

Minority Rights: A Major Misconception?

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The third-rate mind is only happy when it is thinking with the majority. The second-rate mind is only happy when it is thinking with the minority. The first-rate mind is only happy when it is thinking.

A. A. Milne

PROLOGUE: MINORITIES AND MINARETS

On 29th November, 2009, Switzerland accepted a people's initiative to amend Article 72 of its constitution (on Church and State) with a third section:

The construction of minarets is prohibited.

This decision resulted not only in ongoing debate within the country itself, but also in an international outburst of indignation, not least in countries in which freedom of religion is categorically more problematic than in the pricey republic of the conjurers. The Islamic Republic of Iran, for example, summoned the Swiss ambassador to account for the Islam-inimical decision of his people. The dominant feeling within Europe was one of astonishment: this had happened in a country with an impressive political history of peaceful coexistence between people of different cultures and creeds; a state based upon a decentralised system of government; a constitution embodying fundamental rights, including both equality before the law and freedom of religion and conscience; and a fair record of international human rights compliance. Stunningly, all such observations had also been made in the debate in both houses of the national parliament in Bern, where the people's initiative had to be validated before it could be put to the popular vote.

Meanwhile, appeals against the minarets ban have already been submitted to the European Court of Human Rights in Strasbourg. But the socio-cultural background of the decision, its actual content and its international status, are not our major concern here today. Above all, the change of the Swiss constitution is illustrative of the contemporary human rights problematique, not only from a substantive perspective, but also with regard to certain procedural aspects.

The decision was taken with a turn out of 53% and a majority of 57.5 %. Hence, the initiative passed even though less than one third of the electorate had actually voted in its favour; yet, such were the rules of the game. The point is that, in the Swiss system of public-political decision-making, assurances against the popular whim are not sought in qualified majorities –such as the two-thirds majority in the second parliamentary reading of a proposal for constitutional change required in The Netherlands– but in the authority of the federal assembly to validate or invalidate an initiative that had secured the requisite number of more than 100,000 signatures.

When a people's initiative meets the formal requirements, the federal assembly has to discuss two proposals from its governing council: one on validation and one on endorsement. If the initiative is validated but not endorsed, it will be put to the popular vote with a recommendation from parliament to reject it. This is precisely what happened in the case of the minarets. Both validation and the recommendation to reject the people's initiative were accepted with huge majorities.

Article 139, § 3 of the Swiss constitution sets out the grounds for invalidation:

If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part.

Since the proposed constitutional change had been formulated in clear and unequivocal wording, the discussion in the Federal Assembly naturally concentrated on its compatibility with 'mandatory' provisions of international law, *ius cogens* in other words. The obvious question posed by this course of events, albeit rarely discussed, is "How on earth could the *Bundesrat* (the Federal Council) recommend validation and the *Bundesversammlung* (Parliament) approve that"? This query is all the more striking if one considers the initiative's multiple infringements of positive law, which the *Bundesrat* had already enumerated in its proposal to Parliament. Incompatibilities were noted in respect of Switzerland's own Constitution: the equal treatment requirement and the non-discrimination principle (Article 8), freedom of religion and conscience (Article 15), and guarantee of ownership (Article 26).

Furthermore, the initiative was considered to be in breach of Articles 9 (freedom of thought, conscience and religion) and 14 (the non-discrimination principle) of the European Convention on Human Rights. The United Nations Covenant on Civil and Political Rights was considered violated in respect of freedom of thought, conscience and religion (Article 18) and the prohibition of governing with distinction to religion (Article 2).¹ Stunningly, the Swiss Federal Council did not regard any of these violations of international human rights norms as a contravention of *ius cogens*. What then, one might wonder, is the meaning of that phrase? Remarkably, this has not been catalogued, let alone unequivocally determined, although there is general agreement on prohibitions against aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, apartheid, slavery, and torture. The way in which the Swiss government treated the matter is generally in line with states' practice of interpreting the question of infringement of *ius cogens* according to their own authority (Stüssi 2008).²

In the parliamentary debate on the proposal, two observations struck me. One was the reference to other states that had limited the construction of religious edifices. Indeed, it is not surprising that the issue of compliance with *ius cogens* is judged in respect of actual states' practice, which in quite a number of countries tends to be rather restrictive when it comes to Christian churches. (Incidentally, as one of the delegates ironically remarked, the canton of Vaud –'reformed' until 2003³– repealed its prohibition of Catholic church towers only in 1930; strikingly, after eighty years of erecting Catholic towers, the majority of the inhabitants of its capital Lausanne are today Catholic.) More amazing from a contemporary perspective is the delegates' overwhelming adherence to their citizens' "democratic right" to take majority decisions on their Constitution by popular vote. As this freedom entails the

¹ See the message of the Federal Council on the People's initiative "Against the Construction of Minarets", Federal Council 08.061, 27 August 2008, and the Deliberations on that proposal, Federal Parliament 29.11.2009, VH 08.061

² The author describes how "the decision to hold the proposed ban on minarets as valid is equally as legal as holding it invalid" (144) based upon the conflicting *ius cogens* rights to freedom to practice one's religion and the right to self-determination.

³ Through the new Constitution, the Reformed Church lost its established status to become a public institution on the same footing as other religious institutions.

responsibility to watch over the realisation of that charter's fundamental rights, the Swiss government's action raises the question of minorities' protection in the context of majority rule—our subject today.

DEMOCRACY AS MAJORITY RULE

Notably, democracy's way of handling conflicts of interests in a public-political community is not simply majority rule. To illustrate, let us take Abraham Lincoln's definition—government of, by and for the people—as a starting point. Government of the people means not only self-determination but *representative government*; government by the people signifies *participatory government*; and government for the people may be seen as *accountable government*. The three concepts are obviously interrelated, as they are all connected to principles in the formation, use and limitation of political power. Thus, democracy implies that public-political power be representative, participatory and accountable to both the majority and the minority if it is to be legitimate.

Even when confined to just the representative component of democratic government, majority rule entails, in fact, *three* basic principles: (1) decisions rest on majorities; (2) dissenters acquiesce; and (3) majorities respect and protect minorities.

As to the operation of the first principle, it is well known that when it comes to highly contested issues, simply counting heads without any preliminary process of consultation and persuasion is not conducive to peaceful government. Thus, although the will of the majority is the basis for upholding the decision, a connection with the democratic prerequisite of participatory government is essential to the decision's legitimacy.

The second principle naturally presumes that the rules of the decision-making game have been followed, both in the formation and in the execution of political power. "When the majority has once spoken, it is the duty of the minority to submit", Tocqueville noted already in 1835 in his *Democracy in America* (428). Minority compliance exemplifies the rule of non-violence, implying that opposition, protest, and resistance be confined to civil disobedience,

though even that method of non-violent confrontation of government and the laws enacted by parliament already tends to be politically destabilising. In practice, the smooth acceptance of majority decision-making by dissenting minorities requires an adequately functioning rule of law, based on an accessible and independent judiciary within the context of limited government respecting and protecting people's fundamental interests by law.⁴

This brings us to the third principle, which has been strikingly worded in the European Court of Human Rights' *Grand Chamber* judgment in the case of *Sørensen and Rasmussen v. Denmark*:

[D]emocracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and *avoids any abuse of dominant position* (2006: 26, emphasis added).

Yet, this is perhaps the most problematic aspect of democracy in our world today as minorities still tend, poignantly, to be unprotected,⁵ precisely at a time when nations become increasingly heterogeneous. Notably, peaceful settlement of disputes arising from conflicting interests flows from this third principle and requires not only participation in decision-making by all concerned, but also a well-functioning rule of law both to protect minorities' interests and to gain their acquiescence in decisions taken by the majority.

⁴ It is in this respect that Tocqueville warned against a tyranny of the majority: "I do not say that there is a frequent use of tyranny in America at the present day; but I maintain that there is no sure barrier against it, and that the causes which mitigate the government there are to be found in the circumstances and the manners of the country, more than in its laws" (1835: 272).

⁵ I see this as part of the huge "human rights deficit" that still abounds after more than sixty years of the international venture for the realisation of human rights (de Gaay Fortman 2006b). M.A. Mohamed Salih has reflected on the political aspects of this deficit in an essay entitled 'Minorities and the Political in the Human Rights Deficit' (2003).

MINORITY RIGHTS: FOR WHAT PURPOSE?

Coming back now to the Swiss people's initiative, the religious issue as such –constructing a minaret as a culturally specific type of tower connected to an already existing edifice of worship– is obviously rather trivial compared to the *collective discrimination* that such a constitutional prohibition directed towards Muslims entails. Strikingly, this decision was taken in a country with only four existing minarets, where the great majority of Muslims were secular refugees from the former Yugoslavia. In conflict studies –a research area to which human rights studies would be wise to become more intimately connected– it is common knowledge that state policies, measures and actions, negatively directed at specific groups whose public-political position is already problematic, tend to induce political violence. Remarkably, however, criticism on the Swiss people's initiative ignored any reference to minorities' protection.

Incidentally, reference is made to minorities in Switzerland's own Constitution in Article 70, § 2 in the context of languages (qualified by the adjective "indigenous") and in Articles 109 and 110 in respect of tenancy matters and employment policies (which have to take appropriate account of "the justified interests of minorities"). Notably, these clauses stipulate respecting equality before the law as the overriding principle. The fundamental prohibition of discrimination, in other words, remains the primary concern.

In the European setting, a Charter for Regional or Minority Languages (ECRML) was adopted in 1992 under the auspices of the Council of Europe to protect and "promote historical, regional and minority languages" in Europe. As a regional security body, the Organisation for Security and Cooperation in Europe seeks to identify ethnic tensions and to set standards for the rights of persons belonging to minority groups. In 1998 a European Framework Convention for the Protection of National Minorities entered into force. In Article 1 it declares that "[t]he protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation". The ensuing articles refer, again, to "persons belonging to national minorities". In actual legal and political practice, however, this Convention plays no part.

At the global plane, a Sub-Commission (of the Commission on Human Rights; since 2007 called the Human Rights Council) had been set up for the Prevention of Discrimination and the Protection of Minorities. There was consensus right from the start that it had “singularly failed to make any contribution towards the protection of minorities” (Humphrey 1968: 869), for more reasons than just its low place in the UN hierarchy.⁶ In 1992 the United Nations’ adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. This document stipulates in Article 2, § 1:

Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

In this wording, the question whether a minaret is a matter of culture or religion is obviously not decisive. As a declaration adopted by the UN’s General Assembly it is, however, not regarded as internationally binding, *let alone ius cogens*.

As to Treaty law, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.⁷ In its General Comment No. 23 the Human Rights Committee

⁶ The evident toothlessness of efforts to protect minorities at the international level is not a recent development. The League system itself, involving bilateral treaties that were essentially unenforceable, and which was abused by Nazi Germany, was one reason for the lowly status given this Sub-Commission (Humphrey 1968: 870). Since 1999 the Sub Commission is known as Sub-Commission on the Promotion and Protection of Human Rights.

⁷ It might be observed in passing that even where treaty-law is “binding”, states have often declared reservations that make the language of the treaty essentially ineffective in that state. For instance, Turkey has insisted on a definition of “minority” as indicating only “non-Muslims”, a definition dating from the Treaty of

has observed that this Article establishes and recognises a right which is conferred on *individuals* belonging to minority groups. Yet the Committee's jurisprudence has shown that, in practice, Article 27 can be used to address some of the problems affecting indigenous collectivities, namely those related to internal aspects of self-determination. In this connection, the minorities' right to "enjoy their own culture" includes "a particular way of life associated with the use of land resources, [e]specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law" (CCPR General Comment No. 23 1994: ¶ 7). The Committee's jurisprudence on Article 27 has also confirmed that economic activities may come within its scope if they are an essential element of a minority community's way of life. There is, however, no international enforcement in human rights treaty law; this remains dependent on the success of efforts within national jurisdictions.

In situations of intrastate collective violence wherein the state has shown itself consistently unable to protect a minority, which constitutes a majority in a specific area within the national territory, some scholars speak of "an emerging right to autonomy within international law" (Sydenham 2004). Whether regarded as *lex ferenda* or not, such a 'right' is still far from being *lex lata*.

Obviously, then, international minorities law appears too weak to play any effective part in the actual protection of people suffering from abuse by others in dominant positions, to draw on the terminology of the European Court of Human Rights. The question I should like to address now is whether efforts to protect such people should focus on properly defining and strengthening 'minority rights', which seems to be the major trend in modern human rights law, or be directed towards a search for alternative approaches.

Lausanne under the League system. Such reservations make legal enforcement of treaties empty (Oran 2007).

THE MINORITY PROBLEMATIQUE IN A POLITICAL ECONOMY PERSPECTIVE

There is nothing normative in the notion of a minority; it is just a residual category in respect of the idea of majority rule. Nevertheless, “[t]he moral authority of the majority is partly based upon the notion that there is more intelligence and wisdom in a number of men united than in a single individual, and that the number of the legislators is more important than their quality”, Tocqueville pronounced in his seminal work (1835: 265).⁸ True as this may be, however, majorities are fortunately *not* primordial categories. Hence, the starting point in our analysis must be *majority construction* as something beyond simply assembling and counting votes. Indeed, if majorities were merely incidental outcomes of political debate, majority rule would not be problematic in its consequences for dissenters, as the latter might be as ‘floating’ in taking sides as those consenting in the issue at stake. This, however, is not the case. Institutional attempts at majority construction, such as the formation of political parties, are natural and electoral systems merit particular attention here with regard to their exclusionary consequences. Strikingly, in the ‘Westminster’ constituency system, the excluded (‘minority’) parties joined together may well constitute a majority. In the United Kingdom, for example, a majority of the popular vote seldom brings a party into power, while often the party with the most seats garners support from not much more than one third of the population. In reality, then, it is the *rules of the game* that count more than “the will of the people”.⁹

Thus, first-past-the-post may well lead to permanent or at least long-term exclusion from power, even for groups with firm roots in society. The practice of power-sharing becomes particularly crucial in this respect. Although it is a concern usually falling beyond the scope of

⁸ R.A. Dahl (1989) defends majority rule on the grounds that it maximizes self-determination, is more reasonable than any other way of public decision-making, it is one way to check whether an assertion is true and it maximizes utility. Salih (2003: 117) rightly observes that in respect of minority groups with no influence on the polity of the dominant ‘nation’, the relevance of these considerations is questionable.

⁹ It is also worth mentioning in this respect that political consensus is the result of multiple negotiations and cost-benefit analyses, and does not necessarily, much less reliably, represent the *authentic* position(s) of the parties which form the numerical majority of votes. Not that all votes and positions are bought and sold, but they are not all represented by the “consensus of the majority” either.

human rights, attaining ample participation in government for national collectivities often acts as a prerequisite for political stability and peace.¹⁰ The way in which Nelson Mandela managed to secure Inkhata participation in the first South African post-apartheid government of 1994 provides a striking illustration. On the other hand, the constituency system in certain Commonwealth countries has led not only to continuous government by the same political party¹¹ but sometimes even to one-party parliament.¹² In evidently non-homogeneous nation-states this is likely to result in a structural minority problematique. Hence, it is not without reason that heterogeneous Switzerland uses a model of political power formation that guarantees a fair amount of power-sharing among the parties representing the citizens' interests at all distinct levels of government. Ignoring the concerns behind power-sharing may have disastrous consequences, particularly in a post-conflict peace-building stage.

The socio-cultural basis of political party formation is a second aspect of majority construction that may be tricky in its effects on exclusion. This applies particularly to racial, ethnic, tribal, religious or other types of party formation based on an exclusive collective identity, whether formally or informally organised. Particularly in such settings, power-sharing tends to become imperative. Indeed, the Northern Irish exclusion of Catholics from power –for whatever kinds of reasons– has been highly conducive to civil strife. Even when religious and/or ethnic majorities rotate –as in some island states of the Caribbean¹³– majority rule based on collective identity construction may affect entitlement positions of persons belonging to the minority temporarily out of power.

In addition to the political conditions necessary for democracy's capacity to establish legitimate government, there are also *economic* prerequisites of majority rule. In his exposition on *The Economic Prerequisite to Democracy* (1981), Dan Usher's concern is with the distributive effects of democracy as a system of government. His book "is a study of how society

¹⁰ Political participation does, however, have its costs, especially as it tends to require some degree of assimilation, which is precisely what non-dominant collectivities are often resisting (Toivanen 2004: 197).

¹¹ In Botswana, for example, the Botswana Democratic Party has reigned with huge majorities since independence. That these are based on free and fair elections is not in doubt.

¹² This has happened in St. Vincent and the Grenadines and in Lesotho, for example.

¹³ Trinidad and Tobago, for example, and Guyana.

protects democratic government by entrusting the economy with a task that the legislature can never perform –the task of assigning the major part of income and other advantages” (1981: ix). His worry is “conflict over assignment” in societies governed on the basis of majority rule. “For democracy to survive”, Usher feels, “there must be a prior agreement among citizens on a set of rules for assignment that voters and legislators will not lightly overturn”. He refers to this as a *system of equity*, defined as “a set of rules for assigning income and other advantages independently of and prior to political decisions arrived at in the legislature” (1981: viii-ix). I would speak here of the protection of people’s entitlement positions regardless of their political preferences and affiliations. A particular challenge in this connection is to prevent poverty and unemployment from affecting the same people all of the time.

Based on the three points made above –that majorities are not primordial but *constructed*, that they do not necessarily represent an *actual* majority position and that they are subject to multiple forms of manipulation and *political* pressure– I should like to argue that majority-minority relationships are not the key problematique in the formation and execution of political power. The real issue is construction of dominant positions based on collectively exclusive elements and the actual abuse of such positions. In South Africa, for example, the apartheid regime was based on minority rule; political support for the Afrikaner regime by a majority of all voters would not have legitimised the creation and abuse of that white dominant position. In Guatemala, to mention another example, it is still the indigenous majority that suffers from discriminatory exploitation. Obviously, then, numerical inferiority is not an adequate criterion for establishing what constitutes a ‘minority’ in a legally normative sense. As Mohamed Salih has put it:

The case of dominant minorities makes us realize that minorities are not the passive recipients of majority oppression, nor incapable of oppressing others. To that extent minorities are social entities, a construction of a social reality and their position in the polity of the nation-state. Nevertheless, on the whole, history has so far shown that there are more oppressed than oppressive minorities in the world (2003: 109).

Strikingly, there is no internationally enacted definition of the term *minority*. Francesco Capotorti, United Nations Special Rapporteur, in the context of Article 27 of the International Covenant on Civil and Political Rights (on rights of “persons belonging to ethnic, religious or linguistic minorities”), proposed the following text:

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 or language (1979: 96).

“A group numerically inferior to the rest of the population of a State” is not only arithmetic nonsense, but also neglects the primary background of the minority problematique: abuse of dominant positions that are based on exclusive collective identities.

Last year, while still struggling with the minority problematique, my own eyes were opened when at a conference in Brunei—an Islamic Sultanate with an ethnic Malay dominance—no single participant reacted in the affirmative on my question if there were ‘persons belonging to a minority’ present. I then continued with a follow-up enquiry: “Are there Chinese among us?” Many, it appeared. “Christians?” Many, again. So the question posed itself: Why do people corresponding to Capotorti’s definition decline to identify as such? The answer was equally clear: Why identify as a minority person if there is nothing to gain from such self-identification and a lot to lose in terms of daily security?¹⁴ Indeed, the Chinese in Brunei, or the Christians for that matter—to a large extent overlapping categories—wish for security above all else. This happens to be attainable by these groups only through complete identification as citizens of the land: *citizenship above minority rights*, in other words.¹⁵ Naturally, the Chinese citizens of this Malay-dominated state cherish their distinct language; obviously Christians desire freedom of worship in the Islamic sultanate. But while they do

¹⁴ Reeta Toivanen (2004: 108) has found similarly surprising results among minority groups in Germany.

¹⁵ For an examination of the advantages of citizenship rights, see Paulina Tambakaki’s *Human Rights or Citizenship?* (2009).

want to preserve “their culture, traditions, religion [and] language”, their desire is first and foremost for human security in the sense of freedom from fear, which is best attained through indisputable integration in the nation-state.

It is true that Brunei is not a democracy, but neither is it a ruthless tyranny. Constitutionally as well as socio-culturally, ethnic Chinese and religious Christians are accepted and protected. Since that first experience almost two years ago, I have often put the question to my international students at this university: “Who of you belongs to a minority?” My experience, admittedly limited, reveals that a positive answer is given only by refugees and by those whose collectivity had already organised itself as a political power (e.g. Roman Catholics in Northern Ireland).

A second flaw in Capotorti’s definition lies in the phrase “whose members ... possess ethnic, religious or linguistic characteristics differing from those of the rest of the population”. The verb “to possess” creates the impression that there is a kind of primordial distinctiveness about minorities and ignores their construction through identity-based majority formation. Incidentally, in Article 2 of the *UN Convention on the Prevention and Punishment of the Crime of Genocide*, a similar disregard of anthropological wisdom emerges, as it defines genocide as meaning certain specific “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” (emphasis added). This way of putting things creates the impression that such entities exist regardless of their construction and definition either by themselves or by people in dominant positions.¹⁶

In the final part of Capotorti’s definition, the element of self-identification does receive emphasis, as it stipulates that people manifest “a sense of solidarity, directed towards preserving their culture, traditions, religion or language”. But here already declared human rights such as freedom of religion and cultural rights might suffice. It is true that in practice

¹⁶ For an examination of minority construction in Darfur, see Michela Costa’s thesis, *Towards an Open Definition of Genocide. An Inquiry into the Construction of ‘Ethnic’ Conflict in Darfur* (2008).

the latter category has been treated in a step-motherly fashion, but that should be no reason to refrain from further operationalisation of these already established rights.

Quite evidently, then, minorities are far from fixed objective categories and their identification is subject to extensive politicisation, but neither is the 'minority' issue a mere chimera in the sense of an issue that could just be ignored. It remains a reality determined by abuse of entrenched dominant positions, resulting in disqualification and discrimination of collectivities regarded as different in the sense of inferior. In the public-political community, deeply rooted patterns of socialisation of people in terms of majoritarian superiority and minoritarian inferiority are not likely to be eliminated by one stroke of the pen, nor even by enacting rights in countries lacking a strong juridical culture. Notably, in the social as well as the legal sciences, it is not wise to begin working from existing scholarly models and conceptualisations; the challenge is rather to study how people behave in the real world. Hence we have to start from reality on the ground and then attempt to connect our findings to human rights –upstream analysis, in other words– rather than the downstream approach starting from the legal texts, which so often prevails in academic human rights research.

THE IRONY OF COLLECTIVE EQUITY

In the real world the 'minority' problematique appears to be part of the general setting of 'us-them' divides, manifesting itself in three distinct ways: collective prejudice against people associated with certain constructed categories, discrimination against members of such 'groups' (not rarely culminating in the most serious of crimes) and systemic inequalities.

Evidently, legal systems do not provide an effective instrument to deal with collective *prejudice*. The challenge here lies in human rights education, a huge effort tuned to majority acceptance of differences and the creation of an environment in which 'minorities' can feel *recognition* as well as *inclusion*. As concluded from a survey in Finland, a country in which the foremost issue is language:

[t]he best laws are useless if the acceptance of the majority is prerequisite to the laws' successful implementation. In this sense, human rights education would be a valuable tool for the fostering of an environment of acceptance. Human Rights Education is vital to spreading of information about minorities and their special needs, including teaching the importance of recognizing differences to change practical living conditions, even though the protection given by law seems to be perfect (Mahler 2009: 201).

In regard to individual rights of persons belonging to a 'minority', education's utility lies primarily in the struggle for equal treatment. In a society with a strong juridical culture such as the United States, law played an obvious part in getting rid of much systemic discrimination. It must be acknowledged, however, that such laws were the result of long and contentious political struggles that are not over, even in a country that, at least domestically and for its own citizens, has a long history of struggling to realise the rule of law. But when the laws are not observed, national legal systems can deal with disputes only if cases come from recognised legal personalities, or, in practice, *individuals*. In regard to such individual cases of discrimination, domestic law may provide certain remedies, though these are inherently unsatisfactory because they tend to be only partial and reactive in response to discrimination that is systemic and pervasive. This is to say nothing of countries where the juridical culture is deficient.

In the international setting direct remedies are lacking. Thus, with all due respect for the Committee on the Elimination of Racial Discrimination (CERD), which receives occasional individual complaints and scrutinizes state reports while making useful comments and policy recommendations, the lack of effective mechanisms for direct enforcement tends to reduce its role to merely reporting on the effectiveness of national institutions. Nevertheless, where national instruments are completely lacking because specific forms of discrimination have not been established as human rights violations –such as castism and discrimination against certain non-recognised 'minorities'– international human rights may still play its part in bringing issues to the fore and mobilising shame.

It should be clear from the prior discussion that what law has to offer regarding efforts to rectify systemic inequities is inherently limited. This complicated problematique is a matter of policies in the first place, as I have discussed in earlier work.¹⁷ With that in mind, I should like to focus now on the 'minority' issue in its contextual connection with intrastate collective violence, starting with an attempt to draw lessons from a frightful episode in European history: collective oppression, persecution and resistance in France in the epoch between the rise of Protestantism and the French Revolution.

That period of religious strife began with the Reformation, which questioned the public-political monopoly of the Roman Catholic Church in Western Europe. In France, as in other countries, that church had been established as the sole institutionalisation of Christianity. The suppression of those who adhered to the reformed faith, the so-called Huguenots, amounted to what would now be called crimes against humanity and certainly acts of genocide as well. As the protestant resistance had organised militarily, the almost three hundred years of intrastate collective violence included religious wars and war crimes on both sides.

While always a minority in the entire kingdom of France, the Huguenots were geographically concentrated in an area south of the Loire and especially in the crescent stretching from La Rochelle through the southern provinces of Guyenne, Languedoc, and Dauphiné to Geneva. In the cities under their control, it was the Roman Catholics who had to suffer from collective discrimination and humiliation. The Edict of Nantes (1598) brought a short period of relative peace based upon a certain degree of power-sharing that allowed the French Protestants to garrison some 200 towns. Huguenots acquired access to royal offices, legal redress before special royal courts (known as *chambres de l'édit*), and the right to establish their own academies. Royal letters (*brevets*) accompanying the Edict granted subsidies for their troops, pastors and schools. In most of France, however, Protestants were granted only limited

¹⁷ See Bas de Gaay Fortman, 'Racism and Poverty in a Human Rights Perspective' (2002).

rights of worship.¹⁸ Thus, rather than extracting religion from state power, the Edict launched a kind of religious cleansing of the kind we still find today in a city like Belfast.

Collective minority recognition is the inevitable consequence of majority entrenchment through public-political establishment. Yet, a major lesson from that French history, which still is to be learnt, is that its side-product may well be a worsening of the divide. Politically organised and internationally recognised 'minorities' stand at the roots of new processes towards majority construction in the sense of their gaining dominant positions that might well be abused. For instance, after the war of 1998 the Albanians in Kosovo lost no time in transforming themselves from an abused minority into an abusive majority. It is of course acknowledged that collective 'ethnic cleansing', that repulsive phenomenon of the twentieth century, is definitely not the answer to the 'minority' problematique. Nevertheless, in this connection an *irony of collective equity*¹⁹ can be empirically detected: with each supposedly equitable solution to one minority problematique, new majority-minority divides manifest themselves resulting in new iniquities. The former Yugoslavia provides a striking illustration of this tendency. As to the insoluble puzzles to which intolerance in a heterogeneous nation-state may lead, Belgium represents an off-putting illustration.

Notably, in the negotiations leading to the pacification of the Nantes Edict, the Huguenots had formulated three major demands:

1. guaranteed freedom of worship for the Protestant (Reformed) religion in the whole Kingdom of France without any restriction as to time and place;
2. guaranteed equal access to office, whatsoever; and
3. guaranteed security for all citizens of the reformed faith (van Enk 2004: 334).²⁰

¹⁸ For a detailed history of the Huguenots in France see the magnum opus of Pierre Louis van Enk, *Frankrijk en de Hugenoten. Drie eeuwen onderdrukking en verzet* (2009).

¹⁹ In the context of public administration, the term "irony of equity" was introduced by B. Bernard Schaffer and Geoff B. Lamb (1981).

²⁰ A similar and more modern reiteration of these basic guarantees for 'minority protection' was contained within the (admittedly weak) International Protection of Minorities System that was active under the League of Nations (Dinstein 1976: 115).

The failure to grant these guarantees had forced the Huguenots to further organise as a strong minority, dependent on auto-protection. This resulted in collective political and military organisation. Where they were in control they adopted policies of discrimination against the Catholics in their turn. Under Louis XIV they were crushed; the Edict of Nantes, although registered by the legislatures in 1598 as fundamental and irrevocable law, was revoked in 1685. Protestantism was declared illegal; as a result, the following century until the French Revolution was a time of unrestrained anti-Protestant tyranny, persecution and oppression. Hundreds of thousands of Huguenots fled hearth and home (Kaplan 2007: 159-169).

It is instructive here to pay heed to the second Huguenot request, which amounts to equal economic opportunities. The lack of perspective resulting from politico-economic exclusion has proven to be a major factor contributing to intrastate violence –both then and in the present. The following observation from Adam Smith's *Wealth of Nations*, published in 1776, might still be taken as a starting point here:

[C]ommerce and manufactures gradually introduced order and good government, and with them the liberty and security of individuals, among the inhabitants of the country, who had before lived almost in a continual state of war with their neighbours, and of servile dependency upon their superiors. (Smith 1776 (1900): 313)

As a structural basis for peace and political stability, this presumes non-discrimination in trade and employment, too. Equally, the third Huguenot demand obtains: protection of everyone against violence. This may still be seen as the most important function of the state: law and order, aiming at the *equal protection of all* who find themselves on the territory in respect to:

1. their *person*, implying not only protection *against* the state²¹ in the sense of security of person as stipulated in Article 3 of the UDHR, but also protection *by* the state against criminality;

²¹ The acid test of democracy, as Geoffrey Robertson once put it, “is a justice system where there is at least a chance, a possibility of beating the state at its own game” (1998). On the intricacies of this element of the rule

2. their *goods*, implying solidity of entitlement positions, which is both more and less than the right to own property as such (article 17 UDHR); and
3. their *deals*, implying the execution of contracts (*pacta sunt servanda*) through an “exact administration of justice” (Smith 1776 (1900): 540).

Obviously, all this requires a strong state based on an inclusive social contract and commitment to the rule of law. The guarantees the Huguenots sought are the basic due any citizen should expect from the state. Beyond these prerequisites, is there any specific role for ‘minority rights’?

A MISCONCEPTION?

Minority rights do not find much of a basis in the Universal Declaration of Human Rights, that foundational document, which has assumed the character of chapter 1 of a virtual global constitution. Consequently, in efforts to conceptualise these ‘rights’ there was little ground to start from. Actually, two international missions have been confused here: collective rights and the rights of collective entities, usually called group rights or minority rights.²² Collective rights are rights which by nature can be enjoyed just collectively (Dinstein 1976). Self-determination is the most familiar example; today it is particularly the right to a healthy environment that comes to the fore. In the UNESCO setting of pronouncing ever new rights, a declared ‘right to cultural diversity’ may be mentioned (Donders 2002). In practice such ‘rights’ play the part of principles (*regulae iuris*), both in the realm of politics and in litigation.²³

Group rights are a different matter; here the legal subject is a collective entity no matter the character of the rights claimed. Since rights protect interests by law, they grant abstract

of law, see “Beating the State at Its Own Game. An Inquiry into the Intricacies of Sovereignty and the Separation of Powers” (de Gaay Fortman 2008).

²² In *Human Rights in a Pluralist World: Individuals and Collectivities* (Berting 1990), for example, this confusion pervades the argumentation.

²³ Cf. “‘Adventurous’ judgments: A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law-Development” (de Gaay Fortman 2006a).

acknowledgements of claims based on these. It is often argued in this connection that only individuals can be human beings and hence enjoy human rights.²⁴ This, however, is not the issue. There is no compelling reason why the subject of such legal protection could not be a collectivity. The practical prerequisite of creating rights for collectivities would merely be that the groups be granted legal personality.²⁵ As human beings live in community with others, there are definitely collective aspects to the need for human dignity protection, as has been clearly recognised in the UN human rights venture. In the case of ethnic and religious groups –the categories usually referred to in international human rights documents concerned with minorities– this has generally not been the case. The real issue is not, however, whether collectivities might be recognised as legal personalities, but whether doing so is an effective strategy in protecting the human dignity of the individuals in these groups.

While, indeed, international human rights law could universally declare all individual human beings to possess legal personality and has actually done so –equal in inalienable rights– with regard to a general category of ‘groups’ this would obviously be unwise. To the degree that this project is pursued it is distracting, confusing and even counterproductive. This holds true for two central reasons. First there is the unavoidable problem of definition, as discussed above, whether the group is a minority, a majority, a people or an indigenous group. There exists no consistently reliable legal methodology for limiting –defining– the membership composition of groups in a public law context.²⁶ The human rights bodies and the human rights instruments do not share a single definition of “minority”. To imagine that a useful and reliable legal definition of “minority” will emerge seems a naïve dream. Instead, the obvious result of granting special or extra rights such as rights of self-government or secession, or even mere special affirmation of already existing rights, to vaguely defined and ultimately illimitable “groups” is that groups –however defined– will multiply and compete in the political

²⁴ See, for example, “Human Rights, Individual Rights and Collective Rights” (Donnelly 1990: 43).

²⁵ It is true that class action suits or public interest litigation may well result in measures conducive to the protection of excluded collectivities, but the national jurisdictions in which these legal instruments pertain are generally not the most problematic in respect of minorities.

²⁶ The most consistent method and the one most in line with the principle of self-determination is self-identification, but this method is relatively unhelpful in the *legal* determination of a group’s status.

arena in an attempt to take advantage of such rights. This generally has led towards, rather than away from, greater political strife. But this is, of course, only the first problem.

Secondly –and this impediment applies more generally to the narrow conception of human rights as mere rights in the sense of abstract legal acknowledgement of interests– even if legal personality were granted to collectivities, the lack of an international court of human rights seriously hampers the realisation of judicial remedies related to those rights they may hold. So the question remains whether an international legal discourse still is to be seen as an effective way to achieve the aim of equal protection for all as far as the collective aspects of human dignity are concerned.²⁷ indeed, the same doubt persists about whether modern state law could provide the right machinery for such protection.

There are, certainly, states that have incorporated constitutional clauses for the protection of minorities. A striking example is Macedonia where in 2001, after a period of serious civil strife between the ruling Macedonians and the structurally excluded albanians, a new constitution was enacted as part of a peace accord. This involved deletion of references in the constitution's preamble suggesting that persons belonging to minorities are second-class citizens, as well as enshrining 15 amendments designed to give greater rights to the country's ethnic Albanians. There is no general reference here to 'minority rights', but specific clauses are enacted to protect the position of a designated category of citizens, identifiable by their common language. Notably, in response to the peace accord, the leader of the political party of Albanians welcomed the constitutional changes with the following words: "we repaired the constitution and now we have to repair the mentality that created ethnic conflicts" ("Macedonia adopts a new constitution" 2001).

Yet, Macedonia is a shining exception. Actually, in constitutional documents we tend to find more references to arrangements for the protection of the majority than to minority rights.

²⁷ Strikingly, a new international journal to be published through Intersentia in Antwerp presents itself as *Human Rights & International Legal Discourse*, as if it is here that the main vacuum in human rights studies must be located.

Does not the term ‘minority rights’, then, create mere illusions? In other words: isn’t it a major misconception?

Majority entrenchment

Constitutions, as we know, embody rules on the authority of states to maintain public order through law; they tie the exercise of power to moral norms. This is reflected in the notion of a social contract: behind state law, as a way of stipulating legal obligations, lies the state-citizens’ agreement to form one public-political community. I use this term here not as a philosophical idea, but rather, in line with conflict theory. From theoretical and empirical analysis into the kind of context in which intrastate collective violence finds a breeding ground, two major factors emerge: structural socio-economic inequalities and lack of an adequately functioning social contract.²⁸ The latter implies, firstly, that there is not a failing but a functioning state and, secondly, that citizens in general look upon this state as theirs. Naturally, this requires legitimate government, too, in the sense of an administration ruling on the basis of the principles, institutions and processes that are regarded as ‘right’, as well as commonly acceptable outcomes.²⁹

Even where majority construction, as a way of privileging a defined segment of the public community to the exclusion of other ‘groups’, has an emancipatory background, it remains a problematic practice. A characteristic example is Malaysia, where Article 153 of their constitution grants the Head of State responsibility for safeguarding the special position of the Malay and other indigenous peoples, collectively referred to as *Bumiputra*, meaning the sons of the land.³⁰ The Bumiputra actually form a *majority* within Malaysia, but have

²⁸ See, for example, “Violence among peoples in the light of human frustrations and aggression” (de Gaay Fortman 2005).

²⁹ Cf. Bas de Gaay Fortman and Fatos Tarifa, “Vulnerable Democracies: The Challenge of legitimacy in Post-Communist Systems” (1998).

³⁰ For a brief account, see Noon, “The Use of Racial Preferences in Public Procurement for Social Stability”, *Public Contract Law Journal* (2009: 611).

historically been at the bottom end of the economic ladder.³¹ The discriminatory arrangement that Malaysia's constitution entails may be seen as a carry-over of laws made by the British colonial power to protect the Malay from being overpowered by the immigration of Chinese and Indian workers into Malaya. Indeed, behind the *construction* of the Bumiputra as a majority at independence is a period in which income inequalities corresponded to a socio-economic dissimilarity between Chinese and Indians on the one hand and ethnic Malays on the other. In actual practice, Article 153 has created a distinction between Malaysians of different ethnic backgrounds, resulting in the implementation of affirmative action policies which only benefit the majority Bumiputra.³² This entrenchment of a division between the Bumiputra and other groups is one cause of ongoing political tensions.

No matter their intelligibility and their historical origin, such entrenched dominant positions³³ are not only susceptible to abuse; they also institutionalise sensitive us-them divides, thus affecting the susceptibility to conflict of the nation-state as such. Their legal starting point lies in public-political *establishment* of one specific religion, origin, language or any other grouping in a way that may well marginalise or exclude people who do not share the established characteristics. Such establishment of a dominant position for one particular collective entity may be either formally embodied in the constitution or informally entrenched

³¹ Groups subject to this phenomenon have been called, confusingly, "minoritized majorities" (Kymlicka 2008: 26), which is evidence enough for removing this distinction between "majority" and "minority" from the vocabulary.

³² Article 153 § 1 provides that the government should act "in accordance with the provisions of this Article". The government has done this by implementing certain policies, particularly the New Economic Policy (NEP), that was recently changed into the New Economic Model (NEM). Meanwhile the Prime Minister has launched the One Malaysia Policy as an attempt to move towards a more inclusive society. Notably, the only major clash that Malaysia has witnessed is the May 13, 1969 bloodshed that followed election results, which the Malay majority regarded as unacceptable, leading to the stronger affirmative action policies of the NEP. Later 'us-them' clashes have involved crackdowns on Muslim extremism.

³³ Other notable examples of majority entrenchment arising out of an obvious historical context are Sri Lanka, where Chapter II, Article 9 of its Constitution on Buddhism declares: "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14(1)(e)"; and Israel, which has been established as a Jewish state.

in daily decision-making. As this may well be seen as the crux of the whole 'minorities' problematique, let us now examine the international venture for the realisation of human rights in that light.

REFLECTIONS ON THE INTERNATIONAL HUMAN RIGHTS VENTURE

In the global political idea of human rights that emerged after World War II, two genealogies converged: the fight for recognition and fundamental protection of the dignity of *all* human beings and the struggle for fundamental rights as a way to protect citizens against abuse of power, in particular by their own sovereign (the state). We find the distinct convictions behind these two historical lines reflected already in the preamble of the United Nations Charter in which "[w]e the peoples" express our determination

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The preamble of the UDHR repeats that expression of global faith in the inherent worth and dignity of the human being and in fundamental rights as a confessional foundation:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...

The two genealogies then meet in Article 1 of the Universal Declaration of Human Rights of 1948:

*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*³⁴

³⁴ Today we read "sister and brotherhood" or *fellowship*. Obviously, the underlying principle is *solidarity*. In the global venture for human rights, this constitutes the basis for so-called solidarity rights such as the right to a

This global political confession (in legal terminology *ius divinum*) reflects two grand principles, one of a substantive and the other of a procedural nature: *universal human dignity* and *fundamental rights* (including their inalienability). While the emergence of the basic rights idea as legal protection against abuse of power may, indeed, be called a ‘Western’ history,³⁵ the narrative of universal recognition and protection of human dignity could just as well be termed ‘anti-Western’ history in the sense that *equal* dignity had to be vindicated in *contravention* of Western ideas and powers. The idea of legal principles, for example, was already part of Roman law (*generalia iuris principia*). One of these referred to freedom as something of inestimable value (*libertas inaestimabilis res est*);³⁶ yet this excluded subjugated peoples in general and slaves in particular. In fact, the whole story of universal human dignity remains an ongoing struggle.³⁷ In his inaugural address as first holder of our Treaty of Utrecht Chair, titled *Race and the Right to be Human*, Paul Gilroy has perceptively shown how the struggles against colonisation and conquest and the historical efforts to fight racial and ethnic hierarchy have shaped the idea of truly *universal* human rights (2009). Note, for example the following insight gained by Catherine Beecher (older sister of the author of *Uncle Tom’s Cabin*):

The investigation of the rights of the slave has led me to a better understanding of my own. I have found the Anti-slavery clause to be the high school of morals in our land—the school in which morals are more fully investigated and better understood and taught, than in any other. Here a great fundamental principle is uplifted and illuminated, and from this central light rays innumerable stream all around. Human

healthy environment. Besides solidarity, one can also read here an urge not to engage in aggressive behaviour –endangering peace and stability– as the human rights instruments were adopted immediately after WW II.

³⁵ For this narrative see, for example, Lynn Hunt’s book, *Inventing Human Rights. A History* (2007).

³⁶ Paulus libro secundo ad edictum, *Corpus Iuris Civilis*, De diversis regulis iuris antiqui, D. 50, 17, 106. See also 122: Gaius libro quinto ad edictum provinciale: “Libertas omnibus rebus favorabilior est.”

³⁷ A typical ‘anti-Western’ source for the declaration of freedom is Ho Chi Minh: “Rien n’est plus précieux que la Liberté et l’Indépendance”.

beings have *rights*, because they are moral beings: the rights of all men grown out of their moral nature; they have essentially the same rights (Gilroy 2009: 10).

This perception is clearly reflected in Article 1 of the UDHR: born free and equal in dignity and rights, and endowed with reason and a *conscience* (emphasis added). Notably, Catherine Beecher's letter was part of a correspondence with Angelina Grimké, daughter of a slaveholder and simultaneously an active abolitionist. This is what the latter had said, as citizen of a country that had already declared as "self-evident" truths that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, and that among these are Life, Liberty and the Pursuit of Happiness,"³⁸ and that yet tolerated slavery:

... man is never vested with ... dominion *over his fellow man*; he was never told that any of the human species were put *under his feet*; it was only *all things*, and man, who was created in the image of his Maker, *never* can properly be termed a *thing*, though the laws of Slave States do call him 'a chattel personal;' *Man* then, I assert was never put *under the feet of man* by that first charter of human rights which was given by God, to the Fathers of the Antediluvian and Postdiluvian worlds, therefore this doctrine of equality is based on the Bible (Gilroy 2009: 9-10).

Human dignity, then, refers to the inherent worth of each and every human being, simply as an innate consequence of human existence whether or not an individual person is herself convinced of that.³⁹ *Inherent* is, indeed, the adjective used in the preambles of both the UN Charter and the UDHR, meaning that human dignity is a matter of being rather than having, and hence implying that it cannot be taken away. Yet, it is worth emphasizing here that some people have been denied the enjoyment of these rights merely because of their group identity, whether that is imposed from without or within. It is *violation*, then, more than

³⁸ United States Declaration of Independence.

³⁹ Cf. "Self-Determination or Human Dignity: The Core Principle of Human Rights" by Matthijs de Blois (1998: 531) For a full discussion of human dignity as a core principle in human rights, see Chapter 5, on human dignity and humiliation, of *Where Needs Meet Rights. Economic, Social and Cultural Rights in a New Perspective* (Goldewijk & de Gaay Fortman 1999).

preconceived group rights that governs the problematique. Thus what have been conceptualised as 'minority rights' –rights protecting minorities– must be reconceptualised as based not on minority status, but upon universal human dignity as already internationally established, rights protecting universal human dignity in its collective aspects too.

Notably, the way in which this mission has been conceptualised in legal instruments and mechanisms has placed great emphasis on the second foundational principle of human rights: the quest for fundamental rights. The major flaws that affect 'minorities' protection can be traced to this overreliance on legal, judicially enforceable rights as such. International mechanisms for the realisation of human rights were set up as if the emancipatory struggles preceding adoption of the legal model had already been definitively concluded with the victory of the allied forces in World War II. That model is based on three stages: standard-setting, supervision through monitoring of compliance and enforcement. Its capacity to enforce international human rights law, however, is terribly weak, as was noted already. So the responsibility for implementing all those internationally *declared* rights still rests basically at the national and local level. In respect of minorities, however, the nation-state is precisely the level at which the struggle for equal protection faces the greatest challenges.

Monitoring of state compliance with regard to the protection of 'minorities' is clearly flawed, as a summary survey of the recently created Universal Periodic Reviews (UPRs) in the Human Rights Council (HRC) reveals. The organisation of these UPRs is through a kind of peers review with a 'troika' of three countries preparing a first list of questions. For the plenary session there are three hours for discussion, whether China or San Marino faces review. (Currently, the list of speakers and the allocation of speaker's time is treated as a hot issue.) Strikingly, in respect of a country such as Burundi, wherein it has consistently been the Tutsi minority that has abused its dominant position, no substantive questions on minorities and minority rights were asked (HRC 2009a). The same applies to the sessions concerning the Czech Republic, India, Indonesia, Philippines, Pakistan, Uzbekistan, and the

Democratic Republic of the Congo,⁴⁰ to mention just a few other examples of states facing evident challenges in the protection of distinct collective entities.

The substance of the recommendations that the countries having come up for review by their 'peers' have received is equally revealing. The whole process, as it is conducted, fully deserves the title that UN Watch gave its recent evaluation of the process: "Mutual Praise Society" (2009). Here are three illustrations from the review sessions. First, a suggestion from the United Kingdom to Poland:

[C]onsider forming twinning relationships or partnerships with countries that have been through a process of legal reforms on minority issues to work closely with them on the legal, technical and institutional challenges involved in introducing change (HRC 2008f: 7-8).

Is there anyone in Geneva who believes that such advice was really conducive to minorities' protection in the country under review? And what to say about Myanmar making the following recommendation to Malaysia:

[C]ontinue to share and extend its experience and best practices in the efforts in developing comprehensive policies and strategies for the advancement of indigenous groups which focus on uplifting the status and quality of life of the community via socio-economic programs (HRC 2009b: 8).

In the words of the Malaysian poet Cecil Rajendra: "*Can the blind see for the dumb? Can the dumb talk*" (1987: 30-31)?

Quite astonishing, finally, is the following proposal that Mexico made to Sri Lanka:

Continue to strengthen its activities to ensure there is no discrimination against ethnic minorities in the enjoyment of the full range of human rights, in line with the

⁴⁰ See the bibliography for the UPR reports.

comments of the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Right of the Child and the Committee on the Elimination of Discrimination Against Women (HRC 2008g: 20).

Poor Tamils; poor Muslims! To conclude, as treaty-based human rights law hardly offers effective protection of minorities against abuse by those in dominant positions, the UN charter-based mechanism appears to provide no solution either.

A constructive critique

It is in this context that strongly worded criticism of the international human rights endeavour comes to the fore. Strikingly, the March 1, 2010 cover of *Newsweek* magazine screams “The Death of Human Rights”. The article by Joshua Kurlantzick, which confines its title to the mission’s *downfall*, shows a primary concern with the declining role of human rights on the agendas of major state actors, international civil society, and the public at large.⁴¹ Notably, the Geneva- and New York-based mechanisms for human rights standard-setting and supervision are totally ignored, implicitly assessing these as irrelevant. It may be time, indeed, to reconsider this part of the UN mission in the light of the following considerations:

1. The UN project as envisaged in the Charter was never meant to be *legally* enforceable by *international* means.⁴² While rights already imply protection –namely by law– the terminology consistently refers to “protection and promotion of human rights”: a clear testimony to its “soft law” character.⁴³ In this light it is not

⁴¹ He attributes these failings in part to the economic crisis, its effects on the middle class in Western democracies and its concurrent influence on the attitude of ‘political realism’ adopted by their leaders.

⁴² “[T]he human rights system was designed from the start not to be enforced except through political means at the behest of powerful states” (Normand & Zaidi 2008: 322).

⁴³ Rights signify abstract acknowledgement of interests implying protection by law. Human rights refer to interests directly connected to human dignity, *viz.* fundamental freedoms and basic entitlements. To ‘protect human rights,’ then, means protecting the protection of these interests by law. Obviously, such discourse weakens the mission.

surprising that there is remarkably little attention to follow-up of both country-assessments and individual cases in which evident violations of human rights were established through resolutions and/or concluding observations. It is precisely in respect of collectivities' protection that provisions for *international* enforcement cannot be missed.

2. The juridical nature of the international human rights venture went together with an emphasis on *case-by-case* approaches. Yet, non-implementation is often of a structural nature, requiring primarily international *political* action. Insofar as such action has been forthcoming, it has suffered from the almost inherent double standards in a world of states. This certainly applies to collectivities within powerful states with a veto-right in the Security Council whose consent to effective action would have to be sought.
3. Effective protection of collectivities requires close ties between the UN's political set-up, which deals with international peace and security, and its juridical branch, which is supposed to be tuned to the implementation of human rights. Likewise, the realisation of economic, social and cultural rights needs the full commitment of relevant development-oriented agencies, including the international financial institutions. Yet, 'mainstreaming' human rights as envisaged in the whole UN system of governance has, above all, resulted in documents that reflect policy briefs, reports and policy guidelines rather than an effective operationalisation of human rights at all levels and layers.
4. There has not been much interest in global human rights as a *common* mission of the 'United Nations', as envisaged in the Universal Declaration. Instead, many member states appear to believe in setting up their own human rights enforcement mechanisms, not as complementary to the international framework, but as an alternative. Consequently, there is an almost worldwide lack of commitment to truly supranational supervision and enforcement. Particularly in respect of collectivities' protection, this is a crucial deficiency.
5. International human rights are not yet sufficiently focused on the economic, political, social and cultural aspects of the distinct *environments* in which these rights have to be realised. As the whole international venture for the protection of human dignity against abuse of power is based on satisfactorily functioning legal

systems that connect national law to international law, efforts to realise these rights primarily require the creation of good government based on the rule of law. Since malfunctioning economies also commonly form the background to failing states and tyrannies, creating the environments conducive to the realisation of human rights would entail a shift of resources from juridical or quasi-juridical action towards policies supporting political-economic transformation. This applies especially to collectivities that lack financial and legal resources almost completely.

6. Devoid of global governance, economic globalisation has increased socio-economic inequality while also creating an adverse environment for the realisation of economic, social and cultural rights. Simultaneously, non-state agencies have become more relevant in the whole international endeavour for structural protection of human dignity. Yet, effective checks on the actions of multinational corporations that affect human rights are seen primarily as the duty of states under whose aegis these companies operate. Thus, collectivities affected by corporate actions lack legal recourse as, for example, the Ogoni in Nigeria have experienced.

Yet, despite its flaws from the judicial/juridical perspective, the international human rights mission did create a strong notion of *global legitimacy*, which is particularly precious as there is no global government. Indeed, no use of power can be considered legitimate if it violates international standards on the protection of human dignity. It is here that we find a genuine prospective vision for substantial improvement in the relevance of human rights. So, from this point of view, let us now return to 'minorities' and their need for protection.

EPILOGUE: MINORITY PROTECTION IN AN INTEGRATED HUMAN DIGNITY PERSPECTIVE

That Muslims in Switzerland can no longer connect minarets to their mosques is, of course, just a *minor* issue compared to the major violations of human dignity which other 'minorities' have to suffer. Yet, the formal incorporation of that prohibition into the Swiss Constitution despite all national, regional and international law to the contrary is indicative of a world in which offensive action based on us-them divides tends to prevail over legal protection of

collectivities. The validation of the people's initiative by the Swiss national parliament also constitutes a striking illustration of the systematically weak incorporation of human rights into positive law.

A case in point is the civil war that has raged in the Democratic Republic of the Congo since the Rwandan genocide of 1994. This conflict, in which the fighting factions are mainly based on ethnically identified collectivities, has already cost the lives of almost six million people. Since the formal peace agreement of 2003, it is particularly the eastern region that remains prey to gross and systematic violations of human rights. In such a context, crimes against women tend to abound, too (Mibenge 2010). A United Nations peace force is apparently unable to provide military protection to civilians, let alone force an end to the atrocities. A limited legal response comes from the International Criminal Court in The Hague, which since its start in 2002 has indicted a few military commanders responsible for major human rights violations in Eastern Congo. None of these cases has so far led to a conclusive judgment. In the meantime, the political economy of that war appears to be based on illegal mining and selling of coltan, gold and other minerals. While legal deterrence does not offer much in terms of staunching the flow of blood, political-economic intervention holds much more promise as a way to end the carnage. That reality is well known, but not acted upon despite some forceful advocacy by civil society organisations, including the Netherlands Institute for Southern Africa (NIZA).

Overall, then, the picture is grim. Yet, before coming to final conclusions on human rights and collectivities' protection, there are two more recent developments that warrant attention: the progression of indigenous rights and the 'responsibility to protect'.

Indigenous rights

In 2007, after an astonishing twenty-two years of preparing a text, the United Nations General Assembly adopted a strongly worded *Declaration on the Rights of Indigenous Peoples*. This document contains clear statements on vital issues such as self-determination and access to lands, territories and resources. These include not only cultural rights (Article 11) but also strong provisions on land rights. Thus, Article 26 declares:

1. *Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
2. *Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.*
3. *States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.*

Four states, all with historically oppressed indigenous populations far outnumbered by later settlers –Canada, the United States, Australia and New Zealand– voted against this declaration. Two of these, Australia and New Zealand, have since then endorsed it, the latter with the following qualification:

In moving to support the Declaration, New Zealand both affirms those rights and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, define the bounds of New Zealand's engagement with the aspirational elements of the Declaration.

This reservation is in line with the expressed views of many countries that had already voted in favour of the declaration.⁴⁴ At the time of its adoption, concerns were also expressed on

⁴⁴ Given the 'soft law' character of such a General Assembly declaration and the common law prerequisite of national incorporation, even for treaty law obligations, it is questionable whether that reservation had to be made explicitly. It may well have been meant to restrain the country's judiciary from using the declaration for interpretative purposes prior to the enactment of new legislation. For presumably internal reasons, New Zealand apparently wished to make clear that it *aspires* to protect its indigenous peoples in accordance with the Declaration.

the lack of a clear definition of the term *indigenous*. The consensus was that this would have to be decided at the national level. Indeed, an international rule on who is indigenous and who is not would conflict with the general trend towards self-identification as the only reasonable way to determine allegiance with collective entities, such as race and ethnic group. But when socio-cultural groups within a nation-state self-identify as 'indigenous people' just like that, the whole declaration loses its meaning. In fact, this appears to be happening already in Bolivia (Pallares-Burke 2006) as well as Iran (Kymlicka 2008: 16-17). Political mobilization amongst ethno-cultural groups in Africa, based on (a contested meaning of) "indigenusness", similarly illustrates the difficulties inherent in relying upon a normative, all-encompassing legal definition of this concept (Ndahinda 2009). The same problematique, in regard to the construction of 'minorities', is threatening to be overshadowed by the desire to identify as 'indigenous' rather than as 'a person belonging to a minority'. While some scholars may "hope to develop a more adequate legal framework" (Kymlicka 2008: 31) as the path forward, such an approach is not available because of the inherent problems attending such legalistic definition, whether the object of the definition is "minority" or "indigenous".

Meanwhile, the actual problematique of indigenous peoples conspicuously follows from operations of multinational companies endorsed by government policies that make them victims of development (Hadiprayitno 2010). Thus, while language and culture remain important elements in the protection of human dignity in its collective aspects, a primary need today is protection against so-called 'development' and its consequences in terms of sustaining daily livelihoods, particularly insofar as these are based on access to land. Oddly, the human rights mission is not of much use here as it has uncritically opted for an understanding of development as inherently positive, culminating in the UN declared "Right to Development". With this observation we are getting to the crux of the matter: to move beyond such blinkered analysis—to achieve a *lifeworld* understanding of the meaning of human rights as opposed to a policy analyst's. Legalistic questions about the definitions of "minority" and "indigenous" must be put to the side. Instead of focusing on enforcing rights based on legal status—which evidently engenders legal battles over status while the rights go unrealised for decade after decade—human rights must be envisaged and implemented in a

wider human dignity perspective, including sustainable human development and human security.

The responsibility to protect

In 2001 an International Commission on Intervention and State Sovereignty published a report titled *The Responsibility To Protect*. Of the five distinct kinds of protection tasks it identified as post-intervention necessities, the first stood out as the protection of “minorities” (¶ 7.42).

The United Nations World Summit of September 2005 has embraced this *responsibility to protect*:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability (UN: ¶ 138).

In the next paragraph the ‘international community’, through the United Nations, also recognises its responsibility “to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” (UN: ¶ 139). Security Council Resolution 1674 (adopted on April 28, 2006) reaffirmed these provisions and committed itself to taking action to protect civilians in armed conflict. In February 2008, Secretary General Ban Ki-Moon appointed a Special Adviser for the Responsibility to Protect (R2P in UN sms jargon) at the Assistant Secretary-General level.

The responsibility to protect constitutes an important shift in the international law doctrine of sovereignty. This principle no longer means “the right to control” people and borders at all

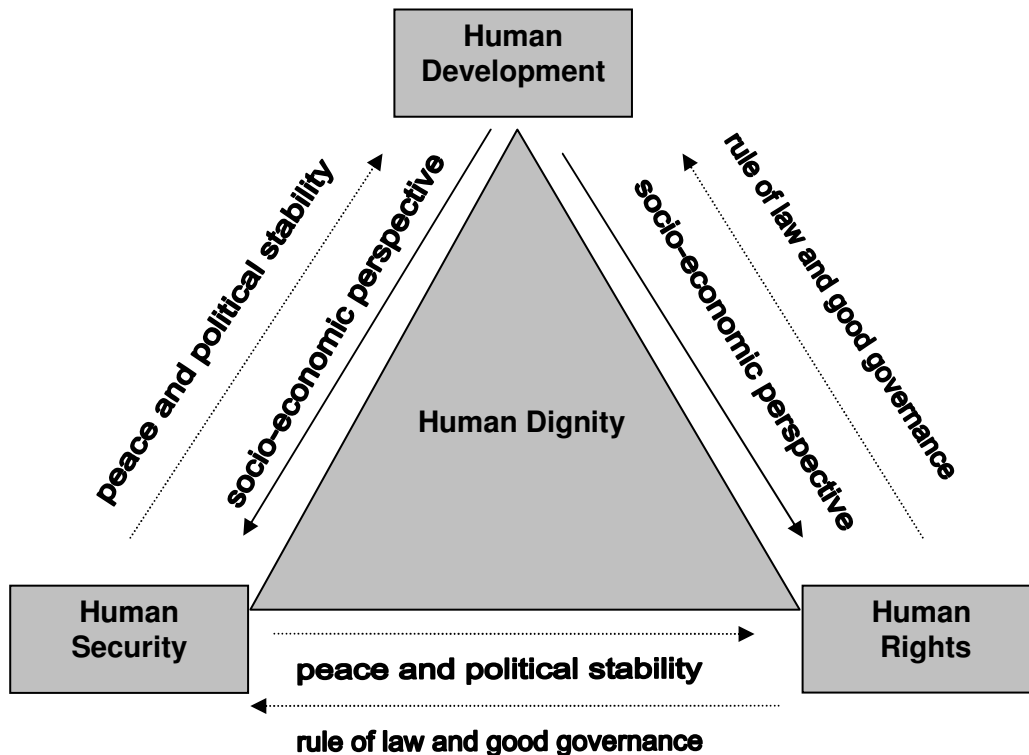
costs, but now implies the duty to protect civilians, especially from genocide, war crimes, ethnic cleansing and crimes against humanity. When a state is failing to protect its civilians, that responsibility falls on the international community in three phases: to prevent, react and rebuild in countries affected by mass suffering and atrocities.

As to prevention, R2P admirably recognises and addresses the root causes of civil conflict in order to prevent atrocities and frames prevention as the foremost duty. It is also the broadest responsibility, as activities that positively contribute to the stability and well being of a country and its people help to prevent future civil conflict and mass human suffering.

Prevention efforts may fail, however, which calls for intervention through a range of reaction options, the large majority of which are non-violent, including targeted sanctions and political pressure from neighbouring countries. If military intervention becomes necessary, it must satisfy the “force majeure” threshold, which implies that large scale loss of life must be imminent or actually happening, before any action can be authorised. It must also meet the ‘threshold criteria’, which include such things as “right intention” and “reasonable prospects of averting suffering”. In order to prevent abuse by powerful states, humanitarian intervention in the sense of military action, for peace with justice against a ‘sovereign’ state, beyond chapter 7 of the United Nations Charter and hence without authorisation by the Security Council, has not been regulated in international law. Yet, it may be accepted in practice through acquiescence by the international community, meaning tacit ex-post approval by the Security Council in the first place. The intervention of NATO allies in Serbia/Kosovo in 1999 is a case in point.

Finally, R2P recognises that without effective rebuilding measures, which establish the rule of law, good government and reconstruction, regions recovering from violent conflict are likely to remain confronted with civil strife. This means that development and poverty reduction programs like education, health, water and food security projects, as well as injustice response programs like peace building, human security and refugee assistance projects, are encompassed in this new international doctrine.

Since the relevant record of the Security Council is not particularly impressive so far, it is too early to come up with a final assessment here. Yet, the shift from useless references to minority rights in Geneva- or New York-based, powerless fora to the day-to-day security agenda of the Security Council might be seen as a first step towards that long-needed global perspective for oppressed peoples. Indeed, this acknowledgement of international responsibility for national security and peace may well contribute to the quest for protection among collective entities under state jurisdiction. It should, however, not be seen as simply an extension of the human rights mission as conceived in legal discourse. R2P plainly confronts the international community with the need to strategically conceptualise human rights in close connection with the two major ventures that form the other points of the *golden triangle of human dignity*: human security, as based on F.D. Roosevelt's freedom from fear, and human development, as tuned towards FDR's freedom from want. In an earlier publication (2004) I have presented that golden triangle as follows:



This figure represents the human dignity mission in a wider perspective than just human rights. In that connection some essential linkages are sketched that are highly relevant from the perspective of collectivities: in order to achieve human security, a socio-economic perspective (and hence a functioning economy) is required as well as good governance and the rule of law (and hence a functioning state); for the realisation of human rights it is also important that people enjoy a socio-economic perspective in their lives while living in peace and security in a politically stable environment; the latter is crucial for human development,

too, as well as good governance based on the rule of law. It is, indeed, this golden triangle of human dignity—considered as an indivisible whole—that represents the core challenges in respect of protecting so-called ‘minorities’.

Conclusion

In the days of the dictator Marcos a student of mine said: “We in the Philippines learned human rights not from books, but through oppression and the need for resistance”. Evidently, her statement refers to the first genealogical line in human rights: inclusive human dignity to be asserted by victims of violation. Here lies the clue to a new conceptualisation of what was meant by ‘minority rights’. The key issue is in how to identify the collective subject in need of protection.

As a normative category entitled to international protection, a minority should not be seen as just a group of people in a non-dominant position with access to particular rights, but rather as a collective entity in need of public-political protection against abuse of dominant positions; *identification through violation*, in other words, rather than legally recognised, seemingly primordial characteristics. To determine abuse of dominant positions, the standards of international human rights law may well serve, meaning primarily the norms of *ius cogens* such as prohibitions of aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, apartheid, slavery, and torture, and generally the Universal Declaration of Human Rights that was proclaimed by the United Nations General Assembly in 1948

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive ... to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

While this approach to the ‘minorities’ problematique provides sufficient clarity for integrated policy responses, it cannot form a basis for *judicial* protection as the legal subject is, and will remain, indefinite. Indeed, the collectivities in need of public-political protection, so called

'minorities', are not primordial categories but collective entities arising out of (deficient) political practice. As such they will benefit from a shift of resources from (quasi-)juridical action towards policies supporting political-economic transformation. After a meaningless start down in the UN hierarchy with the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, it is high time now to take the security of national collectivities seriously. A new mission might well need a new name. Conceivably, then, a Sub-Council for Protection of National Collectivities might be established directly under the Security Council, the only UN body with real teeth, to operate according to the principles of R2P.⁴⁵ The normative background for such a new institutional setting lies in the genealogy of universal human dignity rather than that of fundamental rights, and in established global legitimacy rather than declared universal legality. Indeed, in order to effectively protect collective victims of abuse of dominant positions, this whole mission will have to be rooted in not merely human rights, but in the full triangle of human dignity, including human security and human development.

Finally, then, there is nothing wrong with rights, including group rights in the sense of 'rights of collectivities'. Yet, there are conceptual and contextual difficulties in pursuing efforts to realise such rights. The term "minority", both as a label and as a concept, does not assist in any way toward overcoming those obstacles: it is here that we encounter a *major misconception*. What is required now is firstly to reconceptualise the mission in terms of collective human dignity protection, and secondly to move that mission from the UN mechanisms for the "promotion and protection of human rights" to an international environment truly conducive to their realisation.

⁴⁵ As noted already, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities that used to fall under the Commission on Human Rights has not been a success. For the history of that set-up, see "The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities" (Humphrey 1968).

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