subjects decided at provincial level, where they are minoritised in the decision-making process.

To address these problems, the recently developed concept of “regionally, non dominant titular peoples” is quite useful, meaning groups that are part of the (local) population and, while locally inferior, constitute the “majority” group at national level.⁹³ Such a concept expresses very well the deficits arising from the combination of territoriality and majority rule and forces the development of more complex devices to deal with ethnic complexity as such, regardless of the specific territorial dimension where it might be observed. In simple words, at

89. See the interesting essay by Poulter S., “Limits of Pluralism”, in Hepple B. and Szyszczak E. M. (eds), *Discrimination: the Limits of Law*, London 1992, pp. 183-215. See also (in a different context, showing analogous problems) Piciocchi C., *La libertà terapeutica come diritto culturale*, Padova, Cedam 2006.

90. Ortino S., “La tutela delle minoranze nel diritto internazionale: evoluzione o mutamento di prospettiva?” In Trentino-Alto Adige R. A. (ed.), *Giornata delle minoranze*, Trento 1996, pp. 19-33. The same rationale has been adopted by the Parliamentary Assembly of the Council of Europe, Resolution 1301 (2002), Protection of minorities in Belgium (see below).

91. In the United Kingdom, “although prisoners have few ‘rights’ enforceable through the courts, they are accorded certain privileges and can expect certain standards to be followed in the light of various sets of circular instructions issued to prison establishments by the Home Office. The current guidelines allow, *inter alia*, orthodox baptised Sikhs to wear the five symbols of their religion, together with a turban; Muslim women to wear clothes which fully cover their bodies; Hindu women to wear saris; and Rastafarians to keep their dreadlocks” (Poulter S., *Limits of Pluralism*, cit., 183). Similarly, in a rather interesting decision issued by a Court of Appeal in California (*Friedman v. S. Cal. Permanente Med. Group*, 102 Cal. App. 4th 39, 66, 125, Cal. Rptr. 2d 663, 682 (2002)) about whether vegans could or not be considered a religious group (and thus exempted from some general obligations), the court made clear that the recognition as a religious group (in this case it was denied) could not be made in general, but only for the purpose of the specific law concerned. This means, in other words, that even the very legal recognition can be variable from single law to single law.

92. See expressly in this sense the UN Human Rights’ Committee decision in the case of *Ballantyne et al. v. Canada*, Communications Nos. 359/1989 and 385/1989, J. Ballantyne and E. Davidson, and *G. McIntyre v. Canada*, in UN doc. GAOR, A/48/40 (II), p. 103, paragraph 11.5., when the committee refused to view English speakers in Quebec as a minority because they are part of the national majority in Canada even though they are a minority in Quebec. See further McGoldrick D., “Canadian Indians, Cultural Rights and the Human Rights Committee”, *The International and Comparative Law Quarterly*, Vol. 40, No. 3 (1991), pp. 658-69.

93. Potier T., “Regionally non-dominant titular peoples: the next phase in minority rights?”, *JAMIE Paper 6* (2001), online at www.ecmi.de/jemie/download/JEMIE06Potier11-07-01.pdf, especially p. 3.

least where the basic conditions of survival for groups are given,⁹⁴ a qualitative leap is required where the instruments of diversity management are concerned. In this context, today's complexity requires instruments that are able to protect groups which can be occasionally in a minority position, that are dynamic and not static, that can be addressed to diversity issues in general and are not only focused on the protection of pre-defined minority groups.

(c) The third and following critical element is the increasing awareness of the fact that the state cannot be the sole level of reference for the identification of minority positions. Although it is true that since the Westphalian age the state used to be the exclusive reference and the sole master of minority definition and rights⁹⁵ and it is not contestable that the state still is the main subject in this respect, it cannot be denied that to consider as minorities only those groups which are numerically inferior to the population of the state (and the other criteria elaborated by Capotorti in the 1970s) would be a formalistic exercise which neglects the reality.⁹⁶ Recent and significant examples of the modern and more substantial approach to minority issues even beyond the state dimension are provided by several international and supranational bodies such as the Council of Europe's European Commission for Democracy Through Law (Venice Commission), the Advisory Committee on the Framework Convention for the Protection of National Minorities, the European Union and the OSCE High Commissioner on National Minorities.

The Venice Commission has effectively and convincingly pointed out that the territorial reference for determining the existence of a minority does not necessarily coincide with the state,⁹⁷ nor is the concept of minority necessarily dependent on the requirement of citizenship; its definition of a minority "does not limit the protection of the rights of minorities only to persons belonging to minorities who are citizens" of the state they live in⁹⁸ instead, "a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past".⁹⁹

94. Unfortunately, for many minority groups in Europe and in the world the fundamental question is still their own survival as a group. In these situations it does not seem possible to move beyond the dimension of "mere" legal protection and, from the perspective of the majority, legal recognition of the minority. In many cases, the explicit recognition of basic rights of protection (in the fields of language, culture, participation, etc.) would already be a major step forward.

95. On the historical developments see Ruiz-Vieitez E., *The History of Legal Protection of Minorities in Europe (XIIIth – XXth Centuries)*, University of Derby, 1999.

96. "To be fair to Francesco Capotorti, perhaps when he referred to minorities as being "in a non-dominant position", he had in mind the wider, national context. While this may have been conceptually acceptable in the extant-Wall world, the fall of the former Soviet east and the (partly) consequent re-evaluation of international dynamics, surely condemns the retention of this terminology as being one of a former age". from Potier T., *Regionally, non dominant titular peoples*, p. 8.

97. European Commission for Democracy through Law, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could Be Applied in Belgium, CDL-AD(2002)1, Strasbourg, 12 March 2002.

98. CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania, §5.

99. CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine, §18.

Similarly, the Advisory Committee on the Council of Europe's Framework Convention for the Protection of National Minorities requires an inclusive approach to minority rights that goes beyond the formal requirement of citizenship, this being sometimes, as a matter of fact, a tool for excluding titular groups from the benefit of fundamental rights.¹⁰⁰ Therefore, the Advisory Committee also encourages an extensive interpretation of the Framework Convention with a view to ensuring its application also to non-citizens¹⁰¹ and this is increasingly acknowledged by scholars, calling for a substantive rather than formalistic approach to the issue of titular groups.¹⁰²

Also in the European Union, despite the absence of a direct power to regulate minority issues, an impressive amount of decisions of the European Court of Justice are quite relevant in supporting the mentioned tendency; the rulings are formally grounded on different subject matters such as the free movement of people and the principle of non-discrimination on the ground of nationality¹⁰³ and have *de facto* introduced an EU system of minority protection¹⁰⁴ which had important consequences also in terms of European legislation.¹⁰⁵

Not least, the fundamental role of soft law mechanisms such as the recommendations of the OSCE High Commissioner on National Minorities in key aspects of minority rights has to be recalled. In particular, the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999), by affirming the fundamental democratic role of territorial arrangements for minority self-governance (Articles 19 and 20), also calls for a possible

100. See, for example, the first opinion on Estonia, adopted 14 September 2001, at 17: "In particular, the citizenship requirement does not appear suited for the existing situation in Estonia, where a substantial proportion of persons belonging to minorities are persons who arrived in Estonia prior to the re-establishment of independence in 1991 and who do not at present have the citizenship of Estonia. The Advisory Committee therefore welcomes that *de facto* the Government appears to take a considerably more inclusive approach to the protection of national minorities. In this connection, the Advisory Committee notes that in its dialogue with the Government on the implementation of the Framework Convention, the Government agreed to examine also the protection of persons not covered by the said declaration, including non-citizens (ACFC/INF/OP/I(2002)005).

101. See, for example, the first opinion on Lithuania, adopted 21 February 2003, at 90: "The Advisory Committee finds that it would be possible to consider the inclusion of other groups in the application of the Framework Convention, where such a desire is expressed, on an article-by-article basis" (ACFC/INF/OP/I(2003)008).

102. See also Swenden W., "Personality versus Territoriality: Belgium and the Framework Convention for the Protection of National Minorities", in *European Yearbook for Minority Issues*, Vol. 2, 2002/03, pp. 331-56 and Alen A., de Witte B., Lemmens P. and Verstichel A. (eds), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, Antwerp, Intersentia, 2008.

103. See also Palermo F., "The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ", (2001) *Maastricht Journal of European and Comparative Law*, 8:3, pp. 299-318.

104. On the relationship between EU law and minority rights, see Toggenburg G., *Das Recht der Europäischen Union und die Minderheiten Europas. Spielräume und Schranken in einem neuen Gestaltungsrahmen*, Baden Baden, Nomos, 2007.

105. Up to the Treaty Establishing a Constitution for Europe (29 November 2004, OJ 16 December 2004, C, 310), whose Article I-2 provides that the Union is grounded on several values "including the rights of peoples belonging to a minority".

combination of territorial and non-territorial arrangements for successful minority participation.¹⁰⁶

Finally, as a matter of fact, it is the very evolution of the integrative practice, especially in Europe,¹⁰⁷ that attenuates the link between territory and minority position: One could think, for example, of the preference accorded to the “civic” criterion of residence vis-à-vis the state-centred criterion of citizenship, in recent case law of the European Court of Justice¹⁰⁸ and in a fundamental report by the Venice Commission, which stated that citizenship (that is, the formal relationship with a state) can no longer be considered the only criterion for the recognition of minority rights and that non-citizens should also benefit from specific minority protection.¹⁰⁹

All this leads one to believe that while territory is still (and will always be) an unavoidable reference for the very recognition of minority positions, its practical meaning and its scope are largely variable from case to case and in general are changing due to the evolution of the overall legal environment. Like all other concepts and instruments for minority protection, territory also needs to be profoundly revised in the light of the present challenges.¹¹⁰ A territorial dimension is inherent to minority rights, provided, however, that territory is seen in a more inclusive and flexible way.

Parallel to the evolution of ethnic conflicts, strong legal safeguards are required to re-establish mutual confidence in a first phase separation, whereas more

106. See also Kemp W., *Quiet Diplomacy in Action*. The OSCE High Commissioner on National Minorities, The Hague, Kluwer Law International, 2001.

107. See also Toniatti R., “Los derechos del pluralismo cultural en la nueva Europa”, in (2000) *Revista vasca de administración pública*, 58 (II), pp. 17-47.

108. An interesting example of this trend is visible in some recent developments regarding the political right *par excellence*, the right to vote. Even this right is less and less linked to citizenship and thus to the pure state dimension. Instead, residency is getting momentum as the reference for the exercise of such a right. One should think of two recent and telling judgments of the European Court of Justice of 12 September 2006. In case C-145/04, *Spain v. UK*, the court was asked whether EC law prevents a member state from granting the right to vote for the European Parliament to non-citizens. The case arose after the seminal decision of the European Court of Human Rights in *Matthews* (judgment of 18 February 1999, case No. 24833/94, *Matthews v. United Kingdom*, in Reports of Judgments and Decisions, 1999-I), which forced the UK also to grant the right to vote for the European Parliament to citizens of Gibraltar. The European Parliamentary Act 2003 accorded the right to vote not only to the residents of Gibraltar (who are British citizens), but also to the so-called Qualifying Commonwealth Citizens, that is, non-European citizens who have a special link to the UK. The European Court of Justice held in 2006 that EC law does not prevent a state from making such a decision. In another judgment of the same day (case C-300/04, *Eman and Sevinger v. College van Burgemeester*), the court held that the opposite situation is also admissible, that is denial of the right to vote to some category of European citizens (in this case, Dutch citizens of the Antilles). It follows that citizenship is no longer the sole and primary legal element to which the right to vote is linked. On the increasing preference for residence instead of citizenship as the reference point for the right to vote see also the European Court of Human Rights', judgment of 19 October 2004, *Melnitchenko v. Ukraine*).

109. See European Commission for Democracy through Law, Report on Non-Citizens and Minority Rights, adopted at the Commission's 69th plenary session (Venice, 15-16 December 2006), Study No. 294/2004, CDL-AD(2007)001.

110. The changing role of territory in contemporary law is profoundly analysed by Ferrarese M. R., *Diritto sconfinato*, Roma-Bari, Laterza, 2006.

flexible and integrative instruments become necessary in a subsequent and more mature stage of conflict settlement.¹¹¹ Similarly, the concept and the functions of territory are also deemed to change alongside the evolution of majority-minority relations, at least in situations of consolidated protection in which the minority is recognised and accepted and its survival no longer a matter for discussion; in short, where a sufficient level of protection, and consequently of trust, has been reached. In this context, the most radical instruments for “rebalancing” gradually lose their (necessity and) legitimacy in favour of mechanisms which provide for greater co-operation in the management of the “question of diversity”. In these situations one can no longer automatically presume that the interests of the minority generally prevail over other constitutional objectives. Consequently, the differentiating norms have to be justified more regularly and specifically. The legal instruments, subject to the stricter scrutiny of proportionality, reasonableness and adequateness, thus necessarily become more sophisticated. In the end, in these situations mere “protection” might even risk becoming counterproductive for the same minority which may find itself in a rather isolated position (in an extreme hypothesis confined to a sort of humiliating “reservation”) instead of fully participating in the development of its own group as well as of the complex society as a whole.

In other words, in the more advanced stage of diversity management that we are increasingly experiencing in several parts of the world currently, territory maintains its central role if its understanding moves away from an old-fashioned design as something simple, static, hard law-based and exclusive, towards a more modern factor which is necessarily complex, variable, inclusive and based also on several soft law instruments. Complexity, variability, non-exclusiveness, soft persuasion instead of hard imposition are key elements of the modern law of minorities. In order to better clarify how they are operating in the modern context and how they impact on territory, some further considerations are required.

4. Some final thoughts on the law of diversities and on its impact on territorial solutions to minority issues

For centuries, the main task of constitutionalism has been to limit power by establishing the majority rule and the principle of formal equality. Where(ever) this has been achieved – especially in large parts of Europe – the future challenge for a successful limitation of powers seems to be to enhance guarantees for minority positions and the principle of difference. This is anything but an easy task: due to the permanent change in the external context as well as the internal dynamics of the respective groups, all normative solutions and legal instruments need constant rebalancing, adaptation and reconsideration. This makes “one size fits all” and “once and for all” solutions nearly impossible and counterproductive.

111. On the time dimension of conflict settlement, see further Woelk J., “Südtirol: Ein Lehrbeispiel für Konfliktlösung”, in *Die Friedens-Warte – Journal of International Peace and Organization*, No. 1/2001, pp. 101-24; abstract in English available at www.friedens-warte.de/files/issues/h_1_01e.htm.

The same goes for territories: a “multilevel minority governance” is being created, with some important consequences stemming from this tendency. In the first place, the “protection” of minorities ceases to be a “competence matter” (if indeed it ever was) vested with one subject or another.¹¹² It rather becomes a transversal and shared objective which is to be achieved by different actors and instruments in a combined approach: while minimum denominators are determined at international and supranational level, the state acts as the motor for macro-policies in the field of equality, whereas the sub-national and local authorities and the minority groups themselves are the main actors of micro-policies of diversity.¹¹³ The territorial impact of each of these norms varies according to the area and the group concerned: the territory increasingly becomes like an accordion, which is compressed and expanded according to the scope of the legal norm in relation to which the minority position is determined case by case.

If this is true, a first conclusion to be drawn is that the traditional approach in terms of “protection of minorities” is no longer capable of providing workable legal solutions to the claims of diversity.¹¹⁴ Such an approach, in fact, is based precisely on the traditional criteria that are massively challenged by the new reality: state sovereignty, uniformity of the territory, standards, “top-down” recognition of a minority, strict proportionality scrutiny in order to justify “different” treatment, where “different” necessarily means “different from the rule of the majority”.

For this reason, new terminology is proposed: the “law of diversity” indicates the complex bunch of legal instruments that can be adopted at all possible levels in order to deal with the requests for taking account of potentially endless claims for diversity. A gradual move away from the majority’s perspective of a “law of minority protection” is needed, towards a more complex “law of diversities”, much more in line with today’s culturally complex societies, addressing groups in

112. See for example the cases of Italy and Austria. In Italy, the Constitutional Court originally interpreted minority rights as being vested exclusively with the state, since they were connected with the equality principle (case 4/1956 and several others). Subsequently, the court overruled this approach (case 312/1983): since then, the constant doctrine of the court is that minority protection is a field in which norms stemming from different (in particular: national and regional) authorities necessarily coexist. Similarly, new Article 8.2 of the Austrian Constitution, introduced in 2001, explicitly states that “the Republic (Federation, *Länder* and municipalities) is committed to its rooted linguistic and cultural diversity, which is represented by its autochthonous minorities”. See Marko J., “Art. 8 Abs. 2”, in Korinek K. and Holuobek M. (eds), *Österreichisches Bundesverfassungsrecht – Kommentar*, Vienna 2007.

113. Palermo F. and Woelk J., “From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights”, in *European Yearbook of Minority Issues*, Vol. 3, 2003/2004, Nijhoff, Leiden/Boston 2005, pp. 5-13 and the comment by Malloy T. H., “Towards a New Paradigm of Minority Law-Making: A Rejoinder to Palermo and Woelk’s Law of Diversity”, in *European Yearbook of Minority Issues*, Vol. 4, 2004/5, 5-27.

114. See also Lerner N., “Historical Overview: from Protection of Minorities to Group Rights”, in *Group Rights and Discrimination in International Law*, The Hague, Kluwer Law International, 2003, pp. 7-28.

general instead of simply protecting “minorities”.¹¹⁵ By so doing, rooted instruments for minority protection – beginning with territory – have also to be seen in a different light.¹¹⁶

Secondly, and even more importantly, many of the legal instruments to cope with diversity are now, as a matter of fact, soft law instruments. This field of analysis is particularly telling and paradigmatic of a larger evolutionary trend which seems to affect the entire system of law. Law has always been the expression of values, and as such – at least implicitly – of the majority’s values. In a society characterised by differentiation and thus by complexity and pluralism (even in values), law has necessarily to reduce its ideological (that is, majority imposed) component in favour of increasing its technical, procedural and “softer” character. In fact, to be as inclusive and shared as possible, the law of diversity needs to be inclusive instead of being imposed by a dominant majority.

To this end two elements are fundamental: on the one hand, an effective law of diversity is intimately procedural. This means that instead of imposing a pre-determined result it provides for a procedural framework for making a negotiated decision.¹¹⁷ On the other hand, shared consensus can be better achieved through soft, not immediately binding instruments. Reflecting a pluralist attitude, this “mild”¹¹⁸ law of complexity protects fundamental and individual rights providing at the same time for the procedures leading to negotiated choices, without predetermining or imposing such choices, but guaranteeing that the decision-making process is always assisted by procedural and participatory guarantees. Above all, such a “mild law approach” seems to be inevitable from a long-term perspective: the more a society becomes pluralistic and resistant to strict impositions, the more law can become effective by means of persuasion, obviously

115. Similarly Eric Heinze, *The Construction and Contingency of the Minority Concept*, in Deirdre Fottrell/Bill Bowring (eds), *Minority and Group Rights in the New Millennium*, The Hague, Martinus Nijhoff Publishers, 1999, pp. 25-74.

116. See also Malloy T. H., *National Minority Rights in Europe*, Oxford University Press, 2005 and Henrard K., “Equality Considerations and Their Relation to Minority Protections, State Constitutional Law and Federalism”, in Tarr G. A., Williams R. F. and Marko J. (eds), *Federalism, Subnational Constitutions, and Minority Rights*, Westport, Praeger, 2004, pp. 25-39.

117. Although in very different ways, all modern solutions to minority issues are intimately procedural and substantially bilateral. Visible examples can be found in Spain (especially through the new autonomy statutes that are regulating in detail the bilateral procedures with the state, for example, the new statute of Catalonia of 2006, which dedicates to the topic the whole title V of the new basic law of the autonomous community – Articles 174-200); in Italy (especially by means of the joint committees between the state and the autonomous regions – where minorities are settled – for the implementation of the autonomy regime, as well as specific “minority only” bilateral procedures such as the committee for the protection of the Slovene minority established by law 38/2001); in the UK (by means of the concordats and other still substantially political guarantees of bilateral relations between London and the devolved areas). Moreover, given the fundamental importance of judicial adjudication for the practical meaning of minority rights, it could even be provocatively argued that the codes of procedure are in practice the most important minority rights instruments. In simple terms, in a rule of law society, law increases its importance and minority issues are essentially legal issues; in such a context, since procedure is the essence of law, it ultimately follows that procedure is the essence of minority rights.

118. Using the expression coined by Zagrebelsky G., *Il diritto mite*, Torino, Einaudi, 1992.

within the framework of a stable legal system dominated by the rule of law. In fact, where a majority demands mindless obedience and submission from a minority, this is usually regarded as subjugation and increases the chances of not being respected.¹¹⁹ Thus, the more pluralistic a society, the higher the need for tolerance and persuasion instead of imposition and sanctions.¹²⁰

Such a shift of paradigm also requires a mild and procedural approach to territory as a means (*the means*) for minority protection. Accordingly, the territorial dimension of minority rights can no longer be carved in stone, being identified once and for all in a state-centred perspective and addressing always and exclusively the same group of people, following a majority driven approach which can be detrimental to the very aspirations of minority groups. The variability of the minority concept depending on the applicable law, instead, makes the territory a flexible, “liquid”, relational concept. At the same time, the guarantees for an inclusive law of diversity within a variable territory, where all possible minorities have a right to speak, can only be provided by sustainable and participatory procedures.

5. Outlook

In summary, this paper has argued that territorial arrangements are inherent to minority protection. However, the concept and the very functions of territory have been changing profoundly in recent times and this makes it necessary to take new challenges into consideration. Territories can less and less be identified with just one people. Not only at national, but also at sub-national (regional and local) level rules are necessary to accommodate diversity claims, combining territorial and non-territorial elements.

This requires in the first place a certain degree of “institutional maturity”, a released climate of reciprocal acceptance, trust, mutual information and co-operation between the groups on the one hand and the levels of government on the other, given that the issues of “territorial ownership”, of borders, of identities,

119. This is common to all phenomena of integration, being a societal integration of groups or a legally-driven process of integration in terms of supra-national polity building. For the latter example as regards the principle of tolerance instead of obedience in the frame of European integration, see Weiler J. H. H., “Federalism and Constitutionalism: Europe’s Sonderweg”, *Jean Monnet Working Paper* No. 10/00, www.jeanmonnetprogram.org.

120. This trend is emerging even within the framework of binding documents. Just to give two examples from the Council of Europe, the European Charter for Regional or Minority Languages is the first international document that can be ratified in bits and pieces: not all provisions need to be ratified by the contracting states, but only some for each part and this flexibility has made it possible to obtain a high number of ratifications. Similarly, the role of the Advisory Committee on the Framework Convention for the Protection of National Minorities, despite it not being binding, is extremely important in “adjusting” minority rights in the States Parties. Other extraordinary examples of soft law are, for example, the Venice Commission or the recommendations issued by the OSCE High Commissioner on National Minorities.

of secession, of the invisible line between integration and assimilation still remain quite sensitive ones.¹²¹

Moreover, it seems necessary to abandon any temptation to find easy solutions to complex issues. In addition to the instruments of “mere” minority protection, especially in contexts where basic protection is ensured, a qualitative leap seems necessary regarding the fundamental approach to the issue of minority rights, especially where its immediate link with a territorial dimension is concerned. In particular, the (mis)use of the territorial dimension as an instrument to make majorities out of minorities (the “egg of Columbus” approach) seems no longer to be a satisfactory response to today’s demands for detailed laws on complex issues, because it leaves several other problems unresolved, such as the claims of titular groups within the concerned territory.

The proposed solution is thus a redefinition of concepts, scope and function of the traditional legal instruments for minority protection, especially territory, alongside procedural and soft-law based instruments. The attitude of successful minority protection to evolve into a pluralistic and softer “law of diversities” requires some shift of paradigm in the very understanding of the meaning of territory: it is not true that there are no territorial solutions to ethnic issues, nor that the control over a territory addresses and satisfies all diversity claims. In future, territorial responses to diversity issues will look quite different from how we tend to see them today.

121. See Skurbaty Z. A. (ed.), *Beyond a One-Dimensional State*, Leiden/Boston, Nijhoff, 2005.

Making minorities more influential in public life: opportunities provided by existing constitutional arrangements and their limitations

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The argument implicit in this session is that territorial arrangements are the best, or at least the main, means of protecting minorities. The scope of a law is necessarily territorial, with the result that widespread devolution assures minorities of a degree of self-determination. It is also true that cultural autonomy solutions based on personal factors have not been very successful and that the protection provided by the unitary state seems inadequate. Yet the main tenets of this argument are qualified or put into perspective by the reports on which I have the honour of commenting. Mr Pierré-Caps allows us to glimpse substantial, although not always very visible, changes in the unitary state and it could be said that Mr Palermo points more clearly to the limitations of the territorial approach and the fact that its benefits are only relative, than to its successes.

In these comments I should therefore like to bring to light this convergence of sorts and consider the reasons for it. In a similar vein, I should like to illustrate this relativism with some examples from Bosnia and Herzegovina. To this end, it seems necessary to take a new look at both the principles of the protection of minorities and arrangements for achieving it. It is appropriate to begin by drawing attention to the changes affecting all constitutional systems, which stem, in a nutshell, from globalisation. These changes are bringing peoples closer together and spawning interconnections and interaction on a vast scale, often in a disorderly fashion. Yet the phenomenon is not having the same results everywhere. This shows just how powerful the national sense of identity is. The dialectics of the global and the specific are reflected, in particular, in the constitutional concepts that serve as a reference or context for the protection of minorities. While the first section of my statement draws attention to the difficulties of drawing comparisons, the second, concerning the objectives of the protection of minorities, and more specifically its object or purpose, makes it possible to gauge the difficulty of the undertaking and have an inkling of the likely variety of constitutional responses. These two analyses call for a third one, a review of legal means of helping to achieve the objective of improved constitutional protection for minorities.

1. A new look at the concepts concerned: the dialectical opposition between globalisation and the sense of a national identity

The concepts at issue here are all subject to this dialectical opposition, and this makes any comparison in this area particularly tricky. Whether we are talking

primarily of sovereignty, the nation-state, indivisibility or the unitary state, the concepts in question are all being reviewed in the light of the growing harmonisation of legal systems and of what is called the post-national era. Sovereignty, for instance, which originally meant absolute, supreme power, is tending to become limited and shared, as is borne out by the distinction between total and partial revision of the constitution introduced in Switzerland and subsequently adopted in numerous other constitutions. The indivisibility of sovereignty and of the republic, as enshrined in France in particular, is now often recognised in the same article or section of the constitution as the autonomy of infra-state peoples or territories.¹²² The key concepts that stand in the way of the recognition of minorities are thus changing silently, in so far as there is no mention of the change: the terms remain the same but their content changes.

This content is not, however, changing everywhere, and certainly not at the same pace in all countries. As a result of the internationalisation and Europeanisation of constitutions, principles and rules originating from outside the state or at supra-state level are being imposed in more or less binding fashion, depending on the domestic hierarchy of international standards, highlighting the fact that the state and the constitution are no longer the supreme, unfettered authorities. This situation is not, however, apparent or accepted to the same extent everywhere. Thus, most of the central and east European countries, when they adopted new constitutions after the break-up of the Soviet Union, sought to revive the traditional sense of sovereignty and constitutional supremacy in order to mark their newly acquired independence. Similarly, in western European countries, the extent to which constitutions have become receptive to international and European law varies immensely. The constitution is much less receptive to such law in the Republic of Ireland than in Spain, for instance. It is also worth noting that, even though recognition of minorities is an international custom, this does not prevent states from failing to apply this custom, as the courts can always argue that there is no official document bearing witness to such recognition.

The result is that when these concepts are referred to in general terms, we can be sure that they will be interpreted very differently, depending on the audience. Any comparison therefore needs to be put back in a single conceptual context. These dialectics are not, however, confined to the concepts favoured by unitary states: they also apply to notions that serve to promote the protection of minorities. The very term "minority", for instance, is by no means clear and unambiguous (see below). The principles of equality and non-discrimination are also being reinterpreted, as is apparent from the two general reports. Lastly, territory and territoriality are being affected, in turn, by this change. It therefore has to be acknowledged that the concepts that serve as a reference in the field of the protection of minorities are both variable and evolving.

122. See, for instance, Article 5 of the Italian Constitution, Article 2 of the Spanish Constitution and, even more recently, Article 1 of the French Constitution.

2. A new look at the objectives of protection: its object or purpose

What is a minority and which minorities should be protected? Francesco Palermo emphasises, from the outset, the difficulties of defining the phenomenon. Adopting Roberto Toniatti's analysis,¹²³ he points out that minorities as such do not exist: rather, there exist social groups which, on the basis of a shared reference or identity, establish relations with another group, which comes to constitute the majority. In short, minorities are like sects: sects that are successful are called religions. This success can be gauged mainly in terms of territory. Accordingly, not only are territorial arrangements a means of providing protection but also, perhaps more importantly, a territory is something with which minorities identify. French law is not very far removed from this idea in so far as it accepts, particularly in the economic and social field, territorial distinctions, and even the idea of a "territorial disadvantage", in order to ensure more genuine equality – what Stéphane Pierré-Caps rightly refers to as differential equality. This mix of quantitative and qualitative factors that go to make up a minority is, however, mainly characteristic of what can be called traditional or national minorities, those that are concentrated in a particular territory and form a majority there.

Yet, as Francesco Palermo observes, and as is suggested by the initial difficulty of coming up with a definition, the concept of minority is essentially a relative one. In addition to national minorities, there are dispersed minorities (Jews), minorities within a minority that is in the majority in a particular territory (Roma), minorities that are not part of the national community (immigrants) and, more generally, all the social groups that are in the minority with regard to the application of the law (women, homosexuals, vegetarians, etc). Clearly, in all these cases, the minority is linked less and less to a particular territory, and we can see just how dynamic and changing the concept is.

The question of which groups, which territories or which minorities require protection is therefore a burning issue, and one that brings us to the objectives or purpose of such protection.

While the general aim seems to be clear and shared, it has to be admitted, here again, that more tangible conceptions prove to be extremely varied. Ideally, the idea is to forge an integrated democratic society or pluralist democracy, but this is just as abstract a concept.

To this end, administrative freedom or, better still, territorial self-government on the part of the minority makes it possible to establish a subtle relationship between the minority and the national majority, the minority and the territorial majority. This does not, however, rule out the possibility that the territorial minority will come to oppress minorities within its territory, a problem sometimes

¹²³ Toniatti R., "Minorities and Protected Minorities: Constitutional Models Compared", in: Bonazzi, T. and Dunne, M. (eds), *Citizenship and Rights in Multicultural Societies*, Keele University Press 1995, p. 200.

raised in connection with Catalonia's linguistic policy. In order to avoid this, increasing use has been made over the last few decades of a system of equal or proportional power-sharing – a system that transcends majorities and minorities and is based, ultimately, on consensus.

Such a system applies, in particular, in Bosnia and Herzegovina. The Dayton Accords set up two entities within the state, the Republika Srpska and the Federation of Bosnia and Herzegovina, a Bosno-Croat federation. The Constitutional Court held, in an important decision,¹²⁴ that the three constituent peoples, the Serbs, the Croats and the Bosnians, were equal in each of the two entities. While this solution prevented complete territorial separation, it superimposed on the territorial set-up a principle of collective or ethnic equality that does not seem conducive either to optimum protection for minorities or to the development of democracy, or indeed to the integration of all the communities in society. Whereas the *raison d'être* of democracy is self-determination, the impression is that in Bosnia and Herzegovina the driving force for political action is the desire to prevent any form of hetero-determination. This has brought things to a standstill. For a start, equality for the three constituent peoples in the two entities excludes from politics all the "genuine" minorities (for the three constituent peoples are not considered as minorities), in particular all those descended from mixed marriages ("others"). It also impedes the introduction of a socially committed democracy, in so far as ethnic equality takes precedence over individual equality and thus stymies the formation of a political majority. This is epitomised in the way in which the presidential elections are organised. They take place primarily on a territorial basis, since the Serbian member of the presidency may be elected only in Republika Srpska and the Croat and Bosnian members only in the Federation. In other words, a Serb living in the Federation may not stand for election, and may vote only for a Croat or a Bosnian. Secondly, they are governed by an ethnic criterion, since the idea is to elect a representative of each people, regardless of political majorities. The fact that candidates are recruited on a territorial basis makes it difficult to accept the idea that each represents the whole state, or even that each candidate represents his or her entire people. The link between territory and membership of an ethnic group thus proves to be particularly detrimental to the whole object of the protection of minorities.

3. A new look at legal protection techniques

The reports show that there is not just one means of promoting the participation of minorities in public life. Numerous means can be used to this end, as well as for other purposes. This is particularly true in the unitary state, where the whole range of safeguards for fundamental rights, in particular the principle of equality and non-discrimination, comes into play. If we add positive discrimination and the newly emerging class actions in the courts, it has to be admitted that

124. Constitutional Court of Bosnia and Herzegovina, U 5/98: several partial decisions handed down in 2000.

the unitary state is no longer incapable of protecting minorities, provided it is determined to do so.

The issues here are more connected with the adaptation and effectiveness of traditional techniques and arise largely because of the dynamic nature of the phenomenon of minorities and hence the need for protection that is flexible and can evolve. The territorial approach – whether at state or infra-state level – operates in a legal framework based on a hierarchy of legislation, binding provisions and permanent structures. Is this framework not too rigid to be able to adapt constantly? In other words, should we not devise a new form of legislation based on pluralism, or at least reinterpret traditional techniques and structures in the light of the complexity and flexibility of the present day world?

Special measures to promote minority representation in elected bodies: the experience of the OSCE High Commissioner on National Minorities

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1. Introduction

The High Commissioner on National Minorities (HCNM) was established as “an instrument of conflict prevention at the earliest possible stage” by the Organization for Security and Co-operation in Europe (OSCE) in its Helsinki Decisions of July 1992. In carrying out the High Commissioner’s conflict prevention mandate, the effective participation of persons belonging to minorities in public life has always been one of the HCNM’s priority areas, central to the attention of the HCNM and has been and one of the recurrent themes in the High Commissioner’s Office work. Effective participation is an essential component of a peaceful and democratic society.¹²⁵ When persons belonging to minorities can effectively take part in decision-making processes, especially those affecting them, this creates a sense of inclusion and belonging to the state as a whole. Experience has shown that integration through participation is an important element in forging links of mutual understanding and loyalty between majority and minority communities within the state. On the contrary, exclusion from public life creates a sense of alienation and frustration, which might lead to inter-ethnic tensions and the consideration of using non-democratic means to convey concerns and demands.

While seeing himself as a political instrument, the HCNM grounds his approach in international legal norms and standards, which are his principal framework of analysis and the foundation of his specific recommendations. As his mandate provides, “[i]n considering a situation, the High Commissioner will take fully into account the availability of democratic means and international instruments to respond to it, and their utilization by the parties involved.”¹²⁶ This is in line with the comprehensive security concept of the OSCE, entailing that long-term peace, security and stability are achieved not only with politico-military means, but are based as well on the observance of human and minority rights. The right to the effective participation of persons belonging to minorities is guaranteed by the following international standards: paragraph 35 of the 1990 (CSCE) Conference for Security and Co-operation in Europe Document of the Copenhagen

125. See first general principle of the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life.

126. Paragraph 6 of his mandate, CSCE Helsinki Document, 1992, “The Challenges of Change”.

Meeting of the Conference on the Human Dimension of the CSCE;¹²⁷ Article 2, paragraphs 2 and 3, of the 1992 UN Declaration on Minorities;¹²⁸ and Article 15 of the Council of Europe's 1995 Framework Convention for the Protection of National Minorities.¹²⁹

In order to give meaning and content to this general effective participation standard, the HCNM decided to commission a group of independent experts to elaborate recommendations and outline alternatives for minority participation in public life. This resulted in the adoption and publication in 1999 of the Lund Recommendations on the Effective Participation of National Minorities in Public Life (hereafter Lund Recommendations), named after the Swedish city in which the experts last met and completed the recommendations.¹³⁰ The aim of the Lund Recommendations was not to create new norms and standards but to interpret and elaborate the existing international rules regarding the effective participation of minorities in public affairs. They are intended to serve as a reference to law and policy makers and as a practical tool for the HCNM in order to guide him in his own "quiet" diplomatic endeavours to help key actors to find solutions.

Four recommendations on elections were further drawn up in the "Guidelines to Assist National Minority Representation in the Electoral Process" (hereafter "Warsaw Guidelines"). These guidelines were developed by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in conjunction with the International Institute for Democracy and Electoral Assistance (International IDEA) and the Office of the HCNM and made public in 2001. The Recommendations on Policing in Multi-Ethnic Societies, adopted and made public by the HCNM in 2006, also contain further elaboration of aspects of effective participation of persons belonging to minorities in public life.

127. According to paragraph 35 of the 1990 Copenhagen Document, the OSCE participating states "will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities".

128. According to Article 2, paragraphs 2 and 3, of the 1992 UN Declaration on Minorities: "[p]ersons belonging to minorities have the right to participate effectively in [...] public life" and "the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation."

129. According to Article 15 of the Council of Europe's 1995 Framework Convention for the Protection of National Minorities, states parties "shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them".

130. For a more detailed description of the genesis of the Lund Recommendations, see Packer J., "The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life", 4 *Helsinki Monitor* (2000), pp. 31-6. See also Kemp W., "Applying the Lund Recommendations: Challenges for the OSCE", paper presented at The International Security Forum (Workshop III 3), Geneva, 16 November 2000, www.isn.ethz.ch/4isf/4/Papers/ISF_WS_III-3_Kemp.pdf, pp. 5-6. On the occasion of the fifth anniversary of the adoption of the Lund Recommendations, a special issue of the *International Journal on Minority and Group Rights* was dedicated in 2005 to the recommendations. Krzysztof Drzewicki, senior legal adviser to the HCNM, served as a guest editor. All thematic recommendations can be consulted on the HCNM website: www.osce.org/hcnm.

The Lund Recommendations aim to offer process-oriented solutions. To that extent, they differ from the other HCNM recommendations on education, language and broadcast media, which aim at providing solutions to object-oriented issues.¹³¹ The Lund Recommendations concentrate on possibilities to support processes, which enable concerns and conflicts to be voiced, addressed and resolved.¹³² The key to resolving tensions lies as much in the process as in the substance of the issues themselves: substance and process go hand in hand. Rights are only part of the solution; persons belonging to minorities should be effectively involved when minority rights are drafted, interpreted and implemented, and generally, in all decision making which affects their identity in all branches of government, at all levels. On the other hand, minority representation should not replace minority rights. Without firm legal safeguards for minority rights, minority representatives have to permanently negotiate these rights.

The subject of this report concentrates on minority representation in elected bodies. However, it should be stressed that this should be seen in the context of the broader theme of effective participation in public life. The importance of effective participation of persons belonging to minorities in the administration, the judiciary and law enforcement institutions, such as the police, for example, has been one of the issues which the HCNM followed closely in Croatia. The alternatives as to how to implement the right to effective participation in public life as outlined in the Lund Recommendations are not mutually exclusive nor hierarchical. For example, directly elected representation in legislative bodies is not the only, nor necessarily the most effective, means of ensuring that minority interests are taken into account in the decision-making process.¹³³ Experience shows that minority councils, which should be able to comment directly on issues of minority concern, can sometimes be more effective than representation in parliament. However, while the HCNM has always encouraged and welcomed the establishment of such dialogue mechanisms, he has also emphasised that such forums should only complement, rather than substitute, direct political representation.¹³⁴

In the following report, first, the interaction and co-operation of the HCNM with other OSCE institutions and international organisations to the extent that they are relevant to minority representation in elected bodies will be described.

131. The Recommendations on Policing in Multi-Ethnic Societies reflect a further evolution of the thematic recommendations towards operational guidelines. See de Graaf V. and Verstichel A., "The Recommendations on Policing in Multi-Ethnic Societies", in *OSCE Yearbook 2006*, Baden-Baden, Nomos, 2007, p. 322.

132. Packer J., "The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life", 4 *Helsinki Monitor* (2000), pp. 30-31.

133. "Minority Rights, Participation and Bilateral Agreements", address to an international seminar on Legal Aspects of Minority Rights: Participation in Decision-Making Processes and Bilateral Agreements on Minority Rights by Max van der Stoep, High Commissioner on National Minorities, Zagreb, 4 December 2000, p. 3.

134. See, for example, OSCE HCNM letter to H.E. Mr Anatoly Zlenko, Minister for Foreign Affairs of Ukraine, 4 December 2001.

Secondly, the relevant recommendations of both the Lund Recommendations and the Warsaw Guidelines will be discussed, illustrated with concrete examples of the experience of the HCNM, taking into account the confidentiality of his mandate. The elected bodies considered will not be limited to parliaments and local and regional councils. Some attention will also be given to elected minority advisory bodies and territorial and non-territorial self-government councils. The overview is not intended to be exhaustive,¹³⁵ but purports to give a general idea of the approach of the HCNM to minority representation in elected bodies.

2. HCNM interaction and co-operation with other OSCE institutions and international organisations

The main working instruments in the “toolbox” of the HCNM are currently: specific country recommendations, thematic recommendations, statements and speeches, and pilot projects.¹³⁶ The specific country recommendations of the HCNM can contain both political assessment and advice, as well as legal advice on draft legislation or draft amendments or interpretation and advice on the implementation of domestic legislation.¹³⁷

In the exercise of his conflict prevention mandate, the HCNM also interacts with other OSCE institutions and field missions and other international organisations. To provide a few examples of relevance to minority representation in elected bodies, it has become established practice that a political adviser of the HCNM joins the core team of ODIHR election observation missions in countries where the HCNM is active, and monitors, in particular, minority participation in elections. In addition, the Warsaw Guidelines are at the moment being updated and revised into a real handbook with the aim of making them more user-friendly for all stakeholders, in particular for election observers who do not necessarily have a background in international minority rights standards. Furthermore, OSCE field missions might request advice on international standards and best practice regarding minority participation and representation in order to take an informed position regarding local situations. Moreover, they provide helpful on-the-ground insights, which assist the HCNM in assessing draft legislation. Finally, by taking part in, for example, round tables organised by OSCE field missions, the HCNM himself or through his advisers reinforces the message a particular mission wishes to send.

To reinforce messages sent by the international community and to avoid forum-shopping are among the main reasons for co-ordinating with other international

135. For an overview of the activities of the HCNM, see the yearly contributions to the *European Yearbook of Minority Issues*.

136. See, for more explanation, for example, Neukirch C., Simhandl K. and Zellner W., “Implementing Minority Rights in the Framework of the CSCE/OSCE”, in *Mechanisms for the Implementation of Minority Rights*, Strasbourg, Council of Europe, 2005, pp. 165-66.

137. The letters sent by the first HCNM, Max Van der Stoep, are released to the general public and published on the HCNM website: www.osce.org/hcnm.

organisations, in particular the Council of Europe.¹³⁸ The HCNM and the European Commission for Democracy through Law (Venice Commission) often coordinate with regard to advice on draft legislation. This is currently the case, for example, regarding the constitutional drafting process in Montenegro, where the inclusion of a provision on reserved seats for minorities or a more general provision on the effective participation of minorities in parliament is, among others, at stake. There is also an exchange of views regarding thematic opinions and discussions. For example, the HCNM has provided input to the Venice Commission *Report on Electoral Rules and Affirmative Action for National Minorities' Participation in the Decision-Making Process in European Countries*¹³⁹ and currently is doing so for the discussion on dual voting for minorities. There are also regular contacts with the Secretariat of the Council of Europe Framework Convention for the Protection of National Minorities. Moreover, the HCNM has observer status at the Committee of Experts on Issues relating to the Protection of National Minorities (DH-MIN), where he or his advisers take part in the discussion on topics, such as minority consultative bodies and electoral laws and laws on political parties of relevance to national minorities. Finally, since the protection of minority rights is one of the political criteria for EU accession, the HCNM provides his assessment of the situation of human rights and the protection of minorities in EU candidate countries (Turkey, Croatia, and "the former Yugoslav Republic of Macedonia") and potential candidate countries (for example, Serbia/Kosovo and Montenegro) to DG Enlargement of the European Commission as an input to their progress reports.¹⁴⁰

3. General principles

The Lund Recommendations open with five general principles. The other 19 recommendations have to be interpreted in accordance with these.

The first principle states, among other things, that experience in Europe and elsewhere has shown that, in order to promote the effective participation of minorities in public life, governments often need to establish specific arrangements for national minorities. It might be that the political climate and system in a given country allow naturally for a good representation of persons belonging to

138. For more on the enhanced co-operation between the Council of Europe and the OSCE, see the joint Declaration on Co-operation between the Council of Europe and the Organization for Security and Co-operation in Europe, appended to the Action Plan adopted at the 3rd Summit of Heads of State and Government of the Council of Europe, Warsaw, 16-17 May 2005, CM(2005)80 final 17 May 2005.

139. The European Commission for Democracy through Law, *Report on Electoral Rules and Affirmative Action for National Minorities' Participation in the Decision-Making Process in European Countries*, adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62nd plenary session (Venice, 11-12 March 2005) on the basis of comments by Mrs Mirjana Lazarova Trajkovska, CDL-AD(2005)009.

140. See, for example, Croatia 2006 Progress Report {COM(2006) 649 final}, SEC (2006) 1385, Brussels, 8 November 2006, http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/hr_sec_1385_en.pdf, pp. 11-13.

minorities and provide for a framework in which minority interests are genuinely taken into account in the decision making. Sizeable minorities might even have one or more parties of their own which get elected into parliament without special mechanisms promoting or guaranteeing that, and might even form part of ruling coalitions. Examples are the Hungarian parties in Romania and Slovakia, and the Albanian parties in the "former Yugoslav Republic of Macedonia". However, it is often the case that minorities, especially smaller and dispersed ones and those who suffered historic discrimination, are either under-represented, or not represented at all, especially if voting patterns run along ethnic, religious or linguistic lines. Due to the inherent structural elements of an electoral system, minority votes might get diluted or wasted.

Specific arrangements to promote minority representation in parliament and other elected bodies can be achieved in many ways, both through mechanisms which indirectly favour minority representation, such as proportional representation, or those which directly favour or even guarantee minority representation, such as an exemption from the voting threshold for minority parties or reserved seats for minority representatives.

In advising on proposals for special mechanisms to promote or guarantee minority representation in parliament and other elected bodies, the HCNM is guided by his aim of trying to achieve "integration with respect for diversity". As the first general principle also states, the Lund Recommendations aim to facilitate the inclusion of minorities within the state and enable minorities to maintain their own identity and characteristics, thereby promoting the good governance and integrity of the state. The situation in each country is different and whereas a certain mechanism may be helpful in furthering the integration process in one country, the same mechanism may slow it down in another.

The second general principle stresses the importance of the observance by states of the rule of law and human rights, including non-discrimination and the right to equality, as preconditions for the effective participation of minorities in public life. The third general principle adds that, when specific institutions are established to ensure the effective participation of minorities in public life, which can include the exercise of authority or responsibility by such institutions, they must respect the human rights of all those affected. This includes women and persons belonging to the majority population, as made clear by the Explanatory Report to the Lund Recommendations.¹⁴¹ This is especially important when minorities, which constitute the majority in a certain region, obtain territorial autonomy. As the Explanatory Report to the Lund Recommendations mentions, this principle

141. See the similar provision in the Framework Convention for the Protection of National Minorities (FCNM), Article 20 FCNM:

"In the exercise of the rights and freedoms flowing from the principles enshrined in the present framework Convention, any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities."

addresses in particular the case of “minorities within minorities”. With regard to autonomy arrangements with minority-in-minority situations, the HCNM has always stressed that efforts to support minority participation should not be at the expense of democracy. In a meeting with officials of the Autonomous Republic of Abkhazia in March 2003, for example, the HCNM emphasised that international norms and standards require that any authority controlling territory and people, even if not recognised by the international community, must respect the human rights of everyone.

The fourth general principle acknowledges that individuals identify themselves in numerous ways. Individuals have multiple identities, which coincide, co-exist or are layered in a hierarchical or non-hierarchical fashion. These different identities, as the Explanatory Report to the Lund Recommendations indicates, may be held by different members to varying shades and degrees. And, depending upon the specific matters at issue, different identities may be more or less salient. When structures and procedures are set up and measures are taken to promote or guarantee the effective participation of minorities in public affairs, the existence of multiple identities should be taken into account.

This means, among other things, that minority representation mechanisms should allow for the representation of diversity within groups, in line with the principle of political pluralism. The HCNM, for example, shared the Venice Commission’s concern regarding the Law for the Election of Local Public Administration Authorities in Romania.¹⁴² Article 7 of that law gives a privileged position to those national minorities represented in parliament to put forward candidatures for local elections. These national minorities may present candidates without any further restriction, while other national minorities – or separate organisations within the same national minority – can only present candidates under special, very restrictive conditions detailed under Article 7, paragraphs 3 and 4 of that law.¹⁴³ According to the Venice Commission, the presence of only one list for each minority in the political game could help this minority to be represented – proportionally – in the elected bodies. However, this does not justify restricting competition between lists of the same minority.¹⁴⁴ Special measures

142. *Opinion on the Law for the Election of Local Public Administration Authorities in Romania*, adopted by the Council for Democratic Elections at its 11th meeting (Venice, 2 December 2004) and the Venice Commission at its 61st plenary session (Venice, 3-4 December 2004) on the basis of comments by Mr Ugo Mifsud Bonnici and Mr Pieter van Dijk, CDL-AD(2004)040.

143. Article 7, paragraph 3, provides that “candidatures may also be put forward by other [that is those not represented in Parliament] lawfully established organizations of the citizens belonging to national minorities, that shall submit a members’ list to the Central Election Bureau. The number of members may not be less than 15% of the total number of citizens who, at the latest census, have declared they belonged to that minority”. According to Article 7, paragraph 4, “if the number of members needed for meeting the requirements of paragraph (3) exceeds 25 000 persons, the members’ list shall include at least 25 000 persons residing in at least 15 counties of the country and in the Bucharest municipality, but no less than 300 persons for each of those counties and for the Bucharest municipality.”

144. *Opinion on the Law for the Election of Local Public Administration Authorities in Romania*, CDL-AD(2004)040, paragraph 52.

promoting minority representation in elected bodies should “not have the effect that it favours one national minority or one group within a national minority to the disadvantage of one or more others to the extent that the latter are not able to effectuate their right to participation in public affairs”.¹⁴⁵

Another example is mentioned in the HCNM Report of 2000 on the Situation of Roma and Sinti in the OSCE area. The rules for electing members to national minority self-governments adopted by the National Elections Board allow electors to vote for as many candidates as there are seats – a process that may favour a “winning bloc take all” result. During the first national elections, for example, Lungo Drom candidates were elected to all 53 seats of the national Roma self-government, even though its candidates had won only 39% of local elections. Proportional representation would have better reflected the diversity of Hungary’s Roma communities.¹⁴⁶ Especially when governments approach elected minority councils as legitimate negotiation partners, it is important that these reflect the diversity of views within a minority or among minorities. In its opinions, the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC) considers it important that governments maintain contact with organisations representing each of the national minorities, in addition to contact with minority councils, in order to avoid the possibility that these councils merely promote the interests reflecting the needs of the biggest or more active minority groups.¹⁴⁷

A mechanism which gives recognition to the existence of multiple identities is dual voting for persons belonging to minorities. One vote goes to mainstream parties and a second one goes to a minority representative. In addition, it could contribute to the aim of promoting integration with respect for diversity, which is essential to the HCNM’s conflict prevention strategy. If persons belonging to minorities have only one vote, they might tend to vote for minority representatives only and remain detached from mainstream politics. Nevertheless, it should be taken into account that the mechanism of dual voting deviates from the “one person, one vote” principle and might require that the competences of minority representatives elected by such a second vote are limited to those issues related to matters of importance to the identity of minorities in light of the proportionality principle.

The fourth principle further states that the decision as to whether to belong to a minority or majority or neither rests with the individual and should not be imposed upon him or her. No disadvantage may result from this choice

145. *Ibid.*, paragraph 47.

146. HCNM, Report on the Situation of Roma and Sinti in the OSCE Area, 2000, www.osce.org/hcnm, p. 139.

147. See, for example, ACFC, First Opinion on Moldova (2002), paragraph 89. See also, First Opinion on Armenia (2002), paragraph 80, and Second Opinion on Romania (2005), paragraphs 188-9 and 194.

or a refusal to choose. This principle is also guaranteed by paragraph 32 of the Copenhagen Document, Article 3(2) UN Declaration on Minorities and Article 3(1) FCNM. As a result, a person belonging to a minority should for example, be free to register on a minority voter list to elect minority representatives into parliament.

The fifth and last general principle states that when creating institutions and procedures in accordance with the Lund Recommendations, both substance and process are important. The principles of effective participation should also be applied to the decision making establishing institutions and procedures to enhance the effective participation of minorities. This will inspire and maintain public confidence and voluntary compliance with the resulting decisions.

4. Participation in the decision making

Parts II and III of the Lund Recommendations outline the different institutions and procedures that can enhance the effective participation of minorities in public affairs. Part II deals with participation in the governance of the state as a whole and Part III deals with self-governance. These two sections give minorities respectively “a say” in and “control” over those matters which affect them. The positioning of Part II, entitled “Participation in Decision-Making”, at the beginning of the document reflects one of the key advances of the Lund Recommendations, that is to shift the debate about minority rights away from a discussion of self-governance to one of inclusion and participation in existing institutions. This is consistent with the HCNM’s integrative approach to dealing with minority issues.

Participation on all levels: national, regional and local

Lund Recommendations 6 to 10 contain a number of mechanisms to promote minority representation at the central level. Recommendation 11 recognises that many of these may be equally well applied at regional and local level. Indeed, while the participation of minorities in national parliaments is no doubt important, the functioning of minority representation at local level (as well as the functioning of minority self-government) is as important – if not more so – for minorities. Local problems require local solutions, especially in regions where there is a substantial concentration of persons belonging to national minorities. In Croatia, for example, the HCNM has stressed, apart from the adequate representation in parliament, the need for strengthening the powers for minority self-government at both local and regional levels, as well as the improvement of the capabilities and composition of the Council of National Minorities.¹⁴⁸

148. OSCE Newsletter, October-November 2002, p. 22.

Preconditions: freedom of association, citizenship and the right to vote and stand for election

Among the preconditions for effective minority representation in elected bodies is the enjoyment of freedom of association and the right to vote and to stand for election without discrimination, as mentioned in Lund recommendations 7 and 8. Freedom of association includes the freedom to establish or join political parties based on communal identities.

Conditions for the registration of political parties might affect minorities who wish to set up own political parties in a disproportionate way. Conditions which require the presence of the party in at least half of the country particularly affect minorities which are concentrated territorially. The HCNM has, for example, drawn the attention of the Ukrainian authorities to the fact that the requirement for political parties to be registered in at least 13 *oblasts* of Ukraine created very difficult problems for the Crimean Tatar community (and for a number of Crimean political parties as well).¹⁴⁹

The Explanatory Note to the Lund Recommendations states that, ideally, parties should be open and should cut across ethnic issues. Ideally, in a well-integrated society, persons belonging to minorities are members of or vote for parties which are not organised on ethnic lines, but are sensitive to the concerns of minorities. However, in some situations ethnic or communal parties may be the only hope for effective representation of specific interests and, thus, for effective participation of minorities. One could think, for example, of immediate post-conflict circumstances, where political polarisation is likely to be at its height, or of countries with groups who suffered historically from systemic marginalisation. In the light of the aim of achieving "integration with respect for diversity", the HCNM has always welcomed the fact that persons belonging to minorities are also represented in and through mainstream parties. During his visit to Estonia in 2005, for example, the HCNM considered the results of the local elections held on 16 October 2005 to be a reflection of the positive improvement of the inter-ethnic relations in the country. According to the election results, the voting behaviour of non-citizens and Russians who took part in elections was determined by the economic programmes of the competing parties and not by their agenda with regard to ethnic and national minority issues. Seventy-six percent of ethnic Russian voters in Tallinn, for example, voted for the leftist Centre Party, led by Mr Edgar Savisaar, Minister for Economic Affairs and Communications, while less than 10% of voters voted for the two so-called "Russian parties" (the Civic Initiative 2005 and Spisok Klenskogo list).

With regard to the right to vote and to stand for office, the principle on which the HCNM has based its approach and recommendations is "[t]he will of the people shall form the basis of the authority of Government". This provision from the

149. OSCE HCNM letter to H.E. Mr Hennady Udovenko, Minister for Foreign Affairs of Ukraine, 14 February 1997.

Universal Declaration of Human Rights has been reiterated in the Explanatory Note to the Lund Recommendations. Situations in which states have adopted restrictions and exclusionary requirements, such as linguistic requirements, affecting the ability of persons belonging to national minorities to vote and to stand for office have been a cause of concern in a number of situations in which the HCNM has been involved. The HCNM has argued in the Latvian and Estonian context, for example, that the electorate should be free to choose to elect candidates who enjoy their confidence, but who may not, in the opinion of others, possess relevant or desirable skills. The crucial matter is that the elected person is deemed by the electorate to represent them.¹⁵⁰ The HCNM therefore welcomed the abolition of the requirement of language proficiency for persons standing for elections both in Estonia¹⁵¹ and in Latvia.¹⁵² For the same reason, the HCNM criticised the 1998 Slovak draft law on local elections, which introduced a condition of relevant nationality (in the sense of “ethnicity”, not “citizenship”) for eligibility to hold a seat in the municipal council, so preventing the electorate from voting for a candidate with an ethnicity different from that described. The HCNM considered this provision to constitute an unjustifiable limitation on the possible alternatives for the electorate.¹⁵³

In some situations, substantial numbers of persons belonging to national minorities are not citizens of the state in which they live and do not enjoy the political participatory rights to vote and stand for office (which are among the very few specified rights that may legitimately be reserved for citizens under international law). Lack of citizenship thus not only acts as a bar to effective participation, but in turn can lead to exclusion from all sorts of other rights and benefits. Not only can a lack of citizenship contribute to a sense of alienation, but also the prospects for de-escalation of tensions through participation are significantly reduced. The HCNM has been practically engaged on this issue as a matter of conflict prevention in a number of cases. For example, he has been engaged along with other agencies and organisations, such as the UN High Commissioner for Refugees, the Council of Europe and the International Organisation

150. See, for example, OSCE HCNM letter to H.E. Mr Endulis Bērziņš, Foreign Minister of the Republic of Latvia, 17 December 2001. See also, OSCE HCNM letter of 19 December 1998 addressed to H.E. Lennart Meri, President of Estonia, calling upon the president not to promulgate the adopted laws amending the laws on parliamentary elections, local elections and the state language. Notwithstanding this appeal, the laws were promulgated and subsequently criticised by ODIHR when observing the elections.

See further on the HCNM's engagement on this issue in Latvia, Estonia and “the former Yugoslav Republic of Macedonia” in Zaagman R., *Conflict Prevention in the Baltic States: The OSCE High Commissioner on National Minorities in Estonia, Latvia and Lithuania*, ECMI Monograph #1, April 1999; and Holt S., “The Activities of the High Commissioner on National Minorities: January 2001-May 2002”, 1 *EYMI* 2001/02 (2003), pp. 575-7.

151. Statement by the OSCE HCNM of 22 November 2001 welcoming the Estonian Parliament's abolition of the linguistic requirements to stand for elected office, OSCE Doc. HCNM.GAL/6/01.

152. HCNM statement on adoption of amendments to the Latvian election laws, 10 May 2002, www.osce.org/item/6705.html.

153. OSCE HCNM letter to H.E. Ms Zdenka Kramplova, Minister for Foreign Affairs of the Slovak Republic, 29 May 1998, OSCE Doc. HCNM.GAL/5/1998.

for Migration, in addressing the situation of the Meskhetian population in the Russian Federation which has experienced problems in obtaining citizenship, leaving them unable to enjoy the full legal protection and rights accorded by such status. Indeed, much of the HCNM's activity in the Baltic states over the years has been focused on access to citizenship as a precursor to the enjoyment of the right to vote and stand for office at the national level.

Arguments of good governance and conflict prevention would also support the extension of voting rights, at least at local or regional level, to those persons who have some genuine and effective link with the state, such as long-term residents, for example. In the light of standards and recommendations from other international organisations, both the previous and the current High Commissioner have, therefore, encouraged Estonia and Latvia to study the possibility of extending voting rights in municipal elections to non-citizens.

In some situations persons belonging to national minorities do enjoy the right to vote, but choose not to exercise it at the national level – whether through a lack of confidence that their vote will count, due to feelings of marginalisation, or a simple lack of knowledge as to the voting process and the importance of its consequences for them. Voter education aimed at the Armenian-speaking minority in the Samtskhe-Javakheti region of Georgia, under the HCNM-sponsored “Conflict Prevention and Integration Programme for Samtskhe-Javakheti, Georgia”, for example, has been successful in contributing to the participation of that minority in national elections as an aspect of their further integration into the public life of the state as a whole. Facilitating access of minorities to the electoral campaign is also important in order to form an informed opinion. In Kyrgyzstan, for example, the HCNM provided support to the translation of the presidential debate into Uzbek in the run up to the July 2005 presidential elections. Voter mobilisation of Roma is an area where ODIHR, and especially the Contact Point for Roma and Sinti Issues, is very active in developing and supporting relevant projects.¹⁵⁴

Electoral systems

As no electoral system is neutral from the perspective of varying views and interests, states should adopt the system which would result in the most representative government in their specific situation. This is especially important for persons belonging to minorities who might otherwise not have adequate representation. Lund Recommendation 9 states that the electoral system should facilitate minority representation and influence. It discusses variables of electoral systems which enhance the representation of minorities.

154. See, for example, the three-year programme focusing on electoral participation of Roma and related groups in South-Eastern Europe, “Roma Use Your Ballot Wisely!”, launched by the OSCE/ODIHR Contact Point for Roma and Sinti Issues (CPRSI) in 2003 under a grant agreement with the European Commission.

Where minorities are territorially concentrated, single-member districts may provide sufficient minority representation. In general, proportional representation systems support the representation of minorities. Some form of preference voting may facilitate minority representation and promote inter-communal co-operation. The 2001 OSCE Warsaw Guidelines to Assist National Minority Participation in the Electoral Process elaborate further on preference voting systems, such as the single transferable vote (STV) (proportional system) and the alternative vote (AV) (majority system).¹⁵⁵ Lower numerical thresholds may also enhance the inclusion of minorities in governance. An electoral threshold as high as 10%, however, as is the case in Turkey, reduces the representative quality of the national parliament. The OSCE HCNM expressed his concern regarding this threshold during a recent visit to the country. Another recommendation refers to the geographic boundaries of electoral districts, which should facilitate the representation of minorities.¹⁵⁶

With regard to geographic boundaries of electoral districts, the HCNM was involved in the drafting of the Law on Territorial Division in the “former Yugoslav Republic of Macedonia”. According to the Ohrid Agreement signed on 13 August 2001, there is a 20% threshold for minorities to enjoy certain rights in municipalities. The subsequent adoption of the Law on Local Self-Government in early 2002 allowing for the merging of municipalities gave rise to fears on the part of both the ethnic Macedonian majority and the Albanian minority that some of the smaller Macedonian municipalities would be incorporated into larger Albanian-dominated ones and vice versa. In his commitment to the issue, the HCNM urged the government to draft a broader legislative package including the Law on Territorial Division and offered the assistance of his office in the preparation of this law in order to find politically acceptable and practically workable arrangements regarding the revision of municipality boundaries.¹⁵⁷ The observations and recommendations in the ODIHR election report on the parliamentary elections in the Kyrgyz Republic on 27 February and

155. OSCE Guidelines to Assist National Minority Participation in the Electoral Process, OSCE/ODIHR, Warsaw, 2001, pp. 26-8. For example, STV was successfully used at the 1998 Northern Ireland “Good Friday” agreement elections. It appears to have promoted a degree of moderation and accommodation in the political process. Because of its preferential ballot, STV enabled voters to pass their lower-order preferences on to “pro-agreement” parties, and also encouraged some of the sectarian parties to soften their rhetoric and policies in the hope of gaining such preference votes. It also produced fairly proportional outcomes. In terms of accommodating minority interests, it has much to recommend it, particularly in deeply divided societies. However, this system is not widely used in practice and consequently it is difficult to assess its merits in concrete situations.

156. See also Article 16 FCNM, which prohibits the alteration of electoral boundaries or of the proportions of the population in a district for the purpose of diluting or excluding minority representation, so-called “gerrymandering”; and Article 5 of the European Charter of Local Self-Government is mentioned, which provides that changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum.

157. Draper M., “The Activities of the OSCE High Commissioner on National Minorities: June 2002-June 2003”, in 2 *EYMI* 2002/03 (2004), pp. 479-80 and Holt S., “The Lund Recommendations in the Activities of the HCNM”, 12 (2-3) *International Journal on Minority and Group Rights* (2005), p. 180.

13 March 2005 regarding electoral district boundaries and their impact on minority participation and representation were indicated through, among other things, a concern raised by HCNM political advisers. The report stated that the redrawing of constituency boundaries proved potentially divisive in areas where significant national minorities were present. The division of Uzgen city in the Osh province into three constituencies effectively divided the 90% Uzbek population between three different constituencies and attached them to predominantly Kyrgyz rural areas, where they were in the minority. Of the 21 candidates that stood across the three constituencies, none were Uzbeks, indicating that the redrawing of boundaries had the effect of discouraging the participation of the Uzbek population.¹⁵⁸

The use of minority languages on ballot papers might also be important to promote the effective participation of minorities in elections. For example, in Tajikistan the Kyrgyz language was first used last year along with the Tajik, Uzbek and Russian languages for the ballot papers.¹⁵⁹

Special mechanisms, such as reserved seats

Lund Recommendation 6 advises that states should ensure that opportunities exist for minorities to have an effective voice at central government level, including through special arrangements, as necessary. These may include the special representation of national minorities through reserved seats in one or both chambers of parliament or in parliamentary committees. As early as 1995, the HCNM raised concerns about the failure of Hungary to adopt implementing legislation of the constitutional right of minorities to guaranteed representation in parliament.¹⁶⁰

Reserved seats are but one of the mechanisms to promote or guarantee minority representation in elected bodies. What is important is the end result of effective minority participation and representation in decision-making processes. For example, in 1995, the HCNM recommended with regard to the representation of Crimean Tatars in the Parliament of the Autonomous Republic of Crimea that the Ukrainian authorities either continue the quota system the authorities planned to abolish, or amend the electoral law of Crimea to make representation more proportionate. As Tatars were dispersed over the whole of Crimea, they risked having no representation at all under the majority system then in

158. OSCE/ODIHR Election Observation Mission Final Report on the parliamentary elections of the Kyrgyz Republic on 27 February and 13 March 2005, www.osce.org/documents/odihr/2005/05/14456_en.pdf, pp. 20-21.

159. See OSCE/ODIHR Election Observation Mission Final Report on the presidential elections in Tajikistan on 6 November 2006, www.osce.org/documents/odihr/2007/04/24067_en.pdf, p. 16. See also, generally, the ODIHR Election Observation Handbook, Fifth Edition, 2005, www.osce.org/publications/odihr/2005/04/14004_240_en.pdf, p. 43.

160. Letter to H.E. Mr László Kovács, Minister for Foreign Affairs of the Republic of Hungary, 27 September 1995, OSCE Doc. REF.HC/8/95. See also, OSCE Newsletter, October-November 2002, p. 22.

place, notwithstanding the fact that they constituted nearly 10% of the population of Crimea.¹⁶¹

In Montenegro, a certain number of seats is guaranteed to the Albanian minority on the basis of the election results in special polling stations located in areas where the Albanian minority voters are believed to be concentrated. Ethnic Albanian parties have voiced criticism that the system also allows for the election of representatives on mainstream party lists as well. They claim that representatives from mainstream party lists are not “authentic” representatives, contrary to representatives of ethnic Albanian parties. However, as stated already, “[t]he will of the people shall form the basis of the authority of Government”. Authentic representatives are those deemed by the electorate to represent them. The representative quality of a member of parliament is based on the link of accountability between the representatives and the represented. In addition, in the light of the HCNM’s conflict prevention strategy aimed at integration with respect for diversity, it is important that minority voters have the option to vote for both mainstream parties and ethnic parties. This mechanism provides an incentive to mainstream parties to attract minority voters.

In addition, a few reserved seats do not necessarily mean effective participation in the decision making. It might be of importance symbolically, but if too high expectations are raised, disappointment and frustration might be the result. At the international seminar hosted by the HCNM in Vienna in May 2000 to launch the Lund Recommendations, mention was made of the Georgian experience, which illustrated that some guaranteed seats in Parliament had led to further alienation of national minorities, because of the gap between the expectations these seats had raised and the actual result in (lack of) influence on the outcome of decision making.

The influence of minority representatives on the outcome of decision making might be reinforced by special majorities, such as the so-called Badinter majority in “the former Yugoslav Republic of Macedonia”. According to Article 69 of the Macedonian Constitution, “[f]or laws that directly affect culture, use of language, education, personal documentation, and use of symbols, the Assembly makes decisions by a majority vote of the Representatives attending, within which there must be a majority of the votes of the Representatives attending who claim to belong to the communities not in the majority in the population of Macedonia.” There have been some controversies regarding two members of parliament who claimed to belong to a minority community, respect fully the Vlach and the Torbeshi (Macedonian Muslim – not explicitly mentioned in the Constitution among minorities) community, whereas they did not do so in the previous legislature. Accusations were voiced that these members rediscovered

161. OSCE HCNM letter to H.E. Mr Hennady Udovenko, Minister for Foreign Affairs of Ukraine, 14 February 1997.

or invented their minority identity in order to help the ruling coalition achieve the necessary double majority. There is no easy answer to such a situation. On the one hand, to belong to a national minority is a matter of a person's individual choice (paragraph 32 of the Copenhagen Document). Even if the Torbeshi minority is not mentioned explicitly among the minorities listed in the constitution, the list is non-exhaustive and under the term "others" other minority groups are included. On the other hand, it is important that the functioning of mechanisms to promote minority participation and representation in elected bodies, especially in those affairs affecting them, is not undermined. A mechanism should serve the purpose for which it was set up. The type of competences for which a double majority is needed might provide an indication regarding the type of minority which can be considered to be this double majority.

Advisory and consultative bodies

Lund Recommendation 12 states that states should establish advisory or consultative bodies within appropriate institutional frameworks to serve as channels for dialogue between governmental authorities and national minorities. Lund Recommendation 13 adds that these bodies should be able to raise issues with decision makers, prepare recommendations, formulate legislative and other proposals, monitor developments and provide views on proposed governmental decisions that may directly or indirectly affect minorities. Governmental authorities should consult these bodies regularly regarding minority-related legislation and administrative measures in order to contribute to the satisfaction of minority concerns and to the building of confidence. The effective functioning of these bodies will require that they have adequate resources.

As mentioned already, experience shows that such bodies, which are able to comment directly on issues of minority concern, can be more effective than representation in parliament. A minority expert nominated to, for example, an inter-ministerial commission, may in some cases exert more direct influence on government policy than a parliamentary representative. However, while the HCNM has always encouraged and welcomed the establishment of such dialogue mechanisms, he has also emphasised that such forums should only complement, rather than substitute, direct political representation.¹⁶²

There are a variety of types of minority consultative mechanisms.¹⁶³ Some bodies have functions that go beyond the external representation of minority interests. Such minority councils may be provided with decision-making powers of their own in an internal sense. This will generally be the case where there is provision for functional or cultural autonomy for minorities at the national, regional

162. See, for example, OSCE HCNM letter to H.E. Mr Anatoly Zlenko, Minister for Foreign Affairs of Ukraine, 4 December 2001.

163. See for an overview, the *DH-MIN Handbook on Minority Consultative Mechanisms*, DH-MIN(2006)012, Strasbourg, 20 October 2006.

or local level. In such instances, national councils will function as the executive organ of the respective cultural autonomy.¹⁶⁴

In particular this last type, but also other types of minority consultative mechanisms, are elected. As stated already, according to the HCNM, advisory and consultative bodies should adequately represent the pluralism within different national minority groups.

5. Self-governance

Part III of the Lund Recommendations deals with self-governance arrangements. The recommendations have been expressed very carefully and also look at workable alternatives to territorial autonomy. That is the reason why this section deals with non-territorial arrangements before territorial arrangements. The lesser known, understood or applied possibilities of personal or cultural autonomy raise less concern about the maintenance of the territorial integrity of the state. All self-governance institutions, whether non-territorial or territorial, must be based on democratic principles to ensure that they genuinely reflect the views of the affected population, according to Lund Recommendation 16.

Personal autonomy arrangements should provide for representative decision-making bodies. This was questionable with regard to the local minority self-government elections in Hungary under the previous election rules. All members of the relevant voting district were entitled to cast votes for a local minority self-government. As a result, ethnic Hungarians sometimes determined who would represent a minority.¹⁶⁵ The HCNM welcomed the 2005 amendments, according to which only those included in the minority voters' register can vote for, and get elected into, minority self-governments. The new regulations provide for a direct link of accountability between minority representatives and minority voters.

6. Guarantees

Arrangements set up to enhance the effective participation of minorities in public affairs should result from open processes, which are, as Lund Recommendation 5 advises, inclusive, transparent and accountable in order to maintain a climate of confidence. However, once concluded, stability is required in order to assure security to minority groups. Therefore, it is important that the arrangements agreed upon are entrenched in (constitutional) law and generally not subject to change in the same manner as ordinary legislation. The Lund Recommendations suggest a higher threshold for changes in the area. For example, a qualified majority, entailing the consent of the minority affected, is often required with regard to changes to self-governance arrangements.

¹⁶⁴ Ibid., paragraph 21.

¹⁶⁵ See, for example, HCNM, Report on the Situation of Roma and Sinti in the OSCE Area, 2000, www.osce.org/hcnm, p. 137.

Constitutional guarantees are important, not only because governments tend to restrict participatory rights when “unpleasant” events occur. They are also important to guard against claims that minority participation and representation mechanisms violate the equality principle. The Constitutional Court of Montenegro, for example, declared unconstitutional the provisions on reserved seats of the Law on Minority Rights and Freedoms, adopted in May last year.¹⁶⁶ The inclusion in the constitution of a provision on reserved seats for minorities, or more generally, on the effective participation of minorities in parliament is currently demanded by minority representatives. According to the HCNM, a general provision on the effective participation of minorities in parliament would allow for flexibility in devising mechanisms.

This flexibility is recommended in the Lund Recommendations. In the light of changed circumstances and experience with a particular arrangement, it is useful for it to be reviewed periodically. This is in line with what the ACFC recommended in its second opinion on Croatia, namely, “reviewing the schemes [regarding the representation of persons belonging to national minorities in parliament and in local and regional self-government] periodically in order to ensure that they adequately reflect the developments in the country and the needs of the national minorities concerned”.¹⁶⁷ In addition, the Lund Recommendations mention in Recommendation 23 the possibility of provisional or step-by-step arrangements which allow for the testing and development of new and innovative forms of participation. Especially when divisions may be deep and trust may be shallow, states should not be dissuaded by fears about the irreversibility of their decisions.¹⁶⁸

Finally, there should be recourse for minority groups if problems arise in the implementation of adopted arrangements. This might be provided by judicial remedies, which require an independent, accessible and impartial judiciary. This might also be provided by non-judicial remedies, such as ombudspersons, mediation and arbitration. This is important, as the second type of remedies is less adversarial.

7. Concluding remarks

The effective participation of persons belonging to minorities in public life is an essential component of a peaceful and democratic society. This could be achieved in many ways. The HCNM does not favour one particular way over the others. The HCNM’s goal is to promote an inclusive and democratic process which would lead countries to arrangements which suit them best and would

166. See Constitutional Court of the Republic of Montenegro, Judgment of 11 July 2006, Case No. U 53/06 on the Review of the Constitutionality of Articles 23 and 24 of the Law on Minority Rights and Freedoms.

167. ACFC, Second Opinion on Croatia (2004), paragraph 163.

168. Packer J., “The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life”, 4 *Helsinki Monitor* (2000), p. 40

result in the integration of minorities with respect for their diversity. Such a process should be dynamic and flexible and should take into account the fact that individuals have multiple identities, which coincide, co-exist or are layered in a hierarchical or non-hierarchical fashion. Elected minority representatives should be truly representative-based on a link of accountability with those they represent. Minority representation mechanisms should allow for the representation of diversity within groups.

Can international monitoring mechanisms and EU integration prospects help improve national minority participation at the domestic level?

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After decades of limited activity with regards to the development of international standards and monitoring mechanisms dealing with the rights of members of national minorities, since the early 1990s there have been quite significant developments in this field. On the global level, the United Nations passed the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, while the UN Sub-Commission for the Promotion and Protection of Human Rights established the Working Group for National Minorities. On a level more limited to the Northern hemisphere, the dramatic political changes and ensuing wars which took place in eastern Europe in the early 1990s (from Croatia to the Caucasus), led the Organization for Security and Co-operation in Europe (OSCE) to establish its own High Commissioner for National Minorities. The High Commissioner for National Minorities was set up as an early warning mechanism for interethnic conflicts which have the potential to turn into wars, albeit after several bloody wars had already erupted.

At the European level the Council of Europe was, for quite some time, the main international body through which standards were pursued in the field of national minority protection. In 1992, the Council of Europe passed the European Charter for Regional or Minority Languages, while in 1994 the Framework Convention for the Protection of National Minorities (FCNM) was passed. Several other bodies of the Council of Europe also pushed forward the issue of national minorities, including the European Commission for Democracy through Law (Venice Commission). However, through the Copenhagen criteria (1993) the European Union also declared the rights and position of national minorities as crucial criteria for potential membership in the Union. While focusing on the Croatian experience within the European context, in this text I will tackle the essential question of whether and how these international monitoring mechanisms can influence the position of national minorities in practice.

In this regard, special focus will be placed on more recent developments related to how these international monitoring mechanisms can impact on national minority participation at the domestic level. My main thesis is that international monitoring mechanisms are able to push forward the level of protection of the rights of national minorities in a given country, but that there is usually a significant delay between the identification of the concrete needs of the national minority

in a given country and the ability of these international mechanisms to contribute to the process in which these needs are addressed. The main reason for the delay is that recommendations, reports and conditioning on the side of these international bodies towards a given country can only gradually and partially impact the policies of the government concerned, while having even more complex consequences on the societies of these countries. In terms of the current Croatian perspective, the impact of the European Union accession process clearly outmatches all the other international monitoring mechanisms and should thus be seen as the main instrument for the further advancement of the rights of national minorities in Croatia. In this sense, it would seem that the same is, or will also be the case, within the wider regional context as well.

From a broader perspective, it is clear that Croatia has made significant steps forward in terms of the protection of national minorities. Compared to the war and post-war period in which national minorities (primarily, though not exclusively, the Serb minority) were perceived by many as a danger to the very existence of Croatia and certain discriminatory provisions existed in the laws themselves, currently the main issue is how to push forward the implementation of provisions of the relatively high standards provided to national minorities in the existing legislation. The Croatian Government as well as Aleksandar Tolnauer, the Chair of the (National) Council for National Minorities, have spoken about gradual positive progress in terms of national minority protection. On the other hand, Žarko Puhovski, the Chair of the Croatian Helsinki Committee for Human Rights, describes the government's attitude towards the Serb minority with the following phrase – "the fewer Serbs there are, the more rights they obtain".¹⁶⁹ While recognising that Croatia currently provides high standards for national minorities, Puhovski emphasises existing gaps between these legal provisions and their implementation in everyday life.

Most experts agree that for Croatia, as is the case for the other states of the region of South-Eastern Europe, the issue of: "normatively regulating and practically implementing the rights of members of national minorities became an important test and criteria for the degree of democratization of a given society as well as a crucial condition for its economic and political integration into Europe."¹⁷⁰ The request that the rights of members of national minorities be normatively regulated was a key condition for the international recognition of Croatia, just as today the concrete implementation of the rights proscribed to national minorities in several laws is one of the key criteria for full membership of Croatia in the European Union. Although it is my intention to focus on more recent developments in terms of national minorities in order to correctly place the Croatian perspective on this issue, we do need to briefly reflect back on the war and other political developments that took place in the 1990s.

169. Puhovski Ž., Ž., *Govor// Identitet*, 11,105 (2006), page 6.

170. Tatalović S. "National minorities in Croatia", Split: Stina, 2005, p. 22.

According to the first constitution that was passed in 1990, Croatia was established as the nation-state of the Croatian nation and the state of members of the so-called autochthonous national minorities. The list of the autochthonous minorities cited in the constitution included the Serb minority, but excluded the Bosniak/Muslim, Slovene and Roma minorities. While the exclusion of the aforementioned three minority groups was corrected through the Constitutional Law on National Minorities passed in December 2002, in 1990 the wider political issue was growing international concern about the fate of the Serb minority in Croatia in the light of the increasingly violent conflict. In this context, it became clear that the Croatian Government would need to present some additional assurances before receiving international recognition. The Constitutional Law on Human Rights and Freedoms and the Rights of Ethnic or National Communities or Minorities (Official Gazette – NN 65/91) adopted in December 1991 provided such additional assurances for national minorities, including the Serb minority. Leaving aside a deeper analysis of the reasons why a significant portion of the Serb community was reluctant to accept minority status in Croatia, it is important to note that the above-mentioned constitutional law guaranteed national minorities their human rights and freedoms, cultural autonomy, proportional participation in the representative and other bodies, special status, proportional distribution of employees at municipal courts and in the police.

When we reflect back on Croatia in the 1990s we must underline that this was a period of intense violations of human rights. War crimes were being committed and the most basic human rights were violated, including the right to life and personal security. Although it is quite clear that the main direct cause of the recent war(s) in the former Yugoslavia was the aggressive and dominant nature of the greater Serbian nationalism under the leadership of Slobodan Milošević, already in the early days of the conflict in Croatia reactions against those belonging to the “other” ethnic groups had begun. In this regard, Professor Nenad Zakošek remarks: “In the conflict of ethnic collectives the rights of individuals completely disappear behind the national interests of the collective.”¹⁷¹ In his reflections about this period Professor Siniša Tatalović goes one step further by claiming that the common thread of the wars in the area of the former Yugoslavia is that these wars were all also wars against national minorities.¹⁷²

Professor Zakošek concludes his analysis of this period with a very important observation about the nature of nationalistic ideologies. He states that: “When we are speaking about collectives that are led by extremist nationalistic ideologies then really the most extreme violations of human rights become possible: terrorist bombings of cities, taking civilians as hostages, torture, forced deportation

171. Zakošek, N. Introduction. (War and Human Rights in the Area of the Former Yugoslavia – Documents of Amnesty International i Helsinki Watcha: from multiparty democratic elections in 1990 to the war in Bosnia-Herzegovina). Zagreb: Antiwar campaign Croatia, 1993. P, p. 7.

172. Tatalović, S., Presentation at an expert conference on “The Cultural Autonomy of National Minorities”, Begovo razdolje, May 2006.

and systematic ethnic discrimination (as was the case in Kosovo). However, we should not forget that unfortunately this produced revenge on the Croatian side and numerous violations of the human rights of members of the Serb ethnic community.¹⁷³ The offensive of the Yugoslav National Army, Serb paramilitary units and local Serbian rebels led to numerous war crimes against civilians, but also sparked revenge against citizens of Serbian ethnicity throughout Croatia – including in places that were far away from the front lines. The international community and specifically the European institutions started to realise that the way in which the majority treats the minority in any of the newly-established states is indicative of the overall state of democracy and human rights. However, by this time the war was in full force in Croatia, and members of national minorities were increasingly marginalised throughout the former Yugoslavia.

Despite significant progress in dealing with the past and increasing affirmation of the principle that a crime is a crime independently of the ethnicity of the perpetrator and the victim, the shadow of the war still looms over South-Eastern Europe. Before assessing the role of international monitoring mechanisms in this context, it seems important to put forward a lesson learned from the bloody dissolution of Yugoslavia. If the aggressive war-time relationship of the majority towards certain minorities in the newly independent states (for example, Serbs towards Croats, Bosniaks and Albanians, or Croats towards Serbs) is viewed as one of the main characteristics of political instability, an affirmative relationship of the majority towards those same minorities will be one of the crucial foundations of a period of political stability. In other words, the respect for human rights, especially the effective fulfilment of the rights of members of national minorities, would be the foundation and source of long-term stability in the whole region of South-Eastern Europe. Key indicators that a new paradigm is emerging in a given state would be the dominance of affirmative political rhetoric towards minorities at the top level, a focus on the implementation of legal norms in everyday life and increased societal approval of such new policies. Although further progress is indeed necessary, it does seem that Croatia is increasingly ready to accept this new paradigm.

In terms of the various international monitoring mechanisms, Croatia became a full member of the OSCE in 1992. The next important intergovernmental organisation that Croatia joined was the Council of Europe. When Croatia was accepted into the Council of Europe it was stated that this membership was conditional on further progress in several fields. One of the fields that was explicitly mentioned at the time was national minority protection. In the context of the Council of Europe, it is important to briefly look at how Croatia progressed with the implementation of the Framework Convention for the Protection of National Minorities (FCNM) as well as how it moved towards passing a new Constitutional Law on National Minorities (CLNM) in line with the relevant international

173. Zakošek, *op. cit.* (note 171), p. 7.

standards. It should be noted that Croatia signed the FCNM on 6 November 1996. The convention was ratified by the Croatian Parliament on 11 October 1997 and entered into force on 1 February 1998. Therefore, we are now approaching ten years of implementation of the Framework Convention in Croatia.

The main mechanism of the Framework Convention for monitoring the effective implementation of the convention's provisions at the national level are the periodic reporting cycles that have been set up. One year after the entry into force of the FCNM each country is responsible for drafting its first report after which ensuing reports are made periodically in cycles that take around three years. In general terms the reporting process officially consists of a state report and an opinion of the Advisory Committee of the FCNM, while human rights NGOs and minority groups are strongly encouraged to send alternative or shadow reports as well as other relevant information to the Advisory Committee. The Advisory Committee, which is composed of experts nominated by different governments, then issues an opinion about the degree to which a given government is complying with the FCNM. Following this opinion, any given government has the opportunity to react to it and can decide about how this document will be shared with the public and interested stakeholders. The reporting cycle is finalised when the Committee of Ministers adopts an official resolution about a given country's progress in implementing the FCNM. The opinion of the FCNM Advisory Committee has an important role in the advancement of national minority protection at the domestic level.

In its first opinion concerning the implementation of the FCNM in Croatia, issued on 6 April 2001, the Advisory Committee noted that further progress was needed in aligning Croatian legislation dealing with the rights of national minorities with relevant international standards. Serious problems, in terms of the position of national minorities in everyday life, were also outlined. While the position of some national minorities (most notably, the Italian minority) continued to improve, the results of the Official Census in 2001 showed that the number of ethnic Serbs in Croatia had decreased dramatically since 1991. In percentage terms, the share of ethnic Serbs in the total population of Croatia went from 12.2% in 1991 to 4.5% in 2001.¹⁷⁴ While it was frequently stated at the time that a serious expert analysis would scientifically determine the real reasons for such a decrease, it is quite clear that the main reason was the departure of ethnic Serbs from Croatia resulting from the war. In February 2002, the Council of Ministers of the Council of Europe issued a resolution on Croatia that reflected the opinion's main findings

The Government of Croatia sent its second report to the Advisory Committee of the FCNM in early 2004. Following a visit to Croatia that took place in

174. "The Position and Rights of National Minorities in the Republic of Croatia – Legislation and Practice", report. Zagreb: Human Rights Center, 2005, p. 10.

September of the same year, the Advisory Committee issued its Second Opinion on Croatia's compliance with the FCNM on 1 October 2004. In this opinion, the Advisory Committee stated that the adoption of the new Constitutional Law on National Minorities (CLNM, December 2002) addressed the main legal gaps that were cited in the first opinion. Furthermore, clear improvements were noted in terms of the participation of national minorities in elected bodies. Following the parliamentary elections held in November 2003 not only were eight representatives of national minorities elected to the parliament (including three MPs from the Serbian party SDSS), but these parliamentary deputies proved to be crucial for the formation of the new government. Although a situation in which minorities could effectively tip the political balance and consequently be in a position to topple the government has not gone without criticism, the reformed HDZ-SDSS agreement was a historical turning point in terms of the relationship of the majority towards the minority. This historical moment was limited primarily to the political elite, but must be singled out nonetheless. The HDZ-SDSS agreement also contained specific provisions about the return process and the rights of national minorities, including provisions dealing with other types of minority participation in Croatia.

In its second opinion the Advisory Committee also commends Croatia for responding to the alarming situation of Roma, which included the acceptance of a National Programme for Roma in 2003. However, the opinion also identifies several important areas of national minority protection in which problems were observed. While assessing that the overall implementation of the CLNM was "regrettably slow", it was stated that the shortcomings are particularly manifest in some key areas. One of the areas singled out in this regard was the participation of persons belonging to national minorities in the state administration and the judiciary. In this area, the Advisory Committee concluded that monitoring of the current situation was yet to be developed. In other words, there were practically no statistics that would illustrate the degree to which minorities are, or rather are not, present in the state administration and the judiciary. At different meetings, representatives of the government would speak about the difficulties and problems which this provision of the CLNM highlights, rather than how to implement the law.

The most prominent alleged problem was that state or local bodies would have to infringe upon a person's privacy in order to record their ethnicity. While recognising that problems could indeed happen in certain really small localities, aggregate statistics about the level of minority participation in state administration and the judiciary can in general be obtained without any infringements on the right to privacy. Therefore, the Advisory Committee concluded that the mechanisms for the implementation of the legal guarantees provided for by the CLNM were yet to be developed. After the Croatian Government responded to the second opinion of the Advisory Committee in early 2005, the Committee of Ministers issued a resolution in September, 2005. In this resolution the

Committee of Ministers expressed their support for the detailed recommendations provided in the first and second section of the second opinion of the Advisory Committee. However, for the purpose of this text, it is important to note that the Committee of Ministers emphasised the need for the Croatian Government to: “address the remaining shortcomings in the implementation of the CLNM, paying particular attention to guarantees regarding the participation of national minorities in state administration and judicial bodies.”¹⁷⁵

In April 2005, the Human Rights Center from Zagreb issued a report entitled “The Position and Rights of National Minorities in Croatia”. In this document, the centre cites concrete cases from everyday life in which persons belonging to national minorities face obstacles in obtaining employment in accordance with the proportionality objective set out for state administration and the judiciary in Article 22 of the CLNM. The cases of Niño Mari from Venin and Nikola Sužnjević from Gvozd as well as information about the situation in Gračac, Korenica, Pakrac and other cities, all demonstrate the difficulties faced by persons belonging to minorities as they attempt to obtain employment. The report concludes that: “These data point to the fact that since 2002 no effort has been made to achieve a proportional representation of minorities by way of positive discrimination or some other measure.”¹⁷⁶ Although it is clear that the implementation of Article 22 is not an easy issue, in 2005 the discussion had still not moved away from remarks about how it is not possible to implement the law to a discussion about how the law could be implemented.

In its First and Second Opinions the Advisory Committee of the FCNM correctly outlined the state of affairs related to Croatia’s compliance with the Framework Convention. Several problematic areas were identified and some discussion about these issues was initiated. The official periodic reporting cycle forces the government, including its offices, ministries and other bodies that deal with national minorities, to focus on the issue of national minority protection. Despite its legal obligation to report on the implementation of the Constitutional Law on National Minorities to the Croatian Parliament on an annual basis, the government recently reported to the Sabor (parliament) about the implementation of the CLNM for the first time since its adoption in December 2002. In this regard, the reporting cycle of the FCNM obliges the government to regularly take stock of the progress it has or has not made in terms of issues that are very important for the position of national minorities in any country. At different points in time, the reporting cycle also obliges the government to respond to the issues that are raised by NGOs, experts, the media or the Council of Europe bodies themselves. Finally, after the opinion is published it can serve as a useful instrument for advocacy on the part of human rights organisations, minority groups, minority

175. Council of Europe, resolution of the Committee of Ministers on Croatia’s compliance with the Framework Convention for the Protection of National Minorities, Strasbourg, Council of Europe, 2005.

176. Human Rights Center, *op. cit.*, p. 17 (note 177).

representatives, international organisations (in the Croatian case UNHCR and the OSCE mission, for example) as well as other interested actors.

At the same time, the very nature of these international monitoring mechanisms produces some delay. For example, the main issues raised in the second opinion on 1 October 2004 existed as serious issues a year or two before the opinion was drafted. Compared to the five-year reporting cycles related to the different UN treaty bodies, this delay is actually not that extensive, but it should be noted nonetheless. On the overall level, despite the delayed reaction, the mechanisms provided for by the FCNM force the government to focus on the position of national minorities and create an additional advocacy tool for different actors interested in furthering the position of national minorities. However, substantial progress in this field can be expected only when the government takes "ownership" of the process. In order to surpass the level of merely officially fulfilling yet another international obligation and to reach the level of taking "ownership" of the process, a given government must clearly see its interests. Therefore, "ownership" of the process will be achieved either if the leverage of the international body is strong enough (currently the European Union) or if the government develops a position that is truly supportive of national minorities.

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Leaving aside a more thorough analysis of the government's sincerity in terms of its improved attitude towards national minorities, the European Union clearly has the strongest leverage among the international bodies that refer to the protection of national minorities at the domestic level. Membership of the European Union has irrefutably been a strategic priority for Croatia in recent years. This can be seen from the continued efforts of the past two governments as well as the multi-party consensus about the EU that has been reached in parliament. Although there is still much to be done in terms of initiating a serious public discussion about the consequences of EU accession, the prospect of EU membership is and will be the most appealing international association for any present or future Croatian Government. The recently published initial report of the Human Rights Center entitled "The Impact of EU Accession on Human Rights in Croatia" clearly asserts the existence of certain additional criteria or standards for Croatia.¹⁷⁷ While attributing these additional standards to the lessons learned from the difficulties related to the Constitutional Charter, the experience of the "Big Bang" 10-country accession as well as the decision to fix a date for the accession of Bulgaria and Romania, the Human Rights Center's report claims that further improvements in the human rights field, including the protection of the rights of national minorities will in the end be to the benefit of Croatian citizens.

The rights of national minorities in Croatia are not only emphasised by the Copenhagen Criteria. Rather, different aspects of minority protection and participation are part of the ongoing negotiation process between the Croatian

¹⁷⁷ Human Rights Center, "The Impact of EU Accession on Human Rights in Croatia", initial report, Zagreb, Human Rights Center, 2007, p. 10.

Government and the European Union. The issue of minority protection is discussed primarily within the context of Chapter 23 of the *acquis communautaire*, but is also related to the provisions of several other chapters. In this regard, the European Commission has on numerous occasions voiced its opinion about the progress of Croatia in terms of the rights of national minorities. More recently, this issue has also been stressed by the European Parliament in its progress report about Croatia. In this report, which was presented in April to parliament by the MP and rapporteur Mr Hannes Swoboda, a whole section was devoted specifically to the issue of minority protection and participation.

In the final version of its report on Croatia's progress the European Parliament stated the following: "recognizing that an appropriate legal framework is in place concerning the protection of minorities as well as a demonstrated commitment to integrating minorities in the political system; recalls the importance of guaranteeing adequate representation of those minorities in the civil service, in the police forces and in the judiciary, as well as equal treatment in property-related and economic matters; calls for the development at all levels of state administration of a concrete action plan for achieving proportional representation of minorities, pursuant to the provisions of the Constitutional Law and with adequate provisions for monitoring."¹⁷⁸

While recognising certain improvements, the European Parliament's progress report clearly points to certain provisions of Croatian laws that have still not been implemented. The most commonly referred to example in this context, although not the only one, is the lack of implementation of Article 22 of the Constitutional Law on National Minorities, which sets out the objective of proportional representation of national minorities in the state and judicial bodies. In this text we have already noted how different government bodies have in the past repeatedly cited numerous problems that prevent the effective implementation of this article. Although it should be recognised that progress in terms of increasing the participation of national minorities in the cited bodies will not happen overnight, it does seem that finally a serious discussion has been initiated about how to implement Article 22. The Central Office of State Administration drafted a plan for the employment of national minorities for 2007 and the issue was discussed at the Parliamentary Committee for Human Rights and National Minorities. There are certainly other areas of minority participation in which further progress is necessary. The political participation of minorities in accordance with the CLNM has been achieved. In many local and regional bodies proportional representation of national minorities has also been achieved, although this proportionality is based on the results of the official census carried out in 2001. It is expected that this type of proportional representation will be further advanced at the local elections that are scheduled to take place on 17 June 2007.

178. European Parliament. Resolution on Croatia's Progress, Strasbourg, 2007.

While further adjustments to the EU *acquis* (that is, anti-discrimination legislation) are yet to be made, the effective implementation of Article 22 remains one of the biggest challenges for minority participation in Croatia. In this text I have attempted to show that, despite the fact that we are usually speaking about a delayed process, international monitoring mechanisms can help improve national minority participation at the domestic level. In this context, the periodic reporting cycles set out by the Framework Convention for the Protection of National Minorities has been particularly useful in forcing the government to focus on the issue of minority protection and participation, while spurring the efforts of NGO experts, international organisations and the media. All of these efforts, however, have a limited effect if a given government is performing its reporting duties in order to merely fulfil its international obligations. On the other hand, if the government takes ownership of the process and starts to place high importance on the issue of national minorities, the effects of these different international monitoring mechanisms can be much more substantial. In this regard there are several developments that suggest that Croatia is moving in the right direction. To give one simple example, we are finally no longer speaking about how not to implement Article 22 of the CLNM. Much more serious discussions are taking place about how to implement this important provision, despite all the challenges that this presents. In order for this positive development to continue and to become sustainable, national minorities need to be looked at as the wealth of a nation rather than a potential danger. While this recognition was made by President Mesić and Prime Minister Sanader on several occasions, the next challenge will be to continue to work towards changing the attitude towards minorities (primarily, the Serb minority) at the level of local government as well as society at large. If this challenge were met national minorities could become a major source of stability both for Croatia and the wider region of South-Eastern Europe.

The development of a corpus of international standards and its influence at the domestic level to ensure minority participation

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1. The diversity of international instruments

Nowadays there exists a complex structure of legal and political documents to ensure the protection of minorities and their participation in public life at universal, European, sub-regional and national level. These can be multilateral or bilateral documents, legally binding or non-binding instruments, they can confer individual or collective rights or “in-between” rights ensured for persons belonging to minorities, their wording can be more or less vague, but their aim is the same: to promote the full and effective inclusion of national and ethnic groups in society.

In spite of their legally non-binding character, political documents of soft law such as the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities or the Copenhagen Document of the OSCE have a strong binding force. Of course, their neglect does not result in legal consequences and does not imply international legal responsibility. It does however seriously undermine international confidence and harms the interests of the violating country.

2. State obligations inferred from international standards, with a special focus on the Framework Convention

For the time being, the European Framework Convention for the Protection of National Minorities is the only legally binding document containing the obligation to ensure the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs.

The Framework Convention is formulated in such a flexible way that it is practically impossible to identify any concrete state obligation imposed on the states parties. It does not indicate concrete measures that are compulsory. It contains principles and it aims to reach an end: it is “result-oriented”.

This flexibility can be explained by the diversity of the situations of minorities and the rich variety of administrative arrangements in the participating states which make a uniform legal solution more difficult. The convention is the result of a compromise between the different (and sometimes very divergent) approaches of the member states. Thus, it contains formulations which were politically acceptable

to all parties but which left them a maximum of freedom in the interpretation and the implementation of the document. This flexibility is at the same time a strength and a weakness of the convention. It allows a very broad spectrum of measures to be taken and the most appropriate approach on an article-by-article basis, but its vague wording also constitutes an avenue of escape states unwilling to strengthen the protection and the participation of their minorities.

3. The experience of the OSCE High Commissioner for National Minorities

The experience of the OSCE High Commissioner for National Minorities shows that there is a wide variety of arrangements in the different states. Although some states rely on the experiences of other states when devising their own policies, no identical models exist, and it is obvious that no identical mechanism can be, or must be, applied by all states parties. The purpose of the Lund Recommendations of the OSCE is precisely to encourage and to facilitate the adoption by states of specific measures which ensure the effective participation of minorities in decision making and promote minority representation in elected bodies.

The different arrangements can be typically divided into two major groups: participation in the governance of the state as a whole, and minority self-governance in certain local or internal affairs.

3.1. Participation in the governance

Participation in the governance of the state means participation in the elections, in elected legislative bodies as well as in the programming, execution and evaluation of policies through specific measures such as the freedom to establish political parties, facilitated access to representation in elected national, regional or local bodies, the provision of guaranteed seats, ethnic quotas, complex and multilayered mechanisms of co-decision, and consultative bodies with stronger or weaker competences.

There are no international standards specifically requiring the preferential treatment of minorities to facilitate their access to elected bodies. Neither is a uniform solution for the parliamentary representation of minorities proposed. Mere representation does not seem to be a fully satisfactory solution and may have only symbolic value if minorities are unable to effectively influence the decisions of the elected bodies. As for consultative bodies, it is not enough merely to set them up, a permanent and institutionalised dialogue with them should follow.

3.2. Minority self-governance: forms of autonomy

The second large group of arrangements is linked to the right to make autonomous decisions. This can be typically ensured through minority self-governance, through different forms of territorial autonomy and cultural (personal) autonomy. International law does not impose a duty to give powers on a territorial basis,

and rights to either cultural or territorial autonomy cannot be inferred from the Framework Convention. States are often reluctant, and in general rather cautious in providing autonomy, therefore the existing, not too numerous examples, should be welcomed.

There are risks that territorial self-governance may be too rigid and may prevent social mobility. It might implement the state pattern of majority rule on another, smaller scale. Thus it cannot be considered as an omnipotent means for ensuring minority participation. As for cultural autonomy, it also raises some questionable elements such as the issue of the subject of law or that of registering minority affiliation for acceding to specific rights. This leads us to the conclusion that the various forms of participation and autonomy should be seen as complementary.

4. The case of Hungary

As far as participation in the governance of the state is concerned, Hungary's example is ambiguous. The complex system of minority self-government has been appreciated and praised by many domestic and international actors. Indeed, it offers a complex solution for participation at local, regional and national levels. Minority self-governments have different competences ranging from simple consultation rights to strong blocking powers and to transferred competences of autonomous decision making. Another good practice is the National Minorities Committee set up alongside the Minister for Education. This sectorial consultative body is composed of the delegates of all minorities living in Hungary. It meets every month, it has veto rights in ministerial level legislation affecting minorities and it acts as an authority for approving minority schoolbooks.

However, Hungary has been repeatedly and rightly criticised for not ensuring the parliamentary representation of minorities and for failing to implement its own domestic regulations according to which a specific law should be adopted to ensure parliamentary representation. Another shortcoming of the Hungarian system is the lack of preferential regulation that would enable the representatives of minorities to more easily obtain seats in local municipal governments. In the specific case of Hungary's relatively small and dispersed minorities, such preferential treatment would be justified. However, in 2005 the Constitutional Court stated the anti-constitutionality of the related provisions, which had to be taken out of the amended Act on the Rights of National and Ethnic Minorities.

5. The impact of monitoring mechanisms and EU integration prospects on minority participation at the domestic level

Hungary's experience shows that both monitoring mechanisms and EU integration prospects have a positive, stimulating impact on minority participation and domestic legislation. The involvement of minorities in the compilation of state reports as well as meetings with minority representatives during field visits are explicitly required. Numerous examples show that the opinions of the monitoring

body or the regular reports of the European Commission develop and speed up a state's internal determination to adopt or to amend its legislation. For example, following the adoption of the first opinion of the Advisory Committee, Estonia has taken a number of steps to improve its electoral and citizenship legislation, and Albania has set up its Committee of National Minorities. In Hungary, the recommendations concerning the elimination of electoral abuses in the minority self-government system led to the significant amendment of minority related legislation.

6. Do the relevant international standards constitute a sufficient incentive for states to adapt their institutional arrangements in terms of minority participation in public life?

The internal motivation of the state, the strength of the outside incentive and the results obtained should be examined together in order to identify ways to make minority policies more efficient.

Legally non-binding instruments will bring about the expected results only if they reinforce the state's already existing internal commitment to promote minority participation. This can – but will not necessarily – result in voluntary domestic legislation.

Compliance with legally binding international norms is motivated by the obligation to meet the requirement. The threat of mere obligation may consist in a lack of political will, for example after a change of government. This might result in a policy of window-dressing.

Commitment and obligation seem to be combined during the process of EU accession. States are motivated by the strong will of joining not just a prosperous economic community but also a union of values. This will is coupled with the obligations stemming from the Copenhagen Criteria, law harmonisation and the accession monitoring process. In general, this space in time is a rather efficient period. However, when it ends with accession, states may become lazy again in the subsequent period, as the EU has not developed a specific, legally binding instrument on minority rights.

What is needed is to couple effectiveness with sustainability. This requires more than the existence of international standards and their transposition into domestic legal orders. It requires some important external and internal conditions, for instance, the existence of adaptable good models and instructive practices. But even more so, it requires political maturity (a favourable political climate and the long-term commitment of the state to democratic practices), a stable legal framework, well organised minority communities which are relatively united internally and with democratically elected, legitimate representatives, and a sense of reasonable compromise from all parties. It requires mutual confidence from all participants, the capacity to overcome historical mistrust and the readiness to engage in dialogue and co-operation.

As Alan Phillips, the current president of the Advisory Committee of the Framework Convention puts it: "If international laws are to be effectively implemented, they must be owned and valued by society at large".

The revival of cultural autonomy in certain countries of eastern Europe: were lessons drawn from the inter-war period?

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The concept of non-territorial cultural autonomy (also known as national cultural autonomy – NCA) was originally devised at the turn of the 20th century by the Austrian Social Democrat Karl Renner, as a response to the specific circumstances that obtained within the Habsburg Empire at that time. Rising calls for self-determination on the part of the empire's subject nationalities posed a growing challenge not just to the imperial authorities, but also to those liberal and socialist thinkers like Renner who were seeking to realise democracy and social equality within the existing territorial boundaries of the Habsburg state. In an effort to satisfy these demands, Renner and his fellow Social Democrat Otto Bauer advocated the transformation of the Empire into a genuine democratic federation of peoples. Renner and Bauer also understood, however, that in the context of central and eastern Europe, such a federation could not be constructed solely on a territorial basis. So complex was the region's ethnic mix that it would be impossible to achieve complete congruence between political and national boundaries. Any effort to resolve the "national question" on this basis would be doomed to failure.

For this reason, Renner and Bauer insisted on the need for a separate, non-territorial means of realising national self-determination that would act as a complement to a system of territorial federalism and would cater specifically to the cultural needs of persons living as minorities in a national territorial unit other than their "own". Under their NCA scheme, representatives of national groups would be allowed to set up public corporations and elect their own cultural self-governments. Once constituted, these institutions could assume full control over schooling in the relevant language and other issues of specific concern to the group. The jurisdiction of the aforementioned bodies would not be confined to particular territorial sub-regions of the state, but would extend to all citizens who

179. The Unidem Seminar of Zagreb was partly funded by the UK Arts and Humanities Research Council (AHRC) as part of a broader project headed by John Hiden and David Smith at the University of Glasgow on the Quest for Cultural Autonomy in Inter-war Europe. The author gratefully acknowledges the support provided by the AHRC for this enterprise. For a preliminary overview of findings from this project, see Hiden J. and Smith D. J., "Looking Beyond the Nation State: A Baltic Vision for National Minorities between the Wars", *Journal of Contemporary History*, 41:3, pp. 387-400, July 2006; Smith D. J., "Non-territorial Cultural Autonomy as a Baltic Contribution to Europe between the Wars" in Smith D. J. (ed.), *The Baltic States and their Region: New Europe or Old?*, Amsterdam, Rodopi, 2005, pp. 211-26.

professed belonging to the relevant nationality, regardless of where they lived. Herein lays the main novelty of the NCA scheme – the “personality principle”, which holds that “totalities of persons are divisible only according to personal, not territorial characteristics”.¹⁸⁰

Also notable in this respect was Renner’s insistence that belonging to a particular national group was not an innate characteristic conferred by birth, but rather a matter of personal choice. In this regard, membership of the public corporations was to be determined on the basis of individuals freely determining their ethnicity and voluntarily enrolling on a national register. Those signing up in this way would be eligible to elect the representatives of the cultural self-government. Under the scheme, the state and municipal authorities would continue to provide the bulk of funding. Those enrolled on the national register, however, would also be liable to pay cultural taxes to the corporation. Anyone unwilling to fulfil this added obligation in return for additional cultural rights would be free to withdraw from the respective national register; similarly, those who decided that they wanted their children to be educated in another language would be free to withdraw from one register and enrol on another.

For Renner, this conception of nationality was consistent with the spirit of democracy, and served to differentiate his proposed national bodies from pre-existing corporate structures based on more organic, exclusivist and hierarchical conceptions of group belonging. Judged by the standards of today’s Europe, Renner’s scheme also appears consistent with the terms of the Council of Europe Framework Convention for the Protection of National Minorities, which stipulates that minority rights cannot be given to groups, but only to “persons belonging to national minorities”, who may exercise these rights both individually as well as in community with others.¹⁸¹

A lawyer by training, Karl Renner can be seen as one of the original pioneers of democracy through law. He believed that through a comprehensive legal regulation of the nationalities question, it would be possible to take culture out of politics and engineer a shift towards “a more progressive agenda of political action unhampered by nationalist division”.¹⁸² Although devised with specific regard to the Austrian case, Renner and Bauer’s ideas quickly attained wide currency within tsarist Russia. Here, non-territorial cultural autonomy proved to be of particular interest to the territorially dispersed Jewish communities of the western borderlands. Thinking on cultural autonomy also exerted an important influence on the development of the Baltic national movements. By the last decade of tsarist rule it had also penetrated Russian liberal and socialist circles, finding

180. Renner K., “*Staat und Nation*” in Nimni E. (ed.), *National Cultural Autonomy and its Contemporary Critics*. London and New York: Routledge Innovations in Political Theory, 2005, p. 32.

181. Article 3, paragraph 1, also “guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such”. Framework Convention for the Protection of National Minorities and Explanatory Report, www.coe.int, click on Treaties.

182. Schwarzmantel J., in Nimni (ed.), p. 64.

its way onto the agenda of the Constitutional Democrats and the Socialist Revolutionary Party.

Prospects of realising Renner and Bauer's vision of a multinational federation ultimately disappeared during 1914-20 as the turmoil of war and revolution brought about the demise of the Habsburg and tsarist states. The new Europe that emerged from the First World War, however, simply confirmed Renner and Bauer's contention that it was impossible to solve the national question solely on the basis of territorial adjustments. The new Union of Soviet Socialist Republics that encompassed the bulk of the former tsarist empire embraced cultural pluralism during the 1920s, yet in no way corresponded to Renner's vision of a genuinely democratic federation. The Communist Party not only possessed a top-down monopoly on political power, but also explicitly rejected Renner and Bauer's personal principle, opting instead for the creation and institutionalisation of sub-national, territorially-based identity.

The successor states that emerged elsewhere in central and eastern Europe provided vehicles for the national self-determination of several of the larger nationalities. However, in many ways these states simply replicated the problems of the old empires in miniature, since all contained significant minority populations. In an era of rising national consciousness, these minorities were in many cases ill-disposed to pursue the route of voluntary linguistic and cultural assimilation with the majority nationality. This paved the way for tensions between the new states, their minorities and "external national homelands" – states which claimed the right and obligation to defend the interests of ethnic kin living as minorities in neighbouring states.

This latent conflict gave impetus to efforts by the League of Nations to institute protection for the rights of national minorities, through treaties with the new successor and the system of petitions to the League Council. The guiding principles of the League, however, enshrined the sanctity of indivisible state sovereignty. The treaties stipulated that minorities were to enjoy equal rights as citizens,¹⁸³ plus the right to practise their own culture.¹⁸⁴ Yet any suggestion of allowing minorities to create public legal institutions as an intermediary between the state and the individual was firmly eschewed, on the grounds that this might create "states within states" and fuel demands for territorial revision.

The League system for supervision of the treaties, meanwhile, was largely toothless. Petitions from minority representatives were referred in the first instance to a specially established minorities section within the League Secretariat. If it found the complaint to be justified, it referred it on to a minority committee consisting of three members nominated by the council of the League.

183. Guarantees of citizenship; rights to life, liberty and free practice of religion; equality before the law; and access to public employment and professions.

184. Access to native-language primary education; right to establish and manage own privately-funded cultural and educational organisations.

This committee sought to resolve the issue through consultations with the state accused of having defaulted on its minority obligations. If this failed, the committee could refer the matter to a meeting of the full League Council, where the accused state was invited to take a seat and given voting rights. Since council decisions required a unanimous vote, it was impossible to impose any decision that was not wholly acceptable to the state concerned. In reality, though, only a small minority of the complaints that were made actually got as far as a meeting of the League Council. Three hundred and twenty-five complaints were taken up by minority committees during the period of the League, but of these only 14 went forward to the council. In most cases, complaints led to compromises being hammered out between the minority section and the government concerned.

Thus, as one author rightly observes: "Although the relationship between the states concerned and their minorities was internationalised by the League guarantee and was thus no longer a purely domestic affair, the minority protection procedure itself was essentially a political procedure, in which the sovereignty of the states was scrupulously respected and safeguarded. The petitioner stood as a source of information only. Once he had submitted his petition, he was left wholly out of the procedure".¹⁸⁵ Minority observers suspected, with good reason, that the League had no interest in promoting a new multicultural vision of statehood in the region. Rather, it regarded minority rights as a short-term expedient, and expected that in the longer term, minorities would assimilate linguistically and culturally with the majority nationality of their particular state, and that a system of stable, western-style nation-states based on the principle of one nation – one language, would emerge.¹⁸⁶

Inter-war experiments with cultural autonomy

The NCA principle, however, did resurface within the new setting of post-war Europe. It was implemented to varying degrees by the Baltic states – which were created independently of the Versailles peace settlement – and most notably by Estonia, whose 1925 Law on Cultural Autonomy for National Minorities was unique in Europe at that time. Under the terms of this law, representatives of Estonia's Russian, German and Swedish minorities (and other nationality groups numbering at least 3 000) were given the possibility to establish their own public legal corporations and, on this basis, elect cultural self-governments. These institutions were established on the democratic basis envisaged by Renner and Bauer: representatives of a particular minority seeking to implement autonomy had first to enrol at least half of the adult members of the relevant group onto a national register (the right to membership being determined on the basis of a

185. Crols D., "Old and new minorities on the international chessboard: from League to Union" in Smith (ed.) *The Baltic States and their Region: New Europe or Old?*, p. 188.

186. Hiden and Smith, "Looking Beyond the Nation State", *Journal of Contemporary History*, 41:3, p. 388.

citizen electing to enter the relevant nationality on his/her passport). Once the national register had been drawn up, its members were called upon to elect a cultural council of between 20 and 60 members, which could only be constituted if 50% of registered voters participated in the election. If a council could be established, a two-thirds majority vote by its members was then required in order formally to adopt cultural autonomy. Only if these hurdles were overcome could minority representatives proceed to elect the executive organs of cultural self-government at central and local level.

Thus, as one author has remarked, the constituency of minority cultural self-governments in Estonia derived from "the deliberate personal will of individual nationals living within the state territory."¹⁸⁷ Under the terms of the Estonian Constitution (which stipulated that each citizen was free to choose and change his/her nationality) and the 1925 law, a national minority group was defined as a community of language and culture to which anyone could adhere, regardless of ethnic origin. By the same token, the public corporation became akin to a "daily plebiscite", in that anyone unwilling to subscribe to the terms of membership could simply withdraw, without renouncing his or her passport nationality. If the number enrolled on the national register fell below 50% of the total number of citizens declaring a particular nationality, the state had the right to abolish the institutions of cultural autonomy.

The 1925 law was promptly implemented by Estonia's German and Jewish minorities during 1925-6. The non-territorial nature of the legislation was especially significant to these groups, which were both numerically small and territorially dispersed in terms of their settlement. This meant that unlike, for instance, Estonia's large and territorially compact Russian minority, they were unable to realise minority rights through existing, territorially-based local government.¹⁸⁸ Once constituted, the German and Jewish minority self-governments were able to assume full responsibility for the organisation, administration and control of public and private schools operating in the mother tongue of the relevant minority, as well as for the supervision of minority cultural institutions and activities more generally. The NCA scheme raised a host of practical issues that took a number of years to work through. For all the talk of NCA taking culture out of politics, the limits and scope of cultural self-government will inevitably be the object of contestation, and this was certainly the case in 1920s Estonia – how, for instance, was one to determine the nature of the history curriculum taught in autonomous German-language schools? Such issues could only be resolved through a process of dialogue and negotiation between the institutions of German autonomy

187. Aun K., *On the Spirit of the Estonian Minorities Law*, Stockholm: Societas litteratum Estonica in Svecia, 1949, p. 241.

188. The Estonian Constitution of 1920 stated that wherever there were 20 pupils speaking a particular language, the state was obliged to offer publicly-funded schooling in that language. It also stipulated that in areas where a minority group made up more than 50% of the local population, the relevant language should serve as a second official language alongside Estonian.

and the state, which retained broad powers of supervision and regulation over minority schools.¹⁸⁹

It must be said that at the outset, many Estonian Germans harboured deep suspicions towards the concept of cultural autonomy. The very novelty and complexity of this scheme meant that even its firmest advocates saw it as a step into the unknown. For some more conservative or nationalist Germans, moreover, NCA clearly represented "little more than an appreciation of politics as the art of the possible".¹⁹⁰ These groups had argued consistently for a more far-reaching form of self-government that would have encompassed social welfare and even a distinct legal system, but they ultimately deferred to those more liberal circles that recognised the need to work in partnership with the Estonian state. In the course of 1925-28, the German cultural self-government proved highly successful in establishing a single, streamlined German school network and a system of graduated cultural taxation that was levied on members of the cultural corporation. The establishment of autonomy did not in itself eradicate all outstanding points of contention between the German minority and the state (I return to this point below); nevertheless, by 1930, commentators on both sides were expressing the view that it had gone a long way towards reducing tensions arising from the tsarist period and the agrarian reform of the early 1920s.

It is hardly coincidental that in the same period, NCA also became the guiding principle of the European Congress of Nationalities, which was formed in 1925 under the auspices of German minority activists from Estonia and Latvia. In the 1930s, the congress would be transformed into an instrument of Nazi Germany's foreign policy, which exerted its control via the *Verband der Deutschen Volksgruppen* that by now had the dominant place within the wider organisation. In light of this fact, the existing literature has tended to highlight the predominance of German groups within the congress right from its inception, and the fact that the German Foreign Office provided the bulk of the organisation's funding already during the late 1920s. There is therefore an implication that from the very outset, the congress was no more than a Trojan horse for German "homeland nationalism" and revisionist foreign policy aims.

That *völkisch* German nationalists were present within the NCA right from the start is undeniable. However, to see the organisation uniquely in these terms would be a gross misrepresentation of the character which it assumed during the initial period of its existence in the late 1920s. Although Germans from the Baltic states and Romania were instrumental in setting up the congress, it was far from being a purely German affair, encompassing representatives of 19 minorities

189. Autonomous institutions were thus bound by certain national regulations laid down by the Ministry of Education, including a stipulation that the Estonian language be taught as a compulsory subject.

190. Roshwald A., "Between Balkanization and Banalization: Dilemmas of Ethno-cultural Diversity", *Ethnopolitics*, 6:3, 2007, pp. 365-78.

from 15 states in both eastern and western Europe. More significant was the thoroughly liberal spirit which permeated the congress agenda during the first six or seven years of its activity. Contrary to fears initially expressed by League representatives and state governments, it did not set out to overturn the post-war settlement of European affairs, but rather to place this settlement on more secure foundations. From the outset, the congress declared its commitment to maintaining the new or reduced states of central and eastern Europe within the frontiers established under the peace settlement. Discussion of border revision was explicitly prohibited at congress meetings, as were attacks on the policies of individual governments. Rather, the focus was on developing general principles of minority protection.

Here the congress argued that in constitutional terms, it was not enough merely to stipulate – as the League of Nations did – that each individual had the right to maintain his or her nationality. Only full cultural autonomy, granting minorities the status of legal corporation, would be enough to forestall the spectre of assimilation. In response to the inevitable charge that this would give rise to a “state within a state”, congress leaders reiterated many of the arguments that had previously been made in relation to the Estonian law on cultural autonomy: the competences of the envisaged minority corporations would be expressly confined to culture; moreover, these competences were expressly delegated to the minority corporations by the state, which continued to provide most of the funding and exercise oversight and right of veto in certain circumstances. Finally, in response to claims that cultural autonomy would give minority representatives additional privileges compared to other citizens of the state, the advocates of autonomy reminded their accusers that additional rights also entailed additional responsibilities, not least the obligation to pay supplementary taxes to the relevant minority corporation.

In short, congress leaders argued that “states within” were more likely to arise in those countries that did not adequately respect the cultural rights of national minorities. In their view, constitutional guarantees of cultural autonomy would remove any potential conflict of interest between membership of an ethno-national minority and membership of a wider state community. Indeed, it was argued that the primary loyalty of each individual must necessarily be to the state community of which one forms part. To underline this point, the initial declarations of the European Congress of Nationalities included a stipulation that all individuals belonging to minority groups should have the right and the obligation to learn the majority language, which was to remain the sole official language of central government in the new nation-states created by the peace settlement.

For Paul Schiemann, the Latvian-German vice-chairman of the congress from 1925-32 and liberal “thinker of the inter-war minorities”, policies relating to population moves entailed “work for the good of the place one inhabits. Any diversion to other

ends is suicide. ... Groups unable to identify with the policy of the state in which they lived "must forgo any sort of activity in an international sense".¹⁹¹ For Schiemann and his liberal fellow travellers within the congress, credible guarantees of minority rights were seen as one of the pillars of a durable European peace settlement that would in time give rise to a "United States of Europe". Within this context of peace and stability, they saw it as entirely normal that organised national communities would develop and maintain trans-border ties with kin in neighbouring states, and that a "Europe of nationalities" would ultimately emerge alongside a Europe of states.

In 1931, the leaders of the congress argued that the League of Nations should proceed to a detailed examination of the Estonian experience in order to ascertain whether this model might advantageously be applied in other states. The League Minority Secretariat did respond to this appeal, producing a report on this theme in November 1931.¹⁹² This critique of cultural autonomy makes a number of pertinent objections to the NCA concept which merit contemporary scrutiny, and I return to some of these points below. The overall negative assessment of cultural autonomy contained in this document, however, seems more a reflection of the League's continued obsession with indivisible state sovereignty. In his concluding remarks, Ludvig Krabbe of the League Minority Secretariat asserts that: "the 'complete' solution to the minorities problem rests on the development, in countries of mixed population, of a spirit of national tolerance and liberalism, a development which will be no less long and painful than that which took place in the sphere of religious tolerance, but which will become all the more difficult if a system of separatism in certain branches of the common life of the state becomes generalised."¹⁹³

For all of the pertinent objections that Krabbe raises with regard to NCA, the League's own approach could hardly be deemed successful in fostering the spirit of European and Euro-Atlantic international organisations, arguing that organised minority groups should be given subjectivity at the international level.¹⁹⁴ A similar call was made by Hungarian political circles in connection with the proposed "status law", which most commentators would see as being inextricably linked to Hungary's espousal of NCA in 1993. In seeking to reach out to Magyar kin minorities living beyond the boundaries of Hungary, Prime Minister

191. Hiden J., *Defender of Minorities. Paul Schiemann 1876-1944*. London: Hurst & Co, 2004, p. 144.

192. "L'autonomie culturelle comme solution du probleme des minorités. Note de M. Krabbe au date du 18 novembre 1931", League of Nations Archives R2175 4 32835.

193. *Ibid.*

194. See Klímová-Alexander, Ilona. "Transnational Romani and indigenous non-territorial self-determination claims". *Ethnopolitics*, 6:3, 2007, p. 395-416; on the Jewish demands from the interwar period, see Dohrn V., "State and Minorities: the First Lithuanian Republic and S. M. Dubnov's Concept of Cultural Autonomy," in Nikzentaitis A., Schreiner S. and Staliunas D. (eds), *The Vanished World of Lithuanian Jews*. Amsterdam: Rodopi, 2003, pp. 155-73.

Victor Orban expounded his vision of a future “Europe of national communities”, just as the likes of Paul Schiemann did back in the late 1920s.¹⁹⁵

For some authors, these developments can be characterised as “Austro-Marxism’s last laugh”.¹⁹⁶ The current context of globalisation and European integration, they argue, offers scope to move beyond current modalities of territorially-based sovereignty and realise the vision first expounded by Renner and Bauer more than a century ago.¹⁹⁷ The reality, however, appears somewhat more complex, in that the revival of NCA in contemporary Europe has been characterised by a set of debates which are in many ways startlingly reminiscent of those that took place between the wars. As Roshwald has observed with regard to the current laws on NCA, “pointing to the practicalities of such an approach is one thing, and winning the support of cultural majorities and minorities alike ... quite another”.¹⁹⁸ I do not propose to examine these various laws in detail, as this is something that Christopher Decker will do in his own report for this seminar. Instead, I will try to highlight some common themes in the various national debates on NCA and make a few observations of a general character.

Firstly, as a general point, one can say that in many cases, minority rights issues are still highly “securitised”, especially in central and eastern Europe. Even if national governments and national majorities see NCA as less threatening than territorially-based autonomy, fears of creating a “state within a state” remain very much alive in many contexts. Secondly, as Roshwald rightly observes, many national minority groups themselves remain to be convinced that NCA has any real practical relevance to their situation. If one looks at the practice of cultural autonomy both during the inter-war period and today, successful applications have been limited to groups that are small and territorially dispersed in character – in other words, to groups that have no possibility to realise meaningful cultural self-determination by any other means.¹⁹⁹ Those present day international actors intent on promoting NCA appear to couch it as a potentially less destabilising alternative, rather than a complement to territorially-based minority rights. This, however, raises the question of whether larger and more compactly settled minorities will be willing to forego the kind of territorial autonomy that has

195. Deets S., “Pulling back from neo-medievalism: the domestic and international politics of the Hungarian status law” in Ieda, O. (ed.) *Beyond Sovereignty: From Status Law to Transnational Citizenship?* Sapporo: Slavic Research Center, Hokkaido University, 2006, pp. 17-37.

196. This is to borrow from the title of Bill Bowring’s excellent 2002 article on NCA in Russia: “Austro-Marxism’s Last Laugh? The Struggle for Recognition of National-Cultural Autonomy for Russians and Russians,” *Europe-Asia Studies*, 54, 2, 2002, pp. 229-50.

197. In this connection, see especially Nimni E., “Introduction for the English-Reading Audience,” in: O. Bauer, *The Question of Nationalities and Social Democracy*, Minneapolis: University of Minnesota Press, 2000, xv-xlv; also the debates contained in Nimni (ed.), 2005.

198. Roshwald, “Between Balkanization and Banalization”, loc. cit.

199. Ludvig Krabbe makes this point in his 1931 memo for the League of Nations. If one looks at the contemporary scene, then only the small and dispersed Swedish minority has thus far implemented the Estonian NCA law of 1993. The fact that Hungary opted for NCA also partly reflects the numerically small and scattered character of its minority population.

been routinely granted to similar groups living in western Europe.²⁰⁰ Certainly in cases where groups have already achieved a measure of state-funded territorial autonomy, it has been difficult to persuade them to trade these rights for a scheme that represents a step into the unknown and has major implications in terms of resources and organisation.²⁰¹

One issue of particular concern to many minorities has been the potential financial burdens of NCA, especially the requirement to pay additional taxes to a cultural self-government. In this regard, it is hardly coincidental that minorities implementing the scheme have been for the most part relatively well-off, and have possessed a high degree of socio-political cohesion. The prospect of additional taxation was a particular concern for Estonia's inter-war Russian minority, which already enjoyed territorially-based minority rights and which – unlike the German and Jewish minorities – was for the most part rural and highly impoverished, as well as having high levels of illiteracy. In today's context, similar considerations might lead one to question the immediate applicability of NCA to groups such as the Roma.²⁰²

Even if NCA can be established, it stands to reason that it does not in itself represent a "complete solution" to the national question.²⁰³ Renner and Bauer's theory presumes that once cultural autonomy is granted, this will take culture out of politics and leave the state free to focus on issues of common concern to all citizens. However, cultural autonomy in itself offers no guarantee that the state will treat all citizens equally, grant access to political decision making and distribute resources equitably, rather than prioritising the interests of the majority nationality.²⁰⁴ Renner and Bauer for their part fully recognised that NCA in itself was not sufficient. In their original scheme, it went hand in hand with a consociational form of democracy that would see all national groups represented within a grand coalition government, thus giving access to political decision-making power. Similarly, the nationalities congress of the 1920s – while recognising that the key to the "national question" lay in working constructively within individual

200. Kymlicka, "National Cultural Autonomy and International Minority Rights Norms", in *Ethnopolitics*, Vol. 6/3, pp. 379-93.

201. This remark is relevant to Russians in Estonia, both between the wars and today. With Russian language schooling already operating under local authority auspices in the 1920s, most local Russians saw no need to introduce NCA. Similar territorially-based rights have been extended to Russian-speakers (regardless of citizenship) in today's Estonia, and many Russian leaders have again been suspicious of trading the current status quo for the uncertainties of NCA, especially given that the latter system is open only to those with Estonian citizenship. See in this regard Smith "Cultural Autonomy in Estonia" and Smith D. J., "Retracing Estonia's Russians: Mikhail Kurchinskii and Interwar Cultural Autonomy," *Nationalities Papers*, 27, 3, 1999, pp. 455-74.

202. Here some critics assert that without meaningful participation at grass roots level, there is a danger that NCA – and minority politics more generally – might become a vehicle for the narrow interests of an unrepresentative elite group purporting to speak in the name of the minority. See the discussion in Ilona Klimova-Alexander's contribution to Nimni (ed.), 2005.

203. "L'autonomie culturelle comme solution du probleme des minorités", loc. cit. (note 192).

204. In this regard, Krabbe argued that NCA had offered no defence against "nationalising" measures in other spheres of society, such as the economy or religious life, where there were ongoing wrangles over church property during the late 1920s. *Ibid.*

states – saw NCA as a complement to a genuine and robust League system of minority protection that would prevent governments from engaging in practices of dissimilation. If the League system never came close to matching this aspiration, the situation in contemporary Europe offers greater room for optimism: here, EU conditionality criteria relating to institutional guarantees of democracy and “respect for the protection of minorities” have served as an especially powerful instrument impelling states to take appropriate measures in the spheres of both equality and positive rights. In so far as the minority rights criterion has not thus far been formally incorporated into community law, however, it remains to be seen what kind of minority rights regime will ultimately emerge within the enlarged – and, one would hope, still enlarging – European Union.

My final observation on NCA in many ways follows on logically from the preceding ones. It relates to the requirement to enrol on a national register. Along with an institutionalised system of passport nationality, formal enrolment constitutes a sine qua non of the NCA model, and yet it has proved controversial and divisive for many minority groups, both during the inter-war period and the contemporary era. If minority rights are to be guaranteed only to those on a national register, where does this leave those who are unwilling to enrol? Opponents of NCA in inter-war Europe feared that the registration requirement would introduce a line of legal differentiation within minority groups, and that this in turn might actually serve to weaken the overall position of the minority vis-à-vis the state and majority nation.²⁰⁵

In other cases, minority representatives have expressed a fear that by publicly registering their nationality, they might leave themselves open to discrimination or differential treatment. Krabbe’s 1931 memo, for instance, highlights concern at being branded “a caste apart” as one of the main barriers to a more generalised application of NCA in Europe.²⁰⁶ Such fears appear especially salient where a group is already socially disadvantaged and marginalised: without guarantees of equal treatment, NCA could possibly be conducive to

205. This proved to be a major issue in the protracted debates on the Estonian cultural autonomy law during 1921-5, and it is referred to in Krabbe’s memo of 1931. Krabbe suggests that alternative models not based on registration might actually be more practical. By way of example he cites the much admired Latvian schooling law of 1919-34. Rather than delegating competences to a minority corporation, this law divided the state administration along national lines, creating minority sections within the education ministry that were appointed by minority representatives and were answerable only to the Minister for Education. The democratic Latvian Republic did not require its citizens to state an ethnic affiliation in their passports. Rather, children were allocated to schools on the basis of their declared “family language” – that is, the tongue most commonly spoken at home. Wherever a district contained 30 children speaking a particular family language, the local state authorities were obliged to offer schooling in that language. As in Estonia, however, this law did not adequately cater for the needs of territorially dispersed minority groups, and the German minority, for instance, also set up its own privately organised corporation and system of taxation. Recent research has also shown how the Latvian Government secretly used a range of incentives (for example, free lunches) in order to coax poorer minority pupils (most notably in the eastern borderlands) into Latvian language schools. See Purs A., “The Price of Free Lunches: Making the Frontier Latvian in the Interwar Years”, *The Global Review of Ethnopolitics*, 1, 4, June 2002, pp. 60-73.

206. “L’autonomie culturelle comme solution du problème des minorités”, loc. cit. (note 192).

ghettoisation. Once again, this is a concern that is frequently voiced today in relation to the Roma.

The aforementioned reservation largely explains why, under the original Hungarian law of 1993, the institutions of NCA were elected by all registered voters within a particular constituency, rather than on the basis of a national register of minority voters. In those cases where a defined proportion of minority candidates were returned to office, cultural self-governments could be established alongside existing local governments. It soon became clear, however, that this approach provided particular scope for so-called “ethno-business”, whereby the number of people voting for minority candidates in particular areas routinely outstripped the number of those who had declaring minority nationality under census returns, and candidates were themselves in many cases not representative of the minority group in whose name they purported to act. For this reason, the law was amended in 2005, and a national register system introduced.

Conclusions

For all of the issues and debates outlined above, NCA clearly merits closer consideration as one of a range of possible approaches targeted at Europe’s numerous and highly diverse historic minority groups. In this regard, it bears repeating that NCA was never intended as a stand-alone solution, but as a complement to territorially-based approaches. Renner and Bauer’s key point was that territorial approaches were not in themselves sufficient to bring about a durable regulation of the national question within deeply polyethnic environments. This lesson is as germane to the Europe of the early 21st century as it was to that of the early-mid 1900s.

The other novel feature of Renner and Bauer’s scheme that commands our attention is the “personal principle” that deems nationality to be a matter of personal choice. In keeping with the terms of today’s FCNM, this principle provides a safeguard against forcible assimilation, but does not preclude voluntary assimilation, should an individual wish to follow this route. As many commentators have pointed out, no individual is entirely “free” to choose his or her nationality: national groups are in most cases “communities of character” rather than simply communities of language; also, as the preceding analysis has demonstrated, the choices of individuals within ethnically fluid environments is mediated by a range of incentives and constraints ranging from the material to the socio-psychological. As also noted above, there is the problem of how to ensure that – quoting the FCNM – “the individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s nationality”.²⁰⁷ Renner and Bauer and their followers in inter-war Europe were of course aware of these issues, but regarded personal choice as consonant with the principles of modern

207. Framework Convention for the Protection of National Minorities and Explanatory Report, Article 2, paragraph 1, section 35 (www.coe.int, click on Treaties).

democracy. In their view there was no better way of defining nationality and regulating political issues of nationality.

Renner and Bauer's greatest contribution perhaps lies in their challenge to the principle that particular ethnic groups can exercise exclusive control over particular territories. Their arguments were borne out by the experience of the interwar period, which demonstrated the difficulty of grafting the "classic" western model of "one nation, one state" onto the territories of central and eastern Europe. Unfortunately, the League of Nations, obsessed with the principle of unitary and indivisible state sovereignty, proved unable and unwilling to counter "nationalising" state approaches – and consequent ethnic conflicts – across much of the region during this period.

Some contemporary authors maintain that the nation-state has had its day and that the state-based system is inexorably giving way to a "neo-medieval" Europe characterised by a complex pattern of competing and overlapping jurisdictions at many levels. I would say that this view requires major qualification, in so far as the EU and other international organisations are still defined to a large extent by intergovernmentalism, while for most Europeans, the nation-state remains the primary locus of identification and loyalty. The continued primacy of state sovereignty within international minority rights norms became clear during the vigorous debates surrounding the Hungarian status law: here, international organisations such as the OSCE and Council of Europe could not countenance the reference, within the initial draft, to a "trans-sovereign Hungarian nation", insisting that persons belonging to minorities have to be seen first and foremost as citizens of their state of residence, and that this state must bear the primary responsibility for their welfare. Legitimising the principle of a transsovereign nation, it must be said, raises the risk that a home state might seek to abrogate responsibilities to its minority citizens. Furthermore, it was established that the proposed status law violated the principle of equality in that it discriminated on the basis of ethnic origin between citizens of foreign states.²⁰⁸

As was pointed out in these debates, however, the fact that states bear the primary responsibility for the welfare of their minorities does not mean that other state governments and external agencies cannot have a role to play.²⁰⁹ For instance, the terms of the FCNM stipulate that Hungary can (albeit to the extent allowed by bilateral treaties with neighbouring states) legitimately promote Hungarian language and culture abroad. Indeed, when one looks at the reasoning of international organisations and the various relevant provisions of the FCNM (notably Articles 17 and 18) they do not appear to be far removed from the vision expounded by the late 1920s Congress of European Nationalities, which sought to adapt Renner and Bauer's original model to the realities of the modern

208. Deets, "Pulling back from neo-medievalism", loc. cit. (note 192).

209. Majtenyi B., "Utilitarianism in Minority Protection? (Status Laws and International Organisations)" in Ieda, O, (ed.) *Beyond Sovereignty: From Status Law to Transnational Citizenship?* Sapporo: Slavic Research Center, Hokkaido University, 2006, pp. 3-16.

nation-state system. One hopes that, following its recent enlargements, the EU will continue to deliver the peace, stability and prosperity with which it has become associated over the past 50 years. If this proves to be the case, then it is indeed possible to envisage an EU in which state frontiers progressively decrease in visibility and EU nationals – while defined primarily by the citizenship of their home state – are increasingly free to interact with ethnic “kin” in neighbouring states, without this being construed as a security threat.

The Framework Convention for the Protection of National Minorities, however, remains very much a framework. As Will Kymlicka has observed in a recent paper, European minority norms remain in a state of flux; it is not yet clear in this context whether the EU and other organisations will go further down the road of targeted rights for Europe’s “historic” national minorities (NCA has thus far at least belonged firmly to this category) or opt instead for a more limited “generic” minority rights regime – as exemplified by the 1966 United Nations International Covenant on Civil and Political Rights – that caters for all ethnocultural minorities, regardless of whether they are historically rooted or more recent migrant groups.²¹⁰ The experience of the inter-war period suggests that attempts to dilute minority rights provision in central and eastern Europe would be unwise. In this regard, there is much that can usefully be learned in the present from studying past manifestations of NCA.

210. Kymlicka “National Cultural Autonomy and International Minority Rights Norms”, *op. cit.* note 200.

Contemporary forms of cultural autonomy in eastern Europe: recurrent problems and prospects for improving the functioning of elected bodies of cultural autonomy

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During the last 15 years there has been greater acceptance of national minority rights in eastern Europe. This coincides with the break-up of Yugoslavia and the enlargement of the European Union (EU), specifically the creation of the Copenhagen Criteria as a basis for admission to the EU. Other instruments and mechanisms, such as the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) and the Organization for Security and Co-operation in Europe (OSCE) and its High Commissioner for National Minorities (HCNM), have augmented the European goal of the realisation of national minority rights.

The Copenhagen Criteria were adopted at the European Council meeting in 1993 and created a basic set of economic and political conditions that the EU would require of all states seeking accession. "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union."²¹¹ Because the EU adopted a benchmark standard which requires adherence to national minority rights, it was able to engage in a "carrot and stick" approach concerning these rights with the eastern European candidate countries. The EU, through its yearly reporting on the progress of candidate countries, was able to get states to achieve a fair amount of implementation of European standards with the implied threat of postponing admission. The EU has also been able to rely on other mechanisms, such as the FCNM Advisory Committee and the HCNM, in addressing national minority rights to reinforce its work in this area.

An important aspect of national minority rights is the right to effectively participate in public affairs.²¹² This has led some states to seek to create mechanisms which would allow national minorities the ability to participate in government at the national and local level, in addition to consultative bodies designed specifically for empowering national minorities. Amongst the first 10 eastern European

211. European Council, Conclusions of the Presidency, SN 180/1/93 REV 1, p. 13 (1993).

212. Article 15, FCNM. The Venice Commission has noted cultural autonomy "as potentially instrumental for the implementation of Article 15." Paragraph 58, Opinion on the Draft Law on the Statute of National Minorities Living in Romania, Opinion No. 345/2005, CDL-AD(2005)026, 64th Plenary Session (Venice, 21-22 October 2005).

states that were admitted to the EU, most adopted legislation to implement the FCNM, usually through laws on the status of national minorities.²¹³ In nearly all of these laws some mechanisms are created for national minority participation. Several laws developed the possibility for national minorities to create an institution of cultural autonomy, also known as non-territorial autonomy. However, it should also be noted that many states link national minority autonomy to local government participation and thereby also to territory which the national minorities tend to inhabit. "Pure" cultural autonomy is not territorially linked and therefore does not reinforce territorial claims.

Cultural autonomy does not threaten the territorial integrity of the state since cultural autonomy is granted to individuals. Cultural autonomy assumes that all citizens, both the majority and minority, have a vested interest in the overall well-being and prosperity of the state in which they live. Since allowing a national minority to manage its own cultural life is predicated on the national minority's loyalty to the state in which it resides, cultural autonomy does not automatically create "states within states". "However, cultural autonomy *does* challenge the concept of the 'nation state', which equates one nation with one state. Instead, the theory of cultural autonomy conceives the 'state' as a '*state community*' and understands it in terms of territory *jointly occupied over time by minority and majority alike*. In other words, cultural autonomy creates a '*shared territorial space*'.²¹⁴

Cultural autonomy allows a national minority, for the express purposes of managing its own cultural and educational affairs, to constitute itself as a public corporation. The individual chooses whether to be a member of the national minority, generally through enrolment on a "national register". A percentage of the state budget set aside for all educational and cultural purposes is then allocated to the national minority in proportion to the minority's population. Supplemental funding for educational and cultural purposes can be derived from self-taxation of members of the national minority and, in some cases assistance from a kin-state.

The remainder of this paper will examine some of the difficulties, both for the state and the national minority, in creating the necessary elected institutions for cultural autonomy to function. In particular, the paper will address issues concerning legitimacy and representation, determining the eligibility of the national minority (registration), creation of electoral rolls, legislation and human resources. The paper concludes by determining that while there are numerous obstacles to overcome in creating the elected institutions, cultural autonomy still

213. The Czech Republic, Hungary and Lithuania have these laws while Estonia and Latvia have specific laws on cultural autonomy. Slovenia legislates national minority participation through its constitution and laws in local government.

214. Decker D. C., "Enhancing Minority Governance in Romania: Report on the Presentation on Cultural Autonomy to the Romanian Government", (comments of Dr. John Hiden) p. 7, *European Centre for Minority Issues Report #53* (March 2005).

offers one of the best possibilities to prevent ethnic conflict and create stability within a multi-ethnic state.²¹⁵

For purposes of illustration, this paper will focus primarily on Romania and Armenia, both of which have draft laws that include a form of cultural autonomy that has no tie to territory.

Legitimacy and representation

Cultural autonomy raises some serious issues concerning legitimacy and representation of national minorities. Article 3(1) of the FCNM states that “[e]very person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice”. In the FCNM’s explanatory report it states that Article 3(1) “guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such. This provision leaves it to every such person to decide whether or not he or she wishes to come under the protection flowing from the principles of the FCNM. This paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity”.²¹⁶

What are the “objective criteria”? Who is empowered to determine what the “objective criteria” are? And who is empowered to determine whether a person meets the “objective criteria”?

Perhaps, what the drafters of the FCNM did not fully anticipate is the lengths to which some people would go to seek even the most tenuous connections to national minority groups or invent new ones in order to reap the benefits that states are developing for “genuine” national minorities. This has become known as “ethno-business”.²¹⁷ The problem with Article 3(1) of the FCNM is that it is nigh impossible for a state or even other national minorities to ensure that national minority groups within the state are in fact “genuine” national minorities. Hungary faced problems of ethno-business when it introduced its system of cultural autonomy in 1993. In an attempt to rectify this abuse, Hungary adopted a law which requires national minorities to sign a declaration that they belong to one of 13 minorities and only they can vote in the elections. Candidates for minority councils must “know the language, culture and traditions” of their given

215. See generally, Venice Commission, “A General Legal Reference Framework to Facilitate the Settlement of Ethno-Political Conflicts in Europe”, CDL-INF(2000)16, 44th plenary session (13-14 October 2000).

216. Paragraphs 34 and 35, Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report, H(1995)010.

217. Sometimes ethno-business is also used interchangeably with “ethno-tourism,” the phenomenon of using one’s national minority status for the purpose of “representing” the national minority at conferences, meetings, training courses, etc. in order to obtain free trips.

minority or they are not allowed to stand in the election.²¹⁸ The attempt by Hungary to solve the fraud has actually led to a worsened situation. "The rules do not provide an opportunity for independent candidates to stand for a seat. Only those civic organisations can stand which were founded before the law was adopted. This simply entrenches the existing minority elite in its place, excluding new candidates and reducing the level of competition."²¹⁹

There are two major ramifications from this inherent problem of the individual having the freedom to determine whether to choose to be treated as a national minority versus the problem of states trying to adhere to the letter and spirit of Article 3(1); legitimacy and representation. The issues of legitimacy and representation are inextricably linked. If the legitimacy of the group as a whole or the leaders of the national minority are questioned then this calls into question whether the leadership truly represents the national minority. The legitimacy/representation question is important both within the national minority itself, and from other national minority groups and the majority.

For example, in Romania there are serious questions as to the legitimacy of the Macedonian national minority. The Romanian National Statistics Institute states that there are 731 Macedonians.²²⁰ They claim not to be Macedonians from "the former Yugoslav Republic of Macedonia", but descendents of ancient Macedonians.²²¹ According to other national minorities in Romania this group never existed previous to the last census. Remarkably, the Macedonians have become recognised and have a seat reserved in the parliament. Contrast this situation with that of the Roma, which number well over 500 000 officially and also have only one representative in the parliament.²²² Because of the position that the Roma national minority organisation has taken regarding representation issues and the constant fighting between other potential challengers, no Roma parties even ran in the last local election.

218. "We might assume that the 'filtering' of candidates would only work if they were obliged to prove their knowledge of the language in question before a board of examiners. But this would not be effective. Take two relatively large minorities in Hungary. Plenty of people who never claimed to be Swabians speak good German. The opposite applies with the Roma: many Roma communicate in Hungarian on a daily basis, and speak only a couple of words of their ancestral tongue. So what is to become of them? This measure does nothing to stop swindlers, but excludes plenty of genuine members of minorities from their representative councils. But the law discriminates in an even more serious way. It would clearly be a scandal if the law on elections declared that only existing parties could stand for parliament, and new parties and independent candidates were excluded. But this is precisely what happens with minorities." Tamas Laszlo Papp, *Ethno-business, Repackaged: On the Minority Councils* (29 May 2006) available at <http://hvg.hu/english/20060529etnobusiness.aspx>. 219. *Ibid.*

220. <http://www.recensamant.ro/datepr/tbl4.html>.

221. While they technically do not claim to be descendants of Alexander the Great there is this inference that they date back to "ancient times". However, for a less cynical view see www.proetnica.ro/en/macedonii.html. It is important to bear in mind that there is a Greek minority in Romania which numbers 6 513.

222. According to the World Bank, the Roma may number between one and two million making them between 5% and 10% of Romania's population and the largest national minority group. Available at <http://go.worldbank.org/LP7KA75ZQ0>.

Externally, the majority population sees government money going to these organisations which, arguably, are not very representative and often do not attempt to address the actual needs of the national minorities because the leadership is not actually a national minority, or these groups represent such a small segment of the population, but obtain certain spoils of office.²²³ This can create a backlash against national minority rights in general.

Therefore, a crucial point in establishing legitimate and representative institutions of cultural autonomy will be determined by how eligibility to stand for election is determined and who may vote in the establishment for institutions of cultural autonomy. This will be an area where the Advisory Committee of the FCNM and the Venice Commission can play a role in helping establish standards.

Determining the eligibility of the national minority (registration)²²⁴

A contentious aspect of developing institutions of cultural autonomy is trying to determine which national minorities are eligible to create these institutions. Most states create a threshold, either throughout the whole territory of a state, as in the case of Estonia;²²⁵ or in certain regions or municipalities as is the case in Hungary.²²⁶ Romania has attempted a hybrid system where it names the minorities that are able to form institutions of cultural autonomy, but then adds thresholds in order for an organisation to be legally recognised as representing the national minority.²²⁷ However, the threshold issue is greatly affected by the freedom or limitations it puts on the requirements for membership in national minority organisation.

223. Under Romanian law political parties receive money, offices, vehicles and staff all paid for by the state.

224. For background on election issues relating to national minorities see, Venice Commission, Electoral Law and National Minorities, CDL-INF(2000) 004 (25 January 2000); and Trajkovska M. L., Venice Commission, Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries, Study No. 307/2004, CDL-AD(2005)009, 62nd plenary session (Venice, 11-12 March 2005).

225. Three thousand people must register before elections can be held to establish the institutions of cultural autonomy.

226. Hungary declares that Bulgarian, Gypsy, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian peoples qualify for rights to cultural autonomy. However, if a group is not listed above and wants to meet the requirements of the law, they must petition the Speaker of the National Parliament with a list of 1 000 voters who declare themselves as members of the national minority. Article 61(1) and (2), Act LXXVII On the Rights of National and Ethnic Minorities (1993).

227. The number of members of an organisation of citizens belonging to a national minority cannot be smaller than 10% from the total number of the citizens that declared their affiliation to the respective minority at the last census. In case 10% from the total number of citizens registered as belonging to a minority in the last census is equal or surpasses 25 000 persons, the list of founding members must contain at least 25 000 persons, domiciled in at least 15 counties in Romania, but no less than 300 persons for each of these counties. Persons that do not belong to a national minority may be members of an organisation of citizens belonging to a national minority, but their number cannot surpass 25% from the total number of the members of the organisation at local, as well as at national level. Article 40(2)-(4) (actually Article 39 as it was misnumbered and there are internal references in the draft law to Article 39), draft law on the status of national minorities living in Romania (second draft 2005) [hereinafter Draft 2] at www.ecmiromania.org/Collection_of_Materials.13.0.html.

There are a few possible models for the creation of the elected bodies. The first is that several organisations, each representing the same national minority, stand against each other in an election in which only members of the national minority vote. The party receiving the most votes is then empowered to set up all the institutions of cultural autonomy. This could mean a body to run the national minorities' schools, a board to organise cultural activities, and so forth. One of the drawbacks to this system is that it will most likely entrench the winning party. It also creates a system where one party wins all the spoils of office and there is a greater chance for abuse of the institutions.

Another model could involve creating a national minority council (for each national minority) where individuals stand for election to an executive national board. The executive is then empowered to develop all the institutions necessary for the implementation of cultural autonomy. The benefit is that the elected members to the executive may be either independents, or representatives of different parties. This will ensure some degree of accountability within the executive if its members are independent or of multiple parties.

Yet another possibility is that national minorities are permitted to create local institutions of cultural autonomy with little or no contact with a national council. Of course the benefit of this is that the local population has a great degree of control, but there is little oversight and less chance that there is a connection to other similar institutions developed by the national minority in other geographic locations. This last model is somewhat in opposition to the ideal form of cultural autonomy because it does not link up dispersed groups within the state and most likely would reinforce territorial ties of the national minority.

Creation of electoral rolls

Creating special electoral rolls is a particularly difficult issue because many states in Europe have sensitivities to collecting names of national minorities due to the events of the Second World War. While it is completely normal for the state to create a national register and/or electoral rolls, these instruments do not usually store data on ethnicity. The Venice Commission has agreed that there is a need for ethnic information to be kept. "It is self-evident that any special voting system for national minorities require that the voters and the candidates reveal their belonging to a minority. This does not mean, however, that the list of voters should be made publicly accessible. There are indeed many possibilities to secure the confidentiality of these personal data."²²⁸

In the case of Romania's draft law, the state authorities were not going to create a specific register of national minority voters. However, it is unclear how such a system would ever gain the legitimacy of the national minority and ultimately

228. Paragraph 52, Venice Commission, Opinion on the draft law on the statute of national minorities living in Romania, Opinion No. 345/2005, CDL-AD(2005)026, 64th plenary session (Venice, 21-22 October 2005).

there would always be questions raised if the number of voters in an election for cultural autonomy was greater than the population of the national minority in the previous census.

For example, if there is a national minority in a state with a population of 3 000 people disbursed throughout the state, but one of the candidates to the national minority executive is a trade union member and there is no requirement for a separate electoral roll, the union candidate could get his union members to vote in his favour. Suspicions would certainly be raised if 3 500-4 000 people voted in the election. The national minority population would then question the legitimacy of the executive. Not to mention the fact that this scenario assumes that the candidate is in fact a member of the national minority, but this might not necessarily be the case.

The only manner in which the issues of legitimacy, representation, eligibility of the national minority organisations, creation of electoral rolls and registration can be addressed is through legislation. However, even the legislation could cause problems because while it is aimed at the national minority population of the state, it will have to be adopted by the majority. In several eastern European states that have national minorities, nationalist parties have made a habit of running on a racist/ethnic/xenophobic platform. Furthermore, few national minorities have experience or expertise in drafting constitutional or primary legislation. This means that the main drafters of such legislation tend to be from the majority. For instance, in the case of the Armenian draft law, no minorities were involved in its drafting out of a lack of knowledge about how to draft laws and simple fear and distrust of the government.²²⁹

Legislation

One of the main problems with getting legislation drafted on cultural autonomy is that national minority groups usually do not have significant representation at the national parliament to drive the legislative process. So the national minorities are dependent upon parties of the majority ethnicity. This is assuming that the national minorities actually take the lead in drafting the law itself.

As noted above, the Armenian government has been leading the drafting of its law on the status of national minorities simply because it wants to demonstrate its openness toward national minorities and to fully implement the FCNM.²³⁰

229. The Armenian draft law on the Republic of Armenia's citizens of non-Armenian ethnicity and ethnic minorities is an excellent law that is well drafted and appears to be substantially human rights compliant. The author is in no way implying that the Armenian Government had any nefarious intent when drafting the law.

230. Moreover, a Department for Ethnic Minorities and Religious Issues was set up in the government in 2004, to initiate and co-ordinate policy making on issues relevant to national minorities. A draft law "on the Republic of Armenia citizens of non-Armenian ethnicity and ethnic minorities" is being prepared by this department, in consultation with those concerned. [...]The draft law "on the Republic of Armenia citizens of non-Armenian ethnicity and ethnic minorities" has received criticism from representatives of national minorities. The aspects of the law which have been criticised include

In the case of Romania, the Hungarian ethnic party is part of the governing coalition and is the main driving force behind its law. The Hungarians have pulled the other national minorities along with them. The Hungarians clearly have a sense of *noblesse oblige* toward the other national minority groups and have attempted to accommodate them so long as it does not interfere with the Hungarian community's political agenda.

Another problem faced by national minorities is that creating the legal basis for institutions of cultural autonomy is highly technical. It is difficult to strike the right balance of including enough detail in the primary legislation without falling foul of a state's constitution or other primary law.

In the case of Estonia, the national minority creates an electoral roll. At least 50% of the national minority must register for the process to go forward.²³¹ If that threshold is met, then elections are organised at the expense of the state. The turnout for the vote must be at least 50% of the registered national minority voters. The voters elect a legislative body which begins establishing the institutions of cultural autonomy. The organ of cultural autonomy is created as a public law authority. The legislative body then appoints an executive to run the institutions of cultural autonomy, such as schools, theatres and museums, for example. The legislative body and the executive act like an additional municipality that is comprised only of the national minority and only with a mandate over language, education and culture. The municipality where the national minority lives maintains competencies for all other aspects of the community members' lives. The national minority municipality is not tied to a geographic area, so the national minority's institutions of cultural autonomy must organise schooling for the minority throughout the whole state. Because the cultural autonomy is a public law corporation, it also has the power to levy additional taxes on its members. However, the state is committed to provide the same level of financial support that was spent on the same services for the minority prior to the establishment of cultural autonomy.²³²

This procedure works under Estonian law because the institutions of cultural autonomy are public corporations endowed with powers similar to municipalities.

The Romanian draft law defined cultural autonomy as "the right of a national community to have decisional powers in matters regarding its national, cultural, linguistic and religious identity, through councils appointed by its members".²³³ The draft law then elaborates what powers the councils of cultural autonomy

the perceived attempts to limit the channels of communication with minority interlocutors. Council of Europe, Committee of Ministers, Resolution on the Implementation of the Framework Convention for the Protection of National Minorities by Armenia, ResCMN(2007)5, (7 February 2007).

231. The 50% is based on the population from the last census.

232. Decker D. C., "The Use of Cultural Autonomy to Prevent Conflict and Meeting the Copenhagen Criteria: The Case of Romania", *Ethnopolitics: Formerly Global Review of Ethnopolitics*, 1744-9065, Volume 6, Issue 3, 2007, pp. 437-50.

233. Article 57(1), Draft 2, at www.ecmiromania.org/Collection_of_Materials.13.0.html.

could exercise. These powers include: the creation of strategies and priorities regarding education in the mother tongue of national communities; the organisation, administration and control of education in the mother tongue, or participation in partnership with public authorities competent in carrying on these duties in the case of institutions from the public system education; the organisation, administration and control of cultural private educational institutions or research and development of culture institutions in the mother tongue; the establishment and administration of their own public press institutions, or participation in partnership with public authorities in the organisation of stations, sections, editorial boards or shows within the public radio and TV stations; the ability to participate in the creation of strategies and priorities for the preservation and celebration of historical monuments of the respective national minority; the administration, or monitoring of the administration of funds, destined to finance specific activities in the field of preservation, promotion and expression of cultural, linguistic and religious identity of national minorities; the ability to appoint the management of private and public educational institutions teaching in the language of national minorities, as well as the management of private and public cultural institutions belonging to the respective national minority; the ability to propose the appointment of representatives of the respective national minority at the Ministry of Culture and the Ministry of Education, within departments having duties in the field of the culture of national minorities and education in the mother tongue of national minorities; the establishment and awarding of cultural and scientific scholarships and prizes; and the establishment of special taxes, in compliance with the law, in order to ensure the functioning of the institutions of cultural autonomy.²³⁴ One can see that the issue as to who can propose and appoint staff for education and the Ministry of Culture figures prominently within these powers.

The greatest point of contention within the government was that the drafters believed that in order for the councils to be able to exercise all the powers that they envisioned under the draft law, the councils needed to have sufficient stature so that they could not easily be overruled by municipal government. As such, the drafters made the councils “autonomous administrative authorit[ies]”.²³⁵ This meant that the councils would be just under the level of a ministry, according to the Romanian Constitution.²³⁶ This led to arguments within the government, especially from the ministries of justice and culture, that the councils of cultural autonomy would be parallel institutions to their ministries. The Legislative Council also cited this as a problem.²³⁷ The Legislative Council and the Minister of Justice believed that there were two options for rectifying the legal issues surrounding

234. Article 58, Draft 2, at www.ecmiromania.org/Collection_of_Materials.13.0.html.

235. Article 59(1), Draft 2, at www.ecmiromania.org/Collection_of_Materials.13.0.html.

236. Article 116(2), Romanian Constitution.

237. Comments of the Legislative Council on the draft law regarding the status of national minorities at paragraph 4(a) (April 2005). The Legislative Council is a parliamentary body which provides non-binding opinions on draft legislation in Romania.

the “autonomous administrative authorities”. The drafters could increase the government’s regulation of the council’s formation and functions in the draft law, or a currently established state institution (such as the Department of Inter-ethnic Relations) could implement the decisions of the autonomous administrative authorities.²³⁸

A practical issue in getting the draft law adopted concerned the fact that “[a]utonomous administrative authorities may be established by an organic law.”²³⁹ Under Romanian law, organic laws need to be passed by a majority of the members of the two chambers of parliament, not just a majority of those present.²⁴⁰ This was always going to be difficult to achieve as the ruling coalition has a slim majority, but by making the councils organs of the central government rather than those of local government it was going to exacerbate the situation and make politicians oppose the law for constitutional reasons.

The constitutional issue arose because the Hungarians wanted to be able to elect the people that served on the council,²⁴¹ whilst other national minority organisations wanted to be in complete control of forming the councils of cultural autonomy.²⁴² However, other national minority organisations said that they were simply too small to form institutions of cultural autonomy but wanted to be able to exercise some of the powers granted to the councils. Hence there was an article included that allowed committees of cultural autonomy to be established at the county level, even in cases when the national minority had established a council of cultural autonomy at the national level.²⁴³ This situation has the potential for pitting the national minority against itself.

The issue of election to an autonomous administrative authority raised questions under Romanian law, since the prime minister appoints leadership positions in ministries, specialised agencies, and autonomous administrative authorities. This produced yet another constitutional issue as to whether it is permitted under the constitution to elect people to posts normally appointed by the prime minister, or whether it is permissible even if it is not mentioned in the constitution. The drafters endowed the councils with legislative powers that also raised questions as to the ability of autonomous administrative authorities to develop legislation. Lastly, instead of creating a mechanism to resolve disputes between the councils and the state, the law deferred all these conflicts to the administrative courts.²⁴⁴ This meant that any dispute would sit in the courts for years, effectively

238. Decker D. C. and Ossian R., *Enhancing Minority Governance in Romania. The Romanian Draft Law on the Status of National Minorities: A Consultation with Civil Society*, ECMI Report #55 May 2005, 10, at www.ecmi.de/download/Report_55.pdf.

239. Article 117(3), Romanian Constitution.

240. Article 76(1), Romanian Constitution.

241. Article 62, Draft 2, at www.ecmiromania.org/Collection_of_Materials.13.0.html.

242. Article 73, Draft 2, at www.ecmiromania.org/Collection_of_Materials.13.0.html.

243. Article 59(2)-(3), Draft 2, at www.ecmiromania.org/Collection_of_Materials.13.0.html.

244. Article 72, Draft 2, at www.ecmiromania.org/Collection_of_Materials.13.0.html.

stalling the establishment of cultural autonomy or making the councils completely ineffective.²⁴⁵

The Romanian draft law is too ambitious and too incongruent with the Romanian legal order so as not to fall foul of the constitution and constitutional law. Accordingly the likelihood of its adoption is slim.

Human resources

Human resources tend to be an important issue with national minorities that have a small population in a given state. In order to run institutions of cultural autonomy that are responsible for education and culture it requires administrators, teachers, curriculum developers, authors of textbooks in the national minority's language and support staff. For national minorities with small populations, this could require a commitment from the majority of its members to be engaged in these activities. Ironically, if a national minority needs a large percentage of its population to take positions in the institutions of cultural autonomy, this may have the effect of isolating the national majority rather than integrating it, as a proportionally larger number of national majority members will need to forego jobs in non-minority related fields in order to ensure the sustainability of the institutions.

Prospects and conclusion

The most crucial aspect in creating a state which allows for the peaceful co-existence of the majority and national minorities is to foster integration without allowing assimilation, nor should a state isolate its national minorities. A state must allow members of national minorities, which choose to be treated as such, to practise and maintain their culture, religion and language if they wish. The EU has expounded this ideal in the Copenhagen Criteria. States wishing to become members of the EU must develop mechanisms to ensure minority protection and inclusion. While several states in eastern Europe have adopted laws which set aside seats in parliament for national minorities, the effectiveness for the national minorities is questionable. If there are several hundred members of parliament and a national minority is given one seat, or even a handful, how effective can the national minority be in guiding policy and/or legislative drafting? Some states have focused on national minority inclusion at the local level, which does allow the national minority some degree of control over issues affecting them, however laws and policies affecting education, language and culture are often created at the national level. Therefore, it seems that cultural autonomy, as a policy, is the best option for ensuring national minority protection and participation. Furthermore, if cultural autonomy is implemented in a meaningful

245. Decker D. C., "The Use of Cultural Autonomy to Prevent Conflict and Meeting the Copenhagen Criteria: The Case of Romania", *Ethnopolitics: Formerly Global Review of Ethnopolitics*, 1744-9065, Volume 6, Issue 3, 2007, pp. 437-450.

manner, it would clearly go some way in meeting the Copenhagen Criteria, thereby assisting candidate states in seeking admission to the EU.

The problem with cultural autonomy, and its prospects, lies in its development in law and its implementation. If standard-setting bodies, such as the Advisory Committee of the FCNM and the UN Sub-Commission on the Promotion and Protection of Human Rights' Working Group on Minorities were more proactive in advocating cultural autonomy and assisted in developing good practice concerning its implementation, states might be willing and able to institute cultural autonomy for their national minorities. For example, the drafters of the Armenian law had to undertake an extensive study of laws in eastern Europe that included cultural autonomy, in order to try and determine good practice. While the drafters of the Armenian law took into account opinions by the Venice Commission, commentary by other bodies on cultural autonomy is not readily available. If these bodies are able to set standards for the adoption of cultural autonomy and are able to identify good practice, states might adopt cultural autonomy, and those that do would hopefully be able to implement it more effectively.

Cultural autonomy may not be the panacea for states with national minorities, but it offers the possibility for states to maintain their territorial integrity and prevent conflict, while allowing national minorities to have control over the issues that are most important to their future in their state.

Personal autonomy through the “communities” system: does the example of Belgium suggest that forms of non-territorial autonomy can make a difference in terms of minority participation?

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Introduction

This report was written for the Zagreb Seminar of 18 and 19 May 2007 on “The participation of minorities in public life”. The title of the third session of the seminar was: “The re-emergence of an old model: cultural autonomy”.

The organisers wished not only to find out whether all the lessons had been clearly drawn from the experiences of the inter-war period, and which were the contemporary forms of this “cultural autonomy” in eastern Europe, but also to compare these old and new experiences of cultural autonomy, mainly to be found in central and eastern Europe, with the entirely different experience of Belgian federalism.

My presentation fits into this very specific context. It should be noted at the outset that the organisers basically took the right line when they included Belgium in their comparative exercise, but this needs to be qualified in many respects if the end result is to be a really useful and fruitful comparison.

Accordingly, I shall endeavour first to set the “non-territorial” (or, if you will, “personal”) character of Belgian federalism in its general, historical and institutional context (I), and then to show in what sense the community institutions in Belgium fit into neither the context of purely territorial federalism nor that of a purely personal federalism, but lie somewhere between these two models (II).

I. The territorial and the personal elements in the development of Belgian federalism

A. Background

Belgium’s federal structures have been mainly shaped by two competing demands.

The initial, and stronger, pressure came from the Flemings, whose language had for a long time been regarded as inferior to French. The “Flemish movement” accordingly sought to bring about “equality between the languages” within the state as a whole and to require the use of Dutch in administrative and judicial affairs in the Dutch-speaking region. This region, where the use of Dutch was

compulsory (within the limits permitted by the constitution, although these limits were given a broad interpretation), was initially defined in a very flexible and personalised manner. Surveys were held every 10 years to establish what languages the population was using, and, depending on the results, local authority areas (communes) switched from one linguistic regime to the other, or were provided with specific arrangements ("linguistic facilities").

The 1962 law on the use of languages in administrative matters broke with this personalised pattern. The linguistic boundary has now been definitively determined, and can be changed only by law. This division of national territory was enshrined in the constitution itself by the 1970 revision. The linguistic boundary can now be altered only by a law passed by a special majority.²⁴⁶ The country has been divided into four linguistic regions since 1970: the French language region, the Dutch language region, the bilingual region of Brussels-Capital and the German language region.²⁴⁷ Certain specified communes continue to benefit from the "linguistic facility" (in favour of French, Dutch or German speakers, as the case may be).

It is therefore unsurprising that the Flemish political world as a whole, like Dutch language legal commentators, assigns a leading role in the new state structures to the principle of territoriality. As the experience of other countries shows, when there is one language that is considered "strong" and another that is considered "weak", only the territoriality principle guarantees the linguistic and cultural rights of the speakers of the "weaker" language. At the same time, the "linguistic facilities" in favour of French speakers are often viewed by Dutch speakers as an interim solution (making possible their integration into their "community"), and must in any case be subjected to the narrowest interpretation. That is the main reason why Belgium has not yet ratified the Framework Convention for the Protection of National Minorities.

More generally, the Flemish view of the reform of the state leads to an emphasis on dualism (*tweedeligheid*). There is, of course, a third community, namely the German community, but this has more the status of a protected minority. Unlike the others, it does not participate in the mechanisms that govern the overall balance of the state (votes on special laws, procedure whereby a linguistic group may challenge legislation as it goes through parliament, parity in the Council of Ministers, equal representation in numerous institutions and courts, especially the Constitutional Court – formerly known in Belgium as the Court of Arbitration [*Cour d'arbitrage*]). By contrast, since 1970 the two "major communities" (Flemish and French) have had very broad linguistic autonomy in the corresponding

246. Article 4 of the constitution. The adoption of a "special law" requires a two-thirds majority in both federal assemblies, as well as a quorum and a simple majority in the two linguistic groups making up these assemblies. On some issues, these "special laws" are harder to amend than the constitution itself.

247. Article 4 of the constitution.

linguistic region,²⁴⁸ and have also had autonomy in cultural matters. However, this autonomy applies not only to the corresponding linguistic region but also, according to certain provisions that will be explained below,²⁴⁹ to the bilingual region of Brussels-Capital. That is the source of the "non-territorial" character of Belgian federalism on which we are focusing at the moment.

The Walloon and Francophone view of federalism is quite different, based on neither linguistic nor, in the main, cultural motives, but beginning as a sort of reaction to the demands made by the "Flemish movement", especially with the aim of preventing bilingualism from being established across the board, and subsequently driven mainly by economic concerns. In the face of the decline of Walloon industry, which had been the engine of Belgium's economic strength, but had begun to show signs of running out of steam shortly after the Second World War, the Walloons mainly regarded reform of the Belgian state as a means of combating the structural economic crisis that was gradually developing in their region of old-established industry. The map of Belgium thus clearly emerged: it would be a country divided into three separate regions, the Walloon region, the Flemish region and the Brussels region²⁵⁰ (subsequently called the Brussels-Capital region). These regions have only strictly territorial powers.

Belgium was therefore to be made up of three communities and three regions,²⁵¹ with some overlapping. With regard to the linguistic regions, the Flemish community exercises its community powers in the Dutch-speaking region (which is also the territory of the Flemish region²⁵²) as well as certain community powers (as we shall see below) in the bilingual Brussels-Capital region. The same applies, *mutatis mutandis*, to the French community. The German community exercises its community powers in the German-speaking region. The Walloon and Brussels (Brussels-Capital) regions exercise their regional powers (mainly of an environmental, economic and social nature) in the French-speaking region and the German-speaking region, in the case of the former, and in the bilingual region of Brussels-Capital, in the case of the latter.

B. Scope of the territoriality principle

It follows that the question of absence of territoriality in (or the "personal" character of) the Belgian system of federalism only arises where the Flemish and

248. With some exceptions, especially that of the "communes with facilities", where the federal legislature has the relevant powers (since 1988, the federal legislature has only been able to act on the basis of a law passed by special majority).

249. See paragraphs 13 to 15 below.

250. Article 3 of the constitution.

251. Articles 1, 2 and 3 of the constitution.

252. Article 137 of the constitution permits the two major communities (Flemish and French) to exercise the responsibilities of their respective regional governments (Flemish or Walloon). Only the Flemings, who attach great importance to the community concept, have availed themselves of this possibility. Thus it is the same institutions, in the north of the country, which exercise community and regional responsibilities, according to the arrangements laid down in a law passed by a special majority.

French communities are concerned, and solely in respect of the bilingual region of Brussels-Capital.

“Territoriality” has to be involved in a Belgium consisting of three regions (of an economic and social character), which is the main demand of the Walloons and many inhabitants of Brussels.

However, the French speakers originally tried to give the “community” concept as a whole a very personalised scope that cut across linguistic boundaries, in an attempt to determine the lot of French-speaking people, wherever they might be in the country. This approach, without going as far as this, can be described as not entirely foreign to the law on the Constitutional Court. This law dealt (and still deals) with conflicts between different – community or regional – legislatures resulting from their choice of mutually incompatible geographical scope. Here is a typical example: the communities have powers with regard to the use of languages in employment relations. Let us assume that a community legislature lays down the exclusive use of its language for drawing up employment contracts, and chooses the individual’s place of work as the point of reference for applicability. Let us then assume that another legislature lays down the same rule, but chooses the company’s head office as the reference point. If we take the example of a sales representative working in the first region on behalf of a company located in the second, then the rules are obviously mutually incompatible, as it would be necessary to use each language exclusively. Conflicts like this could not have resulted in the repeal of the rules in question (no abuse of authority was involved), but only in the development of a kind of inter-community law (or private inter-regional law, as the case may be) after the court had replied to the questions referred to it for a preliminary ruling.

The Constitutional Court has never made use of this option. It has emphasised the – strictly interpreted – territoriality principle. It has decided that the principle of exclusivity, which governs the substantive distribution of powers in Belgium, also applies to the territorial level. The effect of this is that “any rule adopted by a community legislature can be applied in the territory for which it has responsibility” in such a way “that all concrete relations or situations are regulated by a single legislature”.²⁵³ This ruling nullifies any “territorial conflicts”, unless they involve abuse of authority.

With the same aim of ensuring “watertight” territoriality, the Constitutional Court has ruled unconstitutional the provision of budget funds by the French community for financing French-speaking institutions located beyond the linguistic boundary (to be more precise, in communes with “facilities” in the Dutch-language region), although such budgetary expenditure would be permissible if its purpose were, for example, to foster the dissemination of the French language and

253. Constitutional Court, Nos. 9 and 10, of 30 January 1986. See on these questions Uyttendaele M., *Précis de droit constitutionnel belge*, Brussels, Bruylant, 3rd edition, 2005, pp. 985 ff.

culture abroad. For the court, the measure concerned the protection of linguistic minorities, and was therefore beyond the French community's powers.²⁵⁴

Briefly, it follows from this case law that the Belgian Constitutional Court has made a broad contribution to a general upholding and strengthening of the territoriality principle.

C. The specific case of the Brussels-Capital region

Before tackling the issue at the centre of the debate, that is to say the non-territorial exercise of the communities' powers in Brussels, it is necessary to give a very brief and simplified description of the "other face" of Brussels, namely the city as a region.²⁵⁵

Brussels, or to be more precise, the bilingual region of Brussels-Capital, is not only the point of convergence of the powers and responsibilities of the two communities (so the point at which they have to coexist), but also the territorial base of a region that exercises the same type of responsibilities as the Walloon region and the Flemish region.²⁵⁶

The community solutions for Brussels, which will be examined below, were created in 1970 and further developed in 1980. In contrast, the Brussels-Capital region was not established until 1988-89, eight or nine years after the other two (Walloon and Flemish) regions. The reason for this was that it took all the negotiating skills and readiness to compromise of Belgian politicians to establish a third region in the centre of the country.

For French speakers, it "goes without saying" that Brussels-Capital has to be a "region like the others" or a "region in its own right", while for the Flemings this might well have sounded the death knell of their dualist vision of Belgium – hence their attachment to everything in the Brussels-Capital charter that can distinguish this region from the other two. The very name given to the region shows this: it was initially called the Brussels region, but was renamed Brussels-Capital region in 1988, emphasising the fact that Brussels was also the capital of the kingdom (as well as being, incidentally, the capital of the two major communities and the main headquarters of the European institutions), and that as such it could be given specific duties and responsibilities. The same also applies to the rule by which the Brussels-Capital region exercises its responsibilities. Unlike the three communities and the other two regions, it issues, not decrees

254. Constitutional Court, No. 54/96, of 3 October 1996. See in particular Scholsem J.-C., "De l'arbitrage", *Journal des procès*, 1966, No. 312, pp. 29 ff.; Uyttendaele M. and Witmeur R., "La frontière linguistique entre deux eaux", *J.T.*, 1967, pp. 477 ff.

255. For a sociological and economic analysis of Brussels and a description of the development of ideas on the subject, see Delcamp A., *Les institutions bruxelloises*, Brussels, Bruylant, 1993.

256. It should be pointed out that the Flemish regional government's powers are exercised, under Article 137 of the constitution, by the Flemish community.

“that have the force of law”, but rules with a legal status slightly inferior to that of decrees (although the difference is in practice hardly noticeable), called “orders” (French: *ordonnances*, Dutch: *ordonnanties*). The same applies to the autonomy in terms of rights and organisation that enables the component parts of the federation to establish certain rules of operation of their own. Apart from the German community, all the communities and regions possess this autonomy, and it is the federal government that is the loser.

To oversimplify the situation, the Brussels institutions replicate, and sometimes accentuate, in a region with a population of 950 000, the overall balance that protects the French-speaking minority (about 41% of the country’s population) in Belgium as a whole. To take just one example, in the same way as there is linguistic parity in the federal Council of Ministers (although the prime minister may be the exception to this rule), the government of the Brussels-Capital region is made up of five members, namely the First Minister and two French-speaking and two Dutch-speaking members. Many regard Brussels’ regional institutions as a kind of mirror image of federal Belgium.²⁵⁷

The Special Law on Brussels, which was drawn up in 1989, does a lot to protect the Flemish minority,²⁵⁸ which is estimated to be about 15% of the city’s population.²⁵⁹ In 2001, the Brussels compromise was once again amended in respect of certain points, the most important of which, from the point of view of the protection of the “minorities”, was that the voters who voted for the Flemish lists would henceforth automatically obtain 17 seats out of the 89 on the Regional Council, that is, around 19% of the total, giving them over-representation.

In principle, the regional institutions cannot deal with community affairs,²⁶⁰ but some community institutions have been grafted onto the regional institutions in Brussels. These are of direct interest to us, as they provide supplementary or different means for the communities to exercise their responsibilities in Brussels.

The first such institution is the Joint Community Commission (*Gemeenschappelijke Gemeenschapscommissie*, *GGC/Commission communautaire commune*, *COCOM*). Its organs are the United Assembly (made up of the 72 French-speaking members and the 17 Dutch-speaking members of the parliament of the Brussels-Capital region, region that is, all the members of this parliament)

257. Alen A. and Muylle K., *Compendium van het Belgisch Staatsrecht*, Mechelen, Kluwer, 2004, p. 239.

258. The term “minority” is used here in a purely quantitative sense without prejudging the question of whether or not this is a national minority within the meaning of the Framework Convention for the Protection of National Minorities.

259. As there is neither a sub-nationality nor a linguistic census, the size of the respective populations can only be estimated by indirect means. In this connection, at the latest Brussels-Capital regional elections, in 2004, 13.7% of the votes went to the Flemish lists.

260. Article 39 of the constitution.

and the "United College" (comprising the five members of the government of the Brussels-Capital region, but with the First Minister only having an advisory role).²⁶¹

Use has been made here of the technique of operational duplication in order to enable members of bodies that are essentially regional to carry out certain community functions. When no community bears responsibility, the Joint Community Commission will intervene in a residual capacity in the sector for matters termed "personal" in the constitution (*personnalisables* in French, *persoonsgebonden* in Dutch).²⁶² Given the sensitive nature of these "personal" matters (mostly health and welfare matters), the decisions (orders) of the Joint Community Commission are in principle adopted by a majority vote in the two linguistic groups of the United Assembly.²⁶³

The second institution is the French Community Commission. Back in 1989, a kind of administrative outpost of each of the two major communities was set up in Brussels, with the subordinate role of implementing and adapting the policy of these communities in the Brussels-Capital region. These institutions are the Flemish Community Commission (Vlaamse Gemeenschapscommissie, VGC) and the French Community Commission (Commission communautaire française, COCOF). The organs of these institutions are the corresponding linguistic groups in the Brussels-Capital regional parliament and, on the executive side, the members of the Brussels-Capital regional government and secretaries of state, split up according to linguistic group.²⁶⁴

The Flemish Community Commission has remained a decentralised institution, highlighting the unity of the Flemish people, which takes action only at community level. However, the 1993 revision of the constitution created a new constitutional asymmetry by permitting French speakers to maintain the maximum pre-eminence of the region. Under a new article added to the constitution (Article 138), the French community may delegate the exercise of some or all of its powers to, on the one hand, the Walloon region (which, however, only exercises them in the French-speaking region),²⁶⁵ and where Brussels is concerned, to the French Community Commission, on the other. These arrangements, which are also designed to enable transfers of funds to be made between these institutions and thus ensure the refinancing of the French community, were immediately

261. Special Law on the Brussels Institutions, 12 January 1989, sections 60 and 77.

262. Article 135 of the constitution. See paragraph 19 below.

263. Special Law on the Brussels Institutions, 12 January 1989, section 72. This law was amended in 2001, stating that "[i]f this majority is not within a linguistic group, a second vote shall be held. In this case, the resolution shall be adopted by a majority of votes in the United Assembly and at least one-third of the votes in each linguistic group". This law thus reduces the protection afforded to the Flemish linguistic group. It is motivated by the fear of seeing an extreme right party (the Vlaams Blok, renamed Vlaams Belang) gaining a majority.

264. Special Law on the Brussels Institutions, 12 January 1989, section 60.

265. While the Walloon region normally exercises its responsibilities throughout its territory, which consists of the French-speaking and the German-speaking region.

implemented by the institutions concerned. It follows from this that some community matters (especially a substantial proportion of what are described as “personal” matters) are no longer dealt with in Brussels by the French community, but by the French Community Commission. The latter, an emanation of the Brussels regional institutions, is becoming a genuine federal entity and can issue decrees.

However, that changes nothing from the point of view of territoriality and the application of community rules in Brussels. The French Community Commission, which is made up of French-speaking Brussels citizens, is simply taking over from the organs of the French community.

II. The field of application of community decrees in Brussels

A. Principles

In the Co-ordinated Constitution of 17 February 1994, the communities’ responsibilities are set out in a series of three articles, numbered 127, 128 and 129,²⁶⁶ one of the main reasons for this being the different territorial scope of these three sets of responsibilities. The two “major communities” have had varying powers from the outset.

Article 129(1) of the constitution first of all describes the communities’ responsibilities in respect of the use of language.²⁶⁷ Article 129(2) then limits the scope of these linguistic decrees.²⁶⁸

It is clear from this that, in this area of legislation, the communities only have responsibilities in their own “linguistic region”, since their territory is supposed under the law to be linguistically “homogenous”, subject to the exceptions mentioned in the constitution. So this once again constitutes a pure and simple application of territorial federalism. The sensitive issue of the regulation of the use of languages in the bilingual Brussels-Capital region is left entirely to the federal

266. Article 130 deals with the responsibilities of the German community. With one exception, regarding the use of languages, these are identical to those of the two “major communities”. They only apply “in the German-language region”. It should be noted that some of the Walloon region’s powers can be – and are – exercised, by mutual agreement, by the German community (Article 139 of the constitution). “Asymmetry” thus exists throughout the Belgian federal system.

267. Article 129(1) of the constitution: “The French and Dutch Community Councils rule by decree, inasmuch as each is concerned, excluding the federal legislator, on the use of language for:

1. administrative matters;
2. education in those establishments created, subsidised, and recognised by public authorities;
3. social relations between employers and their personnel, in addition to corporate acts and documents required by law and by regulations.”

268. Article 129(2) of the constitution: “These decrees have force of law in French-language and in Dutch-language regions respectively except as concerns:

- those communes or groups of communes contiguous to another linguistic region and in which the law prescribes or allows use of another language than that of the region in which they are located. For these communes, a modification of the rules governing the use of languages as described in §1 may take place only through a law adopted by majority vote as described in Article 4, last paragraph:
- services the activities of which extend beyond the linguistic region within which they are established;
- federal and international institutions designated by law, the activities of which are common to more than one community.”

legislature, which in this case takes decisions by ordinary majority, by virtue of its residual powers, pursuant to Article 30 of the constitution.²⁶⁹

Article 127(1) of the constitution grants the communities autonomy on cultural matters.²⁷⁰ Cultural autonomy, a longstanding Flemish demand originally inspired by the theories of Karl Renner and Otto Bauer,²⁷¹ has been established since 1970, long before any thought was given to setting up regions (1980), and an even longer time before the establishment of the Brussels-Capital region (1988-89). Cultural autonomy relates principally to two elements. First, the communities are responsible for education. This area was completely restructured in 1988, and it is the constitution itself (without further legislation) that grants all powers and responsibilities to the communities, although it provides for three limited exceptions. As regards culture, however, the constitution merely establishes a principle ("cultural matters"), to be developed in special legislation. Section 4 of the Special Law of 8 August 1980 sets out the matters covered by the term "cultural".²⁷² In some respects, this list is very conventional, but it is nonetheless a fairly broad one, encompassing as it does sports and outdoor pursuits, leisure and tourism, etc.

Article 127(2) describes the territorial scope of these decrees in the following terms: "These decrees have force of law in French language and in Dutch-language regions respectively, as well as in those institutions established in the bilingual region of Brussels-Capital which, on account of their activities, must be considered as belonging exclusively to one community or the other".

269. Article 30 of the constitution: "The use of languages current in Belgium is optional; only the law can rule on this matter, and only for acts of the public authorities and for legal matters".

270. Article 127(1) of the constitution: "The French and Dutch Community Councils, respectively, establish by decree: 1. cultural issues; 2. education, with the exception of: a. the determination of the beginning and of the end of mandatory scholarship; b. minimum standards for the granting of diplomas; c. attribution of pensions; 3. inter-community co-operation, in addition to international co-operation, including the drafting of treaties for those matters described in 1° and 2°."

A law adopted by majority vote as described in Article 4, last paragraph, establishes those cultural matters described in 1°, types of co-operation described in 3°, in addition to terms governing the conclusion of treaties described in 3°."

271. Clement J., *Taalvrijheid, bestuurstaalen en minderheidsrechten. Het Belgisch model*, Antwerp, Groningen. Oxford, Intersentia, 2003, pp. 412 ff.

272. Special Law on Institutional Reforms, 8 August 1980 (*Moniteur Belge*, 15 August 1980), section 4: "The cultural matters referred to in Article 59bis,(2)(1), [Article 127(1), 1] of the constitution are: 1. the defence and illustration of the language; 2. support for the training of researchers; 3. fine arts; 4 the cultural heritage, museums and other academic institutions in the cultural sphere [with the exception of monuments and sites]; 5. libraries, record libraries and similar services; 6. radio and television, with the exception of federal government announcements [...]; 6bis. support for the print media;] 7. youth policy; 8. lifelong education and cultural activities; 9. physical education, sports and outdoor pursuits; 10. leisure and tourism; 11. early years pre-school education; 12. post-school and out-of-school learning; 13. arts education; 14 intellectual, moral and social education; 15. social advancement; 16. vocational redeployment and retraining, with the exception of rules on assistance with the expenses incurred in respect of the selection, vocational training and relocation of staff recruited by an employer for the purpose of starting up or expanding a business or changing a company's activity; 17. [...]".

This is the text of greatest interest to us. Community decrees on cultural matters never apply directly to individuals. In the Belgian Constitution of 1970, the concept of sub-nationality was rejected for many reasons,²⁷³ and the same line of thought continues to be followed. In law, there is no such concept as Flemish or French-speaking inhabitants of Brussels. Decrees can only apply to “institutions” (not all institutions, but those that “on account of their activities, must be considered as belonging exclusively to one community or the other”). For example, a school where classes are held in Dutch will come under Flemish community legislation. It is only through the legislation applicable to the institution concerned that individuals may be indirectly affected.

Alongside “unicultural” institutions (Dutch or French-speaking), there are also institutions that do not belong “exclusively to one community or the other”, such as the Belgian National Opera, the Palais des Beaux-Arts concert hall and the Belgian National Orchestra. These institutions are called “bicultural”. Although the text does not say so, these are a residual responsibility of the federal government, as a result of the distribution of responsibilities in Belgium.

The situation of the people of Brussels may therefore seem special, and it is indeed to a large extent. The solution adopted is highly flexible. A person’s “attachment” to a community is always voluntary. They may choose to communicate with a Dutch- or a French-speaking institution, or even refrain from making any such choice.²⁷⁴ Their attachment may also be multiple, for they can choose certain Dutch-speaking institutions in one sector and certain French-speaking institutions in another. And, unlike sub-nationality, such an attachment can always be withdrawn.

The situation is all the more special because it also has electoral and fiscal consequences.

As far as elections are concerned, the people of Brussels vote for the members of both communities’ parliaments, which thus represent them. These elections are coupled with those to the parliament of the Brussels-Capital region, where linguistically separate lists have to be presented.²⁷⁵ However, the voters have an absolutely free vote.

The system for forming the two community parliaments is once again going to be characterised by considerable asymmetry. If voters choose the Flemish lists in the election to the parliament of the Brussels-Capital region (or if they abstain), they will be able to vote directly for one of the six members who will hold seats in the Flemish parliament alongside the other 118 elected directly in the Dutch

273. See B. Application and assessment below.

274. H. Dumont, “Les matières communautaires à Brussels du point de vue francophone”, in *Bruxelles et son statut* (eds Witte, E., Alen, A., Dumont, H. and Ergec, R.), Brussels, Larcier, 1999, p. 567.

275. Special Law on the Brussels Institutions (Brux L.S.), 12 January 1989, section 17(1).

language region.²⁷⁶ This procedure, which was introduced in 2001, highlights in particular the importance of their community to Dutch speakers.

If, on the other hand, voters opt for a list of French-speaking candidates in the election to the parliament of the Brussels-Capital region, their votes will only be indirectly taken into account for the composition of the parliament of the French community. It is on the basis of the distribution of these votes between the electoral lists that the French language group in the parliament of the Brussels-Capital region will appoint its 19 elected members who, alongside the 75 members of the Walloon parliament, will make up the parliament of the French community.²⁷⁷ There is accordingly no direct election to the latter parliament, and this reflects how little importance French speakers attach to the community concept.

Similarly, in the fiscal sphere, the constitution has, in theory, since 1980, allowed the communities to levy taxes.²⁷⁸ This should apply to the German community (where implementation of the principle is not a problem) as well as to the French and Flemish communities. Since 1980, the tax-levying powers held in principle by the two "major communities" have in practice been paralysed by the non-existence of sub-nationality. There is currently no community tax, and there probably never will be (unless, of course, the system is radically changed).

The introduction of a community responsibility in respect of what are called "personal" matters was a Flemish demand met by the constitutional revision of 1980. From then on, the adjective "cultural" was dropped from the name of the communities. This was basically because of the crucial importance, in certain sectors, of the language of communication. The Flemings were very keen to add this new responsibility to those previously exercised by the cultural communities. The same applies more particularly in Brussels, where Flemish responsibilities in this area are indirectly a kind of measure to protect minorities, offering the Flemings better support in the fields of health care, social services, etc.²⁷⁹

Article 128(1) of the constitution mentions these "personal" matters without defining them and also refers to the special law.²⁸⁰ Section 5 of the special law of 8 August 1980, which has been amended several times, offers a more

276. Special Law on Institutional Reforms, 8 August 1980 (L.S.R.I.), sections 24(1) and 30(1); Brux L.S., sections 14, 16^{ter} and 18 (2).

277. L.S.R.I., sections 24(3) and 30 (2 ff).

278. Article 170(2) of the constitution.

279. Alen A. and Muylle K., *Compendium van het Belgisch Staatsrecht*, op. cit., p. 367.

280. Article 128(1) of the constitution: "The French and Flemish Community Councils rule by decree, in as much as each is concerned, on personal issues, in addition to what is included in such issues, matters of inter-communal and international co-operation, including the ratification of treaties. A law adopted by majority vote as described in Article 4, last paragraph, establishes such personal issues, in addition to the various forms of co-operation and the terms governing ratification of treaties."

precise definition.²⁸¹ It is immediately clear from this legislation that it is much more difficult to define the matters in respect of which “communication” is vital than cultural matters. It may even be impossible.

281. Special Law on Institutional Reforms, 8 August 1980 (*Moniteur Belge*, 15 August 1980), section 5(1): “The personal matters referred to in Article 59bis(2bis) [Article 128(1)] of the Constitution, are:

I. As regards health policy:

1 Policy on the provision on inpatient and outpatient treatment, with the exception of:

- a. institutional legislation;
- b. operational funding, when the funding arrangements are regulated by institutional legislation;
- c. health and disability insurance;
- d. basic rules concerning programming;
- e. basic rules concerning the financing of the infrastructure, including major medical apparatus;
- f. the national licensing rules, but only to the extent that they may have an impact on the responsibilities covered by b, c, d and e above;
- g. the determination of conditions and designation as a university hospital in accordance with hospitals legislation;

2 Health education and the activities and services of preventive medicine, with the exception of national prophylactic measures.

II. As regards assistance for individuals:

1 Family policy, including all forms of aid and assistance for families and children;

2 [Social assistance policy, including institutional rules on public social assistance centres, with the exception of:

- a. the establishment of the minimum amount of, and the conditions for granting and financing, the statutory guaranteed income, in accordance with the legislation establishing the right to a minimum subsistence income;
- b. matters relating to public social assistance centres, governed by sections 1 and 2 and in chapters IV, V and VII of the institutional law of 8 July 1976 on public social assistance centres, without prejudice to the communities’ responsibility for granting additional or supplementary rights;
- c. the rules relating to public social assistance centres governed by the law of 2 April 1965 on the assumption of responsibility for help granted by public assistance panels;
- d. matters relating to the public social assistance centres of the communes mentioned in sections 6 and 7 of the laws on the use of languages in administrative matters, co-ordinated on 18 July 1966, and of the communes of Comines-Warneton and Fourons, set out in sections 6(4), 11(5), 18ter, 27(4) and 27bis(1), last paragraph, of the institutional law of 8 July 1976 on public social assistance centres and in the law of 9 August 1988 amending the law on local government, the local electoral law, the institutional law on public social assistance centres, the provincial law, the electoral code, the institutional law on provincial elections and the law regulating simultaneous elections to the legislative chambers and provincial councils.]

3 Policy on the reception and integration of immigrants

4 Policy on persons with disabilities, including their vocational training, retraining and redeployment, with the exception of:

a. the rules governing and the funding of allowances for persons with disabilities, including individual cases;

b. the rules governing financial assistance to employers for taking on workers with disabilities;

5 Retirement pensions policy, with the exception of the establishment of the minimum amount and the conditions for granting and financing the statutory guaranteed income for the elderly;

6 [The protection of minors, including social protection and judicial protection, with the exception of:

- a. civil-law rules on the status of minors and the family, such as those established by the Civil Code and the laws supplementing it;
- b. criminal-law rules making it an offence to behave in a way detrimental to the protection of minors and establishing penalties for such violations, including provisions relating to prosecution, without prejudice to section 11;
- c. the organisation of juvenile courts, their territorial jurisdiction and the procedures before these courts;
- d. the determination of measures that may be taken in respect of minors who have committed an offence;
- e. the revocation of parental authority and the supervision of child benefits or other social allowances.]

7 [Social assistance to prisoners in preparation for their social rehabilitation.]”

In general terms, the law singles out two sectors: health policy and personal assistance. However, exceptions abound in respect of the various responsibilities assigned to the communities. In some cases (such as that of health and disability insurance), an attempt is made to draw a dividing line between the matters devolved to the communities, and social security, which remains a federal responsibility. Section 5 of the special law of 8 August 1980 resembles a patchwork in which it is hard to find any consistency.

With regard to territorial application, Article 128(2) of the constitution provides: "These decrees have force of law in French-language and in Dutch-language regions respectively, as well as in those institutions established in the bilingual region of Brussels-Capital which, on account of their organisation, must be considered as belonging exclusively to one community or the other, unless a law adopted by majority vote as provided for in Article 4, last paragraph, makes other provisions with regard to those institutions in the bilingual region of Brussels-Capital."

This wording is very similar to that of Article 127(2) of the constitution, but two differences may be noted. Firstly, Article 128(2) mentions a law passed by a special majority that "makes other provisions". Such a law has never been passed. On the other hand, the word "activities" employed in Article 127(2) is here replaced by "organisation". It is thus because of their internal "organisation" that the institutions "must be considered as belonging exclusively to one community or the other". This change of wording was not planned in the first drafts of the institutional revision submitted for discussion. The reason for it was very closely related to Belgium's rejection of the very idea of sub-nationality. While clearly, in the cultural sphere, an institution is characterised by its activities (a theatre putting on plays in French, for example), such a criterion is equally clearly inadmissible with regard to personal matters. The institutions referred to (such as hospitals and homes for the elderly) all basically carry out the same type of activities, and must remain open to all Brussels residents, whatever their language.²⁸²

As in the cultural sector, there will be institutions that do not belong "exclusively to one community or the other", particularly public institutions governed by the law on bilingualism, which are sometimes described (in French texts) as *bi-personnalisables*, meaning that neither community bears responsibility for them. The most striking case is that of Brussels' public hospitals.

While the federal state is responsible in this context for cultural matters, Article 135 of the constitution, which was revised in 1988, blazed a trail by conferring on the Joint Community Commission²⁸³ the power to deal with "personal" matters for which both communities are responsible. Accordingly, de facto, if not

282. Velaers J., *De Grondwet en de Raad van State*, Antwerp, Maklu, 1999, pp. 416 and 417.

283. See paragraph 11 above.

de jure, it is a Brussels body that assumes responsibility for this sector, but with rules giving the Flemish minority special protection.

B. Application and assessment

The key elements of the foregoing can be summarised as follows. In the specific case of Brussels-Capital, Belgian law has neither gone for territorial federalism in respect of certain community responsibilities nor adopted a criterion of sub-nationality.

The decision has been taken not to introduce territorial federalism into Belgian law. According to the cultural or "personal" (*personnalisable*) nature of the specific matter, there are three different legislatures for the same substantive functions in the same territory (either the two communities and the federal state or the same communities and the Joint Community Commission). However, the decision as to which is responsible is not taken directly on the basis of the status of individuals, but indirectly, by reference to the concept of a cultural or "personal" (*personnalisable*) institution.

This system is apparently much admired abroad for the freedom that it gives to individuals.²⁸⁴ It corresponds to a deep-seated philosophy that, for 37 years, has never been fundamentally called into question. It is pointed out in its defence that the strict choice of a sub-nationality would be an agonising one for many Brussels citizens to make. The same applies to mixed families and bilingual persons, let alone the ever more numerous foreigners living in the city. The citizens of Brussels can opt for one institution or another. The provision adopted in 1970 is in a way "post-modern". There is no apartheid at personal level, making it possible for a genuine "Brussels" feeling to develop, as does now seem to be happening. As time goes by, Brussels feels ever more multicultural, not just bicultural, and this makes it increasingly different from the other regions.

It needs to be added that recognition of sub-nationality would exacerbate rather than ease conflicts. The Flemings are not particularly in favour, remembering as they do the fact that linguistic censuses (which are implicit in the recognition of a sub-nationality) do not necessarily benefit them. The French speakers also have some reason to fear this approach. If "personal" matters were to be extended with regard to services of a largely financial nature, their worry is that they would be drawn by the economic strength of the Flemish community into a competition that they would be uncertain of winning.

However, rejection of personal federalism and reliance on the "institution" concept is a source of endless complications,²⁸⁵ and in a way weakens the position

284. Dumont H., "Les matières communautaires à Bruxelles du point de vue francophone", op.cit, p. 563 (note 274).

285. See for example Delpérée F., *Le droit constitutionnel de la Belgique*, Brussels and Paris, Bruylant & L.G.D.J., 2000, p. 330, Neuray, J.-F., "La réglementation du tourisme en région bruxelloise: une nécessaire mise au point – observations sous C.A. 119/2004", *J.L.M.B.*, 2006, p. 232. The latter

of the communities in Brussels. It is first of all necessary for the community to address institutions. In 1970, the focus was on theatres and radio and television broadcasters; by 1980, it was more on hospitals. However, how can the concept be defined in theoretical terms? After so many years' experience, there are still a number of uncertainties. These institutions may be public or private. Is it conceivable that an "institution" could come down to a single person, such as an individual running a guesthouse, or would that be turning to the (rejected) system of sub-nationality?

The institution must, moreover, be exclusively attached to one community or the other, on the basis of a criterion laid down in the constitution itself: the decisive aspect is either its activities or its organisation. The criterion cannot be broadened or narrowed down. If a community tried to clarify this attachment in a decree,²⁸⁶ the latter would only be valid if it were in conformity with the constitution. In many cases, the problem would no doubt be resolved in practice by the recognition and, usually, the financial support of the community concerned. The fact remains that the organisation concept employed in the context of "personal" matters in particular is controversial.²⁸⁷ The very fuzziness of the concept, coupled with the no less fuzzy nature of the term "personal" matters, makes this issue very fluid and open to all kinds of political demand.

The system of institutional or functional distribution of responsibilities (as opposed to territorial or personal distribution) also weakens the work of the communities in Brussels. It could be said that this is just the price to be paid for the freedom given to individuals. There will not be two responsible legislatures, but three – a consequence of the choice open to Brussels' citizens not to commit themselves to single-community institutions. In certain sectors, such as the protection of young people, where the demarcation of the responsibilities of the three legislatures is becoming practically impossible, some people urge that these responsibilities be "refederalised".

Last but not least, the system established excludes any community taxation in Brussels and, ultimately, anywhere in the territory of the two "major communities".

A strange consequence of the Belgian system is the exercise by the communities of their responsibilities on the same subject in a different way, depending on whether their rules are being applied in their own linguistic region or in Brussels. In their own linguistic region, the communities can take measures that apply to everyone, but in Brussels their decisions can only concern certain institutions.

author is forthright on the subject: "The complexity of the Brussels institutions, which is beyond the understanding of all but a handful of specialists, is mainly due to the absence of sub-nationality in the Belgian federal system".

286. As the French community did in its decree of 1 July 1982 in respect of the institutions that deal with personal matters.

287. Velaers J., *De Grondwet en de Raad van State*, op. cit., p. 418.

Sometimes this has been realised and the constitution amended, withdrawing the responsibility concerned from the communities. If, for example, the communities are in very general terms responsible for education, but are deprived of the power to set the ages at which children must start and may end their compulsory schooling, a power then given to the federal legislature, it is the problem situation in Brussels that underlies this choice of action. In Brussels, compulsory school attendance (non-attendance being subject to criminal penalties) could not be implemented and supervised, in the absence of a sub-nationality of the children and their parents.²⁸⁸ To quote one minor detail, a decree issued by the French community requires public institutions to fly the French community's flag on public buildings in certain circumstances. In the French language region, this decree applies to all public institutions (town halls, schools, prisons, barracks, etc), whereas in Brussels it can only be applied to certain institutions in the cultural sphere operating in the "personal" sector.²⁸⁹ The situation created by the introduction of "dependency insurance" by the Flemish community is more worrying. The aim of this compulsory insurance is to make payments to individuals who, for reasons such as their age, face various expenses that are not reimbursed under the current social security scheme (home monitoring, home help, transport, etc). Although this is closely connected with the social security system, the Constitutional Court has ruled that this is a "personal" matter.²⁹⁰ This system is funded in the Dutch-speaking region by a contribution payable by the whole population, but in Brussels the system is more or less optional. Only those who freely decide to join, pay the contributions and enjoy the benefits offered are covered by the insurance, and only for as long as they abide by their decision.

At any rate, in order for the system of the individual's free choice of attachment to a community (including the right not to choose) to work properly, the "residual" legislature has to exercise its functions in full. In other words, the federal state should organise the "bicultural" sector and the Joint Community Commission should do likewise for matters for which neither community bears responsibility.

The criticism voiced here is much more of a practical than a legal nature. There are many Brussels citizens, especially artists and sportspeople, who believe they are being placed in a kind of "cultural straitjacket", or subjected to cultural apartheid, at the institutional rather than the personal level. Sadly, the federal legislature is in no hurry to develop a genuine cultural policy worthy of a major international city, going beyond the policies pursued by the communities in this sphere. The cultural field is being left to its own devices, as it were,²⁹¹ and the

288. Leroy M., "La communautarisation de l'enseignement", *Journal des Tribunaux*, 1989, p. 72.

289. Delpérée F., *Le droit constitutionnel de la Belgique*, op. cit., p. 328.

290. Constitutional Court, judgment No. 33/2001, of 13 March 2001. See X. Delgrange, "La Cour d'arbitrage momifie la compétence fédérale en matière de sécurité sociale", *Revue Belge de Droit Constitutionnel*, 2001, p. 216 f.

291. Dumont H., "Les matières communautaires à Bruxelles du point de vue francophone", op. cit., pp. 583 ff. (note 274).

situation seems to be the same where the matters for which neither community bears responsibility are concerned.²⁹²

Cultural matters were among the earliest community responsibilities (1970). It has never been possible to define "personal" matters with the minimum degree of precision required. They are more of a response to what is in itself a legitimate political objective. Originally, these matters were undoubtedly perceived mainly in terms of language and communication, and did not involve direct financial benefits for the people concerned.

A movement is discernible on the Flemish side to extend the concept in this direction, and it has already received the Constitutional Court's approval in the "dependency insurance" case.²⁹³

If this movement grows, it is very doubtful that the dogma of the absence of any sub-nationality will in future be able to be maintained *de facto*, if not *de jure*.

Where contributions and benefits are linked, it would seem normal to demand some continuity in the choice made by individuals in order, for example, to avoid their only joining a scheme at (or shortly before) the point in time at which they derive benefits from it. If this type of system were to become commonplace, it would also be necessary to require a certain degree of consistency, in order to exclude *à la carte* choices. For example, an individual in Brussels would have to be prevented from choosing a French-speaking system of contributions and benefits in one sector and a Dutch-speaking one in another. There is no sub-nationality in the strict sense, but a system very similar to it. Once this basis has been established by "free choice" (albeit a very limited choice), it might be possible to add a community tax system. Is it still conceivable that people who pay no contributions would have free access to certain services once these services are financed by this tax system?²⁹⁴ That would *de facto* be the death of the Brussels model, with all its merits and defects.

Conclusions

Our conclusions can be summed up in a few words. The Brussels community model exists in a very particular context in a country fond of "checks and balances" (paragraphs 9 to 12). Against the backdrop of a territoriality principle that has almost been rendered absolute by the Constitutional Court (paragraphs 7 and 8), the Brussels model does not opt for personal federalism, but seeks an indirect solution by focusing on institutions rather than individuals (paragraphs 13 to 19). This system has advantages and drawbacks (paragraphs 20 to 23), and the path that it might take in future is particularly uncertain (paragraph 25).

292. Dumont H., *op. cit.*, pp. 586 ff. (note 274).

293. See paragraph 23 above.

294. Velaers J., "Vlaanderen laat Brussel niet los: De Vlaamse invulling van de gemeenschapsautonomie in het tweetalig gebied Brussel – Hoofdstad" in *Bruxelles et son statut*, *op. cit.*, pp. 600 ff.

The reappearance of an old model: cultural autonomy

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It took the First World War to force the issue of rights for national minorities on to the international agenda – notably through the minority protection treaties instituted under the League of Nations. Dr David J. Smith noted the shortcomings in the practice of the League machinery. Yet the boost to international law given by the work of that organisation was vital in encouraging liberal minority rights activists to revisit the doctrine of cultural autonomy.

The achievement of these “forgotten Europeans” in putting flesh on the bones of the comparatively untested idea of cultural autonomy remains largely unsung. They were no mere dreamers, conjuring up utopias in their studies. Many were already figures in public life – journalists, lawyers, members of parliament in their host countries. When they joined forces in 1925 to found the European Nationalities Congress they created a formidable lobby calling for cultural autonomy to be enshrined in European wide legislation.

Dr Smith shows how they drew inspiration from legislation in the Baltic countries giving cultural autonomy to minorities, particularly in Estonia. His painstaking analysis of the 1925 Estonian Law on Cultural Autonomy raises two general issues of great importance to the cause of minority protection.

The first concerns “choice” in “belonging” to a particular culture. Critics denied “belonging” as the outcome of specific choice as we know it, taken at a given moment. Their objections were met in the European Congress of Nationalities with a robust affirmation of the parallel between “belonging” to a culture and “confessing” a particular religion – making it more difficult to deny the centrality of personal choice and conviction in both cases. Cultural identity was, like religious identity, an inalienable human right. From this followed the notion of cultural autonomy being tied to persons and a consequent refusal to concede that the state or indeed any other authority could set “objective” determinants of national identity.

The second point relates to efforts to restrict the scope of legislation for minority protection, including cultural autonomy. Dr Smith suggested that references within the European Framework Convention for the Protection of National Minorities to rights of “persons belonging to national minorities” indicated that such rights were not offered to groups. A similar qualification in the minority protection treaties of the League of Nations – “persons belonging to a minority”

– was used to deny the existence of group rights in the 1920s. An eminent international law expert of that era, the German, Carl George Bruns, effectively disposed of this objection in an article from 1929: *Das positive internationale Minderheitenrecht*. In it he argued that to accord a person belonging to a minority equal treatment itself presupposes the existence of a minority at the very least as a social collectivity, that it to say a group.

Dr Smith indicated that Estonia's unique law of 1925 raised "a host of practical issues that took a number of years to work through". Such issues included: Can individuals be made to pay extra taxes earmarked for their minority's culture? How? How were such extra taxes to be assessed and collected? What? What should be the fate of those unable to pay? How were the collected resources to be distributed among the different types of school? What types of schooling should be prioritised? More fundamentally, questions arose as to the legal status of decrees issued by the cultural self-governments of the minorities concerned. Dr Smith rightly underlines the relevance of those debates for today.

Those hostile to cultural autonomy on the grounds that it might produce "states within states" were often ignorant of the underlying premises on which the doctrine rested – particularly of the state's role in facilitating and supervising it. Yet the workings of the Estonian law, and of Latvia's minority school law of 1919, brought acknowledgements of progress from the majority peoples in both countries, albeit grudging ones. Those refusing despite the evidence to abandon their suspicions of cultural autonomy were unable to break their addiction to what the Baltic German minority rights campaigner, Paul Schiemann, dubbed the "selfish nation-state".

The durability of the selfish nation-state despite the horrific First World War was a major factor impelling minority rights campaigners to initiate the nationalities congress in 1925. It expressed the conviction that "cultural autonomy in one state" would not in itself be a guarantee of lasting minority rights, even in the country concerned, since too much then depended on the whim of changing governments; only by enshrining cultural autonomy in European-wide legislation would national minorities finally become subjects rather than objects of policy.

The ideology of the nationalities congress, where Paul Schiemann played a formative role, did not attack the state form as such. Indeed, the congress expressly recognised that European wide results would come only after much lobbying and hard work within every individual European state. It was the nation-state – that is a state identifying its territory with one dominant nationality – that the European nationalities movement aimed at dethroning. This point was underlined by the terminology adopted in the discourse of the congress.

Instead of referring to the "state" delegates preferred to speak of the "state community" (*Staatsgemeinschaft*) – a point mentioned in Christopher Decker's paper. The term deliberately sought to propagate the notion of territorial space shared over time by majority and minority peoples alike. The time dimension

was an important ingredient in the proven commitment and loyalty to the host state, demanded of a minority before it was accepted as “genuine” and thus eligible for membership of the nationalities congress.

Professor Scholsem’s analysis of contemporary Belgium can be said to offer an instance where a “state community” has been instituted through some particularly intricate mechanisms – a lengthy process capped by the revision of the constitution in May 1993 and based on three relatively autonomous regions – Wallonia, Flanders and Brussels – as well as three “communities” – the French, Dutch and the smaller German-speaking one. For this part of the Zagreb seminar it is noteworthy that the Flemish and French communities have long had considerable autonomy in running their corresponding linguistic regions.

Ultimately, however, Scholsem describes a variant of autonomy that he suggests falls somewhere between the territorial and personal. This makes for difficulties in tracing the boundaries of responsibilities distributed between the federal state, the communities and the regions (all three of which enjoy legal parity in governance). Moreover, the problem is compounded by responsibilities being allocated institutionally or functionally (rather than on a territorial or personal basis).

Nevertheless, what is striking about the Belgian case is firstly the absence of any concerted direct challenge to the governance of the country for the past 30 odd years, despite the sheer complexity of the system instituted. Complexity also characterises the planning for cultural autonomy for minorities in Romania and Armenia, analysed in Christopher Decker’s paper. Here, determining which group is a “genuine” national minority echoes discussions from the 1920s, but is all the more problematic because of the heated disputes within minority groups as to their legitimate leadership.

While the Estonian case of the 1920s cannot match up to the intricacy of the Belgian model or the possible outcomes in Romania and Hungary, there was nonetheless at the time a comparable process – of doubting, testing, modifying, altering, improving – discernible before authoritarian rule in the 1930s. Moreover, many of the terms of the present day debates examined by Decker – “thresholds”, “special electoral rolls”, “local institutions of cultural autonomy”, “national council” – were certainly not unheard of in Tallinn during the 1920s.

All of which serves to underline the communality of spirit behind the approach to cultural autonomy over the entire period considered by this seminar – which in turn, I suggest, confirms the essential rightness of the underlying ideal of cultural autonomy preached by interwar minority activists.

These not only accepted the notion of a long time scale before the concept would be fully embraced, but also regarded the attainment of cultural autonomy, and with it the empowering of minorities, as inextricably bound up with progress towards European unity. Equally, however, they insisted that the precondition for lasting European union was a solution to the minorities problem. In effect, they

extended the concept of a state community as “territorial space shared over time” to the whole of Europe, envisaging its future as a patchwork of peacefully co-existing national communities where physical borders would slowly but inexorably become less relevant.

From this perspective, the present renewed interest in cultural autonomy seems not, as one commentator put it, “Austro-Marxism’s last laugh”, but rather the latest and manifestly not the last instalments in a long process of resolving European nationality issues; a process rudely interrupted, firstly by the dangerously heightened nationalism of the 1930s and subsequently by the dead hand of Soviet controls.

The practical difficulties discussed in Zagreb do not detract from the potential for solutions to minority issues based on personal cultural autonomy. After all, the creation of small states after the First World War failed to provide a lasting solution to the minority disputes and territorial conflicts resulting from Europe’s mixed settlement patterns. The wholesale movement of populations tried during and after the Second World War is wholly unacceptable. So we return to the idea of entrenching European-wide minority rights in the form of cultural autonomy within the existing states system.

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