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MINORITY RIGHTS IN CULTURALLY DIVERSE SOCIETIES

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Executive Summary

Countries that are seeking to establish constitutional democracy after a history of dictatorial or oppressive government confront large challenges in creating stable structures of government and protecting the rights of their citizens. Many countries have the added challenge of considering how their culturally diverse character—which may be linguistic, religious, tribal, ethnic, or even “national” (if the more than one group within the country calls itself a nation)—should be reflected in their constitution and governmental arrangements. Minority groups may seek special arrangements to protect their basic human rights as well as constitutional provisions providing specific rights to protect their cultural identities, to ensure their symbolic recognition, to protect them against economic marginalization, and to ensure their effective role in government. How to pursue these objectives while also creating a common citizenship, social harmony and effective government is a central challenge in framing a constitution.

This Working Paper discusses the nature of different minorities that may be politically important, and then considers different approaches to dealing with the constitutional recognition of minorities, the protection of their basic human rights and the entrenchment of specific minority rights, as well as the participation of minorities in government.

Further reading

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Dersso, Solomon and Francesco Palermo: “Minority Rights”, in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (New York: Routledge, 2013).

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1. Introduction: Identities and politics

The individuals who live in a country have many different identities. In addition to seeing themselves as citizens of their country, region, and city, they may also value their membership in national, religious, ethnic, linguistic, and/or tribal communities. While a few countries are culturally homogenous, most are culturally diverse, with majority and minority communities of different kinds.

The pattern of cultural diversity in some countries is very complex with different kinds of cultural diversity overlapping or cross-cutting. For example, linguistic and religious divisions may reinforce each other, or conversely, language can unite religiously different groups. Individuals who are part of a “minority” on one dimension of identity (e.g. religion) may be part of the “majority” on another (e.g. language). Patterns of cultural diversity can also vary across a country’s territory. Certain minorities may be territorially concentrated so that while they may be a minority nationally, they may be a majority in their “home” territory.

Cultural diversity may serve as the basis for political division, or it may not. Many factors influence whether and how a group with a strong sense of identity mobilizes politically—these include the extent to which it is discriminated against, how much the minority is itself politically united, the institutional arrangements (such as electoral laws) that might provide an opportunity for political expression, and the strategies of leadership within the community. Minorities sometimes ally themselves with a particular political party in which they are influential but not the majority. Thus the political expression of cultural diversity takes many forms.

At one end of the spectrum a minority can be so discontented that it mobilizes in large numbers for separation—it might even reach the point of insurgency—while at the other end of the spectrum the minority may feel well-treated and secure, so it makes no demands for group rights and does not politically mobilize on the basis of group identity. This paper concentrates largely on cases that fall in between—

where minorities may seek constitutional rights provisions to protect their interests.

The issue of minority rights in any country will depend on the nature of its minorities and the character of their demands. These demands may be narrowly cultural or religious. But even minorities that claim cultural rights are often also strongly concerned with economic issues because they may be the victims of economic discrimination. Economic discrimination, in turn, may result from a lack of political power resulting from inadequate representation in government, and/or official language policies that place them at a disadvantage when participating in political life.

Politically, the size of a minority can affect the dynamics of inter-group relations and the preparedness of a majority to accommodate minority demands. A small minority may be viewed as unthreatening so that some accommodation may not concern the majority—but on the other hand, a small minority may not have the political weight and leverage to secure significant institutional changes. A large minority may have the capacity to raise more fundamental questions about power-sharing and even the continued viability of the state, which may or may not receive a positive response from the majority precisely because of the magnitude of what may be sought.

Majorities may seek to accommodate minorities so as to promote political harmony or what they see as social justice. But on occasion, they may object to certain rights demands as unreasonable or contrary to the political values they favor (e.g. resisting religious schools because of a belief in secular education). There are also majorities that are clearly hostile to certain minorities and may even openly persecute them and refuse to extend even some basic rights to these minorities. Finally, a minority’s political agenda may conflict with how a majority views its legitimate claims.

2. Varieties of minorities

Different types of minorities may pursue different kinds of objectives in terms of constitutional provisions or other governmental arrangements or laws. It is

important to recognize, however, that the political context will play an important role in determining both the opportunities to advance these objectives, and the specific kinds of objectives sought.

2.1 NATIONAL MINORITIES

"National" minorities are historical communities with a sense of being a "people", which usually have their own language and often a territory within a larger country, where the majority has a different "national" character. In some cases, their historic territory may have been brought into the country through invasion and conquest, transfer between colonial powers, or dynastic marriage. It may have occurred voluntarily as when different cultures agree to form a new country. National minorities are usually territorially concentrated and have a distinct language (though it may have died out), and have some distinct social institutions. Examples of robust national minorities include the Québécois in Canada, the Catalans in Spain and the Scots (who no longer speak a distinct language) in Britain. Such minorities often seek substantial political autonomy within their country or even a right to secede and form a separate country (or join their fellow nationals in an adjacent country).

2.2 LINGUISTIC MINORITIES

There are 5000 to 10000 languages in our world of only 200 countries. Thus there are many minority languages. In some countries there is no clear majority language. The size of language communities varies greatly as does the strength and use of their language. Many small language groups speak their tongue essentially privately amongst themselves while they communicate with others in a major language. The number and sizes of different language groups in a country, the spatial distribution of language groups, the possible existence of a common language spoken by the whole population (whatever their first language), past history and social differences between linguistic groups, and urbanization and modernization all affect the social and political dynamics around language. Some linguistic minorities define themselves as "national" minorities. The languages of indigenous populations within a country may have

greater political claims than the languages of immigrants.

2.3 ETHNIC AND TRIBAL MINORITIES

Many countries have ethnic, tribal, clan or even caste minorities that see themselves as distinct, and perhaps discriminated against, but they also see themselves as members of a larger "national" community that extends across the entire country. Such minorities may be territorially concentrated, and have their own language, follow a different religion or cultural practices from the majority. Or these minorities may be mixed in with other groups and have few distinct cultural traits. Some tribal or other minorities may be nomadic, which puts them in contact with different groups at different times of the year, which may bring conflicts over land rights between the settled and nomadic populations.

2.4 INDIGENOUS MINORITIES

In the "settler" countries of the Western Hemisphere and Australasia, indigenous peoples are usually seen as distinctive groups descended from the original pre-contact population: they have been subject to colonization or external control and dispossessed of traditional lands. These populations may be concentrated in relatively small communities, which may have a dedicated land base, while in other cases, their identity may blur with that of the larger society because of urbanization and inter-marriage; such factors can affect the nature of their demands.

In states without a colonial history and non-settler states in Africa and Asia, indigenous peoples are often defined as tribal peoples, associated with a non-modern way of life, who may have a long history of occupying a particular area. Alternatively, they may simply be viewed as the most long-established population. The vast majority of Nigerians are considered to be "indigenous" to a state, where they form the majority. However, with each state there are "settler" populations (who may have lived there for generations, but are considered indigenous to some other state) and these people can be seriously

disadvantaged politically and economically relative to the indigenous majority in the state where they live.

2.5 RELIGIOUS MINORITIES

Many aspects of religious belief and practice can be pursued privately and without controversy, but religion can become contentious where the beliefs and practices of a religious group conflict with those of the majority, especially when the state has adopted rules that interfere with religious practices. Some states accommodate minority religious practices, but others may impose limitations, whether in the name of the majority religion or of “secular” policies. Key areas where religion can be controversial include education, family law, proselytization, and public dress.

2.6 “MINORITIZED” MAJORITIES

“Minority” politics are often associated with groups that have grievances regarding their present or past treatment by a dominant majority. However, there are also cases in which a national majority has a strong sense of grievance and separate identity because of past treatment by a once dominant minority. Even though such a majority is not vulnerable to being outvoted on political decisions as a minority would be, it may still be strongly motivated to seek redress through politics and group rights. For example, the Flemish-speaking majority in Belgium, the Malays in Malaysia, and the black majority in South Africa are “minoritized majorities” in that they invoke group rights to justify policies privileging their group just as a minority group would.

2.7 PATTERNS OF DIVERSITY

Every country has its own pattern of diversity and these will change over time. In some cases, the society is dominated by a single cleavage that sets a clear majority off against a clear minority, but often the situation is much more fluid, with a variety of majorities and minorities of different kinds and with cleavages of different degrees of political salience. Both majorities and minorities can display very different degrees of group unity, which also affects

how they frame their claims. Minorities are more likely to mobilize politically when they feel that they are the victims of cultural, economic and/or political discrimination. By contrast, minorities with few grievances tend not to be politically united.

3. Challenges of culturally diverse societies

3.1 VARYING OBJECTIVES OF MINORITIES

The political objectives of a minority depend on the nature of the minority, its sense of distinctiveness and of being disadvantaged, its size relative to the larger population, its territorial concentration. These characteristics vary greatly for minorities, which means their political objectives and engagement also vary.

1. “National” groups often have as a first priority territorial autonomy, e.g., a regional government or even independence. If the group is a large minority, it may also seek some kind of parity in decision-making in central government institutions—or at least protections regarding how key issues will be decided or managed by the central government.
2. The objectives of linguistic groups vary according to whether they identify as a “national” minority or not, as well as with their size and territorial concentration. Linguistic minorities often seek to have their language recognized as having “official” status; larger linguistic minorities seek to have their language used as a language of employment in the bureaucracy and of instruction in schools, especially in the linguistic group’s territory. They may also try to limit the public use of other languages. Smaller linguistic groups may seek symbolic recognition of their languages, the use of their languages in receiving public services, the teaching of their languages in schools, and so on.
3. Ethnic and tribal groups may seek a degree of local autonomy, but their objectives are usually less extensive in this regard than those of

national minorities. They may also seek some special representation or protections in central institutions, but again these are all normally less extensive than the objectives national minorities would pursue.

4. Indigenous minorities may seek some measure of autonomy and they are often focused on protecting certain rights to land use that are important for their traditional way of life; alternatively, they may seek special compensation for the loss of traditional lands. They can seek symbolic recognition as the original peoples of a country.
5. The priority of religious minorities is usually to be able to practice their religion without persecution or discrimination; however, some religious groups seek to have their own schools or other social institutions (perhaps funded by the state), to be able to be governed by certain religious laws, notably in the area of family law, and to proselytize. In rare cases, such as the breakup of India, a religious minority may seek independence.

Many of these objectives of minorities can be put forth as a demand for “rights”.

3.2 APPROACHES TO DEALING WITH DIVERSITY

Culturally diverse societies can face challenges that do not arise in more homogenous societies. The cultures of minorities are vulnerable to the political power of the majority culture or cultures; the health, economic well-being or even existence of minority cultures may be threatened by the choices made by a dominant cultural community. Conflict may arise between majority and minority groups where certain groups are marginalized and excluded from political processes and from the benefits of political representation. Often minorities are concerned by the discrimination they feel in everyday life, so they turn to politics to seek rules that would bring redress. However, if a hostile majority controls the levers of political power, such minorities may suffer indifference or even oppression and political exclusion at the hands of the state. These

risks can be particularly acute in a period of post-authoritarian constitutional reconstruction, where a fragile new constitutional democracy must guard against a reversion to authoritarian rule or the emergence of an abusive majority that will threaten democratic stability.

Views differ on how to deal with minorities with distinct identities. One approach seeks to *assimilate* them so that over time they come to share a sense of common cultural and political identity with the majority with little sense of distinctiveness. At the other end of the spectrum is to *accommodate* them, through various forms of recognition, rights protection and empowerment, accepting that they will maintain at least elements of a separate identity. An intermediate approach, *integration*, accepts that minorities remain culturally distinct but structures institutions and rights on a difference-blind basis without reference to identity. All three approaches seek to ensure that minorities participate actively and positively in a country’s political and economic life and institutions as equal citizens.

Experience suggests that some substantial measure of accommodation is more likely to succeed in achieving a relatively integrated and harmonious society. Minorities that feel fairly treated are more likely to share a common sense of citizenship with the majority groups. Attempts to suppress their identity may be counter-productive. Finding the right balance in dealing with minorities can be positive both for the minorities themselves and for the larger society. The instruments for responding to minorities include individual rights, group rights and measures for group self-government or empowerment.

4. Rights of importance to minorities

4.1 OVERVIEW OF INDIVIDUAL, GROUP AND COLLECTIVE RIGHTS

Minority rights (or any individuals or groups) vary considerably in their character. Some may impose negative obligations on the state by checking state power, while others impose positive obligations on the

state by requiring the state to act. Some rights are universal human rights that should be enjoyed in all societies, while others may be group specific, arising from a particular society's history, culture, identity and political traditions. In addition, rights may be held equally by all individuals, only by individuals who are members of a particular national, linguistic or religious group, or by groups collectively through institutions governed by groups themselves.

4.2 INDIVIDUAL RIGHTS

Minority or group interests may be protected through an array of individual rights enjoyed by all persons on a basis of equality and commonly included in constitutional bills of rights. These consist of the classic liberal freedoms (speech, assembly, association, privacy and religion), as well as the rights to bodily integrity and due process, participation in the democratic process and equality (which includes and guarantees against discrimination). These individual rights serve the interests of minorities by protecting their freedoms to develop their respective cultures and by protecting their equal treatment to ensure their ability to participate in the political and social life of the state.

The adoption of constitutional equality rights can be especially important for minorities. For example, section 9(3) of the 1996 Constitution of South Africa provides that:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

South African courts have interpreted the prohibition on discrimination to extend beyond the explicitly enumerated grounds to prohibit discrimination based on citizenship status. This provision has also been employed by religious and cultural minorities to protect their ability to engage in cultural practices.

The equal rights provision in the 14th Amendment of the US Constitution has been fundamental in recent decades to many of the key Supreme Court decisions forcing integration in relation to racial equality.

However, the same provision for many years was deemed consistent with a "separate but equal" doctrine that in practice permitted highly discriminatory practices against blacks (and other minorities). Thus, individual rights, although essential, are sometimes inadequate to fully protect minority interests if they are interpreted narrowly.

While individual rights provide certain protections, if they are framed as negative rights, e.g. freedom of religion, they may not provide a minority with certain *positive* rights that a minority may seek. For example, minorities may seek positive rights to health care, education, social assistance, and housing, to enable them to demand that the state provide such services, especially if they are in particular need of them. Similarly, a negative right for individuals to use language in private communication does not impose on the state a positive obligation to give minority language official status in government and schools.

Whether framed as positive or negative rights, individual rights are not collective rights of a group or distinct community and so they do not provide minorities—and especially national or other territorially concentrated minorities—with institutions that provide a measure of self-government (as discussed further below). A politically dominant majority may show little sympathy for a minority's claims for such rights. Moreover, courts may—unless the constitution explicitly provides otherwise—find that the institutionalization of certain ethnic or group rights is contrary to some individual rights. Thus, there are sometimes constitutional provisions that distribute political office to members of certain ethnic, linguistic or religious groups that exclude non-members from those positions. Bosnia-Herzegovina, for example, limits eligibility for the position of President to Bosniaks, Croats and Serbs. Finally, most individual rights are not absolute but rather are weighed against competing rights and governmental interests (such as national security) that may ultimately win out. In most constitutional systems, such restrictions on individual rights are achieved through the doctrine of proportionality, which weighs the relative significance of different principles in particular contexts. Therefore, courts may use the doctrine of proportionality to override or limit minority interests protected by individual rights. For these various reasons, some

minority groups are not likely to feel satisfied with individual rights as an adequate means of protecting their interests and cultures.

4.3 GROUP RIGHTS

In addition to individual rights, a common approach to protecting certain minority interests is the entrenchment of group rights in a constitution. Group rights may be held by a group collectively, or they may be “group-differentiated rights”, which protect the interests of a particular group but are held by its members individually. Whether a particular right is a group right or a group-differentiated right may depend on the wording of the relevant provision in the bill of rights – that is, if the bill of rights guarantees the right to a “nation” or “people” on the one hand, or to citizens or individuals who are members of specific groups, on the other. Both categories will be considered here under the general heading of group rights.

4.3.1 Language rights

Language rights are often important for linguistic minorities. Rules regarding language use can favor or disfavor speakers of different languages. While the right to choose the language of private or communal communication derives from the universal human rights to freedom of expression and association, international law has weak provisions regarding language rights in the context of communications with or within public institutions – “official” languages. The reason is that the choice of official languages depends on context and what is practical or needed. While the state may be able to remain neutral on questions of race and ethnicity, it cannot do so on every type of identity, such as language, where it must designate a language or a limited set of languages as having legal status in relevant state institutions. Not every language can be equally accommodated. Governments must select a limited number of languages to have official status for internal operations, for services to the public, for the courts and legislatures, and for education.

Each country will need to determine its language policy depending on the number and sizes of language groups, their spatial distribution, and whether there is one common language spoken by all citizens, whatever their mother tongue. Some multilingual countries have adopted a neutral link language to avoid favoring one or more local languages; this is often the language of former colonial rulers (e.g. English in Nigeria). Indonesia actually developed a new language to serve as the common basis for communication among its many linguistic groups.

An important dimension of language policy in multilingual countries can be to distinguish which languages have “official” status in the national government and in in sub-national governments. The constitutional designation of a language as “official” or “national” can be symbolically very important, but does not necessarily answer the practical issue of the institutional contexts in which that language is used. Thus specific and distinct choices must be made to determine the particular status and rights of different language in the legislatures, courts, education, civil services and so on. For example, Canada’s Constitution establishes English and French as “the official languages of Canada” and provides that they “have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada”. However, as a practical matter and pursuant to legislation, the internal operations of the government are bilingual in some parts of the country, but in English or French in other parts; similarly, citizens have the right to receive local services from the federal government “where numbers warrant” in English or French, which means that it is not feasible to offer services in both languages everywhere. An independent language commissioner acts as an ombudsman and reports to Parliament on the implementation of Canada’s language laws.

Devolved systems of government, like Canada, can also use their constitutions to establish the language rights of minorities in relation to sub-national governments—or at least in some sub-national governments (and leave other sub-national governments the power to determine language policy themselves). Of course, in devolved systems, the majority in one region may speak a language that is a minority language across the country as a whole, so

sub-national governments often use their regional language. In India, Hindi and English are recognized as the official languages of the nation, but Article 345 of the Constitution allows state legislatures to adopt other languages widely spoken in the state as their official languages. Moreover, Article 347 provides that a minority language within a state may be recognized at the state level, so that devolution can favor not just dominant regional languages but also minority ones. The South African Constitution designates 11 languages as official, providing that national and provincial governments may use any of the official languages for “the purposes of government”, and the national and provincial governments must use at least two official languages.

While Canada’s federal and provincial governments provide some services in both English and French throughout the country, the Swiss and Belgian language policy is based more on territorial unilingualism. Thus most Swiss cantons have one official language (but a few have two or more) and in these unilingual cantons all government business is carried out in one language only, whether at the cantonal or national level (except for citizens dealing directly with ministries in the capital). Belgium is similarly divided into unilingual French and Flemish speaking areas (with a few districts within these having limited rights for linguistic minorities), while Brussels is bilingual.

Thus when considering the language rights of minorities, it is always a question of a minority relative to what. German speakers are the majority in all of Switzerland but the minority in several cantons; in unilingual cantons where German speakers are a minority, they have very limited linguistic rights. English-speakers are the majority in Canada but the minority in Quebec, where they are subject to a provincial law that strongly favors French (though most English speakers enjoy constitutional protection for their right to English-language schools and most French-speakers outside Quebec have similar protection).

4.3.2 Religious rights

Freedom of religion is recognized as a basic human right, but even in countries that recognize this right

there are many sensitive issues that can arise in relation to religion and minorities.

Governments’ positions on religion cover the spectrum from “militantly secular” (e.g. no religious expression in public institutions, no state funding for religious institutions, and no religious instruction in schools), to “accommodating secular” (e.g. some religious expression in public institutions, some state funding for religious institutions, some state funding for religious schools), to “weak official religion” (e.g. the state may be associated with a religion, but with limited practical consequences, such as some financial support for religious institutions), to “cooperative with religion” (e.g. there is no official state religion, but the state may work with religious institutions to deliver programs in areas such as education, health and social services and might also recognize some religious personal law), to single official religion (e.g. close institutional and symbolic links and support; religious law may apply broadly), to “theocracy” (e.g. where religion and state are effectively united and government is by religious leaders). Each of these alternatives (and there are more) poses different issues for the rights of minorities.

Regionally devolved systems may further complicate matters, in that each sub-national government may have some discretion over the relationship between religion and public institution. Thus, in Switzerland the cantons have the right to determine the relationship between church and state: some are secular, while others are officially protestant or catholic. In Canada, the provinces have had different policies regarding the funding of religious schools.

For religious minorities, the issues that often matter most relate to their right to have certain institutions (e.g. places of worship, endowments, schools, hospitals), and to receive equal treatment for their institutions relative to those of the religious majority. Some countries give some religious minorities the right to publicly funded schools, which may be overseen by school boards elected by adherents or named by religious authorities.

Minorities may wish to apply religious law in certain areas (notably family law); they might also wish not to be subject to the religious laws of the majority (which may include certain crimes and punishments, financial

laws and laws regarding proselytization). The Nigerian constitution prohibits the adoption of an official religion at federal and state levels, but it does permit any state to establish a Sharia Court of Appeal with jurisdiction over Islamic personal law. It also provides for two bodies of criminal law—the Criminal Code for the South and the Penal Code for the North—and the latter incorporates elements of Islamic criminal law for Muslims. Several states have gone further and proclaimed Sharia criminal law, which may extend to non-Muslims. This has raised constitutional questions, including the treatment of non-Muslim minorities. Similar issues have arisen in other countries such as Malaysia. India and Pakistan have only religious family law, with no system of secular law, which has sometimes meant that smaller religious minorities that do not have fully developed systems of family law may have to be subject to provisions of another religious community. Recently, the Indian courts have reinterpreted religious personal law in accordance with the constitutional commitments to gender equality—and this tension between religious law and gender equality is found in many countries.

4.4 LIMITATIONS OF CONSTITUTIONALIZED RIGHTS IN PROTECTING MINORITY INTERESTS

While constitutionalizing rights is important, the effect of such rights provisions will depend on an independent and impartial judiciary, and on governments that respect what may be politically unpopular court decisions protecting minorities.

The effectiveness of constitutionalized rights depends on governments respecting and complying with court rulings, which does not always happen. For example, the Kenyan government ordered Somalians living in Nairobi and other urban areas to relocate to refugee camps, despite a ruling of the Kenya courts that such an order was illegal because it threatens rights. Another example comes from Israel, where in 2006, the Supreme Court cancelled a cabinet decision to provide special educational funding to identified communities in the periphery of Israel (called “National Priority Areas”) because it discriminated against Arab citizens. Of the 500 identified communities, only four were Arab Israeli. Although the Court gave the

government one year to implement the ruling, it did not comply and, in turn, the Arab petitioners brought a petition to the Court in 2008 asking it to declare the government in contempt.

A further limitation of some rights provisions is that they act as a form of control only after a right has been violated, which means they can be enforced only after delay and significant costs. A court may grant remedies that do not adequately redress the violation of a right, long after the damage is done.

These limitations on the effectiveness of rights provisions can be addressed depending on the context, but they do show why minorities often want more than constitutionalized rights whose implementation may carry a degree of risk. For example, the likelihood of the judiciary respecting minority rights may be enhanced if some judges come from minority backgrounds. It can be important as well to have a procedure for naming judges that is not dominated by a majority hostile to one or more minorities. Once named, judges need tenure and other elements of security of employment.

5. Institutional design and minority interests

Minorities may seek political empowerment through institutions that provide a measure of self-government, through measures to ensure minorities have effective representation in shared institutions of government, or both.

5.1 DEVOLUTION AND FEDERALISM

Minorities that are territorially concentrated may be politically empowered through devolution or federalism, both of which create local or regional political institutions. At the regional level, such devolution may be established through the constitution, but there are many instances of devolution done through ordinary legislation. For large minorities, devolution may be to a regional government in which they form the majority, but for smaller, more locally concentrated minorities,

devolution to the district or municipal level may be more appropriate. The groups that typically seek significant regional devolution are national minorities (who may have the even more ambitious objective of independence), but linguistic and religious minorities may seek devolution as well. Indigenous populations may advocate devolution to a region (state or province), as in Nigeria and parts of India, but in the Western hemisphere their populations are often too scattered or small, so they focus on the level of local communities (tribes or bands). Bolivia is an interesting counter-example in that the indigenous population constitutes the majority and it is the settler population that has advocated federalism.

Political devolution can answer many concerns of territorially concentrated national minorities, because it gives them control or substantial influence over regional or local governments to which important responsibilities may be assigned. Their language may be official and used for many purposes. They may make special arrangements in relation to their religion and religious institutions. More generally, they will have the sense that regional or local government will reflect their interests and concerns, and that these governments will not discriminate against them because they constitute a majority.

A contentious issue in devolution can be whether it is characterized as “territorial” or “ethnic”.

The underlying concept of territorial devolution is the equality of all citizens living within the territory of a sub-national political unit (e.g. region, state, province, or municipality). It may be that a certain ethnic, linguistic or religious population forms the majority in a devolved unit, but members of such a majority do not have a privileged status relative to other citizens resident in the region or locality with its own government. While the creation of the political unit may have responded to the distinct identity of its majority, the government is meant to be neutral as between its citizens, whatever their identity.

By contrast, with so-called “ethnic” devolution, there may be a sense that the members of the majority or indigenous (historic) population have certain rights that other citizens resident there do not. For example, in Nigeria, the indigenous population of a state has special privileges in terms of access to government

employment and some educational privileges. Indians resident on reserves in Canada and the United States have rights regarding political participation in their community, land and tax exemptions that non-Indians resident in their communities do not have.

While political devolution can protect the interests of territorially concentrated majorities, it can create its own challenges because there will often be minorities in these devolved regions (who may be part of a national majority). In principle, devolved units will be under a constitutional duty to treat such minorities on a non-discriminatory basis. However, regional “minorities within minorities” may still be vulnerable to the prejudices of the regional majority. They may look for constitutional protections of *their* rights (e.g. schools, language of government services) relative to the regional majority, as well as for further political devolution to local communities where they form the majority, e.g. Canada has constitutional and legislative protections for the schools of linguistic minorities in provinces (though these vary by province).

Of course, minorities may not be neatly concentrated territorially, so devolution to a region or locality would still not answer such minorities’ concerns for a degree of self-government. A way to address this can be through “functional” devolution, by which a certain responsibility is consigned to a body controlled by members of a specified (ethnic, linguistic, tribal or religious) group. Thus in Northern Ireland there are separate denominational school boards, where the Catholic and Protestant populations govern their own schools, which receive government funding, throughout the territory. In the Netherlands, for many years there were separate, sectarian governance arrangements of this type for educational and cultural institutions.

5.2 POWER-SHARING

Political devolution can be viewed as a form of “power-sharing” because powers are divided between levels of government controlled by different groups. But there are limits to how far this approach can go in ensuring that minorities truly share in the exercise of government power. Inevitably, some important functions will rest with the central government, and

some minorities may be deeply resistant to permitting central institutions to operate on a majoritarian basis because they could then make decisions contrary to the interests or desires of the minority. This has led some countries to adopt what are called “consociational” arrangements by which some (or even all) decisions of the government are made *jointly* by representatives of the two (or sometimes three) groups. Thus in Belgium, the lower house of Parliament is elected proportional to population (about 60 percent Flemish-speaking and 40 percent French-speaking), but representatives of either linguistic community can declare a matter to be of vital interest to their community and require a double-majority of the representatives of the two communities for approval of the measure. Such arrangements assure the minority that no measure will be agreed without its approval, but they can lead to periodic deadlocks in decision-making and frustrations on both sides. These difficulties are part of the reason why consociational governance has been adopted only in a few countries where there are two or more deeply divided communities.

5.3 ENHANCED OR PROTECTED REPRESENTATION

Even when full power-sharing is not sought or available, minorities can be concerned by their representation in political, administrative and legal institutions of government. This can be because they see such representation as providing influence, the opportunity to ensure their concerns are heard, and the presence of administrators of the minority delivering government services to the minority. But they can also be concerned simply to have a fair share of government employment, given the importance of the public sector and the attractiveness of its jobs.

5.3.1 Representation in legislatures

Most national legislatures have an upper and lower house, whose members are selected through different methods. In those cases where members are elected, the electoral system can play a major role in determining the representation of minorities. For example, systems based on single-member

constituencies tend to favor local majorities so they may produce an over-representation of regionally concentrated minorities and an under-representation of regionally dispersed minorities. Constituency boundaries in such cases can also be important for minorities, because they can be drawn to either enhance or diminish the probability of a minority representative being elected.

By contrast, proportional representation (PR) regimes can enable groups receiving even a very small percentage of the vote to win representation, but this will depend on whether there is a minimum threshold to win a seat and on the number of seats for each voting district (which, at the limit, can be one district for the whole country). The threshold rules of PR can, as in Germany, be modified to make it easier for parties of national minorities to win representation.

Electoral laws can have several objectives, of which minority representation may be only one. This goal must be balanced against other objectives, such as promoting stable government and broad-based parties. A law designed to promote representation of minorities may yield a party system that is too fractured, and/or minority parties that are extreme or separatist. Some countries, such as Nigeria and Kenya, require parties to have a national character if they are to contest elections, meaning parties should represent a broad cross-section of the country's groups and try to integrate minorities—such parties must show a breadth of party membership and field candidates in much of the country.

Quite aside from the general design of the electoral system, electoral laws can have specific provisions that promote or require minority representation. For example, the Indian Constitution reserves seats for scheduled castes and tribes in the national Parliament.

Even when minorities win representation in legislatures, they may not be able to participate in the legislative process effectively. To address this concern, the Constitution of South Africa requires that the rules of the National Assembly provide for the participation of minority political parties represented in the National Assembly, in a manner consistent with democracy. According to the Constitutional Court, this is a constitutional commitment that all members of society, particularly minorities, should feel that they have been

given a real opportunity to have their say, and that their views have been taken seriously.

5.3.2 Representative executives

Both presidential and parliamentary systems may have provisions to mandate a certain level of minority representation in the executive, or at least to require the executive to be broadly representative. This is especially true for consociational regimes: in Belgium, the Constitution requires an equal number of Flemish and French speaking Cabinet Ministers (plus the Prime Minister who may be either); in Bosnia-Herzegovina, there is a three-person collective presidency consisting of a Serb, a Croat, and a Bosniak, each directly elected; and, in Northern Ireland, the rules around the election of the First Minister and Deputy First Minister, who are elected as a pair, effectively require a Protestant First Minister and a Roman Catholic Deputy First Minister, and the choice of other ministers is also balanced. The Swiss Constitution requires that at least two of the seven Federal Councilors, who collectively form the executive, be from the minority francophone population. The Nigerian Constitution requires that the cabinet have a representative of each state. In many other countries, especially parliamentary systems, the practice is to have a cabinet that represents different parts of the country, including significant minorities, though this is not normally a formal requirement.

5.3.3 Courts

Minorities may also be granted special representation rights in the courts or the highest court. This may be done through the procedure for nomination: in Kosovo, for example, the appointment of two of the nine members of the Constitutional Court requires the approval of a double majority of all members of the legislature, and those holding seats guaranteed to minority groups. In Bosnia-Herzegovina, the power of appointment rests with ethnically-dominated constituent units, so that the Serb Republic appoints two judges, the Federation of Bosnia and Herzegovina (which is dominated by Croats and Bosniaks) appoints four, and the President of the European Court of Human Rights appoints the remaining three judges. An alternative way to assure minority representation is to

specify directly the composition of a court. In Belgium, the Constitutional Court must consist of an equal number of French- and Flemish-speaking judges. In Canada, three of the nine judges on the Supreme Court must be from Quebec (which has been understood as mandating that at least two of those judges be from the French-speaking minority).

5.3.4 Civil service, military and police, independent agencies

As important as legislatures, executives and courts are in any system, they represent only a small fraction of the total positions within any governmental regime. A major issue for minorities can be their representation in the larger structures of government: the civil service, military and police, and the several independent agencies that may exist (e.g. electoral commissions, civil service commission, judicial commission, finance commission). Minorities may feel that when they are adequately represented in them, these institutions are more likely to treat them fairly and with understanding and respect. They may also value the important employment opportunities of government service. Accordingly, many governments adopt policies designed to enhance minority employment in their various branches.

Some governments (or constitutions) permit quotas for representative employment. The Indian Constitution allows "reservation in matters of promotion to any class or classes of posts in the services under the State in favor of the (underrepresented) Scheduled Castes and the Scheduled Tribes". The Nigerian Constitution goes further and requires civil service appointments to "reflect the federal character of Nigeria", which in practice aims at proportional representation of each of the 36 states. The South African Constitution, in section 195(1)(i), tries to balance "representativeness" with other considerations:

Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

This constitutional provision highlights the possible tension between attempts to balance representativeness and merit in decisions on staffing

and promotion. This is why many governments avoid rigid quotas and seek to promote minority employment in a variety of other ways, including special recruitment and training programs, and using representativeness as one factor along with others. Of course, a minority may argue that merit should include such factors as ability to speak their language (especially if they have a right to service in their language), and understanding of their culture. Language requirements can be built into staffing criteria, but can sometimes be resented by majorities who do not speak minority languages.

6. Approaches to dealing with minorities

6.1 ACCOMMODATION AND INTEGRATION

We have seen that there is a great variety both of the minorities that may have political claims, and of the specific claims that different minorities may advance. Moreover, the political significance of minorities will reflect their number, their relative size and cohesion, as well as the nature of their claims. The responsiveness of “majorities” to minority claims will reflect cultural and historical factors, as well as more practical considerations.

For all these reasons, there is no one model for dealing with minorities. The area of consensus is probably largest around the value of the basic individual, negative rights (expression, assembly, association, religion, political participation), but even these are subject to broader or narrower interpretation in different countries. A general right of “non-discrimination” or “equal treatment” can also be powerful, depending on its interpretation. All of these rights would, of course, apply to all citizens, which contributes to their attractiveness. They can be very important for minorities, and in some cases, if generously interpreted, may respond to many of a minority’s concerns. They are consistent with the idea of “integrating” minorities, while respecting their basic rights.

The choice of how to deal with minorities becomes more controversial when one moves beyond these

basic individual, negative rights. In practice, the approach adopted in a particular case may depend not just on the nature of the minority or minorities in question, but also on how the majority views the minority or minorities and their demands. In a highly “integrationist” approach, a majority may insist on a common public identity even in the face of considerable cultural diversity, because of concerns that empowering minorities or giving them special protections risks political instability and conflict. Such an approach is resistant to symbolic constitutional recognition of minorities or institutional mechanisms built on cultural or ethnic differences.

By contrast, an “accommodationist” approach may give constitutional, symbolic recognition to more than one national, ethnic, religious identity and provide for some political devolution as well as various measures to enhance the representation of minorities in government institutions. These measures would reflect a belief that they will promote a more harmonious coexistence of different communities within the same state.

A country may choose to have elements of both integration and accommodation in its approach to minorities. This is often the case with devolution, for example, where regionally concentrated minorities may form the majority within a particular region or local government area, whose government may control various matters of strong interest to the minority, such as language policy and education. However, in general central governments emphasize the equality of citizens and their integration into a shared country and make most decisions on the basis of majority rule. It is rare, even in highly devolved systems, for national minorities to be granted equal power in the institutions of the central government—the form of power-sharing described above as “consociationalism”. The more usual accommodations at the central government level are on such matters as language policy, guarantees regarding minority representation in key institutions, and sometimes symbolic recognition. Upper legislative chambers (in bicameral constitutional systems) sometimes have special representation for minorities and minorities may also find some protection in having their consent required for certain constitutional amendments.

Different countries find different balances between the accommodationist and integrationist approaches and in many cases the blend both elements.

6.2 STAGED CONSTITUTION-MAKING OR IMPLEMENTATION

Some countries emerging from autocratic regimes find that there are high levels of mistrust among certain groups in the population. They accept that it will take time to reduce suspicion and develop trust, so they may take a staged approach to making or implementing their new constitution by adopting an accommodationist approach during the negotiation phase or the early years of implementation, but shifting to a more integrationist regime over time. In South Africa, the African National Congress agreed to negotiate a new constitution with the minority apartheid regime on terms of relative equality. This was a way of reassuring the minority non-black population that a new, democratic constitution would protect their interests, and it permitted a peaceful transition of power. The transitional interim Constitution (1993) entitled any party winning 20 per cent of the seats in the National Assembly (in elections on the basis of proportional representation) to a deputy president and any party winning five per cent to representation in the cabinet. This power-sharing structure represented a form of accommodation. The interim constitution, however, contained a five-year sunset clause. There was no requirement to maintain the interim power-sharing structure at the end of that five-year period, and in fact the 1996 Constitution abandoned the power-sharing structure and adopted a more integrationist political system.

Recognizing the intense sectarian and ethnic divisions in Iraq, the drafters of its Constitution provided for a first stage with power-sharing in the central government for four years, after which the regime would become more integrationist. In the initial stage, there was a Presidential Council consisting of a Kurdish President, a Sunni Vice-President and a Shi'a Arab Vice-President elected by a two-thirds majority in the legislature; the Presidential Council in turn chose the Prime Minister. After the four-year transition period, the Presidential Council was replaced by a single-person presidency chosen by a majority vote of the

legislature. At the same time, an upper house representing regions was to be introduced into the legislature but this has not yet happened. This structure was designed for an initial stage of greater power-sharing with an eventual shift to a more integrationist political system.

7. Conclusion

Minorities exist in all countries, but they take very different forms and have quite different political significance. Countries that are marked by a strong degree of cultural, ethnic, linguistic or religious and even regional diversity can face special challenges in dealing with minorities. There may be seemingly conflicting objectives between nation-building and recognizing diversity, between individual rights and more collective rights, between accommodation and integration. While each country must find its own path, the approach taken should recognize the importance of a full recognition of basic rights and of fair treatment for all. Majorities should ask how they would wish to be treated if they were a minority. While every country rightly seeks political stability and harmony, the best way to realize this may be through recognizing the contributions that all groups in the population can bring to a country's strength and richness. Thus many successful and highly diverse countries have found prosperity and stability through measures such as devolution of power to local or regional governments with fair sharing of resources, some power-sharing or guaranteed representation for minorities in central institutions, an inclusive approach to national symbols, and appropriate protection and rights for minority languages. Such measures can be an integral part of nation-building and balanced with a integrative approach to citizenship and government.