

**From the Protection of Minorities
to the Management of Diversity**

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Means and Methods of Minority Protection
in Modern International Law

Hurst Hannum*

Almost exactly 20 years ago, the CSCE adopted a historic statement on human rights at its meeting on the Human Dimension in Copenhagen. In addition to identifying a broad range of human rights, the Copenhagen Concluding Document articulated a set of minority rights that represented the first substantive attempt to define minority rights since the League of Nations (apart from the minimalist formulation found in article 27 of the Covenant on Civil and Political Rights).

Stimulated by fears that conflicts between minority and majority groups would threaten the newly democratizing countries of eastern and central Europe, the CSCE and Council of Europe adopted, in a very short period of time, a number of normative instruments and mechanisms concerned with minorities. These included creation of the post of CSCE High Commissioner on National Minorities in 1992; adoption of the European Charter for Regional or Minority Languages in the same year; and adoption of the European Framework Convention for the Protection of National Minorities in 1994. Both treaties entered into force in 1998, and today they have 24 and 39 parties, respectively. Both the

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OSCE and Council of Europe also have created a number of programs concerned specifically with the Roma and Sinti.

At roughly the same time, 1992, the UN General Assembly finally adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, after considering it for over a decade. Ironically, the country that introduced the concept of the declaration and that was widely believed to be a paradigm of minority relations - - Yugoslavia -- was by 1992 in the throes of dissolution, a process that continues today. To encourage compliance with the declaration, a Working Group on Minorities was created within the UN Sub-Commission on the Promotion and Protection of Human Rights.

After the UN human rights reform process in 2005-2006, a somewhat weaker Forum on Minority Issues continues as a subsidiary body of the Human Rights Council; the forum serves as an adjunct to the Independent Expert on Minority Issues, a special procedure created in 2005. The Office of the UN High Commissioner for Human Rights also is producing a revised guide to minority rights, which should be available later this year.

Interestingly, none of these instruments is overseen by a court with the authority to issue legally binding judgments (although the European Court of Human Rights does consider cases of alleged discrimination, under article 14 and Protocol No. 12).

In addition, many minority rights are set out in very general

terms, nuanced by phrases such as "where appropriate... shall endeavor to ensure, as far as possible... should consider... due regard..." This does not mean that the undertakings are illusory, but it reflects the concern expressed by the UN General Assembly in 1948, in the same resolution that adopted the Universal Declaration of Human Rights, where the Assembly noted that "it was difficult to adopt a uniform solution for this complex and delicate question" of minorities.

Oversight mechanisms to protect minority rights tend to offer advice, not to determine whether or not these rights have been violated. The advisory committees to the Framework Convention and Language Charter clearly fall into this category, and we will learn more about their efforts tomorrow. The goal of the High Commissioner on National Minorities is not to protect rights per se, but rather to find mutually acceptable solutions and to prevent conflict. This is, of course, no less important than protecting rights, but it is quite a different task.

Similarly, UN mechanisms tend to identify "best practices" that they recommend that states adopt, rather than focussing on the legal nature of protected rights. The Human Rights Committee does adopt a quasi-judicial approach to its consideration of complaints pursuant to the Optional Protocol that raise issues under article 27 of the Covenant, but it and the other treaty bodies tend to adopt a more promotional role in their general comments and their concluding observations on state reports. The

Committee's general comment on Article 27, for example, goes well beyond the text of the Covenant, as it attempts to reflect a contemporary understanding of minority rights, rather than reflect their status in 1966, when the Covenant was adopted.

European and UN institutions have done a relatively impressive job of both norm creation and, to a lesser extent, implementation of minority rights. However, any evaluation of minority protection depends in great degree on the expectations that one has, not only expectations for human rights but for international law generally. There is no doubt that Europeans, and perhaps others, are more aware of minority issues, and the EU accession process has made respect for minority rights a requirement for admission into the EU club. The guide to minority rights that I mentioned earlier is striking in the space it devotes to minority protection in Europe, particularly compared to the much more minimal (or non-existent) regional mechanisms for protecting minority rights in the Western hemisphere, Africa, or Asia.

At the same time, however, majority-minority conflict seems to have increased in many European countries in the past decade.

One need only mention Danish cartoons, riots in French suburbs, burquas, and minarets to be reminded of the tensions that continue to plague countries that pride themselves on being liberal and democratic. While the title of this conference may be read to imply that minority protection already has been

achieved, at least in Europe, such a conclusion would be premature.

In the United States, as well, despite significant progress in the past 40 years in combating racism, de facto segregation of housing by race is still common, and discrimination against those who "look Arab" is a continuing problem. The constant refrain, which is heard not just from those on the far right of the political spectrum, is that "they" are not like "us"; "they" just happen generally to have darker skin or a different religion than the majority population.

The protection of minority rights is thus not yet an accomplishment; it remains a goal. It is important to recognize that we have been only partially successful in protecting minority rights, as we turn to consider the much broader issue of diversity within society.

The title of this conference implicitly poses a number of questions, and, indeed, perhaps a question mark at the end of the title would be appropriate. For example, Are the rights currently recognized adequate to protect all of the minority interests that are worthy of protection? Are existing norms and procedures sufficient to "protect" minority rights? What is the relationship between minority protection and the much larger (and less legalistic) issue of how to "manage" diversity?

This last question raises a myriad of issues that arise from the fact of diversity itself. While it may be beyond the

capacity of this meeting to address them all, they are worth reflection. First, what do we mean by "diversity"? Are we concerned only with the more visible aspects of diversity, in ethnicity, language, clothing, or race? Are all cultures equally worth preserving and protecting, or should the natural selection process of evolution be allowed to determine how they will change and which will survive? In a diverse society, does the majority also have the right to protect its cultural identity, in the same manner as minorities within it are entitled to protect their identity? And, perhaps the ultimate issue, within a state that is ethnically, culturally, religiously, and/or linguistically diverse, is it possible for the population to develop a sufficiently strong sense of solidarity so that a sense of "state community" is able to replace the traditional nationalism that -- implicitly, at least -- rejects diversity in favor of cultural homogeneity?

While I cannot promise to answer all (or even any) of these questions, I would like to devote the remainder of my remarks to the broader issues that they raise and address the issue of the relationship between rights and social policy, not only in Europe but around the world.

In this talk, I have referred for convenience to "minority rights", but it is important to remember that international instruments generally protect the rights of "persons belonging to minorities". This may reflect the individualistic bias of human

rights -- which, by definition, are based on the very fact of our being human, not on the groups to which we may belong. However, it also should remind us that rights are designed to enhance the lives of real people, not abstract groups. Of course, some activities -- cultural, educational, religious, and others -- may be meaningless unless their collective as well as individual exercise is protected. However, this should not be confused with the protection of religions or cultures per se.

I would suggest that the issue of diversity should be viewed from a similar perspective. The diversity that a tolerant society should protect is the diversity that enables individuals to make cultural and other choices with only a minimum degree of societal pressure to conform to majoritarian norms. It should not generally matter to government authorities which language or religion or lifestyle I choose, whether individually or communally.

Such choices are not unlimited, however. Like almost all human rights, individual freedom may be properly limited on grounds such as protection of the rights of others, public order/*ordre public*, and public morality. Cultural practices that discriminate against women or racial groups or religions that may injure children may legitimately be restricted. One of the real breakthroughs in international law since 1945 is that it is now the task of **international** human rights monitoring institutions, like the European Court of Human Rights, to ensure that such

limitations are not imposed disproportionately, but the limitations themselves simply reflect the balance that every society strikes between individual and community interests and rights.

Minority rights do protect the exercise of religion, language, and culture, and their guarantee should ensure a fairly large degree of diversity within society. Limitations cannot interfere to such an extent that the essence of the right itself is undermined. Thus, bans on public behavior that society finds offensive should be imposed with care, but international human rights law does not provide a ready answer to the question of whether bans on miniskirts in Saudi Arabia, burquas in Belgium, or topless bathers in the United States are appropriate. The European Court of Human Rights has consistently stated that it is impossible to identify "a uniform European conception of morals", and the task is almost impossible on a global scale. In addition, of course, it is not the goal of international human rights law to create 192 states in which culture and morality are defined in exactly the same manner.

Where bans are imposed against reasonable manifestations of one's religious or cultural beliefs, however, they are more suspect. Switzerland's referendum on minarets is but the most recent example, and arguments over religious sites are common in the Middle East, south Asia, and elsewhere. Pandering to religious intolerance or discrimination is not a permissible

reason to impose limitations on human rights, and such an attitude should not be confused with legitimate restrictions that reflect a society's deep commitment to, for example, equality of women or concepts of public modesty. (As a parenthetical observation, it is striking that so many of the "disputes" about diversity involve the role and perception of women in society, although minority/majority disputes are certainly not limited to these issues.)

Respect for others is not equivalent to respect for others' beliefs or cultural practices, and many of us probably reject in their entirety the beliefs espoused by certain groups, such as neo-fascists, extreme libertarians, or even Scientologists. However, emphasizing an individual's right to hold and express beliefs may be easier to encourage within society than suggesting that everyone must respect beliefs and cultures that they find personally repugnant or have simply decided not to adopt. Developing "a new ethic of responsible intercultural relations", as recently proposed by the Venice Commission in a new publication on blasphemy, insult and hatred, may ask too much. Emphasizing respect for the rights of individuals, on the other hand, may provide a reasonable foundation on which to build peaceful co-existence, social inclusion, and tolerance for other beliefs.

There is another, even more difficult, aspect of minority rights and diversity that we also need to address. Today, human

rights norms protect not only minority identity, but they also call for the "effective participation" by members of minorities in political and economic affairs. Thus, there is increasing emphasis on ensuring that minority voices are heard, not just tolerated, within the dominant society. Indeed, the goal is often not just to ensure that minority voices are heard, but to guarantee that minorities are entitled to some form of representation in the political system.

Unfortunately, guaranteed minority representation at various levels of government may simply entrench ethnic or religious identities rather than promote tolerance or participation. While there are some exceptions, the consociational and similar political theories that exalt representativeness over democracy just don't seem to work very well. Managing diversity through the representation of relevant groups within a state used to be exemplified by Yugoslavia, Cyprus, and Lebanon, yet policy-makers appear not to have learned very much from the demise of the first and the continuing problems of the second and third. As the European Court of Human Rights stated clearly in last year's judgment in *Sejdic and Finci v. Bosnia and Herzegovina*, privileging some groups (as through the granting of special rights to the three "constituent peoples" of Bosnia) may result in discriminating against others.

[W]here a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be

interpreted as strictly as possible.... [N]o difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures."

[para. 23]

These words highlight the difficulty of promoting meaningful diversity without improperly trampling on the rights of individuals. When elections become little more than an ethnic census, the resulting diversity is likely to be hollow.

Just prior to the historic CSCE meeting in 1990 that I referred to at the beginning, I published a book that argued in favor of recognizing a collective right to autonomy or self-governance, in order to reconcile competing claims of self-determination and territorial sovereignty. At that time, human rights were almost exclusively understood in individualistic terms, which failed to address the pressing concerns of minorities and indigenous peoples around the world.

Today, however, the increasing emphasis on diversity and communities is perversely contributing to a reassertion of 19th-century nationalism, on the part of both "old" and "new" minorities, as well as majorities. Not all of these movements are secessionist or violent, but many are characterized by an aggressive assertion of identity, often accompanied by demands for guaranteed political power.

I am not implying that we do not need to continue to battle against racism and discrimination against "unpopular" or marginalized groups -- we do. Discrimination in Europe against Muslims, Roma, and immigrants is problematic; discrimination against Afro-descendants remains widespread in the Western Hemisphere; despite official bans, discrimination based on caste and status is rife in south Asia; and much of Africa remains in the thrall of ethnic and religious conflicts, some of which serve as proxies for greed and corruption. Thus, the fight for minority rights, properly understood, must remain at the forefront of international human rights efforts.

At the same time, the so-called "international community" should not pretend that international norms offer much guidance on the "management of diversity" that is the subject of this conference. Social and political engineering must arise out of the domestic context, and outside interveners often have a short-term perspective. Viewed from any perspective, for example, the 20-year disintegration of Yugoslavia has been a disaster, and it is difficult to identify any principle of either minority rights or diversity management that was applied consistently. We also should remember that "the West" is not the world, and European or American approaches to diversity management may not be particularly relevant outside Europe and the Western Hemisphere.

So, what do we conclude about the direction of minority protection and management of diversity? Let me suggest four principles:

First, the norms of minority protection that have been articulated in the past two decades form an essential part of international human rights law. However, like human rights law in general, they are not designed to resolve every political, social, or economic ill, and their enforcement requires attention to their limits as well as to their protective aspects.

Second, minority protection should remain focused on the individual, acting in community with others, rather than on attempts to achieve harmony among groups within society. The latter is an important goal, but it is more likely to be achieved through education, persuasion, and example, rather than through the imposition of global human rights norms.

Third, diversity has its limits. None of us would be pleased to see the world divided into hundreds of culturally or religiously homogeneous statelets, but the end of the cold war brought neither the end of history nor the end of nationalism. Solutions that artificially preserve borders or impose indefinite complex power-sharing arrangements on unwilling parties in the name of preserving diversity are unlikely to be sustainable. Within societies, the degree to which diversity is encouraged is a philosophical or political choice. Domestic "management" of

diversity will vary from state to state, which is permissible so long as universal human and minority rights are protected.

Finally, the focus on diversity within a state should not become an excuse to ignore the serious problems facing marginalized segments of the population. Members of national minorities are not the only ones who suffer from social and economic exclusion (although they do tend to suffer disproportionately more), and public policies designed to improve the life of all members of society may be more effective than those targeted solely at certain groups.

The protection of minorities and the management of diversity are essential to the smooth functioning of any society, but they are not the same. Rights, by their very nature, are more fundamental and universal than social policies, and only when human rights are respected are societies likely to benefit from the full participation of all segments of society.

Europe is fortunate in that it is beginning to move from the protection of the rights of minorities as part of a diverse and inclusive society. Achieving sustainable diversity without fracturing the underlying consensus on which any society must be based is a daunting task, however, and the European experiment in managing diversity will be watched closely by the rest of the world. I wish you success.