

report

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Public Participation and Minorities

By Yash Ghai



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Minority Rights Group International

Minority Rights Group International (MRG) is a non-governmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. Our activities are focused on international advocacy, training, publishing and outreach. We are guided by the needs expressed by our worldwide partner network of organizations which represent minority and indigenous peoples.

MRG works with over 130 organizations in nearly 60 countries. Our governing Council, which meets twice a year, has members from 10 different countries. MRG has consultative status with the United Nations Economic and Social Council (ECOSOC), and observer status with the African Commission for Human and Peoples' Rights. MRG is registered as a charity and a company limited by guarantee under English law. Registered charity no. 282305, limited company no. 1544957.

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ISBN 1 897 693 885 Published July 2003. Printed in the UK on recycled paper. **Cover photo** Quechua Indian women marching for equal rights, Peru. Jeremy Horner/Panos Pictures. **Public Participation and Minorities** is published by MRG as a contribution to public understanding of the issue which forms its subject. The text does not necessarily represent in every detail and in all its aspects, the collective view of MRG.

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Preface

Ensuring that minorities have a say in the major decisions that affect their lives is essential for the protection of their rights. Promoting the participation of minorities and indigenous peoples in public life therefore permeates all the work of Minority Rights Group International. Increasingly, policy-makers at both the national and international level are realizing its importance too, not least in the post-conflict reconstruction of multi-ethnic and multi-religious societies, including most recently Afghanistan and Iraq.

Where minorities and indigenous peoples are excluded from political, social and economic decisions that have major repercussions on their lives, the price that a society pays can often be enormously high, in terms of economic cost, missed opportunities, conflict and ruined lives.

Over the years MRG has received many requests to provide information about participation mechanisms – from consultation to power sharing – and the legal standards that govern them. Minorities and indigenous peoples increasingly recognize that, besides recognition of their right to a distinctive group identity, they are entitled to participation in the political, cultural, social and economic life of the countries in which they live. Members of majority communities who are concerned about the long-term equity, stability and peace of their societies accept this equally.

Several international standards refer to the right of minorities to participation, including the United Nations Declaration on the Rights of Minorities of 1992 and the Council of Europe's Framework Convention for the Protection of National Minorities which entered into force in 1998. In 1999 the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe published the Lund Recommendations on the Effective Participation of National Minorities in Public Life.

This report, *Public Participation and Minorities*, first published in 2001, provides both legal justification and practical guidance. It is written by a leading constitutional lawyer, Professor Yash Ghai, who has brought to his task a lifetime of distinguished scholarship and practical service in the design of constitutional and political arrangements that will allow minorities and indigenous peoples to play an active part in public life.

The report enhances our understanding of the range of devices that have been, or can be, used to provide for participation, and it demonstrates that, while difference and diversity must be recognized, at the same time integration

or mutual accommodation between minority and majority is equally important. Perhaps the most difficult question of all, tackled in this report, is how best to provide for minority and indigenous participation without undermining the common values and loyalties that are essential to a cohesive society.

Skilfully illuminating such constitutional and political concepts as power sharing, autonomy and self-determination, the text discusses some of the most revealing experiences of constitutional and political provision for minorities and indigenous peoples in modern times. Among the examples given are Bosnia and Herzegovina, Canada, Cyprus, Fiji, India, New Zealand, Northern Ireland and South Africa. With such a diverse range of cases, the report wisely concludes that there can be no universally applied formula to secure participation. Appropriate solutions have to be found from within the society in question rather than being imposed from outside.

Despite the complexities, however, we hope that this report will further the cause of intercommunity cooperation throughout the world by enhancing understanding and giving firm support to a number of all-important principles. These principles include: citizenship as the key to public participation; electoral laws that promote inclusion in the political process; special legislative procedures for situations where law-making has a major bearing on minority and indigenous communities; the key role of power sharing in post-conflict transition; territorial, group or cultural autonomy where desired and appropriate, with adequate provision for the rights of minorities-within-minorities, and for women; the importance of regional bodies working together to develop regional systems to provide for minority and indigenous participation in response to local realities; and the desirability of state-supported organizations to promote minority and indigenous cultures and languages, to ensure fair treatment, and to promote intercultural understanding and reconciliation. Such a range of approaches and devices offers enormous possibilities for enhancing the participation of minorities and indigenous peoples. Rather than allowing it to remain just an abstract 'wish list', we invite readers of this report to work with MRG and its partners and allies to make these ideas a reality for an increasing number of the world's marginalized communities.

Mark Lattimer

Director

July 2003

Introduction

In the last two decades there has been a marked shift from the limited protection against discrimination that characterized the original efforts of the United Nations (UN) regarding minorities, towards a more active engagement of the state in facilitating the development of minority cultures and promoting a political role for minorities.¹ Notions of identity, emphasizing states' responsibility to promote minorities' culture, language and religion, and the rights of minorities to public participation, are central to the new understanding of the protection of minorities.

Issues of minority rights have been subsumed under ethnic relations to a significant extent, focusing on the relations of minorities with other communities. New norms and institutions have been developed in the context of intense ethnic or religious conflicts, and as part of efforts to restructure states, encourage the coexistence of different ethnic groups, and provide security to cultural and national minorities.

The emphasis on identity and public participation has led, in various ways, to the political recognition of minority or ethnic groups and their collective cultural and political rights. Contemporary efforts at minority protection are also influenced by the adoption of democracy in regions and states which had hitherto had military or one-party regimes. Democracy is understood as encapsulating various values – tolerance, pluralism, freedom of expression, participation and accountability. As the foundations of democracy in human rights are explored, the salience of minority rights as an essential component of a democratic society is acknowledged. Increasingly, the framework of rights is used to assess social and political progress, including the situation of minorities.

However, there is no universal formula for minority participation. In the past there was an excessive tendency to look at minority rights from the perspectives of the majority and of 'nation building', requiring common and exclusionary loyalties and the homogenization of public and private space. Now, it is arguable that the present approach is marked by the concern for finding a distinctive political and social role for minorities. Supporters of minority rights, focusing on devices to protect the identi-

ty of minorities, have perhaps paid insufficient attention to another aspect of minority protection, that is, its effect on wider societal and inter-group relations. Effective protection of minorities depends also on minority–majority relations, the integration of communities, and the development of common values and loyalties to sustain the wider political community.

Currently (at least in Western scholarship) two competing views dominate regarding the protection of minorities.² The more fashionable among key policy-makers in Europe is connected with Lijphart's concept of consociationalism, which despairs of peaceful coexistence of ethnic groups unless special constitutional provisions are put in place to recognize their corporate entity and to confer on them the right to separate representation and participation in public bodies. Its typical features are segmental autonomy for ethnic groups (if possible through territorial arrangements, otherwise through forms of group or cultural autonomy), proportional and frequently separate representation, proportional participation in institutions and services, and group veto.

The other approach is integrationist, to be distinguished from assimilation, for integrationists value minority cultures and identities, but seek to establish a political system in which all citizens participate equally. It aims to provide constitutional and political incentives for people of different groups to cooperate, either through coalition of ethnic parties or, hopefully, the establishment of multi-ethnic parties, generally relying on electoral laws which encourage inter-ethnic cooperation.³ It relies on a clearer distinction than consociationalism between the common public space, with state neutrality, and the private where each group is free to pursue its linguistic, religious and cultural predilections. It emphasizes individual rights, claimed and exercised in the name of citizenship, unlike consociationalism which places considerable emphasis on group rights.

In practice a state may be able to incorporate elements of both approaches. South Africa and Fiji, both discussed later, provide instructive examples.

Definition of public participation

Although a number of international and regional instruments require states to promote the right of minorities to participation, few define participation. However, a notion of participation may be gleaned from these instruments. The Universal Declaration of Human Rights (UDHR) and the International Covenant of Civil and Political Rights (ICCPR) protect the right to take part in government or in the conduct of public affairs. The UN Committee on Human Rights has elaborated this provision by stating that the:

'conduct of public affairs ... is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers ... [covering] all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels'. (General Comment 25, 1996)

These instruments protect the right to vote (the UDHR more emphatically when it states that the 'will of the people shall be the basis of the authority of government') and of equal access to the public service. The freedoms of expression, procession, association and conscience imply, and facilitate, participation in politics and public policies. Overarching these specific instances is the general right of self-determination, proclaimed in the UN Charter, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as belonging to 'all peoples'. Although the right is collective, every person is deemed under it to have certain political rights, particularly participation rights expressly granted in the ICCPR. But the reference to the pursuit of economic, social and cultural development indicates that participation rights are not restricted to politics or administration.

The UDHR protects the right:

'freely to participate in the cultural life of the community, to enjoy the arts and to share in the scientific advancement and its benefits'. (Article 27)

The ICESCR guarantees other forms of participation, in the economy, trade unions, culture and arts, scientific research and literary activities. In more recent years, the emphasis on ethnic identity has produced a particular concern with participation rights of minorities. It is through participation that a person expresses and protects his or her identity, and the survival and dignity of the group is ensured. Participation in cultural, educational, linguistic and religious affairs is given special attention, for these matters are closely connected to a group's identity. Under the UDHR and the Covenants, members of minorities are as much entitled to these rights as members of the majority group.

However, so far as the exercise of political influence and participation is concerned, the general principle of non-discrimination is not sufficient. As a minority, a group's interests may well be different from those of the majority; and its culture is likely to be marginalized by that of the majority. Its population may be dispersed through the country, and it will not, as a general rule, have adequate number of legislators etc. to influence the formation of government or its policies. Therefore, in order to ensure effective participation, it is necessary that special procedures, institutions and arrangements be established through which members of minorities are able to make decisions, exercise legislative and administrative powers, and develop their culture.

Conceived in this broad way, participation covers many areas of life, and state and private sector organization, and involves a number of activities. These include taking part in national politics through participation in political parties, standing for elections and voting in them. Participation covers forms of enacting legislation, and may include vetoes by a group on specified matters. It encompasses other forms of influencing policies, through the media, lobbying, etc. It can cover mechanisms for consultation and negotiations. Thus participation may signify the ability of minorities or their members to bring relevant facts to decision-makers, argue their position before decision-makers, propose reform, be co-decision-makers, veto legislative or administrative proposals, and establish and manage their own institutions in specified areas.

The importance of public participation rights

Many of the general justifications for minority protection apply equally, or even more forcibly, to participation rights. A major justification is the inherent fairness of minority protection. Members of minorities are entitled, like any other person, to human rights and freedoms, of which participation is an essential aspect. Minorities have the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social, cultural and economic context as themselves. For a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress, and lay the basis of deliberative democracy.

The rationale for special measures is not to create a privileged position for minorities but to place them effectively in the same position as members of the majority. Paradoxically, special measures can help towards the integration of minorities, for the prospects of integration are better if minorities become involved in national political and social processes. They acquire a stake in the system, and are able to contribute to policy-making and play a part in administration. All too often minorities become alienated from mainstream national processes because they see no role for themselves in these processes or believe that they cannot influence outcomes. Others then claim to speak for them – and claim to know better what is good for them than the minority itself. This encourages prejudices against and the stereotyping of minorities. Participation also develops and utilizes the talents of minorities for the national good. States which welcome participation and integration of minorities tend not only to be more stable, but also more prosperous.

The availability of human rights to members of majority communities themselves may depend on the enjoyment of rights by members of minorities. The whole concept of universal and human rights suffers when some individuals or groups are denied rights on the grounds of their religion, language or colour. In some multi-ethnic states, for example Malaysia and Fiji, it has been very difficult to develop a popular understanding or appreciation of human rights, because human rights are often seen as protecting minorities against the special status and authority of the majority. But if minorities are denied rights, there is the danger of general intolerance and authoritarianism.

The denial of rights to minorities also leads to their denial to all in other ways. Fair treatment of minorities is essential to social peace and stability. Social, often violent, conflict that results from the oppression of minorities creates conditions in which there is a massive internal and external displacement of persons, and the movement of

people to some parts of the country or even within particular cities, becomes impossible. The government is unable to ensure people's physical or psychological security. The state itself becomes a major violator of rights. Oppression of minorities has led to inter-state wars. It has been easy to find in a country's ill treatment of another state's 'kin people' an excuse for territorial aggression.

Special measures can also be justified as providing cultural diversity within, and thus enriching, the wider society. Such diversity challenges the dominant ideas and values of society. It promotes comparisons and debates, keeps society open to new ideas and protects it from narrow orthodoxies. Participation by minorities helps to put old policies in new contexts, often highlighting their weaknesses or ethnic bias, and drawing attention to the need for new policies and approaches. Public participation promotes inter-ethnic dialogues, and averts ethnic conflicts borne out of misunderstanding or ignorance. This recognition of diversity is particularly pertinent now, when few states are mono-ethnic. States and individuals are engaged in multiple relations with other political and cultural systems, and need the background and skills to negotiate numerous contexts where different cultures meet and interact.

This report proceeds on the assumption that minorities welcome opportunities for participation in public affairs and in other national or communal matters. But it is possible to conceive of minorities who would regard participation – on the terms of the state and in its institutions – as compromising their fundamental claims or wishes. This is most evident with a number of indigenous peoples, who, perhaps reflecting their unhappy experience with national institutions, see their goal as self-determination, meaning either independence or a high degree of autonomy. The Draft UN Declaration on Indigenous Peoples makes the exercise of rights by them optional ('if they so choose', Articles 19 and 20). But some minorities may wish to integrate politically (such as Hindus and Christians who resisted the imposition of communal representation in Pakistan). Some groups might feel the threat to their identity in involvement with national politics and institutions, where their own influence may be marginal. Individual members of minorities may desire nothing more than to be left alone by their own and other communities. However, there are many forms of participation, not all involving the surrender to a state's claims or assimilation, and sometimes participation rights are optional and facilitative, both for communities and individuals.

Legal foundations for public participation rights of minorities

The juridical case for minority participation rests on three principal sources, apart from the general norms of human rights: minority rights, indigenous peoples' rights and, more controversially, the right to self-determination. Minority rights may also be protected in bilateral treaties, especially in Europe, dealing with national minorities and the employment of foreigners.

Minorities

When the UN began work on an international regime of rights, it emphasized individual rights and carefully avoided giving rights, particularly political rights, to groups. Article 27 of the ICCPR, until recently the principal UN provision on minorities, was drafted in narrow terms. It reads:

'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

Although this may suggest that it is up to the state to determine whether it has minorities, the UN Human Rights Committee has stated that the question is a factual one to be decided through objective tests. Under the Articles, rights belong not to minorities as groups, but to individual members, although these rights can only be exercised in association with other members of the community, thus giving them a 'collective' dimension. Rights given to members of minorities are negative, prohibiting the state from suppressing their culture or language. But it could be argued that this negative prohibition may be transformed into a positive right, that is, the state is under an obligation to intervene proactively, by implementing legislation or programmes, to ensure that Article 27 is not violated, rather than simply refraining from certain actions. Thus despite the parsimonious language of the Article, it has the potential to develop into the framework for a broader entitlement, including a measure of autonomy – and the UN Human Rights Committee has tried to do this in recent years.

In a series of decisions, the Committee has interpreted the Article as a basis for collective minority rights (*Kitok v. Sweden*, 1988), as a basis for the preservation of the cul-

ture and way of life of a minority group (*Lubicon Lake Band v. Canada*, 1990) and as a basis for protecting and developing the traditional way of life of minorities (*Linsman v. Finland*, 1995). The Committee recognized that in some situations, Article 27 rights may be connected to a territory, for example when cultural rights consist in a way of life which is closely associated with territory and use of its resources. The Committee has given a broad meaning to 'culture', noting that culture manifests itself in many forms, including a particular way of life associated with the use of land resources and traditional occupations, specially in the case of indigenous peoples (General Comment 23, 1994).

The Committee has also interpreted the Article to include elements of group rights, since the prescribed rights 'depend in turn on the ability of the minority group to maintain its culture, language or religion'. Nor are rights merely passive, since

'positive steps may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group.' (para. 6.2)

From the nexus between culture and territory, the Committee draws the right of minorities to participation, observing that the enjoyment of cultural and other rights imply the 'effective participation of members of minority communities in decisions which affect them' (para. 7).

This broader approach is reflected in the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the General Assembly in 1992. Although it also recognizes only the rights of individuals, it places positive obligations on the state to protect the identity of minorities and encourage 'conditions for the promotion of that identity' (Article 1). The Declaration places particular emphasis upon the right of minorities 'to participate effectively in cultural, religious, social, economic and public life' (Article 2.2). They also have the right to participate in decisions on national and regional levels concerning the minority to which they belong or where they live (Article 2.3). Three further specific participation rights are guaranteed – the right to maintain their own associations (Article 2.4), to maintain contacts with members of other minorities and citizens of other states to whom they are

related by national or ethnic, religious or linguistic ties (Article 2.5), and the right to participate fully in economic progress and development (Article 4.5).

A case for minorities' rights to participation can also be made on the basis of Article 25 of the ICCPR, which gives every citizen the right and the opportunity:

'to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections on universal franchise ... and to have access, on general terms of equality, to public services.'

Although the Article does not mention minorities, it has been argued that where a minority is unrepresented or under-represented in national political processes, either because of their small numbers or because of systematic exclusion, special processes and structures for political participation must be developed to respond to the spirit of Article 25(a).⁴ Such an argument was advanced to the UN Committee on Human Rights by the Mikmaq Tribal Society in support of its claim to be represented at the Canada constitutional conferences (separately from the participation by the Canadian First Nations Council).⁵ The UN Committee on Human Rights concluded that the article did not require that any affected group, however large or small, be able to send a representative, but did not rule out special representation in suitable cases.

Several initiatives have been taken in Europe, through the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe and the European Union (EU) to promote the concept of participation and autonomy. This is manifested in both formal declarations and interventions to solve ethnic conflicts in Europe (such as in the Rambouillet proposals for Kosovo/a). In Article 35 of the Copenhagen Document on the Human Dimension (1990) of the Conference on Security and Cooperation in Europe (CSCE, the predecessor of the OSCE), member states have undertaken to respect the rights of members of national minorities to:

'effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.'

The Document takes particular note of provisions for certain minorities:

'by establishing ... appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities.'

The principal instrument of the Council of Europe is the Framework Convention for the Protection of National Minorities (1995) which protects various rights of minorities, obliges the state to facilitate the enjoyment of these rights, and recognizes many rights of 'identity'. It obliges state parties to:

'create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.' (Article 15)

The exercise of some of these rights implies a measure of autonomy, and the prohibition against altering the proportion of a minority in areas inhabited by them (Article 16) will have the effect of enhancing prospects of local autonomy. The Copenhagen Document and statements of principle by the Council of Europe, although not strictly binding, have been used by the OSCE High Commissioner for Minorities and other mediating bodies as a basis for compromise between contending forces, and have thus influenced practice, in which participation rights, including autonomy, have been a key constituent.⁶

The then European Community (now European Union) has also used conformity with the Copenhagen Document as a precondition for the recognition of new states in Europe. The ability of existing states (which is relatively unregulated by international law) to confer recognition on entities, especially breakaway states, can be a powerful weapon to influence their constitutional structure. When various republics within the former Yugoslavia and the Soviet Union were breaking away, the European Community issued a Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991). Among the conditions a candidate had to satisfy before it would be recognized was that its constitution contained:

'guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.'

Similar principles have been used for admission to the Council of Europe and the EU.

Indigenous peoples

The International Labour Organization (ILO) Convention on Indigenous Peoples (No. 169), adopted in 1989, and representing a reversal of the paternalistic and assim-

lationalist approach followed in the 1957 Convention, recognized the:

'aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.'

Their cultural and religious values, institutions and forms of traditional social control are to be preserved (Article 4). The system of land ownership and the rules for the transmission of land rights are to be protected (Article 14 and 17). States are required, in applying the Convention, to:

'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.'

And the consultation shall be in:

'good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.' (Article 6)

A more broad ranging provision provides (Article 7):

'The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.'

Although an advance on the 1957 Convention, it has been criticized for being 'paternalistic',⁷ and its negotiations involved a limited participation by indigenous peoples. These deficiencies were meant to be addressed in another exercise in standard-setting, the Draft UN Declaration on the Rights of Indigenous Peoples (1992). It proclaims their right to self-determination, under which they may 'freely determine their political status and freely pursue their economic, social and cultural development' (Article 3). The principle of self-determination gives them the 'right to autonomy or self-government in matters relating to their internal and local affairs', which include

social, cultural and economic activities, and the right to control the entry of non-members (Article 31). It recognizes their 'collective rights' (Article 7) and the right to maintain and strengthen their distinct political, economic, social and cultural characteristics (Article 4). These ideas have already formed the basis of negotiations between indigenous peoples and the states in which they live, giving recognition not only to their land rights (as in Australia and New Zealand) but also to forms of autonomy (as in Canada).

Indigenous peoples, particularly in North America and New Zealand, have other legal bases for their claims as well: (a) their 'inherent sovereignty' which pre-dates colonization and (b) treaties with incoming powers.⁸ The former is more important in the USA and Canada than in Australia or New Zealand. The US Supreme Court has recognized the 'sovereignty' of Indian tribes and, more narrowly, the rights of Alaskan tribes. With this 'sovereignty' come various rights of participation, particularly of self-government. Canada is only now coming to terms with First Nations' sovereignty, granting autonomy and land rights to First Nations, and with it significant participation in boards, committees and other parts of the administrative machinery. As in the USA, the federal legislature can derogate from the 'sovereignty', although aboriginal and treaty rights have been entrenched in the Constitution and the Charter of Rights and Freedoms. In New Zealand progress has been achieved through resuscitation of the Waitangi Treaty, signed in 1840 between Maori Chiefs and representatives of the British Crown, which was judicially pronounced 'a simple nullity' in 1877. In recent years courts have drawn various implications from its general provisions for the partnership between the Maori and the government. The two parties should behave reasonably and in good faith to each other and negotiate to solve disputes that arise out of treaty provisions. A similar principle of good faith negotiations has been enunciated by the Canadian courts.⁹ Both in New Zealand and Canada this approach has given indigenous peoples significant participation in law, in regulations and contracts over natural resources and in the development of traditional lands. Another basis for participation of indigenous peoples has been their increasing control over their traditional lands, and the resources that have been transferred to them in settlement of previous acquisitions of land. In Australia there have also been some moves towards self-government, the most obvious example being the Aboriginal and Torres Straits Islands Commission.

Self-determination

The broadest source of autonomy as a form of participation is self-determination, increasingly analysed in terms

of the internal, democratic organization of a state rather than in terms of secession or independence. The UN General Assembly resolved many years ago that autonomy is a manifestation of self-determination. The greater involvement of the UN or consortia of states in the settlement of internal conflicts has also helped to develop the concept of self-determination as implying autonomy in appropriate circumstances.¹⁰ However, the birth of new states following the collapse of the communist order in the Soviet Union, Eastern Europe and the Balkans, has removed the taboo against secession, and the international community seems to be inching towards some consensus that extreme oppression of a group may justify secession. This position has served to strengthen the internal aspect of self-determination, for a state can defeat the claim of separation if it can demonstrate that it respects political and cultural rights of minorities. A further, and far-reaching, gloss has been placed on this doctrine by the Canadian Supreme Court which decided in 1999 that, while Quebec has no right under either the Canadian Constitution or international law to unilateral secession, if Quebec were to decide on secession through a referen-

dum, Ottawa and provinces would have to negotiate with Quebec on future constitutional arrangements.

Such a view of self-determination has some support in certain national constitutions. Often constitutional provisions for autonomy are adopted during periods of social and political transformation, when an autocratic regime is overthrown, a crisis is reached in minority-majority conflicts, or there is intense international pressure. Propelled by these factors, a number of constitutions now recognize some entitlement to self-government, such as Fiji (for indigenous peoples), Papua New Guinea, the Philippines, Spain and Ethiopia which gives its 'nations, nationalities, and peoples' the right to seek wide-ranging powers as states within a federation and even guarantees the right to secession. The Russian Constitution of 1993, in the wake of the break-up of the Soviet Union, provides for extensive autonomy to its constituent parts, whether republics or autonomous areas.¹¹ The Chinese Constitution entrenches the rights of ethnic minorities to substantial self-government, although both there and in Ethiopia the dominance of one party denies the substance of autonomy.¹²

Preconditions for public participation

Rights of participation cannot be enjoyed unless certain conditions exist. These include physical and emotional security, financial resources and minimum levels of education for the minorities. There has to be a toleration of opposing, particularly minority, views, and a general condemnation of discriminatory practices. States must ensure the promotion of minority cultures, intercultural exchanges and education in schools, the teaching and development of minority languages, and the protection of religious beliefs and practices.

Citizenship and other bases of entitlement to rights

Traditionally, rights were regarded as the entitlement of citizens only. Such a restriction is not consistent with international instruments, nor indeed with most national constitutions. In this era of mass migrations and globalization, such a restriction would deny many people what have come to be accepted as basic human rights. Rights have been extended to non-citizen residents in several countries in recent decades, reflecting both the general importance of rights and the fact of migration. It is not possible in this report to discuss all the restrictions on the economic, social, cultural and political rights of non-citizens. However, some examples, dealing with the principal participation rights examined here, will illustrate the denial of participation rights of non-citizens who are in a state for legitimate purposes, such as employment with the expectation of settlement.¹³ The provision in the ILO Convention (No. 143 of 1975) requiring the abolition of restrictions on migrant workers on access to employment after two years' residence is widely ignored, even in states which have in the past actively sought labour from outside. In Germany non-citizens do not enjoy the same right to form political parties as citizens; leaders and majority members of a party must be German nationals. Portugal prohibits non-nationals from political activities except with the permission of the government (Article 15 of the Constitution). The law in Switzerland is even worse; non-nationals must secure permission from the cantonal authorities to speak on a political issue at an open or closed private meeting of an association. In principle, non-nationals cannot anywhere stand as a candidate or vote in state or local government elections. Sweden now permits them to vote in local government elections (provided that they have been resident for three years); its

lead has been followed by Denmark, Finland, the Netherlands and Norway. The German Constitutional Court has declared that the granting of franchise to non-nationals is unconstitutional, since the Constitution states that 'all state authority emanates from the people', the concept of people not including foreigners. That decision has been overruled by a constitutional amendment. In Australia, indigenous peoples (Aborigines) were not declared full citizens until 1962, when for the first time they got the franchise, and in Canada it was not until the 1970s that indigenous peoples were enfranchised. On the other hand, Britain has traditionally permitted citizens of the Commonwealth and the Irish Republic both to contest, and to vote in, national and local elections.

The position under international instruments is also far from satisfactory. The ICCPR talks of minorities, but states have often claimed that only nationals are entitled to such rights. However, the UN Human Rights Committee has stated that Article 27 is applicable to non-citizens resident in the state. Whether a group is a minority depends upon objective criteria, and not upon a decision of the state. The UDHR and the ICCPR restrict political rights of franchise, representation and access to public service to citizens, for they belong to a person in respect of 'his [sic] country' (Articles 21 and 25 respectively). The UN Declaration on ... Minorities mentions both national and ethnic minorities, which would cover migrant communities. The tone of European regional instruments was set by the Helsinki Declaration of the CSCE (1975) which refers to the rights only of 'national minorities' (s. VII). The Charter of Paris for a New Europe is likewise restricted and the influential Framework Convention for the Protection of National Minorities (1995) also restricts rights under it to 'national minorities'. None of these instruments defines 'national minorities'. Two well-known definitions of 'minorities' offered by Capotorti and Deschenes in the course of their work for the UN restrict it to citizens.¹⁴ *A fortiori*, 'national minorities' may be interpreted as referring to citizens. However, Professor Asbjørn Eide, in his report as Special Rapporteur on Minorities, expressed the view that 'national minorities' does not refer to 'citizenship', but to 'ethnicity', although a number of states, particularly Germany, have contested his interpretation.¹⁵ Another interpretation of 'national minorities' in the European context is that it refers to long-settled minorities, with

another European state as the kin state, and is designed to exclude the newer immigrants.

Anomalies and injustices arise from the fact, that in this globalized world, large numbers of people live in states of which they are not nationals, but where they expect to live most of their lives. Yet they have no automatic right to the citizenship of these states. Regulations for naturalization as citizen vary from state to state; and the period of lawful residence before an application can be made varies from 5 to 10 years. In an increasing number of states, the rule about citizenship is based on the principle of *jus sanguinis*, that is, the nationality of parents, so that members of a migrant community may remain 'foreigners' for generations. The Committee of the Council of Europe recommended to its members in September 2000 to take measures to enhance the security of long-term immigrants, including giving them the possibility of acquiring the state's nationality. Reviews by the Council of Europe, the OSCE and the UN of citizenship laws enacted by the Czech Republic, Estonia and Latvia after their re-emergence as independent states, which resulted effectively in the loss of citizenship of people who did not belong to the dominant ethnic community, despite long residence, have suggested the limits of the discretion of states to determine citizenship laws. First, the UDHR and the ICCPR give everyone the right to a nationality, and although no specific obligation is placed on a state, this right can be realized only through regulation of state discretion. Second, such restrictive laws may offend the cardinal principle of non-discrimination which lies at the heart of human rights. Third, states in which a substantial number of people are not citizens and are thus not eligible for political rights, are unlikely to satisfy Article 25 of the ICCPR and similar or stronger provisions in other instruments requiring a democratic order.¹⁶

Economic and social rights

The right to participation is meaningless unless a group has the ability and the resources to exercise it. In many countries minorities have been economically or socially disadvantaged. Unless special programmes, such as educational facilities, access to the public service, or sometimes special financial loans, are established to enable them to catch up with other communities, the disparities between them and others increase. Participation assumes security and self-confidence. The importance of minimum levels of education and other social and economic facilities to the exercise of the right to participate is increasingly recognized in studies on poverty and social development (see the Copenhagen Social Development Declaration, 1995).

It is at the national level that some progress has been made, although here too the constraints that globalization places on welfare have restricted progress. The constitutions of several countries now require or urge the state to provide economic and social rights, although for the most part they are mandatory only for disadvantaged groups, not necessarily numerical minorities (as in Fiji and Malaysia, where the main beneficiaries are members of numerical majority communities). India and South Africa are two outstanding examples, where the obligations on the state are based on the moral and political recognition of past injustices to particular ethnic or social groups. The recent Fiji Constitution (1997) imposes a legal obligation on the government to institute schemes for preferential policies for poorer communities and groups.¹⁷ Hungary has set up a Foundation for Hungarian Gypsies (Roma) and a Coordination Council for Gypsy Affairs to examine social and political problems confronting the Roma. A government decree (1995) obliges ministries to develop Roma programmes in housing, education, employment, agriculture and animal husbandry. Some other countries also practise preferential policies (similar institutions for the Roma have also been set up in the Czech Republic, Romania and Slovakia).

Forms and mechanisms of public participation

The most important form of participation is one in which the minority takes part in decision-making, whether legislative, executive or judicial. But participation can also include representations to decision-makers, or consultation before a decision is confirmed. Participation is also important in the implementation of legislative and administrative decisions and policies, as it is in procedures for monitoring and assessing the implementation. A particularly valued form of participation is self-government, where specific matters of special concern to a minority are delegated for policy or administration to the minority. Participation can take place at different levels, national, regional and local.

There are different modalities to ensure participation. Much of the emphasis is on decision-making bodies, but the role of consultative bodies should not be ignored. In Fiji all legislation relating to matters that might affect the interests of indigenous peoples is referred for comment to a representative body of Fijians. In Finland, Norway and Sweden, there are parliaments for the Sami, which governments have to consult on specified matters, and which may make representations on legislative and policy proposals to the national governments. National Councils for Minorities in Hungary are consulted on bills affecting them, and enjoy a limited veto on legislative proposals. In New Caledonia, the Customary Senate has to be consulted on 'subjects relating to Kanak identity'. Many governments have set up anti-discriminatory bodies, ombudspersons for minorities, language commissions and equal opportunities institutions to analyse difficulties faced by minorities, to lobby for legislative or administrative reforms, and to empower minorities. People from minority communities are frequently members of such bodies. This gives them valuable access to information, public opinion and policy-makers.

Participation can also take the form of negotiations over differences between the minority and the state (or other groups). For example in New Zealand, differences over the meaning or implementation of the Waitangi Treaty, which governs the relations between indigenous peoples and the government, are negotiated with the mediation of the Waitangi Tribunal. The Tribunal has played a valuable role in establishing the framework and parameters within which the parties have negotiated. This has been an effective way of empowering Maori communities.

Much of the discussion on participation focuses on official bodies. But unofficial bodies can provide a useful forum for consultation with and influence on decision-making bodies. In Croatia the Council of National Minorities, a non-governmental association, which consists of one member of each of the 14 minorities in the country, complements the work of the parliamentary representatives of minorities. It facilitates dialogue between the government and minorities, examines and gives its opinion on draft laws and other legal acts which concern minorities, and monitors the implementation of provisions for minority protection.

This report does not look at all the forms and mechanisms of participation (the *Lund Recommendations on the Effective Participation of National Minorities in Public Life* sets out a wide variety of them). The focus here is on representation, power sharing, and autonomy or self-government. However, before turning to them, it is necessary to refer to another important basis of participation – the right of access to the public service, which includes the right to employment in state services, recognized by the ICCPR, in Article 25 (c). The importance of equitable ethnic representation in the public service is now well recognized. A great deal of state policy and regulations are made by public servants, and it is appropriate that officials of minorities should be able to participate in these processes. Decisions on policy and implementation are better informed and improve through the input of minorities. The access of minorities to the public service and their relations with state services are greatly facilitated and improved if they can deal with officials from their own community.

Right to legislative representation

Uses of minority representation

Representation is a key instrument for participation, enabling voices of the minority to be heard in official bodies. The process of electing representatives acts to mobilize the minority and, depending on the method of election, to reinforce its corporate character, frequently through a political party. At the same time it also strengthens its articulation with the national political system. Representation is an emphatic recognition of a positive right of the minority – to take part in the state

political processes and to influence state policies. Because, in most democratic systems, governments are formed on the basis of representation, the minority will frequently be able to influence the formation of the executive and indeed to secure membership in it. Even if its representatives do not become part of the government, they are able to play an important role in the political process as part of the opposition. And they add to the efficiency and effectiveness of the legislature by bringing to the attention of the majority perspectives they would otherwise miss.

In general if a minority is small, and represented proportionately, it may not have much influence on politics. In most countries, minorities are under-represented; in the USA African-Americans constitute approximately 12.4 per cent of the population but hold only 1.4 per cent of elected offices; Latino Americans do worse: although 8 per cent of the population, they hold only 0.8 per cent of elected offices, and in Canada the indigenous peoples hold only 1 per cent of elected offices, although they are 3.5 per cent of the population.¹⁸

However, the value of representation to a minority also depends on factors other than numbers. Armed with votes or seats, a minority may be able to extract concessions or promises from larger political groups, or even enter into strategic alliances. If there are a number of ethnic groups, a small minority may hold the balance between the larger groups, as in Fiji where the small electorate of Europeans, Chinese and people of mixed race ('Others') has wielded disproportionate influence and participation in government for this reason. Even if there is a dominant community, the minority may be able to influence politics, if the dominant community is split into two or more parties, as the Sinhala have been in Sri Lanka. The Swedish People's Party in Finland has helped to maintain the political influence of the Swedish-speaking minority; its members have been in most governments since 1945 in larger numbers than its population would justify. But it is noticeable that Swedish-speakers have influenced national politics also by joining national political parties in which they have held senior positions. Here much may depend on the electoral system.

Separate representation may enhance minority influence, as in Fiji, but minorities as part of the general electorate can also influence the outcome of national elections, as the Muslims in India are able to (it is estimated that the Muslim vote is decisive in nearly 100 parliamentary constituencies, forcing even the right-wing Hindu Bharatiya Janata Party to woo them). Forms of proportional representation may also enable minorities to influence the outcome of elections (the Tamil influence in Sri Lanka has increased with the shift to proportional representation, particularly in the presidential elections). Parliamentary systems are more prone to minority influ-

ences given the system of responsibility, although presidential elections can also empower minorities (as in the 1988 Nigerian elections).¹⁹ In bicameral legislatures, representation in the lower house may be more important – contrary to the convention of special representation in the upper house.

A number of devices can be used to enhance the value of minority representation. In some circumstances it may be more effective to have representation for purposes of bringing the interests and concerns of minorities to the attention of the legislature. A novel form of representation has been proposed by the Mikmaq Grand Council for the tribe in the Nova Scotia legislature. It is proposed that a member would be elected or nominated by the Council, to be known as the Treaty Deputy, whose function would be to ensure that the provisions of the Treaty of Peace and Friendship signed in 1752 between Mikmaq and the Crown would not be abrogated. The Deputy would also be able to address general political questions of consequence to the Mikmaq people.²⁰ In order not to affect the democratic process, the Deputy would not have a vote in matters not affected by the Treaty. The inspiration for this proposal may have come from the State of Maine in the USA, which has traditionally allowed two representatives of indigenous groups, elected on a special ballot, in its legislature in order to protect their treaty rights. The provision in the Indian Constitution for nomination of Anglo-Indians to the Upper House was intended to perform a similar function.

Representatives of minorities or minority regions can be given a special role in the legislative process. Members from Scotland in the British Parliament have traditionally formed the Grand Scottish Committee to review legislative bills of special relevance to Scotland, and it has been possible even to take one or more readings of the bill in that committee. In Fiji, representatives of indigenous Fijians sit with senior Fijian civil servants in the Fijian Affairs Committee to review legislative proposals of special concern to them before the proposals can be enacted by the Parliament (this provision dates from the time when indigenous Fijians were considered a vulnerable group). Some constitutions go even further and give communal representatives the right to block legislative proposals or to subject them to a special procedure. In Belgium, where members are divided into linguistic groups, the enactment of certain laws requires the votes of two-thirds of each linguistic group, provided that each group has a majority of its members in the legislature at the time of the vote. Another procedure is designed to help the French-speaking minority: when the French linguistic group considers that a bill is likely to impair relations between the French and Flemish communities, three-quarters of its members may raise an objection,

whereupon the matter is referred to the Council of Ministers, consisting of an equal number of French and Flemish and operating by consensus. The Council presents a reasoned response to the legislature, either to defend or modify the bill. In Bosnia and Herzegovina, the legislative quorum in the House of Peoples in the Parliamentary Assembly requires three representatives each of Bosniacs, Croats and Serbs. In the second chamber of the Parliamentary Assembly, the House of Representatives, a majority of all members comprises a quorum. Any community can declare that a proposed decision affects its vital interests, which then calls for special procedures for mediation and reconciliation of differences. If the political process fails to resolve differences, the matter is referred to the Constitutional Court.

The focus of this section of the report is on representation in national institutions. However, representation can be secured indirectly, through elections to councils of minorities which have a consultative status with the legislature or the government (as in Croatia, Hungary, Romania and Slovakia). This form of representation can be especially useful when members of minorities, being non-nationals, lack the franchise to vote in national elections. The EU states are encouraged to set up these councils when minorities are otherwise disenfranchised. Second, representation at local government level to facilitate minority participation is receiving increased attention. In several countries, non-nationals are allowed to participate in local government elections and institutions, and several instruments have drawn attention to the potential of local-level politics for the participation and welfare of minorities. In other instances, national minorities are given rights of self-government if they constitute a majority in a district (as in Croatia and Hungary), and the draft Sri Lanka Constitution (February 2000) not only provides for power sharing at the provincial level but also cultural councils at the district level.

Securing minority representation: the electoral system

It is only in recent years that consideration has been given to the adaptation of electoral systems to minority representation.²¹ Two widely different approaches have been advanced on their representation. The first focuses on ensuring representation for minorities by members of the minority, hopefully proportional to their size of the population, either through a national electoral system which will facilitate this, or, if necessary, by a system of separate representation. The other approach is less concerned with direct minority representation than with their political integration. The distinction is sometimes blurred, for some methods for direct minority representation are compatible with their integration, such as proportional

representation (PR). In practice the distinction between systems which do and do not provide for separate minority representation is greater.

Of the electoral systems which are not explicitly based on ethnic representation, the most common are the plurality-majoritarian systems and the proportional representation system. The plurality, or first-past-the-post, system, typically used in Britain, the USA and many other countries which have been associated with them historically, is the least favourable for the election of minority representation – unless the minority is sufficiently concentrated in a locality to constitute a dominant group. In Britain, for example, there are relatively few parliamentarians from minority communities, and those usually represent constituencies with significant minority populations.²² Sometimes the first-past-the-post system can yield minority representation if constituency boundaries are changed; such changes have been judicially approved in the USA to allow representation of black people in the southern states. If minorities are politically well integrated with the majority, their members may well be elected in such a system, as with the Jewish community in Britain.

The majoritarian systems are even less favourable to minorities, for a candidate needs to secure at least 51 per cent of the votes to win. The best-known example of a majoritarian system is what is called the ‘two-round system’, under which, if no candidate wins a majority in the first round, a second poll is taken in which voters choose between the two top candidates (as in France and its former colonies, and parts of Europe and Latin America). A variation of majoritarianism is the ‘alternative vote’ (AV), in which electors mark their preference among candidates and if, on the first count, no candidate gets the majority of the first preferences, the candidate with the fewest votes is eliminated and electors’ second preferences are distributed among remaining candidates until a majority winner emerges.

There are also several types of PR which aim at relating the number of representatives to the votes cast for particular candidates or parties. The best-known of these systems is the List PR system, under which political parties which contest the elections present a list of their candidates to the voters. The constituency is either the whole state (as in Israel, Moldova, Namibia and Slovakia) or, more commonly, a series of multi-member constituencies. Large constituencies are better for minority representation. The voting is for a party and not a candidate; a party is entitled to the number of seats which corresponds to its share of the vote, so that if it wins 30 per cent of the votes, it gets 30 per cent of the seats, which go to the requisite number of candidates at the top of its list. However, a party has to secure a minimum percentage of votes before

it can get any seats; this is known as the 'threshold', although a number of countries have no threshold at all – Belgium, Bosnia and Herzegovina, Spain and Switzerland, or none for parties of minority groups, as in Poland and Germany. In some systems, voters are not bound by the ranking of a party's candidates and may declare their own preference ('open list'). Experience suggests that a closed list, in which the party leadership determines the order of priority, can be more effective for securing representation of minorities and women. It is also possible to require political parties to nominate a minimum number of members of minority communities (this device has been useful in securing the representation of women as in Nepal). In the PR system, unless the threshold for securing seats is high, a minority can secure representation through its own political party.

Thus, as between majoritarian and PR systems, the latter is more likely to result in minority representation and to provide incentives for formation of ethnic parties. In the former system, a member of a minority keen on a political career is more likely to join a 'mainstream' party, for the prospects of a minority ethnic party are poor, except in areas, if any, where they are in a majority.

The second approach favours designing electoral systems to integrate different communities by creating incentives for political parties to broaden their appeal to attract votes from all communities. The aim therefore is not so much to ensure direct minority representation, as that those who are elected are likely to enjoy the support of minorities and thus be moderate in their policies. The rules for the election of the Nigerian President, but not of other officials, under the 1982 Constitution was based on this approach (and has recently been used in Kenyan presidential elections). An electoral system to encourage communal integration was adopted in the 1997 Fiji Constitution, although it retained elements of separate representation. Singapore provides an example of a system which both secures minority representation and attempts to integrate communities. A number of constituencies, called the Group Representative Constituency (GRC), return either three or four members. A political party which wants to contest in these constituencies has to present a slate of three or four candidates, of which at least one must be from a minority. Electors vote for the slate rather than individual candidates. The justification advanced for this system is that it secures the election of some minority candidates, although its critics saw it as an attempt by the government to stifle opposition parties which would have difficulty in securing enough qualified candidates given the constraints under which opposition parties operate. It is certainly the case that so far all GRC seats have been won by the ruling party.²³ In its electoral reforms of 1993, New Zealand altered its system of repre-

sentation for Maori by giving them the option to vote on a separate electorate or common roll – as more Maoris opted for the common roll, there was a corresponding reduction in separate representation, a provision designed to encourage integration. With this common roll Maoris secured higher representation than in the past, thanks to the PR system that was adopted at the same time.

The integrationist approach favours electoral systems which create incentives for political parties to woo support among all communities. This is expected to result in both multi-ethnic and moderate parties. Such systems work best when the votes of the minority can have a decisive influence on the outcome of the elections. This is indeed its drawback, for while preferential voting systems like the alternative vote or the single transferable vote (STV) can give the minority a decisive say, they can do so only if certain population configurations are present. Essentially, not only must the constituency be ethnically heterogeneous, but the majority community in it must be split into at least two political parties of roughly equal strength – as has often happened with the Sinhala parties in presidential elections in Sri Lanka. Unless these conditions exist naturally, they will need to be created through constituency boundary changes to establish balanced heterogeneity, as in Fiji. This raises its own difficulties and is open to political manipulation. If an election system does not work as projected by its proponents, the logic of majoritarianism, on which the system is based, is likely to result in an under-representation of minorities.

Communal representation

The preoccupation with minority representation in recent years, particularly as part of complex constitutional schemes for the governance of multi-ethnic territories, has led to provisions for separate representation for ethnic groups, particularly for minorities (called here 'communal representation'), as in Croatia, Finland, Hungary, Romania and Slovenia. Communal representation was the cornerstone of the British colonial system, but at independence most former colonies abolished this system of separate representation, the outstanding exceptions being Cyprus and Fiji. This system is also to be found in China (where minorities are deliberately over-represented), New Zealand and Samoa. The revival of communal representation in the face of considerable criticism calls for an assessment, which the author does by examining a number of examples of its adoption.

Cyprus

From the very start of representative politics in Cyprus, Britain introduced communal representation. Such was the bitterness between the dominant Greek community and the minority Turkish community (fuelled no doubt

by their 'kin states') that independence could only be secured through an intricate Constitution built around far-reaching consociational principles. The Greek (including the Maronite community) and the Turkish communities were treated as separate entities, and the entire system of representation, government, administration and social services was based on proportionality, with Greeks counting for 70 per cent and Turks 30 per cent of the population. This was based on a slight over-representation of Turks. The House of Representatives consisted of 50 members, of whom 35 were Greek and 15 Turkish, elected on a communal basis. The President of the House had to be a Greek, the Vice-President a Turk. In addition to the full House, there were also communal chambers of Greek and Turkish members respectively, which had wide law-making powers in educational, religious and personal affairs, and other matters delegated to them by the House. The President of Cyprus had to be Greek, elected by Greek voters and the Vice-President a Turk who was elected by the Turks, each with their own special powers. Ministerial posts were also divided among the two communities; Greek ministers were appointed (and removed) by the President; the Vice-President performed similar functions in relation to Turkish ministers. The system produced extreme rigidity; the Greeks resented it for giving disproportionate powers to Turks, and Turks resented the permanent dominant position of the Greeks. The first wanted to change the Constitution; the second boycotted arrangements agreed at independence (in which, it should be stated, the decisive influence was of metropolitan powers). Cypriot politics were also complicated by political and military interventions of Greece and Turkey, which eventually spelled the end of the Republic as described above.

India

The Indian National Congress which led India to independence was opposed to ethnic electoral rolls and representation which the British had introduced in 1909. It would have been willing to contemplate them if Pakistan had not been carved out of the subcontinent as the homeland for Muslims; separate rolls having been devised primarily for Muslims. Austin says that the:

'members of the Constituent Assembly had one predominant aim when framing the legislative provisions of the Constitution: to create a basis for the social and political unity of the country'.²⁴

He summarizes the situation at independence as follows:

'not only did the provinces lack even a semblance of popular government ... but the small electorate that

existed was itself thoroughly fragmented ... split into no less than thirteen communal and functional compartments for whose representatives seats were reserved in the various parliamentary bodies'.

Similar distinctions were applied in the indirectly elected central legislature.

The Constituent Assembly did agree to one form of special representation, for scheduled castes and tribes, as part of the package of affirmative policies for these communities. The Constitution expressly provides for reserved seats for each of these communities in proportion to their share of the population in both the lower house at the national level and in the states (Articles 330 and 332 respectively; arguably seats can be reserved for them in other political bodies under Article 15 of the Constitution).²⁵ In India's parliamentary systems, lower houses are the more important component of the legislature, as it is there that governments are formed and removed. This provision was originally to last for 10 years, but it has been renewed ever since. The scheduled castes constitute about 15 per cent of the population, and the scheduled tribes 7 per cent, so that they enjoy significant guaranteed representation. The law also provides that scheduled castes and scheduled tribes candidates are required to make smaller deposits.

Separate electorates are prohibited for the national and state legislatures and the Supreme Court has interpreted the Constitution to prohibit separate electoral rolls at local levels.²⁶ All registered voters may vote in constituencies in which seats are reserved for scheduled castes or scheduled tribes. The Delimitation Commission, an independent body, determines in which constituencies seats will be reserved. There is a single criterion for the selection of constituencies for scheduled tribes – the concentration of its population. Since the scheduled tribes still live in particular areas, these constituencies contain a high proportion of their population, more than 50 per cent in more than half the constituencies so reserved, so that the bulk of scheduled tribes (about 70 per cent) would live in such constituencies.

As for scheduled castes, who are more dispersed, reservations have to be spread throughout the country, and to be located, in so far as possible, in constituencies in which the proportion of their population to the total is comparatively large. Thus constituencies with reserved seats for scheduled castes contain proportionately fewer of them than is the case with scheduled tribes. The largest contain about 30 per cent.

There is considerable opposition from other communities to the designation of the constituencies in which they live as reserved constituencies, as it deprives their members of the right to the seat. Galanter says that on the

whole, constituencies reserved for the scheduled castes 'tend to be political backwaters – slightly less urban, with less newspaper circulation and a slightly greater percentage of agricultural labourers'.²⁷ Scheduled tribe constituencies tend to be more isolated and less urban than general constituencies.

The effect of the reservations is to ensure the representation of these two communities, who are otherwise politically and economically marginalized. This is particularly important for the scheduled castes who do not form a majority anywhere. As over 20 per cent of seats are held by the members of these communities, all major parties have an interest in promoting candidates from them. The candidates likewise have an incentive to cast their appeal beyond their own communities, particularly in the scheduled caste constituencies. This has helped to integrate scheduled caste and scheduled tribe members into the constitutional and political system, but this result has perhaps been achieved at the expense of abandoning particular advocacy of the claims of their own communities. Nevertheless, there are parties which are based predominantly on their support, particularly at the state level,²⁸ where their members have achieved high office. It is fair to say that the reservations have given the two communities considerable political clout. It has facilitated their entry into the government and their lobbying has been crucial for the maintenance and improvement of other affirmative action policies, which for the most part are authorized but not mandatory.

Bosnia and Herzegovina

The Republic of Bosnia and Herzegovina, officially named Bosnia and Hercegovina, is composed of two Entities, 1) the Federation of Bosnia and Herzegovina and 2) the Republika Srpska. Many important powers are vested in the Entities, whilst the government at the level of the state has powers which are necessary to constitute and exercise external aspects of state sovereignty and is responsible for key issues, such as human rights protection. The Constitution is built around the concept of ethnic communities and includes both individual rights of citizens and very strong provisions for collective rights of the three main ethnic groups, called constituent peoples.

Arrangements for representation and power sharing take the three main ethnic communities as building blocks, carrying forward the proposition stated in the Preamble that Bosniacs, Croats and Serbs are 'constituent peoples' of Bosnia and Herzegovina. 'Others'²⁹, and 'citizens' are mentioned only in passing.

Professor Pajic implies, critically, that this makes these three communities, rather than the people as a whole, the source and bearers of sovereignty.³⁰

The Parliamentary Assembly has two chambers, House of Peoples and House of Representatives. The House of Peoples has 15 Delegates; these are five Bosniacs and five Croats from the Federation of Bosnia and Herzegovina (selected, respectively, by the Bosniac and Croat Delegates to the House of Peoples of the Federation) and five Serbs from the Republika Srpska (selected by the National Assembly of Republika Srpska). (Article IV). This means that Serbs in the Federation, Bosniacs and Croats in the Republika Srpska and minorities across the whole of Bosnia and Herzegovina are excluded from standing for office for the House of Peoples. Nine members of the House of Peoples constitute the quorum, so long as there are at least three from each constituent people. The House of Representatives has two-thirds of its members elected from the Federation of Bosnia and Herzegovina and one-third from Republika Srpska; a majority of all members constitutes a quorum. The result of these arrangements is that politics is entirely communal, and almost perforce political parties are ethnically based. Parties get together in Parliament or government only after the elections. The system creates incentives for parties and their leaders to intensify appeals to narrow ethnic interests, which in some cases is linked to their kinsfolk in other states, which does little for the unity of the country. In the 1996 elections, the most extreme ethnic party in each community won the elections, leaving their leaders the impossible task of finding a common purpose.³¹ The relevance of this form of representation for public participation will become clear when power sharing in Bosnia and Herzegovina is discussed later in this report.

Fiji

In Fiji one of the most difficult questions that the leaders of the different ethnic communities had to resolve at independence was the electoral system. Fiji has now experienced three different electoral systems, and is about to design a fourth.

The 1970 (independence) Constitution was dominated by communal seats and communal voting. Although there was provision for national seats, their structure was still based on an ethnic allocation of seats, while the logic of communal seats prevailed over the logic of national seats which was intended to provide a basis for non-racial politics. There were 52 members: 27 were elected on communal franchise (12 by indigenous Fijians, two by Indo-Fijians and three by general electors, principally Europeans and their part descendants and Chinese); 25 ('national seats') were allocated communally (10 each to indigenous Fijians and Indo-Fijians and five to the general electors) but all the voters in the community voted for them – hence the system came to be known as 'cross-voting'. Each voter had three votes in the contests for

national seats, each to be cast for members of different ethnic groups. The rationale of national seats was to integrate ethnic groups politically, promote inter-ethnic parties and prepare for the transition to a complete common roll. However, the logic of the system was dictated by the communal rather than the national seats.

Politically, parties were organized essentially on ethnic lines, in order to compete for communal seats. There was one dominant party for each of the communities. While the need to contest national seats compelled each of the major parties to extend its appeal beyond the community they principally represented, for the most part this was not successful, and few attracted votes from other communities. National seats were decided principally by communal votes; thus, indigenous Fijian candidates sponsored by the dominantly Indo-Fijian National Federation Party were successful as a result of Indo-Fijian votes, and so on. This was possible because of the concentration of the two major communities in different constituencies. In this way cross-voting seats became an extension of communal seats.

The Alliance Party (the dominant party of indigenous Fijians) was a partial exception to this trend. It attracted a significant percentage of Indo-Fijian votes, especially for the cross-voting seats, in which it often achieved over 20 per cent of the vote. By contrast the National Federation Party commonly gained less than 5 per cent of indigenous Fijian votes. However, the Alliance Party had to maintain its support among indigenous Fijians if it was to remain a serious political contender, especially as militant indigenous Fijian parties were bidding for the support of its principal electorate. The logic of the system compelled the Alliance Party progressively to champion exclusively indigenous Fijian interests.

The 1990 Constitution, adopted by the military government following the 1987 coups, abolished national seats. It not only removed any vestiges of cross-voting, completing the separation of ethnic groups (and making politics almost totally ethnically based), but also aimed to ensure the permanent and undisputed rule of indigenous Fijians. It gave a disproportionately large representation to them in both houses of Parliament (in the House of Representatives 37 out of 70 seats being reserved for them). In addition it provided that a Prime Minister had always to be an indigenous Fijian. It also dispensed with the rather awkward, residual agenda of the 1970 Constitution that the ultimate aim was the development of a multi-ethnic Fiji. The sidelining in this way of the Indo-Fijians had the predictable effect of releasing factionalism within the Fijian community that had been largely contained under the more balanced allocation of communal seats in the 1970 Constitution.

The 1997 Constitution (overthrown in May 2000) largely abandoned that approach, but it continued with significant reliance on communal representation. It provided for 25 open seats in the House of Representatives (out of a total of 71) which were open to candidates of any ethnic group and for which all voters resident in the constituency could vote, and 46 communal seats (to be voted communally) divided between the ethnic communities. The voting for these, as for communal seats, was by the alternative vote system. While in communal seats this method of voting served principally the purpose of ensuring that the winning candidate enjoyed clear majority support, its purpose in open seats was to provide incentives for political parties to cooperate across ethnic frontiers. Under the AV system, a voter has to declare his or her preference among all the candidates. Since a winning candidate has to have an absolute majority, the second and subsequent preferences of a voter can be crucial in determining the result. This method thus opens up possibilities of arrangements between political parties for the trade-off of the second and subsequent preferences of their supporters. The logic of the system might well have led to multi-ethnic parties (as was the expectation of the Reeves Commission which recommended it). Additionally, it was expected that candidates with moderate views would have an advantage over those espousing extreme views, as they would have a chance of capturing more second preferences.³²

The results of the first general election seemed to have vindicated some of the assumptions of the Reeves Commission. Two broad coalitions of communal parties were formed and contested the elections. However, it was not only moderate parties with conciliatory policies that tended to trade preferences. In fact the more ethnically conciliatory coalition lost the election, negating the assumption that, even if an extremist party may get a significant proportion of first preferences, the more moderate parties would get the second and subsequent preferences. As an observer of the results has commented:

*'Where racial polarisation is particularly sharp, it is easy to envisage a situation where a majority of an ethnic group's first preferences are picked up by the militant flank party, which also attracts, at the second, third or subsequent count, the preference votes from eliminated more moderate parties representing the same ethnic group. Here the AV system could serve, not as a vehicle for inter-ethnic compromise, but as a means of cohering a politically fragmented ethnic group around an extremist position.'*³³

A major party with predominant Indo-Fijian support failed to secure a single seat, although its share of the

communal vote was over 32 per cent. It does not seem therefore that the electoral system led to cross-ethnic voting on any scale, nor to any proportionality, but the logic of open seats on the AV system did lead to multi-ethnic coalitions.³⁴ Unfortunately it is not possible to make a reliable assessment of this interesting system, for it was tried only once. But the experience may reflect limits of electoral designs and the ability of voters to handle elaborate voting systems.

Discussion

Where both the majority and minorities are agreed that minorities should be represented separately, there may be no objection to communal electorates. But the case studies examined in this report raise doubts as to whether separate representation in general is desirable. A particularly acute observer of constitutional politics, Stanley de Smith concluded that communal seats tend:

'to magnify existing communal differences, in as much as communities are stirred to fuller self-consciousness and electoral campaigns are dominated by appeals to communal prejudices; and new communities discover themselves as further claims to separate representation are lodged'.³⁵

It is exceedingly hard to establish national parties, necessary for political integration, when voting is communal. Communal forms of representation often irritate and provoke majority groups, although this is not in itself a reason for not adopting them. Members of minorities have fewer prospects of high office if they rely on their own separate parties and representation than if they were members of national parties (unless there are provisions for power sharing). Communal representation also tends to obscure social and economic interests that sections of different communities have in common. Moreover, leaders and parties of the majority party have little incentive to woo minorities or design policies to suit them. A better approach would be to consider devices whereby, within an integrated electoral system, there are legal requirements or political incentives to secure representation of minorities, through the list system in PR or mandatory nomination of a minimum number of minority candidates.

Power sharing

It is increasingly realized that, although an important basis for participation, representation by itself does not allow a minority to participate significantly in public affairs. Whatever the electoral system, its members would be too insignificant to influence policy, much less stake a claim to membership of the government or other key

institutions, unless the minority held the balance between the major parties contending to form a government, as has often happened in Israel, for example. Ways must therefore be found for the minority to share in government and administration, through membership of the cabinet and other policy-making bodies, and in the public service, including the judiciary. Power sharing refers to a system in which all major ethnic or political groups are entitled to participate in government and to a proportion of positions in the public service. It also tends to establish harmony and stability, through a partnership of ethnic groups.

The best-known example of power sharing is consociationalism, whereby ethnic groups are recognized as political entities, and as such are entitled to a large measure of self-government in matters deemed to be internal to them, and to a share in power when matters of common interest are being resolved, at the national level. However, consociationalism, which has many critics, is not the only method of power sharing. It is possible to base power sharing not explicitly on ethnicity but on political parties, as in the transitional arrangements in South Africa and under the 1997 Fiji Constitution, for these arrangements also tend to encourage political integration of ethnic groups. Power sharing in consociationalism relies on a number of other devices as a package, but simpler forms of power sharing can be established, geared principally to giving minorities a share in power at the national and local levels.

Arrangements for power sharing can be stipulated in the constitution, as they would under consociationalism, or be left to political understandings or conventions, as in India where it is normal to include at least a member of scheduled communities in the cabinet, and in the US Supreme Court where at least one Jewish and one black judge would normally be expected to hold office. But the important point in such systems is not so much a convention to ensure participation of minorities as that minorities are involved, and integrated, in mainstream politics through parties and other mechanisms. While in the West, to a considerable extent, minorities have had access to power through a non-ethnic political process, in many parts of Asia and Africa minorities have been denied such a role. Hence the current interest in consociationalism.

In general, there is considerable agreement that power sharing is desirable, particularly as minorities would otherwise remain marginalized. However, some criticism is made of arrangements which seek to be inclusive, where all key groups are in government, on the grounds that the government is not subject to sufficient scrutiny and is less accountable. It is also said that coalition governments, which is what power sharing entails, are weak and ineffi-

cient as it is difficult to agree on policies and their implementation. Compulsory quotas in the public service, another consequence of power sharing, may arguably lead to the appointment and promotion of incompetent candidates.

But even among those who support power sharing, there is considerable disagreement on principles and modalities. Some of these principles and modalities, such as federalism or other forms of autonomy, are discussed below. There are few studies that focus on different methods of power sharing and their relative worth.³⁶ A review of some experiences of power sharing may help us to assess the value of this way of empowering minorities.

Cyprus

Power sharing was instituted principally by vesting specified powers respectively in the President and Vice-President of the Republic, the former of which must be Greek and the latter Turkish, elected by their own communities. The President appointed (and could remove) seven Greek ministers; the Vice-President three Turkish ministers. The President and the Vice-President had to make some decisions jointly, but decisions on most important matters, which applied on a communal basis, were made by them separately. This meant that on many matters there were different regimes for the communities, and that these matters were under the jurisdiction of each community. The President and the Vice-President each had a veto over specified legislation, primarily on matters of common interest to the communities. This ensured that no legislation in these areas could be passed over the opposition of either community. Similar vetoes operated also in the Council of Ministers.

Such a system of power sharing placed more importance on differences rather than commonality of interests. It was likely to produce conflict and deadlock, and that is precisely what it did. The President acted, or perhaps more charitably, was compelled to act several times in contravention of the Constitution. There were frequent disputes about the allocation or exercise of powers. The constitutional arrangements collapsed under their own weight, assisted by outside intervention. The collapse led to communal violence and transfers of population, so that Cyprus is now divided between a northern Turkish area and a southern Greek area, and the search, under the auspices of the UN, has been under way for years for a federal solution to the division of territory and the antagonism between the communities.

Northern Ireland

Power sharing has been a recurrent theme in Northern Ireland. In 1973 the British Parliament, in a shift from majority rule, provided that autonomy for Northern Ire-

land would depend on the formation of a broadly based executive, accepted by the population, based on representation of both communities (the Northern Ireland Constitution Act). However, the government (and the system of autonomy) was short-lived as it was opposed by the Ulster Unionists who won 11 out of 12 seats in the election to Westminster and thus discredited the power-sharing arrangements (the opposition being not so much to power sharing as to a subsequent agreement between the UK, Irish and Northern Irish political parties to the 'Irish Dimension' through the Council of Ireland).

In 1982 another attempt was made to move towards autonomy. At first the functions of the Northern Ireland Assembly were consultation, scrutiny and deliberation, particularly in relation to legislation proposed by the British government in Parliament. However, devolution would take place if 70 per cent of the Assembly members supported it or if both communities supported it; full devolution would require an executive acceptable to both communities, implying some form of power sharing. This system was stillborn since the 'nationalists' (those supportive of closer connection with the Irish Republic), opposed it, as it did not provide for something like the Council of Ireland.

The next move towards power sharing was the Belfast Agreement (the Good Friday Agreement) in 1998, which has the support of the governments of the Irish Republic, the UK and the USA. At the first meeting of the Assembly all members are to register their identity in one of three categories – nationalist, unionist or 'other'. The election of the First Minister and the Deputy First Minister is through cross-voting, in which there are three separate forms of voting – by all the members, by the unionists and by the nationalists. Candidates have to secure the support of the majority of all three groups, thus placing a premium upon moderate candidates. Other ministers take office in proportion to the size of their parties' representation in the Assembly. The First and the First Deputy Ministers form a diarchy, so that if one resigns, the other also loses office. They cannot be removed by the Assembly. The principle of power sharing is carried into the Assembly where, for key issues, decisions are made not by simple majority voting but by majority of both nationalists and unionists, or, if agreed, by a majority of the votes of members, provided that it includes 40 per cent of each of the members of these communities.

While the antecedents of this system are understandable, it may tend to entrench religious/political differences, at a time when a substantial proportion of the people of Northern Ireland are willing to drop communal differences. It would give power to those who are adept at manipulating religious differences and nationalist politics. This system unfortunately downgrades the votes of 'oth-

ers', and thus is less favourable to those who work across communities.

South Africa

There were spurious efforts at 'power sharing' in *apartheid* South Africa. 'Bantustans' were created, ostensibly to empower black Africans in their 'homelands', and the 1982 Constitution established different legislative chambers for whites, Indians and Coloureds, and the concept of 'own' and 'common' affairs, whereby each chamber had jurisdiction over communal affairs, and jointly over common affairs. The whole system, a disguise for white domination, worked under the hegemony of the white chamber. During the discussions on, and negotiations for, future constitutional dispensation after the collapse of *apartheid*, demands for power sharing were made by sections of the white, particularly Afrikaner, community and the Zulu-based Inkatha Party. Although contrary to its non-racial policy, the African National Congress (ANC) was prepared to accept it to ensure democratization. These concessions for the government of national unity were included in the power-sharing provisions of the 1993 (transitional) Constitution. Certain executive powers were vested in the President, elected at a joint sitting of Parliament, to be exercised at his or her discretion; others had to be exercised after consultations with the cabinet (sec. 82). Each party which had at least 20 seats in the National Assembly was entitled to seats in the cabinet proportionate to its seats in the Assembly. In addition, each party which had at least 80 members was entitled to nominate an Executive Deputy President. The role of Deputy Presidents was central to the scheme of power sharing. The President had to consult with them on a number of matters, including the development and execution of government policies, the management of cabinet business, appointment of ambassadors and negotiations of treaties, appointment of commissions of enquiry, holding referenda and pardon or reprieve of prisoners (sec. 82[2]). Powers for the allocation and appointment of ministries were to be exercised 'in the spirit underlying the concept of a government of national unity' and through consensus, but in the event consensus could not be achieved, the decisive say rested with the President on the allocation of ministries and with party leaders on appointment of ministers from their parties (sec. 88[5]). The Constitution stated that the cabinet:

'shall function in a manner which gives consideration to the consensus seeking spirit underlying the concept of a government of national unity as well as the need for effective government.' (sec. 89[2])

The Constitution also provided for the collective responsibility of the cabinet, especially necessary in case of forced, multi-party government. If a minister failed to act in accordance with presidential instructions, the minister could be removed by the President, after discussions with his or her party leader (sec. 92[2]).

The provisions for power sharing enabled a measure of bipartisanship in the transition from apartheid towards a non-racial, democratic South Africa. It should be noted that the criterion for power sharing was not ethnic, but it was clearly assumed that it would facilitate the inclusion in government of all ethnic groups (as it did). But it should also be noted that members of all ethnic groups would have been represented even if only the ANC, the party with a substantial majority, had formed government, such were its multi-racial credentials. The provisions did not lead to the accentuation of the ethnic base of parties; all major parties attempted to broaden the ethnic base of their support. It is also worth noting that there were no vetoes for participating parties or mechanisms to block decisions (as is the current preoccupation of European schemes of power sharing). The Constitution specifically mentioned the need for efficiency.

The experience of power sharing did indeed show a concern with efficiency and the need to maintain consensus through what was a difficult and testing time for South Africa's transition. The cabinet was able to maintain a remarkable, and surprising, degree of cohesion. Nevertheless, party leaders in government had difficulties in dealing with their own backbenchers, particularly when trying to sell them compromises reached in the cabinet. This was a problem for all parties, but especially for the ANC, which had enough numbers to have constituted a government on its own in a straightforward majoritarian system. It was this restlessness that persuaded its leadership not to support the continuation of power sharing arrangements when the final Constitution was negotiated.

Fiji

One of the major political problems that Fiji has faced since independence is that its first two constitutions (1970 and 1990) included communal representation in the legislature but provided for government by the majority party. This produced a government composed predominantly of indigenous Fijians and deprived Indo-Fijians of many rights of political participation – producing acute political tensions. After the failure of the racist Constitution of 1990, there developed wide consensus among leaders of major political parties that all communities should share in the powers and functions of the executive, reflected in the 1997 Constitution.

The President appoints as Prime Minister the member of the House of Representatives who in his/her view com-

mands the confidence of the House (sec. 98). The Constitution entitles any political party which wins 10 per cent of the seats to join the cabinet (sec. 99[5] and [7]). If the Prime Minister needs the support of other parties to form a government, these parties would be in a strong position to negotiate policies that would bind the government. If the Prime Minister's party has a majority or substantial numbers, it may exercise a hegemonic role, and other parties may be compelled to comply with its priorities. Smaller parties (those with fewer than eight members) would be less favourably placed than before, for previously they might have held the balance of power. However, the Constitution permits the Prime Minister to appoint as minister a member of such a party, but only by sacrificing a ministerial post from his or her party's quota (sec. 99[6]).

The Prime Minister appoints ministers (sec. 99[1]), although when appointing people from a participating party, he or she has to consult with its leader. The Prime Minister alone decides on the allocation of portfolios (sec. 103) and the dismissal of ministers (sec. 99[1]). He or she would effectively have to consult the leader of the minister's party in the case of dismissal, for in replacing the minister, the Prime Minister would have to consult that leader. In most Westminster-type systems, the Prime Minister is no longer, as in constitutional theory, *primus inter pares* (first among equals), but is effectively the government. This may not create a major constitutional problem if the government consists of one party (whatever the strains within the party), but could become problematic in the case of coalitions. In the case of Fiji under the new Constitution, the problems and difficulties may be even greater: for one, the purpose of multi-party government is power sharing – a purpose which could be negated if the Prime Minister were not to consult other partner parties and, second, multi-party government is mandated by the Constitution, and is not a voluntary arrangement. A 'forced marriage' of this kind requires the utmost sensitivity, consultation and compromise, and therefore effectively changes the nature of the office of the Prime Minister.

The provisions for power sharing came into effect only after the general elections in May 1999. A coalition of ethnic parties under the leadership of the Fiji Labour Party, the most multi-ethnic party, formed the government. There is evidence that the cabinet was better placed than any previous one to appreciate the concerns of all communities and to reconcile their claims. The government brought together a wide variety of interests and, on delicate and difficult questions like land, the presence in significant numbers of representatives of all major groups ensured the avoidance of narrow ethnic approaches. Unexpectedly, one party, the Labour Party, won enough votes to form a government of its own in a normal parlia-

mentary system, adversely affecting the balance of power conducive to power sharing. The largest party of indigenous Fijians, Soqosoqo ni Vakavulewa ni Taukei (SVT), was not in the government – for a variety of confusing reasons. The absence of the largest party of indigenous Fijians was unfortunate, given the aims of the Constitution, as it is also the party of the previous government, associated with the coup. Its entry into the cabinet could have helped to consolidate the improvement in ethnic relations, while in opposition it saw its role as to challenge the government constantly, often on ethnic points, and indeed to destabilize it, as its leaders successfully did when they joined the forces for the coup in May 2000.

Bosnia and Herzegovina

The Constitution of Bosnia and Herzegovina (Annex 4, Dayton Peace Agreement) provides for extensive power sharing. The Presidency, in which executive power is vested, consists of three people, elected directly by each of the three main ethnic communities, or constituent peoples. Decisions are by consensus, giving each community a veto. Similar provisions apply for appointments to other public bodies, including the Constitutional Court³⁷ and the Board of the Central Bank.

The chair of each legislative chamber rotates among the representatives of the three constituent peoples. Voting rules ensure that each of the three main ethnic communities is involved in all decisions. Any of the three sets of constituent peoples can declare that a proposed decision affects vital national interests, triggering special procedures for mediation and reconciliation of differences. If that fails, the matter is referred to the Constitutional Court.

Commenting on the centrality of ethnicity to these arrangements, Pajic observes that preoccupation:

*'with the rights of ethnic groups reflects the transition from communist to nationalist collectivism, where the nepotism of the "one and only" ruling party is replaced by the despotism of presupposed groups' ethnic interests.*³⁸

Both parliaments and Entity governments are required to have a proportional ethnic balance, and distribution of key political functions is along ethnic lines. Ironically, in this preoccupation, the rights of national minorities are seriously downgraded or ignored (as for example, in the restriction of the office of the Presidency, or legislative or executive vetoes to Bosniacs, Croats and Serbs). Rights of individual citizens, as citizens rather than as members of a particular ethnic group, are also limited.

Given this complex process of decision-making, it is not surprising that numerous deadlocks have occurred.

The state level government is seriously handicapped in its capacity to make or execute policy. The Constitution provides for a key role for foreigners. Three judges of the Constitutional Court are foreigners, selected by the President of the European Court of Human Rights; and eight out of 14 members of the Human Rights Chambers are also foreigners. The first Governor of the Central Bank also had to be a foreigner, appointed by the International Monetary Fund.

The highest executive power and key policy powers are vested in the Office of the High Representative, appointed in accordance to UN Security Council's resolutions; his mandate covers monitoring the implementation of the Dayton Peace Agreement and in particular the civilian aspects (Annex 10). Due to differences within the collective Presidency and the unwillingness of each of them to take decisions that might be resented by his or her community, many matters end up on the desk of the High Representative.

Discussion

Most of these case studies suggest various difficulties about power sharing. The majority group may be reluctant to share power if it considers that it can or should form government on its own. At best it is prepared to accept other groups in a subordinate position, and members of these groups may come to be looked upon as stooges of the majority community. Decision-making can be hard, especially if each ethnic group is vested with vetoes. The accountability of the executive suffers as most important groups are in government. Cyprus, Fiji and Northern Ireland show that either the conflict is introduced into the government itself or that those outside it are frequently able to mobilize ethnic unrest. Power sharing is difficult when there are only two major communities, or where there are no traditions of democracy or tolerance. The typical form of power sharing, consociationalism, suffers from particular difficulties: it assumes that groups are driven by primordial sentiments and have an unchanging identity, that communal interests prevail over economic and professional interests, and that within each group there is political consensus on policies and ethnic relations. It tends to rely too much on cooperation among elite groups, and thus to be unstable. On the other hand, there is considerable evidence that a government based on power sharing principles is able to handle ethnic conflicts better than a more exclusive government.

Power sharing has also played a useful role in transition to democracy in ethnically divided or war-torn societies.

Autonomy

Autonomy is a device to allow minorities claiming a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers which cover common interests.

There are two basic types of autonomy: territorial or group. Territorial autonomy can take the form of federation (such as Bosnia and Herzegovina, Canada, India, Nigeria, Switzerland) or autonomy for one or two regions only (as in Åland, Chittagong Hill Tracts, Greenland, Kashmir, Mindanao, New Caledonia, Scotland, South Tyrol). Territorial autonomy for a minority is possible when the minority is concentrated in one region of the country and constitutes a majority within that region. A particular advantage of territorial autonomy, being based on the spatial principle, is that it enables ethnic problems to be solved without 'entrenching' ethnicity. However, some forms of autonomy may indeed entrench ethnicity, as with reservations or tribal areas, or the communist 'republics', under the dominance of titular minorities, as in the former Soviet Union and Yugoslavia, where the cultural and political hegemony of the group may serve to sharpen boundaries against outsiders.

When a minority is not geographically concentrated, it is possible to grant group autonomy to it over specified matters such as culture, language, religion and personal law (Muslims in India; linguistic groups in Belgium; national minorities in Estonia, Latvia, and Hungary; Arabs in Israel). Members of the group, or, where self-identification is permitted, registered members of the group, wherever they may be living in the state, are bound by regulations made by, normally, a council of the group in respect of matters delegated to it. Both territorial and group autonomies give the minority or the territorial community the right to legislate on and administer certain matters, usually to the exclusion of the national authorities. Group autonomy normally encompasses limited, specific matters, unlike territorial autonomy where transferred powers may be extensive. The territory or the group may also have the power to raise revenue through taxation or other measures binding its members, and will frequently also receive financial transfers from the central authorities. Regional institutions are established for the exercise of territorial autonomy, covering legislative and executive functions, and sometimes also judicial and public service functions. In this way the minority and other residents are able to exercise a wide range of participatory rights in the region. Group autonomy may be exercised through a representative council, and through it and other mechanisms, its members will be able to participate in affairs which are vested in the community. Sometimes, as

most extensively in Belgium, it may be possible to combine territorial and group autonomies.

Territorial autonomy

Autonomy enables fair representation of minorities in the regional legislature and the executive. Autonomy arrangements would probably also provide for the minority's language to be the official regional language. Primary and sometimes secondary education is also likely to be the responsibility of the regional government, facilitating the preservation and development of minority culture. Most autonomy arrangements provide financial and administrative resources for the local government to carry out its functions – crucial to effective participation. Autonomy arrangements, especially in the federal form, provide for regional representation at the centre, and thus institutionalizes regional influence at the centre. This, rather than significant provincial powers, is in essence the South African strategy, for through the second chamber, provinces are represented at the centre and determine national policy. Sometimes representation at the centre is not considered important, especially if the region is small and its primary concerns are local (as in Åland or Puerto Rico, or for the Sami in Scandinavian countries).

Autonomy can comprise a wide variety of arrangements regarding structure and powers. The flexibility of the federal device in terms of the division of powers and the structure of institutions enables various kinds of accommodations to be made, as it is more hospitable to compromises than other kinds of minority protection. It can also allow for a gradually increasing transfer of powers. It ensures better prospects for preserving minorities' culture (language, religion, etc.) and resisting state homogenizing policies and practices. It is a device to control local physical and natural resources, although the problem of natural and other resources is not easily resolved. However, state control over national revenue enables other regions to be compensated in other ways to maintain a measure of equity necessary for national unity.

Autonomy has the potential to accommodate the demands of linguistic or cultural minorities. The first important example of the use of federalism to give a minority significant participation rights was the division of Canada into two provinces of the largely anglophone Ontario and the francophone Quebec in 1867.³⁹ Several provinces have been established under the Indian Federation to provide autonomy for linguistic minorities, particularly in the north-east. In Nigeria the federal device, as reorganized after the Biafran war, helped to provide security and participation to its minorities, and maintained the unity of the state. A striking example of the successful use of a federal type autonomy is Spain after Franco's death in the 1978 Constitution.⁴⁰ Various

cultural and linguistic minorities or nations, prominently the Catalans and the Basques, resisting the centralization of the state in the nineteenth century, had been seeking separation by the use of violence.

The outstanding example of the successful use of regional autonomy is Åland, where a predominantly Swedish-speaking population under Finnish sovereignty has enjoyed a large measure of cultural and political autonomy since 1921. Åland was administered by Sweden as part of its dependency of Finland; when Russia obtained Finland as the price for its military victory in the nineteenth century, Åland went with it. On the granting of independence to Finland in 1917, Ålanders demanded re-unification with Sweden. The League of Nations, asked to deal with the matter, recommended that Åland should remain with Finland but should enjoy a high degree of autonomy, under international guarantee, designed to protect Ålanders' political, linguistic and property rights. Åland has its own legislative and executive bodies, which hold a wide array of powers of self-government. Ålanders also have representation in the national Parliament, and the Åland legislature is able to introduce bills in the national Parliament on subjects which fall under the authority of the national government. The national government can, and has, delegated executive authority over some national matters to Åland. There is strong institutional protection for the autonomy, provisions for which cannot be altered without the consent of both the national and Åland legislatures. Over time, Åland has come to value its links with Finland.⁴¹ Åland's experience has served as a model of regional autonomy, and has been followed in Greenland and the Faroes, which are under Danish sovereignty. Other examples of regional autonomy include the Italian South Tyrol, for the protection of its substantial German-speaking minority, the Atlantic Coast of Nicaragua for the protection of its indigenous peoples, and Chittagong Hill Tracts in Bangladesh. In the UK participation rights of the Scottish and the Welsh have been considerably strengthened by devolution of power; it is too early to make an assessment, as it is of the Muslims' autonomy in the Philippines' province of Mindanao, where it has certainly abated ethnic violence.

Discussion

The record of the success of autonomy to resolve or manage ethnic conflicts is mixed. There are many instances when its use has defused tensions, reorganized the state and provided the basis for the existence of ethnic groups. There are also numerous occasions when autonomy has been unacceptable either to the central government or the ethnic group. There are many examples of the abrupt withdrawal of autonomy because the central government rejects pluralism or considers that its continued operation

is a threat to state integrity through secession (as in Southern Sudan and Kosovo/a). In recent years some federations have dissolved into a multiplicity of states: Bangladesh has seceded from Pakistan, Czechoslovakia has broken up, the Soviet Union and Yugoslavia have collapsed. But such break-ups are not the result of autonomy, but of the denial of meaningful autonomy. Many federations or autonomous systems have suffered acute tensions or crises (Canada, Nigeria, Pakistan), but it is probable that without federation, they would be worse off. Agreement on autonomy is, moreover, exceedingly hard to negotiate. It has proved impossible to muster enough political support for significant autonomy in Sri Lanka despite years of negotiations and waves of violence.

An important objection to territorially based solutions is that a complete identity of ethnicity and territory is impossible without an infinite fragmentation of the state. Ethnically based autonomy will create new minorities; the position of these minorities may be worse than in a non-ethnic state, since they may be subjected to discrimination or have to acknowledge the symbols and cultures of the regional majority. The partition of Ireland in 1921 produced minorities on both sides of the border; the substantial Catholic minority in Northern Ireland was then subjected to institutionalized discrimination. The demand for new provinces in India has come from minorities in linguistically based provinces, where there was considerable discrimination against them. However, it is possible to make arrangements which would protect the interests of 'minorities within minorities', through power sharing, cultural autonomy and devolution to local authorities where these minorities constitute a significant number (in Sri Lanka, where this has been a major obstacle to autonomy, these devices are included in the draft Constitution). It is argued that if autonomy can be justified on ethnic grounds, the rules justifying the grant of autonomy (identity, a sense of discrimination/injustice) may encourage the mobilization of other minorities to manufacture 'ethnic communities'. There is also the fear that autonomy may lead in time to secession, although there is little evidence of it.

Group or cultural autonomy

Many of these objections do not apply to group autonomy. There are different forms and uses of cultural autonomy. Rights or entitlements protected under such autonomy can be personal, cultural or political. They can be entrenched or subject to the overriding authority of the government. They normally consist of positive and substantive rights and entitlements, but they can be negative, such as a veto. They form the basis of the communal organization of politics and policies, and of the collective protection of their rights. At one end is corporate auto-

my or, more accurately, corporate identity, as the basis of wide-ranging rights, as exemplified by the independence Constitution of Cyprus (1970). Contemporary examples include the Constitution of Bosnia and Herzegovina, which combines more traditional federalism with corporate shares in power and communal vetoes.

These forms of autonomy were significant features of old and modern empires. Modern examples include provisions in the Constitutions or laws of Estonia, Hungary, the Russian Federation and Slovenia. These countries provide for the establishment of councils for national minorities which assume responsibility for the education and cultural affairs of the minorities.⁴² In principle a council can be set up if a majority of the community desire it, as expressed in votes. Once established, its decisions bind members of the community throughout the state, except that a member can opt in or out of membership – the important principle of self-identification is maintained. Within the areas in which powers are vested in it, the council's regulations prevail over those of the state. The council has the power to levy a tax on its members; and also receive subsidies from the state. It has authority over language, education and culture of the minority. The principal objective of the system is the maintenance or strengthening of the identity of the minority, based on language and culture. The aim is to take culture out of 'politics', and leave other matters to the national political process, in which minorities may or may not have a special status through representation. It is too early to evaluate the experience as the few councils established so far, often under external pressure, have existed only for a short period. However, it would seem that the distinction between culture and politics may be too simplistic, especially today when the survival of culture is closely connected to the availability of resources and to national policy in several areas.

Another use of group autonomy is the application to the members of a community of its personal or religious laws (covering marriage and family, and occasionally land, particularly for tribal communities).⁴³ The application of personal laws, and thus the preservation of customary law or practices, is considered important for maintaining the identity of the community. When India tried, during the drafting of its Constitution, to mandate a common civil code for all of the country, some Muslim leaders objected. The supporters of a common code argued that common laws were essential for national unity. The opponents argued that it amounted to the oppression of minorities and the loss of their communal identity. The result was that the Constitution merely set a common code as an objective of state policy, and it is now a well established convention that the *sharia* will continue to apply to Muslims so long as they desire it.

The scope of the application of personal laws, quite extensive during the colonial period in Africa and Asia, is now diminishing under the pressure of modernization (although it is being reinforced in some countries committed to a more fundamentalist view of religion). However, one place where regimes of personal laws still apply with full vigour is Israel, where all of the major religions have their own laws on personal matters.⁴⁴ For the Jews, most matters of personal law fall exclusively within the Rabbinical courts, while Muslims are subject to the jurisdiction of *Sharia* courts applying the *Sharia*. Although linked to and supported by the state, these courts are administered independently of the state. For the Muslims, the presence of *Sharia* courts has reinforced their sense of community and the values they want to live by, and helped in the social reproduction of the community (an important factor for a minority, and one whose substantial numbers live under foreign occupation). For the Jews, however, the Rabbinical courts have been deeply divisive, symbolizing the fundamental schism between the Orthodox and secular Jews. In both instances the courts give the clergy, committed to the preservation of orthodoxy, a specially privileged position. The law is slow to change in these circumstances. Personal regimes of laws have also sharpened the distinction among Israel's communities, and formed a barrier to social relations among them. Such laws would prove an obstacle if state policy were to change in favour of greater integration of communities.

One of the major problems with cultural/religious/legal autonomy of this kind is that it puts certain sections of the relevant community at a disadvantage. Edelman shows how both Jewish and Muslim women come off worse in their respective autonomous courts. In India, Muslim women are unable to benefit from the more liberal legal regime that applies to other Indian women after the reforms of the 1960s. One aspect of their disadvantage was illustrated in the famous *Shah Banu* case ([1985] 2 Sup. Ct Case 556). In this case, although the Supreme Court held that the maintenance a Muslim divorced woman could claim from her former husband was that under the general national law, which provided a higher amount than she would get under the *Sharia*, the government gave way to pressure from the Muslim clergy and other sections of the Muslim community and legislatively over-ruled the decision.⁴⁵ In Canada the application of the customary law of Indian bands has also disadvantaged women (the UN Human Rights Committee has held invalid the law which deprived an Indian woman of her land and other community rights if she married an outsider; men who marry outside the community do not incur a similar liability). In South Africa claims of traditional leaders for the continuation of customary laws were resisted by African women because of the discriminations against them, such as in relation to custody and inheritance. The South African solution was to provide for the application of customary law but subject to the Bill of Rights. The Canadian government is negotiating a similar solution for the band laws.

Conclusions

Participation in public affairs by minorities is central to their sense of identity. It is crucial to their feeling a part of the state and the wider community. It is essential to the protection of their interests. It helps to inform decision-makers of the concerns of minorities, and leads to better decision-making and implementation.

There is less agreement on how participation by minorities should be facilitated and structured. One point of view is that separate provisions should be established for minority participation, as in legislative representation and executive power, and that there should be as much self-government by minorities as possible. The other view is that the modalities of participation should be designed to encourage the political integration of minorities. Even if it were agreed that one or the other was the preferred approach, it might still be hard to generalize on the usefulness of particular modalities. The choice between these options may depend, in many situations, less on their inherent merits than on circumstances and constraints. The objective circumstances as well as the aspirations of minorities vary from place to place, and from time to time. For example, the size of the minority is a material factor: a substantial and economically well-off minority might not require special rules for legislative representation, but a small minority might. Moreover, in the former case, special rules might be resented or mistrusted by the majority, but not necessarily in the latter case.

This report has attempted to set out a menu of approaches and modalities. The choice of approach and modalities would depend on the ultimate goals that the state and minorities have set themselves. The problem arises when there is no consensus either between the majority and the minority, or within each group. A section of a minority may want to preserve its social structure and culture at all costs; another may wish to escape the constraints or even the oppression of the community and seek their identity in a cosmopolitan culture. The choice would also depend on the balance between individual and communal rights. Furthermore, particular solutions may not be valid for all times; they may need to be reviewed as the socio-economic and demographic situations change.

It is, however, worthwhile to caution against reifying temporary or fluid identities, which are so much a mark of contemporary times. Separate representation and institutions tend to lead to ethnic manipulation or extremism. Many recommendations which have been made in recent years are untried and, even though different ways of furthering minorities' participation have been tried, it is too early to assess their success. Many of them are concerned excessively with conflict management, and perhaps have been insufficiently focused on long-term objectives.

Recommendations

1. All states and regional intergovernmental organizations should provide for and facilitate the effective participation rights of minorities and indigenous peoples in keeping with international norms. Additionally, regional systems for the protection of minorities and indigenous peoples should be established where they do not currently exist. Such regional systems should respond to local realities and facilitate the settlement of disputes that might lead to the oppression of minorities or ethnic conflict.
2. Because citizenship is generally the key to participation rights, those states that have restrictive laws on the acquisition of citizenship should review their laws to enable people who move from one state to another for settlement purposes to acquire citizenship. States that prohibit dual nationality should repeal this restriction, since many people today identify with more than one country.
3. States should guarantee to immigrants key participation rights at the national and local levels after, at most, five years of residence.
4. States should devise electoral laws to encourage political parties to broaden their appeal to members of minorities and indigenous peoples, and require or encourage political parties to nominate a minimum specified proportion of candidates from minorities and indigenous peoples. States that have elections by proportional representation should abolish the threshold for representation as regards parties of minorities and indigenous peoples.
5. States should set up systems of government and administration that allow minorities and indigenous peoples to participate in decision-making and implementation. Legislative procedures should allow representatives of minorities and indigenous peoples, and minority-representative institutions, a special role – such as initiation, prior consultation and special voting rights – regarding any bill with a major bearing on minority rights.
6. States engaged in post-conflict transition should adopt systems of power sharing, at least for a limited period, and such power sharing should be based wherever possible on parties rather than on ethnicity.
7. Where a minority or indigenous people is geographically concentrated, states should establish territorial autonomy to provide for self-government. Group or cultural autonomy should be provided when the minority or indigenous people desires it. Group autonomy should be based on self-identification, allowing individual members of minorities and indigenous peoples to opt out of that autonomy. Within territorial or group autonomy arrangements, there should be provisions to protect the rights and legitimate interests of women and of groups that become minorities as a result of the autonomy.
8. States should support and encourage organizations that promote minority and indigenous cultures and languages and should promote cultural exchanges, understandings and reconciliation between different communities.
9. States should set up institutions, such as minorities ombudspersons, to ensure fair treatment of minorities and indigenous peoples, and the promotion of minority and indigenous participation in public and economic life.

Relevant international instruments

International Covenant on Civil and Political Rights (1966)

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.
- (c) To have access, on general terms of equality, to public service in his country.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (Adopted by the UN General Assembly; Resolution 47/135 of 18 December 1992)

Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

[...]

2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens and other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 4

[...]

5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990

Article 35

The participating States will respect the right of persons belonging to national minorities to effective participation in

public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.

The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

Framework Convention for the Protection of National Minorities (1995)

Article 15

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

Article 16

The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present Framework Convention.

International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169 (1989)

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 6

1. In applying the provisions of this Convention, governments shall:
 - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the

lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in

appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Notes

- 1 Throughout this text, the term 'minority' is used broadly to include indigenous peoples where applicable. However, the author and MRG recognize that some indigenous peoples reject the designation 'minority'.
- 2 For a useful summary see Sisk, T.D., *Power Sharing and International Mediation in Ethnic Conflicts*, Washington, DC, US Institute of Peace, 1996.
- 3 See Horowitz, D., 'Encouraging electoral accommodation in divided societies', in B. Lal and P. Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review*, Canberra, Research School of Pacific and Asian Studies, ANU, 1997.
- 4 See Turpel, M.E., 'Rights of political participation and self-determination in Canada', in H. Reynolds and R. Nile (eds), *Indigenous Rights in the Pacific and North America: Race and Nation in the Late Twentieth Century*, London, University of London and Sir Robert Menzies Centre for Australian Studies, 1992, pp. 104–5.
- 5 *Ibid.*, p. 106.
- 6 See Bloed, A., 'The OSCE and the issue of national minorities', in A. Phillips and A. Rosas (eds), *Universal Minority Rights*, Åbo, Åbo Akademi University Press, 1995; OSCE High Commissioner, *Lund Recommendations on the Effective Participation of National Minorities in Public Life*, 1999; Packer, J., 'Autonomy within the OSCE: the case of Crimea', in M. Suksi (ed.), *Autonomy: Applications and Implications*, The Hague, Kluwer Law International, 1998; Ratner, R.S., 'Does international law matter in preventing ethnic conflict?', 32:3 *New York University Journal of International Law and Politics*, 2000, pp. 591–698; Thornberry, P., 'Images of autonomy and individual and collective rights in international instruments on the rights of minorities', in Suksi (ed.), *op. cit.*
- 7 Nettheim, G., 'International law and indigenous political rights', in Reynolds and Nile (eds), *op. cit.*, p. 25.
- 8 For what has been called 'treaty federalism', see Henderson, J.Y., 'Empowering treaty federalism', *Saskatchewan Law Review* 58, 1986, pp. 241–329.
- 9 See Lawrence, S. and Macklen, P., 'From consultation to reconciliation: Aboriginal rights and the Crown's duty to consult', 79 *The Canadian Bar Review*, 2000, pp. 252–91.
- 10 See Franck, T.M., 'Postmodern tribalism and the right to secession', in C. Broleman, R. Lefeber and M. Zieck (eds), *Peoples and Minorities in International Law*, Dordrecht, Martinus Nijhoff, 1993; and Rosas, A., 'Internal self-government', in C. Tomuschat (ed.), *Modern Law of Self-determination*, Dordrecht, Martinus Nijhoff, 1993.
- 11 See Agnew, J., 'Postscript: federalism in the post-Cold War era', in G. Smith (ed.), *Federalism: The Multiethnic Challenge*, London, Longman, 1995; Lynn, N.A. and Novikov, A.V., 'Refederalizing Russia: debates on the idea of federalism in Russia', *Publius*, vol. 27, no. 2, 1997, pp. 187–203; and Smith, G., 'Russia, ethnoregionalism and the politics of federation', *Ethnic and Racial Studies*, vol. 19, no. 2, 1996, pp. 391–410.
- 12 See Ghai, Y., 'Chinese minorities: autonomy with Chinese characteristics', in Y. Ghai (ed.), *Autonomy and Ethnicity: Negotiating Claims in Multi-Ethnic States*, Cambridge, Cambridge University Press, 2000; and Paul, J., 'Ethnicity and the new constitutional orders of Ethiopia and Eritrea', in *ibid.*
- 13 See generally Cholewinski, R., *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford, Clarendon Press, 1997.
- 14 Capotorti, F., *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN doc. E/CN.4/SUB.2/1985/31; Deschesnes, J., UN doc. E/CN.4/SUB.2/1985/31.
- 15 For references and a fuller discussion see Thornberry, P., 'The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities: background, analysis, observations, and an update', in Phillips and Rosas (eds), *op. cit.*, pp. 29–36.
- 16 Orentlicher, D.F., 'Citizenship and national identity', in D. Wippman (ed.), *International Law and Ethnic Conflict*, Ithaca, NY, Cornell University Press.
- 17 The 1997 Fiji Constitution was abrogated by the army following the coup in May 2000. The High Court said this abrogation was illegal and the Constitution is still in force. The army's appeal against this decision has not yet been heard as this Report goes to press.
- 18 Kymlicka, W., *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, Clarendon Press, 1995, p. 132.
- 19 See also Horowitz, D., *A Democratic South Africa? Constitutional Engineering in a Divided Society*, Berkeley, University of California Press, pp. 184–6.
- 20 See Turpel, *op. cit.*, pp. 107–8, on which this account is based.
- 21 See de Silva, K.M., 'Electoral systems', in C. Young (ed.), *Ethnic Diversity and Public Policy: A Comparative Policy*, London, Macmillan, 1998; and Reilly, B. and Reynolds, A., *Electoral Systems and Conflict in Divided Societies*, Washington, DC, National Academy Press, 1999.
- 22 Saggar, S., *Race and British Electoral Politics*, London and Bristol, PA, UCL Press, 1998.
- 23 Thio Li-am, 'The elected president and the legal control of government', in K. Tan and Lam Peng Er (eds), *Managing Political Change in Singapore*, London, Routledge, pp. 107–8.
- 24 Austin, G., *The Indian Constitution: Cornerstone of a Nation*, Bombay, Oxford University Press, 1972, p. 144.
- 25 Galanter, M., *Competing Equalities*, Delhi, Oxford University Press, p. 45, n. 15. The following account draws heavily on Galanter.
- 26 *Nain Sukh Das v. State of UP*, AIR 1953 SC 384.
- 27 Galanter, *op. cit.*, p. 48.
- 28 Mendelsohn, O. and Vicziany, M., 'The untouchables', in O. Mendelsohn and U. Baxi (eds), *The Rights of Subordinated Peoples*, Delhi, Oxford University Press, 1994.
- 29 The term 'Others', which according to many Bosnian citizens is highly demeaning, is used in the Constitution to refer to all citizens who do not identify themselves as belonging to one of the three constituent groups; this includes members of national minorities, people of mixed ethnicity, and all those who wish to identify themselves simply as 'Bosnian citizens'.
- 30 Pajic, Z., 'A critical appraisal of the Dayton Accord Constitution of Bosnia and Herzegovina', in W. Bendek (ed.), *Human Rights in Bosnia and Herzegovina after Dayton: From Theory to Practice*, The Hague, Kluwer Law International, 1996.
- 31 Moderate parties won the 1998 elections. The last general elections were held in October 2002. Nationalist parties won; voter turnout was only 55 per cent.

- 32 Fiji Constitution Review Commission (the Reeves Commission) 9.150–152 and 10.31–10.109; see also Horowitz, *op. cit.*, 1997.
- 33 Fraenkel, J., 'The triumph of the non-idealist intellectuals? An investigation of Fiji's 1999 election results', unpublished, 2000.
- 34 Prasad, S., 'Fiji 1999 general elections: outcome and prospects', in A. Hoon Akram-Lodhi (ed.), *Confronting Fiji Futures*, Canberra, Asia Pacific Press, 2000.
- 35 De Smith, S., *The New Commonwealth and Its Constitutions*, London, Stevens, 1964, p. 118.
- 36 But see Sisk, *op. cit.*
- 37 The Constitutional Court of Bosnia and Herzegovina is made up of 9 judges: 2 Bosnia, 2 Croat, 2 Serb and 3 foreign.
- 38 Pajic, *op. cit.*, p. 39.
- 39 Watts, R.L., 'Federalism and diversity in Canada', in Ghai (ed.), *op. cit.*
- 40 Conversi, D., 'Autonomous communities and the ethnic settlement in Spain', in Ghai (ed.), *op. cit.*
- 41 Hannikainen, L., 'The international legal basis of the autonomy and Swedish character of the Åland Islands', in L. Hannikainen and F. Horn, *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe*, The Hague, Kluwer, 1997.
- 42 Eide, A., 'Cultural autonomy: concept and contents', in Suksi (ed.), *op. cit.*, pp. 256–9.
- 43 Ghai, Y., 'Decentralisation and the accommodation of ethnic diversity', in C. Young (ed.), *op. cit.*, pp. 52–9; for a historical account of its use in Europe, see Eide, *op. cit.*
- 44 See Edelman, M., *Courts, Politics and Culture in Israel*, Charlottesville, University of Virginia Press, 1994, on which the following account is principally based.
- 45 Kazi, S., *Muslim Women in India*, London, MRG, 1999.

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Public Participation and Minorities

Public participation is a key issue in the context of minority and indigenous peoples' rights. Minorities and indigenous peoples recognize that, as well as their right to a distinctive group identity, they are entitled to participation in the political, cultural, social and economic life of the countries where they live. Members of majority communities concerned about long-term equity, stability and peace in their societies accept this equally. The lack of such participation can have major repercussions – economic costs, violent conflict and ruined lives.

This report by Professor Yash Ghai, a leading constitutional lawyer, clearly describes the range of devices that can be used to provide for participation – representation, power sharing, autonomy and self-determination – and discusses the experiences of constitutional and political provision for minorities and indigenous peoples. The author supplements this discussion with a wealth of

examples: Bosnia and Herzegovina, Cyprus, Fiji, India, Northern Ireland and South Africa, amongst others.

While there is agreement that participation in public affairs is central to minorities' sense of identity, to their feeling a part of the wider community and to protect their interests, there is less agreement on how such participation should be facilitated and structured. The debate between those who favour as much self-government by minorities as possible and those supporting measures designed to encourage the political integration of minorities is likely to continue. This report recommends avoiding generalizations and instead argues that choices should be made in relation to case-specific circumstances and constraints. With this in mind, the report sets out a menu of possible approaches and modalities in the hope of furthering the cause of intercommunity cooperation throughout the world.