

CONSTITUTIONAL LAW AND MINORITIES



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The **MINORITY RIGHTS GROUP LTD.** is an international research and information unit registered in Britain as an educational charity under the Charities Act of 1960. Its principal aims are —

- To secure justice for minority or majority groups suffering discrimination, by investigating their situation and publicising the facts as widely as possible, to educate and alert public opinion throughout the world.
- To help prevent, through publicity about violations of human rights, such problems from developing into dangerous and destructive conflicts which, when polarised, are very difficult to resolve; and
- To foster, by its research findings, international understanding of the factors which create prejudiced treatment and group tensions, thus helping to promote the growth of a world conscience regarding human rights.

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CONSTITUTIONAL LAW AND MINORITIES

by Prof. Claire Palley

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PREFACE

Hitherto MRG reports have dealt with particular minority situations in different parts of the world. MRG has commissioned the investigators and has done its best to check the factual accuracy of their reports. It has not sought to influence the opinions expressed by the authors, and it has printed its reports with a cautionary rubric explaining that the organisation is not necessarily in agreement with the views expressed. This report is different. It examines a whole range of minority situations in terms of the legal measures used to alleviate, or in some cases to aggravate, them. The author, a distinguished constitutional lawyer who has worked for many years in both Rhodesia and Northern Ireland, is a member of MRG's Council and is therefore among those who help to form its policy and decide its activities. Naturally, Professor Palley writes from her own field of specialized knowledge, but her report has been seen and approved by all her colleagues on the Council.

Roland Oliver
Chairman, MRG

**From the Universal Declaration
of Human Rights,
adopted by the General Assembly
of the United Nations
on 10th December 1948:**

Article 1

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.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

INTRODUCTION

The reader interested in minority problems may well ask 'What has Law to do with minorities?' If given the answer to two further questions, namely 'What is a minority?' and 'What is the role of Law in any society?', he or she will immediately realise the significant impact of Law on minorities.

What is a minority? A minority can be defined as follows:

'Any racial, tribal, linguistic, religious, caste or nationality group within a nation state and which is not in control of the political machinery of that state.'

Two points must be made. First, minorities are here defined in terms of their power position in society: they are the non-dominant groups.¹ Second, it would be as valid, if power is the frame of reference, to include any non-dominant group, such as women. However, for purposes of this report only certain kinds of cultural or ethnic group have been selected — groups made up of collectivities of families, who see themselves, or are seen by others, as members of a distinctive group sharing inherited traditional patterns of social organisation and ideology. The justifications for this limitation here are space — otherwise all political problems of all groups would be involved — and the fact that the average man thinks of minorities in terms of ethnic and cultural groups.

What then has Law to do with minorities? To answer this it is necessary to explain the functions of Law in society. Thereafter the effect on minority groups of constitutional and legal rules will be examined with special emphasis on their protective aspects. Finally there will be an attempt, despite the multiplicity of variables, to assess whether, where particular legal arrangements are made, these are accompanied by harmonious or accommodating relationships between majority and minority groups.

I THE ROLE OF LAW AND HOW IT WORKS

To most non-lawyers Law is a technical subject relevant only when a dispute results in recourse to lawyers or in court proceedings. This misconception obscures the all-pervasive effects of Law in society. Law is an indispensable element in the life of governmental systems: it defines the structure and composition of governmental institutions; it sets out the procedures of government and the procedures of orderly change; and it prescribes new norms of conduct for individuals and groups. It is Law which makes regularised political life possible and which provides for the implementation and maintenance of policies. Obviously rules concerning state organs and public administration are relevant to political life, but rules regulating the relationships of groups and individuals to the state and rules governing relationships between groups and individuals may be equally significant. Within the state's framework groups or individuals are authorised to take particular action, or to apply policies, and these often become of public concern. Particular examples supporting this contention are trade union rules and activities, employment law especially in regard to hiring and promotion, restrictive contractual dealings based on race, creed or sex, the provision of housing, and private schooling. Potentially any relationship between individuals can touch on the public interest depending on the circumstances in which it occurs.

If Law is seen in this light it becomes apparent that Law is a systematised process for ordering relationships once men reach the stage of regulating behaviour in a politically organised society. Law is therefore very closely related to politics. However, it is not co-terminous with politics. Law is not as extensive and, although existing laws have an impact on future behaviour, the corpus of law must primarily be seen as the product of politics, with the political system producing formal legal rules incorporating the behavioural standards of the major political actors and reflecting their power relationships. Obviously there are time lags between the interaction of political forces in the existing framework and the production of new laws or changes in existing laws, which have the inertia attaching to any *status quo*. Obviously too in the modern centralised bureaucratic state with an active legislature the time lags between the propounding of policies and practices and the enactment of laws, and also the areas considered unsuitable for legal intervention, are far less than they have been in previous centuries. Law thus consists of the officially promulgated rules governing behaviour in a polity. These rules are implemented and applied by the legal system which is made up of the formal institutions and processes used to create and administer the Law.

Law and the legal system together provide an authoritative guide for human behaviour and provide for enforcement by official organs in society. In this respect Law and the legal system are mechanisms to ensure conformity by individuals and groups to the behavioural standards incorporated into the current rules. Law is therefore instrumental in character. It can be seen as the most formal mechanism of social control when compared with pressures to conformity with political ideals or with conventional behavioural standards supported by groups or individuals.

As an agent of social control Law acts both passively and actively: passively in maintaining the existing order and conformity to traditional norms; and actively by providing a process for implementing goals and values of the past and present political power holders and for facilitating change. Legal rules can, not inappropriately, be described as management agents for suppressing, confining, limiting, guiding, directing, standardising, integrating, adapting and changing behaviour. At the same time the legal system provides machinery for groups and individuals to modify the system itself and the standards it incorporates.

An extraordinary phenomenon associated with Law is that most men in society presuppose that the Law governing the institutions of the state and individuals is valid. Generally men accept the authority of state institutions and of their rule/law output. They also presuppose an obligation on the part of individuals and groups to obey such rules, and accept that the state has a right to coerce persons into obedience. 'The Law' is perceived as something 'out there', a fact of nature, a natural order to be obeyed. This tendency to reification of the concept of Law and to resultant feelings of obligation and constraint occurs because men tend to forget their collective authorship of legal rules and their collective power to change the content and scope of such rules. They fail to see that political, economic or social groups have, in the competitive and compromising processes of political bargaining and interaction, succeeded in having their own ideologies and material interests in whole or in part advanced, protected or entrenched through enactment of legal rules.

Furthermore, even in the mid-twentieth century, few politicians and legislators have appreciated the potentialities, despite numerous variables and difficulties, of using Law

and the legal system to change the social order not only by modifying its major institutions, patterns of group organisation, and methods of acquiring, preserving and transmitting resources such as wealth in all its forms and knowledge, but also to modify behaviour and even attitudes of individuals and of groups (insofar as attitudes — i.e. habitual modes of regarding concepts, issues, persons or things — can be imputed to collectivities). In fact, ever since men organised themselves in political societies, there has been a degree of social engineering resulting from the adoption of legal rules. Conscious attempts to bring about social change by Law began to multiply in the 19th century, but their aim was confined to prohibiting or deterring certain kinds of conduct or to dealing with material resources. They did not seek to change attitudes. Only in the last few decades has Law been used to hit at conduct which has been regarded as largely attitudinal. Discrimination against members of other racial, ethnic, national etc. groups was long regarded as being a manifestation of prejudice, an attitude, and thus beyond the power of Law to regulate. The United States pioneered legal intervention in this field. This was based on a theory that white people had stereotyped beliefs about black people which led to discriminatory behaviour in employment, housing, schooling and social relationships in general. Discrimination led to social and economic inequality on the one hand and segregation on the other. Segregation and inequality then combined to cause psychological damage to children — resulting in lower achievement, lower aspirations and less self-esteem. This led to inadequate education, inferior jobs, black alienation, powerlessness and hostility to whites. The result was increased white prejudice, a general polarisation of race relations, and a repetition of this 'vicious circle' of attitudes and events. If Law is used to intervene at some stage in this process (for example, by legislating for better job or educational opportunities or housing) and such Law is fully implemented, then a push in the opposite direction will have been given. Using the metaphor of the 'vicious circle' it is argued that the circle's direction of rotation will be reversed so as to result in more achievement, more favourable attitudes and less discrimination. In practice the results of such intervention have been less racial segregation, better education, better housing and better jobs for, greater political participation by, more justice for (the 'dual' system of one law for blacks and another for whites being ended), and more favourable attitudes towards, black Americans. Obviously laws could not equalise power or wealth, and great status inconsistencies remain between most American whites and blacks. Nonetheless direct discrimination has been ended, and there have been great changes in patterns of behaviour between the races. In addition attempts have been made to hit at indirect discrimination where covert attitudes have resulted in adverse treatment of persons of a particular race. Statute and judicial decisions now strike down practices or procedures which have a discriminatory effect, or the application of conditions which are such that the proportion of people of a particular race able to comply with the conditions is smaller than the proportion of other persons able to do so.

The United Kingdom has also legislated to hit at discrimination, in 1968 and 1976 strengthening its original regulatory legislation of 1965. The aims of legislation in both the United States and the United Kingdom have been threefold: to inhibit adverse action occasioned by racial prejudice; to confer equal rights and opportunities; and, in the long term, to change prejudiced attitudes by establishing norms of unprejudiced behaviour and by de-institutionalising prejudice. It would be foolish to exag-

gerate the success of these aims, particularly since unwritten, intangible discrimination is extremely hard to tackle by means of legal rules.

The converse process has been used in South Africa and Southern Rhodesia and, until judicial and congressional intervention precluded it, in the United States. Law can be used to achieve, perpetuate and extend racial inequality. Systematic use of discriminatory laws on a society wide basis can result in political and economic dominance of one racial group as against another. The combination of Law and force deter opposition by dominated groups, unless they become so alienated from the society as to adopt revolutionary violence. The part that Law plays in this process is shown when there are changes permitting relative freedom of speech and association (even if only on a temporary basis). These provide the opportunity for dominated groups to enunciate their own ideology, to awaken a group consciousness, and thereafter to mobilize against those who dominate them. This is what happened in 1971 in Rhodesia after the United Kingdom Government insisted that the Smith Regime permit political activity and discussion of the Douglas-Home proposals for a British settlement with Rhodesia so that African opinion could be assessed by the Pearce Commission. Even a temporary and partial withdrawal of the legal bans on discussion and meetings led to the revitalization of the African nationalist movement and an African consensus that Zimbabweans should struggle against European domination. A sociologist would say: the communications process was used to create a common ideology.

Recent social engineering activities, which have contributed to current world minority problems, have been the attempts by newly independent nation states in Asia and in Africa to build a 'nation'. In this task many of the political élites took to heart the theories of sociologists and consciously tried to engage in social control activities. They tried to induce and regulate social change by reconstructing their political and economic institutions to embody and to promote innovation and to enhance their efficiency by centralisation. They engaged in conflict management. They tried to induce national integration by attempting to control individuals' subjective loyalties and to redirect these to a new nation state so as to downgrade local loyalties. They have tried to create a common consensus. They sought to create a new ideology. They sought to give the new nation state and their own rule legitimacy. They featured selected national symbols (flag, national dress, national traditions). They tried to use language to draw the nation together. They tried to direct the economy and national wealth for national objects. The approach was usually authoritarian: in many cases one-party systems were set up by their constitutions. The history of such attempts is relatively short, but even so it can confidently be said that as yet such activities have seldom had the intended effects on racial, tribal, linguistic, religious, national and regional group loyalties. Indeed what has in many cases occurred is an intensification of ethnic conflict and exacerbation on a major scale of minority problems. To integrative attempts the minorities often responded by using similar approaches — they relied on the ideology of self-determination, they consolidated a consensus as the result of suffering discrimination, and they pointed to the economic advantages of independence for their region.

Where new nations were created this was at the cost of repression of opposition and denial of democratic government combined with an unwillingness to allow the same degree of self-determination to minorities as the leaders of

new nations had themselves demanded from colonising powers. In most cases something akin to internal imperialism has been substituted for alien imperialism.

The foregoing account of the effects of Law shows how it has the potentiality of affecting conduct, of creating new patterns of conduct, of shaping attitudes, and of providing a framework for political competition, compromise and accommodation. Obviously it would be legal megalomania to imagine that legal regulation can stem powerful political, economic and social forces or massive revolutionary violence, but Law can, particularly in the long run, affect the framework in which these forces will operate, and can reinforce or weaken the claims of particular groups in society, whether these claims be political, economic, social or cultural and already enunciated or merely latent.

There are ethical problems in deciding to utilise Law for social engineering. To adopt a legal interventionist stance is to choose for others, to structure them and to deprive them of freedom of choice. Put in the context of minority problems the question could be posed thus: 'Has a government the right to decide whether a particular group should have its culture preserved or whether it should be assimilated?' History teaches of the dire consequences for group members of such policies e.g. for the Amerindians of North America. Freedom of choice is probably the most basic of all human values: only with freedom of choice can other values be ranked and selected. What is more, it is the best protector against tyranny. The answer (given by behaviourists such as Professor Skinner) is that society and its rulers already indulge in guided social change. We do not know empirically how this operates on a society-wide basis, but we do in general know from theories that have been tested that we effect change by childrearing, by education, by cultural and political socialisation, by psychological pressures and negatively by the state authorities' imposition of penal sanctions. Society is not self-regulating: to do nothing is therefore to do something. Choices are therefore, being, and have to be, made.

Are there any principles which should guide choice? In applying knowledge of the techniques of Law and of behavioural modification on social learning principles we need to be clear about (a) *what* we are advocating doing; (b) *who* is doing it; (c) by what *means*; (d) for what *ends*; and (e) the likely outcomes for *all* parties. Once the tension between ends and means comes into focus then all the problems of moral choice between conflicting values arise.

The law-maker concerned with minority problems must strike a balance and reconcile so far as he can the following values and procedures (these are in part overlapping and not of course comprehensive): Democracy vs. Individual Rights; Authoritarianism vs. Libertarianism; Interventionism vs. Laissez-faire; Coercion vs. Consensus; Group vs. Nation; Particularism vs. Universalism; Liberty and Free Speech vs. Order; Freedom vs. Equality; Freedom vs. Justice; Affirmative Action to Compensate for Past Injustice vs. Discrimination in the Present; Bureaucracy vs. Democratic Development and Participation; Elite vs. Mass Guidance; Uniformity vs. Diversity; Centralisation vs. Decentralisation; Self-determination vs. State-maintenance; Change vs. Stability and the Status Quo; Mobility vs. Stratification; and Future Well-being vs. Present Well-being. In the context of dealing with minority problems there can be no right answer: it will depend on the values of the decision-maker and the circumstances in which he makes his decision. If he values polity above a small group, he will seek to transfer its orientation to the polity. If he values above polity the individual's right to belong to and to

identify with groups and to obtain satisfaction from group membership, then the decision-maker's choice will differ. Similarly if he values democracy and sees it as part of democracy to allow groups to compete, formulate demands and share in the decision making process, then groups will be more favourably treated.

In the context of minority problems interrelationships between the majority and the minority groups are the key focus of attention for both sides. The aims of the political leadership of each group *vis-à-vis* the other, the nature of the relationship between their élites, and above all the locus of power will determine what policy choices are made.

As Edmund Burke pointed out, what makes every civil or political scheme beneficial or noxious are the circumstances. If constitutional devices are to be employed in dealing with minority problems, consideration of the particular facts of each problem will point to different approaches. Some kinds of group division are more divisive than others: regional, caste, cultural and tribal differences are generally less divisive than are racial, linguistic and nationality differences. The collective political aims expressed by the leaders of the dominant power group may vary. They may enforce assimilation, refusing to recognise the minority's aspirations, culture or distinctive life style (Turkish and Burmese treatment of their minorities; Eastern European states' treatment of the Rom; Malawian and Zambian attitudes to millenarian religious sects, who emphasise the wickedness of the political order and refuse to identify with the aspirations of national leaders). The dominant group may be tolerant and permit cultural differences to survive (Russia and Thailand). The relationship between the élites of the dominant and non-dominant groups will vary from co-operativeness to hostility and will crucially affect any outcome (Holland compared with Cyprus). The dominant group may wish to institutionalise its dominance by denying the minority group access to power, education and economic opportunity (South Africa, Rhodesia and the United States prior to the post World War II era). It may seek to strengthen its own power in relation to the minority (Sri Lanka, Malaysia, East African states). It may treat different minorities differently, favouring some, exploiting some, and allying with some (South Africa). It may seek total domination (Burundi and the Bangladeshi attitude to Biharis). The collective political aims expressed by the leadership of the minority also vary, ranging along a scale of possible attitudes from a desire for assimilation, for cultural pluralism, for autonomy, for separatism to irredentist reconstructivism (as with the Kurds, the Somali, and the Pathans). The minority may become ethnocentric in order to satisfy the psychological needs of its members, and may seek firmly to establish its own identity (Amerindians, Blacks in Brazil, Blacks in U.S.A., Burakumin in Japan and the Rom in Europe). How a minority can be handled will depend on its perceptions of its situation and the likelihood of its achieving success in its targets. Physical factors of time, size of the groups, location, and rates of change, are vitally important.² If the groups are approximately equal and can inflict unacceptable harm on each other they tend to co-operate (as in Malaysia and India). If they are disparate in size the dominant group tends to seek to extend its control and to attack the power base of the minority (Sri Lanka). If there are large and small minorities and no dominant minority there are then fewer problems (Tanzania has over 100 tribal groups, with different languages or dialects and has had little trouble with its indigenous minorities). Whether the minority is physically concentrated in one location is significant. If it is dispersed

and splintered, conflict tends to be diffused. If it is concentrated within fixed boundaries its power is enhanced. How far it is from the centre and how near to the periphery of a state will affect its perceptions of the likelihood of a successful secession (Nagas and Bengalis), or its powers to opt out from the administration (parts of Burma). If it has access to the sea it is logistically better off (Bengalis). If it has supportive neighbours it is more likely to succeed (Bangladesh – compared with Biafra where international African reaction was not supportive, while successful secession would have been an unhappy precedent). At different times willingness of the dominant group leaders to apply a particular policy changes. In India Nehru dropped his policy of linguistic unification; in the Sudan General Nimeiry's willingness to adopt a pluralist policy and to grant regional autonomy for the South ended a long civil war; and in Burma, from an original policy of accommodation of minorities, governments moved to policies of coercion. The history of the country, its past institutions, its political and cultural framework, the relative prevalence of particular values, beliefs and perceptions and the felt urgency of the common task of peaceful co-existence all affect the possibilities of making particular arrangements work. Indeed the mix, the place and the time (and political, economic, and social changes occur with rapidity in the 20th century) will determine the feasibility of making any particular arrangements. If there are good government and good majority/minority relationships in a country these are basically a reflection of the management capacity of the élites and of the degree of political development and responsibility of the masses of the people. However, constitutional arrangements can play a part by facilitating élite bargaining, by providing channels for compromise, and by establishing institutions which will accommodate all groups.

With the increasing knowledge that is becoming available from law impact research, from sociological theory, and from social psychological experimentation, we have the core of a new technology to build more humane social structures and to change human behaviour. On the micro-legal level, when dealing with individual behaviour with measurable dimensions, we are currently on much surer ground. On the macrolegal level we are still in the early dawn stage of knowledge³. Research is required on a massive scale to look at every constituent institution and stratum of society. We need to ask:

'How does this institution or practice . . . function in the articulation of the society, in attaching or detaching or fixing each sector in its relationship to the central institutional and value systems of the society?''⁴

When we know that, we will be able to choose suitable structures, depending on our own goals and values, for societies troubled by disruptive majority/minority relationships. Those who make and implement constitutions and laws have, since the Enlightenment and the enunciation of utilitarian principles by Bentham and his disciples, sought to devise well-balanced constitutional machinery. They sought to tame political power and, with checks and balances, to create an equilibrium of the forces of society. Their visionary approach did not succeed, but then they were seeking too much too quickly and without the social technology produced from the recent blossoming of social science research. Yet their constitutional structures and legal arrangements provide the framework in which there have already been changes in group and individual relationships. We need to examine constitutional devices to see if they can be applied or adapted. Impact studies would be the next step in attempting to assess their usefulness.

Finally, legislators should, if and when new kinds of legal arrangements are proposed, be flexible and open-minded towards them.⁵

II CONSTITUTIONAL DEVICES AND LEGAL ARRANGEMENTS

A convenient starting point for the analysis of the effect of law on minority groups is a catalogue of existing constitutional practices examined from the functional aspect, i.e. listed on the basis of who does what to whom. Some passing reference is also made to the why, how, when and where of these practices. A functional catalogue of this sort takes as its point of departure the power groups controlling any state's machinery because power, combined with possible willingness to change state institutions or determination to maintain them, will be decisive for any outcome. Revolution apart, and bearing in mind the dominant groups' awareness of the inevitability of continuing relationships between themselves and other groups, it is the decisions of the current rulers (i.e. the élite of the dominant group) which will prevail. In the last resort they have 'the say' in deciding which policies shall be translated into law and legal institutions.

In the context of a study of majority/minority group relations the functional aims will either be integration of the groups and individuals into the larger society, or maintenance of differences between groups and individuals in that society. The techniques for furthering integration fall into two main categories: first, benign approaches, which allow the minority the choice of joining the dominant group, and which are usually labelled assimilationist approaches; and second domination devices, where the integration is to be achieved by the imposition of the political, economic and cultural standards of the dominant group. In contrast the technique of pluralism is usual where differences are sought to be maintained. Then groups will, in addition to their participation in some common and compulsory institutions, be permitted or accorded also 'alternative' or 'exclusive' institutions for particular purposes so that they, as a sub-nation, can fix their own norms. If these arrangements are recognised by law there is formalised pluralism. If, in contrast, groups are not recognised *as such*, but institutional arrangements are made effectively to give a say to the groups, without specifically designating them, then there is informal pluralism. Seldom is one technique alone applied – the same élite may apply some assimilationist, some pluralist and some techniques of domination simultaneously.

Here I am dealing only with decision-makers in nation states and am confining discussion to national legal arrangements because International Law's approaches to group relationships would require too lengthy an explanation. It suffices to say that nation states are beginning to examine the possibility of enacting not only national law, but also International Law's protection for minority cultural groups, although maintenance of the territorial integrity of existing states is still the first principle which governs their decisions. A Draft Convention Relating to the Protection of National and Ethnic Groups and Minorities has been recently drawn up by a distinguished international jurist, Professor Ermacora. A watered-down version will in the long term probably be approved by the United Nations General Assembly and some nation states will then enter into treaty obligations of acceptance. But such possibilities are all in the distant future. The question this report seeks

to raise is 'What can be done by internal laws in particular countries in regard to minority groups?'

A. Assimilationist approaches

The aim of such approaches is to eliminate differences of treatment between group and group, and individual and individual. Differences are not recognised by law – although there is usually an informal toleration of social groupings, and formal toleration to the extent that freedom of association is recognised by law. Assimilationist techniques create formal equality before the law, and, where group members have rights, it is in their individual capacities, and not as part of a majority or as part of a minority of the population. There are in fact two complementary principles involved in this approach: the first is the equality principle whereby all are to be treated equally; and the second is the non-discrimination principle, reinforcing the former by negative prohibitions on treating different persons in the same circumstances less favourably than other persons in those same circumstances are or would be treated.

An idea of the numerous techniques to secure equality and non-discrimination and ultimate assimilation can be obtained from the catalogue that follows:

1. *Bills of Rights* – enumerating civil and political rights; conferring social, economic and cultural rights; protecting citizens only; protecting all persons within the jurisdiction; with or without judicial review to test constitutionality and for enforcement; with or without legal aid to assist aggrieved persons; with or without rigid procedures to stop easy amendment of the Bill; an 'interpretation' Bill of Rights applying substantively so as to override earlier inconsistent legislation, but as an Interpretation Act only in the case of future legislation, in which event a later statute can expressly override the Bill of Rights (Canada).
2. *Non-justiciable Directive Principles of state policy* – enunciation in the Constitution of general libertarian principles – serving as aids to interpretation – but not overriding earlier or later laws (Ireland, India and Pakistan).
3. *Special anti-discrimination constitutional provision* – rendering laws and executive action contrary to them invalid (Government of Ireland Act 1920 sec. 5; Northern Ireland Constitution Act 1973).
4. *Anti-discrimination statutes* – with or without criminal sanctions; with or without making 'incitement' to discriminate a criminal offence; with or without civil actions in the ordinary courts for damages and injunctions to assist persons discriminated against; with or without special tribunals to deal with employment grievances e.g. discriminatory hiring, training, promotion, firing; with administrative enforcement rather than direct enforcement by ordinary litigation in the Courts e.g. consent of Attorney General a precondition to commencing enforcement action; with conciliation machinery for parties to negotiate and settle their grievances;

- with promotional machinery to promote good race relations in the community (e.g. Commission for Racial Equality U.K.);
- with investigative machinery to investigate complaints of discrimination (e.g. Commission for Racial Equality U.K.);
- with law reform machinery to make continuous surveys and to recommend changes to Parliament;
- with power to deal with patterns of discrimination and to collect evidence;
- with provision for modification or avoidance of discriminatory contractual terms.

(See generally Race Relations Act 1976 (U.K.)

Race Relations Act 1971 (New Zealand)

State laws in many American States.

Civil Rights Acts 1964 and 1968 (U.S.A.).)

5. *Franchise laws* – positive statements of voting rights; prohibitions on improper application of electoral laws e.g. by discrimination in voter registration procedures.

(See generally Voting Rights Acts 1965, 1968 and 1970 (U.S.A.)

Representation of the People Acts 1949 and 1969 (U.K.).)

6. *Constitutional protections for the enactment of certain laws* (rigidity as opposed to flexibility) – special procedures specified in order to amend constitutional protections e.g. weighted majorities (say 2/3), or a referendum, and in federal states a requirement additionally of the assent of a majority of the regional units; specially entrenched provision requiring not merely the usual procedures for constitutional amendment but also additional safeguards (e.g. referendum with approval by a majority of each racial community voting separately as well as a specified majority in the legislature (1961-65 Southern Rhodesia – here the safeguard is also pluralistic because it expressly recognises the groups); weighted majorities for ordinary legislation of specified character (Electoral Act in Southern Rhodesia); scrutiny of and reports on legislation by a specified body before final enactment and with a period of delay before legislation adversely reported on can be re-submitted to the legislature for enactment (Constitutional Council – Southern Rhodesia 1961-9); external controls such as enactment by an external body. (Certain constitutional amendments in Canada can only be made by the U.K. Parliament); external controls with Bills being reserved by a Governor and being submitted for Her Majesty's assent on United Kingdom Ministers' advice (Southern Rhodesia Constitution Order in Council 1961; all non-independent British Colonies).
7. *Special institutional arrangements to supervise the administration* – thereby ensuring that governmental decisions are properly and fairly reached and are in accordance with principles of equality before the law and non-discrimination –
 - (a) 'Ombudsmen' responsible for investigating complaints about –

- central government administration (Parliamentary Commissioner for Administration (U.K.)); regional government administration (Parliamentary Commissioner for Administration (Northern Ireland)); local government administration (Local Government Commissioners (England and Wales); Commissioner for Complaints (N.I.)); particular governmental functions (e.g. for health services in the U.K.);
- (b) Civil Service Commissions supervising the recruitment training, promotion and transfer of governmental employees –
 'independent' Commissions (Many are in fact nominated, as in Zambia. Such Commissions are found in most former British possessions); Regional Government Staff Commissions (Northern Ireland); Local Government Staff Commission (Northern Ireland).
8. *Special institutional arrangements in the private sphere* to ensure that individuals are treated with equality and not discriminated against by other private individuals –
- (a) Conciliation bodies whose main aim is to reconcile the parties and obtain undertakings so that in future there will be no discriminatory conduct –
 (Race Relations Board and local conciliation bodies under U.K. Race Relations Act 1968; Anti-Discrimination Commissions as in various States of the U.S.A.);
- (b) Promotional bodies who provide educational materials, do research, give advice or assistance to non-governmental organisations, report on desirable law reform and undertake investigations of alleged discrimination –
 (Community Relations Commission under U.K. Race Relations Act 1968);
- (c) Enforcement bodies –
 (Attorney-General under U.K. Race Relations Act 1965; Race Relations Board under U.K. Race Relations Act 1968; Commission for Racial Equality under U.K. Race Relations Act 1976 repealing earlier Acts; Anti-Discrimination Commissions in various States of the U.S.A.);
- (d) Specialised functional bodies concerned with private arrangements of major concern to society e.g. fair employment bodies in the private sector to ensure fair and non-discriminatory employment practices –
 (Fair Employment Practices Commissions (States of U.S.A.); Fair Employment Commission (Northern Ireland 1976).)
9. *Judicial action* i.e. enforcement machinery by litigation in the courts –
- (a) constitutional review (if provided in the Constitution – India – or established by judicial rulings – U.S.A.);
- (b) ordinary civil litigation and criminal proceedings in which the judges develop standards requiring non-discriminatory conduct;
- (c) judicial review of administrative action when governmental decisions are challenged in the courts as being unlawful. Here judges have been inventive so as to require fair decision-making by developing doctrines of public policy, presumptions of statutory interpretation including the rules of natural justice, and the doctrine of *ultra vires* so as to include discrimination. In the U.S.A., with reliance on the constitution, the doctrine of judicial action as state action was invoked so as to refuse enforcement of discriminatory practices.
10. *Law enforcement machinery designed to secure equality and fairness under law* –
- (a) maintenance of a well trained police force with good disciplinary and grievance procedures;
- (b) establishment of independent criminal prosecuting authorities who do not act at the behest of politicians;
- (c) provision of safeguards for the accused in criminal procedures, both pre-trial and during the trial (evidentiary rules and procedural requirements).
11. *Executive action* – to ensure fair decision-making –
- (a) imposition of high standards of training in administration;
- (b) provision of appeal procedures in the administration –
 (i) departmentally;
 (ii) to an independent tribunal;
 (iii) to an internal system of administrative courts;
- (c) political and hierarchical supervision within the bureaucracy itself of bureaucratic conduct (whether at a central or a local government level).
12. *Parliamentary control* – to ensure fairness, equality and non-discrimination, and justice –
 various procedures including correspondence with ministers, questions, debates, select committee investigations involving problematic facts.
- These techniques are designed to ensure good government in the sense of fairness, justice, equality and non-discrimination for all individuals and formally recognised group organisations (e.g. trade unions, clubs). They are certainly not designed to enhance or to reduce the relative power position of particular cultural groups. Nonetheless the cumulative effect of such measures is in the long run to integrate individuals and groups within the greater society, for individuals' group allegiance to fade, and for the relative influence of groups as a whole to be diminished. Competing claims for scarce resources then tend to be couched in individual, class, political, or economic terms rather than in language of minority cultural group claims. Consequently the minority cultural groups as such become less significant politically. Indeed, in an assimilationist society, the long run tendency is to political elimination of minority groups.

B. Domination devices

Domination as a technique may be scaled along a range of attitudes from the most extreme position, where the majority group seeks absolute hegemony within the state, to situations where the élite of the dominant group is seeking to strengthen its own position relative to other groups by giving their own group members greater access to resources of political, economic and cultural power, or to situations where the aim is to maintain the *status quo* by supporting their own groups' current power position. There is little point in this report in dealing with states where the controlling élite have extreme domination or

purification approaches. In such situations, if the power holders have sufficient force, they will exclude the minority groups by partition, or secession, or boundary redrawing, or by mass population expulsion whether directly imposed or indirectly ensured by the creation of intolerable living conditions for the minority. There may even be genocide. For the cultural minority within such a state there is no 'future'.

In the standard domination situation there are noticeable departures from the equality and non-discrimination principles. To the naive observer it is less obvious that when the *status quo* in a state is maintained there is equally domination in the form of an attempt to freeze existing power patterns. Failure by non-minority group members to perceive domination is even more frequent where existing state institutions do not formally recognise the cultural distinctiveness of minority communities. Such societies are often described as assimilationist. If the situation is analysed it is apparent that 'forced assimilation' is domination, whether this is implemented by the provision only of majority-determined linguistic schooling or religious facilities, or by state preservation only of majority cultural symbols. It is domination in the sense of maintaining the current political, economic and cultural predominance of the majority group, and domination in that it denies alternatives to other groups whose members are subjected to enforced integration.

All departures from the equality and non-discrimination principles are not necessarily designed to confer economic and cultural benefits on the majority group and its members. Although this is the most frequent reason for departure from such principles, the dominant group's élite may instead adopt a strategy of destroying minority groups' motives for large scale political change by encouraging political stability through altering disadvantageous patterns of imbalance in the economic and cultural spheres as between different group members. (Many of the élite may have moral as opposed to merely Machiavellian motives.) In such an event legal arrangements will be used to improve the position of group members from the minority groups whose economic and social position has been selected for upgrading. Such a strategy to remedy imbalances resulting from preceding structural patterns in society is termed 'affirmative action'. This is discussed under the heading of domination, not merely because it is brought about by the same techniques used to further the interest of one group and its members as opposed to another, but because the following of such a policy is in essence coercive, being employed at the behest of the élite of the dominant group, which has decided to manipulate the positions of groups and individuals for whatever reason.

It is artificial to distinguish between institutional arrangements in the political, economic and cultural spheres, institutions being multi-faceted with impact in all spheres. It is equally artificial to distinguish institutional arrangements which shape ideology from those which are concerned with material force. Nonetheless for the purposes of exposition it is convenient to analyse domination techniques as being applied in four major spheres of state action viz. the political, the economic, the cultural, and that of order backed by physical force. Within these spheres the legal techniques a dominating élite can select can be catalogued as follows:

1. The Political Sphere

The major technique employed to limit the political power

of minority groups has been electoral manipulation. There are many variations. Potential voters may be disenfranchised by a combination of restrictive citizenship law and electoral law (Sri Lanka). A racial group may be disenfranchised by its removal from a common voters' roll combined with the provision of politically impotent new machinery (South Africa). There may be qualitative franchises, either with educational qualifications (Southern States of the U.S.A. until the Voting Rights Act 1965) or income qualifications or a combination thereof (South Africa and Rhodesia) or property ownership or occupation (Northern Ireland local government franchise until 1969) or tax payment requirements (Rhodesia from 1969 to date). There may be voting registration procedures applied effectively against minority group members (U.S.A. until 1965 and Sri Lanka). There may be residential requirements to exclude potential supporters of the minority (Northern Ireland to preclude immigrants from the Republic from voting in Northern Ireland elections for 7 years after arrival). There may be gerrymandering. There may be deliberate failure to redraw boundaries or to take account of demographic changes or to alter institutions when some provisions have disappeared, thereby frustrating the original purpose of the system (Northern Ireland local government elections until 1969 -- where the plural business vote favouring Protestants, multi-member constituencies designed for proportional representation but operated on a clean slate majority principle, and 40-year old electoral boundaries were retained -- and Sri Lanka -- where disenfranchised Tamils are used for delimitation purposes as 'population' to confer an additional 14 seats on Sinhalese voters). There are systems dependent on units which favour particular groups (Georgia, U.S.A., until 1963), on loading of particular constituencies where there are concentrations of minority group voters (Rhodesia), or on the application of weighting criteria in delimitation to give proportionately more rural than urban constituencies (Malaysia -- where more Malays are rural and more Chinese urban, and South Africa where English voters concentrate in towns). There may also be biased administration of elections and failure by authorities to take corrective action (U.S.A. until 1966, and Nigeria before 1966).

Much more drastic than these manipulative methods is the authorisation by law of population transfer of minority communities to areas where they are not regarded as a political threat (Russia between 1941 and 1944 and South Africa under its 'apartheid' laws).

A more sophisticated approach, but which equally effectively denies all political rights (and many economic rights which are not accorded to aliens) is the enactment of restrictive citizenship laws. This technique has been applied to the Tamils of Indian origin in Sri Lanka where the effect was that by 1952, on a Constitution envisaging that Tamils would hold 29 of the 95 parliamentary seats, they in fact held only 12. Similar policies have been applied to Chinese in the Philippines and in Indonesia, and to Asians and other non-Africans in Malawi, Kenya, Zanzibar and Uganda.

2. The Economic Sphere

The legal mechanisms designed to secure economic advantages for one ethnic group as opposed to another are the same irrespective of the motivation for their enactment. They may of course be designed to perpetuate the economic power of one group (South Africa and Rhodesia) or they may be designed to remedy what is seen by the

dominant élite as imbalance in patterns of economic power as between the various groups. Such imbalance may have occurred in respect of a minority community which has a disproportionately low share of national wealth and has had economic opportunities denied to it (as in the U.S.A.), or it may occur in respect of a minority community which has acquired a disproportionately powerful place in the economy, because of its relationship with a colonial power (the East African Asians used by the British for middle range public service and public works; and the Indian Tamils, brought to Ceylon in the 19th century as indentured labourers), or because of its active economic orientation (East African Asians; Chinese in Malaysia, the Philippines and Indonesia; and Tamils in Ceylon) or its much more rapid modernisation (the Tamils responded more actively to mission education and to urbanisation in Ceylon).

Whether laws and administrative action designed to remedy such imbalances are described as 'affirmative action' or 'reverse discrimination', or as 'national development' or 'discrimination', will depend upon whether the commentator is a beneficiary of the laws or not. If the emphasis is on remedying disadvantage and lack of opportunity (such as special educational programmes, special technical assistance programmes, special loan programmes for help in setting up co-operatives) or is protective (protection of native land against sale to capitalist entrepreneurs) it can be more readily tolerated by non-recipients. If it becomes an instrument of economic attack on other communities by denial of the right to engage in their traditional occupations, then it is proper to describe the technique as one of domination. In contrast, if the economic advantages are a 'plus' in the system, an increment, rather than something already in existence being transferred from one group to another in a zero-sum game, then it would be unfair to describe the new laws as primarily being oriented to domination. However, although non-zero sum transfers are less open to criticism, even those involve departure from the equality of access principle from the standpoint of an individual denied access to the newly available resources e.g. the Tamil denied a place in a new Sinhalese medical faculty.

The best known economic advantages provided by law are restrictions on land ownership and occupation. Many have been protective of colonised indigenous groups (as in New Zealand, South Africa, Rhodesia, Canada and the U.S.A.). Others have been designed to perpetuate economic power of European settlers by grossly unequal land division (Rhodesia and South Africa). In some developing countries previously unsettled rural land has been opened up by establishing new irrigation projects, co-operatives and marketing schemes for the dominant group only (Malaysia, Sri Lanka). In others large land areas are reserved for indigenous groups as opposed to persons of settler descent (in Fiji Indians are over half the population, but owned only 1.7% of the land in Fiji whereas the Fijian 42.3% of the population had reserved for it 83.8% of the land). Another technique is to prohibit aliens from owning land and to define aliens so as to exclude persons not of indigenous descent (in the Philippines many second and third generation Chinese are thus excluded).

Another technique for changing the economic structure is frequently employed where a minority group has hitherto monopolised the roles of middleman in trade or of small scale industrialist. Administrative discretion to refuse or grant trading and business licenses and import or export permits is used on racial grounds or on grounds of non-citizenship (East African states, Indonesia and Malaysia).

Obviously such policies may be in part evaded by 'buying' a tame nominee.

Government contracts have been used in two ways. They have been used directly to give benefits to a particular ethnic group (in Malaysia small public works contracts are preferentially awarded to Malay contractors). They have been used indirectly to require contractors to employ a fixed percentage of ethnic group members and to introduce training and promotion schemes for such employees (in the United States the construction industry has been forced to take on black employees and to give them proper training).

Control of employment in the Civil Service or in government controlled public corporations is another means of ensuring that employment patterns conform to the aims of the dominant group. In Malaysia Malays are guaranteed that appointments will be on the basis of four Malays for every non-Malay. In Sri Lanka, whereas at independence about 30% of government service admissions were Tamils, today the percentage is down to around 6%.

Economic nationalism throughout the world has resulted in policies stipulating that work permits are required before any alien can be employed. Such a policy is justifiable to protect the inhabitants of the state against unemployment and unfair competition from migrant workers willing to accept lower wages and a lower standard of living. United Kingdom Governments have argued that their purpose in cutting down the flow of 'coloured' Commonwealth immigrants by the Acts of 1962 and 1968 was to improve relations, which would otherwise be endangered by social and economic problems consequent on the influx. Similar arguments have been put forward by other European States faced by an influx of migrant workers (Switzerland). The position of the United Kingdom is complicated by the fact that Indian and Chinese communities, transported to or encouraged to go to various parts of the Empire for economic reasons, chose to remain citizens of the United Kingdom and Colonies and to elect not to accept citizenship from newly independent African and Asian states, rightly fearing that in the long run they would face economic discrimination. Not very different in degree has been the attitude of economic nationalism adopted by African States such as Tanzania, Kenya and Uganda, and by the Philippines and Indonesia to persons of foreign descent already settled in such countries. Governments have sought by a combination of nationality laws and the requirement of work permits for aliens to 'Africanize' or to 'de-Sinicize'.

The power of private employers to discriminate has in most states been permissible in terms of the law of contract and is widespread in countries with majority/minority ethnic and religious divisions. If law does not prohibit, it authorises. In the United States and in the United Kingdom such discrimination (subject to very limited exceptions) is unlawful, and a variety of mechanisms, both conciliatory and adversary, have been set up to prevent discrimination. In the United Kingdom, except in Northern Ireland, religious discrimination affecting private employment is unregulated: in 1976 legislation was enacted for Northern Ireland establishing a Fair Employment Commission. Only in the United States is 'affirmative' action to remedy past imbalances in recruitment and promotion permissible. In the United Kingdom (apart from exemptions in regard to special needs in training, education or welfare), reverse discrimination remains unlawful.

Perhaps equally important in determining employment patterns are trade union rules and practices about membership and provision of union facilities, especially representa-

tion. If unions discriminate, minority groups are likely to be denied vocational employment opportunities because many employers prefer unionised labour as they then have to deal only with union representatives. In the United Kingdom since 1968, racial discrimination by unions has been unlawful, while the same results have been achieved in the United States by judicial development of the 'equal protection' doctrine combined with statute.

Fiscal policies are also used to further the interests of particular ethnic groups. In Malaysia, Sri Lanka, Kenya and Tanzania state monies have been directed to development projects and grants for only one ethnic group and its members. This is seen as correcting imbalanced patterns of economic predominance by particular groups in the agricultural or industrial sectors and as helping those who have been denied economic advance. Similar policy issues have arisen in European states where economic policies and the growth of state industry are seen as favouring particular ethnic groups concentrated in the region where public investment is made (Belgium, France, the United Kingdom).

The best known instruments of economic nationalism are nationalisation policies directed against non-citizens. In socialist states following a general policy of nationalisation and where there are coincidentally wealthy ethnic communities, the impact of such policies will be more severe on such communities. Thus in Tanzania the nationalisation policy in regard to export-import business, wholesale trade, industrial production, transport, retail distribution and landlordism led to the transfer of economic enterprise into the hands of an African government from an Asian business community, and to an exodus of that community. Similar effects can be achieved by direct taxation policies which hit at economically dominant entrepreneurial communities (such as Indians and Chinese). Conversely indirect taxation policies will shift economic burdens to the group who usually are part of a disadvantaged ethnic community (Rhodesia, where indirect taxation brings Africans into the tax net).

3. The Cultural Sphere

To discover whether cultural laws are used to secure domination would require study of the administrative practices of particular states. There is often variance between the legal provisions and the practice, which may be tolerant and accommodating. Furthermore laws in this area are differently perceived from different viewpoints: what is described by a minority as forced assimilation is seen by the majority as preservation of national identity. Language, schooling and cultural habits and traditions can be explosive issues in polyethnic states.

Various possibilities are open in respect of official language policy. There may be one language only; there may be multiple languages on an equal basis; and there may be a hierarchy of preferred languages. In federal and pre-federal states the situation may be complicated by different official languages at the federal and at the regional level. The significance of official languages is that it is usually necessary to speak that language to advance economically. Consequently parents from other linguistic groups tend to educate their children in official language schools, thereby in the long run downgrading the significance of their own language. (It is this factor which has led to Quebec's recent specification of French not only as official language but as required language for the education of all children, other than those

who have a parent or a sibling educated at an English language school in Quebec, and as a required language for businesses over a specified size.)

Adoption of a single official language is a policy seen as domination by minority linguistic groups (as in Malaysia, Burma, Thailand, Iran, Sri Lanka, and in the United Kingdom until the Welsh Language Act 1967 made provision for greater use of Welsh). The proposed introduction of Hindi as the sole official language of India led to serious political differences until a compromise was reached in 1967. Similar political strife has arisen in various Canadian provinces and in Quebec over French language policies. Again in Belgium there have been ethno-linguistic disputes for the time damped down by new constitutional arrangements envisaging pre-federal arrangements based on language regions. Specification of use of the majority language only is likely to be particularly contentious in the context of the conduct of government business, including letter writing, or in the context of requirements that civil servants pass language examinations, or in the context of a particular language only being specified for use in the courts, or if a particular language is specified as the medium of school instruction. All these are grievances of the Tamil minority in Sri Lanka. Another context in which single official language use (or, conversely, limited use of a minority group language) is seen as designed to weaken the minority's cultural inheritance is that of language use on national radio and television networks. Unless minority languages are used by the media, their proponents fear that they will not remain living languages. Language used in public places may also be regarded as symbolically significant: this is the case in connection with demands for road traffic signs and public notices to be in a minority language (as demanded in Wales).

In polyethnic countries there are many aspects of and issues in education which can become the focus for intense antagonism. There are major questions to be decided. Should there be a monopoly of state education, or should voluntary schools be permitted to continue in existence; be permitted to increase in numbers; or have their educational programmes carefully directed by the state? If there are voluntary schools, should these receive financial support; if so, how much; and should they be permitted to charge fees? By the way in which an education system answers these questions can it be judged. Sri Lanka is an example of a country applying domination techniques in education. Northern Ireland, Holland and Belgium, with separate voluntary schools state-funded, are all countries where the state education authorities have compromised and implemented policies countenancing pluralism.

In the sphere of cultural habits and traditions there are contexts which give rise to perceptions by minority groups that they are being dominated. National holidays, the national flag, and national dress may reflect only the traditions of the majority group. In the context of religious observance denial by law of freedom to conduct rituals, to observe dietary rules and to observe religious holiday requirements will be seen as weakening the cultural traditions of minority groups. In the present century, with increasing state funding as the major source of support for cultural activities, if adequate state funds are not made available for minority groups' cultural activities and for public facilities for communicating knowledge of the groups' history and cultural traditions (through museums and libraries) the culture of the groups will be more easily displaced by other elements in the national culture and which are more frequently put before group members in the form of entertainment or educational activity.

Access to the public opinion process is essential for the transmission and maintenance of group cultures. The traditional civil liberties of freedom of expression and association have always been important in enabling minorities to perpetuate their cultural or ideological identity. Freedom of expression has become even more important with the rise of literacy, the growth of newspaper circulation, and the technological developments of radio and television with its powerful direct and immediate impact. Important issues are: to what extent does a minority group have access to the media to put across its point of view? What controls are there on freedom of expression? (Such controls may be negative, preventing the group from furthering its ideology, or positive, protecting the group from the stirring up of feelings of racial or religious hatred.) Is there freedom of association, both by means of ability to establish a political party to articulate minority demands, and in the form of trade unions primarily identified with one minority group?

In Sri Lanka, in Malaysia and in African one-party states not all these questions can be answered to the satisfaction of minority groups. In some instances the denial of facilities for communication can be ascribed to a wish to integrate and to remove sensitive issues from public debate, but in other cases it is occasioned by a wish to impose the ideology of the dominant group.

4 The Sphere of Public Order and Lawful Force

In the last resort political and legal systems are maintained by force or the threat of force. That force is, in a modern state, bound down in rules as to how it is organised, when it may be used and when others may use countervailing force. Also significant in this context (since it governs situations which are a prelude to the eruption of force) is public order law. Those who seek to maintain the current order use legal rules governing public processions, meetings, sit-ins and trespass, unlawful assemblies, obstruction of the highway, public nuisance, conspiracy, seditious speech-making and literature, preventive detention and the whole panoply of 'offences against the state' to keep protest within bounds determined by the judicial machinery and by legislative provision. Both statutes and judicial precedents are subject to change whenever it appears to the power holders in a society that protest may threaten the current order. In such circumstances traditional civil and political liberties are relegated, and co-ercive public order law will be used, or will be changed, to facilitate continued domination by the current power holders.

The notion of 'institutionalised violence' is not easily accepted by the average citizen who has been socialised into accepting the legitimacy of law and the legal system. Generally he does not perceive either public order law or the public agents of law enforcement as manifestations of the power of the dominant group. If the aim of those in control is to seek an integrated and stable society, the last thing they will wish is that the law enforcement agents of the state (and here the reference is to the police and in exceptional cases the armed forces) be seen as the tools of one group. It is therefore not only because rulers are aware of possible abuses by law enforcement officers,⁶ but also because the acceptability of the regime to minorities and the likelihood of peace in society will be influenced by the degree to which minorities perceive themselves as being 'oppressed' by state officials, that rulers take action to ensure that police forces behave with propriety. The awareness of the wisdom of such an approach began in the United

States with attempts to recruit and promote Black policemen and then extended into areas of professional training, of teaching of proper behaviour under circumstances of provocation, of techniques for maintaining good community relations section, of giving the minority some participation or say in the control of the police force, of providing grievance machinery for complaints about police behaviour backed by adequate disciplinary machinery, of drawing up codes governing police discretion and of ensuring independent and even handed prosecution of offences. These techniques have been imported into Northern Ireland since 1969 and have gradually begun to affect Catholics' perceptions of the behaviour of the Royal Ulster Constabulary. Obviously politically aware members of any minority realise that in the last resort the police are upholders of the existing political order. (The sociologically sophisticated will speak of 'repressive tolerance'). Nonetheless hostility can be moderated by adoption of such techniques and better group relations maintained. Awareness of this is also influencing English police forces in their dealings with immigrant communities.

Everything said about public perceptions of the behaviour of the police force applies with equal emphasis to the armed forces. Obviously in a deeply divided society a strong government force and security laws are required to maintain intercommunal peace and to provide the framework within which compromise can operate. In such societies suspicions that communal differences are being reflected in the armed forces' recruitment and promotion policies may well stimulate military coups engineered by another communal group (Sudan and Pakistan). In fact, the army can be used as an integrating mechanism by educating soldiers and acculturating them in an integrated force (Israel and India).

C. Pluralist techniques

In a plural society separate institutions are provided for different ethnic groups. Pluralist policies range along a scale of degrees of 'separateness'. Groups will share some common and compulsory institutions e.g. the courts, but will be accorded differing exclusive institutions in other spheres e.g. separate representation in a legislature. Usually the aim is to recognise and protect the special and peculiar interests of the minority. Thus positive rights in the cultural sphere may be recognised e.g. language rights, protection of communal schools or distinctive rules of family law. Occasionally the grant of minority institutions may be tokenism, with the real aim being to keep the minority in an inferior position with politically impotent segregated institutions e.g. reserved racial representation in South Africa. In contrast, in a tolerant plural society, where there is a desire to accord full participation as well as protection to the minority, there are often not only formal plural institutions and arrangements effectively but informally securing pluralism, but also conventional political practices which are plural in character e.g. conventions in Switzerland and Canada as to the ethno-linguistic composition of the cabinet.

1. Group Autonomy on Territorial Principles

Constitutions have been classified in terms of the balance between centralising and decentralising forces as manifested in the state structure. If the powers of government are organised under a single central authority, while whatever

powers possessed by local units are held at the sufferance of the central government, which can exercise supreme legislative authority, the constitution is described as unitary. If the powers of government are distributed between central and local government and the central authority is limited by the powers secured to the territorial units, the state is federal. In Dicey's words the 'federal state is a political contrivance intended to reconcile national unity and power with the maintenance of state rights'.⁷

There is a spectrum of federal societies varying according to the relative strength of the demands for unity and regional autonomy. There may be little practical difference between federal states with unitary tendencies and unitary states with massive devolution: the essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces – economic, social, political, cultural – that have made the outward forms of federalism.⁸ Indeed administrative devolution can provide an alternative to a technically federal state.

(a) Federalism

The factors distinguishing federations from decentralised unitary states are: a retention of some sovereignty both in the units and the central unit; the fact that units and centre are in some respects co-ordinate and not subordinate to each other; the fact that some fields are within the exclusive competence of the units and some of the centre; and a constitutional guarantee of autonomy ensuring relative permanence to the existence of centre and units. The federal principle of constitutional organisation is designed to allow integrative and divisive forces to operate simultaneously: with two levels of government in each unit and operating upon each citizen the central government wields the unifying forces, while the separate local (provincial, central, state) governments in territorial regions provide the diversity. In such a system units and centre are committed to working together and to compromising in a common framework rather than to disagreeing and fragmenting. The differing groups can make their views known and have a say in decision-making, facilitated by channels for communication and for compromise. A federation is not a fixed and immutable framework: it is subject to change and development, both formal and informal (co-operative federalism as in Canada). Just as the federal superstructure affects social and political attitudes so conversely these forces interact with federal political institutions. However if political attitudes (e.g. in an authoritarian one-party state such as the U.S.S.R.) are such that centre and units operate as one under the direction of the centre with the understanding that at all times the centre's wishes will prevail, then, although the state is federal in law, it is functionally unitary. Obviously a federal constitution does not in itself ensure that there will be genuine federalism, or toleration of real diversity amongst the units.

The prognosis for successful federalism depends upon the circumstances under which the federal state has been created. If it is merely a legacy of imperialism and it is a vast territory with agglomerations of ethnic groupings, then the state will face almost insuperable difficulties, which would have arisen irrespective of its principle of constitutional organisation. 'Federation' will have been adopted as a last resort and as giving the best chance to the new state of surviving intact. Many new federations failed: it is surprising that more have not collapsed. British advisers treated federal government as providing a panacea both for the

communal problems of the emerging independent states and for the imperial purpose of maintaining the integrity of their former colonial possessions. The histories of two European federations, created after World War II in nation states which came into existence after World War I on the dissolution of the Austro-Hungarian monarchy, have also been chequered. They have faced constant tendencies to fragmentation, several times making major amendments to their federal arrangements (Yugoslavia and Czechoslovakia).

Only if a federation has arisen out of organic growth, supported by a need for common defence and a desire to exploit economic opportunities, has it in the long run been successful e.g. Switzerland, United States, Australia. Mere artificial creations are unlikely to be held together by constitutional glue and in the long run to survive basic disunity. Even generous constitutional arrangements do not create unity where there are competing cultures. Thus after a century of federation in which French Canadian culture has been protected by dual language rights, by provincial control of education, by recognition for the Roman Catholic church, and by virtually complete autonomy for Quebec – including some *de facto* international representation on Dominion missions and power to influence the political balance within Canada – many French Canadians today demand secession from Canada and an independent state of Quebec. They see themselves as being economically discriminated against and colonised by English-speaking business men and settlers, with federal power a brake on their own development. In reality French Canadian cultural patterns have led to French Canadians' relative inability to meet the demands of an industrial economy.

Is it possible to discern issues occasioning conflict in poly-ethnic federations and can institutional arrangements reduce the likelihood of conflict?

(i) Linguism has been a constant cause of conflict: whether in respect of the official language (India and Pakistan); or in respect of education policy (Quebec); or in respect of state geographical boundaries (India). To meet these problems a 'bargaining' approach,⁹ flexibility, responsiveness and a willingness to accommodate by the federal authorities are prerequisites. So is a certain amount of forethought in establishing institutional mechanisms *before* any conflict arises. The following arrangements help if the region is homogeneous (if it is heterogeneous there are majority/minority problems in the region itself – India, Pakistan and Nigeria i.e. there are minorities within minorities in regions):

- (1) All major languages to be equal on the federal level, with self-determination as to each region's official language combined with a policy of providing facilities for large minority groups within regions;
- (2) The media of educational instruction to be regionally agreed;
- (3) An independent regional boundary commission to be established and to be charged with reporting every 5 years and recommending adjustments in the light of demographic, linguistic and ethnic factors. With such a regular process linguistic tensions in India between 1950 and 1956 might have been minimised. Linguistic loyalties are there: they will not disappear by refusing to recognise them. A similar approach has led to proposals for a new Swiss canton of Jura. If the Constitution is amended in a Referendum to be held in September 1978, the conditions under which Jurassien separatism has become a political force will be weakened.

(ii) Fiscal disputes over allocation of funds between regions and centre, especially for development purposes, have

been frequent. Federal economic policies are seen as favouring one ethnic group to the disadvantage of others (Yugoslavia is alleged to advance Serbian interests). Some devices to preclude such dissension have been utilised. They are:

1. An independent Fiscal Commission to examine the allocation of revenues as between centre and states, and reporting every three years to facilitate regular adjustment;
2. Intergovernmental councils and organisations consulting on economic planning and policies;
3. Inter-delegation of power in advance – so that a state government can act for the federal government or vice versa. (Swiss taxes and social security are cantonally administered by authorities felt to be closer and more congenial to local populations.)

(iii) Fears of domination by a large ethnic state within a federation have caused instability (in Nigeria Northern domination was feared; in India populous Hindi states are feared by Dravidian states; and in Yugoslavia Serb dominance is feared). Constitutional changes on the following lines have helped meet such fears:

1. Restructuring of the federation by dividing existing states into a larger number of units (Nigeria – where it has so far been most successful). This approach also mitigates the problem of minorities within a minority which controls a region: they can now have their own regions;
2. Enhancement of the units at the expense of the centre (Yugoslavia in 1968);
3. Provision of a constitutional veto by groups of regional representatives, which veto then brings into operation a referendum procedure (Yugoslavia);
4. Limitation of the scope of emergency powers accorded the central government so that it cannot take over the functions of state government.

(b) Regionalism or Devolution

Similar to federalism in distributing power territorially, is the principle of regionalism or devolution. Here a unitary state provides for the delegation of executive and legislative governmental powers to a locally elected body. It differs from federalism in that a devolved legislature and administration are not independent of the central legislature, while the central body can override the regional body's decisions by legislation, and sometimes even by administrative veto. Nor does the region enjoy the same degree of financial autonomy as a federal territory. However, depending upon the degree of supervision in practice and its freedom once revenues have been allocated to it, a devolved administration may determine its spending priorities as freely as a state in a federation.

Northern Ireland between 1922 and 1972 had a devolved parliament and executive responsible for most governmental powers other than income tax, defence, and foreign affairs. For 50 years the majority community, the Protestants, exclusively exercised political power and, until 1969, did so with little regard to the Roman Catholic nationalist minority, which favoured union with the Republic of Ireland. By 1972 it was apparent that in a politically and religiously deeply divided society there could only be government by consent of both communities – a consent not forthcoming. Devolution was then ended by the United Kingdom Parliament. From January to May 1974 there was another experiment in devolution, but this time with-

out law and order powers which had been the subject of inter-community disputes. The new Northern Ireland Assembly and a 'power-sharing' Executive collapsed after widespread industrial action by Protestants making it clear that they rejected such arrangements. Subsequent attempts to get local politicians to agree to new constitutional arrangements have failed. Northern Ireland is (in 1978) under 'direct rule', without a local legislature, and governed by a Secretary of State for Northern Ireland exercising executive and legislative powers which the Assembly and Executive would otherwise have enjoyed.

The Italian Constitution has adopted the principle of regionalism. Italy is divided into Regions, Provinces and Communes. Five special autonomous regions have extensive powers either because of communal problems (Trentino-Alto Adige (the South Tyrol) with its large German-speaking minority seeking reunification with the Austrian Tyrol), or because of contiguity to neighbouring states (Friuli-Venezia Giulia which includes Trieste and abuts Yugoslavia and Valle d'Aosta adjacent to France), or because of geographical separation from Italy and local desire for autonomy (Sicily and Sardinia). Regions have regional councils, an executive *giunta* with a president, taxing powers, a share in national taxes, financial autonomy, powers of control over urban and local police, roads, regional transport, town planning, local government, agriculture and industry. Most interesting from the point of view of possible arrangements for minority problems is the Trentino-Alto Adige Region and its Province of Bolzano. Since 1972 a statute has conferred a considerable degree of autonomy on Bolzano, where German speakers are in a majority. This flowed from a 'pact' in 1969 between Italian and Austrian Governments and South Tyrolean politicians to protect both German and Italian communities in the Region and Province and to accord autonomy and equality to the German dominated Province. The new arrangements to deal with the South Tyrol question were brought about partly by international pressure, partly by terrorism and partly through willingness by the Italian Government to make concessions and to compromise. Many of the devices to satisfy minorities with political claims were used. In the Region German became an official language enjoying equality with Italian. Education became less controversial, coming for the most part under local control. Fiscal arrangements (the Regional and Provincial Budgets) were to be agreed by both linguistic groups and mutual vetoes of sorts were given. Proportional representation is used to elect both Provincial and Regional legislatures. Proportional representation also applies in the administration, so that approximately one third of the members of the Regional government are German speakers and two thirds Italian speakers. In the Provincial Government two thirds are German speakers and one third Italian. The German and Italian parties also operate *de facto* coalitions. Proportionate access to the civil service of Province and Region is already observed and ultimately the same principle is to be applied to Italian State posts in the Region. Finally, the Austrian Government has agreed to declare the South Tyrol question closed after finalisation of the constitutional changes implementing the 1969 package of agreed measures to deal with the political problem of the German minority in Trentino-Alto Adige.¹⁰

The constitutional changes in Belgium in 1970, dividing Belgium into 3 regions, with the subsequent creation of consultative regional institutions in August 1974, is another example of dealing with majority problems by constitutional amendment, legislation and compromise. The Regional organs will operate in the general political, economic and

cultural fields and there will be re-distribution of power as between the Houses of Parliament and the King and his Ministers and regional institutions.

South African regionalism in the form of semi-autonomous 'Homelands' supervised by a central government representative, dependent on grants in aid from the South African Parliament and subject to its concurrent legislative power, show that it is not the form of institutions, but the realities of economic power and political relationships, which are the determinants of whether there is meaningful regional autonomy: just as there is federalism in Russia so long as the central authorities do not object, so there is regionalism in South Africa. Independent Bantustans, such as the Transkei, are on a different basis, but they are still dependent on South African subventions. Russia and South Africa both provide perfect examples of institutional camouflage obscuring the limited autonomy afforded their territorial units. (Institutional camouflage is prevalent in many countries where grandiose constitutional documents proclaim a false appearance of individual civil liberties and where in reality constitutional protections are devoid of content or effectiveness).

(c) Administrative decentralisation

An alternative to creating local organs endowed with power is a policy of decentralising national administration. A regional office staffed by national civil servants with power to implement distinctive regional policies is established. Such a regional administrative office has a large hierarchy of civil servants headed by a cabinet minister, who can, by his influence in the cabinet, secure the adoption of distinctive regional policies. Additionally, there may be localised administration by state departments who maintain regional organisations and offices – sometimes overall control of these is delegated to the regional office. Additionally some specialisation occurs in national legislative institutions with specialised groups of legislators scrutinising the activities of the regional administration and those of any other national civil servants operating in the region. Such a policy has been adopted in respect of Scotland since 1885. The Secretary of State for Scotland heads the Scottish Office in Edinburgh and also has functions in relation to administrative arrangements of several United Kingdom Departments operating in Scotland. The Scottish Office's main powers to administer regionally relate to education, home affairs (police and law and order), health, and agriculture and fisheries. Scotland also has its own legal and judicial system for which the Scottish Lord Advocate is responsible. Parliamentary institutions in the form of the Scottish Grand Committee, the Scottish Standing Committee and the Select Committee for Scottish Affairs exercise effective control over legislation for Scotland. Scottish nationalism has now resulted in demands for retransfer of legislative and executive autonomy to Scotland and an ending of the Union. Currently the United Kingdom Parliament has under consideration the Scotland Bill, which seeks to mollify and mitigate nationalist feelings by introducing a devolution pattern very similar to that in Northern Ireland from 1922 to 1972.

(d) Local Government

In all communal situations the difficulties, which exist even in a relatively homogeneous society, of striking a balance between democracy and local feelings on the one side, and efficiency and national interests on the other, are exacerbated. In a communally divided society local government becomes an intensely divisive issue, particularly where

the communities are interdispersed. In Northern Ireland (arising from historical accidents but until 1969 deliberately left unreformed) a multiplicity of urban and rural district councils and of county and county borough councils allowed one community to dominate the other, especially in housing and employment policies. The deep communal divisions in conjunction with dispersed communities and small local government units seemed to result in domination rather than in pluralistic co-operation. The approach then followed was centralisation. Under United Kingdom Government pressure local government was restructured to remove some major functions to the Parliament of the Province and to transfer other controversial functions, such as housing, to a central housing authority.

Another approach is to redraw boundaries along communal lines and to accord each community control in its own area. This was done by the Cyprus Constitution of 1960, but was unacceptable to the Makarios Government, who proposed constitutional amendments to merge the municipalities. These proposals, with others, led to the breakdown of the 1960 Constitutional arrangements.

(e) Community development authorities

In some developing countries it is thought that economic development through enhanced agricultural productivity will result from attitudes developed in local government institutions. Where there are relatively backward tribal communities mixed in with more enterprising communities, another objective of setting up community development institutions has been the strengthening of feelings of group identity to assist local ethnic communities to preserve themselves against tendencies to disintegration in a modernising society. Thus in India the panchayati raj system of local councils provides for tribally composed councils possessing executive, legislative and judicial power in the tribal area. Participation, economic development, and preservation of tribal identity are all aims of the system.

2. Electoral Laws and Composition of the Legislature

Group divisions may be formally recognised, either by establishing separate voter's qualifications and communal voters' rolls for each group or by establishing specially designated seats for each group whether or not proportionate to the size of the group in relation to other groups. The principle of proportionality, implemented by proportional representation voting systems, or the provision of bicameral legislatures with a regionally composed upper house, are methods of informally ensuring that minority groups are represented. Such methods may be used in combination (Fiji, and Lebanon, where both formal and informal techniques exist).

The demand for communal institutions is occasioned by fear of domination by other communities, particularly marked where there is a majoritarian approach by the dominant community. Communal electoral systems are significant not only because they determine the composition of the legislature and thence affect the likelihood of constitutional change, but also because they determine the composition of the government, unless there is a presidential system.

The danger of formal communalism is that it encourages political patterns reinforcing ethnic lines and cuts down the occasions for communal interaction among the ordinary voting members of the community. The effect on the elites is not so marked, but, even in their case, vested interest in respect of their own power and their relationship with

their own community tend to cause a reluctance to compromise or to act counter to communal loyalties as currently perceived.

The variants of communal representation are as follows:

(a) Separate electoral rolls and separate blocs of seats

Separate electoral rolls are maintained. (If there is a qualitative franchise, instead of merely referring to racial criteria, the communal character may be obscured so as to avoid any charges of 'racialism'.) The voters on each electoral roll vote for communal candidates occupying separate blocs of seats. This system applied in Cyprus under the 1960 Constitution (there were 35 Greek Cypriots: 15 Turkish Cypriots), in New Zealand (76 ordinary seats for non-Maoris and 4 seats for Maoris since 1867) and in India (15% of the seats are reserved until 1985 for the Scheduled Tribes and Scheduled Castes effectively giving the Untouchables 77 out of 522 seats). It has also been applied in Fiji, Rhodesia, South Africa and in the British East African territories prior to their independence, where the system worked only because it was propped up by imperial force.

(b) Separate electoral rolls, separate blocs of seats and cross voting

Separate voters' qualifications, dressed up in a qualitative franchise so as not to appear racialistic, may be used in combination with a cross voting system. Each roll has its own seats, but voters may also cross vote, and cross votes will then be adjusted to count as a fixed percentage of the votes cast. The purpose of cross voting is to ensure a minimal degree of support for candidates from each community. This system applied in Southern Rhodesia from 1962 to 1969. In Northern Rhodesia, between 1962 and the grant of the Zambian Constitution of 1964, a similar system, but also requiring a candidate to reach a certain percentage of votes from each community, resulted in failure to fill seats. Such systems give difficulty not only because there must be minimal cross-community support, but because there are problems of definition (what is a 'community?'). Such a system, if there is not to be a qualitative franchise, makes communal rolls or party registration as an identifying factor, a pre-condition. Cross voting has been proposed for Northern Ireland.

(c) Communal seats in fixed proportions, but with common voting

In this system there are a fixed number of national seats for each community e.g. in Fiji 19 national seats for Fijians, 10 for Indians and 5 for others. Members for these seats are elected by all voters irrespective of the roll on which they are registered. Again the purpose is to ensure a minimum degree of support from voters of other communities.

(d) Proportional representation systems

The arguments in favour of proportional representation are based on fair shares, the right of minority groups to be heard, the prevention of large electoral swings entirely removing minority representation, the right of voters that their votes should count fully and not be wasted, the fact that it gives individual voters more freedom of choice, that it allows flexibility and crossing of party lines, that it encourages coalition-type governments in which each party has to compromise with other parties, thus tending to the

emergence of a centre grouping, and that it encourages parties to have regard to the interests of voters other than their own supporters so as to secure later preference votes. In contrast, objections of complexity and cost are relatively insignificant. The system has some difficulty in dealing with by-elections, but the major objections, that it results in multiplicity of parties and instability of government, can, paradoxically be used in its favour, in situations where, as in Northern Ireland, the problem is that for 50 years one party has had the monopoly of power.

There are many variations on P.R. In the list systems, control of candidate selection is entirely in the hands of the political parties uninfluenced by voter choice, the top candidates nominated by the parties being elected. Seats are filled from party lists of preferred candidates in such a way that the seats filled by that party in proportion to the total number of seats is the same as the proportion between the votes cast for that party and the total number of votes cast. Methods of calculating the quota, which will secure a candidate election, result in other variations. The larger the constituencies are, with greater numbers of seats, the more proportional will be the results. Multi-member constituencies with 2 or 3 members are unlikely to result in representation for many minorities. Of the various systems the single transferable vote system, employed in Ireland and in Northern Ireland since 1973, has the advantage over the list system of allowing individual preferences as between candidates. Arguably the adoption of P.R. in Holland and in Belgium has been a factor in keeping communally mixed states together.

P.R. may also be used in a bicameral system for selection of upper house members, as in India.

In Mauritius a P.R. type formula is used effectively. The island has 30 territorial constituencies, each returning two M.P.s from an undifferentiated electorate. In addition, 8 M.P.s are chosen as the 'best losers', in proportion to the state of the parties, but on the basis of representing any community under-represented within the 60 M.P.s. For political purposes, the population is recorded as Hindu, Muslim, Sino-Mauritian, and general (i.e. Afro-Creoles, Coloureds or Mestizos, and White). The effect seems to have been to encourage all the parties to choose a slate of candidates who accurately represent the population-mix.

P.R. systems cannot, however, affect the situation where a country contains a monolithic majority group united against the minority group. Then P.R. systems will result in majority rule with the number of majority representatives being elected in proportion to the size of the majority electorate. Thus in Northern Ireland before 1929 and after 1973, when P.R. electoral systems applied, the majority politicians favouring the union with the United Kingdom and the minority politicians favouring a reunification with Ireland were elected in much the same proportions as they had been under a simple majority system. The difference was that transfer of final preference votes (used 'to keep the other side out') led to election of a small number of politicians willing to engage in coalition politics and anxious to act as bridge builders between the communities.

(e) The Alternative Vote

The alternative vote system is not a P.R. system, although it is often described as one. The system allows voters in single member constituencies to list their preferences, and the first candidate who obtains an absolute majority of votes, generally after elimination of less popular candidates and transfer of their preferences, is elected. The system

results in election of the least unpopular candidate and leads to bargaining and electoral pacts. The system was adopted in Southern Rhodesia to preclude the election of African candidates if European votes were split at first count. In practice it resulted in 'middle of the road' European candidates obtaining African votes, thereby tending to keep Rhodesian Front 'right wingers' out, even though they might poll the largest number of votes. Had African voters exercised the alternative vote in the 1962 elections, as they did in 1958, the Rhodesian Front would not have come to power. The alternative vote was abolished in 1964 by a Rhodesian Front controlled parliament.

(f) Proportional representation with the single ballot system and communal representation in a single electoral college

This system has been employed in the Lebanon since the National Pact 1943. The entire electorate in any constituency votes for candidates for all the various communally designated seats i.e. for one Maronite, one Sunni Muslim, one Greek Orthodox and one Druze candidate in the constituency. The numbers of communal seats for each confessional community are calculated on a formula of 6 Christians to 5 non-Christians based on the 1932 Census. In practice voters rarely split their lists, and consequently candidates in each sect attempted to link themselves with popular candidates in another sect. A ticket (list) would be elected, thus aligning leaders from different sects together as against others in their own sect. Although interconfessional coalitions tended to result, ideological alliances did not follow, and no coherent policies were developed. What occurred was a process of opportunistic bargaining, candidates remaining communally orientated, factional and veto conscious, looking over their shoulders at their own community, and representing themselves as guardians of their own communities.

(g) Bicameral systems with communal representation

Communal representation may be carried over into the upper house. Upper houses are less significant where legislation is concerned, usually merely having delaying powers, but their composition is important for constitutional amendment procedures. Communal representation can be found in Fiji.

(h) Regional representatives in federal bicameral systems

Here there is informal pluralism in that communal factors are not the criterion of representation. Instead, regions of the federation are represented, usually on a basis of equality as between regions, in contrast with the lower house where population numbers are the principle of allocation of seats to regions. Examples of federal plural states with regional representation are India with its House of the People, Malaysia with its Senate, and quinticameral Yugoslavia with its Chamber of Nationalities.

(i) Special communal legislative bodies

A remarkable feature of the Cyprus Constitution of 1960 was the provision in Article 86 for two Communal Chambers, each elected by the relevant Turkish or Greek community, and having exclusive legislative competence in fields likely to occasion controversy between the groups and relating to group cultural identity, for example in all educational, teaching and cultural, religious matters and matters of personal status.

(j) Group veto powers

Communal representation in the legislature is usually related to modes of constitutional amendment by the requirement of a weighted majority, such as two-thirds of the total membership of a legislative body or even of a three quarters majority (Fiji). In some cases there are explicit communal vetoes – as where approval by a majority of the group representatives or in a separate group referendum is required (Southern Rhodesia between 1961 and 1965). In Cyprus separate simple majorities of both Greek and Turkish representatives were even required for some ordinary legislation such as laws modifying the Electoral Law, imposing duties and taxes, or relating to the Municipalities.

3. Participation in executive government

Special patterns of executive government can be found in plural countries. These may have been imposed by an imperial power (Northern Ireland), agreed as a compromise (Lebanon, Cyprus and South Tyrol) or resulted from organic development (Switzerland).

(a) Formal Power Sharing

Constitutional provisions may require the communities to work together as a coalition. The Cyprus Constitution 1960 provided that there was to be a fixed 7:3 ratio as between Greek and Turkish Ministers (who would have been elected on separate communal rolls), and either the ministry of foreign affairs, defence or security, had to be given to a Turk. All Council of Ministers decisions had to be taken by an absolute majority, and any decision concerning foreign affairs, defence or security was subject to veto either by the Greek President or the Turkish Vice-President. Such complicated communal arrangements, even in the most amicable of atmospheres, ran the risk of unworkability: with Greek and Turkish intransigence they broke down in 4 years. The Greeks wanted majoritarianism and the Turks wanted an over generous calculation of communal proportionality as the principle of constitutional arrangement.

Power sharing was equally unsuccessful in Northern Ireland when introduced in 1974. After proportional representation elections on the transferable vote, the Secretary of State for Northern Ireland appointed a power sharing Executive with both Protestant and Catholic members coming from several political parties and effectively commanding a majority in the new Assembly. Consultative parliamentary Committees to advise on departmental policies were also appointed and in each case chaired by the relevant head of department, while the membership of the committees as a whole reflected the balance of parties in the Assembly. By early 1974 the bulk of the Protestant community had withdrawn its support from the Executive, and, after large scale industrial action against the Executive in May, the Executive resigned. The exercise proves that consensus is not created by institutions, and that, where a majority of the population is strongly opposed to particular constitutional arrangements, these cannot be maintained. The Northern Ireland Protestants, like the Greeks, wanted majoritarianism, while the Catholics, like the Turkish Cypriots, wanted proportionality and effective minority vetoes.

The Lebanese National Pact of 1943, operating until 1975, required communities to be equitably represented in government. Cabinet posts were allocated on a Confessional basis, convention requiring the President to be a Maronite

Christian, the Prime Minister a Sunni Moslem, and the Chairman of Parliament a Shi'ite.

The same proportion of 6 Christians to 5 Moslems was followed in the cabinet as applied to the Chamber of Deputies. The cabinet élites also engaged in interconfessional deals, avoided conflict or affronting their own communities, and relied on the operation of mutual vetoes. Consequently there was little coherent policy, future planning or development of national attachments. When the geographic situation of the Lebanon is considered in the context of pan-Arabism, the presence of Palestinian refugee groups, and contiguity to Israel and Syria, it is astounding that the Lebanon for so long remained united through its Machiavelian political bargaining.

Only in Switzerland has power sharing developed organically over a century. The Constitution provides for a seven man Federal Council holding office for a fixed term of 4 years. By convention proportional representation is used by the Federal Assembly to elect Council members. Any member of either house of the Swiss parliament elected to be a Federal Councillor must resign as the executive is independent of parliament. Representativeness is secured by the rule that no canton may provide more than one member of the seven man Federal Council. The effect is that there are usually 4 or 5 German-speakers, 1 or 2 French-speakers and 1 Italian speaker. Power sharing, with voluntary acceptance of the principle of proportionality and the stable fixed-time coalition, together with an attitude of compromise prevalent since 1874, has resulted in relatively good intercommunal relationships.

(b) Informal power sharing by coalition groups

Coalition politics may develop where proportional representation voting systems apply, because frequently the proportionality principle ensures that no single group (provided ethnic groups are not grossly unequal in size) obtains an absolute majority. The power sharing arrangements in the Lebanon and Switzerland are partly formal and partly informal. In Holland and Belgium relatively stable coalition governments have been the usual voluntary practice. Their politics have been described as 'the politics of accommodation'. The combination of a P.R. voting system and groups so large that, if domination is attempted, the minority can retaliate by inflicting an unacceptable degree of damage on the majority seems to have led to a relationship of co-operation and mutual deterrence. Mutual vetoes are accorded in the constitutional amendment arrangements and even in case of some legislation — as under 'the alarm bell' procedure in Belgium.

Malaysia also exemplifies the mutual deterrence model of ethnic community relations, again applying where the communities are approximately equal in numbers and able to operate mutual vetoes. The Alliance Coalition, between the major Malay and Chinese political parties, followed in 1972 by the National Front Coalition, led to some blurring of communal divisions. Assisting this is the 1971 constitutional provision prohibiting discussion of 'sensitive' issues. Similarly the enactment in Belgium in 1970 of Constitutional policies safeguarding language removed this issue from the day to day sphere of knock about politics. This phenomenon has been described as depoliticization.

(c) Formal recognition of minority language interests in the cabinet

Formal recognition that 'minority' language speakers

should play a role in executive government is found in the Belgian Constitution. Since 1970 equal number of French-speaking and Flemish-speaking Ministers are required.

(d) Informal recognition of minority language interests in the cabinet

Convention requires the appointment to the Swiss Federal Council of 5 German-speakers and 1 or 2 French-speakers, and 1 Italian speaker. Similar principles apply in Canada (where there is no P.R. and government is not by coalition) to the party in office. By convention the Canadian cabinet has at least one Minister from each Province and 4 from Quebec, one of whom must be English speaking.

(e) Functional communalism in the cabinet

Sometimes where problems particularly affect one community, it is arranged that the problem will be within the ministerial sphere of a Minister from that community. In the United Kingdom it is usual that the Secretary of State for Wales be a Welshman and that the Secretary of State for Scotland be a Scotsman. The procedure of using an 'ethnic representative' to settle divisive issues has also been employed in India (language issues in Southern India were thus dealt with in 1965).

(f) Formal advisory bodies

Ethnic or regional communities may be involved in executive decision-making by setting up policy advisory bodies acting also as channels of communication. This was why the Council for Wales and Monmouthshire was formed in 1948. It is the progenitor of any Welsh Assembly (envisaged for the future under the United Kingdom Government devolution policy). Similar bodies have been established in India and Nigeria to deal with intra-regional minorities.

(g) Assistance to organisations

Another method of encouraging long run pluralism, is to give financial or other assistance to bodies promoting good relations between persons of different groups. Such bodies tend to become pressure groups seeking to influence executive government policies. Official bodies may also be established. Thus assistance under the Race Relations Act 1976 may be given by the Commission for Racial Equality as successor to other bodies.

4. The Civil Service

Administrative practice, rather than abstract legal provision, is the key both to individual liberty and protection of the interests of group members. In a plural society the composition and behaviour of the Civil Service are crucial to the real and perceived positions of minorities.

Civil Service employment opportunities favouring members of particular racial groups, either by according them preferences in employment or by fixing quotas, were discussed earlier. Such quotas or preferences are designed to maintain the proportional power balance between groups, and to encourage minority groups at the receiving end of state services to perceive the distribution of the spoils of state as fair and as being likely to ensure that they will themselves be fairly handled by the administration. To avoid fears of domination by a Civil Service, staffed in the main by a

majority ethnic group, constitutions have imposed quota requirements in respect of patterns of Civil Service membership (Lebanon, Belgium, Cyprus).

In contrast, the provisions in Malaysia, although allegedly protective against Chinese dominance, are used to ensure Malay domination by administrative fixing of a 4:1 Malay to Chinese ratio. On the other hand, Malaysia has adopted civil service techniques of management likely in the long run to assist communal accommodation. The Department of National Unity examines the impact of all Government Programmes. Training programmes are designed to alert administrators to communal problems and to change their role perceptions, so that they see themselves as managers of communal conflict, as system guiders and as enforcers of the rule of law, and not merely as passive observers of community conflicts. Administrators are taught to cultivate responsiveness, to be flexible in the use of discretion, to ensure that there are regular flows of information and information exchanges between the communities and themselves, and to structure opportunities for communication and bargaining between the communities.¹¹

5. Personal law protection

Many modern governments have accepted that in plural societies the personal law of the communities should be preserved. In Britain's African and Asian possessions the personal law systems governing family law, the law of succession and land laws were by and large retained. The imperial regime also set up special courts either under the traditional authorities or under a colonial official to administer the personal law. Independent states have often continued this policy of preserving laws affecting the family and religious laws affecting personal status. Some may even have separate personal law courts (India and Lebanon).

6. Administrative protection for groups

Administrative systems have been established for the protection of 'backward' people. They work in conjunction with keeping the backward community on land reserved for it against purchase by other races (India and Canada). Such administrations are generally motivated by idealism and concern for the welfare of the indigenous people.¹² Examples of such administrations are the United States' Bureau of Indian Affairs, the Canadian Department of Indian Affairs, the Native Affairs Department (now Internal Affairs) of Rhodesia, and in India the office of the Commissioner of Scheduled Castes and Scheduled Tribes.

7. Protections for Immigrant Communities

States wishing to fit immigrant communities and migrant workers successfully into the host society have adopted a number of legal and administrative provisions. It has been argued that the attitude of the élite in the minority community and whether it is oriented towards giving economic opportunities and social assistance to its own community may be more important than such somewhat paternalistic legal arrangements. (e.g. self-helping Japanese in the United States and Brazil, Jews in Britain, Chinese in the West Indies).¹³ Nonetheless such legal arrangements are necessary to provide a framework for protecting immigrants against abuse of power by officialdom or by private entre-

preneurs in host countries. Indeed, some such measures may assist the immigrant community to become self-sufficient and self-sustaining. Among the measures employed by states wishing to protect their immigrant communities and migrant workers are:

- (a) Fair and sympathetic procedures of processing newly arrived immigrants on first arrival, including appeals tribunals to which all refused admission can apply (Canada; U.K.). The most essential features of successful systems are insistence on proper administrative practices and attitudes among immigration officials and a training in public relations in addition to the sometimes necessary suspicious attitude that every newcomer may be an illegal immigrant;
- (b) Advisory services immediately on arrival giving immigrants some psychological support and assisting them in finding housing, and also a follow up service;
- (c) Availability of some public housing for recent arrivals and control of rented accommodation and boarding houses to stop exploitation and deprivation;
- (d) Education, whether in the form of providing adequate schools, literacy training, technical training, and educational programmes on the media (TV and radio);
- (e) Social services, such as hospitals in immigrant areas, providing reasonable standards;
- (f) Local authorities' establishment of Community Councils and Local Liaison Officers to consult with immigrant communities and to improve race relations;
- (g) Local and national authorities' encouragement of and assistance to (including financial assistance) immigrant organisations, so that they can articulate immigrants' possible dissatisfaction with the system and can give advice on issues affecting immigrants;
- (h) Citizenship laws providing for relatively easy naturalisation so that the long-staying alien can acquire the right of permanent residence and identify as a citizen with the state;
- (i) Creation of psychological security in immigrants by provisions strictly limiting compulsory repatriation to persons found guilty of serious crimes and illegal immigrants for whom there are no extenuating circumstances (in contrast new states in Africa and Asia e.g. Ghana, Nigeria, Singapore, Indonesia, use extensive powers of 'deportation' against external minorities and political opponents of minority descent);
- (j) Political voting rights in local and national elections after a reasonable period of residence so that immigrant communities begin to identify with the political society and to work its system.

8 and 9. Land and linguistic protections

These have been discussed under the heading of Domination devices and in various sections above.

III CONCLUSIONS

After this catalogue of constitutional styles tentative generalisations are possible. Distinctive geo-political, attitudinal and institutional factors appear to accompany the treatment of minorities in a particular state (see Table *infra*). One geopolitical factor is the relative size of majority and minority groups. If more or less equal in size, groups are in a 'no win' situation and compromise is the only alternative to constant battle. There is no mutual deterrence and little inducement to compromise or to enter into co-operative arrangements where they are unequal in size or power.

Another factor is whether a country is adjacent to a neighbouring state which supports the minority, or which is perceived as a threat to the majority. Then majority and minority are unlikely to reach an accommodation. The changing state of economic development is also crucial. If the country is industrialised and scarcity of resources does not trigger group competition, relative harmony is more likely. If, by contrast, resources are scarce, or the country is undergoing rapid economic modernisation with population migration, conflict is more likely.

Another major factor affecting attitudes is the kind of cultural difference between majority and minority groups. Religious, ethno-linguistic, tribal, caste and nationality differences are all divisive. If they co-incide, they are more likely to result in an ideology, and if this is developed, compromise is less likely (principle always being the enemy of peace). Nationalism is an exclusivist ideology: if the majority are chauvinistic they seek unchallenged hegemony, adopt majoritarian attitudes and are unwilling to make concessions; if the minority are nationalistic they prefer secession and their own rule.

Majority attitudes can thus be broadly categorised as majoritarian, compromising or even concessive. Conversely minority attitudes can be broadly classified as compromising or militant, even possibly secessionist.

Obviously geopolitical factors come first, then attitudes, and lastly institutional arrangements. But the latter can, as argued in the first part of this report, markedly affect attitudes and eventual outcomes, while even geopolitical factors can be affected by a combination of attitudes and the provision of new institutions (cp. the agreement between Italy and Austria, while possible agreement between the United Kingdom and Ireland and between Cyprus, Turkey and Greece could in the long term change the majority/minority relationships in two troubled areas).

Institutional arrangements can be identified which seem to regulate and damp down conflict in multi-cultural societies.¹⁴ Obviously there had first to be the motivation to introduce the arrangements, but once introduced such arrangements have progressively been accompanied by accommodating attitudes as between majority and minority groups although previously such attitudes were absent.

Some of these arrangements are assimilationist and some pluralist. They include: adoption of the equality and non-discrimination principles by using some of the legal devices which secure equality; federal arrangements; proportionally representative voting systems; executives outside the legislature (hence more independent and making it easier for élites to co-operate); coalition arrangements formal and informal; mutual vetoes *de facto* or *de jure*; depoliticization by insulating certain issues in a relatively untouchable rigid constitution; equal access to central and local government service or the application of fair proportional quotas;

organisation of the police and armed forces so that they are not perceived as being dominated by the majority group; equal official treatment of languages; and state recognition and fund of communal schools. The Table applies these criteria to a number of multi-cultural societies. It reveals that the more intense the conflict the fewer of these devices are present, and that the more of the devices are present the more accommodating are the attitudes of the communities. The Table shows visually by plusses that better inter-group relations seem to accompany particular factors and devices.

In this report I have deliberately omitted discussion of moral issues such as 'Whether, as a question of ethics all minorities *ought* to be accorded certain legal rights in the states in which they live and international legal rights to complain to international bodies?' Such moral issues raise vexing philosophical and political difficulties, in particular the argument that rights for groups as such are not justifiable or necessary, being best covered by individual human rights including the right to membership of a group. I have therefore sought only to provide information to two questions, namely, 'What legal rights have cultural or ethnic minorities in particular nation states?' and 'What is the effect on inter-group relations and the future of the minority when particular rights are accorded?' These are empirical questions to be answered by analysis of the actual provisions prevailing in particular states at particular times.

Nor have I attempted to provide nostrums for societies with cultural or ethnic minorities. No formula for a mix of constitutional devices can be decided on in the abstract when so many variables are present. Minority group leaders may, however, obtain some guidance as to the kinds of constitutional arrangements they should strategically pursue if they wish to protect the group as such, as well as its individual members – remembering always that leadership and aims change. Similarly dominant group leaders may obtain guidance as to the kinds of arrangements which tend to encourage stability and satisfied minority groups in a multi-cultural society. The arrangements actually adopted will however depend on power and political considerations: law is always the product of politics.

TABLE : SIGNIFICANT FACTORS AND ATTITUDES IN 12 STATES WITH MAJOR COMMUNAL DIVISIONS

	<i>Belgium</i>	<i>Holland</i>	<i>Switzerland</i>	<i>Austria – Carinthia and Styria</i>	<i>Yugoslavia</i>	<i>Italy – South Tyrol</i>	<i>Canada – Quebec</i>	<i>Cyprus</i>	<i>Lebanon</i>	<i>Northern Ireland</i>	<i>Sri-Lanka</i>	<i>Malaysia</i>
Geo-political factors												
Groups about equal in size	+	+	+	–	–	–	–	–	Population ratio now i.f.o.Muslims	–	–	+
No neighbour problems	+	+	+	+	+	Only until 1969	Perceived as threat	–	–	–	Some	–
Kinds of communal division	Ethno-linguistic	Religious	Ethno-linguistic	Ethno-linguistic Nationalism	Ethno-linguistic	Ethno-linguistic Pan-nationalism	Ethno-linguistic Nationalism Religious	Ethno-linguistic Pan-nationalism Religious	Religious Pan-nationalism	Nationalism Religious Ethnic	Ethno-linguistic Religious Nationalism	Ethno-linguistic Religious
Attitudes												
No majoritarian approaches	+	+	+	+	+	+	–	–	+	–	–	+
Compromising approaches	+	+	+	+	+	+	–	–	+	–	–	+
Concessive approaches by majority	+	+	+	+	+	+	–	–	+	–	–	+
No secessionist attitudes	+	+	+	–	Not currently expressed	Not since 1969	From Canadian Confederation	–	+	–	–	+
Legal arrangements												
Equality and non-discrimination principles	+	+	+	+	+	+	+	+	+	Since 1970 only	Affirmative action i.f.o. majority	Affirmative i.f.o. majority
Federation/regional type arrangements	Agreed 1970	–	+	+	+	+	+	–	–	–	–	+
Executive outside legislature	–	+	+	–	–	–	–	–	–	–	–	–
Proportional voting systems	+	+	+	+	One-party	Since 1972	–	+	+	Since 1972	–	–
Coalition-formal and informal	+	+	+	+	One-party until 1965	Since 1972	–	Imposed	Not since 1974	Imposed	–	+
Mutual vetoes – <i>de jure</i> and <i>de facto</i>	+	+	+	+	+	+	Constitution imposed	Constitution imposed	Altered by PLO & Syrian presence	Legally imposed	–	+
Depoliticisation	+	+	+	+	+	+	Constitution seeks to do so	Constitution abandoned	–	Legal powers removed by UK Parliament Since 1970	–	+
Equal access to central and local government services on fair proportional quotas	+	+	+	+	+	Proportionate quotas	+	Quotas imposed	Proportionate quotas	for local Government	–	Affirmative action i.f.o. majority
Army and police not dominated by majority group	+	+	+	–	+	–	–	Separate communal forces <i>de facto</i>	–	–	–	–
Equal linguistic treatment	+	+	+	+	+	+	+	+	+	N/A	–	–
State recognition and funding of communal schools.	+	+	+	+	+	+	+	+	+	+	–	–

KEY: + equals yes
– equals no

FOOTNOTES

- ¹ Normally the most numerous groups are the most powerful, but if a group, although numerically a majority, is relatively powerless and dominated by a smaller group with greater force and technology at its command then I consider the former to be functionally a minority. In this sense the African tribal groups in South Africa are minorities vis-a-vis European South Africans, and Africans are 'minorities' in Rhodesia so long as Europeans are the dominant group. Where the geographical boundaries of power are drawn will also affect which group is or is not a minority. Thus French Canadians are a minority in Canada but a majority in Quebec, and Catholic Irishmen are a minority in Northern Ireland, but a majority in the island of Ireland.
- ² See E.A. Nordlinger, 'Political Development: Time Sequences and Rates of Change' in *Politics and Society: Studies in Comparative Political Sociology*, Prentice-Hall, 1970, pp. 329-347.
- ³ J.H. Kunkel, *Behaviour, Social Problems and Change*, Prentice-Hall, 1975, at p. 188 gives the serious warning that 'It is all too easy for eager and confident designers to underestimate the degree and extent of environmental control that will be needed to modify behaviour and restructure the social environment, and to underestimate the time required for the establishment and modification of behaviour in people and their context. Any program design or attempt at implementation which includes an unrealistic view of these features is bound to fail. During the last thirty years, developing countries have experienced a staggering number of efforts that have failed, programs that were discontinued and hopes and dreams that have come to naught.'
- ⁴ E.A. Shils, 'On the Comparative Study of the New States,' in C. Geertz, *Old Societies and New States*, Free Press, 1963, at pp. 23-4, discussing macrosociology.
- ⁵ Cp. the willingness of the United Kingdom Parliament to introduce and amend race relations legislation between 1965 and 1976. Three Acts, increasingly interventionist in character and following the United States example, have been introduced to deal with minority problems and to improve race relations.
- ⁶ Where there is discretion i.e. choice as to whether to adopt alternative courses of action, whether it be in respect of search, interrogation, arrest, prosecution, judicial decision-making or sentencing, it is possible for officials not merely to make wrong decisions, but also to abuse their position.
- ⁷ A.V. Dicey, *The Law of the Constitution*, MacMillan, 10th ed. 1965, p. 143.
- ⁸ W.S. Livingston, *Federalism and Constitutional Change*, Oxford, 1956, pp. 1-2.
- ⁹ Although Belgium is not a federation yet, and was clearly a unitary state before 1970, willingness to strike a constitutional bargain and to move to a pre-federal pattern has so far prevented its fragmentation into Walloon and Flemish States.
- ¹⁰ For fuller details see A.E. Alcock, *Protection of Minorities, Three Case Studies: South Tyrol, Cyprus, Quebec*, The Northern Ireland Constitutional Convention, September 1975.
- ¹¹ See M.J. Esman, *Administration and Development in Malaysia: Institution Building and Reform in a Plural Society*, Cornell University Press, 1972.
- ¹² Depending upon the viewpoint of the observer protective measures will appear misguided, destructive or exploitative. Policies have included intervention to encourage assimilation; actions designed to acculturate and even sometimes to destroy the indigenous peoples; displacement so as to open up their land for exploitation; segregation designed to preserve peoples in the pristine state uncontaminated by modernising influences; and measures to assist and to encourage self determination by the indigenous communities. Policies of protection and integration may of course be run in harness.
- ¹³ See T. Sowell, *Race and Economics*, McKay, 1975. For general surveys see E. Rose, *Colour and Citizenship: A Report on Race Relations*, Oxford University Press, 1969, pp. 675-756; and S. Abbott, 'The National Committee for Commonwealth Immigration, the Community Relations Committee' and H. Rose and M. Levy 'The Local Committees' in *The Prevention of Racial Discrimination in Britain*, ed. S. Abbott, Oxford, 1971.
- ¹⁴ A study of Belgium since 1830, Holland between 1890 and 1917, Switzerland in the 19th century, Austria between 1945 and 1965, and contemporary Malaysia and the Lebanon by Professor Nordlinger led him to conclude that in societies such as those, where sheer coercion is not possible, if intense conflicts are to be successfully regulated, one or more of six conflict-regulating practices is always employed. The six practices are the stable coalition, the proportionality principle, depoliticization, the mutual veto, compromise, and concessions by the stronger to the weaker party. Such policies could only be successfully employed by political élites who could directly involve themselves in the conflict-regulating practices. He rejected as ineffective and counter-productive deliberate attempts to create a national identity; he dismissed any hypothesis that cross-cutting cleavages (such as membership of a church or a trade union) would lessen intergroup conflict. He also thought socio-economic development intensified conflicts. Professor Nordlinger's theory was designed to cover class as well as ethnic cleavages. E.A. Nordlinger, *Conflict Regulation in Divided Societies*, Occasional Papers in International Affairs, No. 29, Harvard University Centre for International Affairs, 1972.

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