

MINORITY RIGHTS OR HUMAN RIGHTS?

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I. LESSONS FROM EUROPEAN HISTORY

1. Since religion became a private affair in Europe and a matter of tolerance, minority questions have been dominated by ethnicity. Thus, minority rights became mainly an antidote against a political illness which developed in nineteenth century Europe and has its worst fits in the twentieth century: Ethnic nationalism. This does not deny the existence of other minority problems, but as ethnic questions prevail, this paper shall concentrate on them.

Ethnicity as a political myth creates the idea of human relationship beyond family, kinship, village, town, factory and other modern organisations. It conceives a relationship relying on common language which has to be purified and reconstructed by linguists, a common history which was distilled out of European history by the famous national historians, on the construction of a common biological descent which may go as far as racism, and mostly it believes as well in a common destiny. The myth of ethnicity is connected with the political claim for a national state, and where the national state is realised, ethnicity becomes the main factor of integration for the market society with its individualism and its clashes of interest between classes and groups.

2. Feudalism and monarchy relied on personal allegiance, tradition, acquired rights and the grace of God as integrative ideologies. In the pre-democratic political systems in Europe ethnicity and language were less important than today. The educated language all over Europe was Latin and later, with less European importance, French. What was later to become national language was then rather depreciated as popular idioms or 'vulgar' language.

The Holy Roman Empire of the German Nation (Heiliges Römisches Reich Deutscher Nation), which dissolved 1806, had nothing to do with German nationalism. It was a political endeavour, which tried to exploit the myth of the Roman Empire as an additional factor of integration. The German nation in its name was an acknowledgement that the centre of the Empire had moved north of Rome. It contained no allusion to an existing German nation in the modern sense of the word.

Some of these traditional political structures survived as important European actors until the end of World War I, namely the empires of the Habsburgs, the Romanovs and the Osmands. They could be qualified as supra-national with some reason as the European Union is today. The allies fought the war under the flag of the right of people to self-government. The 'peoples' prison'. ('Völker-Gefängnis'), which was a name for the Habsburg monarchy in the war propaganda, gave way to the modern more efficient and more cruel prisons of the ethnic national state.

3. The rise of ethnic nationalism in Europe was connected with democracy that, by its idea, needs not only a population but a self-conscious people, which in turn may define itself by adherence to a republican constitution and democratic values. But the public appeal of ethnicity seems to be stronger.

The French Revolution and the successes of the revolutionary and Napoleonic armies showed to the rest of Europe that nationalism combined with elements of democracy were militarily and politically stronger than traditional structures. The ideologically-inspired masses won not only on the battlefield.

To be clear: the revolutionary ideals of *liberté, égalité, fraternité* were humanistic and global as well as the Declaration of Rights of 1789. But the military expansion of the revolution to other countries and later the Napoleonic wars relied very much on the superiority of the French nation. And, what is more important, the resistance in Germany against the occupation was stirred by the opponents of France by fostering a German ethnic nationalism, as the preexisting political

structures were clearly not up to the challenge. Romanticism in Germany had the political task to develop the linguistic, historical and ideological foundations for ethnic nationalism.

Some European humanists like Goethe or Heinrich Heine saw the danger and tried in vain to oppose it. The Austrian writer Franz Grillparzer put his misgivings in the words: "The development of contemporary humanity proceeds from humanism through nationalism to bestialism" ("Die Entwicklung der heutigen Menschheit geht von der Humanität über die Nationalität zur Bestialität"). Be it acknowledged that Franz Grillparzer was not only a writer but also employed as a librarian by the Habsburg monarchy. He was a conservative and infected by the scepticism of Vienna. Nonetheless, some people would suspect that the political progress which came with the fall of the Habsburg empire was more cruel and less cultivated.

4. Unfortunately, people in middle, eastern and southeastern Europe had not settled according to the ideas of ethnic nationalism. There existed no 'pure' pattern of ethnic settlement. No viable political entity could have been carved out on purely ethnic foundations. The new frontiers in Europe after World War I were far from being 'natural' as they should have been according to the theory of the new national states. So, most of the new national states found themselves with ethnic minorities, sometimes in distinct regions, sometimes in villages and towns, sometimes living together with members of the ethnic majority and other minorities in multiethnic settlements and regions. What had been normal for the old political systems became now an anomaly for the ethnic national states, and this new-born anomaly became known under the name of the minority problem.

5. Throughout European history, a set of political answers have been developed in response to the situation of multi-ethnic communities:

a) The plurinational state

The traditional solution, that is to disregard ethnicity (as was the prevailing attitude in the old Europe of feudalistic and pre-democratic monarchies) seems to continue in Switzerland, which is assisted in this attitude by strong myths of national history, a successful tradition of well-being and peace, and some degree of autonomy for ethnicities through federalism. However, with the latest revision of the constitution in 1996, a new article, 116, has been adopted, obliging the Federation and the cantons of Graubünden and Tessin to help in the maintenance and promotion of the Rätoromanic and the Italian languages. The self-contained stability of ethnic relations seems to have lost its evidence.

Belgium has been another example of the traditional solution of disregard for ethnicity, but it witnessed an upsurge of ethnic thinking and so it changed its system. Acknowledging ethnicity as an important political factor, it organised ethnicities as public corporations responsible for cultural affairs and education. In this it followed a scheme invented by Austrian socialists in the final period of the Habsburg empire in order to overcome ethnic conflict. They intended a threefold political organisation: a citizen of the Empire was to be as well a member of an ethnic corporation responsible for cultural affairs and education and of a territorial unit endowed with some degree of autonomy.

b) Forced assimilation

Forced assimilation means forging a more or less synthetic national language out of disregarded regional and popular languages, suppression of minority languages in teaching, in publications, at courts and administrative agencies, suppression of minority organisations and religions, suppression of topographic and personal names in the minority language. Forced assimilation as a strategy of power seems to have a very old European history in the two national states which existed before the French Revolution. Though the ancien régime in France was not nationalistic in the modern sense, it relied on French dominance over the territory and had fought bitter interior wars against minorities in Provence and Languedoc. Similar struggles seem to have happened in the history of Great Britain.

c) Extinction of minorities

Forced assimilation often uses physical violence and the threat of violence. Violence was also used to extinguish minorities physically. This is the old European story of pogroms against the Jewish minorities and Gypsies. Modern times have industrialised this approach into the horrors of the holocaust.

A more suave method to extinguish a minority has been to displace it. That is what is called nowadays ethnic cleansing. Some efforts in this direction even preceded the holocaust.

With the end of the World War I, the exchange of minority populations became an institution of Public International Law. The treaty of 1919 between Bulgaria and Greece included an exchange of populations as did the Treaty of Lausanne (1923), between Greece and Turkey. Under the policy 'Home to Germany' ('Heim ins Reich'), the Nazi government concluded a series of treaties to exchange populations with the USSR, the Baltic States and Italy. There were some other exchange treaties in this period in middle and eastern Europe.

In the wake of World War I the victorious powers continued this policy. Legitimated by the Potsdam Agreement of 2 August 1945, some twelve million Germans were expelled by Polish, Czech and Soviet authorities.

Like other European abuses and together with ethnic nationalism, this solution to minority problems gained ground in other parts of the world: one of the most striking examples is the millions of people who had to move from India to Pakistan or vice versa following the founding of these two countries in 1947.

d) Minority rights

The ethnic national state, which became a leading political idea in the nineteenth century and nearly destroyed Europe in the twentieth, could at its best tolerate ethnic minorities, but mostly its policy was forced assimilation or later expulsion. Compared with forced assimilation and expulsion, the idea of minority rights, which came to international importance after World War I, is obviously a step to restore humanism. However, in contrast to the policies of neglect or non-identification of ethnicity, the human advantages of minority rights have still to be discussed: a policy of minority rights, relying on ethnicity, duplicates the conception of humanity of the ethnic national state. It is like exorcising the Devil with the help of Satan.

It is worth noting that policies of minority rights for ethnicities were nowhere adopted by the free consent of interior political groups. Minority rights were invented after World War I by the victorious powers to make good on the promise of self-government for peoples living in multiethnic, traditional political structures which had been defeated in the war. In many regions with mixed populations ethnic self-determination was impossible. Thus, a system of minority rights was included in the peace treaties after World War I. It obliged the new republics of Poland, Czechoslovakia, Yugoslavia, Romania, Greece, Austria, Bulgaria, Hungary and Turkey to assume similar obligations in the treaties concerning them. In the German-Polish Convention relating to Upper Silesia (1922), Germany assumed similar obligations vis-à-vis the Polish minority.

In substance, the rights offered minorities by this international treaties were modest compared to actual demands. One of the most important stipulations was the right to citizenship for members of minority groups. They should be protected against discrimination. They should have the freedom to organise, use their language in private and public and exercise their religion. To protect the language of the minority, it should be taught in school, where there was sufficient demand, and it should be allowed in courts and administrative agencies in regions with a considerable proportion of the minority population.

The treaties included no guarantee for the preservation of the 'identity' of minority groups, no measures of affirmative action, no stipulations to separate schools.

Those obligations were put under the protection of the League of Nations. Individuals or associations acting on behalf of a minority group had the right to address a petition to the council of the League of Nations.

This system may have helped minorities to defend their rights, but has caused much international trouble. It ended as a reality of international relations before World War II with the decline of the League of Nations.

One of the worst handicaps of the minority rights policy of League of Nations was that its obligations were asymmetric. They were not accepted by the victorious powers in World War I as binding on themselves. Thus, they were always regarded by the states under minority obligations as an unequal inroad to their sovereignty.

e) Ethnicity as a private concern

After World War II the concern for minority rights stepped back behind individual human rights. This is true on the national and the international level.

For the leading forces in the United Nations the concern for the protection of individual rights had priority, as is testified by the text of the Charter (Preamble, art. 1 no. 3). Individual rights contain the principle of non-discrimination on account of race, language, religion, ethnicity and so it was clear that, if human rights were guaranteed without discrimination by the member states of the United Nations, much of the ground of the minorities policy of the former League of Nations would be covered. The Universal Declaration of Human Rights of 1948 contains the rights to meet and to form associations. This means that minority groups may assemble and organise to promote their culture, their religion and their language. These general human rights have been repeated in the UN Convention on Civil and Political Rights of 1966 (art. 27), which contains a special protection for minorities by curtailing the power of the member states to restrict the freedoms of culture, religion and language by law, if they are used for minority purposes.

Though minority rights were not in the foreground in the post-Second World War period, they were not forgotten. There have been some bilateral treaties, the most important of which is the Gruber/de Gasperi treaty between Austria and Italy regarding South-Tyrol (1950). This introduced regional autonomy as a measure for the protection of the German-speaking majority. It contains elementary and secondary school teaching in German, parity of the German and Italian languages in public offices, in official documents and in topographical names and proportional employment of the two ethnic groups in public service.

The final act of the Helsinki Conference on Security and Co-operation in Europe (CSCE, 1975) declared that participating States will respect equality before the law of persons belonging to minority populations, afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this area. Thus, also in the Helsinki Conference the prevailing conviction was that minority rights should be a part of the individual rights of minority members. This changed with the CSCE conference in Copenhagen in 1990. Since then the CSCE, or now Organisation for Security and Co-operation in Europe (OSCE), has adopted a policy of preserving the identity of national minorities, which is distinct from human rights policy. The Council of Europe moved in the same direction, asking Eastern and southeastern European States for minority guarantees before admitting them into membership and adding to its human rights instruments the Framework Convention for the Protection of National Minorities (1995). In this convention the member states undertake to protect to some degree the identity of ethnic minorities besides protecting the human rights of the members.

The new European accent on minority rights is mostly interpreted as a reaction to ethnic strife after socialism lost its impact as an integrating ideology for the former Soviet Union and its associates. As Western Europe itself relies more on ethnicity than on republican values as integrating factors, the revival of ethnic thinking in Eastern Europe was thought to be natural after so many years of the dominance of socialism and was welcomed by many. Therefore, the international revival of minority rights is also a revival of ethnic thinking and ethnicity as a political force.

II. LEGAL ISSUES

a) What makes a minority?

In democracies, if a consensus cannot be found, the majority should decide collective questions in order to give self-determination to the overwhelming part of society. In this case, those in the minority may console themselves with the Latin words: *minor pars*, *sanior pars* and the hope that, if reason is on their side, they may sometime form a majority.

With ethnic minorities, the situation is different. They are fixed in their role of minority unless they decide to invest in a genetic race of procreation. Members of ethnic minorities are mostly distinguishable by long-term attributes like language, culture, religion and sometimes race. But, as not all of those attributes are easy to verify and the internationalism of modern industrial civilisation tends to transcend ethnic characteristics, minority politics have changed from objective attributes to personal decisions as a foundation of membership to a minority. To belong to a minority or not is a personal decision, the freedom of which is in itself a human right, as is stipulated in art. 3 s. 1 of the Council of Europe Framework Convention. However, as the Explanatory Memorandum clarifies (para. 35), this does not imply a right for an individual to choose arbitrarily to belong to any national minority, as the individual choice should be linked to objective criteria relevant to the person's identity. This makes a minority more exclusive than a nationality should be. The genuine link of nationality which should exist between a person and the state as a condition for the respect of this nationality in international law, may be in consequence of the fact of being born on the territory of the state. To be born somewhere shall not, apparently, be sufficient for membership to an ethnic minority.

The decision to belong to an ethnic minority is not a formal declaration. Therefore it may be only partial and can be withdrawn any time. So, ethnic minorities may have a flexible, aging or declining membership.

Internationally, the most influential definition of an ethnic minority is that of Francesco Capotorti, who said: "A minority is a group which is numerically inferior to the rest of the population of a state and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language." This definition, which is fairly inexact on the last mentioned element of the common political expression on minority aspirations, stresses the non-dominant position of the minority in order to exclude colonial or other situations where a minority dominates.

Though this is internationally the most respected definition of minorities, it is far from being generally accepted. The most practically relevant definitions of minorities in national and international law would be further restricted to traditional minorities which settle in sufficient number either regionally or over the whole territory. A precondition to claiming minority rights is indeed citizenship of the state where they are to be claimed.

This excludes minority rights from migrant workers and other newly immigrated national groups. There are sound political reasons for this attitude of Western European states, as they want to avoid an ethnically segregated society. But it remains contradictory to claim minority rights for ethnic groups in eastern and southeastern European countries and deny minority status to the most relevant ethnic groups in one's own country.

In the deliberations on the Council of Europe Framework Convention on ethnic minorities, many states wanted to exclude migrants, some states wanted to include them, and some states did not want to acknowledge at all the existence of ethnic minorities on their territory. An agreement could only be found by renouncing clarification of which groups are to be protected as minorities by member states. Thus, member states feel free to declare for themselves which groups shall be protected. The German government declared that minorities in the sense of the Convention in Germany were German citizens of Danish or Sorbish nationality and it would apply the agreement as well to Roma, Sinti and Frisians with German citizenship. Under this interpretation, the Convention

will have no legal impact on the major ethnic questions which are actually on the agenda in Germany.

b) Individual rights as a safeguard for minorities

Individual rights, especially at the constitutional level, are a safeguard against the political power of the ruling groups, be they minority or majority. The civil rights of freedom of speech, press, assembly and association are in particular preconditions for the normal functioning of democracy. They protect minority groups as well as the majority of citizens.

From the point of view of legal theory, individual rights may be described as powers given to the individual by law in regard to certain interests. These interests can be strictly individual or they can be collective. As every meeting and every association presupposes several participants, the individual rights to freedom of assembly and association view the individual as a social animal or in its group existence. So the protected interest is collective as well as individual. But still the individual, and not the group, is the subject of the legal power, which does not exclude the law also giving the group some power to make use of the right. This second step would mean conferring, at least partially, legal capacity on the group.

At the group level, these rights may mean little for the aspirations of minority members doing something for the interest of the minority group, as these rights are under the reservation that their use may be restricted by law. In decidedly ethnic nationalistic states the law may be against the expression of minority interests in meetings and associations or it may deny citizenship to minority members and so deprive them of those civic and political rights.

However, combined with a right to equal treatment or the prohibition of discrimination, those rights protect minorities by their individual use. The same purpose is served by the International Covenant on Civil and Political Rights article 27. Yet, in the legal view those rights remain individual rights, though they can be used to protect minorities. In contrast to what is to be read occasionally, by their possible use for minorities, these rights do not become collective rights in the legal sense.

c) Group rights

If individual rights give legal power to individuals, behind the veil of legal capacity this is also true for group rights. In order to make group rights possible, the group must be given legal personality or at least partial legal capacity. Still, in exercising its rights, the group, organised as a legal person, must act through individuals as its agents.

In contrast to their personal rights, the persons acting for the group may not use the rights of the group at pleasure. They are trustees of those rights and normally should be responsible to the group. Nonetheless, it is them who are using those rights and the power connected with them.

Thus, if the group has the right to public funds for maintaining its identity, the representation of the group will define the identity of the group, and they will tend to be advocates of ethnical thinking. Ethnically uninterested persons would not be active in the group.

The group rights policy can go as far as to give the group the legal structure of a public corporation with powers to regulate such important interests of minority members and the whole society as education and cultural activities. This may separate the population and may conflict with the rights of an individual who chooses not to be treated as a member of an ethnic group and who wishes to be free from ethnic communities. Without being incorporated by public law, ethnic groups may have considerable influence and power over persons with the characteristics of the ethnicity and it may be difficult for such persons to stay outside and keep their children outside. Group rights could give even more power to the flag-bearers of ethnicity.

III. MINORITY RIGHTS AND INTERNATIONAL RELATIONS

Human rights developed as part of the constitutional compact and as strictly internal affairs in the French and Anglo-Saxon tradition. Then they got on the international agenda with the foundation of the United Nations. Minority rights for ethnic groups were introduced into international politics as a remedy for situations where ethnic self-government was not possible. From the beginning of this policy after World War I, the guarantee of special rights for ethnic minorities was an encroachment on the self-determination of majorities and on national sovereignty. This is one of the reasons why the stipulation of group rights to ethnic minorities may cause internal as well as international conflict if the general situation is not as favourable as for the Danish and German populations living on both sides of the Danish-German border and, to a lesser degree, in South-Tyrol.

a) Protection politics

Not all but most ethnic minorities belong to an ethnicity which is the titular nation of a neighbouring state. In general in international law it would be an inadmissible interference in the internal affairs of a state, if a neighbouring state identifies with the ethnic interests of its co-ethnics who have the citizenship of that state where they live. With international ethnic rights, be they stipulated bilaterally or in a multilateral convention, the legal situation changes. Now the question of ethnic identity and its preservation has become a legitimate topic of international relations. This means that any government or political group in search of popular topics may put the situation of co-ethnics in neighbouring countries on its political agenda and find legitimation in international law for ethnic chauvinism.

Under the present circumstances in Western and middle Europe—in a very general perspective—this will seem rather far fetched. But on a closer look, this situation may be not so unlikely in some countries, and in any case, law has to be conceived not only for favourable situations.

The system of the neighbouring state as the protective power, which caused some trouble in the aftermath of World War I, was supplemented by the supervision of the League of Nations and is now supplemented by multilateral instruments of the European organisations. The CSCE conference in Moscow in October 1991 conceived of a group of experts which may be sent to any member country to advise on minority questions at the request of this country or of another country. If the country, which is to be monitored is not ready to receive the group of experts, it should be (politically) obliged to receive it if six member countries of the CSCE demand it. At the meeting in July 1992 in Helsinki, a High Commissioner for National Minorities was instituted, with the main task of preventing international conflicts which may arise out of unsettled minority problems.

Multilateral monitoring and supervision may help in some cases to improve objectivity and distance. But it can not prevent national sensitivity building up. A multilateral intervention may be connected to some national policy interest of the group of states backing the intervention and it may be resented as much as a bilateral intervention.

b) The financing of minorities

As it is today a central topic of international minority policy to preserve the identity of ethnic minorities, minorities seem to be entitled to public grants to finance libraries, cultural or social centres, theatres, folklore groups, language lessons and schools.

As long as this finance comes out of public funds of the states where the minority lives, these states have some control to prevent chauvinists laying hand on this money, and to ensure it is used to proper ends.

It is the financing of minorities from outside which tends to cause trouble. It is said that representatives of the German minority in Poland receive thirty million Deutsche Marks every year from the Federal Government and additional public funds which are devoted to the associations of expellees to be transferred to the German minority in Poland. This is a lot of money under the conditions in Poland and the connected affluence may induce people to declare for the minority and thus gear up numbers. It may cause at the same time bad feeling in the rest of the population because of the inequality of the situation. In reaction to this, the declared policy of the German

government is to give the funds to the communities or regions where minority members live in order to make contributions to the well-being of the whole population. But even if this is done, there remains an inequality between communities where minority members live and the rest of society.

According to law, there is a clear distinction between funding a minority in order to help it to preserve its ethnic identity and financing subversion or separatism. Minority rights do not exempt minority members from the lawful duties of a citizen and minority rights and their use should have nothing to do with separatism or subversive action. Yet, control is difficult for the states involved.

Thus, it seems to be for good reasons, that the Council of Europe Framework Agreement on the Protection of National Minorities refrained from including among the rights of minorities to receive funds from other countries. Still, it does not declare giving or receiving subsidies for minority purposes illegal.

The treaties which Germany concluded with Poland and other eastern and southeastern European states with German minorities have a different approach. The treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighbourhood and Friendly Co-operation of 17 June 1991, states in art. 21 s. 2 that the contracting parties will make mutually possible and facilitate measures for the promotion of minority members and their organisations within the framework of valid laws. This stipulation contains many unclear elements, but the principles are clear, that the transfer of money from one country to the other to help minorities in preserving and developing their identity is part of the minority regulations.

IV. CONCLUDING REMARKS

This paper should not be misunderstood as directed against ethnic minorities or as an invitation to forced assimilation. Nor does it aim at denying ethnic identity as a personal and ethnicity as a social fact. Everybody has to some degree an ethnic identity, which can even include elements of different ethnicities. This was the situation of people living in European border regions. Their ethnicity was named 'suspended ethnicity' ('schwebendes Volkstum'), and this can be the case for migrants and their children. Even a person who was born and lived in the surroundings of a governing ethnicity may free him of herself at least from some of its particularities. There is nothing like a stable ethnic identity of a person as long as this person lives in a changing society. And there is nothing in a society like a standard ethnic identity which could be and should be preserved by special organisations. This idea of a standard ethnic identity disowns the individual, his personal development and his human rights.

Ethnicity as a fact of social and political life should be protected against forced assimilation. But it is no more the task of international law to promote ethnicity than to promote nationalism. Under its general purpose to stabilise and pacify international relations, international law has to recognise ethnic difficulties as a potentially destabilising factor. This legitimises the international search for adequate solutions which should be adapted to the concrete situation.

Following the International Convention on Civil and Political Rights as a general guideline, in states with ethnic minorities a member of such a minority should have the right to preserve his or her culture, religion and language in connection with other members of the minority. Minority members should enjoy their human rights and the opportunities of their society in equality with other members of that society and without discrimination. Those basic requirements should remain the centre of international minority policy.

Group rights in the legal sense mean incorporating the minority to some degree and to give it an organisation. Group rights may divide society and even lead to segregation. Though they may contain adequate solutions for particular situations, they should generally not be an aim of international policy.

Beyond individual rights protecting a minimum standard for minorities by international law, sufficient space should be left for the adoption of national policies adequate to the concrete situation. This should include teaching of the minority language in government schools if there is

sufficient demand, but it should not lead to separate teaching of the general topics in separated schools. If possible and not too expensive, minorities should have the right to use their language at courts or in contact with administrative agencies. There should be a chance for minority topics in public broadcasting and television and some minority representation on the boards. There should be a chance for minority representation either through political parties or by special voting provisions. Furthermore, where necessary, there should be legal provisions against the discrimination of minority members in housing, employment and public facilities, but no quotas which reinforce ethnic consciousness.

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