

MINORITY RIGHTS IN INTERNATIONAL LAW:

**MINORITY RIGHTS AND
IDENTITY-CONSCIOUS DECISION-MAKING**

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CONTENTS

<u>Introduction</u>	1 – 15
- An example from Estonia of an attempt to achieve identity-conscious decision making	2
- Chapter 1: Defining minority according to the strong and weak models	4
- Chapter 2: A Context-sensitive Approach to the Definition and Classification of Minority	5
- Chapter 3: Defining minority rights according to the strong and weak models	6
- Chapter 4: Justifications for Special Minority Rights	10
- Chapter Five: From race-consciousness to identity-consciousness: the emergence of identity-conscious decision-making	12
- Chapter Six: The emergence of identity-conscious decision-making at an international level	14
<u>Chapter One: Defining minority according to the strong and weak models</u>	16 – 69
- Limited progress towards defining minority	18

- The Elements of a Definition	26
- Non-dominance	27
- Differing Characteristics	35
- The classification of national minority	40
- The argument that ethnicity gives credibility to the 'race thesis'	44
- Solidarity, or the will to preserve the characteristics	46
- Geographical characteristics, such as density and history	50
- Size	54
- Mode of Arrival	58
- Residence	60
- Citizenship	62
- Loyalty	65
- Recognition	66
- Conclusion: a definition of minority	67
 <u>Chapter Two A Context-sensitive approach to the Definition and Classification of Minority</u>	 70 - 88

- ‘Minorities by descent’: testing the context-sensitivity of concept of minority in relation to India’s Dalits	71
- Conclusion	87
 <u>Chapter Three: Defining minority rights according to the strong and weak models</u>	 89 – 140
- Individual or Collective Rights	91
- “National” or “Ethnic, Religious and Linguistic” Minorities	96
- Positive or Negative Rights	109
- Positive duties towards members of minorities in access to health and education	117
- A positive duty to gather information	117
- Involuntary or Voluntary Minority Membership	124
- Should minorities be able to claim self-determination?	125
- Immediate or Progressive Obligations	134
- Conclusion	139
 <u>Chapter Four: A Justification for Special Minority Rights</u>	 141 – 169
- Justifying special rights for minorities through	

the value of ethnodiversity	141
- ‘Minority culture impact statements’ as a form of identity-conscious decision making	146
- Justifying special rights for minorities by exposing the myth of state neutrality and the reality of state partiality	150
- International norms on minority religious education	161
- The consequences of a partial state	164
- Constraints on minority nation building	166
- Conclusion	168

Chapter Five From race-consciousness to
identity-consciousness: the emergence of
identity-conscious decision-making

170 – 192

- Identity-conscious decision-making as the meeting point of non-discrimination and minority rights	172
- A precursor to identity-conscious decision-making: ‘race-consciousness’ in the jurisprudence of the United States Supreme Court	173
- A duty of special care: the emerging principle	

of identity-consciousness in the Constitution of India and jurisprudence of the Supreme Court of India	178
- The limitation of the separation of powers	181
- Context-sensitive interpretation of minority rights in Canada	187
- Conclusion	191
<u>Chapter Six The emergence of identity-conscious decision-making at an international level</u>	193 – 214
- Enabling participation and “appropriate measures”: a (limited) basis for identity-conscious decision-making in the Framework Convention on National Minorities and the UN Declaration on Minority Rights	194
- The extent of weak minority rights protection and the emergence of a contextual, identity-conscious dimension to Views of the UN Human Rights Committee on article 27 communications under the ICCPR	196
- Communications to the United Nations Human Rights Committee citing article 27 (and not any other articles) of the International Covenant on Civil and Political Rights	197
- Communications to the United Nations Human Rights Committee citing article 27 and other articles of the International Covenant on Civil and Political Rights	204

- Conclusion: satisfying the duty of identity-conscious decision-making	211
<u>Conclusion</u>	215 – 221
<u>Bibliography</u>	222 – 253
- Articles and Books	222
- Reported Decisions	238
- European Court of Human Rights	242
- United Nations Human Rights Committee	239
- International Criminal Tribunal for Rwanda	242
- Supreme Court of Canada	243
- Supreme Court of India	243
- Supreme Court of the United States	244
- International non-treaty texts	245
- United Nations Committee on the Rights of the Child	250
- International Treaties	251

Minority Rights in International Law:

Minority Rights and Identity-Conscious Decision-Making

Introduction

This work aims to test a simple idea with complex implications. Minority rights, as currently posited in international law, can be interpreted according to either a strong or weak model of minority rights. This thesis defends the position that neither model deserves recognition as the sole paradigm for our understanding of minority rights in international law. It shall be argued that minority rights should be given (and are increasingly being given) a 'context-sensitive' interpretation both in the definition and classification of minorities (dealt with in the first two chapters) and in the analysis of the scope of the rights of persons belonging to minorities (which is dealt with in the remaining chapters). It shall be argued that, in both the definition and classification of minorities and in the treatment of minority rights, the relevant law can be interpreted according to either of two traditional paradigms, the weak and strong models of minority rights. Both of these traditional paradigms are consistent with (but are not exclusively based upon) particular approaches to the definition of a 'minority.'

This work aims to show that neither the strong nor the weak minority rights model is completely satisfactory. The weak model of minority rights offends the principle of effectiveness by wholly or mainly failing to offer protection beyond that offered by general individual rights such as freedom of association, freedom of expression, freedom of thought, conscience and religion and non-discrimination. The strong model of minority rights offends against the principle of equality and that it blurs the distinction between minority rights and self-determination¹ on which state acceptance of minority rights obligations depends. It offers an alternative, 'context-sensitive' model of identity-conscious decision-making which, it shall be argued,

¹ Self-determination is a large and conceptually separate topic and a treatment of self-determination is beyond the scope of this thesis.

satisfies the principle of effectiveness, the principle of equality and the need to maintain a distinction between self-determination and the rights of persons belonging to minorities. This thesis aims to show how elements of the identity-conscious decision-making model are beginning to receive legal recognition, at international level (including in the jurisprudence of the United Nations Human Rights Committee) and at national level (in the jurisprudence of the Supreme Courts of Canada, India and the United States).

An example from Estonia of an attempt to achieve identity-conscious decision making

The Estonian Roundtable on Minorities illustrates one possible form that an identity-conscious approach to minority protection can take as well as difficulties that can be encountered. The experience of the Roundtable on Minorities established by the President of Estonia on 10 July 1993 is significant because it illustrates the significance of whether minority rights are considered as a relevant factor in government decision-making processes.² The Roundtable achieves three key early successes that established its credibility. The first success was the successful resolution of conflict between the Government of Estonia and local authorities in the north-eastern part of the country. The second key success was the participation of senior members of the Government of Estonia, even the President, in Roundtable discussions. The third success factor was the international reputation enjoyed by the Roundtable due to participation by diplomats from other nations.

However, a growing perception emerged that the Roundtable had a merely decorative purpose. The tightening of the naturalisation procedure and ratification of the Framework Convention on National Minorities on condition that it applied only

² Aleksei Semjonov "Presidential Roundtable on minorities in Estonia: successes and failures" United Nations Working Group on Minorities Fourth session 25 – 29 May 1998 Conference room paper (Director, Legal Information Centre for Human Rights and member of the Roundtable)

to citizens were examples of this. Aleksei Semjonov, observing the relationship between State institutions and the Roundtable from the perspective of Roundtable membership, made the following comments:

“Both branches of power, the government and the Parliament, accept [the Roundtable’s] recommendations only occasionally, if ever; more often they make decisions in direct contradiction [to] the recommendations of the [Roundtable]”

Processes of public decision-making in relation to minorities are important. Public authorities should have to show that they have made a genuine, substantive consideration of the rights of persons belong to minorities. Just as, in the public law of the United Kingdom, a public authority making a decision without reference to relevant considerations can be required to make the decision again by the courts, so on the implementation of these rights there would be a need for judicial scrutiny. At times, it is perfectly legitimate for States to reject the demands of minorities. Unconditional acceptance of minority claims is not the condition of compliance with minority rights standards. The relevant condition is identity-consciousness. For a State institution to demonstrate identity-consciousness, it must be able to show that in a process of decision-making that affects the rights of minorities, those rights were genuinely considered as a relevant consideration. This is manifestly not always the case when governments make policies with regard to minorities. To continue with the example of Estonia: in the late 1990s, a group of government experts prepared a report on “integration policy” for the Estonian government.

The Estonian integration policy report was formed without any invitation to a member of the Roundtable to participate. In addition, Semjonov comments on the authors of the report that:

“...due to the fact that [the authors of the report] are not members of minority groups themselves, some very important aspects were missed. Additionally, they were mostly social scientists, not lawyers or human rights activists. They did not use

the conception of 'minority rights,' for example; such a term is absent in their lexicon. Consequently, there are no references to the international instruments and mechanisms on minority rights protection."

This thesis will focus on developments towards identity-conscious decision-making by international mechanisms (such as the United Nations Human Rights Committee) and national courts (the Supreme Courts of Canada, India and the United States).

Chapter 1: Defining minority according to strong and weak models

Chapter One aims to identify distinguishing features of the strong and weak models through an analysis of the elements which could make up a definition of minority. It is suggested that the strong minority rights paradigm is concerned primarily with 'national' communities (some of whom inhabited multi-national states in Eastern and Central Europe during the Cold War), while the weak minority rights model is typically concerned with groups who are defined by homogenous ethnic, linguistic and religious characteristics. Chapter One considers the candidate elements for inclusion in a definition of minorities and aims to present a reasoned justification for the following definition:

"A non-dominant group, possessing and, if only implicitly, wishing to preserve characteristics differing from those of rest of the population (or relevant political entity) which is numerically smaller than the rest of the population (or relevant political entity)."

In arguing for a definition of minority that more closely suits the weak minority rights model, Chapter One provides an argument against the sole use of the strong minority rights model.

Chapter 2: A Context-sensitive approach to the definition of minority

Chapter Two provide an opportunity to consider whether a context-sensitive approach may be needed for the definition of minority. Although minorities could be classified as belonging to the national, ethnic, religious or linguistic categories, not all groups which require minority protection necessarily fall within these categories. The Dalit³ (so-called 'untouchable') population of South Asia, who could be called 'minorities by descent,' deserve recognition as a class of minorities, in conjunction with a model of minority rights which has the capacity to assist in the realisation of substantive equality for them and similar groups.

Some would argue that caste is an inherently discriminatory system of classification and that allowing minorities to be defined by their caste identity would be to put international law in the service of preservation of a cultural system of discrimination. Chapter Two will recognise the argument that the caste system is so inconsistent with the principles of human rights that the only task of human rights law should be to eradicate caste through non-discrimination. That argument is a central challenge to the thesis that identity-conscious approaches have merit. An approach which concentrates solely on non-discrimination could be termed an 'identity-blind' as opposed to an 'identity-conscious' approach. In response to that argument, it is argued that, while the caste system is a form of identity imposed by others on those without caste, the identity of a "Dalit" is a self-imposed and positive form of identity. It will be noted that those who are most excluded by the caste system (previously called "untouchables") have constructed for themselves a positive identity as "Dalits" with significant differences of culture from the mainstream culture around them⁴. This more positive identity follows in the wake of

³ The Dalits are distinguished from indigenous populations in the constitutional law of India, as "Scheduled Castes" as opposed to the indigenous "Scheduled Tribes"

⁴ According to James Massey of the National Commission for Minorities (a public body established by the Indian Government), the term "Dalit" is derived from the Sanskrit root word *dal*, which means "burst, split, broken, torn asunder, downtrodden, crushed, destroyed": James Massey (1997) "Downtrodden: The Struggle of India's Dalits for Identity, Solidarity and Liberation" Geneva: WCC Publications p. 1

Dalit political and cultural movements as well as inspiring leaders such Dr Bhimrao Ranjio Ambedkar, one of the principal architects of the Constitution of India and Professor of Law⁵. The argument in Chapter Five that an identity-conscious approach can operate as an exception within a general rule of identity-blind non-discrimination, as an additional way to realise equality, is also relevant here.

It will be found that the weak model of minority rights with its ethnic, religious and linguistic classifications of minority does have some capacity to adopt a 'context-sensitive' approach to the task of defining minority and thus incorporate groups such as the Dalits of South Asia who (through their positive, voluntary adoption of Dalit identity) can be identified by culture as well as by caste.

Chapter 3: Defining minority rights according to the strong and weak models

Thus far, the arguments have presented reasons for a preference for a weak rather than a strong minority rights model, but have not shown why an identity-conscious model should be preferred to a weak model of minority protection. Chapter Three shows that the weak model of minority rights does not satisfy the principle of effectiveness because it does not offer special rights to minorities that extend beyond general individual rights (such as freedom of association, freedom of expression and freedom of thought, conscience and religion). For example, it is well known that the rights of persons belonging to minorities are protected by article 27 of the International Covenant on Civil and Political Rights:

"Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the

⁵ According to former civil servant and academic V. Chandra Mowli (1990) "B. R. Ambedkar – Man and His Vision" New Delhi: Sterling p. 24

other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

For article 27 to have value, it would be necessary to show that this article provides members of minorities with some entitlement which they would not already enjoy under individual rights provisions of the International Covenant on Civil and Political Rights such as article 18 (freedom of thought, conscience and religion), article 19 (freedom to hold and express opinions) article 21 (right of peaceful assembly), article 22 (freedom of association), article 23 (right to marry and protection for families) and article 26 (freedom from discrimination). For example, “freedom to manifest one’s religion” (under article 18) includes “the right to wear clothes or attire in public which is in conformity with the individual’s faith or religion” which means that such issues can be referred to the United Nations Human Rights Committee under article 18, without the need to invoke article 27.⁶

It could be argued that what is distinctive about minority rights, in particular in their formulation through article 27 of the International Covenant on Civil and Political Rights, is their collective dimension, that they are exercised in community with others. However, equivalent applications may be found of overlapping general, individual rights provisions such as freedom of religion. According to General Comment 22 of the United Nations Human Rights Committee, “The freedom to manifest religion or belief may be exercised “either individually or in community with others and in public or private”.⁷ Another example of such overlapping rights is that minorities occasionally experience difficulties in the state acceptance or (where registration or licensing procedures exist) on obtaining registration or licensing of cultural, religious or linguistic associations. For example, the Council of Europe Commissioner on Human Rights investigated the issue of the lack of legal

⁶ *Hudberganova v Uzbekistan* Communication No 931/2000: Uzbekistan 18 January 2005, UN Doc: CCPR/C/82/D/931/2000 (Jurisprudence)

⁷ United Nations Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) 30/07/93. UN Doc: CCPR/C/21/Rev.1/Add.4 CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments)

personality of certain Catholic Church institutions in Greece.⁸ This issue, and the extent to which the subject matter of minority rights protection can be covered by general individual rights, was also illustrated by the decision of the European Court of Human Rights in *Canea Catholic Church v. Greece*⁹ in which the Court found that the Canea Catholic Church, as a landowner, was not able to protect its property rights through legal proceedings in circumstances in which other religious associations would have been able to act through the courts. The European Court of Human Rights found Greece to be in violation of article 6 taken in conjunction with article 14 of the European Convention on Human Rights, which made it unnecessary to consider the argument made by the church under article 9. Of course, Greece had not prohibited the Catholic Church in Canea from existing as an association at all; instead, the courts in Greece had refused to recognise that church as a legal person, thus violating article 6 which holds, as the Court observed, “In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing... by [a] ... tribunal ...” in conjunction with article 14 (non-discrimination). If the European Convention on Human Rights had included a clause with identical wording to article 27 of the International Covenant on Civil and Political Rights, and if the applicants in *Canea Catholic Church v. Greece* had relied on the terms “persons belonging to such minorities shall not be denied the right, *in community with the other members of their group*, ... to profess and practise their own religion”¹⁰ then it is difficult to perceive any difference that such a clause would have made to the outcome of this case.

Whether claims by members of minorities in this area need to be made under minority rights, for example their culture, religion or language “in community with

⁸ Report by Mr Alvaro Gil-Robles, Council of Europe Commissioner on Human Rights, on his visit to the Hellenic Republic, 2 – 5 June 2002, for the attention of the Committee of Ministers and the Parliamentary Assembly Council of Europe Doc: CommDH (2002) 5, included in Council of Europe Commissioner on Human Rights, “3rd annual report January to December 2002, to the Committee of Ministers and the Parliamentary Assembly” Council of Europe Doc: CommDH (2003) 7 (19 June 2003) pp. 111 – 124

⁹ European Court of Human Rights, Judgement of 16 December 1997, Case No: 143/1996/762/963 Rep.1997-VIII, fasc.60

¹⁰ Italics added by this author to the relevant words of article 27 of the International Covenant on Civil and Political Rights

other members of their group” under article 27 of the International Covenant on Civil and Political Rights, or whether all such claims could be made through the general individual right to association (and other rights needed to make the rights of associations effective, such as the right of access to a court and non-discrimination as discussed in *Canea Catholic Church v. Greece*¹¹) is relevant here. While overlap in the protection afforded by individual rights is admittedly not unusual, if general individual rights duplicate the complete sphere of protection offered by the special rights in article 27, then article 27 (at least interpreted through the weak model of minority rights identified here) would be unable to satisfy the principle of effectiveness. This argument can be reinforced by the acceptance of the European Court of Human Rights that the denial of recognition by a state of a religious community can be in violation of article 9 of the European Court of Human Rights: *Manoussakis v. Greece*¹² and *Metropolitan Church of Bessarabia v. Moldova*.¹³ In the latter case, the European Court of Human Rights observed that “in not being recognised, the applicant Church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practise their religion and, not having legal personality, it is not entitled to judicial protection of its assets.”¹⁴ The Strasbourg Court found Moldova to be in violation of article 9¹⁵ and added that:

“... since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, *which includes the right to*

¹¹ European Court of Human Rights, Judgement of 16 December 1997, Case No: 143/1996/762/963 Rep.1997-VIII, fasc.60

¹² European Court of Human Rights, Judgment of 26 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1361, para 37

¹³ European Court of Human Rights, Judgement of 13 December 2001, Application No: 45701/99

¹⁴ European Court of Human Rights, Judgement of 13 December 2001, Application No: 45701/99 para. 105

¹⁵ European Court of Human Rights, Judgement of 13 December 2001, Application No: 45701/99 para.130

manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention.”¹⁶

This illustrates how freedom of religion has been authoritatively interpreted as having a collective, associational dimension which appears to provide the level of protection which would have been made available to members of religious minorities by the addition to the European Convention on Human Rights of a minority rights clause corresponding to article 27 of the International Covenant on Civil and Political Rights. In a similar way, the freedom to associate of a cultural (rather than religious) minority group has been brought within the scope of general, individual rights protection in *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*.¹⁷ Chapter Three therefore shows why the weak model of minority rights does not satisfy the principle of effectiveness.

Chapter 4: Justifications for Special Minority Rights

In defence of the weak model of minority rights, it could be argued that everyone should have the same human rights protection and that, therefore, it is desirable that minority rights offers no greater protection than that offered by general, individual human rights. It will be argued that the response of international human rights law to the rights of minorities should extend beyond the concept of non-discrimination and a weak approach to minority rights which does not extend beyond the level of protection offered by general individual rights (such as freedom of association, freedom of expression and freedom of thought, conscience and religion). International law on minority rights should recognise claims for special rights (including positive State obligations) to achieve substantive equality. It should encompass the concept of decision-making that is identity-conscious. Identity-

¹⁶ Italics added by this author; European Court of Human Rights, Judgement of 13 December 2001, Application No: 45701/99 para. 118

¹⁷ European Court of Human Rights Judgement of 2 October 2001 Applications Nos. 29221/95 and 29225/95)

conscious decision-making refers to a procedural right, with a corresponding duty on public authorities in decision-making processes to genuinely consider the rights of members of the minority as a relevant consideration. Chapter Four examines justifications for special minority rights based upon the value of ethnodiversity and exposing the myth of state neutrality.

It is commonly observed that “Equal treatment of all citizens in ... irrespective of culture, would actually discriminate” against the members of vulnerable minority groups¹⁸. Linked to this idea is the position that states can rarely or never be truly neutral in their treatment of majority and minority cultures. Any “concrete neutrality” in which “the state is not to do anything intended to favour or promote any particular comprehensive doctrine rather than another” is not sufficient to achieve neutrality since, despite the intent of decision-makers within government to act neutrally; the choices made will show implicit or explicit preferences for particular cultures.¹⁹ In making decisions on issues such as the choice of language of instruction in educational institutions and the dates of public holidays (which may or may not coincide with particular religious festivals) an explicit or implicit preference is made. For the state to behave with formal neutrality would, all else being equal, tend to favour cultures that are most represented among decision-makers within the state. Equal concern and respect for minorities dictates that members of minority groups require positive action by the state. In India issues of the scope of minority rights claims include the state regulation of minority-run educational institutions. In India, such cases have included claims by minority educational institutions to opt out of compulsory teaching of the (local majority) language in the Supreme Court of India’s decision in *Mehta v Maharashtra*.²⁰ Another “boundaries of rights” issue was the dispute over State regulation of admissions tests and fees for minority private

¹⁸ Richard Spaulding, “Peoples as National Minorities: A Review of Will Kymlicka’s arguments for Aboriginal rights from a self-determination perspective” (1997) 47 *University of Toronto Law Journal* 35 at p. 42

¹⁹ On concrete neutrality, see Rapahel Cohen-Alamgor “Between Neutrality and Perfectionism” (1994) 7 *Canadian Journal of Law and Jurisprudence* 217 at 222

²⁰ Supreme Court of India, Writ Petition 132 (civil) of 1995; Decision of 5 May 2004

educational institutions in *Islamic Academy v. Karnataka*²¹. As Jeremy Webber has observed in the context of Canada,

“[Canadian human rights law] has come to realise that identical treatment does not necessarily produce equality. Differences between individuals may be such that the same rule has a much more severe impact on one person than another, therefore creating, not eliminating, inequality...where individuals are in fundamentally different situations – where, as in our case, francophone Quebecers and aboriginal peoples have cultural concerns that differ from other Canadians – different treatment may well be perfectly compatible with equality”²²

Chapter Five: From race-consciousness to identity-consciousness: the emergence of identity-conscious decision-making

The jurisprudence of the Supreme Courts of Canada, India and the United States on equality and non-discrimination has the capacity to inform the future development of minority rights in towards the identity-conscious model which is defended here.

While non-discrimination and minority rights are undeniably discrete concepts and separate bodies of law, they can be related through their shared underlying value of equality and developments in one can inform developments in the other.

This thesis shall identify an emerging trend towards ‘identity-conscious decision-making’ in the Supreme Court jurisprudence of three jurisdictions: Canada, India and the United States. These three jurisdictions represent three distinct constitutional approaches towards special rights for historically disadvantaged groups. In India, the members of the Dalit community (sometimes called ‘untouchables’ by high-caste people and generally called ‘Scheduled Castes’ by the Government of India) have enjoyed an *expressly required* system of affirmative action under the Constitution of

²¹ Supreme Court of India, Writ Petition 350 (civil) of 1993, Decision of 14 August 2003

²² Jeremy Webber (1994) “Reimagining Canada: Language, Culture, Community and the Canadian Constitution” McGill-Queen’s University Press pp. 233 – 234

India. The Constitution of Canada *expressly permits* affirmative action. The Constitution of the United States, however, contains no such express permission which means that judges of the United States Supreme Court must decide the extent to which affirmative action is *implicitly permitted* (or required). So the United States Supreme Court scrutinises the constitutionality of affirmative action measures against the constitutional requirement of equality. Of course, the jurisprudence of the United States Supreme Court on affirmative action is generally regarded as an aspect of non-discrimination; and non-discrimination is generally regarded as a separate topic from minority rights. However, by preferring a model of equality as equal concern and respect (substantive equality) as opposed to formal equality, and by proposing a duty of continuing positive action to achieve substantive equality, the model of identity-conscious decision-making directly engages with the issue of affirmative action, as well as the traditional territory of minority rights. However, identity-conscious decision making cannot be equated to affirmative action in a traditional sense. Affirmative action in a traditional sense can be regarded as an automatic legal preference for historically disadvantaged communities. Identity-conscious decision-making can be regarded as containing a duty on the institutions of the state to have regard to the achievement of substantive equality in law and public policy.

This identity-conscious decision-making approach has the potential to assist in the achievement of substantive equality for members minorities without over-reaching and thus offending against the principle of equality. It is submitted that identity-consciousness offers a more nuanced approach than traditional approaches to non-discrimination and or the strong and weak models of minority rights. In the identity-conscious approach, minority rights become a relevant and mandatory consideration for lawful decision-making by public officials. If minority rights are a relevant and mandatory factor in decision-making, the relevant considerations will include themes such as dominance. Dominance has been identified as an important issue in the case law of the Supreme Court of India which modifies the state duty of positive action with the 'creamy layer doctrine,' showing its awareness of how the

affirmative action policy has led to the creation of privileged sub-groups ('creamy layers') within the historically disadvantaged Dalit community. This chapter shows, therefore, how the jurisprudence of the Supreme Courts of Canada, India and the United States have contributed to the emerging model of identity-conscious minority protection.

Chapter 6: The emergence of identity-conscious decision-making at an international level

Strong approaches to minority rights tend, as shall be shown, towards rights held by collectivities (peoples' rights) which are perceived by States as blurring the boundary between minority rights and self-determination²³ It is argued that States will reject minority rights if there is a danger that minorities could make valid claims for a group right to self-determination, as this could threaten States' territorial integrity.

Restricting minority rights claims to the weak minority rights model, to individual negative rights (and/or limited positive rights) to maintain distinctive culture, religion and language risks emptying minority rights of any meaning. If minority rights are restricted only to individual rights to non-interference with culture, religion and language, then arguably minority rights do not add anything to the scope of individual human rights such as the rights to association, education, expression, religious belief and practice.

The concept of identity-conscious decision-making offers a potential way to avoid the over-reaching of strong minority rights claims and the under-reaching of weak minority rights claims. Identity-conscious decision making, as a procedural right (a

²³ Self-determination is not within the scope of this thesis so the focus here is on the perceived threat to the territorial integrity of States and the danger, therefore, that a strong minority rights model would cause the withdrawal of States from participation in the minority protection work of international mechanisms.

right to be genuinely considered in a decision-making process) is distinctive from the weak and strong models of minority rights. The concept of identity-conscious decision-making would require public authorities to show that they had genuinely considered the rights of members of minorities as relevant factors. Chapter Six shows how developments at an international level (in particular by the United Nations Human Rights Committee) demonstrate evidence of the emerging identity-conscious model and assist in the determination of its requirements.

Chapter One

Defining minority according to the strong and weak models

Introduction

This chapter aims to identify how the strong and weak models of minority rights would approach the definition of minority, with a detailed examination of a series of elements that are candidates for inclusion in the definition. This chapter will defend an approach to defining minority that is much closer to the weak than the strong conception of minority rights. In this way, this chapter contributes to the thesis by helping to illuminate the meaning of the weak and strong models as well as by providing reasons for not accepting the strong model of minority rights. Reasons for not accepting the weak model of minority rights are found in the chapters which follow.¹ By emphasising the importance and relevance of geographical factors in the definition of minority (and determination of minority rights), this chapter shall provide additional support for the central thesis that the definition of minority (and minority rights) should incorporate a contextual approach, such as the identity-conscious decision-making model which this thesis defends.²

The lack of an established definition of minority in international law produces a danger that the lack of a definition gives States the opportunity to deny the existence of minorities in general or to refuse to recognise particular minority groups. For example, representatives of France have reaffirmed France's denial of the existence of minorities in their State,³ in discussion with the United Nations Human Rights Committee in relation to Article 27 of the International

¹ For example, in Chapter Three, under the heading 'Should minorities have the right to self-determination?'

² See below, in this chapter under the heading 'Geographical characteristics, such as density and history'

³ This is discussed in more detail in Chapter Four in the section on "Should minorities be able to claim self-determination?"

Covenant on Civil and Political Rights.⁴ This danger will be discussed in more detail in a subsequent chapter.⁵

This work aims to present an approach to defining minority that is both sufficiently precise and sufficiently flexible. The definition should be sufficiently precise in order to prevent States from avoiding their obligations. The definition should be sufficiently flexible for the same reason, to avoid the formalistic exclusion of individuals from minority status and also to reflect the variety of forms of identity in different regions of the world. An example of formalistic exclusion would be the requirement for minority status that persons be citizens, as has been required in certain Baltic States. States are free to establish (*de facto* or *de jure*) onerous citizenship requirements which may be substantially more difficult for people whose first language is not that of the majority.⁶ Such formalistic requirements have the potential to be a major obstacle to the realisation of minority rights. Similar requirements have been imposed by Baltic States in order to restrict minority participation in public life, but this problem has eased.⁷

The definition of minority that will be used is partly dependent on the goals of any international organisation which operates such a definition. At the Fourth Meeting of the CSCE [now OSCE] Council in December 1993, the Foreign Minister of participating States invited the High Commissioner for National Minorities “in the light of his mandate, to pay attention to all aspects of aggressive nationalism, chauvinism, xenophobia and anti-Semitism”; the High Commissioner concluded that “This affords me broad scope to address some of

⁴ adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171; see Jelena Pejić “Minority Rights in International Law” (1997) 19 HRQ 666 - 685 at 667

⁵ Chapter Three, under the heading ‘Should minorities have the right to self-determination?’

⁶ An example of a group suffering *de facto* exclusion from minority status is the Roma. According to the OSCE High Commissioner on National Minorities, the Roma have been “treated as *de facto* aliens and inherent outlaws in several countries”: OSCE High Commissioner on National Minorities, (2000) “Report on the situation of the Roma and Sinti in the OSCE Area” p. 27

⁷ Following intervention by the OSCE High Commissioner for National Minorities, the Saima (Latvian Parliament) adopted bills 1258 and 1259 abolishing the requirement of Latvian language proficiency for persons standing for election at national and municipal levels. Source: Walter Kemp, Senior Adviser to the OSCE High Commissioner on National Minorities, “Statement on adoption of amendments to Latvian election laws” (OSCE Press Statement, 10 May 2002).

the contemporary minority-related challenges faces in the OSCE area.”⁸ The distinction between the goals of rights protection and conflict prevention should not be over-stated. As the observer for India noted at the 6th session of the United Nations Working Group on Minorities, the protection of minority rights contributes to the political stability of the States in which they live.⁹

Limited progress towards a definition of minority

John Packer explored whether a definition of minority was required¹⁰. Packer noted that a number of writers had by-passed this question, saying that the question was ‘too complex’ or that consideration of a definition would delay getting onto the actual realisation of minority rights.¹¹ Packer aimed to show that minority rights exist in the context of democracy and that, rather than being based on a mix of objective characteristics including features such as ethnicity, religious belief and language (as previous writers have accepted, differing on the relevant characteristics and their interpretation) the definition of minority should focus on a free association of people whose shared desire differs from the majority¹². Professor Geoff Gilbert commented that Packer's article "is, in terms of theory, superior to all that have gone before."¹³ Francesco Capotorti produced a definition of minorities that is consistent with the weak model of minority rights, with its emphasis on ‘ethnic, linguistic and religious’ classifications as opposed to ‘national’ characteristics. At the time, Capotorti specified that the following definition was provisional and for the purpose of his study:

⁸ Rolf Ekeus, OSCE High Commissioner for National Minorities, “From the Copenhagen Criteria to the Copenhagen Summit: The Protection of National Minorities in an Enlarging Europe” address to the conference on National Minorities in the Enlarged European Union, Copenhagen 5 November 2002 (p. 7)

⁹ United Nations Working Group on Minorities “Report of the Working Group on Minorities on its sixth session” UN Doc: E/CN.4/Sub.2/2000/27 (30 June 2000) para. 26.

¹⁰ Packer, John (1993) “On the Definition of Minorities” in (ed) John Packer and Kristian Myntti “The Protection of Ethnic and Linguistic Minorities in Europe” Institute for Human Rights, Abo Akademi University.

¹¹ Packer 1993: 24 - 27.

¹² Packer 1993: pp 28 - 40 (context of democracy) and pp 41 - 49 (free association as the basis of minority rights).

¹³ Gilbert, Geoff “The Council of Europe and Minority Rights” (1996) 18 HRQ 160 - 189 at 162, see Packer 1993 pp. 23 to 66.

“an ethnic, religious or linguistic minority is a group numerically smaller than the rest of the population to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from the rest of the population.”¹⁴

Jules Deschenes produced a second attempt for the United Nations Sub Commission on the Prevention of Discrimination and Protection of Minorities (hereinafter, the Sub Commission)¹⁵. Some writers including John Packer¹⁶ offer their own definitions while others such as Professor Patrick Thornberry¹⁷ follow Capotorti or Deschenes' definitions, often with their own refinements. It has been shown that there is not one, but several, possible definitions. An authoritative list of sources of international law can be found in Article 38 of the Statute of the International Court of Justice¹⁸:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) The general principles of law recognised by the civilised nations;
- (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."¹⁹

¹⁴ Francesco Capotorti "Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities" published as volume 5 of the UN Human Rights Study Series (New York: United Nations, 1991) Sales No E.91.XIV.2 after its publication as a UN Document, UN Doc: E/CN.4/Sub.2/384/Rev.1 in 1979 after its completion by Capotorti in June 1977. This Capotorti report will be hereinafter cited as Capotorti 1979.

¹⁵ Jules Deschenes "Proposal concerning the definition of the term "minority"" UN Doc E/CN.4.Sub.2/1985/31 (14 May 1985).

¹⁶ Packer 1993: 45.

¹⁷ Patrick Thornberry "International Law and the Rights of Minorities" (Oxford: Clarendon Press, 1991) pp 6 - 10. For Thornberry, Capotorti offers "a realistic approach": Thornberry 1991: 6.

¹⁸ A wide range of distinguished writers regard this list as authoritative. See, for example, a work by a judge of the International Court of Justice, Dame Rosalyn Higgins "Problems and Process: International Law and How we use it" (Oxford: Clarendon Press, 1994) pp 17 - 18.

¹⁹ Article 59 establishes that there is no rule of binding precedent in the International Court of Justice: each decision has binding force only between the parties and in respect of that particular case.

Treaties that assign rights to persons belonging to minorities have failed to define the term "minority." The omission of a definition in the recent Framework Convention for the Protection of National Minorities was explained in an official Council of Europe explanatory report in these terms:

"It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States."²⁰

Elements of a potential definition have been established by the United Nations Human Rights Committee, when it has interpreted the text of Article 27 of the International Covenant on Civil and Political Rights. One such element is the inclusion of aliens in the definition of minority.²¹ The Human Rights Committee asserted in its 1986 General Comment on the position of aliens that:

"In those cases where aliens constitute a minority within the meaning of Article 27, they shall not be denied the right, in community with other members of the group, to enjoy their own culture, to profess and practice their own religion and to use their own language."²²

The Human Rights Committee re-affirmed this view in their 1994 General Comment on minorities²³. Unfortunately, the otherwise liberal definition of minority in the Constitution of India does require citizenship.²⁴ So the Human Rights Committee has offered a view on a specific question, but it has yet to offer a systematic treatment of the whole question of how we should define minority.

²⁰ Council of Europe "Framework Convention for the Protection of Minorities and Explanatory Report" (Strasbourg, Council of Europe 1994) p. 13 paragraph 12.

²¹ The question of whether citizenship is (and should be) required for membership of a minority will be dealt with more fully below, under the heading of Citizenship

²² UN Doc: CCPR/C/21/Add.5 (9 April 1986) at p. 3, see Thornberry 1991: 170.

²³ Pejic 1997: 672.

²⁴ Article 29(1) of the Constitution of India

Despite the contribution by the Human Rights Committee, there is no definition established by an international convention. The question remains of whether there is a definition according to international custom. That question shall now be considered.

A customary law definition of minorities would require a widespread State practice accompanied by the belief that what was being done was required by international law, or "a general practice accepted as law," in the words of Article 38 of the ICJ Statute. Dame Rosalyn Higgins has shown that there is an overlap between treaty and customary international law. A treaty can articulate what is already customary international law, or that customary international law can absorb the norms in a treaty, if they were not already part of customary law when the treaty was drafted²⁵. This seems hardly probable when States could not agree on a definition, either on the European level (during the drafting of the Framework Convention for the Protection of National Minorities, hereinafter FCNM or the Framework Convention) or the global level (during the drafting of the International Covenant on Civil and Political Rights, with its Article 27 on minority rights).

Perhaps United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²⁶ could provide evidence of State practice. Dame Rosalyn Higgins has noted that UN resolutions are a manifestation of State practice.²⁷ However, the UN Declaration on the Rights of Minorities contains no definition of minority. It could be argued that OSCE²⁸ instruments provide evidence of State practice. Commitment to minority protection emerged in the CSCE (as it then was) at the outset. The Helsinki Final Act, Principle VII of Basket I contains the following political obligation:

²⁵ Higgins 1994: 28 - 29.

²⁶ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, UN Doc A/C.3.47/L.66 (1992) Annex, adopted without a vote by the 47th session of the United Nations General Assembly on 18 December 1992. See Natan Lerner "The 1992 UN Declaration on Minorities" (1993) 23 Israel Yearbook on Human Rights 111 - 128.

²⁷ Higgins 1994:23.

²⁸ OSCE: Organisation on Security and Co-operation in Europe, known until 1 January 1995 the Conference on Security and Co-operation in Europe or CSCE

"the participating States on whose territory national minorities exist will respect the rights of persons belonging to such to equality before the law, will 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 sphere."²⁹

There are two problems in using OSCE commitments to provide evidence of State practice. One problem is that OSCE commitments are political, not legal obligations,³⁰ so it would seem to be contradictory to regard them as a source of State practice for customary international law. A second problem is that the term most used in these documents, "national minority," is not defined by any of them.³¹ A loose working definition can be inferred from the practice of the OSCE High Commissioner for National Minorities,³² but the High Commissioner is independent of the political will of States.³³

Given this disagreement on the level of State practice, it would be hard to see how a definition could be part of the "general principles of law accepted by civilised nations." The Permanent Court of International Justice (PCIJ)³⁴ took some steps towards a definition which deserve recognition. In the *Greco-Bulgarian Communities* case³⁵ the PCIJ defined community as follows:

"By tradition, which plays so important a part in Eastern countries, the "community" is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their own traditions, maintaining their form of worship, ensuring the

²⁹ Jane Wright "The OSCE and the Protection of Minority Rights" (1996) 18 HRQ 190 - 205 at 193.

³⁰ Wright 1996: 193.

³¹ Wright 1996: 195.

³² Wright 1996: 202 - 203.

³³ Wright 1996: 201.

³⁴ The precursor of the International Court of Justice

³⁵ Permanent Court of International Justice *The Greco-Bulgarian Communities* Series B Part 2 Advisory Opinion No 17 (31 July 1930).

instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.”³⁶

The PCIJ was again called upon to decide on a definition in the case of *Minority Schools in Albania*.³⁷ The Albanian Government made a declaration before the League of Nations Council on 2 October 1921³⁸. Article 5 of this Albanian Declaration read:

“Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.”

The Albanian Government then decided to close all non-State schools and to make primary education compulsory for all Albanian nationals. The Albanian Government argued that they had promised to give equal rights to minorities as well as other Albanian citizens, and that their closure of non-State schools and compulsory education for all in State schools was consistent with that promise.

The judgement of the PCIJ was therefore on the question of the extent of rights available to minorities rather than definitional questions. However, the judges chose to relate their judgement to the underlying idea of the treaties on minorities, which gives their views wider application, as follows:

“The idea underlying the minorities treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably

³⁶ PCIJ Series B Part 2 Advisory Opinion No 17 (31 July 1930) p. 21.

³⁷ Permanent Court of International Justice *Minority School in Albania* Series A/B Part 2 Advisory Opinion No 64 (6 April 1935).

³⁸ PCIJ Justice *Minority School in Albania* Series A/B Part 2 Advisory Opinion No 64 (6 April 1935) p. 5.

alongside that population, while at the same time preserving those characteristics which distinguish them from the majority, and satisfying the ensuing special needs."³⁹

Through both of these PCIJ advisory opinions, references have been found to two elements as definitional elements for minorities: differing characteristics and the desire to preserve and develop them. Someone might object that advisory opinions of the PCIJ are only advisory, so they lack binding force. However, this objection would not survive analysis of the practice of the League of Nations:

“We shall simply confine ourselves to observing that although the opinion is in theory only advisory, that is to say the expression of a view having no binding force and lacking the authority of *res judicata*

The quasi-judicial⁴⁰ decisions of the United Nations Human Rights Committee, operating under the ICCPR, offer some assistance here, but the Human Rights Committee is not a judicial body within the meaning of Article 38d, since that Article refers to Article 59 which applies to “[t]he decision of the Court,” not to the decisions of the Court or any other judicial or quasi-judicial body. Human Rights Committee decisions may be a source of assistance in determining the definition of minority for the purposes of the International Covenant on Civil and Political Rights. If the OSCE High Commissioner on National Minorities be regarded as a (very loosely) quasi-judicial office, perhaps the approach of the High Commissioner could be regarded as indicative of the content of the definition.

This argument would be hard to justify. The aim of the High Commissioner's office is the maintenance of peace and security, not human rights protection. And the High Commissioner's mandate includes situations but not cases.⁴¹ A Russian Federation proposal at the Budapest Review Conference in 1994 to extend the

³⁹ PCIJ Justice *Minority School in Albania* Series A/B Part 2 Advisory Opinion No 64 (6 April 1935) p. 17.

⁴⁰ Strictly speaking, the Human Rights Committee does not hand down judgements: Deschenes 1985: page 23, paragraph 135.

⁴¹ Wright 1996: 201.

High Commissioner's mandate to include cases was rejected because of a lack of consensus.⁴² Since there is not even a consensus to allow the High Commissioner to develop a loosely quasi-judicial role, we cannot draw inferences that his practice contributes to international law making as a form of judicial decision.

The writings of the most highly qualified publicists are considered to be a subsidiary source of international law. Francesco Capotorti and Jules Deschenes were separately entrusted by the United Nations Sub Commission⁴³ to draw up a document with an authoritative definition of minorities. Each, after a considerable amount of analysis, proposed a definition. Francesco Capotorti wrote that he drew up his definition solely with Article 27 ICCPR in mind⁴⁴. He proposed that the term minority should refer to:

"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion and language."⁴⁵

Jules Deschenes did not confine his definition to Article 27 ICCPR. He proposed that the following definition of a minority:

"A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."⁴⁶

⁴² Wright 1996: 201 - 202.

⁴³ The Sub Commission on the Prevention of Discrimination and Protection of Minorities

⁴⁴ Capotorti 1979 paragraph 568.

⁴⁵ Capotorti 1979 paragraph 568.

⁴⁶ Deschenes 1985: 30, paragraph 181.

Either of these versions could be seen as an emerging definition of international law. Each of these studies was the result of thorough research. Both have their limitations. Capotorti States that his study is limited to Article 27 ICCPR. Deschenes' version was limited by the same Article 27 framework, in the sense that later developments such as the Framework Convention in Europe and the UN Declaration on Minorities had not yet been established when Deschenes was writing. So each definition was composed within a narrower framework than the current scope of minority rights.

The Elements of a Definition

Below are elements that have been proposed as possible elements in the definition of minorities (the exact number of possible elements varies depending on how they are categorised and whether related elements are considered together):

Elements in definitions of “minority”

1. Non-dominance⁴⁷
2. Differing Characteristics (generally selected from a menu of ethnic, religious, linguistic or national characteristics)⁴⁸
3. Solidarity, or the will to preserve the differing characteristics or (according to Deschenes' definition) to survive and to seek equality in fact and in law⁴⁹
4. Geographical characteristics, such as density and history⁵⁰

⁴⁷ Non-dominance is discussed from p. 27

⁴⁸ Differing characteristics are discussed from p. 35

⁴⁹ Solidarity is discussed from p. 46

⁵⁰ Geographical characteristics are discussed from p. 50

5. Size, both the minimum size and the maximum (whether the group needs to be numerically smaller than the rest of the population)⁵¹
6. Mode of arrival, in particular whether indigenous groups can be minorities⁵²
7. Residence (related to mode of arrival), whether a group must be long-established (and whether, therefore, immigrant groups can be minorities)⁵³
8. Citizenship, whether minority rights are political rights and therefore apply only to citizens (which would also have an impact on when and how immigrant groups can become minorities)⁵⁴
9. Loyalty, in particular whether groups with controversial political aims such as autonomy or secession can still qualify as minorities⁵⁵
10. Recognition, whether States can effectively veto a group's minority status by denying them official recognition⁵⁶

Non-dominance

Nelson Mandela, in his autobiography, showed that negotiators for the apartheid regime attempted to use a form of minority rights to preserve some of their greater political power:⁵⁷

“On the morning of 13 December [1989] I was again taken to Tuynhuys. I met [newly appointed National Party leader and President] de Klerk in the same room where I had had tea with his predecessor. ...

⁵¹ Size is discussed from p. 54

⁵² Mode of arrival is discussed from p. 58

⁵³ Residence is discussed from p. 60

⁵⁴ Citizenship is discussed from p. 62

⁵⁵ Loyalty is discussed from p. 65

⁵⁶ Recognition is discussed from p. 66

⁵⁷ These would have been group-held minority rights, which would have been different from rights under Article 27 of the International Covenant on Civil and Political Rights

One of the issues I emphasized that day was the National Party's recently introduced five-year plan, which contained the concept of 'group rights.' The idea of 'group rights' was that no racial or ethnic group could take precedence over any other. Although they defined 'group rights' as a way of protecting the freedom of minorities in a new South Africa, in fact their proposal was a means of preserving white domination. I told Mr de Klerk that this was unacceptable to the ANC...

I mentioned an editorial I had recently read in *Die Burger*, the mouthpiece of the National Party in the Cape, implying that the group rights concept was conceived as an attempt to bring back apartheid through the back door"⁵⁸.

The non-dominance element appears to have emerged from a local, political context: apartheid-era South Africa.⁵⁹ The non-dominance criterion is a safeguard to prevent minority rights being used to shore up a non-democratic regime, perhaps by governments operating regimes similar to apartheid as a counter-trump to be used against the trump of human rights that was employed by the anti-apartheid movement.

If non-dominance should be included in a definition of minority, then a sufficiently precise definition of dominance should be established. If the apartheid system in South Africa is the precedent for the meaning of dominance, the question of which aspect of that system contains the defining characteristic(s) of dominance arises. Dominance could be interpreted as a reference to control of a particular branch or branches of government. Alternatively, dominance could be taken as meaning the violation of the human rights pertaining to non-discrimination and democratic participation. It will be necessary to show which area(s) of power (political, economic, social or other) dominance operates in and what degree of dominance is required to take a group outside the definition of minority.

⁵⁸ Nelson Mandela "Long Walk to Freedom: The Autobiography of Nelson Mandela" London: Abacus 1994 p. 664

⁵⁹ See, for example, Shaw 1990:38.

There is a consensus in favour of the inclusion of the concept of dominance in the definition of minority.⁶⁰ It is argued that a minority group that is dominant (by, for example, controlling the organs of the State) does not need minority protection because of its position of political power.⁶¹ Special Rapporteur Capotorti argued (in a journal article, published one year before the publication of his UN study on minorities) that "The International Covenants on Human Rights are clearly based on the pattern of a democratic State in which the will of the majority makes the essential decisions for the whole of the population."⁶² Packer argues that "In human rights philosophy, founded on the first premise of equality, the term "minority" does not arise, but in the context of democracy and in relation to majority rule."⁶³ Packer reinforces his argument from human rights philosophy by taking into account the context of Article 27 ICCPR.⁶⁴ Article 27, he notes, follows Article 25 (on political participation) and Article 26 (on equality before the law). So, for Packer, the context of the minority article in the ICCPR strengthens his Statement that the term minority only arises in the context of democracy.

This argument seems to imply that, where democracy is not present, minority rights do not apply. This reasoning could set a dangerous precedent and be open to a consequentialist objection. If one human right can be said not to apply where there is no democracy, perhaps non-democratic leaders might argue that other human rights do not apply, or even that human rights are only required in democratic States. Packer's argument would not support this contention. For Packer, minority rights do not apply until "the principle of non-discrimination in the enjoyment of inalienable rights has been properly applied."⁶⁵ So minority rights are not abandoned when democracy is not present, they are merely not, for Packer, the first priority. In the absence of non-discriminatory enjoyment of human rights, minority rights claims can be attempted by a dominant minority to

⁶⁰ Shaw 1990: 38.

⁶¹ Shaw 1990: 38.

⁶² Francesco Capotorti "The Protection of Minorities under Multicultural Agreements on Human Rights" (1976) II Italian Yearbook of International Law 11 - 32 at 16.

⁶³ Packer 1993: 39.

⁶⁴ Packer 1993: 56.

⁶⁵ Packer 1993: 38.

preserve their position of undemocratic power. For Packer, an element of the definition of minority rights that duplicates the philosophy of human rights is unnecessary. Logically, as Packer has shown, this is hard to fault. The implicit criterion of the philosophical basis for a definition in international law is included in its meaning.

Some writers, such as Manfred Nowak, contend that non-dominance should be broader than just not controlling the political power in the State⁶⁶. They say that a group, to be a minority, should have a weaker position in its economic, social and cultural status. Dominance in the sense of control of political institutions is relative. The historical example of apartheid-era South Africa, that features a very high degree of control of political institutions, is at one extreme of the spectrum of between total domination and complete powerlessness.

Of course, there was no single, unchanged system of apartheid in South Africa. The system evolved and so therefore did the meaning of the term apartheid. An examination of the developmental stages of apartheid is, however, not necessary for this analysis. By looking at some central elements it is hoped to extract some core legal techniques that were used to fix power within the grasp of a minority. The executive, legislative and judicial branches of government in South Africa were controlled by the white minority. The President was appointed by an electoral college with membership as follows: whites 50, Coloureds 25, Indians 13⁶⁷. This “means, in effect, that the President [was] elected by MPs of the white house, currently controlled by the National Party.”⁶⁸ Ministers, even following the establishment of a “multi-racial” Cabinet system, were predominantly white: in 1986, all Cabinet Ministers in South Africa were white except for one Coloured and one Indian minister, neither of whom had a portfolio.⁶⁹

⁶⁶ Manfred Nowak “UN Covenant on Civil and Political Rights: CCPR Commentary” (Kehl, Strasbourg, Arlington: NP Engel, 1993) pp 480 - 505 at 488.

⁶⁷ Roger Omond “The Apartheid Handbook” (London: Pelican, Second edition, 1986) pp. 41 to 42.

⁶⁸ Roger Omond “The Apartheid Handbook” (London: Pelican, Second edition, 1986) pp. 41 to 42.

⁶⁹ Omond 1986: 45.

Following the apartheid policy of separateness on racial grounds, there were three Houses of Parliament: one white, one Coloured, one Indian⁷⁰. Under the Constitution Act, “the control and administration of black affairs shall remain vested in the State President.”⁷¹ It is submitted that consideration of a State’s constitutional law should be examined to determine whether a candidate group for minority status is dominant. Relevant South African laws such as the Internal Security Act (No 74 of 1982), the Public Safety Act (No 3 of 1953) and the Public Safety Amendment Act (No 67 of 1986) enabling respectively wide powers of detention without trial, declaration of States of emergency and declarations of Unrest Areas with State of emergency-type powers were spawned by this minority-dominated system⁷². So were the widespread and severe human rights violations that were facilitated by those laws and by government policies such as the National Management System, a shadow system of government composed of army generals and police chiefs co-ordinating the strategy of “eliminating” political activists.⁷³

The obvious remedy for this constitutional dominance by a minority would be the establishment of a multi-ethnic democracy with universal adult suffrage. In other words, the problem here was that the law mandated the dominance of political power by a white minority. The repressive laws and policies and the severe human rights violations were the consequences of this dominance. The broader the definition, the greater the danger that groups which would otherwise qualify for minority status will be excluded as “dominant” groups. It is submitted that international law should be focused on the constitutional substance of dominance, rather than adopting a formalistic focus on particular laws that may or may not establish dominance for a particular group. Free choices by the electorate in a democracy that operates according to human rights norms may lead to a (temporary) concentration of power in the hands of members of a minority group. In India, a leading architect of the Constitution, Dr B.R.

⁷⁰ Omond 1986: 43.

⁷¹ Omond 1986: 46.

⁷² On repressive laws of the apartheid era in South Africa, see, for example, (ed) Max Coleman “A Crime Against Humanity: Analysing the Repression of the Apartheid State” (Claremont, South Africa: David Phillip Publishers; Mayibuye Books, University of the Western Cape; the Human Rights Committee of South Africa, 1998).

⁷³ Coleman 1998: 20 – 22.

Ambedkar, was a Dalit.⁷⁴ Dalits have reached senior positions in Indian society including President of India. Access to Civil Service posts for members of Scheduled Castes has been protected, through specific clauses in the Constitution of India, by a system of quotas. Yet it would be surprising if anyone seriously contended that Dalits are dominant in the Indian Constitution. To come to that conclusion would be to confuse the form with the substance of domination. Underlying this is the distinction between substantive and formalistic equality, explained by the Supreme Court of India thus in *Marri Chandra Shakhar Rao v Dean, Seth GS Medical College*:

“Equality must be a living reality for the large masses of the people. Those who are unequal, in fact, cannot be treated by unequal standards; that may be equality in law but it would certainly not be real equality. [The] Existence of equality of opportunity depends not merely on the absence of disabilities but on the presence of abilities.”⁷⁵

India’s Dalits would fit the requirements of a substantive approach to non-dominance because of their historic and current status as a group excluded and marginalised because of their status as "untouchables" in the Indian caste structure. One President of India, President Narayan, was a Dalit⁷⁶. However, to focus on the President of India as evidence for Dalits having significant power within the Constitution of India is to misconstrue the role of the President. As Sankaran Krishna has shown of the Constitution of India:

“The real locus of power is the prime minister (who heads a Council of Ministers) and the other important institutions of governance at the Centre are the

⁷⁴ V. Chandra Mowli (1990) “B.R. Ambedkar – Man and His Vision” New Delhi: Sterling Publishers pp. 31 - 40

⁷⁵ 1990 SCR (2) 843 at p. 848. For similar comments, see *Triloki Nath Tikku v State of Jammu and Kashmir* (1967) AIR 1283, Supreme Court of India; *State of Kerala v N.M. Thomas* (1976) AIR 490 Supreme Court of India; Marc Galanter (1989) “Law and Society in Modern India” New Delhi: Oxford University Press

⁷⁶ President of India from 25 July 1997 – 25 July 2002:
<http://presidentofindia.nic.in/scripts/formerpresidents.jsp>

lower house of the legislature (Lok Sabha, or House of the People), the Supreme Court and the civil service.”⁷⁷

It is worthy of note that, according to Sankaran Krishna, the President of India is not only not the real centre of power, the holder of that office does not even deserve mention as an “other important institution” of governance.

It is submitted that the threshold of dominance should be set at a high level, to avoid the exclusion of appropriate groups from minority status. Members of a group may hold offices that are at the apex of a constitutional system, but which hold only ceremonial or symbolic significance, it would be important for a definition to penetrate to the reality of power in a constitution, not just the appearance of power. The difficulty that could then arise for international law is that different constitutions locate power in different ways. In the UK constitution, for example, the Head of State, in theory, holds extensive powers under the Royal Prerogative. In practice, these powers are constrained by constitutional conventions. In the United States, the Head of State also enjoys extensive powers, which (given the democratic mandate enjoyed by the American President but not the British Crown) are not similarly constrained. Any text that defined dominance according to the control of particular positions within each State’s constitution could run the risk of failing to properly locate power in the constitutions of some States.

To ensure that minority rights are compatible with general individual rights and to prevent the abuse of minority rights, non-dominance should be included in the definition of minorities used by bodies whose aims include minority protection (such as the UN Human Rights Committee, the UN Commission on Human Rights and its Sub Commission) and excluded from those bodies for whom minority protection is a means to conflict prevention (the OSCE High Commissioner on National Minorities).

⁷⁷ Sankaran Krishna “Constitutionalism, Democracy and Political Culture in India” in (eds) Daniel P. Franklin and Michael J. Baun “Political Culture and Constitutionalism” quoted in (eds) Vicki C. Jackson and Mark Tushnet (1999) “Comparative Constitutional Law” New York: Foundation Press p. 1071

If the concept of dominance within international law on minority rights had been developed based on the context of India rather than the context of South Africa, then dominance might have had a different meaning altogether. Following the constitutional law jurisprudence of the Supreme Court of India in relation to India's Dalits and other excluded communities, it might have acquired an economic as well as a political locus. It might also have been used to exclude individuals who belong to a dominant "creamy layer" rather than entire groups being excluded from minority status for their dominance.

Professor Marc Galanter, commenting on the effects of India's reservations policy in the legislature as well as government employment for Scheduled Caste and Scheduled Tribe members, made these observations:

"Reserved seats provide a substantial legislative presence and swell the flow of patronage, attention and favourable policy to the Scheduled Castes and Scheduled Tribes...Such redistribution is not spread evenly throughout the beneficiary group. There is evidence for substantial clustering in the utilization of these opportunities. The clustering appears to reflect structural factors (e.g. the greater urbanization of some groups)...Where the list of beneficiaries spans groups of very disparate condition – as with the most expansive lists of other Backward Classes – the 'creaming' effect is probably even more pronounced."⁷⁸

As a result of this tendency towards the formation of a "creamy layer" of privileged individuals, one Chief Justice of India, C.J. Chandrachud, recommended that the policy of reservations for Scheduled Castes, Scheduled Tribes and other backward classes be reviewed every five years according to a "test of economic backwardness."⁷⁹

⁷⁸ Marc Galanter (1989) "Law and Society in Modern India" New Delhi: Oxford University Press,

⁷⁹ Fali Sam Nariman "The Indian Constitution: An Experiment in Unity Amid Diversity" in (eds) Robert A. Goldwin, Art Kaufman and William A. Schambra (1985) "Forging Unity out of Diversity: The Approaches of Eight Nations" quoted in Vicki C. Jackson and Mark Tushnet (1999) "Comparative Constitutional Law" New York: Foundation Press pp. 1051 – 1070 at p. 1068

In a leading authority on the constitutionality of reservation laws in India, *State of Kerala v N.M. Thomas*, Krishna Iyer J. (giving an opinion as a member of the majority) referred to the danger that the benefits of reservations were snatched away by “the top creamy layer of the ‘backward’ class or caste, thus keeping the weakest always weak and leaving the fortunate layers to consume the whole cake.”⁸⁰

The jurisprudence of the Supreme Court of India suggests that minority status determination, like the determination of refugee status in international law, should be an individual matter. Rather than determining the minority status of a group, individual minority status determination could be used to distinguish between those who have acquired an individually dominant position through the exploitation of provisions designed for the protection of minorities. It could be argued that the “creamy layer” doctrine is a response to India’s own version of the strong approach to minority rights protection.⁸¹ In Chapter Three, the strong and weak approaches to minority rights (as opposed to defining minority) will be explained; in later chapters, this thesis aims to demonstrate how the identity-conscious approach to minority rights can overcome certain difficulties inherent in the strong and weak models.

Differing Characteristics

Capotorti in his 1976 article suggested that the element of ethnic, religious and linguistic characteristics is the only part of the definition that is not open to question.⁸² Since 1976, a number of writers have, nevertheless, objected to this element on practical, political, technical and ontological grounds. Packer objected to Capotorti's emphasis on what he calls the "mythical presence of fixed traits."⁸³ Capotorti argued in his 1977 report that the “existence of a minority

⁸⁰ *State of Kerala v N.M. Thomas* (1976) AIR 490 Decision of the Supreme Court of India, opinion of Krishna Iyer J. at para. 149

⁸¹ See Chapter Three on the strong and weak approaches to minority rights.

⁸² Capotorti 1976: 14.

⁸³ Packer 1993: 55.

must be established on the basis of objective criteria.”⁸⁴ Otherwise, according to Capotorti, the protection of minorities would be dependent on the goodwill of States. Presumably, this means that States might deny that members of minorities resident in their territories wish for minority rights protection and that States could pressure minorities to make Statements disclaiming any need for protection of their rights. Professor Malcolm Shaw found two problems with the application of the element.⁸⁵ One problem is that, when a large number of such groups exist, the element becomes difficult to apply. The other problem is that some States deny that groups with such characteristics exist.

It is hard to dispute the facts behind Shaw's argument. Shaw cited the example of Senegal, which argued before the Human Rights Committee that its population was so intermingled that "many of the Senegalese did not quite know which of the seven ethnic groups in the country they belonged to."⁸⁶ Deschenes' study gives strong credibility to Shaw's first argument. Deschenes shows that, in 50 African States, there are over 850 different ethnic and linguistic groups⁸⁷. India, too, includes many distinct ethnic, religious and linguistic groups. Fali Sam Nariman wrote that the “diversity of India is tremendous” and this is reflected in India’s many ethnic groups (including Pathans, Tamils, Bengalis, Marathas, Gujaratis, Andhras, Oriyas, Assamese, Kashmiris, Rajputs and others), thirty main indigenous languages, six main religions and nearly 200 “religious persuasions.”⁸⁸

However difficult to apply this element becomes, if the classifications of “ethnic, religious and linguistic” are to be maintained, then its meaning must be considered, either in the definition of minority or the classification of minorities. Shaw also noted the denials by Uruguay and France that minorities exist in their country. However, it is not clear that these difficulties justify removal of the

⁸⁴ Capotorti 1979: 35 para. 203-204.

⁸⁵ Shaw 1990: 36.

⁸⁶ UN Doc A/42/40 (1987), quoted in Shaw 1990: 36.

⁸⁷ Deschenes 1985: 26.

⁸⁸ Fali Sam Nariman, “The Indian Constitution: An Experiment in United Amid Diversity” in (eds) Robert A. Goldwin, Art Kaufman and William Schambra (1985) “Forging Unity Out of Diversity: The Approaches of Eight Nations” quoted in (eds) Vicki C. Jackson and Mark Tushnet (1999) “Comparative Constitutional Law” New York: Foundation Press pp. 1051 – 1053.

characteristics element, as opposed to its careful application to groups within States. It is impossible to deny that international law gives explicit permission to States to deny the existence of minorities in their territories in the well-known first phrase of Article 27 ICCPR. One possible response would be to point to the minorities' self-identification as minority groups. But, as several writers have shown, some persons belonging to minorities may hold back from making such a statement (identifying them as belonging to a minority) for fear of being perceived to be disloyal by their State.⁸⁹

The objective fact that a person has differing characteristics could acquire great significance here. Arguably, if minority status is perceived as primarily a matter of different objective characteristics, for example being a Punjabi-speaking person of the Sikh religion and North Indian culture in the UK, then the continuing existence of these differences may be seen as less of a political position than the element of intention to preserve those characteristics. So the fact that some States deny that minorities exist in their territory perhaps reinforces the argument for an objective basis in the definition. Packer argued more directly against the inclusion of the characteristics element⁹⁰. On the layer of application of criteria, Packer argues that the adjectives "ethnic, religious and linguistic" are not clearly defined. That is also hard to dispute, as Ramaga shows in his study of the characteristics⁹¹. Ramaga finds an objection to each of these elements.

On ethnicity, Ramaga detected a contradiction in Capotorti's position on the relationship between ethnicity and the characteristic of "race" that ethnicity replaced. Ramaga shows that Capotorti appears to oppose race as unscientific, yet includes it in his understanding of ethnicity.⁹² So the degree to which ethnicity is determined by genetic as opposed to cultural characteristics remained

⁸⁹ This point was made by Yugoslavia: Sohn 1981: 279 and Shaw 1990: 40. Shaw agrees with Capotorti and others that, if a group's differing characteristics have survived, they must have intended to preserve them: see, eg, Capotorti 1976: 17 and see further below.

⁹⁰ Packer 1993: 57 -58.

⁹¹ Ramaga 1992.

⁹² Ramaga 1992, citing Capotorti 1979 paragraph 201.

unclear.⁹³ Below, it will be argued that “ethnic” should be interpreted as a reference to culture rather than biological characteristics.

On religion, Ramaga notes that there is uncertainty about, for example, Aboriginal and Amerindian beliefs that lead to the description of atypical religions as “culture”.⁹⁴ Ramaga used this example to show that States’ defining criteria for a religious minority can be unfair to minorities.⁹⁵ It is unclear whether sub-groups within religions (such as denominations within Christianity) can qualify as religious minorities. As has been shown above, State practice and the practice of the Human Rights Committee provide support for the position that they do qualify.⁹⁶

On language, Ramaga observes that language is a complex issue. What some call languages may be merely dialects in the view of others. Ramaga gives the example that Serbian and Croatian are mutually intelligible.⁹⁷ The Balkan correspondent for the London *Times* and the *Economist*, Tim Judah, made the following comments on the linguistic background to his experiences of observing the Yugoslavian civil war of the 1990s. First, Judah noted the historic connections between Serbian and Croatian:

“While the origins of the Serbs and the Croats are still shrouded in mystery it is clear from the very beginning that these two distinct but close tribes moved one beside the other. Their histories have always been entwined. How close the tribes were is attested by the fact that they spoke, and still speak, virtually the same language.”⁹⁸

⁹³ Below, it will be argued that “ethnic” should be interpreted as a reference to culture rather than biological characteristics.

⁹⁴ Ramaga 1992: 412.

⁹⁵ Ramaga 1992: 412.

⁹⁶ Ramaga 1992: 412 - 413.

⁹⁷ Ramaga 1992: 426.

⁹⁸ Tim Judah (2000) “The Serbs: History, Myth and the Destruction of Yugoslavia” New Haven: Yale University Press 2nd edition p. 8

After the Second World War, Tito became known for his ruthless nation-building of a single Yugoslavia.⁹⁹ Tito was likened to “a great oak tree, in the shade of whose branches nothing else could grow”.¹⁰⁰ In the minds of some observers, the loss of health and eventual death (in 1980) of Tito precipitated the collapse of Yugoslavia.¹⁰¹ Although Tito’s death is perceived by some as the catalyst for the resurgence of nationalist forces, his dream of an enduring united Yugoslavia began to unravel as early as the late 1960s. Judah explained how, in 1967, Croatian writers published a declaration claiming that Croatian was a distinct language from Serbian. The implication was that Serbo-Croatian was, in fact, an attempt to assimilate the Croats into the Serbian language. The response of Serbian intellectuals was to demand that Serbian children in Croatian schools be taught in Serbian, not Croatian, using the Cyrillic alphabet. Judah notes the strongly political, even sectarian, dimension of these claims:

“The question of the difference between Serbian and Croatian was essentially a political one, because the difference between the mainstream dialects is significantly less than say between English English and accented Scottish English. In Croatia itself, however, there was almost no difference at all between the language spoken by the republic’s Serbs and Croats.”¹⁰²

Language is important in the construction of identity, but its importance should not be overestimated. A number of factors contributed to the collapse of Yugoslavia as a multi-ethnic State. Professor Ken Booth identified the significance of “economic factors that can shape the future of human rights”¹⁰³ and Carrie Booth Walling commented on the salience of “power politics that capitalises on latent ethnic mistrust”.¹⁰⁴

⁹⁹ Tito “ruthlessly suppressed any expression of resurgent nationalism” in the years after the Second World War: Laura Silber and Allan Little (1996) “The Death of Yugoslavia” BBC Books p. 29

¹⁰⁰ Laura Silber and Allan Little (1996) “The Death of Yugoslavia” BBC Books p. 29

¹⁰¹ Laura Silber and Allan Little (1996) “The Death of Yugoslavia” BBC Books p. 29

¹⁰² Tim Judah (2000) “The Serbs: History, Myth and the Destruction of Yugoslavia” New Haven: Yale University Press 2nd edition pp. 145 – 6.

¹⁰³ Professor Ken Booth “Still Waiting for the Reckoning” in (ed) Ken Booth (2001) “The Kosovo Tragedy: The Human Rights Dimension” London: Frank Cass 1 – 26 at p. 7

¹⁰⁴ Carrie Booth Walling, “The History and Politics of Ethnic Cleansing” in (ed) Ken Booth (2001) “The Kosovo Tragedy: The Human Rights Dimension” London: Frank Cass 47 – 66 at p. 58

A language referred to by one name, such as Chinese, may in fact incorporate several mutually languages, in this case Cantonese, Hakka and Mandarin, that deserve consideration as separate languages despite their common script¹⁰⁵. So Packer's point that ethnicity, religion and language are not clearly defined is justified. However, a possible remedy is to clarify these terms, rather than to remove this element from the definition.

The classification of national minority

Packer's objection will be considered in relation to the fourth classification of minorities, national minorities. This is important since the strong model of minority rights corresponds to the conception of national minorities, if by 'national minority' a smaller nation within a multinational State is meant (as opposed to an understanding of national minority which corresponds only to a group with ethnic, religious or linguistic characteristics that differ from the majority population.

To understand the meaning of national minorities, their origin and context should be understood. Mr Morosov, representing the Soviet Union at the Ninth Session of the UN Commission on Human Rights, introduced a proposed text¹⁰⁶ with the purpose of spelling out the rights of national minorities, emphasising "the right of national minorities to use their native tongue and to develop their national character."¹⁰⁷ It has been shown that, on the better view, "ethnic" corresponds to culture in the international law classification of minorities. Here it will be seen that "national" in national minority corresponds to "national character," which appears to mean national culture. If ethnic minorities are defined by their culture, and if national minorities are defined by their national culture, the relationship between the classifications of ethnic and national remains to be determined. The

¹⁰⁵ Ramaga 1992: 426.

¹⁰⁶ The proposed text was a possible draft of the minorities article of the International Covenant on Civil and Political Rights. This text was not adopted.

¹⁰⁷ Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR368 (2 October 1953) p. 4.

linkage of national minorities with a national character could mean that national minorities are ethnic minorities whose different culture corresponds so that of the majority in another State. That would mean that, for example, the Irish and Turkish minorities in the United Kingdom are national minorities, whereas the Roma (without a kin State) would probably have ethnic minority status.

That would be consistent with the argument of the applicant in *Ahmet Sadik v. Greece*, imprisoned after an election campaign for election material that referred to the “Turkish community of Western Thrace” rather than the “Greek minority of Muslim faith.”¹⁰⁸ The view of the European Court of Human Rights on that issue was not, unfortunately tested, as the case was dismissed for lack of exhaustion of domestic remedies.¹⁰⁹ However, as Thornberry and Estébanez have noted, the dissenting judges expressed their concern about the Government’s policy of “denying that the minority is not only a religious but also an ethnic one.”¹¹⁰

Second, if national minority corresponds to “national” rights, it could be asked whether that implies imply that the classification of national minority is inherently problematic because it contains the implication that the group have a sense of nationhood that competes with the nationhood of their State of residence.¹¹¹ It is argued in a subsequent chapter that the perceived strength of the rights of national minorities would prompt opposition by States.¹¹² It should be noted that the inclusion of the national category was not a new policy for the United Nations in the Minorities Declaration. Decades before, the 1948 Genocide Convention applied to a “national, ethnical, racial or religious group” without

¹⁰⁸ No 26695/95, judgment of 10 July 1998.

¹⁰⁹ Patrick Thornberry and María Amor Martín Estébanez (2004) “Minority rights in Europe: A review of the work and standards of the Council of Europe” Strasbourg: Council of Europe p. 42

¹¹⁰ No 26695/95, judgment of 10 July 1998 dissenting opinion, paragraph 19, quoted in Patrick Thornberry and María Amor Martín Estébanez (2004) “Minority rights in Europe: A review of the work and standards of the Council of Europe” Strasbourg: Council of Europe p. 43.

¹¹¹ In the section of Chapter Three headed ‘Should minorities be able to claim self-determination?’, it is argued that there is an inherent problem with the model of strong minority rights: that States perceive claims to strong minority rights are opening gambits towards secession, which creates an unacceptable risk that States will not co-operate with the minority protection work of international mechanisms such as the United Nations Human Rights Committee

¹¹² See Chapter Three of this thesis under the heading ‘Should minorities be able to claim self-determination?’

defining these terms.¹¹³ So it is not accurate to speak of a “United Nations approach” that rejects the national minority classification (on the basis of the ICCPR but ignoring the Genocide Convention and Minorities Declaration) as opposed to a “European approach” (Council of Europe and OSCE texts that accept the national minority classification). It is rather a difference between the approach taken in the ICCPR and the Children’s Convention with the approach of other UN texts and the texts of other intergovernmental organisations.

Bearing in mind the context and origin of the classification, the explanation of national minority offered by its prime exponents, the Soviet delegation to the Ninth Session of the Commission on Human Rights, needs to be examined. Mr Morosov, speaking for the Soviet Union, defined a national minority as a group with the characteristics of a “nation”¹¹⁴. The summary records of the Commission show that “by the term ‘nation’ he understood a historically formed community of people characterised by a common language, a common territory, a common economic life and a common psychological structure manifesting itself in a common culture.”¹¹⁵ These references include culture, which implies a relationship with the classification of ethnic minorities (already examined) but goes further. The additional aspects of history, language and economy sound like definitional elements of a political unit, not of a subgroup within a political unit (a minority).¹¹⁶ Writers vary in their interpretation of the term ‘national minority’ and in their views on how the national classification relates to the ethnic, religious and linguistic classifications. This redefinition would meet strong opposition from those States that supported the inclusion of national minorities in the ICCPR, especially if the term “national” was associated with other classifications. Mr Kriven, a delegate of the Ukrainian Soviet Socialist Republic, spoke at the Ninth Session of the Commission on Human Rights in support of the

¹¹³ B. Whitaker “Revised and updated report on the question of the prevention and punishment of the crime of genocide” UN Doc: E/CN.4/Sub.2/1985/6 (2 July 1985).

¹¹⁴ Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR369 p.15.

¹¹⁵ Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR369 p.16.

¹¹⁶ The argument that the category of national minorities (defined separately from ethnic, religious and linguistic minorities) and the model of strong minority rights are perceived as threatening the territorial integrity of States is discussed in more detail in Chapter Three, under the heading ‘Should minorities be able to claim self-determination?’

Soviet proposal. He asserted that ethnic groups “had nothing whatever to do with national minorities”.¹¹⁷

The approach of the Soviet delegate was more nuanced. He observed that an ethnic or linguistic group could be a national minority, but that a group could be an ethnic or linguistic group without reaching the level of qualifying for national minority status¹¹⁸. That Statement, at least, leaves the door ajar to the notion that the constituent elements of a national minority may be essentially similar to those of ethnic or linguistic minorities. Since the door of associating national minorities with the essential characteristics of ethnic or linguistic minorities was left open, other writers have added to the pressure on that door. Malinverni in his analysis of a proposed Council of Europe draft convention for the protection of minorities noted the threefold categorisation of ethnic, religious and linguistic and proposed that “In contrast to other minorities, these minorities are thus national minorities”.¹¹⁹ In Recommendation 1201 of the Parliamentary Assembly of the Council of Europe, containing a draft protocol for the European Convention on Human Rights, the expression “national minority” is defined in Article 1. This definition includes a reference to the different characteristic of a national minority. National minorities are regarded as those which “display distinctive ethnic, religious or linguistic characteristics”¹²⁰. The authority of the International Criminal Tribunal for Rwanda has been added to the weight of argument in favour of a less strong definition of national minority, which moves it closer in line with the ethnic, religious and linguistic classifications. In the case of *The Prosecutor v. Jean Paul Akayesu*¹²¹ in which the Tribunal interpreted the term “national” in the 1948 Genocide Convention, a “national” group was held to be:

¹¹⁷ Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR369 p. 9.

¹¹⁸ Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR369 p. 13.

¹¹⁹ Malinverni 1991: 267.

¹²⁰ Klebes 1993: 145.

¹²¹ *The Prosecutor v. Jean-Paul Akayesu* International Criminal Tribunal for Rwanda (Chamber I) Case No ICTR-96-4-T, accessed at the Rwanda Tribunal web site <http://www.un.org.law/ictt/english/judgements/akayesu.htm/>

“a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”¹²²

There is considerable support, therefore, for the redefinition of national minority to mean a collective term for minorities that fall within the threefold classification of ethnic, religious and linguistic minorities. It shall be argued below that the strong minority rights model, which would distinguish between ethnic, religious and linguistic minorities and national minorities, would be unacceptable for States because of its associations with potential claims to self-determination and the perceived threat to the territorial integrity of States.¹²³

The argument that ethnicity gives credibility to the ‘race thesis’

Packer has expressed a concern that the inclusion of ethnicity as a characteristic gives dangerous credibility to the mythical thesis of race¹²⁴. This section will discuss the ‘thesis of race’ and consider whether it should be denied credibility.

Martinez Cobo describes this race thesis when he notes the widespread misconception that there are important “physical and psychical differences between the so-called races” which he says is not true.¹²⁵ He demonstrates the falsehood of the race thesis by reference to science and history. Science has shown that all human beings belong to one species, so the use of the term “race” to describe a group within the human race is incorrect¹²⁶. Historically, the race thesis reflects the disproved view that racial characteristics are passed on through generations by blood, as in terms such as “half-blood” and “half-caste.”¹²⁷ Hence “race” should only be used to refer to “a specific combination of physical characteristics of physical origin”¹²⁸.

¹²² *The Prosecutor v. Jean-Paul Akayesu* International Criminal Tribunal for Rwanda (Chamber I) Case No ICTR-96-4-T section 6.3.1. Genocide.

¹²³ Chapter Three, under the heading ‘Should minorities be able to claim self-determination?’

¹²⁴ Packer 1993: 57 - 58.

¹²⁵ Martinez Cobo 1986 p. 7 para. 17.

¹²⁶ Martinez Cobo 1986 p. 7 para. 18 to 19.

¹²⁷ Martinez Cobo 1986 p. 10 para 31.

¹²⁸ Martinez Cobo 1986 p 9 para 28.

However, it is arguably unproven that including ethnicity would give credibility to the race thesis. Packer argued that ethnicity is unclear¹²⁹ and in below it will be argued that ethnicity has been interpreted by some as having a genetic or cultural basis. Packer argued that ethnicity is too close to the concept of race. It has been shown that, to avoid association with the concept of race, ethnicity should be interpreted as having a cultural basis. With an adequately clear understanding of the meaning of culture, both of Packer's concerns would be met.

This cultural basis, as Packer could have noted, would not support the "race thesis". The idea that ethnicity has a cultural rather than a genetic basis seems to be a necessary consequence of Packer's assertion that being a member of a minority is a matter of free association, and that the process of free association "is not about deciding what one 'is,' but what one desires"¹³⁰. It would be hard to see a genetically-based ethnicity as being a matter of choice, of desire rather than being a fixed trait. This point also conflicts with Packer's warning about the dangers of ethnicity as a racial characteristic.

Someone might object that, while we recognise that the race thesis is incorrect, nevertheless physical characteristics should be accepted as part of our definition of ethnicity because, firstly, that is how the drafters of the International Covenant on Civil and Political Rights understood ethnicity, second because "ethnic" replaced "racial" in the UN lexicon and no other term has been proposed to include racial as opposed to cultural characteristic and finally because individuals may violations of their rights on the basis of physical characteristics as opposed to cultural aspects of their identity. There is certainly evidence that the drafters of the ICCPR saw ethnicity as having a physical aspect. The replacement of "racial" by "ethnic" was suggested by the Chair of the Sub Commission on the Prevention of Discrimination and Protection of Minorities at the Third Session of

¹²⁹ Packer 1993: 57 - 58.

¹³⁰ Packer 1993: 43.

the Sub Commission¹³¹. The Chair said that “ethnicity” would include “cultural, physical and historical characteristics”¹³².

Solidarity, or the will to preserve the characteristics

The element that a group needs the will to preserve its differing characteristics to qualify as a minority has considerable support. It was established by the Permanent Court of International Justice in the Greco-Bulgarian Communities Case.¹³³ It was accepted by both Capotorti¹³⁴ and Deschenes¹³⁵ in their definitions of minority. Sohn notes the Yugoslavian objection (during the drafting of article 27 ICCPR) to the emphasis on the subjective element (the will to preserve the group's differing characteristics) on the basis that minorities may be seen as disloyal if they make a Statement of their wish to preserve their different characteristics¹³⁶. Professor Malcolm Shaw shares this concern and has recommended that it should be inferred from the objective fact that a group has preserved its characteristics over a period of time that it wishes to preserve those characteristics¹³⁷. This is consistent with the recommendation of Mr Bengoa to the United Nations Working Group on Minorities, at least for what he called the “third generation of minorities.”¹³⁸ However, Professor Geoff Gilbert has noted that the element of solidarity is needed to protect groups from becoming involuntary minorities, that is, groups that have minority status imposed on them by dominant populations.¹³⁹ This approach would appear be more consistent with

¹³¹ Third Session of the Sub Commission on the Prevention of Discrimination and Protection of Minorities UN Doc: E/CN.4/Sub.2/SR.48 (1950) p. 4 para 11.

¹³² Third Session of the Sub Commission on the Prevention of Discrimination and Protection of Minorities UN Doc: E/CN.4/Sub.2/SR.48 (1950) p. 5 para 16.

¹³³ PCIJ (Ser. B), Nos 17, 19, 21, 22 and 33, cited in Gilbert 1996: 163.

¹³⁴ Capotorti 1979 paragraph 568.

¹³⁵ Deschenes 1985: 30, paragraph 181.

¹³⁶ Sohn 1981: 279.

¹³⁷ Shaw 1990: 40.

¹³⁸ The third generation of minorities, for Bengoa, are a corollary of the globalization process in which the “reconstruction of lost or partially lost ties by human groups” occurred. Mr Bengoa contrasted the third generation to the first generation (associated with the break-up of European empires after the First World War) and the second generation (associated with the process of decolonization): United Nations Working Group on Minorities “Report of the Working Group on Minorities on its sixth session (Geneva, 22 – 26 May 2000) UN Doc: E/CN.4/Sub.2/2000/27 para. 31.

¹³⁹ Gilbert 1996: 167.

the direction of the Council of Europe's Framework Convention on National Minorities, with its system of individual choice in relation to minority status determination:

“Every person belonging to a national minority shall have the right to freely choose to be treated or not treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.”¹⁴⁰

However, there is a problem with using Article 3 FCNM as a justification for a subjective approach to minority status determination. Since the Article begins “Every person who belongs to a national minority” the implication is that *belonging to a national minority* is a prior and separate question to *being treated as a member of a national minority*. This is reinforced by the comment on the Explanatory Report to the Framework Convention:

“This paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.”¹⁴¹

Deschenes' version of the subjective element included the requirement that the group aim at equality in fact and law. Shaw has argued that this dual aspect of equality is worth preserving¹⁴². Packer has objected that minorities are not equal in fact, and should not be made equal in law¹⁴³. Deschenes also required a group to have a will to survive. Members of the UN Sub-Commission criticised this requirement, arguing that a requirement of the will to survive would have been more relevant to a treaty prohibiting genocide and that the requirement should have been a will to preserve the group identity¹⁴⁴. Because of this controversy,

¹⁴⁰ Article 3, Framework Convention on National Minorities 1994

¹⁴¹ Explanatory Report for the Framework Convention on National Minorities, para. 35, p. 16

¹⁴² Shaw 1990: 40.

¹⁴³ Packer 1993: 55.

¹⁴⁴ See comments by Turk, UN Doc E/CN.4/Sub.2/1985/SR.14 at 6 and Khalifa UN Doc E/CN.4/Sub.2/1985/SR.13 at 12, cited in Shaw 1990: 40.

the Sub-Commission forwarded the proposal unapproved to the UN Commission on Human Rights¹⁴⁵.

Three potential problems with this element will be evaluated. They are that States might pressure minorities not to declare their solidarity; States may deny that a group wishes to preserve its identity and that minority group membership is rarely voluntary.

(1) States might pressure minorities not to declare their solidarity

Capotorti and Deschenes in their definitions both added the safeguard phrase "if only implicitly," so that the fact that a group has preserved its characteristics over time can be seen to imply that they wishes to preserve those characteristics. An example of implicit pressure not to declare the will to maintain a separate minority identity can be found in the work of the Council of Europe Commissioner on Human Rights who identified a problem with the government census as a measure of the Roma population of Slovakia:

"At the 1991 census, only 80 000 people said that they belonged to the Roma/Gypsy community, whereas is actually comprises between 400 000 and 500 000 persons."¹⁴⁶

This invites consideration of the question of why persons belonging to Roma communities would not admit to being Roma. The Commissioner comments that "Everyone in Slovakia agrees that this figure is wrong and that, if, in 1991, only a very small number of Roma/Gypsies said they belonged to this community, it was because most of them were afraid of being discriminated against and therefore falsely claimed to be Hungarian or Slovak."¹⁴⁷

¹⁴⁵ E/CN.4/1986/43 at 3, cited in Shaw 1990:24.

¹⁴⁶ Gil-Robles, Alvarao, Commissioner for Human Rights (2002) "2nd Annual Report April 2001 to December 2001" Council of Europe Parliamentary Assembly Doc. 9464 of 15 May 2002 p 56

¹⁴⁷ Gil-Robles, Alvarao, Commissioner for Human Rights (2002) "2nd Annual Report April 2001 to December 2001" Council of Europe Parliamentary Assembly Doc. 9464 of 15 May 2002 p 57

(2) States may deny that a group wishes to preserve its identity

Sigler has identified this concern¹⁴⁸. Suppose a State flatly denies that a group wishes to preserve its separate identity. Such a scenario is readily foreseeable in a world including some States that prefer to assimilate minorities. It has been shown (above) that the desire to preserve a group's identity can be inferred from the fact that it has preserved those differing characteristics. So a State's denial of this desire need not be taken as conclusive evidence.

(3) "Minority group membership is rarely voluntary. Minority status is usually determined by descent or inheritance."¹⁴⁹

If this view is accepted, it appears to undermine the logic behind the solidarity element. Packer argued that minority group membership is a matter of free association¹⁵⁰ and so, for Packer, the subjective element of solidarity should be paramount. Sigler's view here is the opposite. Because, for Sigler, individuals become members of minorities because of involuntary factors, the objective element of differing characteristics should be paramount.

Sigler highlights two elements which, for him, show that minority status is involuntary. One is descent, the other inheritance. Inheritance is relevant to the possible genetic aspect of ethnicity. However, it was shown above that ethnicity can be interpreted as having a cultural basis, that this cultural basis is desirable because it avoids giving credibility to the race thesis and therefore that we should interpret ethnicity along these lines. So inheritance of genetic characteristics is no longer relevant to minority status.

Sigler's other element which established involuntariness was descent. To employ one example, this has obvious relevance for the Dalit communities of India, since caste identity is determined by descent, with reference to the traditional occupation of each person's family. At first glance this appears to be winning

¹⁴⁸ Jay Sigler "Minority Rights: A Comparative Analysis" (London: Greenwood, 1983).

¹⁴⁹ Sigler 1983: 7.

¹⁵⁰ Packer 1993: 43.

argument. In India, many would regard caste identity as immutable, determined from birth. However, this view fails to take account of two points. The first point is that caste identity can be escaped. A member of the Hindu religious majority who converted, for instance, to Sikhism, would be converting to a faith that (formally) denied the existence of caste. The second point is that the relevant locus of identity is not defined as caste, but as Dalit identity. While caste identity is a label fixed to a person by others, Dalit identity is voluntary. These two points reflect the choice that people classified by others as “untouchables” have. They can opt out of Dalit identity through conversion. Those who convert have exercised a free choice no longer to be identified as untouchables. The relevant branch of international law for their position is the law of non-discrimination.¹⁵¹ The Constitution of India also provides for non-discrimination.¹⁵²

However, persons classified as untouchables also have the choice to classify themselves as Dalits, thus making a positive form of self-identification. They, too, enjoy the right not to be discriminated against. While Sigler's argument that there is an element of involuntariness in the way that we acquire these characteristics is justified, this does not affect the point that we choose to preserve them, or to adopt other characteristics. This means that Sigler's argument about the way that we acquire characteristics does not justify excluding the solidarity element from a definition of minority.

Geographical characteristics, such as density and history

Greece addressed a note verbale to the UN Secretary-General, dated 9 November 1978, which said that:

¹⁵¹ See the International Convention on the Elimination of All Forms of Racial Discrimination, adopted 14 December 1960, entered into force 22 May 1962, 429 UNTS 93.

¹⁵² Article 14 of the Constitution of India provides for equality before the law and Article 15 prohibits discrimination on the ground of caste.

"There should be taken into account not only the number of persons belonging to a particular group, but also the relations between the number and the size of the geographical area in which the group lives."¹⁵³

Deschenes responded with two objections to this argument¹⁵⁴. His first was that this would introduce a new element into the definition of minorities, an element of population density and the size of the area occupied by the group. The first objection was that it is well-established that the status of minorities must be defined in relation to the political entity (the State) where they exist, not any smaller area. The second objection was that this "raises endless complications" and "could render our task impossible"¹⁵⁵.

Deschenes said that it is well-established that the status of minorities must be defined in relation to the political entity (the State) where they exist. The argument regarding whether a minority must be numerically smaller will be considered. It could be asked why a group must necessarily be numerically smaller than to be a minority. Although that might appear self-evident from the use of the term "minority," it depends on what a minority is defined in relation to. For instance, given the emphasis on the need for non-dominance, it could be argued that a dominated group is a minority, regardless of its numerical size in relation to the rest of the population. However, it should be remembered that this argument was unsuccessful in the communication to the United Nations Human Rights Committee in *Ballantyne and Davidson v Canada*.¹⁵⁶ In that communication, Ballantyne and Davidson argued that, as English speakers in the Canadian province of Quebec whose right to use their mother tongue was interfered, they were victims of a violation of their right to "use their own language" under article 27 of the International Covenant on Civil and Political Rights.¹⁵⁷ However, the Committee rejected that submission:

¹⁵³ Deschenes 1985: 27, paragraph 159.

¹⁵⁴ Deschenes 1985: 27, paragraph 160.

¹⁵⁵ Deschenes 1985: 27, paragraph 160.

¹⁵⁶ United Nations Human Rights Committee Communication No 359/1989 (5 May 1993) UN Doc: CCPR/C/47/D/359/1989

¹⁵⁷ United Nations Human Rights Committee Communication No 359/1989 (5 May 1993) UN Doc: CCPR/C/47/D/359/1989 para 1

“... as to article 27...this provision refers to minorities in States; this refers, as do all references to the “State” or to “State” in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that it extends to all parts of Federal States without limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. They therefore have no claim under article 27 of the Covenant.”

This, of course, meant that Ballantyne and Davidson were members of the English speaking linguistic majority within Canada and that French speakers continue to enjoy the status of a linguistic minority despite their ‘local majority’ status in the province of Quebec. However, as Deschenes noted, in a State like India, the argument of Ballantyne and Davidson could have succeeded since a group that is a majority in the country overall can (for the purposes of national law) be a minority a particular part of that country.¹⁵⁸ Varady showed that, in the decision of the Supreme Court of India in *In re Kerala Education Bill*¹⁵⁹ the term “minority” was held to apply in relation to the State of Kerala (one of the southern States, in the federal system of India) since the relevant law applied to the State of Kerala as a whole. The Supreme Court of India confirmed this approach in *D.A.V. College, Jullundur v. Punjab*.¹⁶⁰

So, according to the Supreme Court of India, the minority must be defined in relation to the relevant political entity (as Deschenes contended) and that relevant political entity need not be the State as a whole. It may be a single State in a federal system. Deschenes' objection seemed to be based on the criterion of certainty: that, if the relevant geographical unit was unclear, then the actors who are trying to confirm to international law (we would hope) cannot clearly determine their rights and obligations. However, the need to achieve certainty does not require that a minority group must only be defined in relation to the

¹⁵⁸ Deschenes 1985: 20.

¹⁵⁹ A.I.R. 1958, SC 956, see Varady 1997: 13.

¹⁶⁰ A.I.R 1971, SC 1737, see Varady 1997: 13.

State as a whole. When, as in the decisions of the Supreme Court of India cited above, the relevant political entity is a local State government in a federal system, then the relevant geographical unit is well defined, so actors can determine their rights and obligations.

Statements by Varady may be used to lend support for the idea that geographical characteristics, such as population density and history, should help to determine whether a group qualifies for minority status. Varady gives examples to illustrate his argument. He suggests that a Norwegian family moving into Pristina would not expect the same rights as an Albanian family in the same area¹⁶¹. Similarly, a Chinese family living in Szentendre, Hungary would not expect the right to have greetings in a Chinese language added to the board at the entrance to the town¹⁶². Following the arguments of Deschenes, someone might reply that history is both controversial in its content and interpretation, and so history as part of the definition of minorities could lead to endless controversies. Moreover, any historical qualification for minority status would be relative and it would be difficult to see how to establish a minimum historical qualification for minority status.

However, we might return to Varady's words and enquire whether he intended geographical factors to be part of the definition of minority status, or whether he was arguing that these factors should influence how minority rights are implemented. Looking at his examples above, it becomes apparent that Varady is suggesting that geographical information should be used for implementation, not for determining whether groups are minorities. This appears relevant to Eide's proposal for a "ladder of rights,"¹⁶³ meaning that the degree of rights held by minorities should vary according to various factors, and to the idea of a "ladder of implementation," as Professor Hannum recommended in a session of the UN Working Group on Minorities.¹⁶⁴ Such Statements imply support for a

¹⁶¹ Varady 1997: 40 - 41.

¹⁶² Varady 1997: 14 -15.

¹⁶³ Asbjorn Eide "Classification of minorities and differentiation in minority rights" E/EN.4/Sub.2/AC.5/1996/WP.2 (6 March 1996) 1 - 12 at 6 - 7.

¹⁶⁴ Professor Hannum had the support in this proposal of Professor Thornberry and the Austrian observer: Eide 1996B: 33 paragraphs 158 - 161.

contextual, rather than categorical, approach to minority rights such as the model of identity-conscious decision-making that will be defended by this thesis.

Size

The size of a group can matter in two ways: the minimum size and the maximum. First, the question of whether international law should require a minimum size will be examined. Capotorti demonstrated why the minimum size is a concern: the question here is where international law requires a minimum size to avoid a disproportionate burden of States.¹⁶⁵ Packer, by contrast, argues that the bottom limit for a minority should be two, since that is the minimum number for a group.¹⁶⁶ Others use two main criteria to justify a higher limit. These are the criteria of proportionality and viability.

Proportionality shall be considered first. Capotorti proposed that "States should not be required to adopt special measures of protection beyond a reasonable proportionality between the effort involved and the benefit to be derived from it."¹⁶⁷ Shaw objects that this generates a danger that States will use the proportionality element to avoid their responsibilities. To adapt Varady's examples above, we would not expect the children of a Hungarian family resident in India's capital to receive their education in a Hungarian language school. However, that reply is based not on whether the Hungarian family should have minority rights, but what the extent of those rights should be (or how those rights should be implemented). The contention that some States seek ways to avoid their international law responsibilities is supported by the requests of some States for loyalty or recognition as elements in the definition of minority, see below. So it is, at least, arguable that the proportionality principle should be applied to the rights of minorities, not to the definition of minorities.

¹⁶⁵ Capotorti paragraph 224.

¹⁶⁶ Packer 1993: 48.

¹⁶⁷ Capotorti paragraph 566.

The viability criterion as a way to justify a higher minimum size requirement for minorities will now be considered. The argument is this: States should not have to support minorities that could not survive without their help. In support of this argument, we could mention Packer's point that minority characteristics such as ethnicity, religion and language are not fixed, static things¹⁶⁸. They develop, and the development of humanity's pool of characteristics can include the ending of some identities. There is a problem, however, when this logical-sounding test is applied. Arguably it cannot easily be determined whether a group has the capacity to maintain its separate identity and pass it onto another generation. Shaw objected to the proportionality criterion because it opened the door to States trying to evade their responsibilities. Similarly, States with policies of assimilation could argue that groups resident in their territories do not have the capacity to maintain their separate identity unaided, and so deny them minority rights. It is suggested that the only practicable way to tell whether a group has the capacity to maintain its separate identity would be to investigate whether it has maintained that identity for a long period of time, which would unnecessarily duplicate the test for solidarity.

It has been shown that the viability criterion faces three objections: it is unworkable (because, apart from duplicating the test for solidarity, there is no way to know whether a group identity would survive unaided), it is undesirable (because it opens the door for States with policies of assimilation to avoid their obligations) and it is unnecessary (because it duplicates the test for another element, solidarity). So we come to the conclusion that a minimum size (other than Packer's minimum of two, for a group to exist) is unjustified. In its definition of minority, international law should simply use the term "group" and omit any reference to a minimum size.

Whether international law should adopt a maximum size for minorities will now be examined. Since the number of India's Dalits has been estimated at about 200

¹⁶⁸ Packer 1993: 42 - 50.

million¹⁶⁹ this is more likely to be an issue in relation to them. What it meant is not strictly maximum size but a maximum proportion of the population. In other words, the question being asked is whether a group should have to be numerically smaller than the rest of the population (of the State as a whole, or the population of the relevant political entity, see above) in order to qualify as a minority.

The answer to this question depends on whether international law was to adopt a literal or sociological interpretation of the word minority. A literal definition would, of course, simply require a group to include a smaller number of people than the majority. Packer's argument that this requirement is redundant¹⁷⁰ is presumably based upon a literal interpretation. Deschenes too opts for a literal interpretation, on the basis that an oppressed majority need self-determination, not minority rights¹⁷¹. This is based on the criterion of non-duplication of another international law right. It is logically linked with Packer's argument that minority rights only arise in the context of a democratic system, which we considered under the element of non-dominance.¹⁷² There is, indeed, a similarity between non-dominance and non-majority status, since a majority group would be likely to enjoy a dominant position on a democratic State.

There are points to be made in favour of a sociological interpretation. A sociological interpretation could mean that any group which experiences the violation of its fundamental rights or a position of being dominated by another group (which, as has been shown above, could imply discriminatory policies which ensure that another group controls all branches of government) should qualify for minority rights. The Human Rights Committee decision on the communication in *Van Duzen v. Canada*¹⁷³ offers indirect support, by

¹⁶⁹ Bishop M. Azariah, Bishop of Madras (now called Chennai) and Chair of the Dalit Liberation Education Trust, a Dalit human rights NGO based in Madras in South India, at a Dalit Solidarity Network seminar in London on 30 May 1998

¹⁷⁰ Packer 1993: 55.

¹⁷¹ Deschenes 1985: 13 -14.

¹⁷² See this chapter, above under the heading 'Non-dominance'

¹⁷³ Communication No. R.12/50 (18 May 1979), U.N. Doc. Supp. No. 40 (A/37/40) at 150 (1982).

establishing that the interpretation of Article 27 ICCPR is independent of a national system of justice and of dictionary definitions.

The criterion of necessity, that is, that minority rights are necessary for the protection of sociological minorities, could be employed so that persons belonging to different groups would enjoy minority rights regardless of their size. What matters, on this view, is the relative power of the sociological minority and the dominating group or groups; it seems, at least, arguable, that the number of people involved is merely an arbitrary factor.

However, the application of the necessity criterion would be in dispute. The use of this criterion begs the question of what exactly is necessary for a sociological minority. It is hard to deny that what would remove the root of the problem would be the realisation of the political rights of the sociological minority. In other words, the establishment of democracy would appear to remove the need for minority rights protection. There are other problems with the application of this sociological minority approach.

One problem is how international law could determine the meaning of a sociological minority. This would raise the problematic question of what degree of violation of fundamental rights would qualify a group for this status. A "dominated minority" could be defined as a group (conforming to the other elements required for minorities) that resides in a non-democratic State.

Another problem is self-identification. It seems unlikely that a dominated majority group would wish to identify themselves as a minority. So, even if there was no maximum size element in the definition, the group would themselves reject the application of minority status, which would exclude them under the solidarity criteria (as we saw above, the solidarity criterion will exclude groups that do not wish to be considered minorities, the involuntary "minorities"¹⁷⁴.

¹⁷⁴ See Gilbert 1996: 167.

This shows that sociological minority approach should not be employed in the definition of minority. It is submitted that our definition of minority should include this maximum size element.

The language used in attempts to include this element in definitions of minority suffers from difficulties: Capotorti offers "numerically inferior,"¹⁷⁵ which is problematic because it implies inferiority, and Deschenes offers "numerical minority"¹⁷⁶ which is not helpful because it includes the word that is being defined. It is admitted that Deschenes' term does not imply inferiority and that it will be readily understood. But it is submitted that it is poor drafting technique to include the subject of a definition in the definition. Instead, we may adopt the term "numerically smaller" (than the rest of the population, or of the relevant political entity).

Mode of Arrival

The point behind this question is whether international law should distinguish between minorities and immigrants or between minorities and indigenous populations (or peoples). Of all the world's regions, Latin American States were the most active in voicing their objections during the drafting of Article 27 of the International Covenant on Civil and Political Rights. There were deliberate and repeated attempts to emphasise and have recorded the argument that Latin American States are countries of immigration, immigrants are not persons belonging to minorities and therefore Latin American States do not contain minorities. The discussion which followed led to the inclusion of the clause "[i]n those States in which ethnic, religious or linguistic minorities exist", the 'opt-out' clause for States in Article 27 of the International Covenant on Civil and Political Rights

¹⁷⁵ Capotorti 1979 paragraph 568.

¹⁷⁶ Deschenes 1985 p 30 paragraph 181.

The records of the Ninth Session of the United Nations Commission on Human Rights¹⁷⁷ show that the Commission had before it a draft minority rights article submitted by the United Nations Sub Commission on the Prevention of Discrimination and the Protection of Minorities. The draft submitted by the Sub Commission read as follows:

“Persons belonging to ethnic, religious and linguistic minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”¹⁷⁸

The representative of Chile proposed an additional clause to be read at the beginning of the article, as follows:

“In those States in which ethnic, religious or linguistic minorities exist”¹⁷⁹

It is submitted that the exclusion of immigrants is an arbitrary exclusion for the convenience of the State: “Often, “immigrant” and “indigenous” are terms for the convenience of the power holder, by which it is able to distinguish between sections of the population despite common nationality”¹⁸⁰

The arguments in favour of a distinction between minorities and indigenous groups should be considered. It should be noted that the Constitution of India distinguishes between Scheduled Castes (India’s Dalits) and Scheduled Tribes (India’s indigenous peoples) showing that, for the constitutional law of India, at least, the two can and should be distinguished.¹⁸¹ Deschenes notes that

¹⁷⁷ UN Doc: E/2447 (6 June 1953).

¹⁷⁸ UN Doc: E/2447 (6 June 1953) Annex III page 162 paragraph 15.

¹⁷⁹ UN Doc E/CN.4/L.260, see UN Doc: E/2447 (6 June 1953) Annex III page 162 paragraph 16.

¹⁸⁰ Philip Vuciri Ramaga “The Group Concept in Minority Protection” (1993) 15 HRQ 575- 588 at 580.

¹⁸¹ The distinction between Dalits and indigenous people, reflecting the distinction in the Constitution of India, between Scheduled Castes and Scheduled Tribes, is the major reason why indigenous people are beyond the scope of this work. Much published material is available on the rights of members of indigenous groups, for instance James A. Anaya, (2003) “International Law and Indigenous Peoples” Ashgate/Dartmouth, S. v. Lewinski (ed) (2004) “Indigenous heritage and intellectual property : genetic resources, traditional knowledge and folklore” The Hague: Kluwer Law International ; Seán Patrick Eudaily (2004) “The present politics of the past :

indigenous peoples' representatives would not like their groups to be considered as minorities.¹⁸² That objection appears to justify the distinction between minorities and indigenous peoples. It was argued, above, that a sociological definition of minority (allowing dominated majorities to enjoy minority status) would be self-defeating because such groups would not wish to define themselves as minorities.¹⁸³

This means that such groups would not be minorities on the basis of the solidarity element, so there would be no dominated groups wishing to take advantage of the lack of a maximum size for minorities. Does the same objection apply to indigenous peoples? Would no representatives of indigenous groups wish to take advantage of minority status?

Arguably, this is the case. Shaw gives the well-known example of the Human Rights Committee communication of *Lovelace v. Canada*¹⁸⁴ in which a Maliseet Indian successfully argued that she was a person belonging to a minority, which was also a person belonging to an indigenous people.¹⁸⁵ As Packer said, minority groups are not monolithic¹⁸⁶; the fact that indigenous representatives say that their groups do not desire minority status does not disqualify individuals from obtaining that status. Therefore the law should not attempt to exclude persons belonging to indigenous groups from minority status, when they desire it and qualify for it under the other elements.

Residence

The Human Rights Committee in their 1994 General Comment on Article 27 ICCPR said that members of minorities "need not be permanent residents. Thus,

indigenous legal activism and resistance to (neo)liberal governmentality" New York : Routledge; Patrick Thornberry (2002) "Indigenous peoples and human rights" Manchester : Manchester University Press

¹⁸² Deschenes 1985: 7.

¹⁸³ See above, in this chapter, under the heading 'Size'

¹⁸⁴ Communication No. 24/1977, UN Doc. CCPR/C/OP/1 at 10 (1984)

¹⁸⁵ UN Doc A/36/40 (1981), cited in Shaw 1990: 27.

¹⁸⁶ Packer 1993: 42 - 50.

migrant workers or even visitors to a State party constituting minorities are entitled not to be denied the exercise of such rights."¹⁸⁷ In opposition to the interpretation of the Human Rights Committee, it could be argued that relatively recent immigrants benefit from a separate scheme of protection (the non-duplication argument). It could also be argued that including immigrant minorities would be unacceptable to Latin American States (the consensus argument).

There is a non-duplication argument that could support the requirement of residence. Thornberry says that we should exclude migrant workers because they benefit from customary international law protection.¹⁸⁸ Breitenmoser and Richter agree¹⁸⁹. However, Nowak has shown that this argument is not very convincing, because the real reason behind this argument is an attempt to resurrect the traditional interpretation of minorities to mean only citizens, an element that we will deal with below¹⁹⁰. Shaw has made the telling point that, in fact, this is not a case of duplication. The other international law protection granted to migrant workers does not grant them the equivalent of minority rights¹⁹¹, so they would be in a position of inferiority compared to the rest of the group

It can be argued that there is no international consensus in support of this criterion. It could be asked how international law can regard migrant workers as members of minorities when that argument is unacceptable to Latin American States. Sohn shows that the term "exist" in Article 27 ICCPR is used to avoid treatment of recent immigrants to North and South America as minorities¹⁹². It follows the failure of a Chilean amendment to the ICCPR, which read "In those countries in which stable and well-defined ethnic, religious and linguistic minorities have long been established."¹⁹³ So the motivation behind the element of residence is revealed. It is an attempt to re-introduce a failed amendment to the

¹⁸⁷ General Comment No. 23, 50 UN GAOR, Human Rights Committee, 1314th meeting, UN Doc: CCPR/C/21/Rev.1/Add. 5 (adopted 6 April 1994), reprinted in (1994) 15 HRLJ 234, quoted in Pejic 1997: 672.

¹⁸⁸ Thornberry 1991: 8.

¹⁸⁹ Breitenmoser and Richter 1991: 268.

¹⁹⁰ Nowak 1993: 488 - 489.

¹⁹¹ Shaw 1990: 38.

¹⁹² Sohn 1981: 279.

¹⁹³ UN Doc E/CN.4/L.261, quoted in Nowak 1993: 484.

ICCPR. States involved in the drafting accepted the compromise text "exist" which refers to the presence of an ethnic, religious or linguistic group in the present day, not their residence in the past.

Ramaga adds that the 'long-established' element would be problematic for newly established States¹⁹⁴. It is unclear whether 'long-established' could refer to events before the founding of the State. Some States, Ramaga noted, were created in the last few decades. We can now add, some States (after the break-up of the former Yugoslavia) were created in the last decade. This would create a real problem, for it would appear to make a group's chances of qualifying as a minority group dependent on their State of residence, which would contravene universality, a core principle of international human rights law. It has been shown that the objections of non-duplication and a lack of consensus are baseless. It follows that proposed element of residence should be excluded from the definition of minority in international law.

Citizenship

Capotorti in his 1976 article asserts a requirement of citizenship, because aliens are treated differently from minorities in international law¹⁹⁵. Looking at the work of the Council of Europe Parliamentary Assembly and its Resolution 1201(1993) with a draft protocol on the rights of minorities, Article 1 would impose two additional qualifications for minority status that are relevant here: minorities would have to be both residents and citizens. The latter requirement, it could be argued, positively invites States to establish restrictive laws and policies on citizenship, so as to deny minority rights to their so-called "newcomers." The requirement of citizenship for the enjoyment of special linguistic and cultural rights also features in the Constitution of India, Article 29(1):

¹⁹⁴ Ramaga 1993: 580.

¹⁹⁵ Capotorti 1976: 16.

“Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.”

The serious implications of excluding non-citizens from the rights of minorities can be illustrated by the experience of some of the Baltic States, where the Russian-speaking minority were regarded by the Council of Europe Commissioner on Human Rights as a category of minority that “urgently requires greater protection and integration”.¹⁹⁶ In Latvia, where the Russian-speaking minority comprises about 40% of the population, some 20% of the total population have been reported as being non-citizens of Latvia at the end of 2003.¹⁹⁷ In Estonia, where the Russian-speaking minority makes up about 30% of the population, about 8% of the total population were non-citizens by the end of 2003.¹⁹⁸ As the Council of Europe Commissioner on Human Rights observed, “such an anomalous situation cannot continue for long without sparking tensions and discontent.”¹⁹⁹

A difference of opinion between United Nations bodies has emerged on the issue of whether non-citizens can qualify for minority status. Jules Deschenes reported that the Working Group of the Commission on Human Rights believed that the definition of minority rights should not include aliens²⁰⁰, but that a Working Group of the Human Rights Committee, in draft comments on article 27, asserted that aliens should be included²⁰¹. Deschenes says that it would be “most regrettable” for an open conflict of interpretation to arise between the Human Rights Committee and the Commission on Human Rights. The Human Rights

¹⁹⁶ Council of Europe Commissioner on Human Rights, “4th Annual report January to December 2003 to the Committee of Ministers and Parliamentary Assembly” Council of Europe Doc: CommDH (2004) 10

¹⁹⁷ Council of Europe Commissioner on Human Rights, “4th Annual report January to December 2003 to the Committee of Ministers and Parliamentary Assembly” Council of Europe Doc: CommDH (2004) 10

¹⁹⁸ Council of Europe Commissioner on Human Rights, “4th Annual report January to December 2003 to the Committee of Ministers and Parliamentary Assembly” Council of Europe Doc: CommDH (2004) 10

¹⁹⁹ Council of Europe Commissioner on Human Rights, “4th Annual report January to December 2003 to the Committee of Ministers and Parliamentary Assembly” Council of Europe Doc: CommDH (2004) 10

²⁰⁰ UN Doc: E/CN.4/1984/L.5 paragraph 8, cited by Deschenes 1985: 7, paragraph 40.

²⁰¹ UN Doc: CCPR/C/23/CRP.1, paragraph 4, quoted by Deschenes 1985: 8, paragraph 46.

Committee, in their General Comment on the position of aliens, did assert that they should be included in the definition:

"In those cases where aliens constitute a minority within the meaning of Article 27, they shall not be denied the right, in community with other member of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language"²⁰²

The practice of international bodies suggests that aliens can be members of minorities. Wright notes that the OSCE High Commissioner for National Minorities adopts a liberal approach to his mandate, not requiring citizenship. The UN Human Rights Committee, in its General Comment on the position of aliens,²⁰³ and in its General Comment on the position of minorities, included aliens as minorities²⁰⁴.

Pejic notes that a Chilean amendment aimed at explicitly excluding aliens from Article 27 ICCPR failed. Professor Malcolm Shaw's point that other international law protection doesn't grant migrant workers an equivalent to minority rights protection, leaving them in a position of inferiority, applies to the citizenship element as it does to the residence element.

Packer argued that the citizenship element is redundant, because minority rights, in the context of democracy, are political rights and therefore are automatically only held by citizens, without the need for a separate citizenship element²⁰⁵.

Nowak addresses the question of whether minority rights are held by citizens alone.²⁰⁶ He says that a grammatical interpretation supports the application of minority rights to aliens, since Article 27 refers to "persons," not "citizens." Since Article 25 ICCPR does refer to "citizens," we can assume that, when the

²⁰² General Comment No 15, 27 UN GAOR, Human Rights Committee, 696th meeting, UN Doc: CCPR/C/21/Add.5 at 3 (9 April 1986), quoted in Thornberry 1991: 170 and cited by Pejic 1997: 672.

²⁰³ Thornberry 1991: 170.

²⁰⁴ Pejic 1997: 672.

²⁰⁵ Packer 1993: 56.

²⁰⁶ Nowak 1993: 488 - 489.

drafters of the ICCPR intended to limit a right to citizens, they said so. Indeed, an Indian proposal to replace "persons" with "citizens" was not accepted.²⁰⁷ A systematic interpretation of the treaty also supports this inclusive interpretation. In Article 2(1), the parties agree to guarantee the rights therein to all in their jurisdiction, without distinction as to national origin.

It is submitted that the element of citizenship is unjustified according to either the grammatical or the systematic interpretation of Article 27 ICCPR. The non-duplication argument, that minority rights should not be granted to aliens such as migrant workers because they enjoy other international law protection, is ill-founded. This means that the element of citizenship should be excluded from the definition of minority in international law.

Loyalty

Whether groups without loyalty to their State of residence, especially those with controversial political views such as a desire for secession or autonomy, qualify for minority rights will be considered here. The UN Sub Commission was reported by Capotorti to be in favour of this element²⁰⁸. It should be noted that "in practice, some Sub-Commission members...may be well attuned to the policies of their governments and take positions that would not conflict with such policies."²⁰⁹ However, the Sub Commission would find themselves rather alone if they were to seek other supporters for this idea. There is support for the inclusion of a loyalty requirement in the Constitution of India. The Constitution of India provides that the fundamental duties of citizens include the duty to "uphold the sovereignty, unity and integrity of India."²¹⁰

²⁰⁷ Nowak 1993: 489, footnote 53.

²⁰⁸ Capotorti 1979 paragraph 22.

²⁰⁹ Hurst Hannum (1992) "Guide to International Human Rights Practice" Philadelphia: University of Pennsylvania Press p. 62

²¹⁰ Article 51A(c) of the Constitution of India. The importance and justiciability of the fundamental duties in the Constitution of India have been demonstrated in decisions of the Supreme Court of India such as *Mehta v Maharashtra* Decision of 5 May 2004, Writ Petition (civil) 132 of 1995, in which the petitioners argued that the imposition of Marathi as a compulsory language in schools throughout the State of Maharashtra prevented them from performing their fundamental duties under Article 51A(c), (e), (f), (h) and (j) of the Constitution.

Two major objections are worth consideration here. It is perhaps telling that both objections are based on an example of a collapsed multiethnic State. Varady, bearing in mind the example of former Yugoslavia, noted that loyalty is a consequence of the implementation of minority rights²¹¹. To repress a group's identity is to invite disloyalty. So States concerned about the loyalty of their minorities need only grant them minority rights. So, according to this objection, the loyalty element is based on an understanding of loyalty that it a mirror image of reality. Klebes based his objection on the example of the former Soviet Union.²¹² Klebes reports that a loyalty requirement in the Soviet constitution "rendered largely worthless" the human rights provisions therein²¹³. So the loyalty requirement would have a realistic danger of destroying any hope of protecting minority rights. That seems ample reason to reject it.

Recognition

It could be argued that official recognition of a group as a minority is necessary for that group to enjoy the status of a minority in international law. Capotorti leads the objections to this rather surprising assertion, saying that it "is clearly unacceptable that the application of Article 27 should be made to depend on the good will of the parties bound by it."²¹⁴ Recognition, like loyalty, would render the protection of minority rights worthless. And, like the loyalty requirement, this element is based on a mirror image of reality: as Ramaga shows, recognition is an *application* of the minority concept, not a qualifying element for it²¹⁵. So, for the same reasons as in the case of the loyalty element, we should reject the inclusion of recognition in our definition of minority.

²¹¹ Varady 1997: 47.

²¹² Klebes 1993: 144.

²¹³ Klebes 1993: 144.

²¹⁴ Capotorti 1976: 18.

²¹⁵ Ramaga 1993: 576.

Conclusion: a definition of minority

In the above analysis, arguments have been presented to justify the rejection of the following elements in the definition of minority: geographical factors (such as density and history), a numerical minimum (apart from the requirement of two persons, to make a group), mode of arrival (a division between the definitions of indigenous peoples and minorities), residence, citizenship, loyalty and recognition.

Only three elements remain. These are: non-dominance, differing characteristics (which are not specified as, for example, ethnic, religious or linguistic, to avoid the 'secret ballot' problem), solidarity (the wish to preserve those characteristics, which may be inferred from the group's preservation of its identity over a period of time) and being numerically smaller (than the rest of the population of the State, or the relevant political entity).

The proposed definition of minority is, therefore:

"A non-dominant group, possessing and, if only implicitly, wishing to preserve characteristics differing from those of rest of the population (or relevant political entity) which is numerically smaller than the rest of the population (or relevant political entity)."

This definition would reject those elements most under the control of States such as official recognition, citizenship (determined by national citizenship laws) and loyalty (formally under the control of the minority, but, as Klebes showed²¹⁶, practically a clause that renders worthless human rights guarantees to which it applies).

If the essence of human rights is that States give away some of their power, to interfere in the lives of people, and accept obligations, to protect and promote conditions that will safeguard and help with the development of human

²¹⁶ Klebes 1993: 144.

personality, then these State-controlled elements are attempts to nullify that essence of human rights, by putting flaws into the documents that give away power.

Instead, we have seen a definition including only four of the proposed ten possible elements for a definition: non-dominance, solidarity, differing characteristics and being numerically smaller. These elements are objective (and controlled by the group, in so far as they are controlled by anyone, differing characteristics and numerically smaller). They may be inferred from objective information (and under the control of the group - solidarity) or objective and controlled in part by the State and in part by the minority (non-dominance, since a minority would have to work to establish dominance, but the existing State system might well resist that attempt).

So, paradoxically, by relying on objective characteristics, we most effectively ensure that groups can determine (indeed, by the fact of maintaining their characteristics and working within a democratic system, have determined) their minority status. We have seen that giving groups an apparent choice, by relying on a declaration on intent by the minority, could lead to fears by the minority that such a Statement would be interpreted as evidence of disloyalty by the State, or that States might pressure groups not to declare themselves as minorities.

This approach is open to the criticism that it is idealist, that States would reject a definition that is out of their control and that it therefore has no hope of success. It is submitted that this definition is realistic. It is realistic because it is based upon the reality of what minorities do (in preserving their characteristics), not what States or groups say (which may be subject to all kinds of political pressures). It is realistic because, since it is not incompatible with a 'ladder of rights' or 'ladder of implementation' argument, it does not ask States to accept unlimited obligations. It is realistic above all because it draws on the experience of collapsed multiethnic empires, the former Soviet Union and the former Yugoslavia, to show that State-controlled elements such as loyalty are based on

the mirror image of reality and have the effect of undermining minority protection.

Chapter Two

A Context-sensitive Approach to the Definition and Classification of Minority

Introduction

This thesis aims to test the extent to which a context-sensitive (and identity-conscious) model of minority rights is emerging (and should be recognised). This chapter explores whether the definition of minority can adopt a context-sensitive approach that would recognise the existence of “minorities by descent” (persons defined by caste) deserve recognition as a class of minorities. This would recognise more fully the experience of members of the Dalit communities in some South Asian States, especially India, for whom which caste is an important defining characteristic.

Defining minority at international level has historically been a complex and intractable task. The previous chapter discussed elements that are candidates for inclusion in a definition of minorities and defended a particular definition. Subsequent chapters will turn from context-sensitive thinking about the definition of minorities to context-sensitive analysis of the meaning and scope of minority rights.

This chapter will recognise the argument that the caste system is so inconsistent with the principles of human rights that the only task of human rights law should be to eradicate caste through a strict ‘identity-blind’ approach. This thesis does not attempt to discredit attempts to end discrimination through identity-blind (or in United States Supreme Court jurisprudence, the narrower concept of race-blind) legal principles. It will be argued that successfully overcoming the effects of discrimination and State partiality requires an identity-conscious approach in addition to the more traditional identity-blind model.¹ It will also be recognised that those who are most excluded by

¹ This is discussed in more detail in Chapter Four

the caste system (previously called “untouchables”) have constructed for themselves a more positive identity as “Dalits” with significant differences of culture from the mainstream culture around them². This more positive identity follows in the wake of Dalit political and cultural movements as well as inspiring leaders such Dr Bhimrao Ranjio Ambedkar, one of the principal architects of the Indian constitution and Professor of Law³. We shall see how the traditional classifications of minority fare when the attempt is made to classify Dalit identity as a form of minority.

‘Minorities by descent’: testing the context-sensitivity of the concept of minority in relation to South Asia’s Dalit communities

The United Nations Committee on the Elimination of Racial Discrimination, in a General Recommendation, noted the explicit inclusion on the Convention on the Elimination of All Forms of Racial Discrimination of distinctions based on “descent” in Article 1, paragraph 1 of that Convention.⁴ So descent is an internationally-recognised prohibited class of discrimination. No such reference to “descent” appears in the classifications of minority established by international law.⁵ It is submitted that a contextual approach to minorities rights (discussed in the form of identity-conscious decision-making in the chapters that follow) includes a contextual approach to the definition of minority. It is submitted that a valid test of whether the definition of minority rights has the capacity to operate in such a contextual manner is to test the definition and classification of minority rights

² According to James Massey of the National Commission for Minorities (a public body established by the Indian Government), the term “Dalit” is derived from the Sanskrit root word *dal*, which means “burst, split, broken, torn asunder, downtrodden, crushed, destroyed”: James Massey (1997) “Downtrodden: The Struggle of India’s Dalits for Identity, Solidarity and Liberation” Geneva: WCC Publications p. 1

³ According to former civil servant and academic V. Chandra Mowli (1990) “B. R. Ambedkar – Man and His Vision” New Delhi: Sterling p. 24

⁴ General Recommendation XXIX of the United Nations Committee on the Elimination of Racial Discrimination, UN Doc: CERD/C/61/Misc.29/rev.1 (22 August 2002) from the 61st Session of the Committee on Racial Discrimination, 5 – 23 August 2002.

⁵ Jay Sigler has even argued that “[m]inority group membership is rarely voluntary. Minority status is usually determined by descent or inheritance.”: Jay Sigler “Minority Rights: A Comparative Analysis” p. 7 (London: Greenwood, 1983). That argument will be considered in Chapter Two.

against a group who are defined not by national, ethnic, religious or linguistic identity but by caste and descent: the Dalits of South Asia. Suppose, for the sake of this argument, that a "minority" requires ethnic, religious and linguistic characteristics, as was accepted in the UN studies by Capotorti⁶ and Deschenes.⁷ This classification arguably equates to the classification of national minorities. The question of whether those marginalised by the caste system, the Dalits (formerly called "untouchables"), who are in the position of a "social" or "persecuted"⁸ minority, can make a valid claim to belong to one of these classes of minority will be investigated here.

During the second half of the twentieth century, India had 33 languages spoken by more than a million individuals.⁹ Paul Brass wrote that "India's linguistic, religious, ethnic, and cultural diversities are proverbial."¹⁰ So there is no difficulty in identifying ethnic, linguistic and religious minority groups in India. Caste identity is a complex phenomenon. It has both religious and cultural dimensions. It has both affected and been affected by religion and culture; for instance, Hutchinson and Smith have argued that caste "diluted a sense of common ethnicity" in ancient and medieval India.¹¹ It previously referred to a relatively simple fourfold classification and has acquired greater complexity over time, so that today there are many hundreds, even thousands, of sub-caste groups, generally defined according to their

⁶ Capotorti 1979 paragraphs 565 - 566 and 568.

⁷ Deschenes 1985 paragraph 181 p.30

⁸ Term used by the Rev. David Haslam of the Churches Commission for Racial Justice at a seminar organised by the Dalit Solidarity Network at the Council of Churches for Britain and Ireland in London, 24 April 1998. The Dalit Solidarity Network was founded in 1998 by David Haslam to bring together individuals and organisations concerned about the Dalits, to share information and to co-ordinate their work.

⁹ According to India's Census of 1971: Paul Brass, (1990) "The Politics of India since Independence" New Cambridge History of India, Vol IV, Cambridge University Press, Introduction pp. 129 – 34, quoted in (eds) John Hutchinson and Anthony D. Smith (1996) "Ethnicity" Oxford: Oxford University Press

¹⁰ Paul Brass, (1990) "The Politics of India since Independence" New Cambridge History of India, Vol IV, Cambridge University Press, Introduction pp. 129 – 34, quoted in (eds) John Hutchinson and Anthony D. Smith (1996) "Ethnicity" Oxford: Oxford University Press

¹¹ (eds) John Hutchinson and Anthony D. Smith (1996) "Ethnicity" Oxford: Oxford University Press, p. 11

traditional occupation. As shall be shown, in India caste has no clear genetic or biological base.¹²

Caste is generally considered to have begun with a few broad classifications which corresponded to traditional occupations: Brahman (priest), Kshatriya (warrior), Vaishya (merchant) and Sudra (worker or servant). These four original case classifications are generally attributed to ancient (religious) texts by Indian scholars, who also identified an emerging fifth category of those without (or out-)caste:

“Manu states that the four *varnas* were divinely ordained from the very beginning. From the mouth of *Purusha*, the Self-Existent One, came the Brahmans, from his arms came the Kshatriyas, from his thighs came the Vaishyas, and from his feet came the Sudras. Other castes were the result of alliances between members of these four original *varnas*. The Candala, whom Manu considered the offspring of a Brahman woman and a Sudra man, the worst possible combination, were to be “excluded from all categories of *dharma*”. Four other groups were also relegated to the ranks of the untouchables. Buddhist literature from the same period also depicts the Candala as well as the four other groups as outside the four *varnas* and polluting.”¹³

Over time, the classification of people according to caste corresponded to more specific occupations. By the time of the 1891 Indian Census (the first to use a standard classification of castes) sixty categories were used to caste in terms of occupations assigned by tradition.¹⁴ Dalits were those assigned occupations such as

¹² This is not to deny the possibility of an inter-relationship between caste and physical characteristics in some nations. Pierre van der Berghe has argued, for instance, that in Rwanda “a rigid caste system hindered interbreeding” between Hutu, Tutsi and Twa groups, maintaining group differences in height: Pierre van der Berghe “Does race matter?” (1995) 1:3 Nations and Nationalism 359 – 68, included in (eds) John Hutchinson and Anthony D. Smith (1996) “Ethnicity” Oxford: Oxford University Press.

¹³ John C.B. Wester “The Dalit Christians: A History” Delhi, ISPCK 1994 p. 3 This account is consistent with those of contemporary Dalit leaders such as James Massey “Downtrodden: The Struggle of India’s Dalits for Identity, Solidarity and Liberation” Geneva: WCC, p. 13 and academics such as Felix Wilfred “From the Dusty Soil” Madras: University of Madras 1995, p. 105

¹⁴ John C.B. Wester “The Dalit Christians: A History” Delhi, ISPCK 1994 p. 8

leather-workers (the Chumars) although their actual work varied, with agricultural work being the most common actual occupation of Dalits.¹⁵

Considering Dalit communities of the nineteenth century, Webster added that, despite the diversity of different Dalit communities, they had certain things in common:

“The first of these was the harsh fact of social stigma, Dalits were considered polluting and were therefore kept at a distance. Their person, shadow, food, vessels were to be avoided. They were made to live separately and often could not share such common village amenities as the well.”¹⁶

The effects of this severe social stigma were clear at the close of the twentieth century: embedded poverty, exclusion social and natural resources such as education, power, land and water:

“With little land of their own to cultivate, Dalit men, women and children numbering in the tens of millions work as agricultural labourers for a few kilograms of rice or Rs. 15 to Rs 35 (US\$0.38 to US\$0.88) a day. Most live on the brink of destitution, barely able to feed their families and unable to send their children to school or break away from the cycles of debt bondage that are passed on from generation to generation. At the end of the day they return to a hut in their Dalit colony with no electricity, kilometres away from the nearest water source, and segregated from all non-Dalits, known as caste Hindus. They are forbidden by caste Hindus to enter places of worship, to draw water from public wells, or to wear shoes in caste Hindu presence.”¹⁷

¹⁵ John C.B. Wester “The Dalit Christians: A History” Delhi, ISPCK 1994 p. 15

¹⁶ John C.B. Wester “The Dalit Christians: A History” Delhi, ISPCK 1994 pp. 29 – 30

¹⁷ Human Rights Watch (1999) “Broken People: Caste Violence Against India’s ‘Untouchables’” New York: Human Rights Watch p. 23

This severe exclusion helps to demonstrate the significance of the need for international human rights law to provide effective mechanisms for the realisation of equality. It is submitted that the realisation of full, substantive equality requires not only an 'identity-blind' approach (equating to some versions of non-discrimination) but also an 'identity-conscious' approach (which this thesis seeks to defend). The distinction between identity-blind and identity-conscious approaches and the need for the latter to supplement (not replace) the former are discussed in a subsequent chapter.¹⁸ This section will consider whether the meaning of Dalitness, of Dalit identity, can be included in any of the classifications of ethnic, linguistic, religious or national minority, whether Dalits can be properly seen as having religious, linguistic or ethnic characteristics, as which are *equivalent to their status as Dalits*.

It could be argued that caste is a cultural construct that inherently tends towards discrimination. It could therefore be concluded that caste should be eradicated and that any minority protection based on caste would perpetuate a discriminatory system. Indeed, the identity of "untouchables" is perceived to be inherently negative and polluting.¹⁹ Over time, the classification of people according to caste corresponded to particular occupations. By the time of the 1891 Indian Census (the first to use a standard classification of castes) sixty categories were used to caste in terms of occupations assigned by tradition.²⁰ Dalits were those assigned occupations such as leather-workers (the Chumars) although their actual work varied, with agricultural work being the most common actual occupation of Dalits.²¹ Considering Dalit communities of the nineteenth century, Webster added that, despite the diversity of different Dalit communities, they had a shared experience of exclusion and stigmatisation.²² The effects of this severe social stigma were clear at

¹⁸ Chapter Five

¹⁹ John C.B. Wester "The Dalit Christians: A History" Delhi, ISPCK 1994 p. 3 This account is consistent with those of contemporary Dalit leaders such as James Massey "Downtrodden: The Struggle of India's Dalits for Identity, Solidarity and Liberation" Geneva: WCC, p. 13 and academics such as Felix Wilfred "From the Dusty Soil" Madras: University of Madras 1995, p. 105

²⁰ John C.B. Wester "The Dalit Christians: A History" Delhi, ISPCK 1994 p. 8

²¹ John C.B. Wester "The Dalit Christians: A History" Delhi, ISPCK 1994 p. 15

²² John C.B. Wester "The Dalit Christians: A History" Delhi, ISPCK 1994 pp. 29 – 30

the close of the twentieth century: embedded poverty, exclusion social and natural resources such as education, power, land and water:

“With little land of their own to cultivate, Dalit men, women and children numbering in the tens of millions work as agricultural labourers for a few kilograms of rice or Rs. 15 to Rs 35 (US\$0.38 to US\$0.88) a day. Most live on the brink of destitution, barely able to feed their families and unable to send their children to school or break away from the cycles of debt bondage that are passed on from generation to generation. At the end of the day they return to a hut in their Dalit colony with no electricity, kilometres away from the nearest water source, and segregated from all non-Dalits, known as caste Hindus. They are forbidden by caste Hindus to enter places of worship, to draw water from public wells, or to wear shoes in caste Hindu presence.”²³

This severe exclusion helps to demonstrate the significance of the need for international law to effectively address the situation of caste. To an extent, this is a question of discrimination. However, it is submitted that the realisation of substantive equality depends on an identity-conscious approach in addition to the identity-blind approach of non-discrimination. Underlining the potential applicability of minority rights to Dalits is the fact that Dalit activism in response to their exclusion has included a re-emerging Dalit culture:

“During the 1960s and 1970s...Dalit literature, painting, and theatre challenged the very premise and nature of established art forms and their depiction of society and religion. Many of these new Dalit artists formed the first generation of the Dalit Panther movement that sought to wage an organized struggle against the varna [caste] system.”²⁴

²³ Human Rights Watch (1999) “Broken People: Caste Violence Against India’s ‘Untouchables’” New York: Human Rights Watch p. 23

²⁴ Human Rights Watch (1999) “Broken People: Caste Violence Against India’s ‘Untouchables’” New York: Human Rights Watch p. 35

Aspects of this renewed, positive Dalit identity include “folklore, myths, stories and symbols” that are distinct from the mainstream traditions, as well as different interpretations of the myths, epics and symbols of the dominant tradition.²⁵ Dalits’ other common features were their occupations, the common experience of poverty, their incorporation into the *jati* system (which included minor forms of local autonomy through a village council system) and what Webster calls “the complex matter of life-style.”²⁶ For this to be a factor in ethnic identity, it would be necessary to identify genuine distinctions between the life-style of Dalits and the life-styles of members of higher castes. Wester admits to shared characteristics, but identifies separate features as well:

“The ethnologists describe Dalit customs and ceremonies surrounding birth, death and marriage in great detail. In many respects these resembled those of the higher castes and Dalit *panchnayats* could be as severe as others in enforcing caste discipline. To this extent Dalits shared in common Indian culture and life-style. However, two practices, both indicative of women’s more equal status, did distinguish them from the higher castes: giving a bride price rather than a dowry and permitting widow remarriage.”²⁷

This shows that Dalit identity can be based on cultural differences; that it can have positive elements, rather than being essentially discriminatory; and that it may, therefore, be appropriate to treat Dalits as a minority group. If Dalits are a minority group, it could be argued that they belonged to one or more of the recognised categories of minority: religious, linguistic, ethnic or national. That argument will now be considered. A significant problem in acquiring a definitive answer to this question is that these adjectives have not been defined by international law. Indeed, in the following analysis the questions of whether these terms are susceptible to precise definition, and whether they can be defined in ways that distinguish them from one another, will be raised.

²⁵ Felix Wilfred “From the Dusty Soil” Madras: University of Madras 1995 p. 120

²⁶ John C.B. Wester “The Dalit Christians: A History” Delhi, ISPCK 1994 p. 30 - 31

²⁷ John C.B. Wester “The Dalit Christians: A History” Delhi, ISPCK 1994 p. 31

It has often been observed that the term minority is undefined.²⁸ As Packer noted, the adjectives in Article 27 ICCPR, "ethnic, religious or linguistic" are not clearly defined either²⁹. In fact, as Philip Ramaga commented, these adjectives were not defined at all during the drafting of Article 27³⁰. An early question that arises is whether these classifications are genuinely susceptible to definitions that distinguish one classification from another. Radhika Coomaraswamy has noted that:

"The terms 'ethnicity' and 'ethnic' are used here in relation to group identity based on linguistic, religious or other culturally determined criteria."³¹

Individual Dalits are Buddhists, Christians, Muslims and Sikhs (in addition to the many Hindu Dalits), so many of them are persons belonging to religious minorities. The fact that India's minority faiths do not formally accept caste does not prevent potential threats to the rights of Buddhist, Christian, Muslim or Sikh Dalits by those who practise caste, including, on occasion, fellow members of their minority religion who practise caste despite the official rejection of it. The Booker Prize-winning novelist Arundhati Roy observed how caste distinctions continue to be practised in churches in Kerala State, in the south-western tip of India.³² This demonstrates the deep cultural, as well as religious, roots of caste. It also reminds us that religious faith is not equivalent to Dalitness. Many Indians of minority faiths are not from Dalit families.

There are, of course, Hindu Dalits, but they arguably belong to India's religious majority. However, a counter-argument should be considered. For India's Hindu Dalits, it could be argued that the fact of their Dalit identity qualifies them for

²⁸ Definitions of minority are discussed in Chapter One

²⁹ Packer 1993: 57 -58.

³⁰ Philip Vuciri Ramaga "The Bases of Minority Identity" (1992) 14 HRQ 409 - 428 at 412.

³¹ Radhika Coomaraswamy "Linkages between methodology, research and theory in race and ethnic studies: a case study of Sri Lanka" in (ed) Peter Radcliffe "'Race', ethnicity and nation: international perspectives on social conflict" London: UCL Press, 1994 pp 134 – 150 at p. 149

³² Arundhati Roy (1997) "The God of Small Things" Flamingo; see David Haslam (1999) "Caste Out! The Liberation Struggle of Dalits in India" CTBI p. ix.

religious minority status irrespective of their (apparent) membership of the religious majority. Hindu Dalits could be regarded as equivalent to a denomination within the religion of Hinduism, especially since, as Dalits, they are generally denied access to temples and participation in worship with people of caste. It may be arguable that clearly distinguishable sub-groups within religions can qualify for the status of religious minorities. This could be used to argue that the caste groups³³ and the Dalits, as people without caste, could qualify as religious minorities. The practice of international bodies is relevant. Ramaga showed that, in scrutiny of periodic reports under the International Covenant on Civil and Political Rights, the Human Rights Committee and States tacitly acknowledge that denominations can qualify as religious minorities.³⁴ The question of whether India's Hindu Dalits could be regarded as a religious minority can be linked to broader questions including as the status of subgroups within religions (denominations within Christianity, for example), languages (dialects and other variations) and sub-cultures.

Looking at State practice, Ramaga also showed that States replying to the questionnaire circulated by Special Rapporteur Capotorti³⁵ included denominational groups as religious minorities, for example Protestants in predominantly Christian Australia and Spain. The United Kingdom response to Capotorti's questionnaire did include Roman Catholics as a religious minority while India did not acknowledge the different castes, or people without caste, as religious minorities³⁶. The finding that Hindu Dalits could, theoretically at least, qualify as persons belonging to a religious minority, could have implications for the inclusion of the non-dominance element in the definition of minority³⁷.

³³ These are traditionally the original four categories: Brahmins, Kshatriyas, Viashyas and Sudras, although these four main categories have over time been divided into many sub-categories based on traditional occupations: John Webster "The Dalit Christians: A History" Delhi: ISPCK 1994 p. 3

³⁴ Ramaga 1992: 413 and footnote 23.

³⁵ Capotorti 1979, Annex III.

³⁶ Capotorti 1979, Annex III pp 113 (United Kingdom) and 111 (India).

³⁷ Since there is a hierarchy of castes and the inclusion of Dalits begs the question of whether caste groups higher in the hierarchy can also qualify as religious minorities. The limiting element in the definition of minorities could be non-dominance: the highest castes enjoy dominance, at least within Hinduism. But this emphasises the problem that dominance is a relative concept.

Dalits could also qualify as members of one or more linguistic minorities. Many Dalits speak different languages (different from the majority language, Hindi). They may therefore be persons belonging to linguistic minorities. But that, too, is not equivalent to their Dalitness.

It could be argued that Dalit communities are an indigenous population. Dr James Massey, as General Secretary of the Dalit Solidarity Peoples organisation in New Delhi (a non-governmental organisation) and a member of the National Commission on Minorities (an Indian Government agency) referred to the Dalits as a "first nation," settled in India from time immemorial who were "invaded and defeated by the first colonisers, the Aryans"³⁸. This raises the question of whether indigenous groups are a type (or classification) of minority. Louis B. Sohn identified a series of categories of minorities in which indigenous groups were included.³⁹ Yet Miriam Aukermann's work shows that indigenous groups themselves tend to zealously defend the distinction between indigenous groups and minorities.⁴⁰ This supports the claim of indigenous groups to be "peoples," regarded as a higher-status category with collective rights. The distinction between minorities and indigenous groups also has the practical benefit of assisting groups in identifying the relevant part of the United Nations apparatus for their complaints. In support of this last statement, Aukermann cites the following comments by Erica-Irene Daes, the Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations:

"[Chairperson Daes] wishes to clarify a point, particularly of concern to the Russian and African speakers. Says that this Working Group deals only with the subjects related to indigenous peoples and says that the United Nations has created another Working Group on minorities which meets annually. Suggests and kindly advises the groups that if their concerns are related to minorities, they have to attend the

³⁸ James Massey "Downtrodden: The Struggle of India's Dalits for Identity, Solidarity and Liberation" (Geneva: World Council of Churches, 1997) p. 12.

³⁹ Sohn, Louis B. "The Rights of Minorities" in (ed) Henkin, Louis (1981) "The International Bill of Rights: The Covenant on Civil and Political Rights" New York: Columbia University Press 270 at p 271

⁴⁰ Aukermann, Miriam J. "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" (2000) 22 Human Rights Quarterly 1011 – 1050 at p 1017 - 1018

other Working Group. Notes that next year, they will be more strict in identifying indigenous groups participating in the session.”⁴¹

In India, the constitutional classifications of Dalits (as members of “Scheduled Castes”) and indigenous peoples (as members of “Scheduled Tribes”) are distinct. Dr Gail Omvedt, a sociologist based in Maharashtra State in India, has shown how controversial any claim of indigenous status for Dalits could become⁴². She argues that the Aryan invaders were not a consistent ethnic group, that there were frequent inter-marriages between Aryans and Dravidians (the ethnic group from which the Dalits claim descent) and that the Aryans absorbed non-Aryans into the caste structure⁴³. This suggests that the today's Dalits are descended both from the Dravidian 'first nation' and the Aryan 'invaders.' So there is no clear distinction between the Dalits as a first nation and other citizens of India an invading population. The question of whether Dalits could plausibly be regarded as an ethnic minority remains.

Just as the noun “minority” has lacked definition, so has the adjective “ethnic,” in social theory as in law.⁴⁴ The following analysis will consider the etymology of “ethnic” as well as its origin in international legal discourse. Professor Patrick Thornberry has shown that the term “ethnic” replaced the term “racial” at the third session of the UN Sub-Commission in 1950, when it was said “to refer to all biological, cultural and historical characteristics, whereas racial refers only to inherited biological features.”⁴⁵ This suggests that the term ethnic includes the content of the term it replaced with additional content as well. However, if the use of biological characteristics as a basis for distinguishing minority groups has genuinely

⁴¹ Aukermann, Miriam J. “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” (2000) 22 Human Rights Quarterly 1011 – 1050 at p. 1021

⁴² Gail Omvedt “Dalits and the Democratic Revolution” (New Delhi: Sage, 1994).

⁴³ Omvedt 1994: 40 - 41.

⁴⁴ Hutchinson, John and Anthony D. Smith “Ethnicity” Oxford: Oxford University Press 1996 p. 13

⁴⁵ Patrick Thornberry “Is there a Phoenix in the Ashes? International Law and Minority Rights” (1980) 15 Texas International Law Journal 421 – 458 at p. 448

been discredited, then arguably the inclusion of biological characteristics should not be maintained.

The abandonment of biological or genetic characteristics is arguably inherent in the language of Article 27 of the International Covenant on Civil and Political Rights. If each of the adjectives in Article 27 corresponds to a particular minority right, and if “ethnic minorities” shall not be denied the right to maintain their culture, then the meaning of “ethnic” would seem to be “cultural.” If an ethnic minority are a cultural group, then they have cultural rights. If there is no distinguishable culture, there seems to be no merit in granting cultural rights to any group that could be defined by biological characteristics.

Like “minority”, the term “ethnic” can be defined according to objective and/or subjective aspects. Emphasis on either objective or subjective elements would correspond to alternative approaches by anthropologists. Tonkin, McDonald and Chapman, within the anti-essentialist school of anthropology, present a case for a subjective understanding of ethnicity.⁴⁶ Tracing the etymology of the term “ethnic” to the Greek *ethnos*, they show how it has tended to be used, then and now, to distinguish others on the basis of an “‘us and them’ duality”:⁴⁷

“Within the discourse of race, everybody had one, everybody belonged to one. In actual use, however, not everybody belongs to an “ethnic group,” or has “ethnicity.” In their common employment, the terms have a strong and familiar bias towards ‘difference’ and ‘otherness.’”⁴⁸

Arguably, then, the concept of ethnicity has within it the idea of a different group to the dominant or majority community. In addition, of the anti-essentialist argument is

⁴⁶ Tonkin, Elizabeth, Maryon McDonald and Malcolm Chapman “History and Ethnicity” London: Routledge 11 – 17

⁴⁷ Tonkin, Elizabeth, Maryon McDonald and Malcolm Chapman “History and Ethnicity” London: Routledge 11 – 17

⁴⁸ Tonkin, Elizabeth, Maryon McDonald and Malcolm Chapman “History and Ethnicity” London: Routledge 11 – 17.

accepted, the idea of an ethnic group is intrinsically subjective. Can an objective basis for ethnicity be found? Possible bases could include the concept of "race" and the idea of "culture." Ethnicity has been linked to the discredited concept of "race." Packer observed that there is no universally accepted definition of the term "ethnic," and that the term lends dangerous credibility to the "mythical thesis of race"⁴⁹.

It has been shown that the category of "ethnic" minority generally replaced the term "racial" minority at the United Nations from 1950⁵⁰. The 1950 Sub Commission version of the definition of minority required a group to "possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population."⁵¹ It is submitted that to continue to link ethnicity to genetic or other physical characteristics is both impractical and would permit the ghost of "race" to persist beyond its time. Indeed, the disassociation of race with ethnicity would appear to restore the term "ethnic" to its previous meaning, before it began to acquire racial overtones in the mid-nineteenth century.⁵²

Even if ethnic identity did refer to genetic characteristics, two further points should be made. The first is that "race" and caste are distinct concepts in the Constitution of India, which implies that they cannot be equated.⁵³ The second point is that, even if race were accepted as a form of ethnic identity in international law, and even if an international institution was minded to ignore the distinction made by the Constitution of India, Dalit communities have no common genetic heritage that could support any claim to status as a "racial" minority.

⁴⁹ Packer 1993: 57 - 58.

⁵⁰ The "racial" element was both completely eliminated. "race" and "colour" remained as prohibited grounds for discrimination in Article 26 of the International Covenant on Civil and Political Rights.

⁵¹ United Nations Sub Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc: E/CN.4.358 of 30 January 1950, quoted in Packer 1993: 52.

⁵² Thomas H. Erikson "Ethnicity and Nationism" London: Pluto Press 1993, p. 3

⁵³ See, for example, Article 29(2) of the Constitution of India, which requires that no-one shall be denied admission to any educational institution maintained by the State (or in receipt of State aid) on grounds of religion, race, caste, language....," referred to in *Hindu Hitrakshack Samiti v. Union of India* (1990) AIR 851

The (already cited) work of Dr Gail Omvedt raises serious questions about any claim of a “racial” basis for Dalit identity⁵⁴. It has already been noted that Dr Omvedt showed that the Aryan invaders were not a consistent ethnic group, that there were frequent inter-marriages between Aryans and Dravidians and the Aryans absorbed non-Aryans into the caste structure,⁵⁵ and that today’s Dalits are descended from both Dravidian ‘first nation’ and the Aryan ‘invaders.’ So there is no genetic basis for distinguishing the Dalits from other Indian citizens.

Having rejected a biological basis for ethnicity, the cultural basis of ethnicity should be considered. India’s Dalits, through their literature and associations, appear to be in the process of constructing (or perhaps re-discovering) a cultural identity. Tangible forms of culture can be seen as the basis of ethnicity. The definition of culture requires consideration. References to ethnicity or culture at times refer to religion and language, leaving no clear boundary between these concepts.⁵⁶ Ethnicity could, then, become a vague, residual category of identity to fall back upon when other concepts leave a gap.⁵⁷ Max Weber presented the following analysis:

“Apart from community of language, which may or may not coincide with objective, or subjectively believed, consanguinity, and apart from common religious belief, which is also independent of consanguinity, the ethnic differences that remain are, on the one hand, aesthetically conspicuous differences of the physical appearance ...and, on the other hand and of equal weight, the perceptible differences in the *conduct of everyday life*.”⁵⁸

If there is to be a precise legal definition of ethnicity-as-culture, separate from religion and language and avoiding racial overtones, then what is left is Weber’s

⁵⁴ Gail Omvedt “Dalits and the Democratic Revolution” (New Delhi: Sage, 1994).

⁵⁵ Omvedt 1994: 40 - 41.

⁵⁶ For example, see Manning Nash “The Core Elements of Ethnicity in the Modern World” Chicago and London: University of Chicago Press 1989 pp. 10 - 15

⁵⁷ Hutchinson, John and Anthony D. Smith “Ethnicity” Oxford: Oxford University Press 1996 p. 13

⁵⁸ Max Weber “Ethnic groups” in (eds) G. Roth and C. Wittich “Economy and Society, Vol. 1 Berkeley and Los Angeles: University of California Press 1978 pp. 389 – 95.

“conduct of everyday life.” This argument is reinforced by the drafting of Article 27 of the International Covenant on Civil and Political Rights.: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Each characteristic is linked to a corresponding right: members of religious minorities can "profess and practice their own religion" and linguistic minorities may "use their own language." That leaves one characteristic - ethnicity - and one right - "to enjoy their own culture." The clear implication is that ethnicity corresponds to culture, not to genetic makeup. This shows that a group with shared cultural characteristics may (if they fulfil the other elements) qualify as an ethnic minority. As well as conforming to the logic of the Article 27 ICCPR drafting, this argument has the benefit of avoiding the 'dangerous myth' of race.

It could also be argued that Dalits qualified as a national minority. Defining the classifications has been a particular problem in work on national minorities. At times, it is assumed that the classification “national” equates to the categories of “ethnic, religious and linguistic.” At other times, it appears that national minorities are regarded as a different category from ethnic, religious or linguistic minorities, with “national” as opposed to ethnic, religious or linguistic characteristics. On still other occasions, it has been suggested that the term “national” refers to a qualifying criterion for ethnic, linguistic and religious minorities. On these occasions, national is taken to refer to the requirement of citizenship.

An early memorandum by the United Nations Secretary-General referred to the task of “Definition and *Classification* of Minorities”⁵⁹ The memorandum breaks down multinational States into two types. In one, the State reflects a predominant nation and other nations are considered as minorities. In the other the State is neutral

⁵⁹ United Nations Secretary-General (1950) “Definition and Classification of Minorities: Memorandum Submitted by the Secretary-General” Lake Success, New York: United Nations Commission on Human Rights, Sub Commission on the Prevention of Discrimination and Protection of Minorities, 1950: UN Doc: E/CN.4/Sub.2/85, 27 December 1949.

towards the resident nations. So the Secretary-General accepted the idea that a minority may be more than a group with distinctive characteristics. It may be a smaller nation within a large State.

Perhaps this means that the Secretary-General believed that all minorities were these smaller national groups. In the text of the memorandum there is recognition that national identity may be linked to differential characteristics: race, religion and language are referred to as “the principal outward manifestations of the national community.”⁶⁰ However, the following section of the memorandum tends to support the distinction between national minorities and those with distinct ethnic, religious and linguistic characteristics:

“Thus, in a general way, so far as the rendering of positive services and the recognition of special rights are concerned, as distinguished from the principles of non-discrimination, it may be said that the term “minority” normally should be applied to groups whose members share a common ethnic origin, language, culture or religion and are interested in preserving either their existence as a national community or their particular distinguishing characteristics.”⁶¹

It should be noted how the Secretary-General’s memorandum at this point distinguishes between groups’ desire to either preserve different characteristics or their identity as a national community. The idea that national identity is separate from ethnic, religious or linguistic identity is implicit in a number of international treaties. Article 14 of the ECHR includes among the prohibited grounds of discrimination “race, colour, language, religion” and “national or social origin.” Article 26 of the ICCPR prohibits discrimination according to “race,

⁶⁰ United Nations Secretary-General (1950) “Definition and Classification of Minorities: Memorandum Submitted by the Secretary-General” Lake Success, New York: United Nations Commission on Human Rights, Sub Commission on the Prevention of Discrimination and Protection of Minorities, 1950: UN Doc: E/CN.4/Sub.2/85, 27 December 1949 para 44

⁶¹ United Nations Secretary-General (1950) “Definition and Classification of Minorities: Memorandum Submitted by the Secretary-General” Lake Success, New York: United Nations Commission on Human Rights, Sub Commission on the Prevention of Discrimination and Protection of Minorities, 1950: UN Doc: E/CN.4/Sub.2/85, 27 December 1949 para 45

colour...language, religion...national or social origin.” These references could be used to show that ethnicity, language and religion can be separated from national origin as legal categories. According to Milan Paunovic the term “narodnost” used in the 1974 Constitution of Yugoslavia may be translated as “nationalities” and it has the equivalent meaning to the term “national minorities”⁶²

However, arguably a national minority is simply a minority that possesses all of the identifying ingredients of minorities: ethnicity, language and religion. National identity, central to the concept of a national minority, breaks down into elements of ethnicity, language and religion. This is implicit in Article 5 of the Framework Convention on National Minorities which refers to States’ obligation to “promote the conditions necessary” for the development of the “culture, religion, language, traditions, cultural heritage” of national minorities.

A separate category of national minorities would be open to a number of criticisms. It would be arguably too vague: it cannot account for exactly what makes some groups defined by ethnic, linguistic and religious criteria as national, while others are not. In its association between the idea of a minority and the idea of a nation, it would tend to blur the distinction between minority rights and self-determination which is essential to reassure States that minority rights are not disguised opening moves towards secession. Since the idea of national minorities has not been accepted as a distinct category in international law, it is unnecessary to decide whether India’s Dalit communities would qualify for national minority status.

Conclusion

It has been shown that the Dalits cut across the traditional classifications of ethnic, religious and linguistic minorities. While particular groups of Dalits fall within

⁶² Paunovic, Milan “Nationalities and Minorities in the Yugoslav Federation and in Serbia” in (ed) Packer, John and Kristian Myntti (1993) “The Protection of Ethnic and Linguistic Minorities in Europe” Institute for Human Rights, Abo Akademi University 1993

distinct cultural, religious and linguistic groups in India, it is not an easy task to identify a classification that corresponds directly to their status as Dalits. Nor can Dalits establish an undisputed claim to the status of an indigenous population. The closest match has been found. It is based on the fact that Dalit communities have (or are constructing) a shared culture. By this shared culture, they can demonstrate ethnic characteristics that could, if the other required elements were fulfilled, qualify them as an ethnic minority group.

It has been shown, therefore, that (at least one of) the existing classifications of minority may be applicable to India's Dalit communities. The weak conception of minority rights does have the capacity to show a context-sensitive approach. Nevertheless, it shall be argued in the chapters that follow that neither a weak nor a strong model of minority rights is satisfactory alone, since neither can satisfy both of the principles of effectiveness and equality.

Chapter Three

Defining minority rights according to the strong and weak models

It could be hypothesised that there is an inverse relationship between the classification and/or definition of minorities and the strength of minority rights. Where there is a narrower definition of “minority,” a strong approach to the content of minority rights would occur. If not all ethnic, religious or linguistic minorities were recognised as national minorities, and a state, institution or text only accepted national minorities as ‘true’ minorities then a narrow definition of minority would be used. In exchange for the narrow definition of minority, a broad approach to the scope of minority rights could be taken. This could involve greater positive duties on States, for example funding for their institutions as opposed to mere toleration of the establishment of minority institutions. Minorities might also expect greater recognition of their group as a collective entity. However, as Thornberry argued, “it is the *community* aspects of this right that pose the sharpest challenge to many States; minority rights are inevitably harder to accept than the rights of individuals because of their communitarian and institutional focus.”¹ This thesis will defend the position that state resistance to the implications of a strong version of minority rights is a sufficient reason not to prefer it.

If a broad definition of minority is used then numerically smaller groups with differing ethnic, religious or linguistic characteristics (and the will to maintain them) could qualify for minority status. On that basis, arguably such groups would qualify for a weaker scope of minority rights, potentially limited to negative rights such as non-interference with minority institutions. Such minorities would not be likely to advance successful claims to positive action by the State. Their rights would certainly be regarded as the rights of individual persons belonging to minorities, not the rights of collective groups. The following is a working hypothesis of the elements of strong and weak minority rights claims:

¹ Thornberry, Patrick (1991) “International Law and the Rights of Minorities” p. 190.

FEATURE	STRONG MODEL OF MINORITY RIGHTS	WEAK MODEL OF MINORITY RIGHTS
Individual or collective rights ²	Individual and collective	Individual only
Kinds of minority ³	National	Ethnic, religious and linguistic
Positive or negative rights ⁴	Positive “shall have the right” (implying a state duty to act)	Negative “shall not be denied the right” (implying a state duty to refrain from action)
Voluntary or involuntary membership ⁵	Involuntary	Voluntary
Should minorities be able to claim self-determination? ⁶	Yes	No
Immediate or progressive obligations ⁷	Immediate	Progressive

Of course, this is not the first suggestion that different classes (or theories) of minorities would accord minorities different degrees of rights. This approach can be compared to the “ladder of rights” theory discussed by Eide.⁸ Eide suggests a “graduated differentiation” approach under which different categories of minorities are entitled to different sets of rights⁹. Varady offers support for the graduated

² Individual and collective rights are discussed from p. 90 onwards

³ The classifications of minority were discussed in Chapter One and they are analysed further in this chapter

⁴ Positive or negative rights are discussed from p. 108 onwards

⁵ Voluntary or involuntary membership is discussed from p. 123 onwards

⁶ This section aims to show why the strong model of minority rights should not be accepted.

⁷ Immediate and progressive obligations are discussed from p. 133 onwards

⁸ Eide, Asbjorn (1996) “Classification of minorities and differentiation in minority rights” UN Doc: E/CN.4/Sub.2/AC.5/1996/WP.2 (6 March 1996).

⁹ Eide, Asbjorn (1996) “Classification of minorities and differentiation in minority rights” UN Doc: E/CN.4/Sub.2/AC.5/1996/WP.2 (6 March 1996) p. 3.

differentiation approach in his analysis of linguistic rights when he calls for “minority conscious remedies”¹⁰. Varady suggests that the right to use the majority language is a “collective right of the majority”¹¹ and that demands for, for example, bilingual road signs and place names can only be constructed as collective rights claims. However not all minority groups would qualify.

Varady gives the example of a Chinese family in the Hungarian town of Szentendre, who could not rightly insist on the addition of a Chinese greeting to the “welcome” sign on the entry road¹². Rather than proposing a hierarchy of minorities with corresponding rights, this thesis aims to take Varady’s approach of “minority conscious remedies” further towards a theory of identity-conscious decision-making. The presentation of weak and strong models of minority rights in this chapter, therefore, is intended as an explanation and evaluation of these models, not as a defence of them.

Individual or Collective Rights

It has been noted that the concept of strong minority rights is associated with the idea that minority rights are held by collective groups themselves, not only individual members of collective groups. On this model, a minority is perceived to be a national minority or even a “national community”:

“National communities which are in a State community with other nations are equal in national, political and social rights.”¹³

¹⁰ Varady, Tibor (1997) “Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Case” (1997) 19 HRQ 9 – 54 at 37 - 38.

¹¹ Varady, Tibor (1997) “Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Case” (1997) 19 HRQ 9 – 54 at 40.

¹² Varady, Tibor (1997) “Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Case” (1997) 19 HRQ 9 – 54 at 40 –41.

¹³ United Nations Secretary-General (1950) “Definition and Classification of Minorities” Lake Success, New York: UN Commission on Human Rights, Sub Commission on the Prevention of Discrimination and Protection of Minorities UN Doc: E/CN.4/Sub.2/85 (27 December 1949).

The use of "persons belonging" to minorities, deliberately ensuring that the bearers of the rights would be individuals, was introduced into the drafting of Article 27 of the International Covenant on Civil and Political Rights by the British expert, Monroe¹⁴. When Article 27 was adopted (as draft article 25) by the Third Committee of the United Nations General Assembly, there was an unresolved discussion about whether the rights therein would be held by individuals or groups.¹⁵ So the question remains open. A host of objections are raised against the idea that minority rights could be held by groups.

It has been observed that group-held rights are "dangerous" rights¹⁶. Professor Ronald Dworkin's well-known analysis of individual rights includes the feature that individual rights trump collective goods¹⁷. But if those collective goods are constructed as rights, then arguably the priority claim of individual rights is lost. F.W. de Klerk, the last of South Africa's apartheid-era Presidents, described the fear of subordination by a majority that lay behind his National Party's claims for group rights in the post-apartheid constitution:

"Our search for minority safeguards was perfectly legitimate. However, our legacy of apartheid meant that any proposal we that we would make for such safeguards would immediately be construed by our critics as a new form of apartheid."¹⁸

Indeed, such proposals were construed by the ANC negotiators as an attempt to establish a "minority veto," as Nelson Mandela's autobiography makes clear.¹⁹

¹⁴ Nowak 1993: 483.

¹⁵ Third Committee of the United Nations General Assembly, UN Doc: A/5000 (5 December 1961) p. 35 paragraph 122.

¹⁶ "Dangerous" was the term used by (then Professor, now Dame) Rosalyn Higgins, former member of the United Nations Human Rights Committee and afterwards member of the International Court of Justice to the author in an informal discussion at a conference on the International Covenant on Civil and Political Rights in relation to the law and practice of the United Kingdom, London, 1993.

¹⁷ Dworkin, Ronald (1977) "Taking Rights Seriously" London: Duckworth.

¹⁸ De Klerk, F.W. (1999) "The Last Trek: A New Beginning" Pan Books p. 100

¹⁹ Mandela, Nelson (1994) "Long Walk to Freedom" p. 723

Varady has noted that groups enjoy protection under a number of international instruments such as the Genocide Convention, the Racial Discrimination Convention and several ILO treaties²⁰. Article 20 of the International Covenant on Civil and Political Rights 1966 requires States to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination or violence.” It could be argued that where States have such a duty, national, racial and religious minorities enjoy a corresponding group right.

There is the difficulty of identifying who has the capacity to speak on behalf of a group that has rights²¹. Professor Geoff Gilbert has noted the danger that giving groups rights could lead to intercommunity conflict²². Paul Sieghart perceived a danger that group rights could be used to override individual human rights²³. Sieghart argued that, even if group rights exist, they cannot be human rights because human rights are, by definition, the rights of individual human persons²⁴ and applauds the fact that minority rights are human rights, precisely because they are vested in individuals²⁵. Advocates of group-held minority rights have a steep hill to climb.

Some writers nevertheless advocate group-held minority rights. Dinstein, looking at Article 27 ICCPR²⁶, notes that its freedom of religion aspect is also covered by Article 18 ICCPR. So, Dinstein argues, since the drafters of Article 27 must have intended for it to have meaning, its religious freedom aspect must go beyond the protection of Article 18.²⁷ Hence, for Dinstein, the purpose of Article 27 ICCPR is to grant collective rights. Tibor Varady, in an interesting and provocative article, advocates group rights precisely to reduce that which Gilbert fears that they would

²⁰ Varady, Tibor (1997) “Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Case” (1997) 19 HRQ 9 – 54 at 31.

²¹ Capotorti 1976: 18 - 19.

²² Gilbert 1996: 170 - 175.

²³ Sieghart 1986: 163 - 164.

²⁴ Sieghart 1986: 161 - 167.

²⁵ Sieghart 1986: 168.

²⁶ International Covenant on Civil and Political Rights

²⁷ Tibor Varady “Minorities, Majorities and Ethnicity: Reflections on the Yugoslav Case” (1997) 19 HRQ 9 - 54 at 33.

increase: inter-group conflict.²⁸ Varady advocates a "group-sensitive" state, and yet he recognises that this would not be enough, that extra-legal measures are also needed to overcome inter-group conflicts²⁹.

Examples of a tendency towards group held rights can be detected in the Constitution of India. There is the potential for an interpretation that the Constitution grants collective rights in the language of Article 29(1):

"Any *section of the citizens* residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same."³⁰

A similar interpretation could be made of Article 30(1). It should be noted that it refers to "All *minorities*" rather than "All *persons belonging minorities*":

"All *minorities*, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice..."³¹

Despite the strongly voiced objections to group-held rights, the language of states' obligations to groups still finds its way into international law texts. For example, Article 1 of the UN Declaration of the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities does not refer to the rights of persons, but to the obligation on states to protect the identities of minority groups:

"States shall protect the existence and the national, ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity."³²

²⁸ Varady 1997: 44.

²⁹ Varady 1997: 44.

³⁰ Emphasis added to Article 29(1) of the Constitution of India

³¹ Emphasis added to Article 30(1) of the Constitution of India

³² Article 1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, in Lerner 1993: 126.

Lerner noted that this expressly establishes a "group right."³³ Similarly, Article 1 of the Framework Convention on National Minorities too uses the language of groups:

"The protection of national minorities and of the rights and freedoms of persons belonging to these minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation."³⁴

Perhaps oddly, the Explanatory Report on the Framework Convention denies that Article 1 FNCM creates groups rights:

"The article refers to the protection of national minorities as such and of the rights and freedoms of persons belonging to such minorities. This distinction and the difference in wording makes it clear that no collective rights of national minorities are envisaged ... The Parties do however recognise that protection of a national minority can be achieved through protection of the rights of individuals belonging to such a minority."³⁵

Looking at the work of the Council of Europe Parliamentary Assembly, the rights that the draft protocol in Council of Europe Recommendation 1201(1993) would give are clearly individual, not collective. Articles 3, 4, 6, 7, 8, 9, 10 and 11 use the formula "Every person belonging to a national minority" or equivalent words, usually at the beginning of the article and occasionally in the middle of the text. The only article that lacks this language is Article 5, which reads:

³³ Lerner 1993: 117.

³⁴ Article 1 of the Council of Europe Framework Convention for the Protection of National Minorities 1994

³⁵ Explanatory Report for the Framework Convention on National Minorities, para. 31, p. 15

“Deliberate changes to the demographic composition of the region in which a national minority is settled, to the detriment of that minority, shall be prohibited.”³⁶

At most, then, it could be argued that states would owe a duty to minority groups not to make deliberate changes to the demographic composition of regions inhabited by national minorities.

If states possess obligations to both groups and individuals, it seems difficult to sustain the argument that only individuals thereby possess rights. In support of collective rights, Varady has argued that, in some contexts, collective rights are needed to counterbalance the opposing power of the state. Where “ethnic consciousness has eminent importance, the state actually does not belong to the citizens, but to the ethnic majority.”³⁷ Against this is the view that group rights would function not a counterbalance for state power, but as an instrument of state power.

“National” or “Ethnic, Religious and Linguistic” Minorities

It should also be noted how the preference for “national minorities” rather than “ethnic, linguistic or religious minorities” tends to be a feature of strong versions of minority rights. The following extract is an example of that preference; this example is from the Yugoslavian proposal for a minority protection clause in the Universal Declaration of Human Rights:

³⁶ Article 5 of the draft protocol on the rights of national minorities for the European Convention on Human Rights, from Recommendation 1201(1993) of the Parliamentary Assembly of the Council of Europe

³⁷ Varady, Tibor (1997) “Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Case” (1997) 19 HRQ 9 – 54 at 48

“Any national minority, as an ethnical community, has the right to full development of its ethnical culture and to the free use of its language. It is entitled to have those rights protected by the State.”³⁸

Wright has noted the lack of a definition of “national minority” and some alternatives³⁹. According to Wright and Gilbert, a national minority could mean that only nationals of a country are members of the group; or national minority could have the meaning proposed by the USSR and discussed by Thornberry of:

“a historically formed community of people characterized by a common language, a common territory, a common economic life and a common psychological structure manifesting itself in a common culture.”⁴⁰

On this interpretation, it does not seem to be necessary for a national minority to have a kin state. So the Roma, for example, can qualify as a national minority. O’Nions has noted the recognition of the Roma as a national minority in the Czech Federal Republic:

“Following the Velvet revolution, the new Government issued ‘Principles of the Governmental Policy of the Czech and Slovak Federal Government Toward the Romany Minority’. The first principle states that Romany nationality is equal to all other national minorities in the Czech Federal Republic. On the dissolution of Czechoslovakia, a new constitution was established incorporating an impressive

³⁸ United Nations Secretary-General (1949) “Definition and Classification of Minorities” Lake Success, New York: UN Commission on Human Rights, Sub Commission on the Prevention of Discrimination and Protection of Minorities UN Doc: E/CN.4/Sub.2/85 (27 December 1949).

³⁹ Wright, Jane (1996) “The OSCE and the Protection of Minority Rights” 18 HRQ 190 – 205 at 193-194.

⁴⁰ UN Doc: E/CN.4/SR369 para 16 discussed in Wright, Jane (1996) “The OSCE and the Protection of Minority Rights” 18 HRQ 190 – 205 at 193-194 and Gilbert, Geoff Gilbert, Geoff (1996) “The Council of Europe and Minority Rights” (1996) HRQ 160 – 189 at 176.

range of rights and freedoms which exceeds the requirements of the European Convention on Human Rights.”⁴¹

It is not always immediately obvious whether references to ‘national’ minority refer specifically to minorities as national groups within a multinational state or as a shorthand for ethnic, religious and linguistic groups. An example of this potentially ambiguous usage can be found in reports of the Council of Europe Committee on Legal Affairs and Human Rights. On 22 December 2000, Mr Georges Clerfayt, a member of the Committee on Legal Affairs and Human Rights, forwarded a petition signed by 37 local signatories from the French-speaking population of the ‘Brussels periphery’ area of Belgium to Lord Russell Johnstone, President of the Assembly⁴². On 6 April 2001, the Council of Europe Committee on Legal Affairs and Human Rights declared the petition to be “admissible” and appointed Mrs Nabholz-Haidegger as Rapporteur for this matter. She visited Belgium on 13 June 2001 and again from 3 to 7 September 2001.⁴³

Unlike the reports of the Council of Europe Commissioner on Human Rights, the Rapporteur’s report makes frequent reference to relevant international texts. The Rapporteur’s recommendations tend to be formulated with more precision than those of the Commissioner for Human Rights. The Rapporteur identified progress on minority protection in Belgium with Belgian ratification of Protocol 12 of the European Convention on Human Rights and the Framework Convention on National Minorities. The main obstacle identified by the Rapporteur was the need for all seven parliaments in the federal structure of Belgium to agree to ratification.⁴⁴ For

⁴¹ O’Nions, Helen (1999) “Bonafide or Bogus? Roma Asylum Seekers from the Czech Republic” 3 Web Journal of Current Legal Issues.

⁴² Nabholz-Haidegger, Rapporteur to the Council of Europe Committee on Legal Affairs and Human Rights (2002) “Protection of minorities in Belgium” Council of Europe Parliamentary Assembly Doc. 9395 (revised version) of 18 April 2002 in the Explanatory memorandum p 6

⁴³ Nabholz-Haidegger, Rapporteur to the Council of Europe Committee on Legal Affairs and Human Rights (2002) “Protection of minorities in Belgium” Council of Europe Parliamentary Assembly Doc. 9395 (revised version) of 18 April 2002 in the Explanatory memorandum p 6

⁴⁴ Nabholz-Haidegger, Rapporteur to the Council of Europe Committee on Legal Affairs and Human Rights (2002) “Protection of minorities in Belgium” Council of Europe Parliamentary Assembly Doc. 9395 (revised version) of 18 April 2002 in the Explanatory memorandum p 3 paragraph 11

the seven parliaments to agree, it was necessary to clarify which groups would qualify for national minority status. The draft resolution section of the report includes the following key paragraphs:

“20. The Assembly thus recommends that the Kingdom of Belgium, and its respective competent parliamentary assemblies (including those on the level of the regions and the communities)

i. in a spirit of tolerance, ratify the Framework Convention without further delay, ensuring that all minorities identified by the Assembly are duly recognised as such on the state and regional level, and refrain from making a reservation incompatible with the content of the Framework Convention;

ii. ratify Protocol No. 12 to the European Convention on Human Rights in the near future;

iii. make the signature and ratification of the European Charter for Regional or Minority Languages a priority”

and:

“22. Finally, the Assembly calls on the Kingdom of Belgium to implement, without further delay, the judgment of the European Court of Human Rights of 23 July 1968, which *inter alia* stipulated that children of parents not resident in the six municipalities with linguistic facilities in the Brussels periphery should nevertheless be allowed to attend the French-speaking schools in these municipalities.”

Whether the approach of the Rapporteur correspond to the earlier theory of minority rights and whether it corresponds to a model of “strong” or “weak” minority rights should be considered. It might seem that, by referring to “national” minorities, the

Rapporteur was employing the language of strong minority rights. However, it should be remembered that the “strong” theory emphasises the distinction between “national” and “ethnic, religious or linguistic minorities” so that only a subset of “ethnic, religious or linguistic minorities” acquire national minority status. By contrast, the Rapporteur’s draft declaration refers explicitly to the definition of “national minority” given by the Parliamentary Assembly in its Recommendation 1201 (1993). That definition, as we shall see below in the section on the Parliamentary Assembly, tends to equate “national” minorities with “ethnic, cultural, religious or linguistic” groups. In other words, the set of national minorities is constituted by the subsets of ethnic, cultural, religious or linguistic groups. This is different from the “strong” theory in which the set of national minorities is a subset within those larger groups, in which “national” minorities are special and different.

The work of the Council of Europe Parliamentary Assembly, and in particular Resolution 1201 (1993) on an additional protocol to the ECHR on the rights of national minorities, provides another example of potential ambiguity over whether ‘national’ minority refers only to national groups within multinational states or whether it is meant only as a collective term for ethnic, religious and linguistic minorities.

The Parliamentary Assembly contributes towards minority rights implementation in its own right. It also convenes several committees of relevance to this task, such as the Committee on Legal Affairs and Human Rights and the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe. By its series of Recommendations and Resolutions, the Parliamentary Assembly has contributed to our understanding of the content of minority rights. Unusually for an institution concerned with minority protection, the Parliamentary Assembly has established a definition of minorities.

Resolution 1201 (1993) on an additional protocol on the rights of national minorities offered a definition of national minorities as follows:

“For the purposes of this Convention, the expression “national minority” refers to a group of persons in a state who:

- a. reside on the territory of that state and are citizens thereof;**
- b. maintain longstanding, firm and lasting ties with that state;**
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;**
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;**
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.”⁴⁵**

This definition suggests a gradual fusion of the concepts of “national” and “ethnic, religious and linguistic” minorities, and perhaps of strong and weak approaches. Only minorities which maintain “longstanding, firm and lasting ties with that state” qualify which is a relatively restrictive clause. Relatively restrictive definitions tend to be more compatible with stronger versions of minority rights.

Whether the features of the draft protocol in Recommendation 1201(1993) corresponds to a strong or weak notion of minority rights needs to be assessed. Perhaps the Recommendation supports the notion that a restrictive definition of minority rights with rights of broad scope should be adopted. It would be usual

⁴⁵ Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, quoted by Nabholz-Haidegger, Rapporteur to the Council of Europe Committee on Legal Affairs and Human Rights (2002) “Protection of minorities in Belgium” Council of Europe Parliamentary Assembly Doc. 9395 (revised version) of 18 April 2002 in the draft resolution p 2

when considering a minority rights instrument to note its lack of a definition of minorities. But, as is noted elsewhere, this draft protocol does contain a definition.

At first glance, it might seem that the Parliamentary Assembly here is employing a strong approach to minority rights, since it uses the language of “national minorities.” However, the definition includes a number of objective and subjective elements, principal among which is the element of “distinctive ethnic, cultural, religious or linguistic characteristics.” This suggests that the Assembly intends to equate ethnic, cultural, religious or linguistic groups with national minorities, rather than to regard national minorities as a limited subset of minorities with ‘national’ character.

The work of the Advisory Committee on the Framework Convention for National Minorities in relation to the question of whether national minorities equate to ethnic, religious and linguistic minorities (or whether they constitute a different classification) shall also be considered. To put their contribution into context, their role within the structure of the Council of Europe should be understood:

“In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention, the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognised expertise in the field of the protection of national minorities.”⁴⁶

In December 2002, the advisory committee was composed of seventeen ordinary members from Council of Europe Member States and one additional member, Stanislav Tchernitchenko, from the Russian Federation.⁴⁷ The roles of individual members and indeed of the committee as a whole are governed by its Rules of

⁴⁶ Article 26(1) of the Framework Convention on National Minorities, Council of Europe H(94)10 Strasbourg, November 1994

⁴⁷ Council of Europe web site:

<http://www.humanrights.coe.int/Minorities/French/FrameworkConvention/AdvisoryCommittee/Composition.htm> accessed on 3 December 2002

Procedure.⁴⁸ Rules 34 to 42 govern the consideration of state reports under the framework Convention, a key role of the advisory committee.

The committee has produced guidance for states as they produce their reports under Article 25 of the Convention. When the advisory committee have examined a state report, they prepare an opinion on it. Opinions are generally made public and they are available at the web site of the advisory committee. When the opinion has been produced, the Committee of Ministers is invited to adopt conclusions and, where appropriate, recommendations in response to the state report.⁴⁹

The questions listed for states in the guidance document include the following very interesting question, in relation to Article 3 of the framework Convention:

“Are there any linguistic or ethnic groups, (whether they consist of citizens or of non-citizens living in the country), which are not considered a national minority? If so, please provide information on the different points of view in this respect.”⁵⁰

This relates to the question of whether the term “national minority” merely corresponds to the terms “ethnic, religious or cultural minority” (the weak minorities approach) or if “national minority” is a smaller category of minorities with “national” characteristics beyond the ethnic, religious and linguistic characteristics of ordinary minorities. The responses of Azerbaijan, the Federal Republic of

⁴⁸ Rules of Procedure of the Advisory Committee on the Framework Convention for the Protection Of National Minorities (Adopted by the Advisory Committee on 29 October 1998) Pursuant to Rule 37 of the Resolution (97) 10 adopted by the Committee of Ministers on the Monitoring Arrangements under Articles 24-26 of the framework Convention. For example, according to Rule 23 of the Advisory Committee Rules of Procedure, “In accordance with Rule 34 of Resolution (97) 10, additional members shall sit in an advisory capacity; they shall not have the right to take part in a possible vote.”

⁴⁹ Advisory Committee for the Framework Convention on National Minorities, First Activity Report covering the period from 1 June 1998 to 31 May 1999, adopted by the Advisory Committee in September 1999, paragraph 4.

⁵⁰ Outline for reports to be submitted pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities (Adopted by the Committee of Ministers on 30 September 1998 at the 642nd meeting of the Ministers’ Deputies) available at the Council of Europe web site <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/AdvisoryCommittee/Outline.htm> accessed on 3 December 2002

Yugoslavia and Poland, the three states that issued State Reports in 2002, shall be considered here:

AZERBAIJAN

According to a State Report submitted by Azerbaijan on 4 June 2002:

“Although there is no definition of «national minority» in the national legislation, the Government of Azerbaijan had never faced with the issue of recognition or non-recognition of any language or ethnic groups as national minorities, since it proceeded from the fact that every person has the right to freely determine his belonging to any national minority.”⁵¹

This shows an apparent acceptance of the self-definition of groups with distinctive ethnic or linguistic characteristics are national minorities.

FEDERAL REPUBLIC OF YUGOSLAVIA

The following is an extract from the State Report submitted by the Federal Republic of Yugoslavia on 16 October 2002:

“1. In FR Yugoslavia national minorities are all the groups of Yugoslav citizens who have a long-lasting connection with the territory of FR Yugoslavia and possess features such as language, culture, nationality, origin or religion that differentiate them from the majority of the population and whose members are characterized by the fact that they are concerned with the joint maintenance of their common identity, including culture, tradition, language or religion. The above definition of a national minority is provided for by Article 2, paragraph 1, of the Law on the Protection of

⁵¹ Report submitted by Azerbaijan pursuant to Article 25, paragraph 1 of the Framework Convention of National Minorities (Received on 4 June 2002), Council of Europe Doc: ACFC/SR (2002) 1

Freedoms and Rights of National Minorities and constitutes the first legally binding definition of a national minority in FR Yugoslavia.”⁵²

POLAND

According to a State Report submitted by Poland on 10 July 2002, the Polish Constitution contains the following:⁵³

“Art. 35

1. The Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture.
2. National and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity.”

The Polish state report, in its section on Article 3, says that: The principle of deciding about belonging to a national minority enshrined in the treaties signed by Poland with the Federal Republic of Germany, Czech and Slovak Federal Republic, Ukraine, Republic of Belarrusia and the Republic of Lithuania.”

Whether Poland considers national minorities to be a distinct category from ethnic, religious and linguistic minorities needs to be considered. The following article from a treaty between Poland and Belarussia deserves consideration:

“Art. 14.

1. The Contracting Parties confirm that persons belonging to the Polish national minority in the Republic of Belarussia and persons belonging to the Belarussian

⁵² Report submitted by the Federal Republic of Yugoslavia pursuant to Article 25, paragraph 1 of the Framework Convention of National Minorities, Belgrade 2002 (Received on 16 October 2002) Council of Europe Doc: ACFC/SR (2002) 003

⁵³ Report submitted by Poland pursuant to Article 25, paragraph 1 of the Framework Convention of National Minorities, (Received on 10 July 2002) Council of Europe Doc: ACFC/SR (2002) 2

national minority in the Republic of Poland shall have the right, individually or together with other members of their group, to freely retain, develop and express their ethnic, cultural, linguistic and religious identity, without any discrimination and in conditions of full equality before the law.

2. The Contracting Parties confirm that belonging to a national minority is a matter of individual choice made by persons and may not involve any negative consequences.”⁵⁴

This language seems to equate membership of the Belarussian national minority with possession of “ethnic, cultural, linguistic and religious identity.” In other words, national minorities are equated with minorities possessing these characteristics, rather than presented as a different category of minorities. Similar terms can be found in the following treaties:

- Article 8 of a treaty between Poland and the then Czech and Slovak Federation Republic⁵⁵
- Article 13 of a treaty between Poland and Lithuania⁵⁶
- Article 20 of a treaty between Poland and Germany⁵⁷
- Article 16 of a treaty between Poland and the Russian Federation, although in this treaty the wording is amended to a duty on Poland to allow citizens of

⁵⁴ Treaty between the Republic of Poland and the Republic of Belarussia on Good Neighbourliness and Friendly Co-operation dated 23 June 1992 (1993 Journal of Laws no. 118, item 527)

⁵⁵ Treaty between the Republic of Poland and the Czech and Slovakian Federation Republic on Good Neighbourliness, Solidarity and Friendly Co-operation dated 6 October 1991 (1992 Journal of Laws no. 59, item 296) Article 8

⁵⁶ Treaty between the Republic of Poland and the Republic of Lithuania on Friendly Relations and Neighbourly Co-operation dated 26 April 1994 (1995 Journal of Laws no. 15 Item 71)

⁵⁷ Treaty between the Republic of Poland and the Federal Republic of Germany on Good Neighbourliness and Friendly Co-operation dated 17 June 1991 (1992 Journal of Laws no. 14, item 56)

Russian origin to retain and propagate “their ethnic identity, own culture and teaching the native language on pre-school and school level.”⁵⁸

- Article 11 of a treaty between Poland and Ukraine⁵⁹

Not all states tend to equate “national minority” with any minority that has ethnic, religious or linguistic differences. In the State Report of Ireland in 2001,⁶⁰ Ireland breaks down minority groups into classifications of indigenous minorities, linguistic and religious minorities. While Ireland classifies minorities, and notes that minorities are properly identified by both objective and subjective criteria,⁶¹ the report notes that:

“Ireland has not made a declaration on the application of the Convention to any particular national minority or minority community.”

This arguably leaves open the question of Ireland adopts a strong distinction between “national minorities” and “ethnic, linguistic and religious” (or, as the state report suggests, “indigenous, linguistic and religious”) minorities.

Another body whose conduct is worthy of attention on the question of whether ‘national’ minorities are equivalent to or different from ‘ethnic, religious or linguistic’ minorities is the OSCE High Commissioner for National Minorities. The High Commissioner for National Minorities has engaged directly in thematic work,

⁵⁸ Treaty between the Republic of Poland and the Russian Federation on Neighbourly and Friendly Co-operation dated 22 May 1992 (1993 Journal of Laws no. 61, item 291)

⁵⁹ Treaty between the Republic of Poland and Ukraine on Good Neighbourliness, Friendly Relations and Co-operation dated 18 May 1992 (1993 Journal of Laws no. 125, item 573)

⁶⁰ Report submitted by Ireland pursuant to Article 25, paragraph 1 of the Framework Convention of National Minorities, (Received on 13 November 2001) Council of Europe Doc: ACFC/SR (2001) 6

⁶¹ Report submitted by Ireland pursuant to Article 25, paragraph 1 of the Framework Convention of National Minorities, (Received on 13 November 2001) Council of Europe Doc: ACFC/SR (2001) 6 p 13

for example in a report on linguistic rights of national minorities⁶² and on the situation of the Roma and Sinti.⁶³

It should be recalled that the mandate of the High Commissioner, established by the Helsinki Decision of July 1992, is to be “an instrument of conflict prevention at the earliest stage.”⁶⁴ Thus, the High Commissioner is unlike instruments and mechanisms for the promotion and protection of minority rights; and this may affect how the institution registers on the scale of strong or weak approaches to minority rights.

The language of the Hague Recommendations on the Education Rights of National Minorities tends to emphasise the similarity between “national” and “other” minorities; that the “national” characteristics of national minorities are made up of ethnic, cultural, linguistic and religious elements, rather than a separate sense of “national” identity above and beyond these elements. This is the language of a relatively broad definition of minorities, although the High Commissioner has tended towards a pragmatic approach to the meaning of “minority”, rather than adopting a legalistic definition.

It has been shown that there is a spectrum of possible meanings corresponding to the idea of a national minority. The national minority classification does not automatically correlate to a strong concept of minority rights. However, when a national minority is interpreted as corresponding to a smaller nation within a multi-national state, then that version of a national minority certainly matches the strong minority rights concept.

⁶² OSCE Report on the Linguistic Rights of National Minorities in the OSCE Area, available online at www.osce.org

⁶³ OSCE Report on the situation of the Roma and Sinti in the OSCE Area (The Hague, 2000)

⁶⁴ The Hague Recommendations on the Education Rights of National Minorities, Foundation on Inter-Ethnic Relations p 1

Positive or Negative Rights

There is scope for different interpretations of what qualities make a right positive or negative. At the level of choice of language in the drafting of international instruments, the negative “shall not be denied the right” language of article 27 of the International Covenant on Civil and Political Rights can be contrasted with the positive formulation of article 29(1) of the Constitution of India which uses the expression “shall have the right”⁶⁵ and the political (not legal) standard set by the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe:⁶⁶

“States will protect the ethnic, cultural, linguistic and religious identity of national minorities.”

However, this distinction does not appear to have a high level of significance. Interpretations of article 27 by Francesco Capotorti in his study of the rights of minorities⁶⁷ and the United Nations Human Rights Committee in their General Comment⁶⁸ suggest that the phrase “shall not be denied the right” does not detract from the capacity of article 27 to impose obligations on states.

On a more specifically legal level, positive rights can mean those rights which correspond to duties of positive action by states, whereas negative rights are interpreted to mean that states have duties to refrain from action. Examples of this

⁶⁵ “Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.”: Article 29(1) of the Constitution of India

⁶⁶ The Conference on Security and Co-operation in Europe (CSCE) became the Organisation on Security and Co-operation in Europe (OSCE) in January 1995.

⁶⁷ Capotorti, Francesco (1991) Study on the rights of persons belonging to ethnic, religious and linguistic minorities Add 2 para 132.

⁶⁸ United Nations Human Rights Committee, General Comment No. 23, The rights of minorities, 50 UN GAOR, Human Rights Committee, 1314th meeting, UN Doc: CCPR/C/21/Rev.1/Add. 5 (adopted 6 April 1994)

could include Chapter 1, article 2 of the Swedish Constitution at the time of *Kitok v Sweden*⁶⁹ and in the following proposed text from Yugoslavia at the United Nations:

“Any national minority, as an ethnical community, has the right to full development of its ethnical culture and to the free use of its language. It is entitled to have those rights protected by the State.”⁷⁰

A positive right can also be defined more narrowly as a right involving an obligation on the state to take action with a financial cost. In the Constitution of India, for example, such a positive duty is expressly ruled out under article 29 since there is no duty that the State make financial provision to support the desire of a minority to preserve its own language, script or culture. When a minority has established its own educational institution, there is no requirement of State aid, only a provision for non-discrimination in any provision of State aid to that institution:

“The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.”⁷¹

Even in the absence of a specific minority rights provision in the European Convention on Human Rights, the European Court of Human Rights has found in the individual right of freedom of religion a duty on the state to promote pluralism by taking positive action to ensure that competing religious groups are mutually tolerant: *Metropolitan Church of Bessarabia v. Moldova*⁷², *Serif v. Greece*.⁷³ In

⁶⁹ “The possibilities of ethnic, linguistic or religious minorities to preserve and develop a cultural life of their own should be promoted.”: chapter 1, article 2 of the Constitution of Sweden: *Kitok v Sweden*, United Nations Human Rights Committee, Communication No 197/1985 (10 August 1988) UN Doc: CCPR/C/33/D/197/1985

⁷⁰ United Nations Secretary-General (1949) “Definition and Classification of Minorities” Lake Success, New York: UN Commission on Human Rights, Sub Commission on the Prevention of Discrimination and Protection of Minorities UN Doc: E/CN.4/Sub.2/85 (27 December 1949).

⁷¹ Article 30(2) of the Constitution of India

⁷² European Court of Human Rights, Judgement of 13 December 2001, Application No: 45701/99

⁷³ European Court of Human Rights, Application No. 38178/97, § 53, ECHR 1999-IX

*Thlimennos v Greece*⁷⁴ the Strasbourg Court has also found in the principle of non-discrimination a duty of positive state action that the “right not to be discriminated against in the enjoyment of rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”⁷⁵ Unless the rights of minorities can be interpreted as requiring positive action by the state it would appear that (at least in relation to Member States of the Council of Europe) the general, individual rights which (at least) overlap with the rights of minorities provide a greater level of protection than minority rights. This would reinforce the argument that the weak minority rights model is redundant since it provides no greater protection (in this context, actually lesser protection) than the protection available to all under general, individual rights.

The tendency towards an interpretation of minority rights under which they impose only negative obligations of non-interference is demonstrated in the phrase requiring that ethnic, linguistic and religious minorities “shall not be denied” their rights in Article 27 of the International Covenant on Civil and Political Rights. However a negative rights interpretation is not the only possible construction of Article 27, despite what could be regarded as clearly negative wording. Capotorti in his analysis of Article 27 argued that implementation of this requirement included “active and substantial intervention by states” and that a “passive attitude on the part of the latter would render such rights inoperative.”⁷⁶ The need to establish this interpretation of Article 27 can serve as a reminder of a potentially serious problem with the weak concept of minority rights: that the weak model renders minority rights ineffective, because (on this interpretation) minority rights do not go beyond the rights that

⁷⁴ European Court of Human Rights, Application No 34369/97, judgement of 6 April 2000 para 44 discussed in Patrick Thornberry and Maria Estébanez (2004) “Minority rights in Europe” Council of Europe Publishing p. 78 (footnote 98)

⁷⁵ European Court of Human Rights, Application No 34369/97, judgement of 6 April 2000 para 44 discussed in Patrick Thornberry and Maria Estébanez (2004) “Minority rights in Europe” Council of Europe Publishing p. 78 (footnote 98)

⁷⁶ Capotorti, Francesco (1991) Study on the rights of persons belonging to ethnic, religious and linguistic minorities Add 2 para 132.

persons belonging to minorities already have through universal, individual human rights guarantees.

It should be admitted that some Views of the United Nations Human Rights Committee can be explained as applications of article 27 involving negative duties of non-interference, rather than positive duties of state action. For example, in *Kitok v Sweden*,⁷⁷ the Human Rights Committee took the position that the permissible State regulation of an economic activity could be affected by article 27 provided that the economic activity was “an essential element in the culture of an ethnic community.”⁷⁸ That can be interpreted as a duty that states will not interfere with economic activities which are essential to the cultures of persons belonging to minorities, unless the state action is reasonable or proportionate.⁷⁹ Nevertheless, the Human Rights Committee in their General Comment on minority rights insists that article 27 does impose positive duties. Citing the Views of the Committee in *Kitok v Sweden*, the Committee observe that the decision supports the view that the cultural rights of minorities may include traditional activities such as fishing and hunting and added that “The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”⁸⁰ That statement provides support for both the position that article 27 imposes positive obligations and for the thesis that states’ duties corresponding to minority rights include an identity-conscious approach to decision-making. The Committee’s strong support for the position that article 27 imposes positive obligations can be found in the following statements in the General Comment on the rights of minorities:

⁷⁷ United Nations Human Rights Committee, Communication No 197/1985 (10 August 1988) UN Doc: CCPR/C/33/D/197/1985

⁷⁸ United Nations Human Rights Committee, Communication No 197/1985 (10 August 1988) UN Doc: CCPR/C/33/D/197/1985 para 9.2

⁷⁹ United Nations Human Rights Committee, Communication No 197/1985 (10 August 1988) UN Doc: CCPR/C/33/D/197/1985 para 9.5

⁸⁰ United Nations Human Rights Committee, General Comment No. 23, The rights of minorities, 50 UN GAOR, Human Rights Committee, 1314th meeting, UN Doc: CCPR/C/21/Rev.1/Add. 5 (adopted 6 April 1994) para 7

“a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party... positive measures by States may ... be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.”⁸¹

Where positive duties can be found in Human Rights Committee communications on article 27, they tend to be positive duties to engage in a decision-making process which takes the rights of members of minorities into account, in other words a positive duty of an identity-conscious decision-making process rather than a particular outcome. For example in *O. Sara v Finland*, Finland accepted that, in applying the relevant Finnish law, “Finnish authorities must take into consideration article 27 of the Covenant”.⁸² The progress towards a requirement of identity-conscious decision-making through Views of the United Nations Human Rights Committee in a succession of communications on article 27 is explored in Chapter Six.

It could, of course, be argued that all human rights require positive action by states, since (for example) even the implementation of a right that at first glance might seem intrinsically about non-action such as the right of non-discrimination requires positive action (such as ongoing monitoring) by states. Arguably, the distinction between “positive” and “negative” rights is merely a political construct reflecting the Cold War conflict between the NATO allies (who tended to favour “negative” civil and political rights) and the Warsaw Pact alliance (who tended to emphasise “positive” economic, social and cultural rights).

⁸¹ United Nations Human Rights Committee, General Comment No. 23, The rights of minorities, 50 UN GAOR, Human Rights Committee, 1314th meeting, UN Doc: CCPR/C/21/Rev.1/Add. 5 (adopted 6 April 1994) para 6.1 and 6.2

⁸² Communication No 431/1990 CCPR C/50/D/431/1990 para. 6.1

Evidence for the idea that positive obligations are a plausible interpretation of article 27 of the International Covenant on Civil and Political Rights comes from the work of the United Nations Human Rights Committee in their General Comment on the rights of minorities. The Human Rights Committee have mitigated the negative language of Article 27 ("shall not be denied the right") with the expectation in their General Comment on this article that it article does impose positive obligations:

"6.1. Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party."⁸³

It should be noted that paragraph 6.1 refers not only to positive obligations but also to the horizontal effect of minority rights, asserting that the rights require positive measures of protection against "the acts of other persons within the State party.

"6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as

⁸³ United Nations Human Rights Committee, General Comment No. 23, The rights of minorities, 50 UN GAOR, Human Rights Committee, 1314th meeting, UN Doc: CCPR/C/21/Rev.1/Add. 5 (adopted 6 April 1994)

long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.”

The more conditional language of the Sub Commission proposed text for the Universal Declaration of Human Rights (also rejected) should also be noted. This has elements of both strong and weak versions of minority rights:

“In states inhabited by well-defined ethnic, linguistic or religious groups which are clearly distinguished from the population and which want to be accorded differential treatment, persons belonging to such groups shall have the right, in so far as is compatible with public order and security, to establish and maintain their schools and cultural or religious institutions and to use their own language and religion in the Press, in public assembly and before the courts and other authorities of the State, if they choose.”⁸⁴

In the Sub Commission proposed text for the Universal Declaration of Human Rights, the linguistic and religious rights are positively stated (“shall have the right”) and apply in various spheres of life (education, the media, at public meetings and before courts and public authorities). However the rights are also qualified (“so far as is compatible with public order and security”) which is the language of weak versions of minority rights.

The argument that minority rights impose positive obligations can be reinforced by an examination of the practice of the United Nations Committee on the Rights of the Child. The United Nations Convention on the Rights of the Child contains the following provision on the protection of members of minorities:

⁸⁴ United Nations Secretary-General (1950) “Definition and Classification of Minorities” Lake Success, New York: UN Commission on Human Rights, Sub Commission on the Prevention of Discrimination and Protection of Minorities UN Doc: E/CN.4/Sub.2/85 (27 December 1949).

“Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”

This provides for children who belong to certain minorities (where such minorities exist) essentially the same level of protection as that available under article 27 of the International Covenant on Civil and Political Rights. The starting point on the question of whether the rights enjoyed by child members of these minority groups is the phrase “shall not be denied the right” which, like its counterpart in article 27 (of the ICCPR) would appear to imply a negative right.

- Affirmative measures in general

However, in their consideration of periodic reports under the Convention on the Rights of the Child, the practice of the Committee on the Rights of the Child has repeatedly urged positive action on states. States have been urged to adopt “positively differentiated” assistance and to take “affirmative measures” for children belonging to minority groups in Colombia,⁸⁵ “measures towards social inclusion and to combat marginalization of Roma children” in Finland,⁸⁶ “measures...to combat marginalization and stigmatization of Roma children” in Hungary⁸⁷ and to give “special attention to vulnerable groups, eg ethnic or language minorities” in the dissemination of the Convention in Turkmenistan.⁸⁸

⁸⁵ United Nations Committee on the Rights of the Child, concluding observations of the third periodic report of Colombia, (8 June 2006) UN Doc: CRC/C/COL/CO/3

⁸⁶ United Nations Committee on the Rights of the Child, concluding observations of the third periodic report of Finland (20 October 2005) UN Doc: CRC/C/15/Add.272 para. 57

⁸⁷ United Nations Committee on the Rights of the Child, concluding observations on the second periodic report of Hungary (17 March 2006) UN Doc: CRC/C/HUN/CO/2 para 3 (c)

⁸⁸ United Nations Committee on the Rights of the Child, concluding observations on the initial report of Turkmenistan (2 June 2006) UN Doc: CRC/C/TKM/CO/1 para. 18

Positive duties towards members of minorities in access to health and education

Concluding observations by the United Nations Committee on the Rights of the Child on periodic reports by several states⁸⁹ (including China, Colombia, Finland, the Russian Federation and Thailand) urge the adoption of affirmative measures or “special attention” for child members of ethnic minorities in the area of health and education. Such recommendations go beyond the traditional protected spheres of culture, religion and language governed by article 30 of the United Nations Convention on the Rights of the Child, providing an example of minority rights as “passenger rights” influencing the implementation of other individual human rights. In the European Convention on Human Rights, non-discrimination was originally conceived as a ‘passenger’ right, operating only in relation to other rights.⁹⁰ In a similar way, minority rights may be thought of as having a ‘passenger’ role, influencing the implementation of other rights.

A positive duty to gather information

The Committee on the Rights of the Child makes recommendations relating to information gathering and structures for monitoring the rights of minorities: a party to the Convention on the Rights of the Child was commended for carrying out independent monitoring through “Parliamentary Commissioners for Civil Rights and

⁸⁹ United Nations Committee on the Rights of the Child, concluding observations of the third periodic report of Colombia, (8 June 2006) UN Doc: CRC/C/COL/CO/3; United Nations Committee on the Rights of the Child, concluding observations on the second periodic report of China (24 November 2005) UN Doc: CRC/C/CHN/CO/2 para 78(b); United Nations Committee on the Rights of the Child, concluding observations on the third periodic report of Finland (20 October 2005) UN Doc: CRC/C/15/Add.272 para 57; United Nations Committee on the Rights of the Child, concluding observations on the third periodic report of the Russian Federation (23 November 2005) UN Doc: CRC/C/RUS/CO/3 para 65(c); United Nations Committee on the Rights of the Child, concluding observations on the second periodic report of Thailand (17 March 2006) UN Doc: CRC/C/THA/CO/2 para 25

⁹⁰ Article 14 of the European Convention on Human Rights applied the non-discrimination requirement only to “The enjoyment of the rights and freedoms set forth in this Convention,” not to law and policy in general. This contrasts with other international provisions on non-discrimination which are general, for example Article 25 of the International Covenant on Civil and Political Rights

Ethnic and National Minorities”⁹¹ and the Committee has argued the regular, co-ordinated collection by states of disaggregated data on children belonging to vulnerable groups including child members of minorities in Finland⁹² and Thailand⁹³ as well as the collection of information on child members of a specific community, the Batwa, in Uganda.⁹⁴ When such information has been collected, the Committee has not only recommended the formulation of a plan of action in response to that information, it has also recommended that leaders of the relevant minority participate in the formulation of that plan of action which is the language of identity-conscious decision-making.⁹⁵ In the related area of non-discrimination, the Committee on the Rights of the Child has recommended “a proactive and comprehensive strategy to eliminate discrimination on any grounds against vulnerable groups throughout the country” which similarly employs the language of positive obligation.⁹⁶

Whether the rights are positive or negative would appear to depend in part on which body of international norms, and which institution, is considered. The language of certain recommendations by the Parliamentary Assembly of the Council of Europe has been of obligations for action by states and other actors. In, for example, recommendation 1277 (1995) on migrants, ethnic minorities and the media, refers to “a responsible approach by media professionals and improved media access for migrants and ethnic minorities on all levels.”⁹⁷

⁹¹ United Nations Committee on the Rights of the Child, concluding observations on the second periodic report of Hungary (17 March 2006) UN Doc: CRC/C/HUN/CO/2

⁹² United Nations Committee on the Rights of the Child, concluding observations on the third periodic report of Finland (20 October 2005) UN Doc: CRC/C/15/Add.272 para. 13

⁹³ United Nations Committee on the Rights of the Child, concluding observations on the second periodic report of Thailand (17 March 2006) UN Doc: CRC/C/THA/CO/2 paras. 19, 20 and 21

⁹⁴ United Nations Committee on the Rights of the Child, concluding observations on the second periodic report of Uganda (23 November 2005) UN Doc: CRC/C/UGA/CO/2 para 82(a)

⁹⁵ United Nations Committee on the Rights of the Child, concluding observations on the second periodic report of Uganda (23 November 2005) UN Doc: CRC/C/UGA/CO/2 para. 82(a)

⁹⁶ United Nations Committee on the Rights of the Child, concluding observations on the second periodic report of Azerbaijan (17 March 2006) UN Doc: CRC/C/AZE/CO/2 para 25

⁹⁷ Parliamentary Assembly of the Council of Europe, Recommendation 1277 (1995) on migrants, ethnic minorities and the media para. 3

Taking into account the work of the Foundation for Inter-Ethnic Relations towards the conflict-resolution work of the OSCE High Commissioner for National Minorities, the following language, of positive action by states, is also noteworthy:

“States should approach minority education rights in a proactive manner. Where required, special measures should be adopted by States to actively implement minority language education rights to the maximum of their available resources, individually and through international assistance and co-operation, especially economic and technical.”⁹⁸

This statement, based on the analysis of specialist analysts on international commitments in relation to minorities (albeit in the context of the political commitments on which the OSCE is based) suggests that states should go beyond non-interference into the realm of positive intervention. That is one component of the model of strong minority rights. Paragraphs 5, 6 and 7 of the Hague Recommendations specify further measures of positive action by states in relation to minority language education.

Considering the draft protocol on the rights of minorities attached to Council of Europe Parliamentary Assembly Resolution 1201 (1993), it is worth noting that the articles of the draft protocol use expressions such as “shall have the right”, for example in Article 3:

“Every person belonging to a national minority shall have the right to express, preserve and develop in complete freedom his/her religious, linguistic and/or cultural identity, without being subjected to any attempt at assimilation against his/her will.”⁹⁹

⁹⁸ The Hague Recommendations on the Education Rights of National Minorities, Foundation on Inter-Ethnic Relations para 4

⁹⁹ Article 3 of the draft protocol on the rights of national minorities for the European Convention on Human Rights, from Recommendation 1201(1993) of the Parliamentary Assembly of the Council of Europe

So minority rights under the draft protocol if it was adopted and brought into force would be different in emphasis from those granted in Article 27 of the International Covenant on Civil and Political Rights with its negatively phrased formula “shall not be denied the right.” But, as was shown earlier, Capotorti wrote that to be truly “positive” a right must require “active and substantial intervention by states”¹⁰⁰. An examination of the rights tends to suggest that the test of a duty of active and substantial intervention is not satisfied. If the draft protocol had come into force, persons belonging to national minorities in State Parties would have acquired the right to set up their own organisations (Article 6), to use their mother tongue (Article 7), to set up their own schools (Article 8), to be able to use the courts when their rights are violated (Article 9) and to communicate with citizens of other states who share their different characteristics (Article 10). Other than to review their law and policy to ensure non-interference in these areas, and to maintain the rule of law, it would not seem that states would be required to take active and substantial intervention.

The first paragraph of Article 8 would seem to suggest that states would acquire a duty to provide teaching of and in minority languages, but this obligation would be conditional on the geographical distribution of the minority. It would seem likely that there would be a margin of appreciation for states in determining what geographical distribution would demand minority language teaching. Nevertheless, the significance of this positive requirement should not be underestimated. The following extract from a report by a Rapporteur of the Council of Europe Committee on Legal Affairs and Human Rights is worthy of note, on the question of the obligation to provide minority language teaching:

“Flemish parliamentarians repeatedly voiced the fear during the April part-session 2002 that ratification of the Framework Convention along the lines of the proposals of the Venice Commission and the Committee on Legal Affairs and Human Rights

¹⁰⁰ Capotorti, Francesco (1991) “Study on the rights of persons belonging to ethnic, religious and linguistic minorities” Add 2 para 132.

would lead to Flanders having to accord wide rights to French-speaking “newcomers” in Flanders (such, as the opening of French-language schools), even if they were very small in number.”¹⁰¹

This shows that there is a real sensitivity among states to positive obligations, so even a conditional positive obligation in the draft protocol is significant. The Rapporteur’s response to the repeated concern of the Flemish parliamentarians was to emphasise that the French speakers in Flanders were not “newcomers.” It is also significant that, under the draft protocol, a genuine argument by a state that it should not be obliged to provide minority language education for “newcomers” would succeed. This is because of a clause in the Article 1 definition of national minorities, which states that “national minority refers to a group of persons in a state who...maintain longstanding, firm and lasting ties with that state.”

In India, the Supreme Court has limited the requirements for positive State action, at least in the sector of education. In *Islamic Academy v. Karnataka*¹⁰² the Supreme Court held that Article 30 of the Constitution of India did not require the State to provide financial aid to educational institutions (minority or otherwise), only to not discriminate if when a private educational institution applies for State aid. Whether this is perceived to be a negative rights approach depends on the definition of negative and positive rights which is adopted by the observer. Prima facie, this could be regarded as a classic statement of a state duty of non-interference. However, it could be maintained that for the state to refrain from discrimination does require positive action. The state should arguably adopt an active approach to the detection of discriminatory conduct and take positive steps to ensure the actual implementation of this right. On that basis, the right could be perceived as a positive one.

¹⁰¹ Nabholz-Haidegger, Lili (2002) “Protection of minorities in Belgium” Report to the Committee on Legal Affairs and Human Rights, Parliamentary Assembly Doc. 9536 of 5 September 2002 p 14, paragraph 56 of the explanatory memorandum

¹⁰² Decision of the Supreme Court of India, 14 August 2003; Writ Petition (civil) 350 of 1993

Some evidence of state practice on minority language rights can be found in the work of the OSCE High Commissioner on National Minorities. The High Commissioner has researched the linguistic rights of persons belonging to national minorities in the OSCE Area.¹⁰³ Drawing upon Council of Europe and United Nations standards as well as OSCE commitments, the report considers a series of themes. For each theme, the report identifies stronger and weaker approaches to protection of the relevant rights.

The summary below of stronger and weaker responses does not represent the full range of practice identified by the research. The ‘weaker’ response generally indicates the lowest level identified (apart from states which responded that they did not recognise the existence of national minorities or that there were no national minorities on their territory).

- Presence of State and Official Languages and Languages with Special Status

Evidence of a stronger approach involved granting to a minority language the status of an “official” language. Eight states responded to the questionnaire that they had two official languages and two states (Switzerland and Bosnia-Herzegovina) had three or more.¹⁰⁴ Evidence of a weaker approach involved a “special status” for the protection of minority languages, but not the status of an official language

- Use of Minority Languages in Official Communication

Evidence of a stronger approach involved guaranteed free interpretive services for persons using minority languages (the maximum provision found by the research) and use of the minority language in responses to communications in minority languages (provided, for example, with regard to the Welsh language in the United

¹⁰³ OSCE High Commissioner for National Minorities “Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area” p 3

¹⁰⁴ OSCE High Commissioner for National Minorities “Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area” p 7

Kingdom). In judicial proceedings, this would include the possibility (or right) that the proceedings themselves be held in a minority language. Evidence of a weaker approach included a right to communicate with the judicial authorities in minority languages, in particular interpretation for defendants who are persons belonging to minorities in criminal trials

- Teaching of and in Minority Languages

It is difficult to analyse this topic under the headings of “stronger” or “weaker” approaches. The obvious stronger approach would be a right to teaching in the minority language; and the obvious weaker right would be teaching of the minority language in question. However both Teaching “of” and teaching “in” minority languages in schools are rights granted in every state responding to the question¹⁰⁵

- Inclusion of National Minority Perspectives in the National School Curriculum

Evidence of a stronger approach would correspond to the approaches of states such as Austria, the Czech Republic and Denmark, which have a programme of teaching about their national minorities in the general school curriculum. Evidence of a weaker approach involved responses from 15 states that they taught minority culture, but only to members of minorities, not in the general curriculum.

- Implementation of the Right to Establish Private Schools

¹⁰⁵ OSCE High Commissioner for National Minorities “Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area” p 15

Stronger approaches include the prescription of this right in the law of the state. Another distinguishing mark of a stronger approach would be the requirement of public funding for private minority schools. According to the OSCE report the requirement of funding would go beyond existing international standards¹⁰⁶ Weaker approaches include the position that every state responding to this question permitted minorities to establish their own private schools.

Involuntary or Voluntary Minority Membership

This partly depends upon whether membership is based on objective or subjective criteria. If membership is objective then those who display the objective features (eg carrying out religious or cultural practices) may be identified as members. If membership is subjective then that may imply a greater degree of voluntariness (although conduct that demonstrates objective features is arguably itself voluntary). One example of an approach based on voluntary membership is the draft Council of Europe protocol on the rights of minorities; Article 2 states that “Membership of a national minority shall be a matter of free personal choice. No disadvantage shall result from the choice or renunciation of such membership.”¹⁰⁷

In support of an approach based on voluntary membership, the Minority Rights Group have registered their concern about “involuntary minorities” whose minority status is imposed by the dominant population¹⁰⁸. This would seem obviously applicable to the category of caste, although it has been noted people choose to adopt a positive Dalit identity.

¹⁰⁶ OSCE High Commissioner for National Minorities “Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area” p 20

¹⁰⁷ Article 2 of the draft protocol on the rights of national minorities for the European Convention on Human Rights, from Recommendation 1201(1993) of the Parliamentary Assembly of the Council of Europe

¹⁰⁸ Gilbert, Geoff (1996) “The Council of Europe and Minority Rights” (1996) HRQ 160 – 189 at 167.

The answer will also depend upon the interpretative approaches of international organisations. The UN Human Rights Committee, for example, emphasized both the objective and subjective features of minority membership in *Lovelace v. Canada*¹⁰⁹. The Committee referred to objective features such as upbringing and ties with their community (“Persons who are born and brought up on a reserve, who have kept ties with their community...”) as well as the subjective “...and wish to maintain those ties”)¹¹⁰.

Should minorities be able to claim self-determination?

According to a strong minority rights view there is a link between minority rights and self-determination. United Nations Secretary-General wrote in a memorandum in 1949, in relation to transfer of populations between states:

“The sense of solidarity of some minorities with their co-nationals is intensified when they are placed under another State’s jurisdiction and *they are willing to accept the authority of the new State only on condition that they are permitted to retain their distinct characteristic and to carry on their own collective life by means of an autonomous regime.*”¹¹¹

In the drafting of the International Covenant on Civil and Political Rights, the records of the United Nations show that the Soviet delegate took the position that the right to self-determination in Article 1 of the ICCPR “unquestionably implies the

¹⁰⁹ UN Doc: A/36/40 p. 166 (1981)

¹¹⁰ McGoldrick, Dominic (1991) “Canadian Indians, Cultural Rights and the Human Rights Committee” 40 ICLQ 658 – 669 at 667, see also Bayefsky, A.F. (1982) “The Human Rights Committee and the Case of Sandra Lovelace” 20 Can. YIL 244 – 266.

¹¹¹ Italics added by this author. Source: United Nations Secretary-General (1950) “Definition and Classification of Minorities” Lake Success, New York: UN Commission on Human Rights, Sub Commission on the Prevention of Discrimination and Protection of Minorities UN Doc: E/CN.4/Sub.2/85 (27 December 1949).

right of any national group to secede.”¹¹² The fear of States of such claims is illustrated by the response made by Mr Ingles on behalf of the Philippines, to this statement by the Soviet delegate. While in broad sympathy with the inclusion of the classification of national minority, Mr Ingles was concerned that this should not prejudice the application of self-determination to the article on minorities and said that the right of secession should only apply to national minorities that were incorporated into a state against their will.¹¹³ Other delegates who shared this concern expressed it by wanting the category of national minority excluded altogether (which was, as the final text of Article 27 ICCPR shows, the prevailing view). Mr Whitlam for Australia was concerned that adding the national category would blur the concept of minority¹¹⁴. Mr Kaeckenbeeck of Belgium considered it “dangerous” which supports the fears noted above that claims to national minority status might cause a strong reaction by security-conscious states.¹¹⁵ This seems to confirm the genuineness of the fear of States that the status of national minority is inherently dangerous because it represents a claim to nationhood and a threat to their territorial integrity. States fear that, as Laponce put it, “national minorities want liberty to choose the sovereignty under which they live”.¹¹⁶ Shaw has suggested that the national minority classification should therefore disappear altogether as a category separate from ethnic, linguistic and religious minorities.¹¹⁷

Such texts can be interpreted as support for claims by minorities to self-determination. No attempt to evaluate the validity of such arguments will be made

¹¹² Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR370 pp 10 to 11. Whether this statement is correct, as part of the subject-matter of self-determination, is not within the scope of this thesis.

¹¹³ Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR370 p 8.

¹¹⁴ Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR370 p 10.

¹¹⁵ Ninth Session of the UN Commission on Human Rights, UN Doc: E/CN.4/SR370 p 12.

¹¹⁶ J. Laponce “The Protection of Minorities” (1960) Berkeley: University of California Press p. 21, quoted in Malcolm Shaw “The Definition of Minorities” in Yoram Dinstein and Mala Tabory “The Protection of Minorities and Human Rights” (Dordrecht, Boston and London: Martinus Nijhoff, 1992) p. 20.

¹¹⁷ Shaw in Dinstein and Tabory 1992: 22.

here, as self-determination is outside the scope of this thesis. This thesis aims to defend the view that such a link should be rejected because it will be perceived by states as an unacceptable threat to their territorial integrity.¹¹⁸ The principle of territorial integrity is a well-established norm of international law.¹¹⁹ It is underlined by the prohibitions in the United Nations Charter on interference with the domestic jurisdiction of states¹²⁰ and the use of force against the territorial integrity or political independence of states¹²¹. The principle was spelled out by the United Nations General Assembly in Resolution 2131 (XX).¹²²

The serious concern of states about claims of minorities for self-determination as a threat to their territorial integrity and the likely response of states to any proposal that minorities should be able to claim self-determination will be the centre of attention here. As Varady noted, a minority claim to collective rights tends to be seen as “a disguised opening gambit towards secession.”¹²³ Akermark noted that the Preamble of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities¹²⁴ refers to the contribution of minorities to “the political and social stability of States in which they live.” Akermark comments that “The General Assembly here presents minorities as a potential threat to the security of the state”¹²⁵ The change in atmosphere at the Conference on Security and Co-operation in Europe (CSCE, from 1995 the OSCE) provides further support for this point. Helgesen noted the change in the international atmosphere from a climate of “euphoria” at the 1990 Copenhagen Meeting after the end of the Cold War to the “paralysing” fear of “ethnic chaos” at the 1991 Expert Meeting on

¹¹⁸ On the concerns of States, see Nowak, Manfred (1993) “UN Covenant on Civil and Political Rights: CCPR Commentary” Kehl: Strasbourg p 495 and Thornberry, Patrick (1980) “Is there a Phoenix in the Ashes? International Law and Minority Rights” 15 *Texas International Law Journal* 421 at 433.

¹¹⁹ Shaw, Malcolm (1997) “International Law” Cambridge: Cambridge University Press p. 354.

¹²⁰ Article 2(7) UN Charter.

¹²¹ Article 2(4) UN Charter.

¹²² Shaw, Malcolm (1997) “International Law” Cambridge: Cambridge University Press p. 784.

¹²³ Varady, Tibor (1997) “Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Case” (1997) 19 HRQ 9 – 54 at 29.

¹²⁴ Adopted by General Assembly resolution 47/135 of 18 December 1992.

¹²⁵ Akermark, Athanasia (1997) “Justification of Minority Protection in International Law” London: Kluwer Law International p. 182.

National Minorities.¹²⁶ For states, then, collective rights (and especially any suggestion that minorities might assert a right to self-determination) are perceived as a direct threat to their territorial integrity. It should not be forgotten that the fundamental duties in the Constitution of India include the duty of each citizen to “uphold and protect the sovereignty, unity and integrity of India.”¹²⁷ The declaration by France that article 27 does not apply since there are no minorities in France is important and should be remembered.¹²⁸

When the door to article 27 arguments was closed by France, the Human Rights Committee kept it closed. Despite a long line of communications in which the authors of communications attempted to persuade the Human Rights Committee to examine their complaints involving France under article 27, the response of the Human Rights Committee has been a totally consistent refusal to consider arguments of article 27 violations.¹²⁹ The French declaration is treated, in effect, as a reservation to the International Covenant on Civil and Political Rights. In *Kerrain v*

¹²⁶ Helgesen, Jan (1993) “The Protection of Minorities in the Conference on Security and Co-operation in Europe (CSCE): A note on the Helsinki Document” in (eds) Packer and Mynitti (1993) “The Protection of Ethnic and Linguistic Minorities in Europe” Abo-Turku: Abo Akademi University Institute for Human Rights pp 15 – 22 at 16.

¹²⁷ Article 51A(c) of the Constitution of India

¹²⁸ According to Stephen Roth, this means that minority rights protection depends entirely upon state recognition of the relevant minority; and this is a key weakness of the system of the United Nations era: Roth, Stephen “Toward a Minority Convention: Its Need and Content” in (eds) Dinstein, Yoram. Mala Tabory noted that this approach to drafting was repeated in Principle VII of the Helsinki Final Act of the Conference on Security and Co-operation in Europe (the CSCE, now the OSCE) in 1975: Tabory, Mala “Minority Rights in the CSCE Context” in (eds) Dinstein, Yoram and Mala Tabory (1992) “The Protection of Minorities and Human Rights” pp 187 – 211 at 192

¹²⁹ *TK v France* Communication 220/1987 (8 December 1989) UN Doc: CCPR/C/37/D/220/1987 paragraphs 7.5, 8.5 and 8.6; *Cadoret and Bidan v France* Communication No 221/1987 (11 April 1991) UN Doc: CCPR/C/41/221/1987 paragraphs 4.9 and 5.3; *Kerrain v France* Communication No 222/1987 (8 December 1989) UN Doc: CCPR/C/37/D/222/1987 paragraphs 6.6, 7.3, 8.5 and 8.6; *RT v France* Communication No 262/1987 (3 April 1989) UN Doc: CCPR/C/35/D/262/1987 paragraphs 5.7 and 7.4; *SG v France* Communication No 347/1988 (15 November 1991) UN Doc: CCPR/C/43/D/347/1988 para. 5.3; *GB v France* Communication No 348/1989 (15 November 1991) UN Doc: CCPR/C/43/D/348/1989; *CLD v France* Communication No 439/1990 (25 November 1991) UN Doc: CCPR/C/43/D/439/1990 para. 4.3; *Hopu and Bessert v France* Communication No 549/1993 (29 December 1997) UN Doc: CCPR/C/60/D/549/1993/Rev.1 para. 4.3. The communication (insofar as it involved article 27) in *Le Duigou v France* Communication No 228/1987 (4 August 1988) UN Doc: CCPR/C/33/D/228/1987 would, it is submitted, have met the same fate had it not been inadmissible for non-exhaustion of domestic remedies

France, the United Nations Human Rights Committee took a substantive rather than a formalistic approach, taking the view that:

“...it is not the formal designation but the effect the statement purports to have that determines its nature. If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration.”¹³⁰

Observations with an identical effect were made by the Human Rights Committee in *TK v France*.¹³¹ The complete lack success of this long line of attempts to persuade the Human Rights Committee to examine allegations of article 27 violations in France indicates the vital importance of the continuing consent of other states to remain subject to article 27 complaints rather than following the example set by France. It is submitted that, if the strong model of minority rights were adopted, then the seriousness of the perceived threat to the territorial integrity of states could lead to other states adopting the position taken by France. Therefore, the strong model of minority rights should not be adopted.

The concept of self-determination is a large and separate part of international law. Self-determination is not within the scope of this thesis; this thesis will not examine the meaning, status or implications of self-determination.¹³² The only point of contact with self-determination in this thesis is the argument that a fear among states of claims to self-determination by minority groups is likely to render ineffective a strong approach to minority rights, since states would reject such an approach due to a fear of potential threats to their territorial integrity. Thornberry has noted that some minorities have claimed claim self-determination such as the Basques in Spain and

¹³⁰ Communication No 222/1987 (8 December 1989) UN Doc: CCPR/C/37/D/222/1987 para. 8.6

¹³¹ Communication 220/1987 (8 December 1989) UN Doc: CCPR/C/37/D/220/1987 para 8.5

¹³² So, for example, this thesis will not examine the implications of the view of the United Nations Human Rights Committee in their General Comment No 12 on article 1 that self-determination “is an essential condition for the effective guarantee and observance of individual human rights” (para. 1) as argued by the Government of Canada in *Chief Bernard Ominiyak and the Lubicon Lake Band v Canada* Communication No 167/1984 (10 May 1990) UN Doc: CCPR/C/38/D/167/1984

the Biafrans in Nigeria¹³³. Such incidents illustrate the historical basis for the fear of states that minorities (especially if they are conceived as 'national' groups within states) may make claims to self-determination which go beyond 'internal' self-determination (creating conditions for democracy) or local autonomy (within a federal structure) and actually include demands for independence.

There is tacit recognition of potential threats to the territorial integrity of states by members of minorities in the United Nations Human Rights Committee General Comment on the rights of minorities which contains a clause that "The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party".¹³⁴ The anxiety of states that minorities will threaten their territorial integrity can be illustrated in the decision of the European Court of Human Rights in *Metropolitan Church of Bessarabia v. Moldova*¹³⁵ in which "the Government ... submitted that in reality the applicant Church was engaged in political activities contrary to Moldovan public policy and that, were it to be recognised, such activities would endanger Moldovan territorial integrity."¹³⁶ Another example, showing the recognition by a minority group that its existence may be perceived by a state as a threat to its territorial integrity, is the inclusion in the aims of the United Macedonian Organisation Ilinden in Bulgaria of the statement that, as summarised by the European Court of Human Rights, "the organisation would not infringe the territorial integrity of Bulgaria"¹³⁷; however, this statement did not protect the group from a finding by the domestic courts of Bulgaria that "the applicant association's aims were directed against the unity of the nation,

¹³³ Thornberry, Patrick "Self-Determination, Minorities, Human Rights: A Review of the International Instruments" (1989) 38 ICLQ 867 – 889 at 868.

¹³⁴ United Nations Human Rights Committee, General Comment No. 23, The rights of minorities, 50 UN GAOR, Human Rights Committee, 1314th meeting, UN Doc: CCPR/C/21/Rev.1/Add. 5 (adopted 6 April 1994) para 3.2

¹³⁵ Judgement of 13 December 2001, Application No: 45701/99

¹³⁶ para 125 of the judgement of the European Court of Human Rights in *Metropolitan Church of Bessarabia v. Moldova* Judgement of 13 December 2001, Application No: 45701/99

¹³⁷ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* European Court of Human Rights Judgement of 2 October 2001 Applications Nos. 29221/95 and 29225/95) para 10

that it advocated national and ethnic hatred, and that it was dangerous for the territorial integrity of Bulgaria” resulting in a refusal of registration.¹³⁸

The European Court of Human Rights addressed the question of whether the group in fact did pursue separatist goals and found that it did, while reminding states that “the fact that a group of persons calls for autonomy or even requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country’s territorial integrity and national security”¹³⁹ and found that Bulgaria was in violation of article 11 of the European Convention on Human Rights.¹⁴⁰ The centrality of the perceived threat to the territorial integrity of Bulgaria in this case further illustrates the significance of real or perceived threats to territorial integrity by minority groups. While it can be argued, as Varady has done,¹⁴¹ that a strong approach to minority rights, with its greater support for positive rights imposing duties of positive action on states, would more effectively secure the integrity of states, there is no doubt that the perception of states is that strong minority rights claims are associated with threats to territorial integrity.

The historical example of the League of Nations minority protection system provides evidence for the position that serious state resistance to an inherent component of the system (then, the principle that minorities could maintain separate identities; today, the possibility that minorities could make self-determination

¹³⁸ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* European Court of Human Rights Judgement of 2 October 2001 Applications Nos. 29221/95 and 29225/95) para 12

¹³⁹ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* European Court of Human Rights Judgement of 2 October 2001 Applications Nos. 29221/95 and 29225/95) para 97

¹⁴⁰ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* European Court of Human Rights Judgement of 2 October 2001 Applications Nos. 29221/95 and 29225/95) para 112

¹⁴¹ Varady noted that “loyalty in this part of the world can only be fostered by allowing and encouraging, rather than suppressing, national identities”: Varady, Tibor (1997) “Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Case” (1997) 19 HRQ 9 – 54 at 47.

claims) would endanger the system for the protection of minorities. Although not all reasons for the failure of the League of Nations system are relevant to the choice between strong and weak models of minority rights protection, analysis of this unsuccessful system provides a degree of justification for rejecting the strong model of minority rights. One obvious indicator of the strong minority rights model is the immediate cause of the League system. As in previous peace negotiations, at the Paris Peace Conference in 1919 the boundaries of states were shifting, creating new, relatively concentrated, national minorities. Between 1919 and 1924, there were nine treaties, five declarations and four local conventions which embodied minority rights obligations under a League guarantee.¹⁴² The obligations were, Bilder noted, applied to the defeated states of the First World War, and among them only to the weaker nations.¹⁴³

Kay Hailbronner has outlined the basic rights accorded to persons belonging to minorities in the post-First World War treaties.¹⁴⁴ Minority members were given the individual rights to use any language in private or public; to create and control their own institutions and to primary school instruction. She also noted how the Permanent Court of International Justice recognised the need for minorities to have means for the preservation of their “racial peculiarities, their traditions and their national characteristics” in *Minority Schools in Albania*.¹⁴⁵

The experience of minority rights protection by the League of Nations can be seen as a warning from history, a message about how not to protect minority rights. Josef

¹⁴² Bilder, Richard “Can Minorities Treaties Work” in (eds) Dinstein, Yoram and Mala Tabory (1992) “The Protection of Minorities and Human Rights” Dordrecht, Boston, London: Martinus Nijhoff, pp 52 to 82 at 63

¹⁴³ Bilder, Richard “Can Minorities Treaties Work” in (eds) Dinstein, Yoram and Mala Tabory (1992) “The Protection of Minorities and Human Rights” Dordrecht, Boston, London: Martinus Nijhoff, pp 52 to 82 at 63

¹⁴⁴ Hailbronner, Kay “The Legal Status of Population Group in a Multinational State under Public International Law” in (eds) Dinstein, Yoram and Mala Tabory (1992) “The Protection of Minorities and Human Rights” Dordrecht, Boston, London: Martinus Nijhoff, pp 117 – 144 at 121

¹⁴⁵ Hailbronner, Kay “The Legal Status of Population Group in a Multinational State under Public International Law” in (eds) Dinstein, Yoram and Mala Tabory (1992) “The Protection of Minorities and Human Rights” Dordrecht, Boston, London: Martinus Nijhoff, pp 117 – 144 at 122. For the *Minority Schools in Albania* case, see [1935] PCIJ Ser A/B at 17; 3 World Court Reports 496

Kunz, writing in the 1950s, saw minority rights as a fashion that was “nearly obsolete.”¹⁴⁶ He identified five reasons for the decline in minority rights in the first decade of the United Nations era. The reasons included the fact that minority rights had not been applied generally in Europe, or outside Europe and the procedural inefficiency of the League of Nations¹⁴⁷. Another reason, which is the most significant reason for the purposes of this argument, was that states were opposed to the protection of the differing characteristics of minorities. Kunz gave as an example a Brazilian delegate in the 1920s who spoke “in favour of the rapid assimilation of minorities,”¹⁴⁸ hardly the language of minority rights protection. If the opposition of states to the toleration of different forms of identity at the time of the League of Nations was a cause of the lack of success of that minority protection system, then it is submitted that the opposition of states to any potential self-determination claim would again endanger the international minority protection system.

The other reasons for the decline in minority rights, according to Kunz, were that states attempted to avoid the problem of minorities by population transfers¹⁴⁹ and that minorities engaged in subversive activities.¹⁵⁰ It is submitted that similar issues have arisen in more recent years, which tends to reinforce the relevance of the views of Kunz and the argument that adopting a form of minority protection which states strongly resist would not achieve a successful system of minority protection. The issue of forced population transfer was a real issue in 1990s Europe, under the name

¹⁴⁶ Kunz, Josef “The Present Status of the International Law for the Protection of Minorities” (1954) 48 AJIL 282 at 282

¹⁴⁷ Richard Bilder noted that few complaints survived the complex procedures and that the procedures were slow, cloaked in excessive secrecy and hampered by the ambiguous scope and nature of the obligations: Bilder, Richard “Can Minorities Treaties Work” in (eds) Dinstein, Yoram and Mala Tabory (1992) “The Protection of Minorities and Human Rights” Dordrecht, Boston, London: Martinus Nijhoff, pp 52 to 82 at 66

¹⁴⁸ Kunz, Josef “The Present Status of the International Law for the Protection of Minorities” (1954) 48 AJIL 282 at 283

¹⁴⁹ An example of forced population transfers in the League of Nations era was that undertaken under the Greco-Turkish treaty of 30 January 1923 which involved the compulsory transfer of one and half million Greeks from Asia Minor where they had lived since early Greek times: Kunz, Josef “The Present Status of the International Law for the Protection of Minorities” (1954) 48 AJIL 282 at 283

¹⁵⁰ This related especially how states bordering on Nazi Germany perceived their German minorities Kunz, Josef “The Present Status of the International Law for the Protection of Minorities” (1954) 48 AJIL 282 at 283 - 4

of “ethnic cleansing.” Since the devastating terrorist attacks in New York and Washington DC on 11 September 2001, increased prejudice and distrust towards Islamic minorities has occurred, as Muslims are increasingly at greater risk of being perceived as potential security threats.¹⁵¹

It is submitted, therefore, that the model of strong minority rights should be rejected. The French declaration and the lack of success of a long line of attempts to persuade the United Nations Human Rights Committee to hear article 27 arguments should be remembered: France closed the door to minority rights arguments under article 27 ICCPR and the Human Rights Committee kept the door closed.

Immediate or Progressive Obligations

The evidence of some Council of Europe institutions provides some support for the idea that minority rights impose only progressive obligations. The second annual report of the Council of Europe Commissioner on Human Rights included information on a visit to Slovakia.¹⁵² This report refers in the most general terms to “difficulties, particularly as regards the situation of ethnic minorities and the Roma/Gypsy community.”¹⁵³ The Commissioner explained these difficulties. There is implicit recognition of shortcomings in the Slovakian legal framework in the following extract:

“It therefore seems to me that the opinion issued by the Advisory Committee on the Framework Convention for the Protection of National Minorities takes on a full significance in this context [of the situation of Roma/Gypsies], since a better legal

¹⁵¹ In December 2002, it was reported that the European Union was considering a new directive to enable EU Member States to return refugees who were a “danger to the security of the host country.”: Norton-Taylor, Richard and Ian Black (2002) “European Union plans new directive making it easier to send refugees back” *The Guardian* 11 December 2002 p 15

¹⁵² Gil-Robles, Alvarao, Commissioner for Human Rights (2002) “2nd Annual Report April 2001 to December 2001” Council of Europe Parliamentary Assembly Doc. 9464 of 15 May 2002 pp 54 to 66

¹⁵³ Gil-Robles, Alvarao, Commissioner for Human Rights (2002) “2nd Annual Report April 2001 to December 2001” Council of Europe Parliamentary Assembly Doc. 9464 of 15 May 2002 p 54

framework must be rapidly introduced in order for the constitutional rights granted to national minorities and ethnic groups to be implemented and subsequently incorporated into existing legislation.”¹⁵⁴

The language of the rapid implementation of a legal framework could be perceived as evidence of a stronger approach in practice than the Commissioner’s legal remit would suggest. The Roma are referred to in the Commissioner’s report as a “national minority” which is consistent with (but does not require) a strong approach. The Commissioner discusses the general socio-economic conditions of this national minority in terms of employment, education and the development of projects for the community which are all issues of progressive obligation.

One organisation whose statements are worthy of study on this question is the contribution of the Foundation for Inter-Ethnic Relations. As a non-governmental organisation acting at the request of the OSCE High Commissioner for National Minorities, the Foundation have been able to offer a distinct perspective with detailed recommendations on the effective participation on national minorities in public life (the Lund Recommendations)¹⁵⁵, on national minorities’ linguistic rights (the Oslo Recommendations)¹⁵⁶ and on their education rights (the Hague Recommendations).¹⁵⁷

The recommendations made by the Foundation for Inter-Ethnic Relations do not employ a lawyers’ language of rights. Rather than legal statements of entitlements, the recommendations attempt to persuade. For example the Hague Recommendations include the following persuasive statement on early education:

¹⁵⁴ Gil-Robles, Alvarao, Commissioner for Human Rights (2002) “2nd Annual Report April 2001 to December 2001” Council of Europe Parliamentary Assembly Doc. 9464 of 15 May 2002 p 55

¹⁵⁵ The Lund Recommendations on the Effective Participation on National Minorities in Public Life, Foundation on Inter-Ethnic Relations, September 1999.

¹⁵⁶ The Oslo Recommendations on the Linguistic Rights of National Minorities, Foundation on Inter-Ethnic Relations, February 1998

¹⁵⁷ The Hague Recommendations on the Education Rights of National Minorities, Foundation on Inter-Ethnic Relations

“11) The first years of education are of pivotal importance in a child’s development. Educational research suggests that the medium of teaching at pre-school and kindergarten levels should ideally be the child’s language. Wherever possible, States should create conditions enabling parents to avail themselves of this option.”¹⁵⁸

This language suggests progressive rather than immediate obligations: states may wait until it is “possible” to create conditions for the provision of an option of minority language teaching at pre-school and kindergarten levels. The language of entitlement can be found in the Hague Recommendations; but it tends to be the language of non-interference by the state, rather than a commitment to positive action:

“8) In accordance with international law, persons belonging to national minorities, like others, have the right to establish and manage their own private educational institutions in conformity with domestic law. These institutions may include schools teaching in the minority language.”¹⁵⁹

One body whose practice is relevant to the question of whether states have immediate or progressive obligations is the Committee of Ministers of the Council of Europe. The Committee of Ministers is expected to oversee the implementation of decisions of the European Court of Human Rights and other Council of Europe agencies such as the Committee of Experts of the European Charter for Regional or Minority Languages. According to the Council of Europe, the Committee of Ministers can be described as follows:

“The Committee of Ministers is the Council of Europe’s decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. It is both a governmental body, where

¹⁵⁸ The Hague Recommendations on the Education Rights of National Minorities, Foundation on Inter-Ethnic Relations para 11

¹⁵⁹ The Hague Recommendations on the Education Rights of National Minorities, Foundation on Inter-Ethnic Relations para 8

national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings."¹⁶⁰

At the 765th meeting of the Ministers' Deputies of the Committee of Ministers on 19 September 2001, the Committee adopted Recommendations on the application of the European Charter for Regional or Minority Languages. These Recommendations related to the application of the Charter by the Netherlands¹⁶¹, Croatia¹⁶², Finland¹⁶³, Hungary¹⁶⁴, Norway¹⁶⁵, and Switzerland¹⁶⁶. These Recommendations request the relevant states to take precise action in a number of areas, for example in relation to the Frisian language in the Netherlands, to "take into account the special needs of broadcasting in Frisian and to consider increasing its support." The language of these Recommendations of the Committee of Ministers is the language of progressive obligation.

Turning from the Committee of Ministers to the example of the Council of Europe Commissioner for Human Rights, it should be noted that the Commissioner is a "non-judicial" institution. This suggests that the Commissioner's acts and decisions are not a source of law or binding upon Member States of the Council of Europe. This, together with a remit of promoting education, awareness and respect, is the

¹⁶⁰ Council of Europe web site:

http://www.coe.int/t/E/Committee_of_Ministers/Home/General_Information/About_the_C.M/aboutcm.asp#TopOfPage accessed on 2 December 2002

¹⁶¹ Recommendation RecChL (2001) 1 adopted by the Committee of Ministers at the 765th meeting of the Ministers' Deputies

¹⁶² Recommendation RecChL (2001) 2 adopted by the Committee of Ministers at the 765th meeting of the Ministers' Deputies

¹⁶³ Recommendation RecChL (2001) 3 adopted by the Committee of Ministers at the 765th meeting of the Ministers' Deputies

¹⁶⁴ Recommendation RecChL (2001) 4 adopted by the Committee of Ministers at the 765th meeting of the Ministers' Deputies

¹⁶⁵ Recommendation RecChL (2001) 5 adopted by the Committee of Ministers at the 765th meeting of the Ministers' Deputies

¹⁶⁶ Recommendation RecChL (2001) 6 adopted by the Committee of Ministers at the 765th meeting of the Ministers' Deputies

language of “progressive” rather than “immediate” obligations which, at its strongest, it consistent with the weak approach to minority rights.

A practical concerns expressed about the Roma in the OSCE Area by Max van der Stoel often related to what have been traditionally understood as “economic, social and cultural” rights as well as “civil and political” ones¹⁶⁷. As Jack Donnelly has shown, this distinction is “seriously misleading.”¹⁶⁸ It could be argued, following Cranston¹⁶⁹, that:

1. Civil and political rights are held by all
2. Some economic and social rights are held only by certain classes of human beings
3. Minority rights are held only by a certain class of human beings (minorities)
4. Therefore, minority rights must be economic and social rights.

Two particular flaws in this reasoning process are relevant here. One is the implicit premise that all rights belong to either “civil and political” or “economic and social” categories, and that these categories of rights are mutually exclusive. Another is the explicit premise that, whereas civil and political rights are held by all, and economic and social rights are held by certain classes of human beings.

Donnelly demonstrates the flaw in the explicit premise that civil and political rights are held by all, using the example of the right to vote. It is common among States to have a minimum age for voting and formalities before the right to vote can be exercised. This is not challenged as a violation of the universal right to vote. If it is possible for rights held only by certain classes of people to be civil and political rights, then it is possible for minority rights to be civil and political rights. There is the obvious inference that, since minority rights are included in the International

¹⁶⁷ Van der Stoel, Max (2000) OSCE “Report on the situation of Roma and Sinti in the OSCE Area” (OSCE High Commissioner for National Minorities, The Hague, 2000).

¹⁶⁸ Donnelly, Jack (1989) “Universal Human Rights in Theory and Practice” Ithaca and London: Cornell University Press, pp. 28 – 45.

¹⁶⁹ Cranston, Maurice (1973) “What are Human Rights?” Bodley Head p. 67

Covenant on Civil and Political Rights 1966, in the well-known Article 27, therefore they must (in the implicit view of the many State parties) be civil and political rights.

Looking at the work of the Council of Europe Parliamentary Assembly, one relevant feature to the question of whether minority rights obligations are immediate or progressive is its sense of urgency towards developments and implementation. Particularly in its texts from the early 1990s, perhaps in response to the historical events then unfolding in the former Yugoslavia and tensions generally in post-Communist states, the language of urgency appears repeatedly. Recommendation 1177(1992) for example referred to “an urgent need for international decisions and commitments which can be rapidly implemented in the area concerned,” to a “sense of urgency” leading to a colloquy in Paris on 13 and 14 November 1991 to recommend to the Council of Europe “constructive action which could be put into effect rapidly.” This language was continued in Recommendation 1201(1993) when the Parliamentary Assembly called the attention of the Committee of Ministers to the need for “rapid implementation of the Charter [the European Charter on Regional or Minority Languages].” However Recommendation 1201 is most notable for the features of the draft protocol to the European Convention on Human Rights that was included.

Conclusion

By blurring the distinction between individual and collective rights, between minority rights and self-determination, the strong minority rights theory risks alienating states whose overriding concern is their territorial integrity. By contrast, the weak minority rights offers too little. By failing to clearly offer more than corresponding individual human rights, such as freedom of association and expression, the weak minority rights model vulnerable to the argument that it is wholly or mainly redundant. These traps of state resistance and redundancy can arguably be overcome by the approach of identity-conscious decision-making. Identity-conscious decision making avoids the blurred boundaries between minority

rights and self-determination, while providing a degree of protection that are not achieved simply by the provision of general, individual rights such as free association and expression.

Chapter Four

Justifications for Special Minority Rights

Introduction

This chapter will examine two justifications for special minority rights. The first justification is based on the value of ethnodiversity. The second justification is linked to the banishment of the myth of state neutrality and the recognition of state partiality in issues of minority religion, language and culture. The identity-conscious decision-making model has in common with the strong minority rights model a commitment to the principle of effectiveness of minority rights, which means that minority rights should offer greater protection to members of minority groups than general, individual human rights. Without this form of effectiveness, it is submitted that clauses in international treaties which give rights to members of minorities would be redundant. An exponent of weak minority rights might reply to this argument by stressing the need to respect the principle of equality. They might argue, as Benedict Kingsbury observed, the “idea of ‘extra’ rights for a group of individuals sits uneasily” with the equality framework established by the principle of non-discrimination.¹ An exponent of a weak conception of minority rights could defend the position that everyone should enjoy the same level of human rights protection, regardless of whether they are members of minority groups or not. The idea of special rights for members of minority groups is both contentious and an essential component of the model of identity-conscious decision-making which means that special rights must be justified. A number of justifications can be identified for minority rights.

It shall be argued that one plausible rationale for minority rights is the value and preservation of ethnodiversity and that some international texts on minority rights can be explained through this lens. An analogy can be drawn between one instrument of environmental protection, the idea of an environmental impact

¹ Kingsbury, Benedict “Liberal Democracy and Tribal Peoples: Group Rights in Aotearoa/New Zealand: Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law” (1999) 52 *University of Toronto Law Journal* 101 at p. 105

statement, and the identity-conscious decision-making model which would require states to collect disaggregated data on minorities, investigate the impact of their laws, policies and judicial decisions on members of minorities, involve members of minorities in decision-making processes and genuinely take into account minority rights when decisions involving minorities are made.

The second justification for special minority rights that this chapter will offer is based on the recognition that states do not have a default option of neutrality in their law and policy towards minority culture, religion and language. Against a background of state partiality in favour of majority religion, language and culture (despite official neutrality in law and policy in many states, such as the formal rejection of caste-based discrimination in the Indian Constitution²) the claims of members of minorities to promote their culture, or to have the promotion of their culture considered as a relevant factor in decision-making which affects them, deserve to be considered. This does not imply an unlimited entitlement for members of minority groups to promote their culture. Liberal criteria for nation-building in general as well as criteria for minority nation-building on shall be considered in relation to members of minority groups.

Justifying special rights for minorities through the value of ethnodiversity

It is submitted that a valid analogy can be drawn between environmental protection and the protection of minority cultures. Just as society should value diversity in nature, so society (and the law) should value diversity in cultures. Cultures have for millennia interchanged ideas and practices; societies today are the beneficiaries of these countless generations of inter- (and intra-) cultural

² According to Article 17 of the Constitution of India, "Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be punished in accordance with the law." The lack of real equality and actual respect for the human rights (in general) of Dalit communities is amply illustrated in works such as Human Rights Watch (1999) "Broken People: Caste Violence against India's Untouchables" New York: Human Rights Watch.

interchange.³ The value of ethnodiversity can be justified by self-interest: it is in the interest of a society to enjoy a variety of cultures. In the decisions in *Gratz v Bollinger* and *Grutter v Bollinger*⁴ the United States Supreme Court considered the constitutionality of considerations of race in admissions decisions to higher education institutions. In *Gratz* the petitioners argued that the use of race as a factor in undergraduate transfer admissions decisions by the University of Michigan admissions team for its College of Literature, Science and the Arts was in violation of Title VI of the Civil Rights Act of 1964⁵ and the Equal Protection Clause⁶ of the Fourteenth Amendment to the Constitution of the United States. The respondents relied upon the opinion of Justice Powell *Regents of University of California. v Bakke*⁷ holding that race-conscious decision making may serve a compelling government interest. The respondents' position was that they had a compelling interest in "the educational benefits that result from having a racially and ethnically diverse student body"⁸ as well as in the remedying of past and current discrimination against minorities. The centrality of the question whether promoting diversity could justify special rights for members of a ('racial') minority was undermined by the focus on this issue in the petitioner's argument. As Chief Justice Rehnquist said giving in the Opinion of the Court, from "the time petitioners filed their original complaint through their brief on the merits in this Court, they have consistently challenged the university's use of race in undergraduate admissions and its asserted justification of promoting 'diversity.'"⁹

³ For example, an account of this process as it occurred in recent centuries in the United Kingdom is available from Robert Winder (2005) "Bloody Foreigners: A History of Immigration to Britain" Abacus

⁴ 539 U.S. (2003) Decision of June 23, 2003

⁵ According to Title VI of the Civil Rights Act of 1964, no "person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in ,be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.": 78 Stat.252,42 U.S.C. §2000d

⁶ According to the Equal Protection Clause, no "State shall ...deny to any person within its jurisdiction the equal protection of the laws."

⁷ 438 U.S. 265 (1978)

⁸ 438 U.S. 265 (1978), opinion of the Court presented by Chief Justice Rehnquist (in which Justice O'Connor, Justice Scalia , Justice Kennedy and Justice Thomas joined) p. 8

⁹ 539 U.S. (2003) Decision of June 23, 2003 p. 14

The university sought to defend its undergraduate transfer admissions policy which stated that “diverse, as opposed to a homogenous, student population enhances the educational experience for all students”¹⁰; under this policy, students who belonged to under-represented ‘racial’ minorities on the ground that they would enhance diversity received additional points in the university’s points-based system of decision making. Against this policy, the petitioners argued that race-conscious decision making could only be justified by remedying identified discrimination (which was not a justification that the university sought to use) and that the permitted use of race-consciousness in this context was “simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.”¹¹

The Opinion of the U.S. Supreme Court in *Gratz v Bollinger* was that the adoption of a policy under which members of under-represented ‘racial’ minorities would automatically acquire 20 points in a points-based undergraduate transfer admissions system was not “narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program”¹² To connect this decision with the wider thesis, it is submitted first that this decision (while it ruled the particular university policy unconstitutional on the facts) did recognise the value of diversity in public decision-making. Even the petitioners did not attempt to exclude completely the value of diversity from university decision-making, as the dissenting opinion of Justice Stevens makes clear.¹³ It was not the value of diversity or the capacity of diversity to justify special rights for members of minorities which was unconstitutional, but the adoption of a categorical (not contextual) approach of an *automatic* 20 points in the points-based admissions system under which the university admitted that “virtually every qualified

¹⁰ 539 U.S. (2003) Decision of June 23, 2003 p. 17

¹¹ 539 U.S. (2003) Decision of June 23, 2003 p. 20

¹² 539 U.S. (2003) Decision of June 23, 2003 p. 22

¹³ “when questioned at oral argument about whether petitioners challenge would impact both private and public universities, petitioners counsel stated: it Your Honor, I want to be clear about what it is that we’re arguing for here today. We are not suggesting an absolute rule forbidding any use of race under any circumstances. What we are arguing is that the interest asserted here by the University, this amorphous, ill-defined, unlimited interest in diversity is not a compelling interest.” Dissenting opinion of Justice Stevens in *Gratz v Bollinger* 539 U.S. (2003) Decision of June 23, 2003 (p. 7 of the dissenting opinion)

underrepresented minority applicant is admitted”¹⁴ which caused the conflict with the principle of equality. The Supreme Court in *Gratz* contrasted this categorical approach examined in this decision with the example of permissible special rights for minorities mentioned by Justice Powell in *Bakke*, “where the race of a ‘particular black applicant’ could be considered without being decisive”: in other words, a contextual (not categorical) approach.¹⁵ The categorical nature of the university’s decision making was underlined by the observation of Justice O’Connor (in her concurring individual opinion) that “meaningful individualized review of applicants” was not possible under the university’s undergraduate transfer admissions policy.

In *Grutter v Bollinger*, the U.S. Supreme Court directly considered diversity as a justification for race-conscious decision-making and upheld the use of the value of diversity in this context.¹⁶ *Grutter v Bollinger* concerned a challenge to the admissions policy of the University of Michigan Law School by Grutter, a white Michigan resident, who argued that the use of race as a “predominant” factor in law school admissions was unconstitutional under the same legal provisions guaranteeing non-discrimination which were the basis of the petitioner’s case in *Gratz v Bollinger*, namely Title VI of the Civil Rights Act of 1964¹⁷ and the Equal Protection Clause¹⁸ of the Fourteenth Amendment to the United States Constitution. Grutter was not successful in convincing the Supreme Court of the unconstitutional nature of the admissions policy of the University of Michigan Law School. The decision in *Gratz v Bollinger* was distinguished on the basis that, in the former case, the decision-making process was rigid, mechanical and categorical, providing for automatic additional points for members of certain under-represented minorities, whereas the race-conscious admissions system of the University of Michigan Law School involved “a highly

¹⁴ 539 U.S. (2003) Decision of June 23, 2003 p. 25

¹⁵ *Regents of the University of California v Bakke* 438 U.S.at 317, cited in *Gratz v Bollinger* at p. 23

¹⁶ 539 U.S. (2003) Decision of June 23, 2003

¹⁷ According to Title VI of the Civil Rights Act of 1964, no “person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in ,be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”: 78 Stat.252,42 U.S.C. §2000d

individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."¹⁹ In other words, a contextual decision-making process (which is consistent with the identity-conscious approach that this thesis seeks to defend) was regarded as consistent with the principle of equality whereas a rigid, categorical decision-making process (which this thesis does not seek to defend) was not consistent with the same principle

The justification for permitting the value of diversity in university admissions rested partly on deference to the educational judgement of university admissions staff²⁰ and partly on the studies cited at trial or by *amicus curiae* which supported the proposition that diversity has educational benefits as well as the benefits of diversity in terms of preparation for working life and good citizenship.²¹ In addition, it is significant that another factor in the decision of the Supreme Court to uphold the University of Michigan Law School's admissions policy was that the "Law School sufficiently considered workable race-neutral alternatives."²² It should be recalled that this thesis does not aim to show that race-blind decision making is wrong or bad, merely that such approaches are not sufficient to achieve equality. It is submitted that the requirement that a public body engage in ongoing reflection about its choice of decision-making process and in individualised decision-making represent examples of important strands of identity-conscious decision making. The value of diversity, therefore, was upheld and was linked through the chain of the U.S. Supreme Court's logic to a requirement of an identity-conscious approach.

'Minority culture impact statements' as a form of identity-conscious decision making

¹⁸ According to the Equal Protection Clause, no "State shall ...deny to any person within its jurisdiction the equal protection of the laws."

¹⁹ 539 U.S. (2003) Decision of June 23, 2003 p. 4 and p. 25

²⁰ 539 U.S. (2003) Decision of June 23, 2003 p 16

²¹ 539 U.S. (2003) Decision of June 23, 2003 p 18

²² 539 U.S. (2003) Decision of June 23, 2003 p 28

Private and public decision making in matters that affect environmental resources must now take account of environmental impact statements. Arguably, in the same way, decision making processes should be subject to impact statements of their effect on minority culture, language and religion. States have a legal duty to investigate the effects of their law and policy on members of minorities. This includes disaggregated data collection on minorities, consultation with members of minority groups and creating the conditions for participation by members of minority groups in decision-making. Such requirements are highly consistent with the emerging legal standards for identity-conscious decision-making which are emerging. Support for this position can be found in the Views of the United Nations Human Rights Committee on the communications of *Jouni E Länsman v Finland* (1995)²³ and *Jouni Lansman v Finland* (2001).²⁴ These communications concerned the effects of economic development a minority cultural practice of reindeer husbandry in Finland and the compliance of that economic development (and its effects on the minority culture) with article 27 of the International Covenant on Civil and Political Rights. In the 1995 communication, the Human Rights Committee took the view that:

“As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party’s forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsman, *does not appear to threaten the survival of reindeer husbandry.*”²⁵

In the subsequent communication of *Jouni Lansman v Finland* (2001)²⁶ the State party conceded that “‘culture’ within the meaning of article 27 provides for protection of the traditional means of livelihood for national minorities, in so far as they are essential to the culture and necessary for its survival.”²⁷ Such an

²³ Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995

²⁴ Communication No 1023/2001 (15 April 2005) UN Doc: CCPR/C/83/D/1023/2001

²⁵ Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995, quoted in *Jouni Lansman v Finland* (2001) Communication No 1023/2001 (15 April 2005) UN Doc: CCPR/C/83/D/1023/2001 para 2.2

²⁶ Communication No 1023/2001 (15 April 2005) UN Doc: CCPR/C/83/D/1023/2001

²⁷ Communication No 1023/2001 (15 April 2005) UN Doc: CCPR/C/83/D/1023/2001 para 7.3

emphasis, requiring an examination of the impact not only on individual practice of culture (which might have been thought to have been the focus of attention, given that article 27 creates individual rights), is consistent with an approach to the justification of minority rights based on ethnodiversity, a cultural analogue for the value of species diversity in the sphere of environmental protection. This emphasis on the value of the communal culture of minorities can be regarded as a consequence of the community aspect of article 27 ICCPR, that the rights of minorities are exercises in community with others.

Continuing the analogy with environmental protection, it may be useful to draw an analogy between the concept of “pollution” (in its broadest sense to include the effects of human development on living beings and the environment in general) and the effect of State action (including economic development) on minority cultures. Pollution (which is undesirable) is a side-effect of development (which is generally perceived to be desirable). Pollution is a form of inevitable interference with the environment. Pollution cannot be completely eradicated; billions of human beings exhale carbon dioxide with every breath out which may contribute (if only marginally) to changes in the global climate. Interference with minority religions, languages and cultures is arguably inevitable. In many states interference with minority culture is arguably a side-effect of economic development as well as the promotion of majority religions, languages and cultures which is arguably desirable as a form of nation-building, certainly for the states concerned. In the Views of the United Nations Human Rights Committee in *Ilmari Lämsman v Finland*²⁸ the Committee recognised that the economic development of States parties which have a limited impact on minority cultures will not violate article 27;²⁹ the Views of the Committee in *Ilmari Lämsman v Finland* on this point were accepted by Finland as the *ratio decidendi* of that decision in the in *Jouni Lämsman v Finland*.³⁰ Turning from economic development to nation-building, for post-Soviet republics there tends to be a deliberate strategy of nation-building, of asserting their separation from Soviet Russian identity:

²⁸ Communication No 511/1992 UN Doc: CCPR/C/52/D/511/1992

²⁹ Communication No 511/1992 UN Doc: CCPR/C/52/D/511/1992

“Estonia will have to work hard to unify the curriculum of Estonian and non-Estonian schools. To do this, the following are of primary importance:

- teaching of the Estonian language, history and culture in all schools...”³¹

Majority nation-building is permissible, even when it interferes with the building of minority culture (as it inevitably must) and it is impermissible when it interferes with the capacity of minorities to sustain their different forms of identity. In the United Nations Human Rights Committee communication of *Ominayak and Lubicon Lake Band v Canada*,³² the individual opinion of Mr Nisuke Ando argued that:

“It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the [Lubicon Lake] Band’s traditional way of life, including hunting and fishing. In my opinion, however, the right to enjoy one’s own culture should not be understood to imply that the Band’s traditional way of life must be preserved intact at all costs.”³³

A series of communications to the United Nations Human Rights Committee have helped to clarify the permissible limits of intrusion or harm to minority culture and these are discussed in detail in Chapter Six.³⁴

³⁰ Communication No 1023/2001 (15 April 2005) UN Doc: CCPR/C/83/D/1023/2001 para 7.3

³¹ Hallik, Klara “Ethnicity and cultural transition” in (ed) César Bîrzea (1996) “Human rights and minorities in the new European democracies: educational and cultural aspects” (Report on a workshop held at Lohusalu (Estonia) 20 – 23 October 1994 (Council of Europe Press).

³² United Nations Human Rights Committee, Communication No 167/1984 (10 May 1990) UN Doc: CCPR/C/38/D/167/1984

³³ United Nations Human Rights Committee, Communication No 167/1984 (10 May 1990) UN Doc: CCPR/C/38/D/167/1984, individual opinion of Mr Nisuke Ando

³⁴ In addition to the leading case on economic activities and minority identity, *Kitok v Sweden* Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985 (Jurisprudence), other examples of cases in this group include *O. Sara v Finland* Communication No 341/1990 UN Doc: CCPR/C/50/4/431/1990; *Ilmari Länsman v Finland* Communication No 511/1992 UN Doc: CCPR/C/52/D/511/1992; *Jouni E Länsman v Finland* Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995; *Äärelä v Finland* Communication No 779/1997 UN Doc: CCPR/C/73/D/779/1997 and *Jonassen v Norway* Communication No 942/2000 UN Doc: CCPR/C/76/D/942/2000

Justifying special rights for minorities by exposing the myth of state neutrality and the reality of state partiality

According to a liberal pluralist conception of identity which reconciles the competing liberal and communitarian approaches to human identity,³⁵ elements such as language, culture and religion, as well as caste status, do play a part in constituting identity. But it is also true that individuals and communities have choices in the development of their identities. Our identities construct as and we construct them in turn. This understanding is a development from “orthodox liberalism” to a new “liberal pluralism”.³⁶ Kymlicka identifies two theoretical tasks. One is to clarify distil the underlying principles of minority rights from the different variations of minority rights that exist. The other is to promote an international and intercultural dialogue. Kymlicka questions what he calls “the myth of ethno-cultural neutrality”.³⁷

According to Kymlicka, orthodox liberals hold that the state should remain neutral towards the different identities of their citizens. Walzer gives the United States as the clearest example of a state that is neutral towards the differing identities of its citizens³⁸. But is the United States neutral?

³⁵ Dunbar, Robert “Minority Language Rights in International Law” (2001) 50 ICLQ 90; Kellar, Perry “Re-thinking Ethnic and Cultural Rights in Europe” (1998) 18 OJLS 29; Sandel, Michael J. (1982) “Liberalism and the limits of justice” Cambridge University Press 147 – 152; Macmurray, John (1957) “The Self as Agent” London: Faber & Faber Limited; Macmurray, John (1961) “Persons in Relation” London: Faber & Faber Limited; Kymlicka, Will (1990) “Contemporary Political Philosophy: An Introduction” Oxford: Clarendon Press

³⁶ Kymlicka, Will “Western Political Theory and Ethnic Relations in Eastern Europe” in (eds) Kymlicka, Will and Magda Opalski (2001) “Can Liberal Pluralism be Exported” Oxford: Oxford University Press, pp 2 – 3

³⁷ Kymlicka, Will “Western Political Theory and Ethnic Relations in Eastern Europe” in (eds) Kymlicka, Will and Magda Opalski (2001) “Can Liberal Pluralism be Exported” Oxford: Oxford University Press, p 16

³⁸ Walzer, Michael (1992) “Comment” in (ed) Gutmann, Amy “Multiculturalism and the ‘Politics of Recognition’ Princeton: Princeton University Press pp 100- and Walzer, Michael (1992) “What it Means to be an American” New York: Marsilio p 9. Both references are cited in Kymlicka, Will (2001) “Western Political Theory and Ethnic Relations in Eastern Europe” Oxford: Oxford University Press, p 17

Kymlicka presents three key policies as evidence that the United States is not, in fact, neutral towards differing identities: (1) The legal requirement that American children must learn English in schools (2) The legal requirement for immigrants over the age of 50 to learn English in order to acquire American citizenship and (3) The de facto requirement that English be spoken for employment and relations with Government officials. Kymlicka comments that:

“These decisions about the language of education and government employment, the requirement of citizenship and the drawing of internal boundaries, are profoundly important... Government decisions about the language of public schooling and public administration are in effect decisions about which language groups will survive.”³⁹

States tend to promote majority cultures through the choice of national languages and religions as well as cultural assumptions in public policy. Even if there is no official national language, as in the United Kingdom, the use of a majority language for instruction in education, in commerce and public life is likely to have a significant effect in entrenching use of the majority language. Hutchinson and Smith have shown that the phenomenon of globalisation has accelerated this promotion of majority cultures:

“...the homogenizing tendencies of advanced industrialisation and nationalism leave little space for ‘sub-national’ ethnic identities. Globalization, economic and cultural, tends to reduce ethnicity to the folkloric margins of society; neither the multinationals nor mass electronic communications have any regard for ethnic or national boundaries.”⁴⁰

There is no single meaning of what state neutrality towards minority culture, religion and language would mean. Eric Mack has analysed four different

³⁹ Kymlicka, Will “Western Political Theory and Ethnic Relations in Eastern Europe” in (eds) Kymlicka, Will and Magda Opalski (2001) “Can Liberal Pluralism be Exported” Oxford: Oxford University Press, pp 17 to 18

⁴⁰ Hutchinson, John and Anthony D. Smith “Ethnicity” (Oxford: Oxford University Press, 1996) p. 13

‘neutral’ approaches that are all consistent with liberalism.⁴¹ These different approaches would have different outcomes in terms of, for example, whether there was an individual right to the promotion of linguistic diversity. The first ‘neutral’ approach, one which Mack prefers, is non-interventionist neutralism. On this approach:

“the state is constrained from interfering with individuals in specified ways that would characteristically diminish their abilities to pursue their own life plan or conceptions of the good even if intervention would foster acknowledged or widely affirmed values.”⁴²

Using this justification, no individual rights would require positive intervention; and therefore individual minority rights would not. If implemented through international law as an approach to the protection of minorities, it is submitted that the result would be a weak version of minority rights based on negative duties of state non-interference. The problem with such an approach is that, on this model, general individual rights (such as freedom of association, freedom of expression and freedom of thought, conscience and religion) would provide all of the protection that minority rights would make available, rendering minority rights redundant.⁴³ However, what Mack calls “equal promotionist neutralism” would permit, indeed require, positive state action. While non-interventionist neutralism bars society’s promotion of all valued ends, equal promotionist neutralism puts distributional requirements on the state’s promotion of values. The state may promote cultures, provided that it does so equally.

There seems to be little room for doubt that States demonstrate explicit or implicit partiality in matters of language; States are not neutral (in the sense of

⁴¹ Mack, Eric (1988) “Liberalism, Neutralism and Rights” in (eds) Pennock, J.R. and J.W. Chapman “Nomos XXX: Religious Morality and the Law” pp 46 to 49

⁴² Mack, Eric (1988) “Liberalism, Neutralism and Rights” in (eds) Pennock, J.R. and J.W. Chapman “Nomos XXX: Religious Morality and the Law” pp 46 to 47

⁴³ The argument that weak minority rights protection does not extend beyond the protection provided by general individual rights is developed in Chapter Six, under the heading ‘The extent of weak minority rights protection and the emergence of a contextual, identity-conscious dimension to Views of the UN Human Rights Committee on article 27 communications under the ICCPR’

Mack's non-interventionist neutralism). There is, for example, partial language in the Constitution of India, in the fundamental duties section of the Constitution which includes a duty "to value and preserve the rich heritage of our composite culture,"⁴⁴ the provisions establishing Hindi as the official language⁴⁵ and the corresponding duty on the federal Government of India to "spread the Hindi language...so that it may serve as a medium of expression for all the elements of the composite culture of India."⁴⁶ Whether state partiality exists in the other forms of identity, culture and religion, which are regarded (at least in some minority rights instruments) as classes of minority also deserve examination. The existence of state partiality is recognised by the following comments in United Nations Human Rights Committee General Comment 22 on freedom of religion:

*"The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26."*⁴⁷

"If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized

⁴⁴ Article 51A(f) of the Constitution of India

⁴⁵ Article 343(1) of the Constitution of India

⁴⁶ Article 351 of the Constitution of India

⁴⁷ (Italics added by this author) United Nations Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) 30/07/93. UN Doc: CCPR/C/21/Rev.1/Add.4 para 9

under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.”⁴⁸

Other examples exist of *explicit* partiality can be found within the constitutional law or general law of particular states. For example, many States have an official language or a state religion. The Norwegian Constitution states in Article 2 that the Evangelical Lutheran Church and questions of state partiality through a religious education policy in state schools were the subject of a communication to the United Nations Human Rights Committee in *Leirvåg v Norway*.⁴⁹ In *Leirvåg v Norway*,⁵⁰ the State’s own submissions to the Committee make the point that an “explicit aim” of the religious education policy that was the subject of the complaint was “to contribute to the enhancement of a collective cultural identity.”⁵¹ Another example of state partiality in the sphere of religion is the status of the Greek Orthodox Church in Greece which was translated as “prevailing religion” (in a report by the Council of Europe Commissioner on Human Rights⁵²) and was translated as “dominant religion” (in the European Court of Human Rights decision in *Canea Catholic Church v. Greece*.⁵³ In a similar way, in Sri Lanka article 9 of the Constitution of Sri Lanka provides that “The Republic of Sri Lanka shall give Buddhism the foremost place and

⁴⁸ United Nations Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) 30/07/93. UN Doc: CCPR/C/21/Rev.1/Add.4 para 10

⁴⁹ Communication No 1155/2003 (23 November 2004) UN Doc: CCPR/C/82/D/1155/2003

⁵⁰ Communication No 1155/2003 (23 November 2004) UN Doc: CCPR/C/82/D/1155/2003

⁵¹ Communication No 1155/2003 (23 November 2004) UN Doc: CCPR/C/82/D/1155/2003 para. 9.13

⁵² Report by Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to the Hellenic Republic, 2 – 5 June 2002, for the attention of the Committee of Ministers and the Parliamentary Assembly Council of Europe Doc: CommDH (2002) 5, para. 8, contained in Council of Europe Commissioner for Human Rights, 3rd Annual Report January to December 2002 to the Committee of Ministers and the Parliamentary Assembly Council of Europe Doc: CommDH (2003) 7 (19 June 2003)

⁵³ European Court of Human Rights, Judgement of 16 December 1997, Rep.1997-VIII,fasc.60 part II of the judgement on “Relevant Law and Practice” translated article 3(1) of the Constitution of Greece as including the following clause [italics added by this author]: “The *dominant religion* in Greece is that of the Christian Eastern Orthodox Church. The Greek Orthodox Church, which recognises as its head Our Lord Jesus Christ, is indissolubly united, doctrinally, with the Great Church of Constantinople and with any other Christian Church in communion with it (omodoxi), immutably observing, like the other Churches, the holy apostolic and synodical canons and the holy traditions. It is autocephalous and is administered by the Holy Synod, composed of all the bishops in office, and by the standing Holy Synod, which is an emanation of it constituted as laid down in the Charter of the Church and in accordance with the provisions of the Patriarchal Tome of 29 June 1850 and the Synodical Act of 4 September 1928.”

accordingly it shall be the duty of the State to protect and foster the *Buddha Sasana*, while assuring all religions the rights granted by articles 10 and 14(1)(e).”⁵⁴ Some states impose requirements for the use of personal names that arguably show partiality towards those (in the majority) who do not need to use names with religious significance, unlike the authors of the communication to the United Nations Human Rights Committee in *AR Coriel and MAR Aurik v The Netherlands*.⁵⁵

There is some evidence of state partiality towards particular aspects of culture and religion in the United Kingdom. There is the establishment of the Church of England and a series of special rules privileging the Anglican Church including, in the field of government and relationships between the state and the individual, reserved seats for some Church of England bishops in the legislature (the House of Lords), a requirement that the monarch belong to the Church of England and a religious exemption in the Human Rights Act 1998. There are also, arguably, ways in which education law and policy privilege the Christian majority (and, on occasion, long-established religious minorities). These include the designation of religious schools (available under the Religious Character of Schools (Designation) Procedure Regulations 1998⁵⁶) which provide that: Christian, Jewish and Muslim communities may have their own schools, as well as requirements for religious assemblies in schools to occur and to be predominantly Christian. s70 School Standards and Frameworks Act 1998 requires collective worship:

“70. - (1) Subject to section 71, each pupil in attendance at a community, foundation or voluntary school shall on each school day take part in an act of collective worship.”

⁵⁴ *Joseph v Sri Lanka* United Nations Human Rights Committee, Communication No 1249/2004 (18 November 2005), UN Doc: CCPR/C/85/D/1249/2004

⁵⁵ Communication No 453/1991 (9 December 1994) UN Doc: CCPR/C/52/D/453/1991

⁵⁶ Statutory Instrument (SI) No 2535 of 1998

Para 3 of Schedule 20 to the School Standards and Framework Act 1998⁵⁷ require specifically Christian content of such religious assemblies. It should be noted that “collective worship is of a broadly Christian character if it reflects the broad traditions of Christian belief without being distinctive of any particular Christian denomination... (4) Not every act of collective worship in the school required by section 70 need comply with sub-paragraph (2) provided that, taking any school term as a whole, most such acts which take place in the school do comply with that sub-paragraph.”⁵⁸

These references to a particular religion would certainly seem to exclude any claim that the state is neutral towards religion. Carolyn Hamilton noted that, in the drafting on the Education Reform Bill 1988 (subsequently the Education Reform Act 1988), the Government was initially minded to take a formally neutral stance:

“The government recognises that a variety of practices has grown up in the form and content of worship. The government believes that this reflects the complexity and variety of present-day society and differences in the organisation of schools. They do not believe it would be helpful to standardise practice in this respect, but they are ready to receive representations about an act of worship from the Churches and others at any time.”⁵⁹

Hamilton identifies the source of the amendments that re-introduced partiality towards the Christian faith in the Education Reform Bill:

“During the passage of the Education Reform Bill in Parliament, the House of Lords moved a number of amendments to ensure that the daily act of collective worship was to be a Christian act of worship... At the third reading the Bishop of London introduced an amendment which is now section 7 of the Education

⁵⁷ Since s6 Education Reform Act 1988 was repealed by Education Act 1996 Sch 38 (I) Para 1)

⁵⁸ Schedule 20, School Standards and Framework Act 1998

⁵⁹ “The Secondary Schools Curriculum and Examination: Initial Government Observations on the School Report from the Education, Science and Arts Committee, Cmnd 8551 HMSO in: Hamilton, Carolyn (1995) “Family, Law and Religion” Sweet and Maxwell p 272

Reform Act 1988, requiring that collective worship shall be wholly or mainly of a broadly Christian character.”⁶⁰

Work by Professor Anthony Bradney suggests that this formal partiality of the law towards Christianity in education is mitigated in practice.⁶¹ According to report by Her Majesty’s Inspectorate, many school assemblies included no explicit religious references. This suggests that s 7 of the Education Reform Act 1988 was not rigidly enforced.⁶²

However, despite the limited implementation of this requirement, Bradney found other evidence to suggest that religious minorities were in a weaker position in education. If formal rules were not fully implemented, procedural rules for the registration of new voluntary sector schools were and their effect had been to exclude Muslim schools from voluntary sector status.⁶³

This exclusion by informal rules has not prevented Muslim schools from operating in the UK. Indeed, the legal requirements aimed at the promotion of the Christian religion may have been a catalyst for the formation of separate schools in the UK context. This illustrates the significance of context on minority rights claims. While, in one state, promotion of a (historically) majority religion might lead to the formation of separate schools, that does not show that all minorities, in that state or other countries, will need or require separate schools.

The first Muslim schools in the UK appeared during the 1980s, the first being the London School of Islamics which was operating from 1981 – 1986. By 2002, there were 102 Muslim schools educating approximately 10,000 Muslim pupils.⁶⁴ According to a 2001 report by the Institute for Jewish Policy Research, two

⁶⁰ Hamilton, Carolyn (1995) “Family, Law and Religion” Sweet and Maxwell p 272

⁶¹ Bradney, Anthony (1993) “Religion, Rights and Law” Leicester: Leicester University Press, p 66

⁶² Bradney, Anthony (1993) “Religion, Rights and Law” Leicester: Leicester University Press, p 66

⁶³ Bradney, Anthony (1993) “Religion, Rights and Law” Leicester: Leicester University Press, p 68.

⁶⁴ “The Guardian” 22 May 2002, from <http://society.guardian.co.uk>

Muslim schools have acquired voluntary sector status.⁶⁵ This is a small number against the background of religious minority education in general:

“While recent decades have seen a decline in the British Jewish population and a decrease in its level of attachment to Judaism, during that same period the number of children in full-time Jewish day school education has rapidly increased. This growth in the demand for Jewish faith-based schooling means that there is now full-time provision for over 22,000 Jewish children in nursery, primary, secondary and special educational needs (SEN) schools...

... The Jewish day school movement is part of the larger context of faith-based schooling provision in Britain, including Catholic, Church of England and Muslim schools. There are currently 2,610 Catholic schools, only 6 per cent of which are independent, providing a service for 820,000 pupils. With nearly twice as many schools, a total of 4,774, the Church of England educates 904,000 pupils. More recently a Muslim school system has developed in Britain, and currently consists of 72 schools catering for 9,000 pupils, only 2 of which are state-sector voluntary-aided.”⁶⁶

All of this suggests that it is now possible for religious minority schools to acquire voluntary sector (publicly aided) status. The question of whether religious minorities have equal access to state funds through voluntary-aided status remains open.

In India, too, education policy has been regarded as reflecting state partiality towards the majority of people who ‘have caste’ (as opposed to untouchables, who are perceived as people ‘without caste’ or ‘outcast’). Dr M.E. Prabhakar has shown that, during the nineteenth century, leaders of untouchable movements called for access to education.⁶⁷ By the late nineteenth century and early twentieth century, some Dalit groups such as the Mahars began to open their own

⁶⁵ Institute for Jewish Policy Research (2001) “The future of Jewish schooling in the United Kingdom” Report 2 of 2001 available at www.jpr.org.uk/index.html

⁶⁶ Institute for Jewish Policy Research (2001) “The future of Jewish schooling in the United Kingdom” Report 2 of 2001 available at www.jpr.org.uk/index.html

⁶⁷ Dr M.E. Prabhakar “Dalit Education and Youth” in (eds) Bhagwan Das and James Massey (1995) “Dalit Solidarity” New Delhi: ISPCK pp. 94 – 124 at pp 95 – 97

schools.⁶⁸ Despite Dr Ambedkar's rallying cry in the 1930s for Dalits to "educate, organise and agitate,"⁶⁹ Bhagwan Das, President of the Dalit Solidarity Programme, argued that education has been used as an instrument of oppression for India's Dalits.⁷⁰ During the twentieth century, the focus of attention for Dalits moved from access to education (via mainstream schools or separate schools) and onto the "critical role of promoting social equality and justice."⁷¹ Even where access to education is provided, during the late twentieth century it was estimated that, out of every hundred children belonging to a Scheduled Caste who enter school, only fourteen complete ten years of school education.⁷²

Factors identified as contributing to this retention problem include, according to Dr Devanesan Nesiah, a lack of schools within walking distance.⁷³ While secondary schooling is available within 28.4% of habitations in India with a population of 500 or more; but, in predominantly Scheduled Caste (Dalit) habitations, the secondary schools are available within only 13.5% of such habitations.⁷⁴ Other factors leading to poor retention of Dalit children include poverty, which compels poor families to make their children work rather than attend schools, and inadequate school infrastructure.⁷⁵ Broader political and economic factors behind this lack of funding have included the structural adjustment and stabilisation programmes of the World Bank and IMF.⁷⁶

⁶⁸ Dr M.E. Prabhakar "Dalit Education and Youth" in (eds) Bhagwan Das and James Massey (1995) "Dalit Solidarity" New Delhi: ISPCK pp. 94 – 124 at p. 97

⁶⁹ Dr B.R. Ambedkar, addressing the All-India Depressed Classes Conference on 19 July 1942 at Nagpur: Dr M.E. Prabhakar "Dalit Education and Youth" in (eds) Bhagwan Das and James Massey (1995) "Dalit Solidarity" New Delhi: ISPCK pp. 94 – 124 at p. 98

⁷⁰ Bhagwan Das, "Notes by the President of the Dalit Solidarity Programme" in (eds) Bhagwan Das and James Massey (1995) "Dalit Solidarity" New Delhi: ISPCK pp. 207- 210 at p. 207

⁷¹ Dr M.E. Prabhakar "Dalit Education and Youth" in (eds) Bhagwan Das and James Massey (1995) "Dalit Solidarity" New Delhi: ISPCK pp. 94 – 124 at p. 102

⁷² Dr M.E. Prabhakar "Dalit Education and Youth" in (eds) Bhagwan Das and James Massey (1995) "Dalit Solidarity" New Delhi: ISPCK pp. 94 – 124 at p. 104

⁷³ Dr Devanesan Nesiah (1999) "Discrimination with Reason? The Policy of Reservations in the United States, India and Malaysia" New Delhi: Oxford University Press p. 171

⁷⁴ Dr Devanesan Nesiah (1999) "Discrimination with Reason? The Policy of Reservations in the United States, India and Malaysia" New Delhi: Oxford University Press p. 172

⁷⁵ Dr M.E. Prabhakar "Dalit Education and Youth" in (eds) Bhagwan Das and James Massey (1995) "Dalit Solidarity" New Delhi: ISPCK pp. 94 – 124 at p. 105

⁷⁶ Dr M.E. Prabhakar "Dalit Education and Youth" in (eds) Bhagwan Das and James Massey (1995) "Dalit Solidarity" New Delhi: ISPCK pp. 94 – 124 at p. 111

There is also broader evidence of State partiality towards the majority at both federal and state levels. On the topic of languages, there is evidence of partiality to Hindi and English in the Constitution of India. At the federal level, India has an official language, Hindi, in the Devanagari script.⁷⁷ The Constitution of India places an obligation on the federal Government of India to adopt a partial stance in favour of the Hindi language:

“It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interference with its genius, the forms, style and expression used in Hindustani and other languages of India...⁷⁸”

English is the official language for the introduction of Bills and adoption of Acts by state and federal legislatures, as well as the official language of the (federal) Supreme Court and (state) High Courts.⁷⁹ At state level, there is evidence that state law in India shows partiality towards local majority languages. In *Mehta v Maharashtra*⁸⁰ the Supreme Court of India was asked to review the legality of the language education policy of the State Government of Maharashtra. The policy required that the Marathi language be made compulsory throughout the schools in the state. The case was brought by English Medium Schools that wished to retain their three-language policy of teaching Hindi, English and Gujarati). The petitioners argued that the policy violated their right as a linguistic minority to freely establish an educational institution of their choice.⁸¹ The Supreme Court upheld the partial language policy, reasoning that:

⁷⁷ Article 343(1) of the Constitution of India

⁷⁸ Article 351 of the Constitution of India

⁷⁹ Article 348 of the Constitution of India

⁸⁰ Decision of 5 May 2004, Writ Petition (civil) 132 of 1995

⁸¹ Article 30(1) of the Constitution of India

“A proper understanding of [the] Marathi language is necessary for easily carrying out the day-to-day affairs of the people living in the State of Maharashtra and also for proper carrying out of daily administration.”⁸²

India, at federal and state levels, provides a good example of a state with constitutionally protected and required partiality. This partiality, derived from the Constitution, has been implemented in state law and upheld by the Supreme Court.

International norms on minority religious education

A minimal claim might be for minority religious groups to be allowed to establish their own, private religious schools without funding by the state. A medium claim would be for the right to equal access to public education funding for minority religious schools. A strong claim would be for greater access to public education funding. The latter claim might be justified on a number of grounds; for example, on the ground that the majority religion is privileged in society in general or using an ecological argument for the preservation of religious diversity.

Paragraph 32.2 of the OSCE Copenhagen Document requires that persons belonging to national minorities shall have the right to “establish and maintain their own educational...institutions, organizations or associations, which can seek voluntary financial and other contributions as well as public assistance, in conformity with national legislation.”⁸³ It should be noted that this right is accorded only to national minorities. Muslims in Britain generally will only qualify for national minority status if “national minority” is given a generous interpretation, as a category that includes religious, ethnic and linguistic minorities rather than requiring a small nation within a larger state.

⁸² Decision of 5 May 2004, Writ Petition (civil) 132 of 1995

⁸³ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Conference on Security and Co-operation in Europe, known since January 1995 as the OSCE, the Organisation for Security and Co-operation in Europe, available at www.osce.org

Even if national minority status is recognised, it should be noted that only the right to establish institutions and to “seek” rather than “receive” or “receive a fair share of” funding is available. However, this right in paragraph 32.2 is modified by the statement at the foot of paragraph 32 that:

“Any such measures will be in conformity with the principles of equality and non-discrimination with respect to other citizens of the participating State concerned”

The UN Minority Rights Declaration⁸⁴ confers the right on persons belonging to minorities to establish their own associations in Article 2(4) and it could be argued that religious minority schools are associations. Minorities could employ Article 3(1) of the Declaration which states that minorities may exercise all of the rights in the Declaration “without any discrimination” to support a claim for equality of state education funding.

So a similar argument could be used for both the Copenhagen Document and the Minority Rights Declaration: that the right to found institutions combined with the principle of equality justifies equal access to state funding. However it is arguable that paragraph 32 of the Copenhagen Document and Article 3(1) of the UN Declaration exist not to extend minority rights but to constrain their exercise.

There seems to be little support in international law for any special claims for public funding by religious minorities. Indeed, in the early twenty-first century political climate among states, it seems that governments are more likely to fear religious schools than encourage them.

⁸⁴ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by UN General Assembly resolution 47/135.

Early in the morning, on 3 January 2002, a phalanx of riot police and plainclothes officers descended on a school for about 200 young children in a lush oil palm estate in the southern Malaysian state of Johor, adjacent to Singapore.⁸⁵ The school was closed. The reason, according to Malaysian authorities, the Islamic school, or *madrassa*, was linked to a group of Muslim extremists.

Events like this are symptomatic of a widespread caution towards minority religious education, in particular towards Islamic religious education. In the UK, the question of public funding for minority religious education was debated in an Education Bill in 2002⁸⁶. Frank Dobson, a former Labour education spokesman, had introduced an amendment that would require religious schools to reserve a quarter of places to children of different faiths, but the measure was rejected.

The Home Office had recommended the measure after releasing a report on the riots in the northern cities of Bradford, Oldham and Burnley. The report warned that a heavy concentration of students from one religion or racial group risks damaging community cohesion.

According to Barry James, public opinion does not support the extension of minority religious schooling:

“A recent survey by the Mori polling organization indicated that three quarters of respondents oppose the government proposals. It also found that 34 percent thought that religion should not be part of education at all and 29 percent thought that faith-based schools would be divisive in society. Only 11 percent of those who responded to the poll said they strongly supported schools run by religions.”⁸⁷

⁸⁵ Richardson, Michael (2002) “Asians take a closer look at Islamic schools” in “International Herald Tribune” Tuesday 12 February 2002, available online at <http://www.ihrt.com/articles/47803.html>

⁸⁶ James, Barry (2002) “British debate deepens on faith-based schools” in “International Herald Tribune” Tuesday 12 February 2002, available online at <http://www.ihrt.com/articles/47799.html>

⁸⁷ James, Barry (2002) “British debate deepens on faith-based schools” in “International Herald Tribune” Tuesday 12 February 2002, available online at <http://www.ihrt.com/articles/47799.html>

Bearing in mind public opposition and the government fears about links between religious schools and religious extremists, it seems unlikely that states would support strong education rights for religious minorities.

State practice seems to support the idea that states must permit religious minorities to operate their own schools but that the state is not obliged to fund them. In Africa, at least 12 states that permit religious minority schools including Burkina Faso, Cameroon, Djibouti, Gabon, Guinea, Kenya, Mozambique (where Muslim schools are permitted although it is not certain that Islam is a minority religion there and some Muslims do dispute this), Rwanda (information was not available on all African states⁸⁸). Senegal, Togo, Uganda and Zambia. In India, the Constitution provides that “All minorities, whether established by religion or language, shall have the right to establish and administer educational institutions of their choice.”⁸⁹ However, there is no constitutional right to state aid for minority schools. The Constitution of India goes as far as requiring non-discrimination in the granting of aid, but no further.⁹⁰

The consequences of a partial state

The following argument appears to connect a partial state with stronger, rather than weaker, forms of minority rights. Charles Taylor has shown that the partial state privileges ethnic, linguistic and religious majorities:

“If a modern society has an ‘official’ language, in the fullest sense of the term, that is a state-sponsored, -inculcated and -defined language and culture, in which both economy and state function, then it is obviously an immense advantage to people if this language and culture are theirs. Speakers of other languages are at a distinct disadvantage.”⁹¹

⁸⁸ United States Government, Bureau of Democracy, Human Rights, and Labor (2002)

“International Religious Freedom Report 2002”, available online at www.state.gov

⁸⁹ Article 30(1) of the Constitution of India

⁹⁰ Article 30(2) of the Constitution of India

⁹¹ Taylor, Charles (1997) “Nationalism and Modernity” in (eds) R. McKim and J. McMahon “The Monality of Nationalism” New York: Oxford University Press cited in Kymlicka, Will (2001)

Using this point, Kymlicka makes the suggestion that, if a majority is entitled to engage in nation-building, why not a minority? In a sense, there is a return to the language of neutral treatment by the state here. The underlying argument is that the state should be neutral towards forms of nation-building, whether engaged in by a majority or minority.⁹² On this view, then, minorities are perfectly entitled to engage in nation-building. By nation-building, Kymlicka here refers to the deliberate construction of both forms of identity (language, culture and religion) and national institutions.

Arguably, this approach that recognises nation-building is compatible with more than one conception of neutrality. Returning to Mack's conceptions of neutrality⁹³, we have seen that non-interventionist neutralism requires the state to refrain from interfering with the pursuit of individuals' conceptions of the good. This model of neutrality could be compatible with the recognition of a partial state and with Kymlicka's argument. On this approach, the solution to the problem of a partial state is that all states must refrain from intervention in the nation-building of either majorities or minorities.

However, theory and practice may depart from one another. While it is possible to conceive of a state that refrains from intervention in the nation-building of majorities or minorities, this may not be practically achievable (or, if achieved, provide substantive equality). States must make choices. They must choose to require elements of the content of the curriculum, or not. State choices about allocation of public funding of schools, the charitable status of religious institutions and the use of languages in the public sector and formal occasions all impact on majority and minority culture. It could be argued, then, that states are forced to make choices which impact upon majority and minority cultures; and

"Western Political Theory and Ethnic Relations in Eastern Europe" Oxford: Oxford University Press, p. 22

⁹² Kymlicka, Will "Western Political Theory and Ethnic Relations in Eastern Europe" in (eds) Kymlicka, Will and Magda Opalski (2001) "Can Liberal Pluralism be Exported" Oxford: Oxford University Press, p. 27

⁹³ Mack, Eric (1988) "Liberalism, Neutralism and Rights" in (eds) Pennock, J.R. and J.W. Chapman "Nomos XXX: Religious Morality and the Law" pp 46 to 49

that these choices represent forms of state intervention. If this argument is accepted, then the non-interventionist approach cannot be realised. However, as we have seen (above) Mack's equal promotionist neutralism would permit, indeed require, such intervention. While non-interventionist neutralism bars society's promotion of all valued ends, equal promotionist neutralism puts distributional requirements on the state's promotion of values. The state may promote cultures, provided that it does so equally.

Constraints on minority nation building

This argument that minorities are equally entitled to engage in nation-building seems theoretically compelling but impracticable. It seems impracticable because of the well-known hostility of states towards anything which might support claims for self-determination. Kymlicka does not propose that minorities should have unlimited rights. He suggests two ways in which liberal theory constrains claims by national minorities:

"Liberal principles will preclude any attempts at ethnic cleansing, or stripping people of their citizenship, or the violation of human rights...liberal-democracy is founded on the principle of respect for individual civil and political rights. Moreover, liberal principles will also insist that any national group engaged in a project of nation-building must respect the rights of other nations within its jurisdiction to protect and build their own national institutions."⁹⁴

It is submitted that the reciprocal tolerance of minorities for the nation-building of States, and of States for the identity-building of minorities, can best be achieved through the identity-conscious decision-making model. Kymlicka's theory provides a basis for structuring the discretion of decision-makers who need to strike this balance. He offers three criteria for nation-building by national

⁹⁴ Kymlicka, Will "Western Political Theory and Ethnic Relations in Eastern Europe" in (eds) Kymlicka, Will and Magda Opalski (2001) "Can Liberal Pluralism be Exported" Oxford: Oxford University Press, p. 27

majorities:⁹⁵ (1) There must be no permanent exclusion of long-term resident minorities from citizenship and equality (2) Where integration is encouraged, this should be 'thin.' 'Thin' integration means that individuals must adapt to different institutions and languages but they should not be forced to adapt their "customs, religious beliefs and lifestyles" and (3) Members of national minority groups have the right to engage in nation-building, to maintain themselves as a separate social culture. These are Kymlicka's conditions for the moral legitimacy of majority nation-building. In addition to these conditions, Kymlicka later in the same work proposes nine tests to distinguish 'liberal' from 'illiberal' nation-building⁹⁶, whether by majorities or minorities. Perhaps these could be termed the conditions for the 'political legitimacy' of nation-building, to consider alongside the earlier three criteria for moral legitimacy. The nine tests for liberal nation-building are: (1) What degree of coercion is used to promote nation-building? The more coercion, the more illiberal the society, (2) How large is the 'public sphere' in which the dominant national identity must be followed as opposed to the 'private sphere' in which different identities are tolerated? The larger the area in which the dominant identity must be used, the more illiberal the society (3) To what extent does the state permit speech and organisations challenging the privileging of the national majority? The more restrictions on these, the more illiberal the society. (4) To what extent is the dominant identity required for citizenship? The more membership of a race, ethnic or religious group is required, the more illiberal the society. (5) How 'thick' is the national identity? The more the national identity is thick in the sense that, for admission, it is necessary to change your surname, religion, recreation etc as opposed to learning a language, the more 'thick' and illiberal the society is. (6) How far is the nation seen as the supreme value? The more so, the more illiberal it is. (7) How closed or open is the society to the interchange of culture? The more closed, the more illiberal it is. (8) Is national identity exclusive? The more resistance in the state to dual identity, eg that a person can be truly Canadian while being fully

⁹⁵ Kymlicka, Will "Western Political Theory and Ethnic Relations in Eastern Europe" in (eds) Kymlicka, Will and Magda Opalski (2001) "Can Liberal Pluralism be Exported" Oxford: Oxford University Press, p. 48

⁹⁶ Kymlicka, Will "Western Political Theory and Ethnic Relations in Eastern Europe" in (eds) Kymlicka, Will and Magda Opalski (2001) "Can Liberal Pluralism be Exported" Oxford: Oxford University Press, pp. 54 to 59

Irish or Vietnamese, the more illiberal the society and (9) To what extent has the state denied public recognition and space to national minorities? The more such recognition is denied, the more illiberal the society is.

Kymlicka identifies a “complex dialectic” in the relationship between states and minorities.⁹⁷ States tend to represent the wish of national majorities to pursue nation-building. In response, minorities tend to make minority rights claims. Within areas dominated by national minorities, there is a “second-order dialectic” in which the minority takes the position of the state (engaging in nation-building which should be within the same limitations as for state nation-building) and internal minorities take the position of national minorities (making minority rights claims against the national minority).

Conclusion

This chapter has presented two justifications for special rights for minorities; these are an argument based on the value of ethnodiversity and an approach based upon state partiality (questioning the underlying assumption behind weak minority rights theory that states have available a neutral position on minority religion, language and culture). These arguments support the central thesis by providing reasons why a weak minority rights model should not be the preferred way to understand minority rights. A weak minority rights model would provide for minority rights that would give minorities no more protection than would be available under general individual rights. By presenting a justification for special minority rights, this chapter has shown the need to provide a greater level of protection than the weak model would allow. It must also be shown that the weak model actually would provide no more protection than would be available.⁹⁸ Having shown that the weak and strong minority rights models are insufficient in

⁹⁷ Kymlicka, Will “Western Political Theory and Ethnic Relations in Eastern Europe” in (eds) Kymlicka, Will and Magda Opalski (2001) “Can Liberal Pluralism be Exported” Oxford: Oxford University Press, pp. 48 - 52

⁹⁸ See Chapter Six under the heading ‘The extent of weak minority rights protection and the emergence of a contextual, identity-conscious dimension to Views of the UN Human Rights Committee on article 27 communications under the ICCPR’

that they do not satisfy the principles of effectiveness and equality, it is also necessary to justify, illustrate and explain the proposed model of identity-conscious decision-making.⁹⁹

⁹⁹ See Chapters Five and Six

Chapter Five

From race-consciousness to identity-consciousness: the emergence of identity-conscious decision-making

Introduction

This chapter shows that race-blind and race-conscious decision-making of the United States Supreme Court provides a precursor, a precedent and guidance in the development of the identity-conscious decision-making model and that evidence of the emerging model can be found in the jurisprudence of the Supreme Courts of Canada, India and the United States.

An obvious objection to identity-conscious decision-making is that it could permit the reintroduction of the version of race-consciousness that was defended by the majority of the United States Supreme Court when they upheld a law requiring racial segregation on the ground that it provided for 'separate but equal' treatment of members of minorities in *Plessy v Ferguson*.¹ In addition to illustrating the emergence of the model through Supreme Court jurisprudence, this chapter aims to defend the identity-conscious decision model from the argument that it would allow the reintroduction of 'separate but equal' laws or policies.

Another potential objection to the model of identity-conscious decision-making as it evolves through judicial precedent is that this emergence represents unacceptable judicial law-making as an intrusion into the proper sphere of legislatures. It will be argued that the jurisprudence that illustrates this emerging model contains respect for the principle of the separation of powers and that the separation of powers provides an important limiting factor for the identity-conscious decision-making model. A related and important development illustrated by jurisprudence from Canada is the application of the identity-conscious model to the judicial decision-making process, in addition to the

¹ *Plessy v Ferguson* 163 U.S. 537 (1896) Supreme Court of the United States

application of the model by judges to the decision-making process of the executive branch of government.

The concept of equality advocated here involves substantive, not merely formal equality; and it involves positive action by the State (Mack's equal promotionist neutralism²) rather than State non-intervention (Mack's non-interventionist neutralism³). This thesis does not argue that the race-blind approaches of higher national appellate courts (such as the United States Supreme Court) are wrong or bad; instead, this thesis aims to show that race-blind (or more broadly, identity-blind) approaches are insufficient for the achievement of substantive equality that includes equal promotionist neutralism. It is submitted that, under certain circumstances, a race-conscious (or, more broadly, identity-conscious) approach is desirable as a means towards that notion of equality. It will emerge that evidence of identity-conscious approaches can be found in the non-discrimination jurisprudence of higher national appellate courts. This suggests that identity-conscious decision making draws not only upon minority rights law, but also on the law of non-discrimination. It can even be argued that the identity-conscious decision-making model is a meeting point between minority rights and non-discrimination.

Parallels can be drawn between the evolution of identity-conscious decision-making in minority rights law and the development of the law on affirmative action in the United States. As Professor David Cole has shown, in the Constitution of the United States there is an implicit tension between the Sixth and Fourteenth Amendments.⁴ That tension is between the need for race-consciousness, on which the Sixth Amendment is predicated, and race-blindness, which the Fourteenth Amendment requires.

² Mack, Eric (1988) "Liberalism, Neutralism and Rights" in (eds) Pennock, J.R. and J.W. Chapman "Nomos XXX: Religious Morality and the Law" pp 46 to 47

³ Mack, Eric (1988) "Liberalism, Neutralism and Rights" in (eds) Pennock, J.R. and J.W. Chapman "Nomos XXX: Religious Morality and the Law" pp 46 to 47

⁴ David Cole (1999) "No Equal Justice: Race and Class in the American Criminal Justice System" New York: The New Press pp. 112 - 115

The concept of identity-consciousness can be regarded as an extension of the existing concept of race-consciousness. The extension of the concept would bring forms of identity other than race within the consciousness of courts and States. Just as race-consciousness is controversial because of its apparent conflict with race-blindness, so identity-consciousness is likely to be controversial because of the potential for tension with identity-blindness.

Identity-conscious decision-making as the meeting point of non-discrimination and minority rights

However, it can be argued that, depending on the interpretations of the relevant terms which are used, the contrast between race-blindness and race-consciousness does not involve an inevitable conflict. Indeed, given the interpretation of indirect discrimination adopted by the European Court of Human Rights in *Shanaghan and Kelly v United Kingdom*⁵ in which the Strasbourg Court found that when “a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discrimination notwithstanding that it is not specifically aimed or directed at that group.”⁶ If that is the case, then arguably in order to comply with the norm of non-discrimination, States must monitor the effects of their general policies and measures in order to determine whether they have prejudicial effects on particular groups, and State officials must determine whether any prejudicial effects are disproportionate. That implied duty could be regarded as a facet of identity-conscious decision-making, in which case identity-conscious decision-making is a point at which minority rights and non-discrimination meet.

⁵ European Court of Human Rights, Application Nos 37715; 30054/96, judgements of 4 May 2001, Third Section

⁶ European Court of Human Rights, Application Nos 37715; 30054/96, judgements of 4 May 2001, Third Section para 129, discussed in Patrick Thornberry and Maria Estébanez (2004) “Minority rights in Europe” Council of Europe Publishing pp. 49 – 50

This point can be taken further when the decision of the European Court of Human Rights in *Thlimennos v Greece*⁷ is considered. The Strasbourg Court held in *Thlimennos v Greece*⁸ that it had:

“so far considered that the right under article 14 not to be discriminated against...is violated when states treat differently persons in analogous situations without providing an objective and reasonable justification...However the Court considers that this is not the only facet of prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

As Thornberry and Estébanez have noted, this statement has great significance since it shows that non-discrimination generates a duty of positive State action to treat members of minority groups differently. So non-discrimination, according to the European Convention on Human Rights, requires monitoring of the effects of State policies on persons belonging to minorities and differentiated treatment for members of minority groups (provided that their situations are significantly different from the situation of the majority or of other minority groups if no majority exists).

A precursor to identity-conscious decision-making: ‘race-consciousness’ in the jurisprudence of the United States Supreme Court

An underlying assumption of both weak and strong minority rights is that minority rights involve entitlements to particular outcomes as substantive rights. An alternative (or additional) feature of minority rights would be a procedural

⁷ European Court of Human Rights, Application No 34369/97, judgement of 6 April 2000

⁸ European Court of Human Rights, Application No 34369/97, judgement of 6 April 2000 para 44 discussed in Patrick Thornberry and Maria Estébanez (2004) “Minority rights in Europe” Council of Europe Publishing p. 78 (footnote 98)

right to identity-conscious decision-making. The apparently contrasting approaches of race-consciousness and race-blindness at the national level reflect the apparent contrast between the need for special measures to protect minority rights and the right of non-discrimination at the international level. Race-consciousness and race-blindness have emerged as important themes in United States Supreme Court decisions on topics such as race in jury selection⁹, the contracting policies of the Federal Government¹⁰ and admission to university.¹¹

The approach of race-blindness was shown by the dissenting opinion of Harlan J. in the U.S. Supreme Court decision of *Plessy v Ferguson*.¹² In *Plessy* the majority held that segregation on trains was not discriminatory because white people were equally barred from riding with blacks, just as black people were barred from riding with whites. This kind of formalism demonstrates further the need for a context-sensitive approach to minority rights. Harlan J. in his dissent contrasted the formalistic equality of the “separate but equal” doctrine with the reality of inequality, and argued that:

“[no] legislative or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved...in the view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color blind.”

There is a genuine tension in this particular context between race-blindness and race-consciousness. For a legislative, executive or judicial decision to be race-conscious, the decision-maker must “have regard” to race, and yet that is precisely what Harlan J. ruled out in his dissent in *Plessy*. One of the tasks of a theory of race-consciousness, or indeed of identity-consciousness, would be to successfully distinguish between permissible and impermissible ways of having regard to race or identity. It would not be progress for international law to permit (or even to require) a re-introduction of the “separate but equal” approach taken

⁹ *Strauder v West Virginia*, 100 U.S. 303 (1880) Supreme Court of the United States

¹⁰ *Adarand Constructors, Inc. v. Peña* 515 U.S. 200 (1995) Supreme Court of the United States

¹¹ *Gratz v Bollinger* Supreme Court of the United State, decision of 23 June 2003

¹² *Plessy v Ferguson* 163 U.S. 537 (1896) Supreme Court of the United States

by the majority in *Plessy*. Identity-conscious decision-making can be distinguished from the kind of “race-consciousness” preferred by the majority in this decision. Identity-consciousness should be applied consistently with a full understanding of the principle of equality. In particular, it should be recognised that equality requires that minority groups may need special rights in order to enjoy actual equality and that this would not permit a lower standard of rights protection for minority groups. Identity-conscious decision-making could impact positively on a wide variety of forms of government conduct and public policy. In the United Kingdom, for example, Saxby has argued that policy on making the Government accessible through the use of information technology (“eGovernment”) with its benchmark requirement that “new services should be ‘developed so as to be available to all and easy to use’ would “particularly include minority language groups or those with a disability or limited mobility.”¹³

In *Strauder v West Virginia*, the jury that had convicted an African-American of murder was all-white.¹⁴ State law in West Virginia ensured that African-Americans could not serve in juries. The decision can be regarded as simply the application of the principle of non-discrimination that has been introduced by the Fourteenth Amendment to the Constitution of the United States. However, Professor David Cole has suggested that *Strauder v West Virginia* could be interpreted as a decision promoting race-consciousness:

“In reaching its result, the Court in *Strauder* acknowledged what could hardly be denied in post-Civil War America: Race matters. In particular, by finding that the black *defendants*’ right to equal protection was infringed by the exclusion of black *jurors*, the Court necessarily presumed that white and black jurors would react differently to prosecutions against black defendants, that is, that jurors are not color-blind.”¹⁵

¹³ Saxby, Stephen “Public Policy and the Development of a New Geographic Information Strategy” (2006) 14 *International Journal of Law and Information Technology* 147 at 153

¹⁴ *Strauder v West Virginia*, 100 U.S. 303 (1880) Supreme Court of the United States

¹⁵ David Cole (1999) “No Equal Justice: Race and Class in the American Criminal Justice System” The New Press: New York p. 106

Hence, the requirement of race-consciousness was not located in the interpretation of particular words in a text but in the understanding that differences of background, viewpoint and culture inevitably affect the approach of decision-makers. If that is true for decision-makers in the criminal justice system, then arguably it is true generally. This could be the basis for the application of a requirement of identity-consciousness to public authorities by the courts. One of the steps in reaching that identity-conscious approach would be to broaden the basic concept from race-consciousness to include other aspects of human identity.

The Supreme Court of the United States has already applied the approach of race-consciousness to another form of identity, gender, in a case on jury selection.¹⁶ In *Taylor v Louisiana*, Bill Taylor had been convicted of aggravated kidnapping. Mr Taylor, a white man, did not object to the exclusion of persons of his own race or sex, but to the exclusion of women from the jury that convicted him. Mr Taylor argued that the right to be tried by an “impartial jury”, guaranteed by the Sixth Amendment to the Constitution of the United States, included the right to a jury selected from a representative cross section of the community. Women were under-represented in Louisiana because, following state law at the time, their names were not placed on the jury roll unless they asked to be included. As a result the proportion of women on the Louisiana jury roll at the time was under 10%. The Court held, quoting Thurgood Marshall J. in *Peters v Kiff*¹⁷, that:

“It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.”

¹⁶ *Taylor v Louisiana*, 419 U.S. 522, at 528 (1975) Supreme Court of the United States

¹⁷ 407 U.S. 493, 502 – 504 (1972) Opinion of Marshall J., joined by Douglas and Stewart, JJ. For this point, I am grateful to Professor David Cole (1999) “No Equal Justice: Race and Class in the American Criminal Justice System” New York: The New Press p 113.

In *Adarand Constructors, Inc. v. Peña*¹⁸ the Supreme Court had to consider the compatibility of Federal Government policy on contracting with the equal protection component of the due process clause in the Fifth Amendment to the Constitution of the United States. The Federal Government policy was to give financial incentives for contractors on government projects to hire sub-contractors controlled by “socially and economically disadvantaged individuals”. The petitioners, Adarand Constructors, objected to the race-based presumptions used by the Federal Government in identifying such individuals. O’Connor J., giving the judgment of the Supreme Court in *Adarand Constructors, Inc. v. Peña*, noted that the majority of the Supreme Court in *Richmond v J.A. Croson Co.*¹⁹ established a “strict scrutiny” standard of review for classifications based on race. O’Connor J. observed that:

“With *Croson*, the [Supreme] Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments... The Court’s cases through *Croson* had established three general propositions with respect to government racial classifications. First, scepticism: ‘any preference based on racial or ethnic criteria must necessarily receive a most searching examination’²⁰ Second, consistency: ‘the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.’ i.e. all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinised. And third, congruence: ‘equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.’”²¹

However, as Henkin, Neuman, Orentlicher and Leebron have observed, in *Metro Broadcasting v ICC*,²² the court adopted a different approach to challenges to

¹⁸ 515 U.S. 200 (1995) Supreme Court of the United States; see Louis Henkin, Gerald L. Neuman, Diane Orentlicher and David W. Leebron (1999) “Human Rights” New York: Foundation Press, p. 1058

¹⁹ 488 U.S. 469 (1989) Supreme Court of the United States

²⁰ 515 U.S. 200 (1995) Supreme Court of the United States

²¹ 515 U.S. 200 (1995) Supreme Court of the United States

²² 497 U.S. 547 (1990) Supreme Court of the United States

race-based policies.²³ The Court held that “benign” federal racial classifications did not need to be examined according to strict scrutiny, but only to a standard of intermediate scrutiny.

The jurisprudence of the Supreme Court of the United States has granted cautious permission for race-conscious policies. This permission is subject to careful scrutiny, probably to the high ‘strict scrutiny’ standard. The concept of race-consciousness has been extended beyond the original reference point of race to include gender. The next section will show how the Constitution and Supreme Court of India have responded to similar challenges.

A duty of special care: the emerging principle of identity-consciousness in the Constitution of India and jurisprudence of the Supreme Court of India

The Constitution of India employs a mixed economy of rights, rules and Directive Principles. Part VI of the Constitution outlines the Directive Principles. The Constitution explains the significance of a text being classified in this way:

“The provisions contained in this part shall not be enforced in any court, but the principles therein laid down are nonetheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws...”²⁴

Relevant here is the duty of “special care” imposed on the State by Article 46, which is one of the Directive Principles:

“The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”

²³ Louis Henkin, Gerald L. Neuman, Diane Orentlicher and David W. Leeborn (1999) “Human Rights” New York: Foundation Press p. 1060

The Constitution of India provides for two main rights for minorities. Linguistic and cultural minorities have the right to “conserve” their distinctive characteristics.²⁵ Religious and linguistic (but not cultural) minorities have the right to “establish and administer educational institutions of their choice” according to Article 30 of the Constitution. Curiously, Article 30 states that it is referring to “All minorities” and then qualifies this with the phrase “whether based on religion or language.” Since cultural differences qualify a group for minority status according to Article 29(1), it seems that there is a contradiction between Article 29(1) (which states that groups with cultural differences qualify for minority status) and Article 30 (which states that “All minorities” includes only religious and linguistic minorities).

There is language in the Constitution of India which is highly consistent with an identity-blind approach. These can be compared to the tradition of identity-blindness in the jurisprudence of the U.S. Supreme Court. It should be remembered that this thesis does not argue that requirements of identity-blindness should be universally abandoned, merely that identity-blind legal reasoning alone is not likely to be as effective a vehicle for the realisation of substantive equality as an approach which also allows for identity-conscious reasoning. This chapter aims to show that, bearing in mind certain other provisions of the Constitution, and in particular the jurisprudence of the Supreme Court of India, there is evidence of an emerging principle of identity-consciousness in addition to the (welcome) tradition of identity-blindness.

The initial approach of the Constitution of India, as interpreted by the Supreme Court of India, was of strict identity-blindness. This followed the non-discrimination clause in Article 14 of the Constitution:

²⁴ Article 37 of the Constitution of India

²⁵ Article 29(1) of the Constitution of India

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”²⁶

It is worthy of note that the fourteenth Article of the Constitution of India employs the same phrase as the Fourteenth Amendment to the Constitution of the United States, “the equal protection of the laws.”²⁷ It should not be surprising, therefore, that similar approaches were experienced in the different context of India. In *State of Madras v Champakam Dorairajan* the Supreme Court of India had to review the constitutionality of a State programme that made applicants’ caste and religion a factor in university admissions to study medicine and engineering.²⁸ The Supreme Court held such a policy unconstitutional. Marc Galanter, commenting on the ambit of this decision, showed that it prohibited preferential treatment in all areas except for government employment.²⁹ Preferential treatment in the area of government employment had been specifically permitted by Article 16(4) of the Constitution of India. While Article 16(1) establishes a general prohibition on discrimination in the area of employment, Article 16(4) establishes an exception in relation to government employment, subject to conditions:

“Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward classes of citizens which, in the opinion of the State, are not adequately represented in the services under the State”³⁰

The approach in that case, therefore, is of identity-blindness. It is not the intention of this chapter to prove that this decision was wrong. The decision in

²⁶ Article 14 of the Constitution of India

²⁷ Amendment XIV of the Constitution of the United States:

Section 1. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

²⁸ (1951) AIR 226 Supreme Court of India

²⁹ Marc Galanter (1984) “Competing Equalities: Law and the Backward Classes in India” Oxford University Press pp. 164 – 165

³⁰ Article 16(4) of the Constitution of India

*State of Madras v Champakam Dorairajan*³¹ illustrates that, where it is appropriate in the local context, a well-defined space in which the identity-conscious model can operate can be defined by the law within a larger legal category in which the identity-blind model is the general rule. This offers a more nuanced approach than the use of strict identity-blindness in all circumstances, regardless of the context.

It is also consistent with an identity-conscious model that there is no categorical requirement that the State make financial provision to support the desire of a minority to preserve its own language, script or culture. When a minority has established its own educational institution, there is no requirement for State aid, only a provision for non-discrimination in any provision of State aid to that institution:

“The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.”³²

It should be remembered that a duty of non-discrimination can involve a duty of ongoing, continuous positive action by a State in order to ensure that its law and policies do not have discriminatory effects in practice. Such ongoing scrutiny of the effects of the law on members of minority groups in practice is consistent with the pursuit of that substantive equality which identity-conscious decision making seeks to achieve. The lack of a categorical right to State financial support in the Constitution is underlined by the appearance of a non-justiciable duty on the State to “promote with special care the educational and economic interests of the weaker sections of the people,”³³ which is discussed below.

The limitation of the separation of powers

³¹ (1951) AIR 226 Supreme Court of India

³² Article 30(2) of the Constitution of India

It has been shown that the jurisprudence of national appellate courts is an important source for the emergence of the identity-conscious model. It could be argued that this development represents an unacceptable form of judicial law-making. In response, it will be argued that the emerging identity-conscious jurisprudence includes respect for the separation of powers, providing an important limiting factor.

The Supreme Court of India in *Ram Bhagat Singh v. Haryana*³⁴ faced a choice of decisions that would fit within the weak or strong models of minority rights protection, but chose instead a decision that is consistent with the thesis that an identity-conscious model is emerging. The decision concerned rules, adopted by the state of Haryana, requiring a minimum 55% pass mark in exams taken by applicants for the Judicial Branch of the Civil Service. The Supreme Court observed that this case involved a conflict between the principles of efficiency and equality. It should be remembered that efficiency and equality are exactly the principles which this thesis seeks to reconcile in the context of minority rights, through the identity-conscious model. The Court could have given either of those principles priority over the other. The Court could have preferred the principle of efficient operation of the Civil Service and upheld the requirement of the minimum pass mark. That would arguably have corresponded to a weak approach to minority rights. Alternatively the Court could have preferred the principle of equality, striking down the minimum mark in order to promote access to Civil Service positions for candidates with weaker educational backgrounds, especially those from Dalit communities, who would find it more difficult to reach the standard minimum mark. That approach would arguably have corresponded to a strong theory of minority rights.

However the Supreme Court in *Ram Bhagat Singh* did not itself decide to elevate either principle over the other. Rather than dictating a solution itself, the Court directed that the Government exercise its discretion, in an objective manner, before the next selection process, and determine a minimum percentage of marks

³³ Article 46 of the Constitution of India

³⁴ (1990) SCR (2) 329 Supreme Court of India

that is consistent with both efficiency and the need for equality for Scheduled Castes and Scheduled Tribes. This can be explained as a pragmatic refusal by the Court to decide how policies should be carried out through particular administrative procedures. It may be seen, on this view, as an application of the separation of powers which requires that the judiciary should not interfere in the area of responsibility of the executive branch of the State. It is submitted that this can be accepted as a highly plausible explanation of the decision, while at the same time the decision may also be regarded (and should be regarded) as an example of the Supreme Court of India applying the approach of identity-conscious decision-making, structuring the discretion of the executive since a categorical decision would not show the necessary deference to the policy-making role of the executive branch of Government. Evidence for this argument can be found in the Supreme Court's repeated use of the language of identity-consciousness, referring to the need for a "conscious process" of decision-making (involving the application of the decision-maker's mind to the relevant factors) and a "conscious decision" consistent with efficiency and the need to ensure equality of opportunity for Scheduled Caste and Scheduled Tribe members.

Hitrakshah Samiti v Union of India was a Supreme Court decision on access to pre-medical studies in medicine and dentistry.³⁵ The tests were held in English and the Supreme Court of India had to determine whether the Constitution required that the tests be offered in Hindi and other regional languages. The Court noted the relevant non-discrimination provision of the Constitution of India, which is in classic identity-blind terms. Under Article 29(2) of the Constitution of India, no citizen shall be denied admission to any educational institution maintained by the State or in receipt of State aid on the grounds of religion, race, caste, language or any of them.

In *Hitrakshah Samiti*, the Court held that, while the use of minority (and the national majority) languages may be more appropriate, Article 32 of the Constitution of India cannot be used to make the courts require policy preferences. This case could be regarded as a setback for the introduction of

identity consciousness in Indian constitutional law, since the Court declined to require the use of admissions tests in other languages. However, to regard the case as a setback for the identity conscious approach would be to misunderstand the meaning of identity consciousness. As has been shown in the case of *Ram Bhagat Singh*,³⁶ identity consciousness does not involve the courts in making merits-based policy decisions, intruding into the proper role of the executive. What identity consciousness requires is that the courts apply the classic administrative law principle of requiring a decision-maker to genuinely exercise discretion, in a way in which the decision-maker takes account of all relevant considerations.

In a similar way, in *Islamic Academy v Karnataka*³⁷ the Supreme Court of India referred to the United States Supreme Court decision in *Gratz v Bollinger*.³⁸ The latter case involved review by the Supreme Court of an undergraduate transfer admissions policy which awarded 20 points out of a possible 100 points to potential applicants who belonged to 'underrepresented minorities' in university admission decisions. The U.S. Supreme Court decided that this policy was unconstitutional. Arguably this, too, can be found to be consistent with identity conscious decision making. Significantly, Ginsburg and Souter JJ. in minority opinions in *Gratz* held that:

"the [U.S.] Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination."³⁹

³⁵ (1990) AIR 851

³⁶ (1990) SCR (2) 329 Supreme Court of India

³⁷ Writ petition (civil) 350 of 1993, Decision of 14 August 2003, Supreme Court of India

³⁸ 539 U.S. (2003) Decision of June 23, 2003

³⁹ 539 U.S. (2003) Decision of June 23, 2003

That passage was cited by the Supreme Court of India in *Islamic Academy v Karnataka*, providing further confirmation that the model of identity consciousness has influenced the development of Supreme Court jurisprudence in India.

The reluctance of international instruments to dictate educational policy is mirrored in India by the reluctance of the Supreme Court to dictate policy on minorities to states within India, or to India's federal government, in decisions such as *Hindi Hitrakshak Samiti v Union of India*.⁴⁰

It has been noted that in *Hindi Hitrakshak Samiti v Union of India* the Supreme Court of India had to consider an argument that the Constitution of India required that examinations for students wishing to be considered for pre-medical places for medicine and dentistry should be conducted in Hindi and other regional languages, not only in English. It will be recalled that it was argued that this was required by Article 29(2) of the Constitution of India, which requires that no-one shall be denied admission to any educational institution maintained by the State or in receipt of financial aid from the State, on grounds of religion, race, caste or language. The Court ruled that, while the use of Hindi or other regional languages might be more appropriate, the Constitution cannot be used as a means to compel the Government to follow a particular policy preference unless that policy is directly required by the Constitution.

If international law and the Constitution as well as the Supreme Court of India adopt an approach of deference to national policy, it could be argued that the proposed model of identity-conscious decision-making would fail to satisfy the principle of effectiveness, just as it is argued in this thesis that the weak model of minority rights does not satisfy that principle. However, such a procedural right would not be insignificant if properly implemented. Even several decades after Independence, the public law of India continues to employ concepts familiar to

administrative lawyers in England and Wales. In *Municipal Corporation of Greater Bombay v New Standard Engineering Co.*⁴¹ (in which the court held that it was fatal to a decision-making process to fail to have regard to a matter which the decision-maker should have taken into account) then-current works on English administrative law were cited, which highlighted the affinity between Indian and English public law.⁴² In particular, the concept in judicial review that where procedural safeguards are imposed it is fatal to a decision-making process to ignore them needs to be part of the model of identity-conscious decision making. If this approach of mandatory procedural requirements in decision-making applied to the consideration of the rights of minorities, then it could become a powerful instrument of minority rights.

In *Islamic Academy v. Karnataka*, the Supreme Court of India it was argued that State regulation of admissions tests and fees for access to private (minority-run) educational institutions was incompatible with the constitutional right of members of minorities to establish their own educational institutions.⁴³ S.B. Sinha J. explicitly recognised that for many members of minorities, “the protection of their minority rights” was a motive for the establishment of such institutions. The Court held that minority-run institutions without State aid had an absolute right to choose between employing the Government’s Common Entrance Test (known as the CET) or their own test. However, the institution would not have an unlimited right to determine the content of their own tests. Such tests would have to be designed according to an identifiable and reasonable methodology which must include consideration of the “social and educational backwardness” of the area.

These decisions of the Supreme Court of India show the language of mandatory relevant considerations in relation to the right of minorities is already present in India’s law, although they deal with private educational institutions rather than

⁴⁰ (1990) AIR 851

⁴¹ (1991) AIR 1362

⁴² The Court cited Professor Wade’s text “Administrative Law” in its 6th edition, p. 247, and De Smith’s “Judicial Review of Administrative Action”, in its 4th edition, pp. 144-45, in support of this proposition.

State institutions. The significance of the application of a duty to take into account the protection of minority rights in decisions on private educational institutions should not be ignored. It shows that the minority rights of identity-conscious decision-making can, at least in this jurisdiction, have horizontal effect.

Context-sensitive interpretation of minority rights in Canada

In *Lalonde v Ontario*,⁴⁴ the Canadian courts had to consider the compatibility of the proposed closure of Hôpital Montfort, a French-language hospital, with section 15 of the Canadian Charter of Rights and Freedoms, administrative law principles and the Canadian constitutional principle of the protection of minorities (in particular, the protection of “a minority which is an official language minority in Canada and one of the country’s founding cultures”).⁴⁵ It should be noted that “substantive limitations on government action” can arise from this constitutional principle of minority protection and that this principle binds courts, as well as governments, in Canadian law: *Reference re Secession of Quebec*.⁴⁶

The applicants’ approach to their submissions involved an expectation that the Canadian court would be prepared to hear evidence about the impact of the proposed hospital closure on the Francophone linguistic minority. Expert evidence was submitted:

“Dr Raymond Breton and Dr Roger Bernard, two well-qualified experts in the field of sociology – particularly regarding social trends affecting the existence and viability of cultural communities – gave evidence that institutions are vital to the survival of cultural communities. They are much more than providers of

⁴³ Decision of 14 August 2003, Writ Petition (civil) 350 of 1993

⁴⁴ Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50

⁴⁵ Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50 para 5

services. They are linguistic and cultural milieus which provide individuals with the means of affirming and expressing their cultural identity, and which by extension permit them to reaffirm their cultural adherence to a community. The individual and the family alone are incapable of maintaining the linguistic and cultural identity of a community. Thus, these institutions must exist in as wide a range of spheres of social activities as possible in order to permit the minority community to develop and maintain its vitality.”⁴⁷

It is submitted that this is a valuable illustration of what is possible and desirable in an identity-conscious approach. Courts, like any other branch of the State, should (under this model) accept evidence on the impact of their decisions on minority groups, just as the executive and legislative branches of the State should determine the impact of their public policy and legislative choices on minorities. The evidence appears to have been significant as it persuaded the court that “the existence of such a hospital is crucial to the preservation of the minority Franco-Ontarian culture as well as to the continued provision of adequate francophone medical services and medical training.”⁴⁸ The court, moreover, held that positive action was required since, following *R v Beaulac*⁴⁹ “language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided”.⁵⁰

The language of the court is highly suggestive of a contextual rather than categorical approach to resolving the question before it:

“...this is not a minority language rights case. This is not a minority rights language education case. This is a case about whether the rights of the Franco-Ontarian minority have been undermined by the Directions of the Commission in

⁴⁶ Supreme Court of Canada [1998] 2 SCR 217 at pp. 248 – 249; the *Quebec Secession Reference* case was cited as authority for this point in *Lalonde v Ontario* 181 DLR (4th) 263 at para 40

⁴⁷ Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50 para 14

⁴⁸ Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50 para 60

⁴⁹ Supreme Court of Canada [1999] 1 SCR 768

a fashion which violates the ‘protection of minorities’ principle, one of the fundamental organizing principles underlying the Canadian Constitution. In a way this is not even a case about the *fate* of a hospital, but about the *place* of that hospital in the cultural/linguistic milieu of francophone minority rights in Ontario. In that sense the issues to be determined on this Application touch on broader concepts than the more discrete notions of minority language rights or minority language education rights, as contemplated in the [Canadian] *Charter* [on Rights and Freedoms]. They touch on the multicultural francophone heritage of Canadians.”⁵¹

It is submitted that, as the court recognised,⁵² the extension of the constitutionalisation of minority language issues into the sphere of health services provision is a helpful illustration of how an identity-conscious approach to minority rights can require identity-conscious decision-making by the judiciary, the legislature and the executive of States in broadly defined areas of law and policy. The argument of the applicant is reminiscent of a key justification for identity-conscious decision-making in that the applicant emphasised the way in which the English-dominated bilingual medical institutions were becoming for practical purposes “engines of assimilation in relation to the minority francophone community”⁵³ which the court agreed with while acknowledging that the “survival of the Franco-Ontarian community is threatened by an alarming rate of assimilation.”⁵⁴

Another illustration of the need for context-sensitive implementation of minority rights is the decision of the Supreme Court of Canada in *Ford v Quebec* (1988) DLR (4th) 577. In *Ford*, the Supreme Court reviewed the constitutionality of Bill

⁵⁰ Bastarache J. in *R v Beaulac* [1999] 1 SCR 768 (Supreme Court of Canada) cited as authority for this point in *Lalonde v Ontario* Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50 para 62

⁵¹ *Lalonde v Ontario* Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50 para 68

⁵² *Lalonde v Ontario* Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50 para 69

⁵³ *Lalonde v Ontario* Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50 para 72

⁵⁴ *Lalonde v Ontario* Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50 para 74

101, a law for the province of Quebec which required all commercial signs to be in the French language only. The Court acknowledged that the goal of seeking to maintain a French “visage linguistique” was legitimate in the circumstances of Quebec. As Webber noted, “The specific issue in that case – the preservation of French as the dominant language of public expression – was clearly unique to Quebec”.⁵⁵ Webber added that “To some people, this is a heresy. Individual rights, they argue, should be universal, applying in the same manner regardless of cultural context. The rights of the individual should not be affected by cultural differences. But, if that is so, why bother creating a Canadian Charter of Rights and Freedoms?”⁵⁶

It is submitted that the commitment to individual rights underlying the issue identified by Webber is based on a concern for equality of individual rights and a concern that States should not enjoy a ‘cultural opt-out’ clause from human rights protection. In other words, this is a concern that consideration of cultural differences might be used to lower the requirements of human rights. This alternative identity-conscious decision making model (which this thesis seeks to defend) would not permit exceptions to be made to individual human rights and it would arguably tend to increase, not decrease, the duties of States. The particular merit of this approach is that it would seek to raise the benefits of minority rights above the level of protection conferred by general individual rights without doing violence to the principle of equality (understood as equal concern and respect or substantive equality, rather than formal equality).

The argument for an identity-conscious decision-making approach emerges in part from a critique of the dominant approaches to minority rights. Will Kymlicka has already identified the essence of this critique:

“In effect, international law provided only two unsatisfactory options for [national] minorities: they could appeal to article 1 of the United Nations Charter,

⁵⁵ Jeremy Webber (1994) “Reimagining Canada: Language, Culture, Community and the Canadian Constitution” McGill-Queen’s University Press at pp. 246 - 7

⁵⁶ Jeremy Webber (1994) “Reimagining Canada: Language, Culture, Community and the Canadian Constitution” McGill-Queen’s University Press at p. 247

which says that all ‘peoples’ have a right to ‘self-determination;’ or they could appeal to article 27 of the International Covenant on Civil and Political Rights, which says that ‘members of minorities’ have the right to ‘enjoy their own culture...in community with other members of their group.’

We can now see why new norms were required by considering why these older options are unsatisfactory. To over-simplify, for most national minorities, be they stateless nations or indigenous peoples, article 1 (as traditionally understood) is too strong, and article 27 (as traditionally understood) is too weak. Most national minorities need something in between, and recent developments in international law regarding minority rights are precisely an attempt to codify certain standards in between articles 1 and 27.”⁵⁷

Conclusion

It has been shown that identity-conscious decision-making can draw inspiration from the race-consciousness jurisprudence of the Supreme Court of the United States, as well as the emerging identity-consciousness case law of the Supreme Court of India and the work in this area of the Supreme Court of Canada. Identity-conscious decision-making would not permit the reintroduction of racist laws and policies such as the form of segregation permitted by the majority of the U.S. Supreme Court in *Plessy v Ferguson*.⁵⁸ The proposed model of identity-conscious decision-making, while being a largely judicial creation, has limitations inherent in the respect of the judiciary for the separation of powers. As the Canadian jurisprudence showed, the model is applicable to judicial as well as executive decision-making. The implications of identity-conscious decision-making have been shown to be significant, for example in that the proposed model can involve horizontal effect.

⁵⁷ Will Kymlicka “Theorising Indigenous Rights” (1999) 49 *University of Toronto Law Journal* 281 at p. 283

⁵⁸ *Plessy v Ferguson* 163 U.S. 537 (1896) Supreme Court of the United States

Chapter Six

The emergence of identity-conscious decision-making at an international level

Introduction

Chapters One and Three illustrated how the strong and weak approaches relate to the definition of minority and minority rights. It became apparent that there is a series of indicators rather than a single test to distinguish the strong and weak models. Strong approaches contain elements such as a willingness to accept collective as well as individual rights, a focus on “national” as opposed to “ethnic, religious or linguistic” minorities, involuntary as opposed to voluntary membership of a minority group and positive as opposed to negative rights.

It has been argued¹ that there is a real risk that States will not continue to participate in international mechanisms which protect minority rights (such as the United Nations Human Rights Committee) unless international law adopts an approach to minority rights that is not perceived as a threat to the territorial integrity of States² Since effective minority rights protection depends on the preferences of States, the alternative of a weak approach to minority rights deserves consideration. However, a weak approach to minority rights suffers from a significant problem: to justify the existence of minority rights, it needs to be shown that they provide some entitlement that goes beyond the other individual rights that members of minority groups have.

A case could be made on behalf of the strong and weak models of minority rights, but this thesis aims to show that neither model can satisfy both of the principles of effectiveness and equality. Minority rights should be interpreted as meaningful international obligations. To be meaningful international obligations, they should not simply duplicate the contents of other human rights (the principle of effectiveness).

¹ In Chapter Three, under the heading ‘Should minorities be able to claim self-determination?’

² See works such as (ed) James Crawford (1988) “The Rights of Peoples” Oxford: Clarendon Press

They should do this while remaining consistent with the norm of non-discrimination (the principle of equality).

This chapter argues that the weak minority rights model does not provide additional protection beyond goes beyond that provided by general individual rights such as freedom of expression, freedom of association and freedom of thought, conscience and belief. This chapter aims to show how international normative development can be explained as a developing model of identity-conscious decision-making which is consistent with the principles of effectiveness and equality.

Enabling participation and “appropriate measures”: a (limited) basis for identity-conscious decision-making in the Framework Convention on National Minorities and the UN Declaration on Minority Rights

It is submitted that actual participation in decision making by members of a minority, while desirable, is not always essential for the protection of minority rights. For States parties to the Framework Convention for National Minorities, a relevant obligation is below:

“The 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.”³

This right refers to the creation of necessary conditions, not a guarantee of participation. What is essential is that the decision-makers demonstrate that they have considered minority rights as a relevant consideration in the process of decision-making.

³ Article 15 of the Framework Convention on National Minorities

Where is the international law basis for such a “right to minority rights as a relevant consideration in public decision-making”? It can be regarded as within the range of plausible interpretations of the terms of the Framework Convention on National Minorities. In the terms of Article 4(2):

“The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to a majority. In this respect, they *shall take due account of the specific conditions of the persons belonging to national minorities.*”⁴

This right that minority conditions are taken into account comes into greater focus when particular policy issues are examined. One example is government policy on the implementation of the right to education. As Guillaume Siemenski has noted, international instruments relating to the rights to education of persons belonging to minorities do so in general terms. Article 4.3 of the United Nations Declaration on the Rights of Minorities provides that:

“States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.”

The use of the phrase “wherever possible” could deprive this clause of real effect. If States have free choice to determine that measures for education in the mother tongue of minorities are not possible then the right has been emptied of value. If the principle of effectiveness is applied, the paragraph should be found to contain some meaning. A plausible meaning is that State institutions with responsibility for education should be able to show that they have genuinely considered the feasibility of providing mother tongue education. If this interpretation is correct, then any state which failed to engage in a genuine decision-making process in which they

⁴ Italics added

reasonably considered the needs of the minorities would have failed to implement this right. The reluctance of international instruments to dictate educational policy is understandable. It illustrates an important limiting factor within identity-conscious decision making which reflects its connections with public law: the separation of powers.⁵

The extent of weak minority rights protection and the emergence of a contextual, identity-conscious dimension to Views of the UN Human Rights Committee on article 27 communications under the ICCPR

In the Introduction, the question was posed whether the rights of members of minority groups under article 27 of the International Covenant on Civil and Political Rights (ICCPR) logically extend beyond the protection available to members of minority groups under individual human rights provisions of the Covenant such as article 18 (freedom of thought, conscience and religion), article 19 (freedom to hold and express opinions) article 21 (right of peaceful assembly), article 22 (freedom of association), article 23 (right to marry and protection for families) and article 26 (freedom from discrimination). An obvious way to test this theory would be to examine views of the United Nations Human Rights Committee on communications that have been brought before them under article 27 and the alternative individual rights provisions. The views of the Committee on applications involving minority rights as well as other rights claims will be considered.

⁵ This issue is discussed more fully in Chapter Five under the heading of 'The limitation of the separation of powers'

Communications to the United Nations Human Rights Committee citing article 27 (and not any other articles) of the International Covenant on Civil and Political Rights

There is a body of Committee decisions which appear to relate to article 27 but not to any of the other individual rights provisions. (Usually, in the sense that article 27 is the only individual right referred to by the authors of the relevant communication). With a high level of consistency, these are decisions based on the principle explained by the Committee in *Kitok v Sweden*⁶ that, while “regulation of an economic activity is normally a matter for the State alone” but that “where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant.”⁷ In a similar way, the Committee decided in *Ominayak v Canada* that “the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong”⁸ and this was cited by counsel for the author of the communication in *Mahuika v New Zealand* which related to negotiations concerning the fishing rights of the Maori people.⁹ In response, the committee in their decision in *Mahuika v New Zealand* acknowledged that “economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community” and *Ominayak v Canada* was referred to in the corresponding footnote as supporting this proposition.¹⁰ Many of these cases relate to reindeer breeding rights of the Sami minority group in Finland, Norway or Sweden.¹¹ Other cases in the ‘economic

⁶ Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence)

⁷ *Kitok v Sweden* Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence) para. 9.2

⁸ Communication No 1671/984, Views adopted on 26 March 1990, UN Doc: CCPR/C/38/D/167/1984, para 32.2

⁹ Communication No 547/1993, Views adopted on 15 November 2000, UN Doc: CCPR/C/70/D/547/1993 Para 6.2

¹⁰ Communication No 547/1993, Views adopted on 15 November 2000, UN Doc: CCPR/C/70/D/547/1993 Para 9.3 and footnote 14

¹¹ In addition to the leading case on economic activities and minority identity, *Kitok v Sweden* Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence), other examples of cases in this group include *O. Sara v Finland* Communication No 341/1990 UN Doc: CCPR/C/50/4/431/1990; *Ilmari Länsman v Finland* Communication No 511/1992 UN Doc:

activity' category relate to economic development and traditional modes of economic survival among First Nation communities in Canada.¹²

It might be thought that this line of Human Rights Committee cases, by being based primarily or exclusively on article 27 of the International Covenant on Civil and Political Rights, would demonstrate that a weak approach to minority rights does have the capacity to offer protection which would not be available under other individual rights. However, the following analysis aims to show that cases turning exclusively or primarily on article 27 are highly consistent with the proposed model of identity-conscious decision making, in which the focus of attention of the Human Rights Committee has been on the process of decision making and whether members of minority groups had an opportunity for genuine participation, rather than on substantive rights which go beyond other individual rights.

In *Kitok v Sweden*, the Committee noted that "a right to enjoy one's own culture in community with the other members of the group cannot be determined in abstract but has to be placed in context"¹³ and found that the conduct of the State had a reasonable and objective justification and was based upon "economic and ecological reasons"¹⁴ so there was no violation.¹⁵ The communication in *O. Sara v Finland* was considered to be inadmissible for lack of exhaustion of domestic remedies.¹⁶ It is nevertheless noteworthy that, in *O. Sara v Finland*, Finland accepted that, in applying the relevant Finnish law, "Finnish authorities must take into consideration

CCPR/C/52/D/511/1992; *Jouni E Länsman v Finland* Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995; *Äärelä v Finland* Communication No 779/1997 UN Doc: CCPR/C/73/D/779/1997 and *Jonassen v Norway* Communication No 942/2000 UN Doc: CCPR/C/76/D/942/2000

¹² Examples include *Chief Ominayak and Lubicon Lake Band v Canada* Communication No 167/1984 UN Doc: CCPR/C/38/D/167/1984 and *Howard v Canada* Communication No 879/1999

¹³ *Kitok v Sweden* Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence) para. 9.3

¹⁴ *Kitok v Sweden* Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence) para. 9.5

¹⁵ *Kitok v Sweden* Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence) para. 9.8

¹⁶ Communication No 431/1990 CCPPR C/50/D/431/1990 para. 9

article 27 of the Covenant”.¹⁷ In *Ilmari Länsman v Finland* there was no violation because the Finnish authorities consulted the members of the relevant minority group:

“the Committee concludes that quarrying on the slopes of Mt. Riutusvaara, in the amount that has taken place, does not constitute a denial of the authors’ right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatanturi Herdsmen’s Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings, and that the reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.”¹⁸

A pattern appears to be emerging that a violation of article 27 can be avoided by taking the rights of a minority group into account and/or consulting them and involving them in decision-making processes which affect them. The decision of the Committee in *Mahuika v New Zealand* confirmed that that sufficient consultation and engagement with members of a minority can avoid an article 27 violation.¹⁹ The Committee in *Mahuika* cited the decision in *Ilmari Länsman v Finland* as the basis for the statement that “the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.”²⁰ This suggests that the degree of participation by the members of the minority in the decision-making process will be weighed against the seriousness of the effects of the decision on the identity of the minority in order to determine whether the conduct of the State complies with article 27. In carrying out this calculation, the Committee determined that:

¹⁷ Communication No 431/1990 CCPR C/50/D/431/1990 para. 6.1

¹⁸ *Ilmari Länsman v Finland* Communication No 511/1992 UN Doc: CCPR/C/52/D/511/1992 para. 9.6

¹⁹ Communication No 547/1993, Views of the Committee adopted on 15 November 2000, UN Doc: CCPR/C/70/D/547/1993

²⁰ Communication No 547/1993, Views of the Committee adopted on 15 November 2000, UN Doc: CCPR/C/70/D/547/1993 para 9.5

“In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, inter alia to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities. While it is a matter of concern that the settlement and its process have contributed to divisions among Maori, the Committee concludes that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article 27.”²¹

This is important as it demonstrates that a process of identity-conscious decision making was specifically what avoided a breach of article 27 in *Mahuika*. *Mahuika v New Zealand* also adds to our existing knowledge an understanding of the *continuing* nature of the State’s duty to engage members of minorities in decision-making processes which affect them. The Committee stressed “that the State party continues to be bound by article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act...the Committee emphasised that in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group. The State party is under a duty to bear this in mind in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act”²²

This shows that States are under a continuing duty to engage in identity-conscious decision making as they make smaller decisions on the day-to-day implementation

²¹ Communication No 547/1993, Views of the Committee adopted on 15 November 2000, UN Doc: CCPR/C/70/D/547/1993 para 9.8

²² Communication No 547/1993, Views of the Committee adopted on 15 November 2000, UN Doc: CCPR/C/70/D/547/1993 para. 9.9

of major decisions. It indicates that the minority rights obligation has the capacity to affect how a State implements particular laws. Taken together, this series of decisions by the Committee (based on applicants' claims which raised only article 27) is evidence of an emerging trend towards a contextual, not categorical approach to article 27 and a move towards identity-conscious decision making. Further evidence of a contextual approach arrived in the Views of the Committee in *Howard v Canada* which concerned whether restrictions on the right of a member of the Hiawatha First Nation to engage in fishing (which, it was undisputed, was part of his culture) were acceptable.²³ The Committee accepted that fishing, as an essential part of a minority culture, could be within the ambit of article 27 even though it is an economic activity.²⁴ This was consistent with the previous jurisprudence of the Committee on economic activities as part of minority culture. The author's case rested partly on an argument that the State had a duty to consult with members of a minority group before curtailing their rights to engage in traditional cultural practices²⁵ and partly on a distinction between "a cultural right to fish" and "any statutory privileges to fish that are available to all persons, indigenous and non-indigenous, upon obtaining through payment a licence from the Government."²⁶ In response, the State party argued that "article 27 does not require that a cultural activity be protected by way of right...licensing in and of itself does not violate article 27."²⁷ The Committee's response to this point was to hold that "States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right."²⁸

²³ Communication No 879/1999, Views of the Committee adopted on 4 August 2005, UN Doc: CCPR/C/84/D/879/1999

²⁴ Communication No 879/1999, Views of the Committee adopted on 4 August 2005, UN Doc: CCPR/C/84/D/879/1999 para. 8.6

²⁵ Communication No 879/1999, Views of the Committee adopted on 4 August 2005, UN Doc: CCPR/C/84/D/879/1999 para. 10.7

²⁶ Communication No 879/1999, Views of the Committee adopted on 4 August 2005, UN Doc: CCPR/C/84/D/879/1999 para. 10.2

²⁷ Communication No 879/1999, Views of the Committee adopted on 4 August 2005, UN Doc: CCPR/C/84/D/879/1999 para. 11.6

²⁸ Communication No 879/1999, Views of the Committee adopted on 4 August 2005, UN Doc: CCPR/C/84/D/879/1999 para. 12.11

Hence the Committee held that the requirement of obtaining a licence to fish, as opposed to being entitled to fish as of right, did not by itself violate the rights of the author of the communication under article 27.²⁹ The Committee went on to hold that the facts disclosed no violation of the International Covenant on Civil and Political Rights, showing that there can have been no sufficient denial of the duty to consult members or leaders of the author's minority group before any curtailment of the group's rights. It is perhaps unfortunate that the consultation point is not explicitly addressed in the Views of the Committee. As the Committee's finding was that the author's minority right to culture (in the form of fishing) had not effectively been curtailed, but (permissibly) regulated, then it may be that the issue of consultation did not arise. Then there is still the matter of whether the author's rights are affected is logically prior to the question of whether such a limitation of rights was legitimised by any process of consultation. If that is the reason why the point about consultation was not discussed in the Committee's views, then the question remains of how "curtailment" (triggering a duty of consultation) as opposed to "regulation" (which would not trigger such a duty) would be defined and distinguished from one another. On the facts, the Committee decided that they were unable to find a violation due to the inconclusive evidence.

The impression that the Committee takes a contextual, not categorical, approach was reinforced by *Jouni E. Länsman v Finland*³⁰ in which the State party argued that "the requirements of article 27 were consistently taken into account by the State party's authorities in their application and implementation of the national legislation and the measures in question."³¹ However, this kind of argument could become a formalistic escape route for States wishing to avoid their obligations under article 27; cases of this type seem likely to turn on the genuineness of any consultation and involvement in decision making, as the following extract from the argument of the author of the communication shows:

²⁹ Communication No 879/1999, Views of the Committee adopted on 4 August 2005, UN Doc: CCPR/C/84/D/879/1999 para. 12.11

³⁰ Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995

³¹ Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995 para. 6.3.

“The authors contend that what the State party refers to as “negotiations” with local reindeer herdsman amounts to little more than invitations extended to the chairmen of the herdsman’s committees to annual forestry board meetings, during which they are informed of short-term logging plans. This process, the authors emphasize, involves no real consultation of the Sami. They express their desire to have a more significant influence on the decision-making process leading to logging activities within their homelands and refute the State party’s views on the perceived good experiences within the existing consultation process.”³²

Following these arguments, the UN Human Rights Committee referred in their views to paragraph 7 of their General Comment on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or reindeer husbandry, and that measures must be taken “to ensure the effective participation of members of minority communities in decisions which affect them.” The Committee went on to take the view that consultation had taken place and that “the State party’s authorities did go through the process of weighing the authors’ interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management”³³

By the time that the communication in *Äärelä v Finland*³⁴ on the effects of logging and road construction on the culture of Sami reindeer herders was considered, the degree to which the minority had participated in decisions affecting them had become central to the arguments. The State party argued that “affected persons effectively participated in the decisions affecting them”³⁵ While the Committee’s finding of no article 27 violation was based on a lack of information, not on the question of consultation, the Committee did recognise that the authors of the

³² Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995 para. 7.9

³³ Underlining was present in the original text: Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995 para. 10.5

³⁴ Communication No 779/1997 UN Doc: CCPR/C/73/D/779/1997

³⁵ Communication No 779/1997 UN Doc: CCPR/C/73/D/779/1997 para. 4.6

communication were consulted in the evolution of the plans for logging.³⁶ It would, perhaps, have been helpful if the Committee had gone further by providing guidance on the level of consultation and involvement that would be required to avoid a violation of article 27.

Communications to the United Nations Human Rights Committee citing article 27 and other articles of the International Covenant on Civil and Political Rights

It is suggested that, when the United Nations Human Rights Committee receives communications under a number of articles of the International Covenant on Civil and Political Rights including article 27, if a violation is found, it is either based solely on articles other than article 27 or the same result could have been achieved without consideration of article 27 (interpreted according to the weak minority rights model) on the basis of general individual rights (such as freedom of association, freedom of expression and freedom of thought, conscience and religion) . If this claim can be substantiated, it would appear to provide support for the thesis argued in this work that, on the weak model, minority rights as protected by article 27 do not provide extra protection to that offered to everyone under general, individual rights. An example of the first category of case (a decision based solely on articles other than article 27) is *Joseph v Sri Lanka*.³⁷

In *Joseph v Sri Lanka*³⁸ Sister Immaculate Joseph and 80 Teaching Sisters of the Third Order of St Francis in Menzingen of Sri Lanka claimed to be victims of breaches of articles 2(1), 18(1), 19(2), 26 and 27 of the International Covenant on Civil and Political Rights. The law of Sri Lanka required that incorporation of a religious association occur by enactment. The Supreme Court of Sri Lanka ruled that a Bill which would have incorporated the religious association of the authors of the

³⁶ Communication No 779/1997 UN Doc: CCPR/C/73/D/779/1997 para. 7.6

³⁷ United Nations Human Rights Committee Communication No 1249/2004, 18 November 2005, UN Doc: CCPR/C/85/D/1249/2004

³⁸ United Nations Human Rights Committee Communication No 1249/2004, 18 November 2005, UN Doc: CCPR/C/85/D/1249/2004

communication was inconsistent with articles 9 and 10 of the Constitution of Sri Lanka. The Supreme Court of Sri Lanka appears to have based its decision on the concern that the religious association would interfere with the free choice of individuals within Sri Lanka to adhere to the religion or belief that they preferred.³⁹ This decision also appears to have been influenced by the inbuilt partiality of the Constitution of Sri Lanka towards Buddhism: “The Republic of Sri Lanka shall give Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the *Buddha Sasana*”⁴⁰ It has been argued that State partiality is a plausible justification for special minority rights.⁴¹

The View of the United Nations Human Rights Committee was that these facts disclosed a violation of the authors’ freedom of religion under article 18 since the Committee found that there was no factual evidence to support the conclusion that the Bill to incorporate the author’s religious association would threaten the existence of Buddhism and that the jurisprudence cited by the Supreme Court of Sri Lanka support that Court’s conclusions.⁴² Similarly, a violation was found of the rights of the authors of the communication under article 26 to freedom from discrimination, since the authors could provide examples of other, equivalent religious associations in Sri Lanka with objectives of the same kind as those of the authors of this communication.⁴³ It is significant for the purposes of this thesis that the Committee went on to find that the claim under article 27 did not add to the issues already addressed under articles 18 and 26, which meant that it did not need to be separately considered.⁴⁴ This relatively simple statement is significant because it tends to show that on the issue of protecting the right of members of a minority to enjoy their

³⁹ United Nations Human Rights Committee Communication No 1249/2004, 18 November 2005, UN Doc: CCPR/C/85/D/1249/2004 para 2.2

⁴⁰ United Nations Human Rights Committee Communication No 1249/2004, 18 November 2005, UN Doc: CCPR/C/85/D/1249/2004 para 2.3

⁴¹ See Chapter Three of this thesis for a discussion of state partiality as a justification for special minority rights.

⁴² United Nations Human Rights Committee Communication No 1249/2004, 18 November 2005, UN Doc: CCPR/C/85/D/1249/2004 para 7.3

⁴³ United Nations Human Rights Committee Communication No 1249/2004, 18 November 2005, UN Doc: CCPR/C/85/D/1249/2004 para 7.4

⁴⁴ United Nations Human Rights Committee Communication No 1249/2004, 18 November 2005, UN Doc: CCPR/C/85/D/1249/2004 para 7.6

religion, culture or language “in community with the other members of their group”⁴⁵ article 27 does not provide protection in addition to that provided by the general, individual human rights protection made available by other provisions of the Covenant.

An example of the second category of case is the classic, well known communication of *Lovelace v Canada*.⁴⁶ This communication may be regarded as the basis of an argument against the thesis that the protected sphere covered by article 27 is completely (or almost completely) protected by general individual rights. The Human Rights Committee explicitly found a violation of article 27 and they did not find a violation of any other article of the Covenant.⁴⁷ However, Sandra Lovelace was arguing that she had lost her membership of the Maliseet Indian band in circumstances in which a man would not have lost his membership (as the Committee noted, “only Indian women and not Indian men are subject to” the disadvantage of loss of membership of the group on marriage to a non-member⁴⁸). If article 27 had not existed, it is submitted that Sandra Lovelace would have had a strongly arguable case under her right to association and freedom from discrimination. An obstacle here would have been that the date when her loss of status occurred was before the date when the Covenant came into force. Sandra Lovelace’s marriage to a non-Indian occurred on 23 May 1970; the Covenant did not come into force for Canada until 19 August 1976 and the Human Rights Committee held the view that it lacked the legal competence to consider alleged violations occurring before 1976.⁴⁹ This was, however, subject to the argument that the alleged violation should have been regarded as a continuing one, constituting a violation

⁴⁵ Article 27 of the International Covenant on Civil and Political Rights

⁴⁶ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977

⁴⁷ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 paragraphs 17, 18 and 19

⁴⁸ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 para. 7.2

⁴⁹ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 para 10

after the date when the Covenant came into force for Canada.⁵⁰ On that question, it seems hard to argue with Lovelace's submission that the effects of exclusion from the Maliseet Indian group were "permanent"⁵¹ and the Committee did refer to "persisting effects of her loss of legal status" which "may amount to a violation of rights protected by the Covenant".⁵² It was certainly the view of Mr Nejib Bouziri in his individual opinion that "Mrs Lovelace is still suffering from the adverse discriminatory effects of the Act in matters other than that covered by article 27."⁵³ This shows that a communication based on non-discrimination, as well as other rights protected by the Covenant, would have been at least arguable. The Human Rights Committee acknowledged this argument, commenting that in such situations the rights of persons under article 12(1) ("the right to liberty of movement and freedom to choose his residence"), 17 (privacy, family, home and correspondence), 23(1) (family) and 24 (freedom from discrimination for children) may be affected.⁵⁴ The Human Rights Committee did not take the view that other provisions of the Covenant were not violated, they simply held that it was "not necessary" to determine whether other Covenant rights were violated following a finding of an article 27 violation.⁵⁵ The Committee's observation that article 27 was the provision of the Covenant which was "most directly applicable to this case"⁵⁶ may also be regarded as evidence for the view that a violation based on other rights protected by the Covenant could have been shown. If it was needed, still further support for the view that other Covenant rights were violated can be obtained from the individual

⁵⁰ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 para 11

⁵¹ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 para 9.9

⁵² United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 para 7.4

⁵³ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977, Appendix, Individual opinion appended to the Committee's views at the request of Mr Nejib Bouziri

⁵⁴ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 para 7.4

⁵⁵ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 para 12 and para 18

⁵⁶ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977 para 13.2

opinion of Mr Nejib Bouziri that articles 2(1), 3, 23(1) and (4) and 26 were breached.⁵⁷

A subsequent communication, *RL v Canada*,⁵⁸ shows that this is, of course, not the first suggestion that *Lovelace v Canada* could have been decided on general, individual rights grounds. The authors of the communication in *RL v Canada*, the Chief and members of the Whispering Pines Indian Band in British Columbia, Canada, submitted that “the Committee’s Views in the Lovelace case confirm that States cannot unreasonably restrict freedom of association and co-habitation of individual families, nor of the related families which comprise an ethnic, religious or linguistic community”⁵⁹ and submitted that loss of band membership for many of their children and grandchildren (as well as imposition of new band members by the state of Canada) interfered with their freedom of association under article 22 of the International Covenant on Civil and Political Rights⁶⁰ as well as their rights as persons belonging to a minority⁶¹. The Human Rights Committee did not have the opportunity to confirm or deny the interpretation adopted by the authors of the communication on its merits as the communication was inadmissible for non-exhaustion of domestic remedies.⁶²

Article 27 may also appear to provide unique protection (not available under any other article of the Covenant) in communications such as *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*.⁶³ In that decision involving economic

⁵⁷ United Nations Human Rights Committee, Communication No 24/1977, 30 July 1981, UN Doc: CCPR/C/13/D/24/1977, Appendix, Individual opinion appended to the Committee’s views at the request of Mr Nejib Bouziri

⁵⁸ United Nations Human Rights Committee, Communication No 358/1989 (28 November 1990) UN Doc: CCPR/C/43/D/358/1989

⁵⁹ United Nations Human Rights Committee, Communication No 358/1989 (28 November 1990) UN Doc: CCPR/C/43/D/358/1989 para 3.3

⁶⁰ United Nations Human Rights Committee, Communication No 358/1989 (28 November 1990) UN Doc: CCPR/C/43/D/358/1989 para 3.1

⁶¹ United Nations Human Rights Committee, Communication No 358/1989 (28 November 1990) UN Doc: CCPR/C/43/D/358/1989 para 3.7; the authors

⁶² United Nations Human Rights Committee, Communication No 358/1989 (28 November 1990) UN Doc: CCPR/C/43/D/358/1989 paragraphs 6.4 and 7

⁶³ United Nations Human Rights Committee, Communication No 167/1984 (10 May 1990), UN Doc: CCPR/C/38/D/167/1984

exploitation of land which the Lubicon Lake Band regarded as its territory,⁶⁴ the authors of the communication accused the State of violations of a number of rights protected by the Covenant including those protected by article 2, 6, 14, 17, 18, 23 and 26 as well as article 27.⁶⁵ The Human Rights Committee, however, determined that they should only consider the complaint under article 27, since the allegations of breaches of other rights were either not sufficiently substantiated or of a sweeping nature (or both)⁶⁶ and found a violation of article 27, but no violation of any other article. This might be regarded as evidence of protection provided by article 27 that would not be available under any other article of the Covenant.

However, the following three submissions should answer such a claim. Firstly, the objection to the other articles was not that the evidence was outside the scope of those rights but that the factual evidence was not sufficiently precise or compelling. Second, there is a tendency, when a communication could involve violations of overlapping articles, to find a violation of a particular article and then refuse to consider potential violations of the overlapping rights. That is a possible explanation for the Committee's refusal to find a violation of any right other than article 27. The third submission on this point is that the article 27 violation would now be determined using a contextual approach following *Kitok v Sweden*,⁶⁷ in which the focus would be on the genuineness of negotiations conducted between the Canadian Government and the Lubicon Lake Band and whether there was specific evidence of interference with the opportunity of the Band to maintain their culture, following the Views of the Human Rights Committee in communications discussed above such as *O. Sara v Finland*,⁶⁸ *Ilmari Länsman v Finland*,⁶⁹ *Mahuika v New Zealand*,⁷⁰ *Jouni*

⁶⁴ United Nations Human Rights Committee, Communication No 167/1984 (10 May 1990), UN Doc: CCPR/C/38/D/167/1984 para 2.2 and 2.3

⁶⁵ United Nations Human Rights Committee, Communication No 167/1984 (10 May 1990), UN Doc: CCPR/C/38/D/167/1984 paragraphs 16.1, 16.2, 16.3, 16.4, 27.2, 27.3, 27.4 and 27.5

⁶⁶ United Nations Human Rights Committee, Communication No 167/1984 (10 May 1990), UN Doc: CCPR/C/38/D/167/

⁶⁷ Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence)

⁶⁸ Communication No 341/1990 UN Doc: CCPR/C/50/4/431/1990

⁶⁹ Communication No 511/1992 UN Doc: CCPR/C/52/D/511/1992

⁷⁰ Communication No 547/1993, Views of the Committee adopted on 15 November 2000, UN Doc: CCPR/C/70/D/547/1993

E Länsman v Finland,⁷¹ *Äärelä v Finland*⁷² and *Jonassen v Norway*.⁷³ The individual opinion of Mr Nisuke Ando in the *Ominayak and Lubicon Lake Band* communication, in which Mr Ando expressed his “reservation to a *categorical* statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27”⁷⁴ may be regarded as a precursor to the later adoption by the Human Rights Committee of a contextual, rather than categorical, approach.

Related to communications in which article 27 was argued together with other articles of the ICCPR, and in which violations of other articles (but not article 27) were found are cases involving cultural, religious or linguistic issues in which article 27 might have been argued – but was not. A possible example (depending on the branch of Islam followed by the author of the communication and whether that could be regarded as a minority in Uzbekistan) is *Hudoyberganova v Uzbekistan*.⁷⁵ As Sir Nigel Rodley observed in his individual opinion, the Views of the Committee run into difficulty when the Committee claim to be taking into account the “specifics of the context” since it is difficult to find evidence of that⁷⁶; and, as Ms Ruth Wedgwood showed in her individual opinion, details such as the precise version of the hijab adopted by a particular person or group may vary widely.⁷⁷

In *Hudoyberganova v Uzbekistan*⁷⁸ the author claimed to be a victim of a violation of articles 18 and 19 of the Covenant. The case concerns the religious dress which the applicant believed that she should wear as a Muslim while studying in the Farsi

⁷¹ Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995

⁷² Communication No 779/1997 UN Doc: CCPR/C/73/D/779/1997

⁷³ Communication No 942/2000 UN Doc: CCPR/C/76/D/942/2000

⁷⁴ Italics added by this author; United Nations Human Rights Committee, Communication No 167/1984 (10 May 1990), UN Doc: CCPR/C/38/D/167/1984, individual opinion submitted by Mr Nisuke Ando

⁷⁵ United Nations Human Rights Committee Communication No 931/2000, 18 January 2005, UN Doc: CCPR/C/82/D/931/2000

⁷⁶ United Nations Human Rights Committee Communication No 931/2000, 18 January 2005, UN Doc: CCPR/C/82/D/931/2000, individual opinion by Committee member Nigel Rodley

⁷⁷ United Nations Human Rights Committee Communication No 931/2000, 18 January 2005, UN Doc: CCPR/C/82/D/931/2000, individual opinion by Committee member Ms Ruth Wedgwood

⁷⁸ United Nations Human Rights Committee Communication No 931/2000, 18 January 2005, UN Doc: CCPR/C/82/D/931/2000

Department of the Tashkent State Institute for Eastern Languages. At first glance, it might be thought that the applicant would certainly not be a member of a religious minority: it has been estimated that 88% of the population of Uzbekistan are Muslims;⁷⁹ however, this depends on which sub-set of the Islamic faith the author of this communication belonged to. The Human Rights Committee found the State party in violation of article 18, in circumstances which (if the author of the communication had been a member of a minority, either within Uzbekistan or another State in which Muslims are a minority) article 27 could also have been applied.

Conclusion: satisfying the duty of identity-conscious decision making

Actual participation in decision making by members of a minority, while desirable, is not always essential for the protection of minority rights. It can be recalled that, for States parties to the Framework Convention for National Minorities, a relevant obligation is below:

“The 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.”⁸⁰

It has been noted (by this author) that to his right refers to the creation of necessary conditions, not a guarantee of participation. This can be compared to an attempt under article 25 of the International Covenant on Civil and Political Rights to argue that representatives of the Mikmaq tribal society in Canada should have been invited to attend constitutional conferences, in *Chief Donald Marshall and Grand Council*

⁷⁹ CIA World Factbook entry on Uzbekistan

<https://www.cia.gov/cia/publications/factbook/geos/uz.html#People>

⁸⁰ Article 15 of the Framework Convention on National Minorities

*of the Mikmaq tribal society v Canada.*⁸¹ The Human Rights Committee responded that:

“Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, *article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in public affairs.*”⁸²

It is submitted that had the authors of the communication tried an identity-conscious argument under article 27 in these circumstances, (bearing in mind the jurisprudential developments in *Kitok v Sweden* and subsequent communications⁸³), then the Human Rights Committee would have considered whether the Mikmaq tribal society had a contextual right to have their participation taken properly into account in the decision-making process about which individuals and groups were invited to participate, as opposed to an unconditional right to be included in the constitutional conferences. This is an instance of the wider principle that what is essential is that the decision-makers demonstrate that they have considered minority rights as a relevant consideration in the process of decision-making. An example is that, in *Mahuika v New Zealand*, the State party avoided a violation of article 27 ICCPR by “engaging itself in a broad consultation before proceeding to legislate and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article

⁸¹ United Nations Human Rights Committee, Communication 205/1986 (3 December 1991) UN Doc: CCPR/C/43/D/205/1986

⁸² United Nations Human Rights Committee, Communication 205/1986 (3 December 1991) UN Doc: CCPR/C/43/D/205/1986 para 5.5

⁸³ *Kitok v Sweden* Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence), subsequent communications include *O. Sara v Finland* Communication No 341/1990 UN Doc: CCPR/C/50/4/431/1990; *Ilmari Länsman v Finland* Communication No 511/1992 UN Doc: CCPR/C/52/D/511/1992; *Jouni E Länsman v Finland* Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995; *Äärelä v Finland* Communication No 779/1997 UN Doc: CCPR/C/73/D/779/1997 and *Jonassen v Norway* Communication No 942/2000 UN Doc: CCPR/C/76/D/942/2000

27.”⁸⁴ It should be remembered that, according to the Human Rights Committee, the State party was under a continuing duty under article 27 to “bear in mind” that “measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group.”⁸⁵

It has been shown that one basis in international law for such a “right to minority rights as a relevant consideration in public decision-making” can be regarded as within the range of plausible interpretations of the terms of the Framework Convention on National Minorities. In the terms of Article 4(2):

“The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to a majority. In this respect, they *shall take due account of the specific conditions of the persons belonging to national minorities.*”⁸⁶

This right that minority conditions are taken into account comes into greater focus when particular policy issues are examined. One example is government policy on the implementation of the right to education. As Guillaume Siemenski has noted, international instruments relating to the education rights of persons belonging to minorities do so in general terms. Article 4.3 of the United Nations Declaration on the Rights of Minorities provides that:

“States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.”

⁸⁴ Previously cited above; the reference is United Nations Human Rights Committee, Communication No 547/1993 (15 November 2000) UN Doc: CPPR/C/70/D/547/1993 para 9.8

⁸⁵ United Nations Human Rights Committee, Communication No 547/1993 (15 November 2000) UN Doc: CPPR/C/70/D/547/1993 para 9.9

⁸⁶ Italics added

The use of the phrase “wherever possible” could be taken to deprive this clause of any real effect. If States have free choice to determine that measures for education in the mother tongue of minorities are not possible then the right has been emptied of value. If the principle of effectiveness is applied, the paragraph should be found to contain some meaning. A plausible meaning is that State institutions with responsibility for education should be able to show that they have genuinely considered the feasibility of providing mother tongue education. If they have failed to engage in a genuine decision-making process, in which they have reasonably considered the needs of the minorities, they would have failed to implement this right.

Conclusion

This thesis defends the position that minority rights has generally been understood according to either a strong or a weak minority rights paradigm, that neither the strong nor the weak model should solely govern the future direction of minority rights and that there is a third, emerging model, that of identity-conscious decision-making, which (unlike the other models) can satisfy both of the principles of effectiveness and equality.

The strong minority rights model would satisfy the principle of effectiveness by providing for rights for minorities that would go beyond the rights available to all under general, individual rights. However, the strong minority rights model would offend the principle of equality and involve a real risk that States would withdraw from participation in international mechanisms which protect minority rights (such as the United Nations Human Rights Committee) because the strong minority rights model, precisely because it satisfied the principle of effectiveness by providing for group-held rights which generate a perception among states that such minority rights would be an unacceptable threat to the territorial integrity of States.¹

The weak minority rights model satisfies the principle of equality by providing for an interpretation of minority rights that does not extend beyond the individual rights available to all (such as freedom of association, freedom of expression and freedom of thought, conscience and religion).² Support for the view that the weak model of minority rights does not extend beyond such general individual rights can be found in the analysis of Views of the United Nations Human Rights Committee on a series of communications involving minorities.³ But the success of the weak model in

¹ In Chapter Three, under the heading 'Should minorities be able to claim self-determination?'

² See Chapter Six, under the heading 'The extent of weak minority rights protection and the emergence of a contextual, identity-conscious dimension to Views of the UN Human Rights Committee on article 27 communications under the ICCPR'

³ See Chapter Six, under the heading 'Communications to the United Nations Human Rights Committee citing article 27 and other articles of the International Covenant on Civil and Political Rights'

satisfying the principle of equality is its downfall since an approach that does not provide for protection beyond that available through individual, general rights offends the principle of effectiveness.⁴ The value of ethnodiversity, the liberal pluralist approach to identity and the exposing of the myth of state neutrality provide justifications for special minority rights.⁵ This thesis aims to defend the position that the model of identity-conscious decision-making can satisfy both principles. The identity-conscious model would satisfy the requirement of effectiveness by providing for positive duties to acquire disaggregated data on minorities⁶ and active investigation of the effects of law and policy on members of minorities including measures to engage the participation of members of minorities in decisions which affect them. Such duties can be based on the Framework Convention on National Minorities⁷ which imposes on States parties a duty to “create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs”⁸ as well as the Views of the United Nations Human Rights Committee on a series of communications following *Kitok v Sweden*; ⁹ they can involve duties that can be applied to decision-

⁴ See Chapter Six, under the heading ‘The extent of weak minority rights protection and the emergence of a contextual, identity-conscious dimension to Views of the UN Human Rights Committee on article 27 communications under the ICCPR

⁵ Chapter Four provides a justification of special rights for members of minorities, going beyond the individual, general rights that are available to all.

⁶ See Chapter Three under the heading Positive duties towards members of minorities in access to health and education’

⁷ Article 4(2) of the Framework Convention on National Minorities, discussed in Chapter Six under the heading ‘Enabling participation and “appropriate measures”: a (limited) basis for identity-conscious decision-making in the Framework Convention on National Minorities and the UN Declaration on Minority Rights’

⁸ Article 15 of the Framework Convention on National Minorities, discussed in Chapter Six under the heading ‘Enabling participation and “appropriate measures”: a (limited) basis for identity-conscious decision-making in the Framework Convention on National Minorities and the UN Declaration on Minority Rights’

⁹ See the Views of the United Nations Human Rights Committee in communications discussed under the heading ‘Communications to the United Nations Human Rights Committee citing article 27 (and not any other articles) of the International Covenant on Civil and Political Rights’, in particular *Kitok v Sweden* Communication No: 197/1985; UN Doc: CCPR/C/33/D/197/1985(Jurisprudence), other examples of cases in this group include *O. Sara v Finland* Communication No 341/1990 UN Doc: CCPR/C/50/4/431/1990; *Ilmari Lämsman v Finland* Communication No 511/1992 UN Doc: CCPR/C/52/D/511/1992; *Jouni E Lämsman v Finland* Communication No 671/1995 UN Doc: CCPR/C/58/D/671/1995; *Äärelä v Finland* Communication No 779/1997 UN Doc: CCPR/C/73/D/779/1997 and *Jonassen v Norway* Communication No 942/2000 UN Doc: CCPR/C/76/D/942/2000

making by the judicial as well as the executive branch of the state: *Lalonde v Ontario*.¹⁰ Further evidence of the effectiveness of the identity-conscious model is included in the argument that the State, under this model, has an ongoing duty since States must monitor the effects of their general policies and measures in order to determine whether they have prejudicial effects on particular groups: *Shanaghan and Kelly v United Kingdom*¹¹ and that duties under the identity-conscious model can involve horizontal effect: *Islamic Academy v. Karnataka*.¹²

This thesis aims to defend the model of identity-conscious decision-making from the counter-argument that it would represent the illegitimate reintroduction of the race-conscious model¹³ which was used to justify the institutionally racist practice of racial segregation in the United States which was accepted by the United States Supreme Court in *Plessy v Ferguson*.¹⁴ It is argued that, instead, the model of identity-conscious decision-making draws support and inspiration from the dicta of the first African-American Justice of the United States Supreme Court, Thurgood Marshall J., in *Peters v Kiff*¹⁵, that inclusion of an identity-conscious requirement ensures that the State will have the benefit of a human perspective that may have “unsuspected importance”¹⁶ Like the Constitution of the United States in the views of Ginsburg and Souter JJ. in the United States Supreme Court decision of *Gratz v Bollinger*, the model which this seeks to defend here incorporates both identity-blindness and identity-consciousness

¹⁰ Ontario Court of Justice, General Division (the Divisional Court) 181 DLR (4th) 263, 70 CRR (2d) 136, 48 OR (3d) 50

¹¹ European Court of Human Rights, Application Nos 37715; 30054/96, judgements of 4 May 2001, Third Section, discussed in Chapter Five under the heading ‘Identity-conscious decision-making as the meeting point of non-discrimination and minority rights’

¹² (1991) AIR 1362; see Chapter Five, under the heading ‘The limitation of the separation of powers’

¹³ See Chapter Five under the heading ‘A precursor to identity-conscious decision-making: ‘race-consciousness’ in the jurisprudence of the United States Supreme Court’

¹⁴ 163 U.S. 537 (1896) Supreme Court of the United States

¹⁵ 407 U.S. 493, 502 – 504 (1972) Opinion of Marshall J., joined by Douglas and Stewart, JJ. For this point, I am grateful to Professor David Cole (1999) “No Equal Justice: Race and Class in the American Criminal Justice System” New York: The New Press p 113.

¹⁶ 407 U.S. 493, 502 – 504 (1972) Opinion of Marshall J., joined by Douglas and Stewart, JJ; see Chapter Five under the heading ‘A precursor to identity-conscious decision-making: ‘race-consciousness’ in the jurisprudence of the United States Supreme Court’

Further support for identity-conscious decision-making is provided by the duty of “special care” for the “weaker sections of the people” in Article 46 of the Constitution of India and in the jurisprudence of the Supreme Court of India.¹⁷ It is argued that, following *State of Madras v Champakam Dorairajan*¹⁸, a defined space in which the identity-conscious model can operate can be included as an exception in a body of law for which the identity-blind approach is the general rule.¹⁹ This work shows that jurisprudence of national courts and international mechanisms has the capacity to build a new model for the protection of minority rights, including “substantive limitations on government action”: *Reference re Secession of Quebec*²⁰ while respecting the separation of powers: *Ram Bhagat Singh v. Haryana*²¹ and *Hitrakshah Samiti v Union of India*.²²

Much of this work has been concerned with the explanation and critique of strong and weak models. Strong and weak approaches to the definition of *minority*²³ and strong and weak approaches to the definition of *minority rights*²⁴ were both identified. For strong versions of minority rights, minorities have been characterised as smaller nations within larger multinational states (for example, national groups within the former Yugoslavia and the former Union of Soviet Socialist Republics) whereas for weak minority rights models, minorities are perceived to be (primarily, but not exclusively) immigrant populations differentiated by ethnic, religious or linguistic characteristics. From these general approaches a typology of minorities and minority rights emerges: national minorities enjoying strong minority rights,

¹⁷ See Chapter Five, under the heading ‘A duty of special care: the emerging principle of identity-consciousness in the Constitution of India and jurisprudence of the Supreme Court of India

¹⁸ (1951) AIR 226 Supreme Court of India’

¹⁹ See Chapter Five, under the heading ‘A duty of special care: the emerging principle of identity-consciousness in the Constitution of India and jurisprudence of the Supreme Court of India’

²⁰ Supreme Court of Canada [1998] 2 SCR 217 at pp. 248 – 249; the *Quebec Secession Reference* case was cited as authority for this point in *Lalonde v Ontario* 181 DLR (4th) 263 at para 40

²¹ (1990) SCR (2) 329 Supreme Court of India; see Chapter Five, under the heading ‘The limitation of the separation of powers’

²² (1990) AIR 851; see Chapter Five, under the heading ‘The limitation of the separation of powers’

²³ Chapter One

²⁴ Chapter Three

while ethnic, religious and linguistic minorities experience weaker minority rights protection.

It was accepted that the existing weak model of minority rights, with its classifications of ethnic, religious and linguistic minority rights, have some capacity for the sensitivity to particular contexts since the Dalit population of South Asia can be brought within the existing weak minority rights paradigm.²⁵ This thesis defends a relatively generous approach to the definition of minority which is more closely compatible with the weak conception of minority rights than the strong model. Chapter One aims to show that, in the interpretation of the classification of 'national' minority, a weak conception according to which groups with differing ethnic, religious or linguistic characteristics should be preferred to the strong minority rights conception which would incorporate a distinction between national minorities and ethnic, religious or linguistic minorities.²⁶ Chapter One provides, therefore, a defence of a relatively weak approach to the definition of minority and a series of arguments which provide reasons for opposing the conception of defining minority that is most consistent with the strong model of minority rights. However, the thesis aims to justify the provision of special minority rights that go beyond the level of rights protection offered by general individual rights.²⁷ This thesis aims to show that the weak minority rights model does not provide the protection that goes beyond general individual rights (such as freedom of association, freedom of expression and freedom of thought, conscience and religion).²⁸ Another way in which Chapter One provides support for a preference for the model of identity-conscious decision-making, a contextual approach to minority rights, is by highlighting the importance of "geographical characteristics, such as density and history" for minority rights, if not for the definition of minority.²⁹

²⁵ Chapter Two

²⁶ Chapter One under the heading of 'The classification of national minority'

²⁷ Chapter Four

²⁸ Chapter Six

²⁹ Chapter One under the heading of "Geographical characteristics, such as density and history"

The thesis also defends the position that minority rights should adopt an identity-conscious approach in which the duties of State decision-makers include a positive duty to acquire disaggregated data on minorities within their jurisdiction and ongoing monitoring of the status of minorities. A contextual, identity-conscious approach is well-suited to ensuring that public decision-makers have regard to the effects of measures aimed to provide equality including the risk of the creation of what in India is called a 'creamy layer,' a privileged group within a minority who manage to monopolise the benefits of minority rights protection.³⁰ The Indian judiciary highlighted this danger in decisions such as *State of Kerala v N.M. Thomas* in which Krishna Iyer J. vividly referred to the danger that the benefits of reservations were snatched away by "the top creamy layer of the 'backward' class or caste, thus keeping the weakest always weak and leaving the fortunate layers to consume the whole cake."³¹

The thesis aims to show how an identity-conscious decision-making model has been emerging at a national level in the jurisprudence of the Supreme Courts of Canada, India and the United States³² as well as at international level in the jurisprudence of the United Nations Human Rights Committee.³³ It is significant that most of the forward momentum in this aspect of minority rights has come through judicial and quasi-judicial work rather than international instruments. This indicates the capacity of judicial systems at international and national levels to point the way forward for international legal norms when States are slow to establish binding international instruments. There is, of course, a potential danger that national courts and international mechanisms may cross the line from permissible judicial creativity into an unacceptable level of judicial legislation that would dictate policy choices to States and become unacceptable, just as it has been argued that a strong minority rights model would be unacceptable.³⁴

³⁰ This is discussed in Chapter One under the heading of non-dominance.

³¹ *State of Kerala v N.M. Thomas* (1976) AIR 490 Decision of the Supreme Court of India, opinion of Krishna Iyer J. at para. 149

³² Chapter Five

³³ Chapter Six

³⁴ Chapter Three, under the heading 'Should minorities be able to claim self-determination?'

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