

Role for the Kin-states?

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I. Introduction: Why Do We Protect Minority Rights?

The answer to this question seems obvious. As human rights, they protect the individuals' distinct ethnical, language, religious or other identity, and in this way, minority rights help preserve the existence of communities sharing the same distinct features. At least this is the official canon of the international protection of minority rights. Whether openly or tacitly, politicians and political scientists often have a different view. Both see domestic and international minority rights protection as important because ethnic conflicts have tremendous potential for destruction, as has been seen over the past fifteen years, especially on the territories of the former Yugoslavia and the Soviet Union. Consequently, there are two goals, and they do not contradict: stability and security presuppose the protection of identity. Still, the two goals are not on the same level; for while the protection of identity is itself a goal, it also serves as a tool of the primary target, international stability and security. This is the case now, and it was the understanding after World War I. As US President Woodrow Wilson expressed in May 1919 at the peace conference after World War I, 'Nothing [...] is more likely to disturb peace of the world than the treatment which might in certain circumstances be meted out to minorities'.¹ After World War II, international discussion of the protection of minority rights was dropped for decades, for it was regarded as irreconcilable with international security. The reference point was Adolf Hitler, who manipulated ideas on the rights of German minorities across Europe. So at the San Francisco Conference leading up to the UN Charter, which would establish the basic international human rights norms, it was

¹ As quoted by: Jan Helgesen, 'Protecting Minorities in the Conference on Security and Co-operation in Europe (CSCE) Process' in Allan Rosas and Jan Helgesen (eds.), *The Strength of Diversity: Human Rights and Pluralist Democracy* (Dordrecht, 1992), p. 159.

bluntly stated: 'What the world needs, now is not the protection of minorities, but protection from minorities'.²

Consequently now there are two competing and completely contradictory approaches in international law to the protection of minority rights. Still, whether one does or does not protect them, one should act for the sake of security.

Why is it important to deal with the role of kin-states in protecting the rights of its kin minorities? It is not simply because of the bad memory of Hitler and Nazi Germany, but because many authors see this question from a security perspective, asking what are the dangers of such a role and what might be its fateful consequences for the stability of interstate relations.³ I do not question whether this approach is justified, but I would like to underline, if we really think the protection of the rights of minorities is of value, we cannot avoid the question: how far can it be subordinated to security concerns? A precarious balance is needed if we are to take the protection of minority rights seriously and not satisfy ourselves with pictures of minority persons as ones who wear national costumes, sing folksongs and dance folkdances.

II. Who Should Protect Minority Rights?

The answer to this question might be the following: the minority persons and communities themselves, the state in which they live, the international machinery designed for this purpose, and the kin-states.

The first answer may be surprising, but it is easy to understand the importance of the rights holders and why the community of rights holders should stand up their rights. In its original cast, even cultural autonomy is seen as based on classic freedoms, which only require toleration and non-interference from the state. The minority community takes the opportunity offered by freedom of association and education to bring about its own private institutions and exercise its rights of self-government. The state

² As quoted by: Helgesen, op. cit.

³ See, for example: Konrad Huber and Robert W. Mickey, 'Defining the Kin-state: An Analyses of its Role and Prescriptions for Moderating its Impact' in Arie Bloed and Piter van Dijk (eds.), *Protection of Minority Rights through Bilateral Treaties: The Case of Central and Eastern Europe* (The Hague, 1999), pp. 17–51.

may lay down quality requirements (concerning the curriculum, acquisition of certificates, etc.) and may seek guarantees that the schools educate pupils to become ‘good citizens’, but the schools are founded and maintained by the minority community itself. For a long time, this was the understanding of cultural autonomy as invoked in international law. A change was ushered in by statements as to the positive obligations of the state *vis-à-vis* minorities.⁴ But even if there are positive state obligations arising from minority rights, the actual implementation really needs the active behaviour of the rights holders to secure and maintain them. For example, in the case of rights to official use of a minority language, they should accept being seen as troublemakers who make the work of local state offices and courts more complicated and more expensive.

Minority rights are human rights. Consequently, the state in which the minority lives has the primary duty to protect minority rights. Protection basically depends on the domestic constitutional system of the state. But even if the state is a perfect democracy—and which state is that?—it could happen that it is a majoritarian democracy, where ‘winners take all’ and pay no significant attention to minority wishes without heed as to whether the groups belong to political, ethnic or any other minority. To belong to a minority is never an advantage. Moreover, as James Madison, one of the founding fathers of the US Constitution, stated: ‘In all cases where a majority are united by a common interest or passion, the rights of the minority is in danger’.⁵ This danger occurs when the Jacobin concept of nation state satisfies itself with equality before the Constitution, not paying attention to such particularities as language or culture. Even if minority rights on language and culture are legally settled and the majority-minority relationship is relaxed, the state may not provide generous subsidies for minority education and cultural institutions. Rich minorities who could finance their institutions are rare, especially in Central and Eastern Europe. Of course, it is more advantageous for the majority to preserve dependence on the central state budget than to give minority organisations or churches property or to establish legal

⁴ See, for example: Article 1 and 5 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN General Assembly resolution 47/135 of 18 December 1992).

⁵ As quoted by: Jon Elster, ‘On Majoritarianism and Rights’, *East European Constitutional Review* 1:3 (1992), p. 20.

opportunities for them to share local taxes so that they could finance their institutions from their own resources. Cultural autonomy, however, if implemented at all, is likely to remain formal as long as every penny depends on the good will of the majority.

Today nobody can convincingly deny that the protection of minority rights is a part of the protection of international human rights.⁶ Consequently, they share the same achievements and pitfalls. No doubt, the international supervisory mechanisms go on their way, although Philip Allott is right in saying: ‘[...] governments have been reassured in their arrogance by the idea that, if they are not proved actually violating the substance of particularised human rights, if they can bring their lawyerly qualifications and exceptions, then they are doing well enough’.⁷ Moreover, international supervisory mechanisms neither in the case of economic, social and cultural rights nor in the case of minority rights are empowered to distribute money to help compliance with them. International protection of human and minority rights also reflects the achieved level and problems of general inter-state co-operation.

Even if the minority rights holders actively demand the implementation of their rights, the home state does its best to do so, and the international supervisory machinery correctly sends signals about shortcomings, there is a room for the kin-state to play a role. The question is: what kind of role is legitimate and does not undermine security?

III. The Role of Kin-states

Four types of actions can be taken by a kin-state in favour of its kin minority: actions in the context of international bodies and mechanisms, actions in co-operation with the home state, actions *vis-à-vis* other states, and domestic legislation on the relationship with its kin minority.

⁶ Article 1 of the Council of Europe’s Framework Convention for the Protection of National Minorities states: ‘The protection of national minorities and of rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and such falls within the scope of international co-operation’.

⁷ Philip Allott, *Eunomia: New Order for a New World* (Oxford, 1990), as quoted in: Henry J. Steiner and Philip Alston (eds.), *International Human Rights in Context* (Oxford, 2000), p. 703.

As far as the first option is concerned, international institutions clearly represent a legitimate instrument for achieving foreign policy goals, especially if the kin-state stays inside established institutional processes. The relatively new practice that states do not regard human rights (including minority rights) as a part of the exclusive *domain réservé* of state sovereignty could make it relatively easy for kin-states to rely on international bodies and mechanisms.⁸ But it is worth recalling that even before this became widely recognised, the inter-state complaint procedure under the European Convention on Human Rights was used to protect the rights of ‘persons with whom the applicant State had a special relation’⁹ (i.e. members of their kin minority). Complaint applications by Cyprus against the United Kingdom concerned the mistreatment of Cypriots of Greek origin.¹⁰ Austria started procedures against Italy to protect the rights of six persons from South Tyrol.¹¹ Ireland’s applications against the United Kingdom concerned the rights violation against Roman Catholics in Northern Ireland.¹² Although formally Cyprus’ application against Turkey was about the mistreatment of Cypriot citizens, actually they had Greek origin.¹³ If you take into consideration that only some inter-state procedures have been launched so far and four were to protect the rights of kin minorities, you could hardly escape the conclusion that at least in Europe there is an established practice to act in favour kin minorities in the context of international bodies and procedures.

Many cases could be cited from the OCSE (CSCE), the European Parliament, and Council of Europe in which kin-states came forward with initiatives aimed directly or indirectly at their kin minorities. In a broader view, even initiatives and efforts to set minority rights norms belong here, for it is not by chance which states are active in this field. Norm setting activity by itself cannot be questioned, and it contributes to the progressive development of international law. Returning to the inter-state

⁸ See: fn. 6.

⁹ The expression is taken from P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer, 1990), p. 35.

¹⁰ Appls. 175/56, 299/57.

¹¹ Appl. 788/66. The role of guarantor, or guardian (*Schutzmacht*), of the German speakers of south Tyrol was delegated to Austria by the 1946 Austrian-Italian Treaty. Consequently, Austria was legitimated to start the procedure as the kin-state.

¹² Appls. 5310/71, 5451/72.

¹³ Appls. 6780/74, 6950/75.

complaint procedure under the European Convention on Human Rights, although it provides only a limited possibility to address the rights of kin minority persons—specific minority rights are not included into the Convention and its Additional Protocols—it could work well in this area because of its quasi-judicial, impartial, and authoritative character. In general, the use of international bodies by a kin-state is advantageous. If other states join with the kin-state, it legitimates its efforts; if not, its behaviour is immediately tempered. Furthermore, international bodies do not simply reflect the opinion of the member states, but channel their conflicts as well.

As far as common actions of the kin and home states, they could range from joint declarations to bilateral agreements dealing with minority issues and to concrete steps based on them. If an action comes from the mutual will of states, it can hardly be questioned; the will of states is the foundation of international law. There can be problems with mutuality for both objective and subjective factors, though. The objective factor means if there is significant asymmetry in the number of members of each others' kin minority. Either as a consequence or independent of this objective factor, the subjective factor is the lack of political will to address minority issues. Bilateralism in minority issues—if it works—could work well, but it could also have drawbacks. As far as the advantages are concerned, it is worth quoting the Venice Commission:

The potentialities of bilateral treaties in respect of reducing tensions between kin-states and home states (tensions which can rapidly escalate when those in power regard minorities as unreliable and minorities fear that the home states will not respect their identity) appeared to be significant, to the extent that they can procure straight commitments on sensitive issues, while multilateral agreements can only provide for an indirect approach to those issues. Furthermore, they allow for specific characteristics and needs of each national minority as well as of the peculiar historical, political and social context to be taken into direct consideration.¹⁴

¹⁴ European Commission for Democracy through Law (Venice Commission), 'Preferential Treatment of National Minorities by Their Kin-states'. Report, CDL (2001) 97, p. 4. Also available at <[http://www.venice.coe.int/docs/2001/CDL\(2001\)097-e.asp](http://www.venice.coe.int/docs/2001/CDL(2001)097-e.asp)>, accessed 6 January 2006.

In many cases, the supervision over implementing such agreements is vested in joint governmental commissions empowered to bring recommendations to the respective governments. These commissions are capable of treating sensitive minority issues as normal business. Of the possible drawbacks to bilateral approaches to minority issues,¹⁵ I will return to the problem of discrimination later; here I consider the truly important issue of unequal position of the parties, especially the different level of minority participation in the preparation and implementation of agreements.

As a part of its foreign policy, the kin-state could seek the help of a third state to achieve the establishment of an important multilateral norm or improvements in the position of its kin minority. So much depends on the foreign policy capabilities of the kin-state.¹⁶ Even more important is what the great powers want. In case of the Central and East European countries, the Western powers clearly gave a priority to inter-state stability, although accepting to a certain extent that only a kind of accommodation of minority interests could guarantee lasting internal stability. This policy wanted to reconcile these two elements with the help of ‘*pactomania*’; it became a primary goal to convince the states in the region to conclude bilateral treaties as a part of broader European integration. The ‘Jewel of the Crown’ was the European Stability Pact, the Framework Convention for the Protection of National Minorities came second, and the bilateral agreements had to fill the ‘framework’. The leading Western states heavily relied on conditionality for membership in

¹⁵ See: Gudmundur Alfredsson, ‘Identifying Possible Disadvantages of Bilateral Agreements and Advancing the Most Favoured Minority Clause’ in Arie Bloed and Pieter van Dijk (eds.), *op. cit.*, pp. 165–175.

¹⁶ In the early nineties the Hungarian Government wanted Recommendation 1201 of the Parliamentary Assembly of the Council of Europe accepted as an Additional Protocol attached to the European Convention on Human Rights (mainly because one of its sections contained a vaguely formulated right to autonomy and it provided a right to complaint to the European Court of Human Rights). The ‘target state’ of Hungarian foreign policy was Germany, on the grounds of German sensitivity towards minority issues and on the amicable relationship between Prime Minister Antall and Chancellor Kohl. During the October 1993 Conference of the Head of States and Prime Ministers of the Member States of Council of Europe, the forum deciding the issue, French President Mitterrand and others convinced Kohl to drop the Draft Protocol. The main partner in the European integration had stronger arguments.

NATO and EU. The message was clear: No Treaty? No Entry!¹⁷ The main virtue of these agreements is not how they regulate minority rights, but their supervision (see above).

IV. Domestic Legislation of the Kin-state in the Relationship with its Kin Minority

The unilateral actions of the kin-state *vis-à-vis* the home state of its kin minorities can have their origins in constitutional provisions or policy statements. Constitutional regulations and policy statements are not on the same normative level, although government policy statements mean that not only the competence of the government stands behind it, but the legislative power of the parliamentary majority as well.

In Central and Eastern Europe, constitutional regulations mainly came into existence after the Cold War.¹⁸ Governments change their policy lines, but the existence of kin minorities abroad is a constant factor, bringing continuity at least in this respect.¹⁹ This continuity has been reflected in certain policy approaches. For example, in November 1995 the French Foreign Minister stated in Parliament: ‘(w)e have cared for the fate of Quebec for generations, and generations, and I can assure you we keep maintaining and developing the very warm ties we enjoy with Quebec’.²⁰

Constitutional regulations and policy statements lead, or could lead, to specific domestic legislation providing a wide range of preferential treatment to the members of the kin minorities. But neither the

¹⁷ Péter Kovács, *International Law and Minority Protection: Rights of Minorities or Law of Minorities?* (Budapest, 2000), p. 108.

¹⁸ The Venice Commission quotes seven constitutions. European Commission for Democracy through Law (Venice Commission), *op. cit.*, pp. 3–4.

¹⁹ There are exceptions. The most obvious examples are the former communist governments of Central and Eastern Europe. During the Communist era, the socialist countries adhered to a tacit agreement not to openly criticise each other’s minority policies, not to or hardly help the educational and cultural institutions of their kin minorities, and not to bring minority issues to the attention of international bodies, because this would helped the ‘international class enemy’.

²⁰ As quoted in: ‘France Reassures Both Sides’, *International Herald Tribune*, 1 November 1995, p. 5.

constitutions and the policy statements nor the legislation contain a claim of responsibility for ensuring the rights of their kin minority that supersedes the competence of the home state and the international community. Just the opposite is true; the preferential treatment, or a substantial part of it, even might be seen as contributing to the educational and cultural infrastructure of the home state, guaranteeing a more substantial implementation of the rights of minorities recognised and protected by a wide range of international agreements. Language and/or culture are of utmost important for the preservation of the identity of those minorities.²¹

The Venice Commission has written that ‘the preferential treatment can be justified in the genuine pursuit of the aim of maintaining cultural links with the kin-state’.²² On the basis of this statement, we conclude that there is no discrimination if the preferential treatment given to the members of its kin minority by the kin-state is confined to the field of culture.²³

The other thing that the kin-state legislation must avoid is extraterritorial effects. ‘A state can only issue unilateral acts concerning foreign citizens inasmuch as the effects of these acts are to take place within its national borders. When these acts deploy their effects on foreign citizens abroad, in the absence of international customs allowing the state to assume the consent of the other states affected, such consent must be explicitly sought prior to the adoption of any measure’.²⁴ The Venice Commission does not leave any doubt that such measures cannot be enacted unilaterally, even after long, unsuccessful negotiations. In any case, there is a contradiction here. Even if the domestic act of the kin-state

²¹ But there is something more. Language and the culture based on it are somehow automatically synonymous with some sort of representation of the minority as well. Language is one of the most important expressions of a sense of collective identity, a really strong bond in a community which has even been imbued with a mythical significance. Even the use of geographic and other place names in the minority language in everyday life may be an outward expression of the authentic existence, authentic living of the community in the given physical space.

²² European Commission for Democracy through Law (Venice Commission), *op. cit.*, p. 19.

²³ This interpretation is not shared by everyone. The most powerful opponent is the EU Commission, which got Hungary to modify the recipients of certain cultural preferences guaranteed by its Status Law from national (ethnic) Hungarians to those who would like to learn or to secure education to their children in Hungarian in their home states.

²⁴ European Commission for Democracy through Law (Venice Commission), *op. cit.*, p. 20.

includes measures with extraterritorial effects, its proper implementation directly requires the co-operation of the home state anyway.

If the domestic acts have extraterritorial effects, or a kind of discriminative nature, who could complain about it? Obviously both the home states, where such effects could take place and whose citizens are impacted, and international bodies addressing human and minority rights could complain. It is important that not only should the kin-states act in good faith, seeking the consent of the home state before legislating measures having extraterritorial effects, but the home states should as well if it criticises those acts. States cannot undermine expectations created by themselves. In this context, if a state does not criticise earlier legislation by a kin-state whose kin minority lives on its territory, the state should not later criticise domestic acts of another kin-state which has a similar kin minority in that home state.²⁵ Or, if a kin-state has very similar domestic legislation to another kin-state's and their kin minorities live on each other's territory, it seems to be dubious for the first state to be critical towards the second's legislation.²⁶

Conclusion: The Precarious Balance

Although in the previous decade there were so many words on the 'decline of sovereignty', and according to certain authors we are 'over the nation state', the efforts of the kin-states in favour of their kin minorities need clarification. To do this, international legal and security concerns should be reconciled. I am convinced that where international legal justification is in place, security concerns are no longer valid because international legality itself is a decisive factor of security and stability. The precarious balance is set by the following principles to be followed by a kin-state:

- Recognise the primary role to be played by the home state and the international community in minority issues;

²⁵ Romania, having both Slovak and Hungarian minorities, never criticised the Slovak legislation, only the Hungarian.

²⁶ Slovakia and Hungary both have their kin minorities on each other's territory. Slovakia, although it earlier enacted very similar legislation, proved to be very critical toward the Hungarian act.

ROLE FOR THE KIN-STATES?

- Adhere to international human rights mechanisms and procedures of international bodies;
- Favour bilateralism; and
- In case of unilateral legislation, concentrate on culture and avoid extraterritorial effect.