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THE PARTICIPATION OF PERSONS BELONGING TO NATIONAL MINORITIES IN THE FUNCTIONING OF DEMOCRATIC INSTITUTIONS

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Summary

To what extent are citizens belonging to national minorities involved in the national and local political life of democratic states? What means are usually employed and what might be the most appropriate instruments for taking into account the distinctiveness of minorities while preserving the unity of the state?

To answer these questions it is first necessary to reflect upon the very concept of democracy. While majoritarian democracy should offer all citizens the same protection, the function of "consociational democracy" will be to adapt political institutions to the situation of a multinational society. On this basis, persons belonging to national minorities may participate in the operation of democratic institutions in two ways; joint management of affairs common to the national group as a whole, and self-management of the minority group's own affairs. Autonomy may thus be contrasted not only with assimilation but also with self-determination.

Despite their variety, one has to acknowledge the inappropriateness and imperfection of the constitutional and legislative solutions adopted, stemming from the methods of voting and of ensuring representation of minorities, as well as from the systems of self-government applied, which appear to be linked too closely to local conditions. The search for an overall solution seems to depend primarily on the principle of legal personality, the only one capable of reconciling the political unity of the state and the diversity of its national society. It is on this condition that the single transferable vote might represent an appropriate method of voting, as might the widespread introduction of the system of personal autonomy, which has been rediscovered in Estonia and to which Hungary is currently turning.

INTRODUCTION
THE FRAMEWORK OF PARTICIPATION
MAJORITARIAN DEMOCRACY AND CONSOCIATIONAL DEMOCRACY

The participation of persons belonging to national minorities in the operation of democratic institutions takes place within a framework which must first be defined and which is represented by the concept of democracy.

For this purpose, democracy is regarded not only as an ideal form of government, but also appears as an "empirical and rational method of political decision-making"[1]. American political science has accounted for this second aspect by making use of the more neutral concept of "polyarchy"[2], which finds expression mainly in majoritarian democracy.

The basic guarantees of majoritarian democracy are necessary for the participation of persons belonging to national minorities in the operation of democratic institutions. However, that is not a sufficient requirement bearing in mind the propensity to uniformity of the majoritarian methods of democratic regulation when confronted with ethnic, cultural, linguistic or religious divisions, which are the very basis for the existence of national minorities. Hence the introduction of the concept of "consociational democracy" - coined by Arend Lijphart[3] - as a corrective for use by plural national societies.

1. A necessary framework: majoritarian democracy

According to Robert Dahl, every polyarchic system or majoritarian democracy should combine eight institutional guarantees: freedom to form and join organisations; freedom of expression; the right to vote; eligibility for public office; the right of political leaders to compete for support and votes; alternative sources of information; free and fair elections; and institutions for making government policies depend on votes and other expression of preferences[4].

To these should be added the guarantees relating to human and civic rights and the rule of law, in particular the principles of equality and non-discrimination.

Any constitution worthy of the name should subscribe to such standards of majoritarian democracy while also facilitating access to all the political rights of citizenship. By definition,

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1. *C Emeri, Droit constitutionnel et institutions politiques, Paris, Les Cours du Droit, 1990-1991, p. 117.*

2. *Cf. R A Dahl, Polyarchy, participation and opposition, New Haven and London, Yale University Press, 1971, 257 p.*

3. *A Lijphart, Democracy in plural societies. A comparative exploration, New Haven, Yale University Press, 1977, 248 p.; Democracies. Patterns of majoritarian and consensus government in twenty-one countries, New Haven, Yale University Press, 1984; Majority rule versus democracy in deeply divided societies, Politikon, 4 (2) December 1977; cf. also Kenneth D McRae (ed.), Consociational democracy. Political accommodation in segmented societies, Toronto, 1974, 311p.*

4. *Op. cit., p. 3.*

however, majoritarian democracy is only concerned with citizens individually in their relationship to the state. The polyarchic system therefore has difficulty in coming to terms with a heterogeneous national society. Furthermore, the instruments of majoritarian democracy and of the state governed by the rule of law can be used as techniques for assimilating national minorities and, hence, imposing uniformity on national political society.

This is the French approach, for example, as recently outlined by the French delegation to the United Nations Commission on Human Rights: "France's ideas are based on a universal principle: all human beings are born free and equal in dignity and in law. The French Constitution draws on this principle, and under the Constitution all citizens of the Republic, which is one and indivisible, are equal before the law. The unity of the French people[5] and the equality of citizens rule out any possibility of a distinction based on ethnic criteria"[6].

Recourse to consociational democracy will thus make it possible to adapt the features of majoritarian democracy to national pluralism.

2. An essential corrective: consociational democracy

The numerical basis underlying majoritarian democracy has to be adjusted when the latter is applied in a heterogeneous national society, in the same way as the constitutional principle of equality "does not prevent a law from laying down non-identical rules with regard to categories of persons in different situations"[7]. That is the purpose of the generic concept of consociational democracy, found chiefly in Switzerland. It should be noted that this country had been practising consociational democracy as an improvement on federalism well before that notion became the subject of conceptualisation by American political scientists. In this connection, Professor Cadart describes Switzerland very aptly as "a democracy of minorities, a democracy balanced by minorities" in as much as "each citizen is a member of several groups, nearly all of which are minorities, but he is never in the majority in more than one group, and then only in a religious or linguistic group[8], because the various boundaries reflecting the diversity of minority groups do not coincide.

Consociational democracy is thus based on a "set of institutional mechanisms and arrangements enabling a modus vivendi to be established in deeply divided societies"[9]. It is based on the

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5. It will be recalled in this connection that the Constitutional Council, in its decision no. 91-290 DC of 9 May 1991 on the Law establishing the status of the territorial community of Corsica (JORF, 14 May 1991, pp. 6350-6354), specified that "the legal concept of the "French people" has constitutional value"; S Pierré-Caps, Le Conseil Constitutionnel, gardien de l'identité française, RSAMO, no. 31, pp. 141-151.

6. Quoted in Z Ilíc, Report of the working group on the rights of persons belonging to national, ethnic, religious and linguistic minorities, E/CN4/1991/53, 5 March 1991, p. 6.

7. Constitutional Council, no. 79-107 DC, 12 July 1979, R, p. 31.

8. J Cadart, Institutions politiques et droit connstitutionnel, Paris, Economica, Vol. 1, 3rd edition, respectively p. 607 and p. 609.

9. B de Witte, Minorités nationales, reconnaissance et protection, Pouvoirs, no. 57-1991, pp. 126-127.

principle of the search for a balance between the constituent parts of a national society. This will take the form of power-sharing on the basis of the balance thus achieved and its organisation will depend on the combination of two principles: first, co-management of common affairs, ie national affairs; second, self-management of the national minority's own affairs.[10]

It is with reference to these two principles that one should assess the various constitutional and political experiments designed to ensure the participation of persons belonging to national minorities in the operation of democratic institutions.

It also follows that this participation should be viewed not only in terms of minorities' exclusive interests, but also in terms of those of all the citizens of the state in question. It should not be forgotten that the pluralism of national political society can only be institutionalised in a context of unity of the state. This concern is embodied in some constitutions, such as the Spanish Constitution of 1978, Article 2 of which provides as follows: "The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards, and recognises and guarantees the right to self-government of the nationalities and regions of which it is composed and solidarity amongst them all". In this particular case, unity of the state is consistent with recognition of national plurality since the latter is related to the unity of the Spanish state. The Hungarian Constitution of 23 October 1989 expresses a similar idea in Article 68.1, which provides as follows: "The national and ethnic minorities living in the Republic of Hungary shall share in people's power, being constituent factors of the state". Likewise, the Swiss political system is based on this idea that "the complementarity arising from diversity is the source of national unity"[11].

In the final analysis, far from being mutually exclusive, majoritarian democracy and consociational democracy necessarily appear indissociable.

PART ONE: CO-MANAGEMENT OF COMMON AFFAIRS

This can be studied at both national and local level.

A. National level

The participation of persons belonging to national minorities in affairs of national interest has to be secured through national elections. This is a particularly sensitive issue as the organisation of elections, the choice of the method of voting and the procedure for allocating seats are assimilation techniques par excellence. It will thus be sufficient to combine electoral law with a restrictive right of citizenship or even stringent residence requirements in order to exclude potential minority voters, as, in this last instance, in Northern Ireland, where immigrants from Eire cannot vote in the seven years following their arrival.

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10. This duality was already present in the concept of personal national autonomy developed by the Austrian lawyer and politician Karl Renner: "Das Selbstbestimmungsrecht im Innern ... das Mitbestimmungsrecht im ganzen ..."; in Das Selbstbestimmungsrecht der Nationen, Leipzig and Vienna, Franz Deuticke, 1918, pp. 24-25.

11. J Cadart, op. cit., p. 608.

However, the use of a particular method of voting can also produce opposite effects to those originally expected. This was the case in the Bulgarian elections of 13 October 1991, which were organised according to the list system of proportional representation instead of the mixed system used previously. The setting of a minimum figure of 4% for obtaining seats was designed to limit the number of parties represented in Parliament. For this purpose, calculations were based on the national vote count in order to increase mathematically the proportional effect of the conversion of votes into seats. But this national vote count also gave an advantage to the Muslim minority in constituencies in which it is itself in the minority by encouraging it to present a Movement for Rights and Freedom list, whereas a vote count by constituency would have excluded it from parliamentary representation[12].

It will also be noted that most constitutional texts leave it to the law to organise the electoral process. From this point of view, it would be desirable for the constitution to contain a number of basic provisions designed to guarantee the representation of national minorities. Some constitutions have already adopted this approach, such as the Romanian Constitution of 8 December 1991, Article 59-2 of which provides for the allocation of a member's seat to each organisation of citizens belonging to national minorities if they fail to obtain the number of votes needed to be represented in Parliament; similarly, the Slovenian Constitution of 23 December 1991 reserves one seat each in Parliament for the Italian and Hungarian minorities.

Is there any method of voting which is particularly conducive to minority representation? To answer this question it will first be necessary to review the systems commonly used.

a) Survey of voting systems allowing for minority representation

In a study published in 1978[13], Mrs Claire Palley attempted a survey of the various possible electoral solutions. It covers proportional representation systems, bicameral systems with community representation (Fiji), unitary bicameral systems with regional representation (Spain and, to a lesser extent, Italy), systems with a special legislative structure (the Communal Chambers of the 1960 Cypriot Constitution and the Community Councils stemming from the 1980 revision of the Belgian Constitution) and the single-ballot proportional representation system combined with community representation in a single electoral college, adopted in Lebanon following the National Covenant of 1943. To these should be added the system of separate lists and seats, which is particularly well-suited to the specific representation of autochthonous peoples (eg in New Zealand, where 4 seats have been set aside for the Maoris since 1867; similarly, Article 28 of the Danish Constitution sets aside two seats for Greenland and two seats for the Faroe Islands in the Folketing); and also the system of joint voting and proportional representation of community seats, under which the number of national seats reserved for each community is determined in advance. This is the case in China, where Article 59 of the 1982 Constitution stipulates that national minorities must be represented in the National People's Congress in an appropriate proportion, set at 12% by the Electoral Law of 10 December 1982, ie twice what proportional representation should have given them.

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12. *Cf. B Owen, Les modes de scrutin de l'Europe du Centre et de l'Est: les influences à l'oeuvre, Association française de science politique, 4th Congress, 23-26 September 1992, pp. 27-28.*

13. *C Palley, Constitutional law and minorities, Minority Rights Group, Report no. 36, 1978, London, 23 p. (new edition 1982).*

These various systems have at least two major disadvantages: on the one hand, it is difficult to export them outside the specific situations to which they apply; on the other, they all involve, in varying degrees, a risk of isolating of minority groups from national political life. There is, however, one solution that can be adopted, whatever the particular type of minority situation, and which offers the advantage of guaranteeing appropriate representation of minority groups while maintaining the participation of persons belonging to national minorities in national political life: it is the single transferable vote.

b) A solution: the single transferable vote (STV)[14]

Still known as the Hare system, this method of voting is used in Eire and in Northern Ireland, in the state of Tasmania in Australia and in some American local elections. It operates in a constituency where there are at least three seats to be filled and where the voter, although voting for only one candidate, is allowed to note on his ballot paper a second, third ... nth candidate to whom his vote will be transferred if the preceding candidate obtains the number of votes required to be elected.

This variant of proportional representation tends to exclude party influence and to give priority to the personal element in the choice of elected representatives[15], which is essential in a constituency where several national groups live side by side. The practical disadvantage represented by the time taken to count the votes can be offset by the use of computers. The widespread adoption of the STV system in plural national societies could thus be a guarantee of consociational democracy.

B. Local level

The decentralised management of national affairs is of direct concern to minority groups when they are confined to a clearly defined territory. It is for this reason that the CSCE seminar on questions relating to minorities held in Geneva in July 1991 laid particular emphasis on the need for constitutional guarantees of local self-government through freely and fairly elected consultative, legislative and executive bodies.

For example, seats on municipal councils could be reserved in given proportions for national minorities, but on condition that the municipal ballot remains a joint ballot. This is the case with the Slovenian Constitution, which guarantees representation of the Italian and Hungarian minorities on local organs of self-government.

However, the Hungarian system is undoubtedly the most original. The Hungarian law of 1990 on the election of mayors and local councillors concerns itself with the situation of minorities at

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14. Cf. A Lijphart and B Grofman (ed.), Choosing an electoral system. Issues and Alternatives, New York, Praeger, 1984, 273 p., in particular: G H Hallet Jr., Proportional representation with the single transferable vote: a basic requirement for legislative elections, pp. 113-125; A Lijphart, Trying to have the best of both worlds: semi-proportional and mixed systems, pp. 207-213.

15. Cf. B Chantebout, Droit constitutionnel et science politique, Paris, Armand Colin, 10th edition, 1991, pp. 206-207.

an earlier stage, namely that of dividing the municipality into wards, when "account shall be taken of local ethnic characteristics, religions, historical and other features" (Article 10-2)[16]. In addition, Chapter 11 of the law is devoted entirely to the protection of the rights of national and ethnic minorities; it guarantees the specific expression of minorities' views in local elections and the allocation of local seats to lists of national minorities which have failed to obtain any representatives on the basis of the election results, through a complex vote counting system (Articles 48 to 50) designed to ensure that the elected candidates are truly representative.

Another tendency, which reflects the dissociation of nationality and citizenship, is worth mentioning here: namely, the granting of the right to vote to foreigners satisfying a certain residence requirement. Where citizens belonging to a particular national minority are related to the dominant national group in a neighbouring or bordering country, as is usually the case in Central Europe, one can see the full significance of granting foreign residents rights pertaining to local citizenship. In fact, some recent constitutions have embarked on this course, as in Hungary (Article 70-3) and Russia (Article 29-4). The incipient dissociation of nationality and citizenship can also be reinforced by an inter-state approach developed through the signing of treaties on neighbourly relations between states with common borders. From this point of view, the Germano-Polish treaty of 17 June 1991 on "relations of neighbourliness and friendly co-operation" stands out as a model owing to the status which it gives minorities (Article 20) and the fact that, here, international law, as Pierre Koenig points out, "introduces some extremely interesting distinctions regarding the nationality of an individual in his relations with the host state's legal system. A person belonging to the German minority is a Polish citizen, he has rights and obligations as a national and as a person belonging to a minority ..."[17]. Other treaties have been signed by Germany, notably with Hungary, and by Hungary with Slovenia and Croatia. But these treaties mainly stress self-management of minorities' own affairs, especially in the educational sphere. That is the second aspect of consociational democracy.

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16. *In B Owen and H Opolska, La réinvention démocratique - les premières élections en Europe de l'Est. Les lois électorales, Association française de science politique, 27-28 March 1991.*

17. *P Koenig, Le traité germano-polonais sur "Les relations de bon voisinage et de coopération amicale" du 17 juin 1991, AFDI, 1991, p. 294.*

PART TWO: SELF-MANAGEMENT OF MINORITIES' OWN AFFAIRS

Here again we shall draw a distinction between the national and local levels.

A. National level

To what extent do national political institutions arrange for minority groups' specific aspirations to be taken into account? The answers to this question presuppose constitutional or, at the very least, legislative recognition of the heterogeneity of the national political society[18]. On this basis, the right of minorities to form political parties and specific associations must be fully guaranteed. The situation in Hungary is exemplary in this respect since they are able to organise themselves under freedom of association. The associations representing minorities' interests have also set up some flexible co-ordinating bodies, such as the Union of Minorities of Hungary or the Round Table of Minorities of Hungary.[19].

It will thus be possible to devise a rough classification according to whether the bodies in charge of minorities' own affairs have rule-making or consultative powers; rule-making or consultative powers; mention should also be made of possible opportunities for persons belonging to national minorities to take their specific claims before the courts.

Bodies with rule-making powers

Affairs specific to minority groups may first of all be discussed by their directly and separately elected representatives, as was the case, for example, in Cyprus and as is the case in Belgium today. But the failure of the Cypriot system and the difficulties which Belgium is currently experiencing are no incentive to copy it. What is more, it seems to occur only in a particular type of plural national society - the bi-national political society.

For this reason, affairs specific to minority groups will often be discussed by the national Parliament acting on a qualified majority basis, as in Belgium since the constitutional revision of 24 December 1970 and in Hungary, where "the adoption of the law on national and ethnic minorities requires a majority of two-thirds of the votes of the members present" (Article 68-5). Similarly, mention should be made of the provisions of the Slovenian Constitution according to which legislation - in the broad sense of the term - relating to the rights and situation of infra-national communities may not be adopted without the consent of the representatives of those national communities (Article 64), which implies that they would have a right of veto in this particular case.

This second kind of solution undoubtedly offers the advantage of not fragmenting national representation, provided, however, the representatives of minority groups are under the aegis of

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18. A survey of the recognition given to infra-national groups may be found in S Pierré-Caps, Nation et peuples dans les constitutions modernes, Nancy, Presses Universitaires de Nancy, 1987, pp. 555-577.

19. Cf. Peter Kovàcs, The situation of linguistic minorities in Hungary, report to the Council of Europe's ad hoc Committee of Experts on Regional or Minority Languages (CAHLR), 31 May 1992, 33p.

national sovereignty and the representative mandate, and do not seek above all to assert a distinct identity as in Belgium. This last risk would in fact be an argument against taking the minority dimension into account - except in a consultative capacity - within the executive, unless it is vested with wide rule-making powers.

Consultative bodies

They are extremely varied and there would be no point in trying to draw up an exhaustive classification of them here. This variety should not lead one to underestimate the extensive possibilities stemming from the choice of consultative bodies. Inter alia, it is by this means that certain identity-related aspects of persons belonging to national minorities can be taken into account by states which refuse to recognise their national plurality officially. For example, a "National Council for Regional Languages and Cultures" has been operating in France since 1985. From the same point of view, the Swedish example is edifying in that the state began to consider the phenomenon of minorities through various consultative bodies before officially recognising the existence of "ethnic, linguistic and religious minorities" in the 1977 revision of the Constitution (Article 2). The example of Hungary must be mentioned, however, since a genuine institutional system is gradually being introduced which, in the very words of the lax of 7 July 1993 on the rights of national and ethnic minorities, is opposed to a policy of assimilation.

Article 19 of the Constitution provides for the election by the National Assembly of a commissioner for the rights of national and ethnic minorities, a kind of ombudsman (Article 32/B-5) for minorities[20]. Since September 1990, there has been an Office for National and Ethnic Minorities, a government institution for the expression of state policy and consultation with minorities, which also operates a government foundation for national and ethnic minorities in Hungary.

Judicial bodies

The organisation of an independent judiciary and the setting up of machinery to review the constitutionality of legislation are essential foundations of any state governed by the rule of law. From this point of view, the ordinary judicial remedies should naturally be available to persons belonging to national minorities.

The question arises, however, of whether certain particular remedies may be open specifically to them by virtue of their minority status. The question is a delicate one because it raises the preliminary problem of what might be called the "enforceability" of minority rights, the principle of positive discrimination having first been accepted, ie the fact that the particular situation in which national minorities find themselves grants them specific rights by reason of their ethnic, linguistic or religious characteristics. In other words, should rights be conferred only on persons belonging to national minorities, or should they be conferred on those

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20. Similarly, Article 70 of the Chinese Constitution states that, among the special commissions set up by the National People's Congress to study and draw up, under its guidance, the motions concerning them, is a "commission of nationalities".

minorities as such; do minorities have not only individual rights but also collective rights which can be enforced by the courts[21]?

States are very reluctant to recognise national minorities as legal entities governed by public law and, consequently, confine themselves to guaranteeing that persons belonging to national minorities have access to the ordinary judicial remedies. In practice, everything depends on the legal nature and substance of the autonomy which national minorities enjoy in the state in question. In Italy, for example, protection of the German and French-speaking minorities of the Trentino-Alto Adige and Valle d'Aosta regions takes on a collective dimension as it falls within the scope of the special constitutional status which they enjoy as autonomous regions. More precisely, by virtue of Trentino-Alto Adige's special status, the majority of the members of a linguistic group within the Regional Council or the Provincial Council of Bolzano may lodge an appeal with the Constitutional Court against any text infringing the rights of the minority concerned or against the decision rejecting their request for a vote by linguistic group. Furthermore, the Regional Council and the Provincial Councils of Trentino and Bolzano may appeal to the Constitional Court against an alleged infringement of minority rights by a national, regional or local provision.

Generally speaking, the constitutional organisation of territorial autonomy on a regional or federal basis entails the setting up of a Constitutional Court as the body responsible for regulating powers between the centre and the "regions". It is on this level that the protection of minority rights can operate, via the powers - notably in linguistic matters - conferred on regional institutions, as is the case in Italy, Belgium and Spain[22]. This takes us back to the question of the type of autonomy practised.

B. Local level

It is at this level that the question arises of the type of autonomy which should be granted to national minorities, and hence the extent of that autonomy. This question is all the more important in that it is related to the issues of self-determination and territorial integrity and therefore concerns the very destiny of the particular nation-state. Illogical as this might seem, the solution should be the right of national minorities not to become a state[23], provided they enjoy a constitutional status of recognition and protection based on autonomy. But what kind of autonomy is involved? There are two main schools of thought, one favouring territorial autonomy, the other favouring personal autonomy.

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21. *For a discussion of the question at international level, see Giorgio Malinverni, Le projet de convention pour la protection des minorités élaboré par la Commission européenne pour la démocratie par le droit, RUDH, 1991, pp. 157-165.*

22. *Cf. Dominique Rousseau, La justice constitutionnelle en Europe, Paris, Montchrestien, Clefs-Politique series, 1992, pp. 116 et seqq.*

23. *Cf. A Cassese and E Jouve (ed.), Pour un droit des peuples, Paris, Berger-Levrault, 1978, 220 p.; see comments on personal autonomy below.*

a) Territorial autonomy

This is currently the most widespread kind. In particular, it can help national minorities to be taken into account in states which do not recognise the heterogeneity of their national society but which practise governmental and administrative decentralisation: the developments in the status of Corsica within the French Republic provide a good illustration of how a unitary state can come to terms with a certain degree of regional diversity. The same idea may be found in federal states such as the United States, Germany and Australia.

The difficulties arise where territorial autonomy is associated with a plural national society. Except in the case of Switzerland, multinational federalism is quite clearly in crisis: failure in Yugoslavia, difficulties of adaptation in Russia, in India and, in a quite different context, since it is a bi-national society, in Canada. Similarly, Belgium's progress towards federalism has not resolved that country's existential crisis, to judge by the success of the Walloon "rattachiste" movement. The underlying reason for all this would seem to be that territorial federal autonomy is too close to the principle of self-determination. This is probably also why the formula of the regional state, which originated in Italy and has been successfully adopted in Spain, appears more satisfactory, although, in the latter case, the historical nationalities have become diluted in the generalisation of the "state of autonomies". It is for all these reasons that the notion of personal autonomy currently warrants attention.

Personal autonomy[24]

The system of personal autonomy represents the most appropriate institutional solution for territories in which minority groups live close together without it being possible to assign national groups to a particular area, as is the case to a large extent in Central Europe. It is also practised successfully by the Scandinavian countries, some of which intend to encourage the effective participation of autochthonous peoples in national and local political life.

Briefly, the principle of personal autonomy tends, in a nationally heterogeneous region, to effect a dissociation between the territory and its administration. It does not rule out territorial autonomy; what is ruled out is the territorial basis of the right to autonomy. While autonomous status applies, therefore, to the individual per se, it does not apply without any distinction to all the inhabitants of a given area, but only to those who have freely and individually chosen to belong to a national minority. Consequently, autonomy is not based on a region's national configuration, but on a personal choice. Hence the name "personal autonomy".

The theoretical foundations of this individual right to national autonomy will first be discussed, followed by an assessment of the way in which it is exercised.

Political and constitutional thinking on the principle of personal autonomy is of Austro-Hungarian origin. Although the Austrian lawyer Karl Renner[25] is credited with the theory, this

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24. The following comments are based on an article to be published in Revue du droit public in 1994: cf. S Pierré-Caps, Le principe de l'autonomie personnelle: l'exemple hongrois, 28 p. (manuscript).

25. The first work containing a complete formulation of the system of personal autonomy dates back to

should not lead us to overlook the not inconsiderable role played by a Hungarian precursor, Baron Josef Eötvös[26].

Starting from a critical appraisal of the majoritarian principle governing traditional political systems, including, of course, the democratic system, in which relations between the state and the nation reflect the "atomist-centralist" view, according to which individuals are isolated in the face of a centralised state and its administration, Karl Renner maintains that the principles of political equality and liberty claimed by traditional majoritarian democracy can only really be achieved within the framework of a multinational federation. It is here that the principle of personal autonomy emerges, whereby the nation becomes a legal reality, the aim then being to make it a constitutionally recognised and guaranteed mediator between the state and the individual. This legal status of the nation is based on a declaration of nationality made freely by each individual. This is what Karl Renner calls the right to self-determination ("das Selbstbestimmungsrecht"): "Membership of a nation depends on the individual's free declaration of nationality before the competent authority. This right to self-determination of the individual is the counterpart to any right to self-determination of the nation"[27]. This fundamental idea prompts two comments:

- the will of the individual is a direct source of law; he is not confined within a pre-established national framework;

- the right to self-determination which expresses this individual will is not the principle of nationalities in its absolute form as the principle governing the formation of states -one nation, one state; on the contrary, it emerges as a principle governing the state's internal organisation. Consequently, the nation as a legal institution calls for reformulation of the right of peoples to self-determination from a constitutional standpoint, and no longer only from the international standpoint.

This last idea ("Die Nation als Rechtsidee") in fact represents the Austrian political thinker's essential goal, namely recognition of the nation as a legal entity governed by public law. In a nutshell, the aim is to make the nation an intermediate legal body between the individual and the state: "The constitution of the nation as a legal person, in particular as a corporation governed by

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1899: cf. Synopticus (pseud.) Staat und Nation, Wien, Josef Dietl, 39 p.; this was expanded upon three years later in the context of the Austo-Hungarian "national question": cf. Rudolf Springer (pseud.), Der Kampf der Österreichischen Nationen um den Staat, Leipzig und Wien, Franz Deuticke, 1902, 252 p., up to the fall of the Dual Monarchy: Karl Renner, Das Selbstbestimmungsrecht der Nationen, previously cited; but the Austrian lawyer's constant concern remained the problem of nationalities as, in a posthumous work, he maintained his arguments on the system of personal autonomy within the multinational, or even supranational, state: cf. Karl Renner, Die Nation: Mythos und Wirklichkeit, Wien, Europa Verlag, 1964, 138p.

26. In Die Nationalitätenfrage, Pest, 1865.

27. Das Selbstbestimmungsrecht der Nationen, op. cit., p.111: "Über die Nationszugehörigkeit kann nichts anderes entscheiden als die freie Nationalitätserklärung des Individuums vor der dazu Kompetenten Behörde. Dieses Selsbtbestimmungsrecht des Individuums bildet das Gegenstück jedes Selbsbestimmungsrecht der Nation".

public law, is the prerequisite for any ordering of national relations and the basic assumption underlying any organic conception of the nation"[28].

This idea of the nation as a legal institution thus defines a new relationship between the nation and the state. If nations are legally constituted on a personal basis, they become associations of individuals. As a result, they are deprived on any territorial basis, and hence statehood, as a state cannot exist without a territory. This separation of state and nation can be seen in the type of powers exercised, as it leads in turn to a separation of political affairs, over which the state retains control within its exclusive territorial sovereignty, and national, ie cultural, affairs, with which the legally constituted nations are entrusted. Quite clearly, this approach is federal in essence, but it is a novel type of federalism which is basically expressed in the fact that it allows the territorial principle, which expresses the general interest of the state, to co-exist with the personal principle, which expresses the interests of national communities. In this connection, Renner stresses that it is the nation as a cultural community which calls for the principle of personal autonomy. It is this consideration which determines the nature of the rights conferred on the minority and the means employed. In the final analysis, the future Chancellor of the Republic of Austria wanted to depoliticise the national question by reducing it to its cultural dimension, the only way, in his view, of reconciling the unity of the state with the diversity of its cultures.
Moreover, nation and state are not on the same level, legally speaking: the state is a sovereign authority, the nation a subordinate authority. This system is characteristic of national autonomy, which Karl Renner defines as follows: "I understand national autonomy as meaning the establishment of the nation on the state model, its institution as an organ of the state and the organisation of the entire state as a federation of nationalities"[29]. This new conception of the state, running counter to the French model of the national state, is none other than the theory of the multinational state, the "Nationalitätenstaat", or even the supranational state, whose hallmark is the dissociation of political unity and national unity, in other words the nation without a state, a corporation of persons ("Personenkörperschaft") governed by public law.

Karl Renner also described at length the rights and obligations, powers and institutions of autonomous national corporations. They derive in the first instance from the subjective public law inherent in membership of the nation, ie, in general terms, the right to participate in the national culture and the duty to share in its financial cost by paying taxes. It should not be forgotten, however, that membership of a national minority makes the minority a legal entity governed by public law. In this respect, it comprises judicial guarantees which undoubtedly confer a decisive advantage on the system of personal autonomy in the protection of minorities. These judicial guarantees are reflected in the capacity to take legal proceedings, both against

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28. *Das Selbstbestimmungsrecht der Nationen, op. cit., p.118: "Die Konstituierung der Nation als juristische Person, im besonderen als geschlossene Körperschaft öffentlichen Rechts, ist die Voraussetzung jeder Ordnung der nationalen Verhältnisse und das Hauptpostulat jeder organischen Auffassung der Nation".*

29. *Das Selbstbestimmungsrecht der Nationen, op. cit., p.84: "Ich verstehe unter nationaler Autonomie die staatsgleiche Konstitution der Nation, ihre Einrichtung als Gliedstaat und die Ordnung des gesamtes Staates als Nationalitätenbundesstaat".*

individuals belonging to another nation and against the latter as a legal entity governed by public law. Insofar as the right to nationality - in the sense of identity - subjectively establishes a public law corporation with collective rights, the question of the "enforceability" of minority rights is effectively resolved, leading to a judicial system of protection of the national minority's reserved sphere of competence vis-à-vis the state, which ultimately tends to define the relationship between the nationality and the state encompassing it.

Renner took care to explain the practical functioning of this relationship at length in the context of a complex and sophisticated institutional organisation intended for a remodelled Austria-Hungary. Admittedly, the latter now belongs to the history of political and constitutional ideas, but the positive law texts which have taken an interest in the principle of personal autonomy have particularly emphasised the system of guarantees and powers coupled with appropriate institutional arrangements, all within the cultural framework delineated by personal autonomy. This is true of the Estonian law of 1925 on the cultural autonomy of minorities[30], which itself partly provided the inspiration for the law of 15 December 1989 on citizens' ethnic rights, Article 7 of which stipulates that all Estonians have the right to choose their ethnic group freely according to their ethnic origins. Paragraph 9 of the 1925 law provided as follows: "Membership of an institution of cultural autonomy shall be determined by the register of nationality, in which citizens aged 18 or over may have their names entered...". The Hungarian law of of 7 July 1993 on the rights of national and ethnic minorities is on the same lines.

Belgium has also borrowed from the principle of personal autonomy, although only partially and in a context of territorial federalism, because, since the revision of the Constitution in 1980, the powers of the Communities - French, Flemish and German-speaking - have been extended significantly to include so-called "matières personnalisables", ie those in which language and, hence, membership of a Community play a decisive role"[31]. Furthermore, in the Brussels-Capital region, the powers of the Communities apply on a personal and not a territorial basis for the very reason that Dutch and French-speakers are interspersed. Hence, recourse is had to the principle of personal autonomy whenever application of the territorial principle proves impossible.

Admittedly, the complexity and practical difficulties of personal autonomy should not be underestimated. But thinking on this subject originated in Central Europe itself and, since then, administrative science has been able to perfect the idea of local self-government. Even if the latter has proved unsuccessful in Cyprus and Lebanon, the causes are too closely associated with these countries themselves for any further lessons to be drawn. Consequently, it seems that it is indeed the principle of legal personaility which should be explored today as the basis for the participation of persons belonging to national minorities in the operation of democratic institutions.

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30. Official Journal of the League of Nations, June 1925,pp. 788-791.

31. Rusen Ergec, Un Etat fédéral en gestation: les réformes institutionnelles belges de 1988-1989, RDP, 1991, p. 1595.