

Facing diversity

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Introduction

Fragmented states confronted with open or hidden conflicts based on social diversity face almost insolvable problems. The issue of diversity, as we learn from these conflicts, is not only one of human rights, but in most cases is a state issue and – much more important – an issue of the classic majority principle of modern democracy.

In a state based on the democratic principle of the rule of the majority, ethnic minorities are at a disadvantage whenever state politics reflect open or hidden ethnic interests. Democracy, as the basic concept on which the state is organised, is based on the idea that through democratic rational discourse, the best arguments defending common interests will be the most convincing and will therefore prevail. Rational arguments, however, can only be effective in a state which has a rational decision-making process, and which is based on a rational and legitimate system of justice. This is the case in so-called distributional conflicts where, through state politics, it is commonly decided how state income should be divided among its citizens. On the other hand, in categorical conflicts, one cannot convince the undecided or the opponent with rational arguments. Categorical conflicts are not open to a democratic discourse by which the

majority governs. Ethnic identities are based on subjective or objective characteristics arising from a commonality of language, religion, culture, or history. These identities cannot be changed by rational arguments. They are symbols created by emotions. One cannot change the roots of one's identity in the same manner in which societies determine the level of social security.

Since categorical conflicts cannot be solved through a majority decision-making process, the liberal state limits the power of the majority by securing human rights and by protecting the liberty of all citizens. In fact, the main goal of the modern state is to protect and promote individual liberty. Such liberty has to be secured on the basis of equal rights for every individual.

In fragmented societies, however, individuals belonging to minority groups are not satisfied with just the protection of their liberty as individuals. They also require that the community they belong to has the same status, rights, and privileges, as the majority community. Only if a Romansh-speaking Swiss has the assurance that his language will be given the same status and protection as that of German, the majority language, will he or she feel accepted in the state and society as the equal of a German-speaking compatriot. This requires not only equal individual rights, but

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also the right to be a member of a different ethnic community. Such collective interests, however, are in clear contradiction to the concept of a state based on individual liberty.

Thus, ethnic diversity, because of categorical conflicts, fragments political communities. These conflicts can be overcome only if states and governments, as well as defending individual liberty, are prepared to make compromises by placing limits on that liberty for the sake of peace. This is the challenge states are confronted with when – in order to become a real homeland for all individuals living under their authority – they seek to achieve legitimacy and trust, and to be respected by their different communities.

What are the tools that until now have been used to foster, respect, or tolerate diversity? One can, in principle, distinguish two main ways to accommodate diversity: one is based on institutional forms of power sharing and the other is based on citizens' rights.

Institutional forms of power sharing

Federalism

Federalism is the traditional institutional tool that can give the status of a quasi-state with limited sovereignty, to communities seeking autonomy and state-guaranteed rights. In federal states, the constitution protects not only the autonomy of constituent units but also the shared power of those units with regard to the decision-making process of the federation. Thus, constituent units have constitutional status. Through the constituent units of a federal state, ethnic communities can enjoy the collective right of autonomy – i.e., self-rule of their constituent unit – and shared rule, that is the constitutional right of the constituent unit to influence policies of the federation. Thus they participate in decisions that may enlarge or limit their autonomy and the legislative, judicial, executive, and taxing power of the units of the federation. It is possible that through multilevel citizen rights, individuals belonging to different constituent units will have different emotional and constitutional identities.

Federalism is usually based on territorial division, but one can also divide a country along language or religious lines. Thus the publicly recognised religious communities in Germany and Switzerland, the different language communities in Belgium, and some state organisations deriving from the millet system of the Ottoman Empire, are examples of rights of autonomy based on personal identity rather than territory. According to historical experience, such structures based on personal federalism may not be very stable. Nevertheless, they may be useful in bringing different communities together into a state organisation and in maintaining this cohesion.

A constituent unit may even become the symbol of a homeland for the minority citizens, who are loyal to the federation through their loyalty to their constituent unit. If states choose to bring their fragmented societies together through this type of federalism, they must also be prepared to reconsider the concept of sovereignty as the absolute right of the central level of government.

The main arguments against such federal policies are based on the fear that federalism is the first step towards secession, and that federal states lack the efficacy for guaranteeing equal rights and liberty that unitary states have. In response to these arguments, one might mention the new loyalty that India has been able to instil within the Tamil population by creating a new Tamil state within the Union of India.

Regionalism

Regionalism is a less efficient tool than federalism for accommodating ethnic minorities. In some instances, however, it can help to hold or bring different societies together. Unlike federalism, which is established by the state's constitution, regionalism is generally based on legislative decision. Thus, regions can be shaped, created, or abolished by the simple majority of the legislature. The autonomy of minorities can be strengthened but also reduced by a simple majority. Thus the minorities have no constitutional standing either to prevent authorities that wish to place limits on regionalism, or to promote further decentralisation. One should also note that generally, regionalism provides only some autonomy; it is federalism without



Swiss boy holding a representation of the apple pierced by William Tell's arrow. Jean-Philippe Daulte / Cosmos

the forms of power sharing given to federal units.

We have to be aware that, as with federalism, there are different types of regionalism. Very often, regionalism is not only a general tool for decentralisation but also a tool to accommodate minorities demanding different kinds of autonomy. This often leads to asymmetric regionalism, which gives specific regions specific autonomy. For instance, this is the case in Spain, where regionalism has a quasi-constitutional ground, whereas in France, regionalism is decided on statutory bases, recognising the regional specificity of Alsace, Corsica, or Normandy, but without autonomy.

Constitutional goals

The fundamental question of state organisation is: what are the goals of the state with regard

to diversity? Is diversity considered a problem, to be solved by assimilation or integration? Is it simply tolerated? Are minorities seen as tolerated guests and their members treated as second-class citizens, or is diversity viewed as enrichment, an asset to be fostered and promoted?

The Treaty of the European Union (article 151, 128 old), for example, explicitly states that the Union should promote existing diversities. The new Swiss Constitution, in article 2, considers the fostering of existing diversity as a specific goal of the state. This type of commitment will usually be accompanied by federal grants to support and uphold teaching in minority languages, and to help religious groups of a minority religion benefit from full religious services, etc. States fostering diversity will also be prepared to accept compromises for the sake of the peaceful coexistence of different ethnic

communities. Such compromises may also restrict individual liberty in order to respect cultural traditions of the community. The constitutional court of Columbia, for example, has allowed Indian communities to have their own system of corporal and physical punishment contrary to the modern norms.

Democracy as conflict management

Democracy should be seen not only as a decision-making process to find clear majorities for efficient state administration, but also as a tool to manage conflicts with peaceful and legitimate procedures. Thus, the very basics of the concept may need to be reconsidered in the context of managing conflicts between different ethnic communities.

Democracy can be seen as a procedure that allows for the fullest individual self-determination in the context of individual dependence on community decisions. Seen from this point of view, the main objectives of democratic procedure are not only to find an efficient majority, but also to achieve the widest possible consensus. If individuals, because of social interdependence, cannot pursue their happiness through individual liberty but only as part of a group, they will have the most autonomy if they can decide democratically within the smallest possible group. Democracy, according to this point of view, is best guaranteed if decision-making processes are decentralised to a local level as much as possible. Optimal self-determination is reached if consensus can be achieved, and such a consensus can most easily be achieved in smaller rather than in larger groups. Democracy, as a means to find consensus, is thus linked to decentralisation and local autonomy. This view of consensual democracy is complementary to regionalism and federalism.

Democratic consensus is also indispensable for conflict management. States that establish democratic institutions in order to reach consensus also install the necessary procedures for conflict management.

The Swiss experience teaches us that semi-direct democracy may at the same time educate citizens to tolerate and respect diversity, as it can be a procedure to reach a consensus without establishing a tyranny of the minority. A typical example from Swiss political life illustrates this.

When a valley in the Canton of Grison wants a new street opened, the whole population of the Canton has to decide in favour, in a referendum. In Grison there are Catholic and Protestant valleys. When the Catholic valleys vote without good reasons against the construction of a street in a Protestant valley they know that the next time a Catholic valley wants a new street the Protestants are likely to block their endeavour. This enhances the willingness to vote in favour of the opening in a valley of the other religion. Similar mechanisms also operate on the national scale.

Constitutional power

One of the most important issues regarding minorities is their constitutional “standing”. The constitution serves as the foundation of every state. If minorities are not given a status enabling them to affect the constitutional foundation of the state, how can they consider the state as their own? The challenge that diversity poses for every society is the need to find an institutional ground for minorities to be involved at the constitutional level. The great difficulty they face is to find a middle ground that avoids the tyranny of the majority on the one hand, and the tyranny of the minority on the other.

Governmental system

The governmental system, or more precisely the power exercised by the executive, is another tool by which minorities can be accommodated in a state. Representative democracy has developed two main types of governmental systems: a presidential system with a powerful head of the state, as in France, or a parliamentary system with a powerful prime minister along with her/his cabinet, the head of state being symbolic and representing unity. In a presidential system, minorities may feel threatened or discriminated against, because a strong head of state can be linked to the representation and promotion of majority interests. Such a problem is encountered in several constitutions of Eastern Europe. In these cases, constitutions usually base their legitimacy on the notion of the purely political citizen, denying the relevance of any cultural considerations in politics.

Such a conception can lead to majority/minority conflicts, as in Turkey.

Tiny minorities might, on the other hand, feel better protected by a strong head of state, because he or she may be more independent, and thus have more freedom to intervene than a prime minister, who depends on the ethnic majority of the parliament. In states where the power of the executive depends on the majority of the parliament, political parties may see minorities as mere instruments for their ends. This implies the risk of an ethnification of politics, which can be disastrous for minorities. When the gap between majority and minority in the parliament is small, no party will be interested in taking minority interests into account for fear of losing the next elections. Minorities generally do not feel well represented by either type of government. Whenever the majority begins to promote hidden or open ethnic interests, it will de-legitimise the authority of the executive and ultimately that of the state in general.

There are collegial forms of government that do not depend directly on the majority group in parliament and, at the same time, represent the head of the state and the executive. Some examples are the French directorate of the first French Republic of 1795, the Federal Council of Switzerland (indirectly a copy of the French directorate), or the Commission of the European Union. These forms of government may serve minority interests better than a government depending daily on the small majority of the parliament. The peers forming such a government can represent the existing diversity of the country. In such a case, minorities will feel that the head of the state and the executive represent them. Since the Executive, in this form of government, is not ruled by a president or a prime minister, it has to seek a consensus within the government. This again enhances the chances that minority interests will somehow be brought to light, respected and even pursued by a government in which they also have a representative. It is, however, important for the functioning of a collegial government that it is not elected by an ethnically based constituency, as is the case with the presidency of Bosnia. Representing minority interests means also having legitimacy in other parts of the country. A system which allows for the selection of individuals who – while

having the mandate to represent all citizens – defend both the interests of the state as a whole as well as those of their particular communities, has the best chance of integrating diversity and avoiding the fragmentation of society.

Electoral system

The issue of electoral systems is linked to that of the governmental system. The main question with regard to the electoral system is: Do we aim for efficient majority governments in parliament, or do we wish parliaments to reflect social diversity, sacrificing efficiency for the sake of peace? In a state with highly conflictual diversity, the answer is clear. If we seek electoral results reflecting social diversity, we should adopt an electoral system based on proportional representation with large constituencies. Only with large constituencies does a proportional system give a realistic chance to territorially dispersed minorities to be fully represented in the parliament. In states where ethnic communities are territorially concentrated, the territories are usually not completely homogeneous. Thus tiny minorities within larger minorities have a better chance of being represented in this system. In addition, fragmented states wanting to reflect diversity should not institute a minimum percentage threshold, which tends to eliminate small parties from the parliament. Thresholds not only eliminate small parties but also diminish representation of small minorities.

In some states, electoral systems have certain quotas for minorities so that they may be proportionally represented. These quotas may be advantageous in states with very small minorities, which would – even in a proportional system – not be fairly represented.

Citizens' rights

Affirmative action

Liberty is the traditional aim of human rights, and is achieved by limiting governmental power. The main concern of minority communities is discrimination – either by public authorities or by private action – which excludes them, or which imposes an additional burden on their members. This discrimination, either

real or perceived, concerns their opportunities in such areas as education, the economy, or housing, in comparison with persons belonging to majority communities.

The traditional understanding of individual rights has to be broadened considerably if minorities are to be protected against general social discrimination. One important mechanism, especially developed in the United States, is affirmative action. This principle provides the basis for a state to reverse discrimination by means of, for example, quotas for minority groups, enabling them to have privileged entry into schools, universities, etc. Affirmative action is, by definition, reverse discrimination. It is based on a quota system that enables persons of minority communities to be accepted in universities even when they do not meet the same standards as persons belonging to the majority community. Because of the quotas reserved for minorities, people belonging to majority groups will be required to achieve higher standards. Some of those who would normally be accepted will be eliminated because of the quota system, and will feel deep discrimination. The only argument in favour of this discrimination is that the majority has historically discriminated against the minority and thus should accept its reversal.

This argument is fully justified at a collective level but how can it be justified individually? Why should people pay a price because their parents and grandparents discriminated against the minority group? This is the main reason why affirmative action is still criticised and, in some instances, rejected on the grounds of equal protection under the law.

State action doctrine (*Drittwirkung*)

The state action doctrine prohibits state authorities from enforcing discriminatory private measures against persons belonging to minority groups. Attempts to prevent certain customers, Turks or Afro-Americans for instance, from using private services in public – such as restaurants, parks, or to buy houses in certain areas – violate the rights of citizens because they exclude individuals on racial or national bases. The courts in Germany and Switzerland, inspired by the doctrine of the *Drittwirkung*, have developed a similar device against private

discrimination. The so-called *Drittwirkung* is based on the idea that certain rights and liberties not only limit the power of states, but also limit private actions of individuals or firms. The concept of *Drittwirkung* is a substantive approach to rights, directed at individuals, while the state action doctrine prohibits the state to support discriminatory measures. The Swiss Constitution of 18 April 1999 (Art. 35 al. 3) expresses the principle of *Drittwirkung* in the following way: “The authorities shall ensure that the fundamental rights also be respected in relations among private parties whenever the analogy is applicable.” *Drittwirkung* allows, for instance, new competitors to sue a firm that tries to boycott them in order to prevent their entry into the market.

Collective rights

Collective rights can be used as a means to defend minority interests. The constitutional court in Columbia has granted collective rights to Indian minorities in response to their claim that their right to live is a collective right, since their way of life cannot be understood in the individual sense but only in a collective sense. Collective rights might also be understood as an extension of individual rights. Thus the language of a minority may be defended on an individual basis by a person belonging to the minority group claiming that she/he has the right to use it.

According to some, however, rights will only effectively defend the interests of a minority if they are rights given to the minority understood as a collective and if they can be defended by a representative body of that community. If such is the case, rights of individuals within the minority – such as freedom of religion or linguistic freedom – may be restricted to protect and defend its minority religion or language on the basis of collective rights.

Court jurisdiction

The efficacy of citizens’ rights is, of course, dependent on the jurisdiction of the court system of the country. It is on this basis that the American Supreme Court could uphold the concept of integration made famous in the “Brown v. Board of Education” case. In Colum-

bia, the *actio popularis* and the *tutela* are new constitutional instruments that have enabled the court to establish and maintain its new jurisdiction with regard to collective rights. In the continental European legal tradition, where courts have a much more limited jurisdiction, it is more difficult to guarantee minority rights effectively through court decisions.

International law

International law is an important instrument to cope with diversity and to guarantee the protection of minorities. In this regard, one can mention the very disputed right of self-determination of nations or people (article 27 of the International Covenant on Civil and Political Rights), some recommendations of regional organisations such as the Charter of Paris for a New Europe (1990) of the OSCE (Organization for Security and Cooperation in Europe) or the minority conventions of the Council of Europe concerning language and minorities in general.

Right of self-determination

The right of self-determination of people, recognised in Articles 1 and 55 of the Charter of the United Nations, could be interpreted as a right of every ethnic community to autonomy or even to secede unilaterally from the majority state. If there was an objective definition of “people” or “nation”, one might be able to discuss such collective rights based on the Charter of the UN. Such a definition, however, does not exist.

Every community that claims some common language, culture, religion, or other common historical root could consider itself to be a people or a nation. Thus the right of unilateral self-determination of nations could lead us to a total international anarchy of smaller and smaller communities claiming their own rights to self-determination. One has to consider further that in most cases minority communities usually have smaller minority communities within their territory. Very often the larger minority community is not prepared to protect its smaller ethnic community living within its territory. Thus their conflict with the majority will often end up in a new conflict with their own minority.

Finally it has to be noted that Article 2 of the UN Charter proclaims sovereign equality of its members. The right of self-determination of peoples should not be in contradiction with article 2.

Enforcement

Another problem concerns the international enforcement of minority rights, such as the right to self-determination. There is no international authority – legal or otherwise – that can legitimately interpret or enforce international minority rights. When the international community intervenes in minority conflicts, it often cannot remain an objective mediator, but becomes allied with one of the parties in conflict. This means that it enforces minority rights to the detriment of other minority or majority communities. The break up of former Yugoslavia is a clear example. Aside from independent Slovenia and Macedonia, Yugoslavia, rather than embracing diversity, ended up with three homogeneous regions in Bosnia, a homogeneous Croatia and, it is to be feared, an ethnically homogeneous Kosovo. There is no known case where the international community with its enforcement has succeeded in upholding existing diversity through the enforcement of minority rights. On the contrary, it has either tolerated, or even indirectly promoted the homogenisation of territory.

Other international instruments are autonomous rights, which are based on mandatory conventions, such as the European Charter for minority rights, or on recommendations, such as those of the OSCE Charter of Paris. In both cases, it is up to the majority within a state to guarantee or establish autonomous rights for its minority community. The main problem with these conventions, however, is usually that minorities deny any legitimacy to the state ruled by majority. Thus any autonomous rights generously granted to the minorities are rejected. Minorities will only accept those rights that they take themselves from the majority, rejecting “gifts”.

Conclusion

Confucius recounts the following story. A pupil asked his master: what are the necessary

conditions of a state? The master answered: the economy, the army, and trust. But if one has to renounce one of those conditions, which must it be? The answer is the: army. If one can have only one element for the state, which one is indispensable? The answer is: trust.

Without trust no state can function. When we face the modern challenge of diversity we have to be aware that trust is indeed indispens-

able. The state needs not only the people's trust in its institutions and leaders, but also trust among the different communities. Thus, institutions have to meet the requirement of legitimacy for all communities and they have to develop procedures that can provide trust among the different ethnic communities. Diversity will be upheld in fragmented states only on the basis of this fundamental trust.