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The Experience of the former Yugoslavia***

Minority rights have seen substantial advances over the past decade. A marginal topic during the Cold War, they have since entered mainstream debates and instruments of human rights. The establishment of the High Commissioner on National Minorities of the OSCE, the Framework Convention for the Protection of National Minorities of the CoE and the Copenhagen Criteria for the admission of new members to the EU, have each provided for substantial advances in the promotion of minority rights.

Minority rights, nevertheless, remain largely undefined and international standards are vague and evasive, not the least of which is the definition of ‘minorities’ themselves.¹ Although ‘the highest European standards’ remain often invoked by both minority leaders and governments in Southeastern Europe, the term is largely devoid of meaning. In addition to protecting minorities from discrimination, minority rights have focused on two key areas: linguistic rights and educational rights.

These two areas have been supplemented by the concept of political participation as a part of minority rights. Including political participation in the larger concept of minority rights can be based on two arguments: First, that other rights and prevention of discrimination of minorities cannot be effectively ensured, unless the minority itself is actively partaking in the political decision-making processes which govern the protection of minority rights. Thus, without participation other mechanisms of minority rights protection can be substantially weakened. Second, minorities run the risk of being excluded from the political system without special protective measures. Particularly in countries with mobilized ethnic nationalism, majorities (and minorities) have been unlikely to vote for parties or candidates of other nations or ethnic groups. The odds of political representatives from minority communities successfully partaking in the political system are thus limited. Furthermore, a number of approaches to democracy run the risk of permanently excluding minorities. Most obviously, the British-style ‘First-Past-The-Post’ electoral system has the feature of excluding dispersed minorities from representation.² Additionally, electoral districts can be drawn to favour the dominant nation. A number of other tools intentionally or inadvertently can preclude or minimize the minorities’ share of representation in political institutions. Thus, a number of scholars of divided societies and ethnic relations have concluded that the

¹ See Tim Potier, ‘Regionally Non-dominant Titular Peoples: The Next Phase in Minority Rights?’, *Journal on Ethnopolitics and Minority Issues in Europe* (July 2001): <http://www.ecmi.de/jemie/download/JEMIE06Potier11-07-01.pdf>, pp. 2-3.

² It favours, however, territorially concentrates groups, such as voters in favour of Scottish independence in the House of Commons.

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conventional institutions of democracies without minorities are insufficient to allow for a stable democratic system in diverse societies.³

In addition to the ‘injustice of procedural democracy’⁴, stability provides a key argument for specific measures to include minorities. Alienation of minorities from their state of residence and responses ranging from extraparliamentary organizations to armed secessionist movements have been key challenges to states in recent decades. It is thus in the interest of state stability to provide for political inclusion of minorities, in order to avoid the consequences of exclusion. While most would agree on the need to devise special institutions in divided societies, little consensus exists on what type of institutions to pursue alternatively. The controversies derive from two conceptual differences. Some approaches concentrate on *representation*, while others focus on *cooperation*.⁵

In debates about minority rights, the emphasis has been put on representation, as exemplified by the first article of the Lund Recommendations on the Effective Participation of Minorities in Public Life:

Effective participation of national minorities in public life is an essential component of a peaceful and democratic society. Experience in Europe and elsewhere has shown that, in order to promote such participation, governments often need to establish *specific arrangements* (emphasis added) for national minorities. These Recommendations aim to facilitate the inclusion of minorities within the State and enable minorities to maintain their own identity and characteristics, thereby promoting the good governance and integrity of the State.⁶

The Lund Recommendations of 1999, drafted by international experts for the High Commissioner on National Minorities, is the first comprehensive list of mechanisms for achieving minority inclusion in public institutions.⁷ While referring to international Human Rights protection mechanisms, the Lund Recommendations move well beyond international legal standards and instead draw from the rich experience of ensuring minority representation extant in numerous European countries. This contribution argues that political participation constitutes an important aspect of minority rights protection.

³ Donald L. Horowitz, ‘The Challenge of Ethnic Conflict. Democracy in Divided Societies,’ 4(4) *Journal of Democracy* (1993), pp. 18-37; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, London, 1977), 25-52.

⁴ Expression borrowed from Thomas W. Simon, ‘The Injustice of Procedural Democracy,’ in Džemal Sokolović and Florian Bieber (eds.), *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina* (Aldershot, 2001), 11-28.

⁵ This divide is usually associated with the two authors Lijphart and Horowitz. For a short overview of the two alternative approaches see Timothy D. Sisk, *Power Sharing and International Mediation in Ethnic Conflicts* (Washington, 1996), 34-45.

⁶ OSCE High Commissioner on National Minorities, Lund Recommendations on the Effective Participation of National Minorities in Public Life, September 1999, Art. 1/1.

⁷ The Framework Convention for the Protection of National Minorities contains only a vague commitment in Art. 15 to ensure the minorities participation in public life.

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Instead of being understood as right in and of itself, political participation should be conceived of as an *instrument* of minority rights protection. Recent experience in the former Yugoslavia, as will be reviewed here in broad strokes, suggests that minority rights without minority participation in the institutional framework of minorities' rights protection and other public institutions has been largely ineffective. At the same time, political participation of minorities alone, without a comprehensive framework of minority rights protection, as again will be explored here on the basis of examples in the former Yugoslavia, are equally inadequate for securing the rights of minorities. In fact, there has been a danger that in the former Yugoslavia political representation has received excessive importance over substantive minority rights.

The argument that minorities' rights cannot be protected without participation of minorities in public life and in the mechanisms of protection is a pretty straightforward one. First, the protective mechanisms run the risk of not being relevant for the minority community; that is, they might focus on the protection of educational rights, whereas social rights might be of more fundamental importance. This has been a common challenge with the adequate protection of Roma communities across Eastern Europe. Second, enforcement has been a critical difficulty with minority rights protection in the region.⁸ Laws have often been largely exemplary, enacted only to satisfy international demands and to meet criteria for accession to international organizations. States have been, however, reluctant to implement these laws. This has been particularly the case in Tudjman's Croatia and in the former Yugoslavia during the Milošević era. The heredity for minorities was substantially worse than outlined in minority rights instruments, which existed *pro forma*.⁹ Admittedly, neither of the two were democracies during the 1990s; thus the lack of implementation of legal and democratic standards were not limited to minorities. At the same time, similar difficulties, albeit less pronounced, can be found in the democracies of the region.¹⁰ Enforcement through representation in state institutions and some autonomous minority institutions, such as found in Hungary, are thus crucial for the protection of minority rights.

The cases of Bosnia-Herzegovina and Macedonia exemplify, however, that political representation alone cannot suffice in protecting the interests of the different ethnic groups and in stabilizing the two countries. Nondominant groups¹¹ enjoyed broad

⁸ Already the Minority Treaties, concluded with some countries after World War I, largely failed to improve the life of minorities due to the absence of enforcement and implementation.

⁹ Tibor Varady, 'Minorities, Majorities, Law, and Ethnicity: Reflections of the Yugoslav Case', 19 (1) *Human Rights Quarterly* (1997), 9-54.

¹⁰ EU Accession Monitoring Program, *Monitoring Minority Protection in the EU Accession Process* (Budapest, 2002).

¹¹ In Bosnia, the term 'minorities' is reserved for communities other than the three 'constituent peoples' (Bosniaks, Serbs, Croats). Thus, here the term 'nondominant groups' refers to any of the three constituent people where they are not in a dominant position. Serbs in the Federation, Bosniaks and Croats in the Serb Republic would qualify. Furthermore Croats in Sarajevo or Bosniaks in Western Herzegovina would equally qualify. Key is the relationship to the respective layer of governance. Due to the dispersion of power among multiple layers, one individual can be nondominant in his/her interaction with one layer, but

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political representation in parliament and in government. Both in Macedonia since the early 1990s and in Bosnia since the end of the war, coalition governments existed that incorporated representatives of the different groups. While Macedonia did not possess specific tools for ensuring representation of Albanians in parliament or government, Albanian parties were at no point excluded from the political process. In Bosnia, equitable representation in parliament and government is constitutionally regulated at the state level and in the Bosniak-Croat Federation. Only in the Serb Republic the two nondominant groups, Croats and Bosniaks, were not represented in government before the constitutional changes of 2002, but did sit in the entity's parliament.¹² This degree of representation did not, however, provide sufficient safeguards for the protection of the two nondominant groups. In Macedonia, the absence of adequate representation of Albanians in state administration, especially in the police force and the limited ability to use Albanian in public administration, as well as other minority-rights-related issues furthered broad support among the Albanian population for the armed conflict during the spring and summer of 2001. In Bosnia, nondominant groups fail to enjoy adequate rights in terms of employment and schooling, furthermore frequently facing discrimination through local administrations. This has been a key factor in delaying the so-called 'minority returns'—refugees or internally displaced persons returning to their prewar residence in areas where they now constitute a nondominant group.

In both cases, the argument could be made that the inadequacies of minority protection derive from insufficient political representation. There is little doubt that there has been inadequate political representation of nondominant groups in both cases. Albanian parties tended to take less seats in the Macedonian parliament than their percentage of the overall population would suggest; Croat and Bosniak parties were not included in the government or the administration of the Serb Republic before 2002.¹³ Nevertheless, a number of reasons suggest that enhanced political representation is not the solution to facilitating the protection of the rights of nondominant groups.

First, political representation is largely unconcerned with cooperation between the different communities' representatives in the different political institutions and also less inclined to decree a share in the decision-making process. The reason for this is obvious: While it is easy to find legal instruments to ensure representation, neither cooperation nor codecision-making is easily legislated. In a number of cases, representation, even at the governmental level, does not translate into participation in the decision-making process.

not with another. In Macedonia, the term minority is more clear-cut, but no less contentious. Thus, the use of 'nondominant people' primarily refers to the Albanian community, which has aspirations beyond the mere safeguard of minority rights.

¹² On the different institutional mechanisms see Florian Bieber, 'Power-sharing after Yugoslavia. Functionality and Dysfunctionality of Power-Sharing Institutions in Post-war Bosnia, Macedonia and Kosovo,' Paper presented at the conference "From Power-sharing to Democracy: Post-conflict Institutions in Ethnically Divided Societies," 8-10.11.2002, London, Canada.

¹³ In 2001 for the first time a Bosniak became minister in the Serb Republic.

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In fact, representation can lead to pluralistic window-dressing with the dominant nation controlling the political process.

Second, in a system without firm legal safeguards for minority rights, political representation has to permanently *negotiate* these rights. ‘Negotiating’ rights implies that certain minimum standards of protection are not guaranteed, but have to be continuously fought for or sought by the representatives of the respective community. Additionally, the representatives of the group might excessively broaden the agenda of issues that are part of the rights or protective measures required for the group, leading to an ‘ethnification’ of broad areas of the political process which extend well beyond the narrow community interests. As ‘ethnic issues’ have an additionally mobilizing function with the electorate and might have additional institutional safeguards (veto rights), parties have an interest in extending the sphere of ‘ethnic issues’.

Third, protecting the communities through political representation is likely to benefit larger communities with adequate representation while disadvantaging smaller groups who, either due their size or their lesser political mobilization, are less able to pursue their demands. Thus, minorities beyond the three constituent nations in Bosnia and minorities other than Albanians in Macedonia have been largely excluded from negotiations of the protection of the rights of the different communities.

Fourth, representation *from* the nondominant group does not equal complete representation *of* the whole group. Just as within majorities, minority communities often support largely different political options. ‘Rights’ for the Croat minority in the Serb Republic will be perceived to be largely different whether the deputy is a Croat from the multiethnic Social Democratic Party or the nationalist Croat Democratic Community. As minority representation inherently will be less numerous than that of the majority, whole diversity of the nondominant community will not necessarily be represented. It could be argued that minority rights protection can also protect the community from some its own political leaders.

To conclude, just as general instruments for the protection of human rights and the rule of law are also deemed necessary in functioning democracies, minority rights cannot be short-circuited by political representation. Few would argue that a system of government could work with human rights protection and the rule of law, but without political representation of the citizens of the country; that is, without democracy. Similarly, minorities can only be included in their state through representation *and* the safeguard of both the rights of the group and the members of the group. Political representation without protection of minority rights is thus likely to result in instability and arbitrariness, like a state governed by elections, but without the legal safeguards preventing abuse by those elected.