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Non-Discrimination and Equality in the Right of Political Participation for Minorities

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Non-discrimination in the right of political participation is essential for the protection of the interests of all minority groups – both minorities by force and minorities by will. This article considers some of the measures necessary to ensure effective participation by minorities in the deliberative and decision-making processes of the democratic state. For minorities by will, what the author calls ethno-cultural minorities, the right of political participation, within a deliberative understanding of democratic government, also implies the need to introduce special measures, including where necessary the introduction of autonomy regimes, to protect and promote the minority culture. The author then goes on to examine this proposition in the second half of the article, paying particular attention to the provisions set out in the 'Lund Recommendations' on Effective Participation of National Minorities in Public Life.

I. Introduction

There is no general obligation for the state to introduce democracy in international law.¹ Democracy is though an implicit requirement for signatories of the International Covenant on Civil and Political Rights (1966),² and in Europe there is a clear commitment by all states to democratic forms of government.³ The form of democracy that emerges from the human rights instrument is liberal in character, in that democracy is defined and structured within the limits established by individual human rights norms. In a liberal democracy, the individual is of central concern. The state

1 The basis of the emerging 'right to democratic government' is the internal aspect of the right to self-determination, and the human rights to freedom of political activity and to free and fair elections: Franck, "The Emerging Right to Democratic Governance", 86 AJIL (1992) 46, 52. See, Wheatley, "Democracy in International Law: A European Perspective", 51 ICLQ (2002) 225, 227-235.

2 Those states who have ratified the ICCPR are committed to respect the right of their peoples to democratic government contained in Articles 1 (self-determination), 19 (freedom of expression), 22 (freedom of association), and 25 (right to free elections).

3 The Treaty on European Union 1992 provides in Article 6 (1), that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member states"; the Council of Europe's Court on Human Rights has concluded that democracy ... appears to be the only political model contemplated by the [European Convention on Human Rights] and, accordingly, the only one compatible with it" (*United Communist Party of Turkey and others v Turkey*, Reports 1998-I, at para. 45) and the participating states of the Organization for Security and Cooperation in Europe have agreed to "build, consolidate and strengthen democracy as the only system of government of our nations", and to "co-operate and support each other with the aim of making democratic gains irreversible" (CSCE Charter of Paris for a New Europe (1990) 30 ILM 190 (1991)).

must justify interferences in individual liberty, and must protect the individual from interferences by others. The regime on minority rights, as part of a wider human rights regime, recognizes that membership of a minority group is a matter of personal choice⁴ – a person may not be ascribed to a minority group against their will. Individuals not groups are the basic unit in the human rights regime. Democracy in the liberal, human rights, sense cannot be constructed by accommodating bargains concluded between those who claim to represent different groups in the population. That said, restrictions on individual liberty are permissible for the protection of the rights of others, in the interests of the wider society and to protect the cultural security of minority groups.⁵ Any restriction must be proportionate to the aim pursued.⁶ Liberalism in this sense is not to be equated with the economic liberalism that supports the unfettered free market, or the social liberalism of the progressive left. Nor does it conceive of an atomized individual, seeking to form their own beliefs on all issues, isolated from the values of the community in which they were brought up, or now reside. Liberalism rests on the idea that individuals within a polity may be governed only by institutions that can be justified to reasonable persons. That justification must take into account the different identities of the individuals concerned. In a democracy, the legitimacy of government rule depends upon the will of all the people to their being governed by those in power. Sovereignty lies with the people, who rule on a basis of political equality (Held 1996: 1, Crawford 1994: 4).

In a democracy, policies and regulations should be determined by a majority of concerned citizens. The justification for this in liberal democratic thought is not clear. According to John Locke, the majority have the right to determine policy, as it is necessary that the body should “move that way whither the greater force carries it”. Locke (1964: II 96, at 350). The only alternative would be the consent of each individual, but “such consent is next impossible ever to be had” (*ibid.*). For minorities,

4 See, Article 3(1), Framework Convention on National Minorities: “Every 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”.

5 See *Kitok v Sweden*, No. 197/1985, UN Doc. CCPR/C/33/D/197/1985, 10 August 1988, paras. 9.7 and 9.8.

6 *Lovelace v Canada*, No. 24/1977, UN Doc. CCPR/C/13/D/24/1977, 30 July 1981, para. 17: “it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe”.

the legitimacy of majority rule is problematic. Human rights norms limit the application of majority rule. The prohibition against torture exists even in the face of a democratically expressed will for its use. International minority rights norms, beyond those on non-discrimination and provisions already contained in human rights instruments, are insufficiently prescriptive to provide grounds for challenging state policies before judicial bodies. The language of the UN Declaration is opaque and often exhortatory (see, for example, Art. 4(3)),⁷ the relevant clauses of the Framework Convention struck through with conditional clauses and vague formulations (see, Art. 10(2)).⁸ Where minorities are excluded from the decision-making process they may challenge the legitimacy of majority decision. This may be particularly important for what Thornberry refers to as ‘minorities by force’ (1991: 9-10) and Packer as ‘negative associations’, following Wiessner, who talks about ‘non-organic (or involuntary) associations’.⁹ These groups are created by outside designation, invariably for negative purposes. An example would include the African-American population of the United States. Democratic norms do not permit such persons to be excluded from the democratic process.

The principle of non-discrimination in the right of political participation is central to liberal democratic thought. Citizens who are members of an ethno-cultural, national or any other type of minority group enjoy an equal right of political participation with all other members of the polity. The point is made clear in the International Covenant and the European Convention on Human Rights. Article 25, of the ICCPR provides that the right of political participation is to be enjoyed without discrimination, *inter alia*, on grounds of race, language, national origin or other status.¹⁰ Article 3 of the

7 “States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.”

8 “In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities”.

9 Packer (1999) 254. S. Wiessner, “Faces of Vulnerability”, in G. Alfredsson and P. Macalister (eds) *The Living Law of Nations* (1996) 221.

10 Article 25 provides three distinct rights: 1) to take part in the conduct of public affairs, directly or through freely chosen representatives; 2) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and 3) to have access on general terms of equality, to public services in his country. See, also, Article 23(1), American Convention on Human Rights (1969); Article 13(1), African Charter on Human and Peoples’ Rights (1981).

first Protocol of the European Convention on Human Rights (P1-3)¹¹ may be invoked in conjunction with the non-discrimination article.¹² This point is reiterated in the UN Declaration on Minorities, and in Article 15 of the Framework Convention on National Minorities.¹³ Inclusion is also important for those groups Thornberry refers to as ‘minorities by will’ (1991: 9-10) or ‘positive/organic (or voluntary) associations’ (Packer 1999: 254). These consist of a group of persons, predominantly of common descent, who think of themselves as possessing a distinct cultural identity (which includes religion and language differences) and who evidence a desire to transmit this to succeeding generations. These ‘ethno-cultural’ minorities raise the same questions as minorities by force (i.e. those of inclusion) and different ones. Such groups are defined by their real not imagined differences to the majority population/culture. In one sense, they are defined by the claims that individuals from those groups make for special treatment in the face of a dominant majority culture. When issues are being considered that impact directly on the cultural identity of majority and minority groups, on issues such as work rest days, the use of public languages, funding of particular activities associated with one or another culture, then it cannot be acceptable for ethno-cultural minorities to find themselves constantly outvoted by the majority population.

This article considers first the question of inclusion for all minority groups, before examining demands by ethno-cultural minorities for exemption from the application of adopted norms. For members of ethno-cultural minorities, the right of political participation means more than the right to seek to influence the outcome of a process designed to aggregate individual preferences to find a decision acceptable to a

¹¹ P1-3 provides: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. It contains an implicit recognition of an individual right to “equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election” (Case of Mathieu-Mohin and Clerfayt (1987) Series A No. 113, para 54).

¹² “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... race, colour, language, religion ... national or social origin, association with a national minority, birth or other status”, Article 14, ECHR.

¹³ Article 2(2), UN Declaration on Minorities (1992): “Persons belonging to minorities have the right to participate effectively in ... public life”; Article 15, Framework Convention on National Minorities: “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”. See, also, the CSCE Copenhagen Document which provides that “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” (1990) 29 ILM 1318, para. 35.

majority of citizens. This is clear from the ‘Lund Recommendations’ on Effective Participation of National Minorities in Public Life (1999).¹⁴ Recommendation 1 provides:

participation of national minorities in public life is an essential component of a peaceful and democratic society. Experience in Europe and elsewhere has shown that, in order to promote such participation, governments often need to establish specific arrangements for national minorities. These 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.

This, John Packer describes as their “immediate and ultimate aim”, with the remaining Recommendations essentially showing what to do, including various options, and how to achieve the stated aim. They concern both the issue of participation in decision-making (“having a say”) and that of self-governance for minorities (“having control”) (2000: 40).

II. “Having a Say”

Elections provide the clearest expression of the will of the people.¹⁵ No democracy can discern the popular will in the absence of free and fair elections. The role of the citizen, however, extends beyond the right to vote in free and fair elections to determine who will hold power (cf. Schumpeter 1976: 284-5). All citizens have the right to participate in political deliberation and activity as the society seeks to determine the answers to the political questions of the day. No one has a monopoly on truth, and dissenting voices have a right to be heard in the process of devising those laws by which all in the community must live (Canadian Supreme Court [1998] 2 S.C.R. *Reference re Secession of Quebec* 217, para. 68). Individuals may not be excluded because they are members of minority groups nor because they propose particular measures. In both *United*

14 Whilst the work is that of a body of independent experts, the Recommendations are rooted in existing commitments, both legal and political, of OSCE states, and have been described as an “authoritative interpretation of the relevant international standards” on political participation and minorities (Packer 2000: 41).

15 Art. 21(3) of the Universal Declaration on Human Rights: “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections ...”: General Assembly Resolution 217A (III) 1948

Communist Party of Turkey and others and *Socialist Party and others*, the European Court of Human Rights determined that political parties in Turkey could not be proscribed because they advocated autonomy for the Kurdish population within a federal state. The Court concluded:

[T]he fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised.... (*Socialist Party and others v Turkey*, Reports 1998-III para. 47; see also *United Communist Party of Turkey and others v Turkey*, Reports 1998-I, paras. 55-7).

Likewise, in *Stankov v Bulgaria*, the Court determined that the fact that a group calls for autonomy or even requests secession of part of the country's territory cannot automatically justify a prohibition of its assemblies (Judgment of 2 October 2001, para. 97). Other than measures to promote a more effective democracy,¹⁶ or to protect the democratic order itself, the state should not interfere with political activity and debate.¹⁷ Indeed a healthy democracy should facilitate debate, creating means of communication between political parties and marginalized groups, and access to national political debate by marginal or minority viewpoints.

The importance of elections has already been noted. No citizens may be unreasonably excluded from the electoral process. The human rights instruments recognize limited ground for excluding individuals from the right to vote or to stand as a candidate, for example, in the case of minors and convicted criminals. Membership of a minority group can never constitute reasonable grounds for exclusion. Individuals from minority groups expressing intolerant or anti-democratic positions may be excluded on the basis of their political opinions, but not their identity. Certain restrictions, although on the face of things objective and reasonable,

16 Restriction on the right to participate in political debate and activity may be justified to protect the rights of others – the electorate – to an effective political democracy: *Ahmed and others v United Kingdom*, Reports 1998-VI, at para. 54.

17 Political debate may only be limited where it does harm to democracy itself (*Socialist Party and others v Turkey*, ECHR, Reports 1998-III, para. 47). Thus a political party may campaign for a change in the law on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles: *Refah Partisi and others v. Turkey*, ECHR judgment of 31 July 2001, para. 47.

can disproportionately affect the right of minorities to political participation. For nomadic minorities residence requirements may cause difficulties. Other problematic criteria include citizenship and language restrictions. Rights of political participation, unlike other human rights, are granted only to citizens. Where, as in parts of the former Soviet Union, individuals are excluded from citizenship by the application of restrictive, ethnically based, criteria for citizenship or the use of language tests, this has the effect of disenfranchising large sections of the permanent population who are nevertheless subject to the adopted laws.

In a multilingual polity, regulations on the use of official or working language(s) in public life can act to exclude members of minorities. The right to freedom of expression protects the right to use of the minority languages to discuss political questions in the public sphere. The abilities of a candidate to function effectively as a representative are not normally grounds for his or her exclusion from the electoral process. Numerous, though not enough, representatives in national parliaments are visually, aurally or orally impaired. The provision of facilities to ensure that the candidate can participate in parliamentary debates and activities is a separate question, involving practical and economic considerations. Yet human rights bodies have not been willing to determine that language requirements for candidates are in themselves a violation of the right to political participation. In *Ignatane v Latvia* (No. 884/1999, decision 31 July 2001) and *Podkolzina v. Latvia* (Judgment of 9 April 2002), the Human Rights Committee and the European Court of Human Rights determined a violation respectively of Article 25, ICCPR and P1-3, ECHR. The individuals concerned were removed from the list of candidates for election after it was decided they did not possess the required minimum official language qualification. Both decisions turned on procedural questions and did not concern the central issue as to whether such restrictions are themselves compatible with the right to political participation. The choice of working language for a national parliament is one for the state. Candidates may not be prevented from standing on account of their linguistic, religious or cultural identity. They should not be prevented from standing because they do not have the required language skills of the official or working languages of the national parliament. It is for the electorate to determine their choice of representative.

In most cases the will of the people will be divided, and this must be reflected in the outcome of any election. Each vote must count equally, but there is no requirement that each vote should have equal effect in the determination of the outcome of political power. Electoral systems must both reflect fairly faithfully the opinions of the people, and channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will (see *Case of Mathieu-Mohin and Clerfayt* (1987) Series A No. 113, para. 54). Elections must produce a government with a popular mandate to rule and ensure that no significant interests, preferences and identities are excluded from representation. The legislative body is not simply charged with passing government legislation but with examining and considering proposed action. Democracy, according to the Inter-Parliamentary Union's (IPU) Universal Declaration on Democracy, requires the existence of a parliament in which “all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action”.¹⁸

Whilst the presumption must be for equal voting weights and for an equal number of voters in each constituency, the electoral system may deviate from this to facilitate a more representative legislative body. Where members of minorities are not represented, the state must consider the introduction of measures to facilitate representation. Where this may be achieved by the removal of barriers to participation that is to be preferred. Where not, positive measures should be introduced. A report by the *European Commission for Democracy Through Law* (Venice Commission) concluded that a fairer representation of minorities results not so much from the application of rules peculiar to minorities, as from the implementation of general rules on electoral law, albeit adjusted, where required, to increase the chances of success by candidates from minority groups (2000: 4). Where minorities are concentrated territorially, single-member districts may provide sufficient minority representation. In other cases, proportional representation systems, where a political party's share in the national vote is reflected in its share of the legislative seats; some forms of preference voting, where voters rank candidates in order of choice; or lower numerical thresholds

¹⁸ Inter-Parliamentary Union's Universal Declaration on Democracy: www.ipu.org. Adopted without a vote by the Inter-Parliamentary Council at its 161st session (Cairo, 16 September 1997), reprinted 1 Netherlands Quarterly of Human Rights (2000) 127 para. 11. The IPU, established in 1889, is the world organization of parliaments of sovereign states. Over a hundred national parliaments are currently members.

for representation in the legislature may enhance the inclusion of national minorities in governance (Lund Recommendation ('LR') 9). These issues are considered in more detail in an OSCE/ODIHR publication, *Guidelines to Assist National Minority Participation in the Electoral Process* (2001: 17-26).

Parliament is an important forum for deliberation and decision-making. It is not the only one within the state. Decisions are made in Ministries, local government and by quasi-governmental organizations. It is important that the interests and preferences of citizens from minority groups are represented at all levels of government decision-making. This requires as a minimum that the state consult with members of minorities before measures are adopted that might impact upon the cultural security of the group. The importance of consultation is reflected in the UN Declaration on Minorities (Art. 2(3)) and in the Framework Convention on National Minorities (Art. 15). International human rights bodies demonstrate a particular concern that the principle of deliberative inclusion has been given effect, and that a majority decision has resulted from reasoned public debate and not the simple aggregation of preferences and interests.¹⁹ The Lund Recommendations commend the establishment of formal advisory or consultative bodies to facilitate effective communication (LR 12). Such bodies, they argue, 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 (LR 13). The right of inclusion in the process of deliberation and decision-making is clearly important for minorities. If democracy is conceived as a process to determine where a majority lies on a particular issue, then participation, particularly for minorities by will/ethno-cultural minorities will provide insufficient protection for their interests. The next section considers arguments that ethno-cultural minorities should be exempted from the application of majority rule and considers the justification for such an exemption.

19 See, *Länsman et al. v Finland* (No. 2), HRC, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995, 22 November 1996, para. 10.5; *Mahuika et al v New Zealand*, HRC, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993, 15 November 2000, para. 9.8; *Hopu and Bessert v France*, HRC, Communication No. 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997, para. 10.3.

III. “Having control”

No right of autonomy exists for minorities or peoples under international law. With notable exceptions autonomy has not featured in the international instruments on minority rights.²⁰ Those groups who constitute a ‘people’ within the state, possessing the right to self-determination,²¹ have the right to have their distinct character reflected in the institutions of government under which they live (Brownlie 1988: 5). They do not have the right to autonomy. It might be a good idea, “but it does not flow freely from the sources of international law as an obligation on States” (Thornberry 2000: 56). A demand for autonomy by an ethno-cultural group constitutes a political claim for recognition of the moral right to self-governance. It is a controversial idea in a democracy. If a majority of political equal citizens have agreed to the introduction of a specific measure, and if it is accepted that it does not constitute an unreasonable interference in individual liberty, then those opposed must accept the decision. Individuals are not permitted to exempt themselves from the application of laws that they did not support. Claims for autonomy for minorities require recognition that, on certain issues, members of language, religious or cultural minorities have the right to both participate in the formulation of general laws, and to be to be exempted from them. For Packer, the recognition of regimes of autonomy as one aspect of political participation follows from the idea of, what he calls, ‘good governance’:

[T]he notion of good governance may be summarised in the idea that the government reflect the ‘will of the people’ – meaning the whole population so

20 Those exceptions are the Draft Declaration on the Rights of Indigenous Peoples, the Council of Europe’s Parliamentary Assembly’s Recommendation 1201, and the OSCE Copenhagen Document. The latter simply notes that one of the possible means to protect and promote minority cultures is the introduction of “appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned”. See, also, “Various concepts of autonomy as well as other approaches outlined in the above-mentioned documents, which are in line with OSCE principles, constitute ways to preserve and promote the ethnic, cultural, linguistic and religious identity of national minorities within an existing State”: OSCE Charter For European Security, Istanbul, November 1999, 39 ILM 255 (2000), para. 19. Article 11, of Recommendation 1201: “In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the State”. The proposed minority rights protocol to the ECHR was rejected by the Heads of State and Government of the Council of Europe.

21 Consider, for example, the determination of the Canadian Supreme Court in *Reference re Secession of Quebec* [1998]: “It is clear that ‘a people’ may include only a portion of the population of an existing state”: [1998] 2 S.C.R. *Reference re Secession of Quebec* 217, para. 124.

far as practicable. In this regard, majority decision-making may be viewed as the default position where ... the will of the people is divided. Good governance, therefore, requires that steps be taken so far as practicable to accommodate the minority will(s) in an effort to respond to the whole population (2000: 39).

Self-governance rights for minorities flow from a recognition of the political equality of all citizens in a polity. This argument makes little sense where democratic government is conceived of as a mechanism for aggregating the preferences of equal citizens to determine the majority. In contrast, if the deliberative understanding of democracy, developed by Habermas in *Between Facts and Norms* (1996) and a number of other influential writers,²² is accepted, then recognition of the legitimacy of autonomy regimes of ethno-cultural minorities becomes possible. The deliberative model of democracy accepts that each citizen has a genuinely equal share in the exercise of power. The requirements of a deliberative system of democratic decision-making are as follows:

the equal and uncoerced participation of all All issues have to be open to question; all opinions voiced in conditions of equality and free from domination. Decision processes have to be conditioned by the desire of participants to reach agreement in the absence of coercion or threat of coercion. To this end each has to put forward reasons that others could reasonably accept, and seek acceptance for their reasons, and reject proposals on the basis that insufficiently good reasons have been offered for them: the requirement of public reason. The only influence thus exercised is the force of the better argument (Black 2000: 609).

The cardinal features of the deliberative model are political equality, participation (i.e. inclusion) and consensus. Legitimate policies emerge through a process of rational deliberation between equal participants who must agree on what should be done. The importance of deliberation as a good in political decision-making is recognized in the Lund Recommendations, which talk of the need to ensure that minorities have an 'effective voice' at the level of the central government (LR 6). Equally, the Flensburg Proposals, drawn up by a group of international experts, speak of the need to provide mechanisms to increase the opportunities for minorities to "make themselves heard" (para. 5). Both argue for the establishment of advisory or consultative bodies to serve

22 In addition to the work cited in this article, see, the collection of essays in S. Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* (1996); and J. Bohman and W. Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (1997). Also J. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (2002); and Oquendo, "Deliberative Democracy in Habermas and Nino", 22 OJLS (2002).

as “channels for dialogue” to ensure the “effective communication” of minority interests (Flensburg Proposal 8 and LR 12). Both recognize that a key feature of democratic government is deliberation between interested parties. The system of government may be designed to facilitate the inclusion of minorities in decision-making bodies, including as members of the government.

There are a number of examples of minority parties forming part of a governing coalition. The extent to which this model of deliberative model of democracy is compatible with consociational democracy is beyond the scope of this work. Whilst, a consociational system of government violates the principle of majority rule, it does not, according to Lijphart, “deviate very much from normative democratic theory” (Lijphart, 1969: 214). The deliberative model of democracy does not accept the majoritarian concept of democracy, but requires democratic government to facilitate, as far as possible, the emergence of a consensus, amongst all concerned citizens, as to what is to be done. What Lijphart calls self-determined consociationalism, where the political system is structured to encourage the emergence of power-sharing arrangements (but they are neither required nor prescribed by the constitution) is probably not incompatible with a deliberative conception of democracy (Lijphart, 1995: 280).

The ideal, hypothetical, model of deliberative democracy assumes that individuals will be willing to change positions they have initially adopted where faced with a better, more compelling, argument. Given sufficient time and goodwill on the part of all concerned, a consensus on what is to be done should always be possible. In the real world, there will seldom be sufficient time and goodwill. As a non-decision amounts to an implicit one in favour of the status quo, there must be a positive decision from the participants. If, following reasoned public debate, a majority determine that *A* is the right thing to do, then there is a presumption that this conclusion is rational and legitimate (Benhabib 1996: 72). This is the justification for majority rule in a democracy. On certain issues involving ethno-cultural minorities this legitimacy basis of majority rule is not present. Where it is agreed that a uniform rule is required, individuals from the majority and minority cultural groups will not be capable of reaching a rational consensus, irrespective of the amount of time and goodwill devoted to a particular issue. On questions on the name of the state, the design of its flag, the choice of national anthem, designation of public holidays, use of public

languages and questions of education policy both sides will argue for their preferences to be accepted – because these issues are central to their distinctive identity. The fact that a majority agree on policy choice *A* cannot create a presumption of rationality and legitimacy. The respective communities must agree to recognize their differences and similarities, and reach an agreement that accommodates the differences in appropriate institutions and similarities in shared ones (Tully 1995: 131). Preference should be given to those arrangements that accommodate diversity in shared institutions. Measures may be introduced to guarantee the cultural security of the group. These might include the funding of minority cultural activity, the licensing of a minority television or radio channel, or the recognition of minority language as one of the official or working languages of the state.

The Lund Recommendations conclude that effective participation of minorities in public life involves not only a right to a say in decision-making, but in certain circumstances, the establishment of “non-territorial or territorial arrangements of self-governance or a combination thereof” (LR 14). The Recommendations continue: “It is essential to the success of such arrangements that governmental authorities and minorities recognize the need for central and uniform decisions in some areas of governance together with the advantages of diversity in others” (LR 15). Self-governance, or autonomy, regimes create a space within which an individual or group may be self-determining, free from government interference. They may be personal, cultural or territorial in nature. Personal (sometimes individual) autonomy provides, for members of minority groups only, a right to be exempted from the application of general laws. In the United Kingdom, members of the Sikh community are exempt from the legal requirement to wear crash helmets whilst riding motorcycles. Cultural autonomy concerns self-governance arrangements which provide the minority group control over specific aspects of life, but within a territory over which the minority group does not enjoy legislative or regulatory autonomy. The government might recognize the right of a minority group to determine elements of the curriculum for those schools where a majority of students identify themselves with the minority group. According to the Lund Recommendations, “the issues most susceptible to cultural autonomy arrangements are education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities” (LR 18).

Demands for individual or cultural autonomy are often less threatening to the state than claims for territorial autonomy and for the transfer of power and authority from the central government. Such claims are often strongly resisted by the state which fears for its territorial integrity. The Lund Recommendations note that all democracies have arrangements for governance at different territorial levels (LR 19). Localized government allows decision-making to be more responsive, less remote, and to enjoy a greater degree of participation and sense of ownership by the local population, thus giving the decision a greater degree of legitimacy. Appropriate functions that may be devolved include education, culture, use of minority language, environment, local planning, natural resources, economic development, local policing functions, and housing, health, and other social services (LR 20). Autonomy (self-governance) arrangements are introduced in response to the heterogeneous nature of the population. It is the devolution of authority to those parts of the population that conceive of themselves as distinct from the majority population. There must, after all, be a ‘self’ to which the self-governance regime may be applied. The Lund Recommendations call for the establishment of autonomous administrations that correspond to the specific historical and territorial circumstances of national minorities (LR 20), and for asymmetrical devolution to respond to different minority situations (LR 15). Their purpose is to “improve the opportunities of minorities to exercise authority over matters affecting them” (LR 19). Such arrangements do not involve the transfer of authority from democratically elected national governments to unaccountable local elites. Any autonomy arrangement must respect the human rights of all those citizens within their jurisdiction (LR 3), and be “based on democratic principles to ensure that they genuinely reflect the views of the affected population” (LR 16).

Kymlicka has argued that territorial autonomy is the most effective way of accommodating sub-state nations, what he terms, ‘national minorities’ i.e. groups that formed complete and functioning societies on their historic homeland prior to being incorporated into a larger state (Kymlicka 2001: 23). Territorial autonomy allows these groups to engage in a competing process of nation-building so as to protect their societal culture in their traditional territory (*ibid.* 25). Immigrant communities are excluded from consideration. They are too small and territorially dispersed to hope to create a viable societal culture (*ibid.* 30). Political accommodation requires agreement

between certain groups, defined by their historical relationship to the territory, on the degree and nature of territorial autonomy. In Canada, the political settlement must accommodate three distinct identities: the dominant Anglo-Canadian identity; the French-Canadian identity; and the plurality of identities of the various truly indigenous groups. All other immigrant groups, and their descendants, are required to accommodate themselves to the dominant (Anglo-Canadian) identity, except in Quebec where they must accommodate themselves to the French-Canadian identity. Members of the three recognized identity groups are privileged over those of all other groups, who constitute in excess of one-quarter of the population, making nonsense of any claim of political equality for all citizens. In Bosnia-Herzegovina, Bosniacs, Serbs and Croats are considered the ‘constituent peoples’ of the state. Other groups are ‘merely’ minorities. As Packer notes, such distinctions, normally on the basis of ‘new’ versus ‘old’ minorities, when applied between equal citizens constitutes simply an act of discrimination (Packer 1999: 264). Political equality is a core democratic principle. It demands the recognition of the equality of individuals, not groups. Difference is accommodated by recognizing that members of ethno-cultural minorities may not be subject to a simple application of majority rule on issues central to their distinct (linguistic, religious or cultural) identity. Experience has shown that members of minority groups – citizens of the state – that have been formed through the process of recent migration patterns are more likely to assimilate into the dominant culture than long-established minority cultures, but they cannot be required to do so.²³ Territorial autonomy is unlikely to be demanded by such groups, but claims for individual and cultural autonomy are increasingly made. To exclude such groups from any consideration of self-governing arrangements is both illogical and unjust.

IV. Conclusion

The heterogeneous state must find a way of accommodating the differences that exist amongst its population without violating the right of minority groups to cultural

23 This is made clear by Article 27, ICCPR. The Human Rights Committee has indicated that Article 27, ICCPR would cover recent immigrant groups, and even non-citizens, nor those even permanent residents: Human Rights Committee General Comment 25 (57) on Article 27, ICCPR, adopted by the Committee at its 1510th Meeting, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), paras. 5.1 and 5.2.

security, or paralysing its ability to govern. It is a difficult balance, with failure having severe destabilizing effects. One of the advantages of democratic institutions is their ability to channel competing interests into arenas of discourse, leading to compromises that can be respected by all, thus avoiding the need of any participants for recourse to violence. The fear of minorities has always been that of a tyranny of majority rule. This is possible if democracy is conceived as an aggregative model of government. It is not possible under an effective deliberative model of democracy. It has been argued that deliberative democracy is not simply an additional theoretical model, but one that elucidates some aspects of the logic of democratic practices better than others, albeit in imperfect form (Benhabib, 1996: 84). It is a model which finds implicit recognition in the judgements of national constitutional courts and international human rights bodies and one which sits more easily with the principle of equality and with the internal aspect of the right to self-determination, which requires that the government of a state be representative of all the people, not simply a majority. Deliberation is conducted by equal citizens. The fact that a majority determine that a particular policy is to be preferred does not *a priori* make it acceptable. Democracy is not the will of the majority *simpliciter*. No state may discriminate as to the right of political participation between citizens. The democratic state is required to be as inclusive as possible in deliberations on the political questions of the day. It should, in principle, seek agreement from all reasonable persons as to what should be done. Where majority decisions produce complaints about interferences in individual liberty the state must be able to give reasons for its actions and show that those reasons are sufficient to justify the interference. This principle applies to all citizens and is the basis of any human rights regime. In relation to ethno-cultural minorities a further consideration comes into play.

Where the interference is on a subject that individuals from a minority could not reasonably accept, because of their distinctive cultural values, the state must demonstrate that it has considered introducing special measures to mitigate the impact on such groups. These may be in measures to improve the group's cultural security or regimes of autonomy where relevant. Where not introduced, the state must provide reasons and show that such reasons were sufficient to justify its lack of action. Arguments for the introduction of territorial autonomy would be restricted to circumstances where the minority group is large and territorially concentrated, and

where the differences between the majority and minority cultures are significant. They should enjoy the support of both the minority population and the other citizens of the state. The value of a deliberative understanding of democracy for minorities is not that it necessarily affords them a share of political power but that it requires them to be recognized as equal, albeit culturally distinct, members of the polity with a right to be included in the decision-making process and to a right of self-governance in circumstances where the dominant culture would otherwise conflict with their own.

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