

Minority Rights and the Role of Law: Reflections on Themes of Discourse in Kymlicka's Approach to Ethnocultural Identity

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Minority Rights and the Role of Law: Reflections on Themes of Discourse in Kymlicka's Approach to Ethnocultural Identity

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This paper discusses the international legal dimension to Kymlicka's theory of ethnocultural diversity and the prospects for achieving consensus on a stronger set of justice-based international norms on minority rights. Besides addressing specific human rights issues on their own terms, the author argues that the impact of Western experiences in addressing minority questions, while of considerable importance to locally-generated minority protection strategies in the East, may prove more limited in generating a credible set of generally-binding regimes rooted in considerations of justice than is expected. Minority rights standards, it is contended, have so far been perceived – by both East and West – primarily as security tools. This raises not only the problem of how best to strengthen minority rights as part of human rights law, but also the need to clarify the ultimate vision of minority rights law itself.

I. Introduction

Will Kymlicka's line of reasoning on ethnocultural diversity and minority rights as articulated in his *Multiculturalism and Minority Rights: West and East* (2002) and, more extensively, *Can Liberal Pluralism be Exported?* (2001) is thought-provoking in many respects. It cuts across the entire spectrum of ethnic relations, ranging from issues of national minorities to several matters regarding the treatment of other ethnocultural groups, and discusses the possible implications for Eastern Europe of the way in which the West has addressed and pursued strategies of group accommodation so far.

While written by a political philosopher and mostly intended to stimulate discussion among political theorists, Kymlicka's assessment offers enough ground – I believe – for some reflections on ethnocultural diversity from the perspective of human rights law. Far from embarking on a comprehensive critique of such an overarching assessment, the following short comments will instead point to particular aspects of Kymlicka's approach to national minorities which relate directly or indirectly to contemporary international minority law-making.

II. The West and National Minorities: What Models?

A fundamental starting point in Kymlicka's analysis is that there already exist a number of models in Western democracies which illustrate how best to protect national minorities and, consequently, what rights best meet their needs and demands. In fact, there can be little doubt that such countries

in the West as Finland, Italy, Germany, Belgium, Canada, and so on, have long institutionalized the accommodation of *certain* minority groups and that this has proved workable and effective in many ways. Focusing on territorially-concentrated minorities, Kymlicka refers to regional autonomy and official language rights as some of the typical components of such domestic responses, combined with additional guarantees in the case of indigenous peoples such as the Indians of Canada or the Maori of New Zealand.¹ In other words, despite the fact that the rhetoric of the nation-state is still foremost in the public consciousness of several Western societies and their political élites, and even triumphantly – though implicitly – reasserted in concomitant intellectual circles (Barry 2001), in practice this rhetoric has over time given way – at the institutional level – to a constructive search for arrangements designed to effectively accommodate ethnocultural diversity within the larger polity.

Indeed, a paradox can be noted here: at a time when the West appears reluctant to embrace strongly worded and legally-binding general regimes on minorities internationally, it is precisely the West that appears to offer most of the ‘best practices’ on how effectively to protect minorities domestically.² And yet, by discussing such domestic “deeper trends” (Kymlicka 2002: 3) and explaining them as a reflection of the underlying notion that it is “normal and appropriate for a free and democratic state to move in this direction [i.e. in the direction of so-called ‘multination federalism’] (2002: 6), Kymlicka seems to suggest that some sort of ‘minority virtue’ can be discerned in contemporary Western democracies *as such*, which makes it advisable, or at least fitting, to raise the issue of extending their respective systems to the East intent on stabilizing democratic rule. If this understanding of Kymlicka’s thought is correct, I would caution that while all minority regimes in the West share the principle of non-forced assimilation, the substantive ramifications of a good deal of them are, or may still be, perceived as pragmatic concessions to be made under particular circumstances rather than as a consequence of a systematic reconceptualization of minority rights within a liberal-democratic system.

Two quick points should be made in this regard from the perspective of international law. Most, if not all, of the post-1945 international arrangements regarding the treatment of certain Western European minorities, such as the Paris Agreement of 1946 between Austria and Italy on the

¹ I should clarify that, in accordance with contemporary international law, this paper assumes ‘national minorities’ as representing a category that distinguishes itself from that of ‘indigenous peoples’. Although all of the points made in the text also apply to the situation of the quite numerous indigenous communities constituting minorities for such purposes, they do not necessarily match the legal underpinnings or ramifications of this second separate regime.

² And indeed, recent cases of group accommodation such as Bosnia, Kosovo, Northern Ireland, or, potentially, even post-conflict Iraq, seem to have relied upon – or to be in need of – those practices for guidance.

German-speaking South Tyroleans, resulted from very particular political and territorial circumstances and were adopted at a time when the emphasis in international Western practice was almost entirely on human rights ‘for all’ while minority rights were looked upon with great suspicion. The fact that these arrangements – which were themselves far from uncontroversial (for example, it was not until 1992 that the South Tyrol case was actually settled) – still form the basis of the continuing protection of the minorities concerned, may indicate a trend that, even in a truly democratic context, ambitious regimes of this sort are far less likely to follow without the backing of international guarantees. Of course, the case of individual countries like Canada may provide a different setting for internally-generated minority and indigenous rights. Also, Western European countries do not necessarily confine protection to those groups which are mentioned in a special treaty by which they are bound. But overall, I would hesitate to say that autonomy and official language rights have originated from anything other than a process of bargains conceded by the minority state in its dealings with the relevant group and its respective kin-state. Kymlicka is right in highlighting a range of factors which in principle make Western democracies more conducive than non-democratic countries to a greater level of accommodation of ethnocultural diversity. However, he himself notes that there is still uncertainty in the West surrounding the notion of equality, especially when it comes to justifying the establishment of regimes for the benefit of minorities (for a vigorously polemical philosophical critique, see Barry 2001).

The way in which the Council of Europe’s (CoE) European Court of Human Rights (ECHR) has addressed minority issues in relation to the principle of non-discrimination recognized in the European Convention on Human Rights seems to mirror that uncertainty (Spiliopoulou Åkermark, 2002). After all, one should not forget that it was not the West but authoritarian regimes of the Cold War East, such as Hungary, the Soviet Union and Yugoslavia that put forward bold proposals for international minority rights standards (for example, as early as during the Paris Peace Conference of 1946, the drafting of the Universal Declaration of Human Rights and as a way of initiating the drafting process of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Linguistic and Religious Minorities). This perhaps suggests that one can paradoxically have a democratic state grudgingly concede on substance rather than on principles and an undemocratic state pro-actively concede on principles rather than on actual protection. The overall picture may be changing, as Kymlicka appears inclined to believe, in conjunction with a rethinking of the role of minority rights in liberal societies. I would point out, though, that it is also important to take this pragmatic aspect into account when analyzing the “maximal resistance” (Kymlicka and Opalski

2001: 372) (apart from limited capabilities related to possible objective structural deficiencies, particularly at the institutional level) of the newly democratic East to advanced minority regimes of the sort indicated by Kymlicka, the double standard (West versus East) question raised in the context of recent monitoring processes in Europe, as well as the real prospects to further strengthen both the content and the enforcement of international minority rights.

III. The East and National Minorities between Human Rights and Security Concerns

In arguing for autonomy and official language rights in Eastern Europe, Kymlicka addresses some of the key concerns which have been voiced in this context, namely that 1) community leaders may in fact consist of unaccountable people who purportedly mischaracterize the aspirations of the group; 2) minority territorial autonomy regimes may reflect a ‘special status’ running counter to equality of treatment, and may even prove oppressive *vis-à-vis* non-minority groups within the relevant area; and, even more importantly, 3) they may constitute a threat to the cohesion and stability of the country. Does international law have anything to say about these perspectives?

One general indication relating to the first of these areas of concern is offered by some case-law from international bodies where the applicants have rejected being represented by certain community leaders in dealing with public authorities or have claimed protection as a distinctive element of the community in question because of diverging practices of the respective organisational bodies. For example, in *Marshall et al. v. Canada*³ before the United Nations Human Rights Committee (HRC) the authors emphasized that the indigenous group of which they were representatives had not conferred any right to represent their members on the Assembly of First Nations (AFN), one of the four major indigenous associations invited by the Canadian government to attend constitutional conferences which were designed to identify and clarify the indigenous rights recognized in the Constitutional Act of 1982. In *Apirana Mahuika et al. v. New Zealand*,⁴ lodged with the same body, the applicants challenged a comprehensive settlement between the government of New Zealand and the Maori people as a whole – entered into in the light of the Treaty of Waitangi signed in 1840 between the Maori and the British Crown – as overriding their claims and those of the majority of their particular Maori tribes. In *Cha'are Shalom ve Tsedek v. France*,⁵ filed with the ECHR, the dispute revolved around allowing for religious pluralism within

³ Communication No. 205/1986, views of 4 November 1991, [1992] Annual Report, 201.

⁴ Communication No. 547/1993, views of 27 October 2000, CCPR/C/70/D/541/1993.

⁵ Application No. 27417/95, judgement of 27 June 2000.

the Jewish community in France in the face of diverging practices of religious rites by a sector of such a community compared to those of mainstream Jewish associations. These cases do not reflect a radical rift between the group and the complaining members such that the basic identity aspirations of the group themselves are called into question, so much as illustrate how the issue of representation can indirectly manifest itself as a matter of ‘fine-tuning’ or adjustment between mainstream group leadership and certain group members over individual matters. At the same time, though, they suggest that this sort of conflict is only one among many others which are conceivable along the broad spectrum of inter-communal disputes, in which even serious questions of élite accountability – involving suspected self-appointed ethnic entrepreneurs – must be framed in terms of adequate internal decision-making and the recognition of the group’s representatives. In *Marshall* and *Cha’are Shalom ve Tsedek* the HRC and ECHR, respectively, essentially assumed the external representative role of the relevant mainstream associations, while in *Apirana Mahuika* the HRC at least characterized the divisions amongst Maori as a “matter of concern” and noted that New Zealand had nevertheless engaged in a process of “broad consultation” with Maori before proceeding to legislate on the settlement.⁶ Although so far international supervisory bodies have seemingly shied away from a direct assessment of the matter, they have either stressed the importance of consultations involving all of the main actors or have appeared to embrace the notion that sufficiently adequate representation had been secured in the case at issue.

As long as a national minority does exist, a rift between the group and its leadership is generally *not* cast in the mould of a discourse between ‘assimilation’ and ‘minority status’ but rather is centred on the extent of rights believed to be needed in order to meet the aspirations of the minority as an ethnocultural entity. A split between hard-liners seeking secession for the group and members seeking adequate minority rights protection within existing state boundaries is a typical case in point. For example, during the drafting process of Article 27 of the International Covenant on Civil and Political Rights (CCPR) – at present still the only legally-binding norm on minorities contained in a universal human rights treaty – considerations were apparently embraced by the UN Human Rights Commission to the effect that the language of Article 27 stressing the communal exercise of rights should be understood as preventing individuals from abusing minority rights for ‘disruptive tendencies’ unsupported by the minority as a whole. Clearly, reference here was made to the case reflected in quite a number of practical instances in which only a small fraction of the group pursues a secessionist agenda whereas a clear majority wants effective protection within the state. There

⁶ Communication No. 205/1986, views of 4 November 1991, [1992] Annual Report, 201, para. 9.8.

may well be situations where a group which has long perceived itself as a national minority becomes at some stage internally divided as to whether the focus of its claims should be shifted from the protection of its own identity (irrespective of the degree of treatment) to the protection of solely general rights and freedoms, which would imply abandoning minority status for the group. There may even be situations where there is no internal general agreement as to whether the group should be considered a national minority at all, due to diverging approaches taken by its associations (for example, this appears to be the case of German Roma). In a report delivered by the Dutch Advisory Committee on Human Rights and Foreign Affairs regarding indigenous peoples, the minimum requirement for testing representation is suggested to the effect that “the position of a representative should not be controversial, or should not be contested by the people in question. In cases of reasonable doubt, it should also be possible to require a representative to make plausible his claim to represent an indigenous people”.⁷ Although this criterion has been mainly submitted in relation to the external recognition of (indigenous) community leaders before international forums, I believe it could also provide useful guidance, *mutatis mutandis*, for identifying a base line from which to assess the level of participation and inclusiveness in decision-making and representation within the national minority – arguably implied by at least some elements of international practice – and thus the claims which ensue.

Addressing this issue in relation to Eastern Europe, Kymlicka is correct in observing that the setting up of mechanisms to effectively measure representation and accountability within the group does not pre-judge the issue as to whether or not its members and the group as a whole will claim minority rights. Indeed, as suggested by the above considerations, accountable community representatives may well desire to put minority rights off the agenda or may even reject the characterization of the group as a national minority. I should point out that this aspect of the matter underlies not only the question of if but also of *what* minority rights are being demanded, be they language or education rights or autonomy regimes. In other words, this is a general aspect arising from the existence of a community which in itself tells us nothing about whether this community is prepared to seek minority rights, and if so, of what sort.

A recurrent scenario is of course one in which widely supported representatives of the group push for minority rights protection based on the undisputed historical existence of the group as a minority. It is important to emphasize that the ‘exit rights’ of dissenters within the group referred to by Kymlicka as a necessary complementary guarantee against the representation of the group’s will

⁷ Advies Commissie Mensenrechten, *Indigenous Peoples*, Report No. 6, 1993, 22-23.

prevailing over the rights of individuals are firmly protected by the international law of minorities, though they are more problematic in the area of indigenous peoples.⁸ Roughly speaking, two basic courses of action are available in the event of dissent: 1) preferring mainstream society over the minority; or 2) taking a different approach to the protection of one's identity while remaining part of the minority. The cases of *Sandra Lovelace v. Canada*⁹ and *Apirana Mahuika*, before the HRC, illustrate such options. As is widely known, the first case was concerned with the situation of an Indian woman who had lost her domestic legal status as an Indian following her decision to marry a non-Indian man, thereby leaving the reserve where she had been born and brought up. Although the key issue was whether she had retained the right to enjoy her own cultural identity under Article 27 CCPR – which she had been claiming after divorcing her husband – the theme highlighted by the case, as confirmed by the HRC, was that being treated as a member of a minority is a matter of individual choice. A noteworthy point is that the choice between the majority and the minority is in fact a two-way street: you have the right to choose the former ('exit right') *and* the right to rejoin the latter at some stage ('return right') if you so wish, provided that there is no reasonable and objective justification for precluding it. As hinted at earlier, *Apirana Mahuika* raised the issue of the impact of a settlement reached between the government of New Zealand and the Maori people regarding Maori fishing rights as a fundamental component of their economic and cultural activities on the rights of 'dissenters' Maori to enjoy their own culture under Article 27 CCPR. The HRC importantly concluded that the settlement was compatible with Article 27, but it also held that the parallel rights of other members of the minority group should be protected as well, pointing to the need for a sustainable, though diversified, way of securing protection of Maori identity.

While the above human and minority rights considerations are generally applicable, some problems are specifically linked to what Kymlicka characterizes as 'multination federalism', based in particular on varying degrees of territorial autonomy for the benefit of national minorities. First, Kymlicka aptly reminds us that minority demands in the form of autonomy claims or even independent statehood can be blocked or deflected by considerations of security, especially in Eastern Europe, thereby eroding the democratic space to voice such demands. It might be useful to note that the ECHR has repeatedly stated in recent years that the banning or dissolution of political parties or associations (in several actual instances, e.g. Turkish parties with a pro-Kurdish agenda) that through peaceful means and without rejecting democratic principles advocate autonomy or

⁸ For example, as it stands now, Article 34 of the UN Draft Declaration on the Rights of Indigenous Peoples, adopted in 1993 by the UN Working Group on Indigenous Populations, states that "indigenous peoples have the collective right to determine the responsibilities of individuals to their communities".

request secession or other rights for the benefit of a minority, as well as other measures intended to prevent individuals from spreading similar ideas, constitute a breach of the freedom of association and/or freedom of expression guaranteed by the European Convention. This is an important benchmark considering that most, if not all, Eastern European countries are now parties to the European Convention and therefore bound to abide by its principles as applied by the ECHR. It follows that no matter how, for example, the autonomy solution as such is seen from a legal or political perspective, it simply may not be taken out of the democratic debate. Second, as Kymlicka acknowledges, there is no general right to autonomy (or ‘multination federalism’ as he puts it) for minorities under international law. At the same time, though, it is being debated whether autonomy schemes should be regarded as a means of realizing rather than infringing the principle of equality, which is a cornerstone in human rights law. As indicated earlier, the implications of equality are often difficult to grasp. On several occasions, states such as France, Turkey or Greece have appeared to embrace the notion that equality only means identical treatment in rights and duties, thereby rejecting – in principle, if not in practice – the proposition that the achievement of so-called ‘full’ or ‘positive’ equality, implying a measure of differential treatment, is just as essential as ‘formal’ or ‘negative’ equality. I believe that the battle of legal ideas has now been won by those who value both of these two dimensions to equality. Based on a gamut of human rights norms, regional and universal, international jurisprudence has indeed clearly confirmed that the principle of equality does not require identical treatment in every instance but may well produce difference in treatment which is reasonable and objective – i.e. whose foundation lies in a particular situation significantly different from otherwise similar ones – as well as proportionate to the aim sought to be realized.

And yet, this falls short of saying that a positive reading of equality can *per se* generate special minority guarantees such as autonomy arrangements. It should be pointed out that, given its very wide objective and scope of application, ‘positive’ equality is not (at least, should not be, as argued below) yet another way of characterizing specific minority rights, though the two categories are interconnected. And this holds particularly true with regard to an autonomy regime as long as it is construed in this context as a far-reaching minority right. In other words, without a positive right to a regime involving decentralized decision-making, mother tongue education and/or communication with public authorities, the equality principle will tend, at best, to justify such a regime *ex post facto* and on a case-by-case basis, rather than prescribe it *ex ante* on general terms. The European Court

⁹ Communication No. 24/1977, views of 30 July 1981, [1981] Annual Report, 166; [1983] Annual Report, 248.

of Justice seems to provide some indication of this line in its recent, rather fluid, case law within the framework of Community law (Pentassuglia 2002: 145-146). The ECHR has become increasingly assertive with regard to differential treatment but has in practice so far been quite reluctant to draw major consequences from this, especially in relation to minorities. Interestingly, in a recent case involving the dissolution of a major Muslim political party in Turkey which advocated, *inter alia*, the establishment of a plurality of personal law regimes along religious lines,¹⁰ the ECHR (sitting as a Chamber first and then as a Grand Chamber) held firmly that the envisaged difference in treatment was incompatible with the Convention, and more particularly Article 14, which prohibits discrimination. It needs to be noted that the assumption discussed by the ECHR was that *all* fields of public and private law would differentiate between individuals according to their religion. However, the ECHR appeared to disregard from the outset that under certain conditions forms of cultural autonomy might actually benefit minority groups in multinational states in a way which is consistent with the anti-discrimination parameter.¹¹

In fact, whatever the rationale for establishing minority autonomy, the principle of equality at least tells us *how* that should be done. It indeed provides the criteria for determining the legitimacy of such arrangements benefiting minorities, compared to their effects on the rest of the population, other minority groups and individuals within the protected minority. For example, regimes of personal autonomy based on unreasonable gender-distinctions are discriminatory and thus inconsistent with human rights. As pointed out by Kymlicka, a special issue is whether a regime of territorial autonomy can secure respect for the rights of individuals and groups other than the national minority in question. The legal point here applies also to situations where no autonomy right is directly involved: in *Ballantyne et al. v. Canada*¹² the HRC observed, *inter alia*, that the Article 27 rights of the francophone Quebecois minority in Canada did not justify under the CCPR positive measures entailing restrictions on the anglophone Quebecois authors' right to freedom of expression (in terms of linguistic preferences) in private, commercial activities. An important proposition reflected in Kymlicka's assessment on Eastern Europe is that, where adopted, autonomy schemes must be entrenched in a liberal-democratic framework in which rights and freedoms for all are respected. In spite of what his emphasis on 'internal' minorities – which is also a subject of discussion in international law – might appear to suggest, it seems to me that the question raised here is less one of automatically reproducing minority schemes within the region and more one of

¹⁰ *Refah Partisi (The Welfare Party) and Others v. Turkey* (Applications Nos. 41340/98, 41342/98, 41343/98 and 41344/98), judgement of the Grand Chamber of 13 February 2003.

¹¹ See further the separate concurring opinion of Judge Kovler annexed to this judgement, at <http://www.echr.coe.int>

allowing comprehensive democratic processes to take place for the benefit of all individuals concerned.

Third, the ‘securitization’ of state-minority relations in Eastern Europe is very real and certainly stands in the way of transferring issues such as autonomy from the ‘security’ to the ‘democratic politics’ box, along the lines of what has mostly occurred in the West, as Kymlicka reminds us. When we put this aspect into perspective, I see, however, two wider interrelated processes at work. On the one hand, the surface manifestation of reluctance by most of the newly independent East to go down the autonomy route for their national minorities largely echoes the underlying suspicion of, if not hostility to, cultural diversity imported at the time of decolonization by newly independent states from the nominally ‘culture-blind’ values of former colonial masters, consolidating the stress on national unity (and sovereignty) prompted by concerns for internal and international stability. On the other hand, the East, by invoking security as a justification for such a reluctance, indirectly reaffirms the territorial integrity of states as the most veritable mantra of inter-state relations. Indeed, one should remember that while the West has generally addressed its own minority issues with no or little international pressure in terms of standards and monitoring activities, the East is being demanded to bring its legislation and practices into line with international norms, and the autonomy question is part of that international discourse. The point I am trying to make is that while the West has largely managed to ‘desecuritize’ this question at home, the East looks carefully at the guarded pragmatism of most of the West in dealing with its own minorities, the paramount importance it attaches to the principle of territorial integrity as well as its resistance to a general right to autonomy under international law. True, the suggested link between territorial integrity and minority autonomy is often overstated, feeding ‘paranoia’ or even political hypocrisy on the part of governments. But, as implied by Kymlicka’s view itself, the West and Western institutions are very much on this game. For example, whereas Turkey is not even willing to contemplate a ‘democratic box’ for the peaceful autonomy and non-autonomy demands made by the vast majority of Kurds in the south-east, Italy, Spain, the UK, France or Canada would, or do fiercely resist any general international right to ‘multination federalism’, meaning a right which, respectively, the South Tyroleans, the Basques, the Catholic Irish minority in Northern Ireland, the Corsicans or the Quebecois, among others, could invoke (perhaps with the backing of their kin-state, where there is one) irrespective of locally-generated and carefully negotiated special arrangements. The relevant OSCE work is not based on the notion of enforcing human and minority rights across the board in

¹² Communications Nos. 359/1989 and 385/1989, views of 31 March, [1993] Annual Report II, 91.

the name of democracy, but on the more ambiguous concept that *certain* situations must be contained in one way or another as they threaten to develop into armed conflicts – somewhat a replay of the League of Nations’ approach in the 1920s. This background makes it difficult not only to sell Western responses to minority issues to the East as anything more than practical ways and means resulting from intense political hand tailoring, but also to avoid the post-Cold War East getting caught in the vices and virtues of its older counterparts.

IV. ‘Let’s Sit Back and Think’ (or Where Do We Go From Here?)

I believe that this picture must be accounted for in any conceivable process of achieving *international* consensus on minority rights norms. Kymlicka aptly goes straight to the point: the future of international minority rights largely hinges on how we solve the ‘security-justice dilemma’. With regard to Europe, what he characterizes as ‘justice-based’ and ‘security-based’ minority rights tracks mostly matches what I have discussed elsewhere in terms of the contested boundaries of ‘judicial-like’ and ‘policy-driven’ responses to minority issues (Pentassuglia 2001/2). There is one important nuance, though, in my reading: whereas Kymlicka sees the above tracks as “different and somewhat contradictory” (Kymlicka and Opalski 2001: 372), I argue that these tracks, despite their technical distinctive traits, underlie the same ‘policy-driven’ logic, i.e. to address the protection of minorities from a pragmatic, context-specific and conflict prevention perspective, and to grapple mainly with the situation in the Eastern part of Europe. Leaving aside the 1990 Copenhagen Declaration of the then CSCE, brought about as a result of the optimistic climate generated by the fall of the Berlin Wall a year before, the first real operational attempt at tackling the minority question in Europe was more gloomily defined in terms of security, not law. The post of the OSCE High Commissioner on National Minorities (HCNM) was set up in 1992; the CoE in practice embraced some of the key assumptions – and inherent limits – underlying the security track when it decided in 1993 to go for the vaguely-worded Framework Convention for the Protection of National Minorities rather than the stringent protocol to the European Convention on Human Rights tabled by the Parliamentary Assembly with Recommendation 1201. If my understanding is correct, this not only shows, together with a panoply of non-binding instruments on minorities, a considerable degree of convergence *between the West and the East* as to the current fundamental primacy of the political – or policy-making – over the justice approach to minority issues in such areas as education, language and political participation, beyond a minimum,

presumably genuine, commitment to non-forced assimilation. It also, and consequently, reveals that looking at internal Western arrangements or ‘deeper trends’ as the way forward for ‘universalizing’ minority rights may prove effective up to a point precisely because the international law perspective (if any) is not meant to be merely a snapshot of country solutions or the effect of domestic analogies but is the reflection of a complex system to be appreciated on its own terms.

Having said that, Kymlicka definitely puts his finger on the big question, i.e. that of reinforcing the international protection of minorities, most notably in Europe, on the basis of considerations of justice or – as I would argue – on ‘normal’ human rights law. Concerns for operational and legal consistency generated by both the way in which the security track performs in Eastern Europe and the reluctance by the West to subject itself to stringent international minority rights regimes of protection and supervision well illustrate the problem. In fact, diversifying the security-based response to several individual cases does not necessarily amount to producing inconsistencies. The OSCE approach to the Baltic states, prioritizing citizenship over identity issues affecting ethnic Russians, might arguably be justified by the fact that the issue there was, and still largely is, one of integration rather than minority rights, which, by contrast, lies at the very base of the situation regarding the Hungarian minority in Slovakia. In Serbia, the emphasis of the OSCE on even greater protection for the Kosovar Albanians than in the latter case appears to be influenced by the perceived need to restore the degree of autonomy previously enjoyed by Kosovo. It is also interesting to note in this context that the whole point of setting out *inter alia* human and minority rights conditions for admission to the EU and the CoE rests on the notion that each applicant country’s record has to be assessed on its own merits, thereby implying differentiation rather than homogenization between the applicant countries. But no matter how one views particular cases, the predicament here is that by and large the very nature of these processes leads to either, at best, ‘negative peace’, i.e. absence of conflict (somewhat sidelining peaceful minority rights claimants), or, at worst, – given the lack of an objective mechanism to judge compliance – double standard and *realpolitik* conclusions, fudging in practice what appears to be firmly grounded in principle (an issue raised particularly in relation to the application of EU and CoE membership conditionality). At the same time, the at least *de facto* differential treatment of the West and East with regard to minorities – reflected in the OSCE HCNM’s mandate, the ‘export-only’ EU approach to minority rights, as well as the weak, yet not ratified by all Western countries, Framework Convention – testifies to not only a “subtle” (Kymlicka and Opalski 2001: 375) dividing line between specific policy objectives and the law of minority rights protection and supervision but also a distinctive

understanding of the role of minority rights regimes themselves. Indeed, precisely because of the Western post-1945 experience, it consists in the perception of international standards as primarily security tools for locally-generated regimes such as bilateral treaties or otherwise internal arrangements – law (if any) as a by-product of security rather than security as a necessary, yet circumscribed, supplement to ‘normal’ (i.e. generally applicable) considerations of justice.

Now that the emergency of the early 1990s is mostly behind us, ‘let’s sit back and think’ – Kymlicka suggests – about fleshing out minority rights as the end-result of justice, or, again, as I prefer to say, as part and parcel of human rights law. He is entirely right. But then the question becomes: what vision do we have of minority rights law? Roughly speaking, at least two conceptual structures can be identified in the contemporary discourse about minorities in international law: one prioritizes equality (i.e. the right to be equal), the other prioritizes identity (i.e. the right to be different) (for a more general survey, see Pentassuglia 2002). In most cases, the first conceptual structure has two major ramifications: 1) equality as a means of ‘deepening’ protection in a way that it can reach out to, for example, mother tongue education and mother tongue communication with public authorities; and 2) equality as a means of ‘widening’ protection in a way that it can bring national minorities, immigrants, groups permanently excluded from societal processes (‘minorities by force’), and so forth, under the same roof. As noted earlier, the former ramification offers a perspective that must be taken seriously. Yet, it appears incapable of generating other than *ex post facto* justificatory mechanisms, which may therefore apply only to regimes already in place; in other words, it normally does not say if and when particular language or other rights must be recognized – in this respect, it is retrospective, not prospective in character. Protocol 12 to the ECHR, adopted in 2000, confirms this logic, which in fact is the predominant logic of the equality approach of this sort. For its part, the latter ramification understands minority rights not as a cohesive and distinctive regime, but rather as an attempt to loosely capture the ‘minority flavour’ of a whole range of rights and freedoms that are recognized to everyone. Affirmative action policies are often seen as the necessary complement to this line – economic and social issues indeed figure highly in this context. Its thrust is *au fond* integrationist. In terms of Kymlicka’s call for strengthening the justice-based track for national minorities, the limitations on this latter version of the equality discourse are apparent: direct concerns for minority identity in the form of robust

guarantees in such areas as language, education or political participation tend to evaporate,¹³ while the logic of ‘widening’ in itself outweighs that of ‘deepening’.

The second conceptual structure, namely minority rights as entitlements which are aimed at protecting the identity of minorities, is not at odds with some fundamental equality assumptions. Quite the contrary, this approach sees minority rights as a species of a larger *genus* which is indeed the principle of equality. Nevertheless, the key point underlying this structure is that the genie of minority rights works *outside*, not inside, the bottle of equality. In other words, this structure insists that such rights have developed into an autonomous body of standards precisely because they serve the specific and sole objective of governing the complexities brought about by the existence of a minority as an ethnocultural group, while the equality approach does not – cannot – address such complexities systematically, is limited by an inevitable nexus with rights of unqualified individuals, and is silent about the specifics of any minority regimes, although it provides them with some foundational criteria. This reading is indeed consistent with old and new norms running through the modern history of the international protection of minorities.

Admittedly, as far as national minorities are concerned, the two conceptual structures are not necessarily competing but can prove mutually reinforcing, in the same way that the safeguard of minority identity implies neither the insulation of minorities from the reality of modern societies – but rather the enrichment of the fabric of societies as a whole – nor their exclusion from the benefit of other rights, whose effective enjoyment is often linked to reasonable means of remedying social and economic inequalities. Also, it might be argued that the current level of protection of the ‘right to identity’ of ethnic, linguistic or religious minorities has not been terribly successful in generating regimes which exceed the implications of general human rights norms. Moreover, both of these lines of discourse value security as providing an additional set of considerations in the assessment regarding the legal protection of minority groups.

Nevertheless, there can be no doubt that the mantra of these approaches *is* different as they embrace different starting propositions. This, in turn, has important repercussions on the substance of the treatment envisaged, ranging from mainly indirect linguistic (or otherwise) protections to generic forms of direct social and cultural protection, to robust protections of the essential or core elements relating to the identity of national minorities. I believe that Kymlicka’s approach to ‘internationalizing’ minority rights provides a conceptual framework (as opposed to doctrinal

¹³ Although concerns for identity still play a role in this context, the ultimate implications of such legal approach are not too far away from the ‘culture-blind’, yet socially and economically sensitive, philosophical conception of equality contended by Brian Barry (2001).

analysis or political assessment) which sits well with the conceptual and legal framework of international minority rights as encapsulating a distinctive right to identity or right to be different. Two caveats, though, should be entered here. First, while there is no right to autonomy in international law along the lines suggested by Kymlicka, minority language, education and participation rights are already established in international instruments, although their legal status and substantive implications remain unclear. Kymlicka himself understands minority rights as advanced individual rights rather than rights of groups or collectivities as such, and so do those instruments. Given the obvious linguistic, educational and participatory components of autonomy schemes, one may wonder whether there would be very much to gain from a ‘brand new right’ (i.e. right to autonomy) – assuming a consensus on it could ever be reached amongst states – compared to the benefits of ‘deepening’ the protection attached to existing entitlements in the above areas. Second, ‘internationalizing’ or ‘generalizing’ minority rights based on domestic analogies, *as opposed to internalizing locally-generated minority rights*, may prove less far-reaching than expected, for the reasons explained earlier. At the same time, if one major problem in establishing a credible set of generally applicable minority rights lies in the Western reluctance to international control of their own minority laws and practices (if any) (for some general thoughts see, Pentassuglia 2001/2, especially 56-8), then consensus should be found in a way that such control, for example in the form of judicial or quasi-judicial review, can be effective, bringing the seeds of a minority rights regime as ‘normal’ human rights law to flourish over the longer term.

Whatever one’s views of Kymlicka’s assessment of minority issues in the West and East, he unquestionably captures the challenge of the new century in the area of majority-minority relations: ‘desecuritizing’ minority rights, on the one hand, while reconsidering the most proper role of security mechanisms, on the other. It would appear that the contemporary category of international minority rights is approaching a crossroads, similarly to that of the inter-war period of the last century. The difference now is that minority rights are recognized as human rights, which was somewhat disputed after 1945. And yet, international minority rights still make states nervous or unhappy. The key themes of discourse about minorities reflect these frictions. A pervasive focus on security or on ‘minority rights’ in general human rights clothes (whether such clothes are rights of equality or otherwise) would paradoxically make minority rights law unnecessary, or even counter-productive. This is entirely possible, but should be openly recognized, explaining why the long-term historical failures of that vision are going this time to set the stage for the successes of the years and decades ahead.

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