

Towards 'Consociationalism Light'?

The EU's, the Council of Europe's and the High Commissioner on National Minorities' policies regarding the Hungarian Minorities in Romania and Slovakia

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Abstract

This paper concerns how three organisations, namely the Council of Europe, the European Union and the Organisation for Security and Cooperation in Europe (OSCE) including its High Commissioner on National Minorities, have addressed the issue of the Hungarian minorities in Romania and Slovakia. The organisations have issued recommendations to the governments of Hungary, Romania and Slovakia regarding how to treat these sizeable minorities, and paper looks into these recommendations to see what the 'ideal minority policies' of the three organisations have looked like. It is argued that the organisations started from rather different perspectives, but during the 1990s increasingly converged in their views. This was due to a large degree to the process of EU enlargement, which started in 1997. As the EU held relatively little expertise on the question of national minorities, it relied extensively on the positions of the other two organisations. The advent of the Framework Convention for the Protection of National Minorities drafted by the Council of Europe also provided a common standard for the three organisations.

Introduction

The end of the Cold War was followed by an upsurge in the interest in nationalism and especially ethnic conflict. The criss-crossing of ethnic and state boundaries in the old East Bloc led many, particularly Western governments, the EU and NATO, to fear that other countries may end up with the same fate as Yugoslavia. The three million Hungarians living in neighbouring countries, for the most part in Romania and Slovakia, seemed to constitute a potential cause of such conflict. At the same time, there was a renewed interest in ethnic politics and democracy also in the West, largely due to the (re-)emergence of ethnic movements in states such as Canada, Spain and the UK (Kymlicka 2001). Therefore the Hungarian minorities became subject of much interest from Western and pan-European organisations, including the Council of Europe, the EU and the newly created OSCE and its High Commissioner on National Minorities (the HCNM).

I will argue that the attempts of these three organisations, the Council of Europe, the EU and the HCNM, to regulate the issue of the Hungarian minorities in Romania and Slovakia were not created out of the blue, but to a large degree inspired by the theories of ethnic conflict and multiethnic democracies. This paper is based on my research on how the three organisations have reacted to the situation of the Hungarian minorities in Romania and Slovakia. I have

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analysed the various documents from the three organisations addressing the situation of the Hungarian minority in the country. The texts have all been addressed to the governments of the two countries and have criticised or approved actions as well as suggested changes. The period covered starts in 1993 when the office of the High Commissioner was established and Romania's and Slovakia's accession processes to the Council of Europe began. The period ends with Slovakia's and Hungary's entry into the EU in May 2004. It is important to keep in mind that I do not address the reasons of the organisations for arguing what they have argued, but rather look at their arguments themselves. In other words, what is interesting is which kind of argument that is being made, not why it is being made (Skinner 2002: 98). Thus, the interesting issue is whether an organisation recommends a specific policy in its recommendation, not whether the leaders of the organisation actually think that this policy is commendable.

Whereas there have been many attempts to look at the overall policies and discourses on national minorities of these organisations in order to understand their underlying perspectives,² this paper intends to look at the discourse employed in the practice of the organisations regarding the specific case of the Hungarian minorities in Romania and Slovakia. The intention is to provide an understanding into which norms can be extracted from the arguments of the three organisations, and ascertain how these norms are increasingly converging.

In order to do this, I will first briefly outline what I see as the theoretically most important distinction when studying the management of national minority issues, namely the distinction between security and justice approaches. Secondly, the developments of the organisations' recommendations, from differing perspectives to convergence around a loosely defined norm will be outlined. Thirdly, it will be argued that the emerging norm is best understood in terms

² Brusis, M. (2003). "The European Union and Interethnic Power-sharing Arrangements in Accession Countries". *Journal on Ethnopolitics and Minority Issues in Europe* 4 (1); Flynn, G. and Farrell, H. (1999). "Piecing Together the Democratic Peace: The CSCE, Norms, and the "Construction" of Security in Post-Cold War Europe". *International Organization* 53 (3): 505-535; Lerch, M. and Schwellnus, G. (2006). "Normative by Nature? The Role of Coherence in Justifying the EU's External Human Rights Policy". *Journal of European Public Policy* 13 (2): 304-321; Malloy, T. (2005). *National Minority Rights in Europe*. Oxford and New York: Oxford University Press; Sasse, G. (2005). "Securitization or Securing Rights? Exploring the Conceptual Foundations of Policies towards Minorities and Migrants in Europe". *Journal of Common Market Studies* 43 (4): 673-693; Tesser, L. M. (2003). "The Geopolitics of Tolerance: Minority Rights under EU Expansion in East-Central Europe". *East European Politics and Societies* 17: 483-532; Thio, L.-A. (2003). "Developing a "Peace and Security" Approach Towards Minorities' Problems". *International and Comparative Law Quarterly* 52 (1): 115-150..

of (diluted versions of) consociationalism and multiculturalism. Fourthly, I will argue that one best understands the similarities and convergence between the organisations in their recommendations by looking at the organisations' (common) framing of concepts such as national minorities, ethnic conflict and multiethnic democracy. Fifthly, the causes of the convergence around this norm will be discussed. Finally, the findings will be put into the context of other post-Communist minority questions and the developments after EU enlargement. Hence my argument is that this convergence between the policies recommended by the organisations is due to a shared understanding of these fundamental concepts, an understanding which emerged in the late Nineties.

Justice vs. Security

Although the conflicts in ex-Yugoslavia gave impetus to the international concern regarding nationalism, security and conflict-prevention were not the only issue on the agenda of these organisations, as this concern co-existed with a desire to create a just democratic system allowing for the equal participation of everybody. These concerns can be traced in the academic literature and the policies of the organisations, two fields which often have intersected. Following Gwendolyn Sasse, the academic literature on national minorities can be divided into three groups (Sasse 2005: 677-8). Firstly, political scientists concerned with the political and institutional handling of potential ethnic conflicts, including consociationalists such as Arend Lijphart (1990) as well as the critics of this approach (Horowitz 1990a; 1990b; Snyder 2000). Put briefly, consociationalism tries to prevent conflict by making the political elites of the different groups cooperate, so that no group can be excluded. Consociationalism as a political system has four characteristics:

1. All significant ethnic groups participate in the government of the state, what will here be referred to as power-sharing³. In parliamentary systems, this means that the government is always a 'grand coalition' with representatives of the different groups; in presidential systems that the presidency or the higher positions (president, prime minister) are shared.
2. A high degree of autonomy for each group, so that decisions which are not of common inter-ethnic interest are left to the respective groups in the shape of territorial or cultural autonomy, depending on the territorial distribution of the group.

³ Power-sharing has often been used in the sense in which consociationalism is employed here.

3. Proportionality as the basic standard of political representation as well as of public appointments and funding.
4. The possibility for a minority to cast a veto in case its vital interests are threatened (Lijphart 1990: 494-5).

Of these characteristics, the first two are by far the most important. The critics of consociationalism have criticised consociationalism of reifying ethnic groups, and have often argued that establishing depoliticising ethnicity and creating cross-cutting cleavages is preferable (Horowitz 1990b: 471-4; 2002: 22-3; Snyder 2000: 275).

Secondly, political theorists and philosophers concerned with reconciling the existence of ethnic differences with a functioning democracy with respect for individual rights. This normative debate has primarily taken place between proponents of multiculturalism such as Will Kymlicka (2000; 2001) and those critics arguing that it is damaging to the individualistic and egalitarian foundations of liberal democracy (see for instance Barry 2001). The debate has in the context of national minorities often centred on whether national minorities should be granted some kind of self-determination (usually in the shape of autonomy or participation in decision-making), or whether non-discrimination and the right to enjoy the minority culture would suffice (Kymlicka 2004a; Malloy 2005). Thus, multiculturalists have argued for political systems with consociational elements, particularly territorial autonomy, but from a normative rather than security-oriented perspective (Kymlicka 2007). This has been discussed in academic circles as well as during the drafting of international instruments on national minorities and in countries with significant national minorities.

Thirdly, legal scholars concerned with the unclear relationship between the different legal texts on the subject, as well as the legal relationship between universal human rights and group-specific national minority rights. However, I will here focus on the two former aspects which I have defined as justice and security concerns, as the legal concerns are less relevant to the analysis of the policies of the organisations. The degree of contention over national minority policies among academics as well as practitioners demonstrates that there is not a specific standard upon which the organisations could have based their recommendations to the post-Communist states.

The distinction between security and justice perspectives is obviously a simplification, as theorists or actors operating with a security approach will rarely suggest solutions they

consider unjust, and theorists or actors concerned with political justice will practically never suggest solutions they admit will lead to an increased risk of violent conflict. Nevertheless, I will argue that this distinction is important, as it has been used in most of the theoretical literature as well as in much of the literature on the three organisations. Here, a common notion is that the EU and the HCNM have operated with the aim of preventing conflict, whereas the CoE has operated from a normative point of view (Flynn and Farrell 1999; Thio 2003). However, one of the arguments of this paper is that in reality this is less straightforward, when the concrete practice is analysed. It is important to keep in mind that using security-oriented arguments does not necessarily mean arguing against policies beneficial to the minorities, the same way that justice arguments not necessarily have to be pro policies. Rather there has been a large ‘pool’ of different security and justice-oriented theories from which the organisations have been able to pick different arguments. I should mention that there is a rather different view on this, namely that security and justice concerns essentially point in different, often opposite directions (Kymlicka 2004b: 144-6; 2007). This view will be addressed in more detail below.

The Early Nineties: Divergent Positions

The HCNM and the CoE started to address the issue of the Hungarian minorities in Romania and Slovakia in 1993 (the EU only entered the picture with the beginning of the Accession process in 1997). On paper, the two organisations started out from very different perspectives. The CoE had operated for most of the Cold War period with a very ‘republican’ conception of citizenship and rights, rejecting the notion that minorities had a need for special rights and treatment, arguing instead for equal and ‘ethno-blind’ treatment of all citizens of a state (Manas 1995). More fundamentally, it was primarily a justice-oriented organisation that was set up to promote democracy and the rule of law.

However, when national minorities (re-)entered the European agenda, the CoE quickly became an actor within the debate over the rights of national minorities (Thio 2003: 116-7). Nevertheless, the attempt to attach a protocol on minority rights to the European Convention for Human Rights failed. Yet, the CoE Parliamentary continued to see the treatment of national minorities as an important aspect of a state’s conformity with the values of the CoE (Council of Europe 1993a; 1993b). Therefore, the Parliamentary Assembly addressed the situation of the Hungarian minorities in Romania and Slovakia when it processed the

accession of the two states to the organisation. This meant that the two states were the subjects of monitoring reports both before their accession in 1993, and again about four years later when their compliance with CoE norms was assessed. Later, following the introduction of the Framework Convention on the Protection of National Minorities (FCNM), the Advisory Committee on the FCNM would be the CoE institution monitoring the treatment of the Hungarian minorities in Romania and Slovakia.

The HCNM, on the other hand, was set up by the OSCE member states in 1992 in order to prevent ethnic conflict involving national minorities and was explicitly named High Commissioner *on, not for*, National Minorities, i.e. his task was to resolve and handle national minority issues, not to protect national minorities (Kemp 2001). Accordingly, his mandate was clearly oriented towards security rather than justice, and the creation of this position can be seen as a reframing of national minorities from a human rights issue (and hence a justice issue) to a security issue (Flynn and Farrell 1999: 526-8). However, the OSCE, including the HCNM, operated with a far-reaching conception of security, including human rights and democracy among the subjects which should be protected. This conception, I will argue, is also evident in the recommendations of the HCNM.

Turning to the reactions to the treatment of the Hungarian minorities by the Romanian and Slovak states, significant differences existed between the two organisations from the beginning in 1993 up until the late Nineties. Whereas the CoE's approach was more justice-oriented than the HCNM's, it also (unlike the HCNM) addressed more immediate security concerns such as the 1990 violence in Târgu Mures in Transylvania and the following imprisonments of Romanian Hungarian individuals⁴ (Council of Europe 1993c).

The HCNM, on the other hand, adopted an approach focused more on long-term conflict prevention. This included removing causes of contention, especially by 'de-securitising' and 'de-politicising' ethnicity and by encouraging dialogue. Nonetheless, I will argue that implicit in the HCNM's conceptualisation of conflict prevention have been several notions of a more justice-oriented kind. This includes first and foremost the notion that the minorities, or rather

⁴ The clashes between Romanian citizens of Hungarian and Romanian ethnicity and between the former and Romanian security forces took place in the Transylvanian town of Târgu Mures in March 1990 and resulted in the death of between three and ten people. The course of events and the subsequent prison sentences given to ethnic Hungarians who were held responsible have been much contested, and therefore it will take too long to go into details here.

their representatives, should have a say in decisions affecting them. This notion can be made from a security perspective (it is the best way to prevent separatism and minority alienation from the political system) and a justice perspective (the minority, as a group different from the majority, deserves special authority over issues that affect it as a minority).

On a related note, the HCMN also advocated granting the members of the Hungarian minorities the possibilities for reproducing their culture(s), especially via Hungarian language education. This can be seen in his argument that the Romanian and Slovak governments had the duty to ensure education in Hungarian by ensuring that an adequate number of Hungarian-language teachers were educated and that there was enough teaching material, and that teaching material also reflected the perspective of national minorities (van der Stoel 1995b; 1995a; 1996). It can also be seen in his argument that the Meciar government should support as well cultural events as periodicals of the Slovak Hungarian minority (van der Stoel 1995b). This is interesting, as the HCNM did not argue for them with reference to security, but rather with reference to justice and the governments' commitments to international standards, although it is easy to imagine how he could have used security arguments. For instance he could have argued that educating Hungarian-language teachers in Slovakia prevented both resentment of the Hungarian minorities and the 'import' of teachers from Hungary who might have been more nationalistic and less attuned to the Slovak context.

Interestingly, this indicates how intertwined security and justice objectives can be and have been in the case of the HCNM; in his letters to the governments of the two states as well as in his public statements, he emphasised that the best way to prevent ethnic conflict was to create a just society for everybody. His vision of a just society is one in which the national minority culture could be expressed, in which any disadvantages stemming from being a minority member have been removed, and in which the minorities have a say in all decisions affecting minority life and culture. The latter did not necessarily amount to a place in government (which was not recommended until the late Nineties when Hungarian minority parties actually gained this place), but rather meant an important role for the councils of national minorities existing in both countries (van der Stoel 1993; 1995b). The former two goals (expression of culture and removal of disadvantages) would be achieved by an extensive set of minority rights, although it is of course contested what exactly constitutes an ethnically-based disadvantage. If we return to the normative debate concerning minority rights discussed above these two latter goals were relatively uncontroversial, whereas the former amounted to a

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recommendation of a (very limited) kind of self-government⁵, an issue that I will return to below.

One reason for the differences between the CoE and the HCNM was that in the early- and mid- Nineties no established standard set of norms for minority rights existed. In the OSCE context the Copenhagen Document (OSCE 1990) existed, and the CoE made, as mentioned above, a failed attempt to establish a minority rights protocol to the European Convention on Human Rights. Yet the Copenhagen Declaration was rather vaguely worded, and the CoE member states' failure to agree on the minority rights protocol to the European Convention on Human Rights meant that only the CoE Parliamentary Assembly would promote this goal (as Recommendation 1201). Hence, the HCNM and the CoE Parliamentary Assembly would draw on the national minority protection documents from their respective organisations, with the HCNM using primarily the OSCE Copenhagen Declaration to support his arguments, and the CoE Parliamentary Assembly primarily Recommendation 1201.

Post-1995: A Growing Convergence

With the introduction of the 1995 CoE Framework Convention on the Protection of National Minorities, which most European states (including Romania and Slovakia) ratified in the following years, a new standard emerged. Not only was the states' compliance with the standards established in the Framework Convention monitored by the CoE (thus granting it significant power over the states), but it was also recognised and used by both the HCNM and the EU as the definitive international standard on minority protection and rights. The fact that the Convention was a Framework Convention and somewhat loosely worded gave the CoE's Advisory Committee on the FCNM great discretion to interpret its standards and whether states lived up to them.

⁵ Following Rainer Bauböck, the term self-government, rather than internal self-determination, will be used to describe political institutions which allow the members of a minority to collectively shape the future of the minority, i.e. autonomy. See Bauböck, R. (2006). "Autonomy, Power-Sharing and Common Citizenship - Principles for Accommodating National Minorities in Europe". In: *European Integration and the Nationalities Question*, Keating, M. and McGarry, J. (eds.). London: Routledge.

When the CoE issued its first reports on the two states' implementation of the Framework Convention in 2000 and 2001, the HCNM's and the EU's reliance on the document had already led to an increased convergence between the organisations, especially concerning the definition of contested rights. Already in connection with the Stability Pact (also known as the Balladur Plan) in 1994 and 1995, the EU had started to deal with national minority issues. This Pact had brought states with national minorities and kin-states together in order to create bilateral treaties regulating controversial issues, particularly national minorities, and to establish a mutual recognition of borders.

Nonetheless, it was not until the accession process took off in 1997 that the EU started to address the treatment of the Hungarian minorities in Romania and Slovakia directly. In 1997, when the EU published its first cycle of Reports on the applicant countries' progress towards accession, it had clearly adopted a security perspective on the Hungarian minorities. And this security perspective was both more focused on the short-term and based on a traditional notion of security as an inter-state affair than the HCNM's long-term, 'broader' and more normatively influenced perspective. This can be seen in the EU's emphasis on the international aspect of the Hungarian minority issues, and its promotion of the bilateral treaties between Hungary, on the one hand, and Romania and Slovakia, on the other, as the framework for solving the issues (EU Commission 1997a; 1997b). Yet, in the course of the following years, it increasingly adopted positions similar to those of the CoE and the HCNM.

The Hungarian parties' participation in the government of Romania (1996) and Slovakia (1998) was highly welcomed by all three organisations, and meant that the participation of minority parties in government became part of the norm promoted by the three organisations (Brusis 2003). As a consequence there was a strong pressure on all political parties to continue having the Hungarian party involved in governing, even if the government changed and did not necessarily have to rely on the Hungarian party's votes, as it was the case after the Romanian elections in 2000⁶. It can also be seen in the pressure to stay put on the Party of the Hungarian Coalition (SMK) in Slovakia, when in the summer of 2001 it was ready to leave the coalition government due to disagreements particularly concerning amendments to the

⁶ After the 2000 elections in Romania, the winning PDSR party made an agreement with the UDMR (the party representing the Hungarian minority, which was renewed each year. According to this agreement the UDMR would vote for the government on all important issues in return for government support for legislation proposed by the UDMR. The PDSR could also have chosen to cooperate with the nationalist Greater Romania Party, a previous coalition partner, but chose to work with the UDMR.

Slovak constitution (Brusis 2003: 12; Henderson 2002: 54). Together with the notion that the Hungarian minorities should have a say in decisions affecting it, this insistence on inter-ethnic power-sharing amounts to an avocation of what I will refer to as ‘consociationalism light’, a notion that I will turn to next.

Consociationalism ‘Light’

Using the above-mentioned distinction, consociationalism as a theory is primarily a security-oriented approach as it aims at conflict-prevention in ethnically divided societies, in other words, a security-oriented approach. However, I will argue that there are also strong justice-elements, as the objective is not only preventing conflict, but also creating a functioning democracy with equal participation of all ethnic groups. This reveals similarities between consociationalist theory and different theories advocating multiculturalism and multicultural democracy, including Will Kymlicka’s (2007) and his adherents’ concept of liberal multiculturalism (see also Simonsen 2005: for a discussion of similarities and differences between the two theories). As will be discussed below, these similarities are particularly due to common view of the relationship between ethnicity and politics. Furthermore, both approaches argue that each ethnic group should have some kind of self-government, be it for security or normative reasons, and adherents of multiculturalism have argued for consociationalism as a desirable way of achieving this (Malloy 2005). Yet, multiculturalists have generally, unlike the consociationalists, stressed territorial autonomy over power-sharing.

I will argue that these two theoretical approaches have significant affinity with many of the arguments put forward by the three organisations, especially the CoE and the HCNM. Here I particularly think of the notion that each ethnic or national group should have the right to reproduce its own culture (in terms of education, media and cultural events) and have control over this process (through government participation and minority councils). The organisations formulated the claim more diplomatically, and the HCNM also emphasised the importance of integration in society; but nevertheless I will argue that the underlying normative ideals share many notions with multiculturalism and consociationalism⁷. A good example of this is the

⁷ Obviously there have been various differences between the organisations, such as the EU’s emphasis on bilateral treaties and the HCNM’s emphasis on integration and self-definition of identity; but I will argue that these have been of less significance than the overall trend of increasing convergence.

system of multiculturalism suggested by the HCNM for the Romanian-Hungarian-German Babes-Bolyai University in the Transylvanian city of Cluj (van der Stoel 2000). Here he advocated a system of governance for the University, in which each ethnic group would have its own self-governing line of study, and in which the government of the joint ethnic institutions would be shared by an equal number of representatives from each group. Hence, the system proposed looks very much like a kind of ‘consociationalism on university level’, although he chose to brand it ‘multiculturalism’.

Nevertheless, a fully consociational or multicultural system has never been advocated on the state level, and hence I find that it makes more sense to see the underlying ideals as consociationalism ‘light’. This is especially, so since the organisations have deliberately chosen not to endorse the many calls for autonomy from the Hungarian parties in the two countries, but rather discouraged them. Therefore, the norm advocated by the organisations is better described as consociationalism ‘light’ than multiculturalism ‘light’, as the former stresses power-sharing over territorial autonomy (as did the organisations), whereas the latter stresses territorial autonomy over power-sharing. Additionally, granting Hungarian the status of official language was not recommended, although this would have been in line with multiculturalism, and a lot less controversial than territorial autonomy. It is important to note, that power-sharing was never defined as something which should be institutionalised as a right, but merely as something which was commendable.

Therefore, consociationalism light as a norm seems to consist of two elements: a universal set of rights entrenched in the FCNM, and a more contextual endorsement of power-sharing. The latter element not only reveals that the organisations (particularly the EU) preferred power-sharing as a solution in the given context of Romania and Slovakia, but also gives us an idea about the more general understandings of normative and factual issues held by the organisations. The relevance of these ideals in other contexts will be explored further below. Here it suffices to say that when the change in context (the inclusion of Hungarian minority parties in government) allowed the organisations to support power-sharing, they took advantage of the opportunity. And this reveals a lot about the norms held by the organisations. Regarding these norms, the distinction between justice and security has mattered less than one would have thought based on the theoretical literature. This is partly because it often has been hard to tell whether an organisation has been arguing from a justice or security perspective, and partly because no matter whether it argued from one or the other perspective, the

recommendations have been more or less similar from the late Nineties and onwards. The irrelevance of the distinction between justice and security to some degree undermines the criticism of the organisations for prioritising security over justice, as Will Kymlicka has done (Kymlicka 2004b: 144-6; 2007). Rather, security and justice were tightly knitted together for the three organisations, as also the OSCE's concept of comprehensive security indicates (Buchsbaum 2002). This does not mean that Kymlicka is wrong in his substantive criticism of the policies of the organisations, rather that the shortcomings of these policies are not due to a prioritising of security concerns over justice in the organisations.

Rather, the two merged in the vision promoted by the organisations. That is, a system in which the representatives of the Hungarian minorities are guaranteed participation in government and a say in decisions affecting them as minorities; especially the decisions concerning the Hungarian culture. My argument is that this is due to the premises (understood as the interpretation of contested concepts such as national minority and political participation) which the organisations share with these multicultural theories as well as with consociationalism. These premises are the subject I will turn to next.

The Foundations of an Ideal

I will argue that the reason why the discourses of the organisations look so similar, irrespectively of whether they operate from a security-perspective or a justice-perspective, is that it is their fundamental understanding of the Hungarian minorities and their role in society which shapes the discourses. And these remain more or less unchanged irrespectively of whether security or a just society is the objective. Starting from the most basic conception, the Hungarian minorities are conceptualised as unitary, monolithic entities⁸, defined by their ethnicity, and with all internal divisions (class, gender, religion, political orientation) not taken into account. This is even more pronounced when it comes to the framing of the participation of ethnic Hungarians in the political life of the two countries, which has almost solely been framed in terms of being one entity with a specific set of representatives. This is

⁸ The HCNM has more often than the other organisations framed the Hungarian minorities as something to which individuals belong rather than unitary entities in themselves. Nonetheless, when it comes to political participation, he has almost solely framed it as a unitary entity.

done by referring to the Hungarian parties as “the representatives of the Hungarian minority” or “the party of the Hungarian minority” as all three institutions have often done. This framing excludes not only the possibility of depoliticising the Hungarian minority, but also seeing the ethnic Hungarians as part of a wider civic community encompassing all Romanian or Slovak citizens.

This frame also does not allow for politicising, or merely taking into account the differences existing within the Hungarian minorities in Romania and Slovakia, or seeing an individual’s identity as ethnic Hungarian as being one identity among many, such as class or religious identity. In Romania different, various Hungarian identities exist, first and foremost the Szekely, the Csango, whose relation with Hungarian minority is much disputed⁹, and finally those Hungarians in Romania, who see themselves as Hungarians without having any other significant ethnic (sub-) identities. Furthermore, there is also the political division within the Democratic Alliance of Hungarians in Romania between the more compromise-seeking and the more hardline wings of the party, especially over the issue of autonomy which in 2004 led the hardliners to form their own party. In Slovakia, important sub-group identities do not exist, but there are and have been political cleavages within the minority, which resulted in three Hungarian parties with different political positions until a new election law in 1997 made them merge.

The argument is not that the political participation of Hungarian minorities necessarily should have been framed in a different way, but to demonstrate that this framing can tell us about how political participation of ethnic minorities was perceived in the three organisations. And that this perception is similar to how consociationalism sees it: political participation happens via the interaction of ethnic elites, and there is, at least in the case of minorities, one specific ethnic point of view and one specific set of interests.

Thus, the ideal envisioned by the three organisations (or rather envisioned by the HCMN and the CoE and adopted by the EU) seems to be a society in which the various ethnic groups participate in the social and political life as homogenous and equal. The political participation of individuals is seen as primarily taking place via their ethnicity. Yet there are limits to have

⁹ Interestingly, the CoE and the EU, which are the only organisations addressing the issue of the Csango, have framed it as a minority distinct from the Hungarian minority. Nevertheless the result is the same: the Hungarian minority is framed as being clearly delimited.

fixed this participation should be, as the HCNM and the EU in 1998 strongly opposed the proposed Slovak Law on Local Elections which would have fixed political participation on the local level completely along ethnic lines (EU Commission 1998; van der Stoep 1998). Furthermore, as mentioned above, neither territorial autonomy nor official language status were advocated by the three organisations.

Causes: the Framework Convention and the EU as a Catalyst

One factor which played a crucial role in the convergence between the organisations was the emergence of the 1995 CoE Framework Convention on the Protection of National Minorities as a standard for national minority protection which most European states (including Romania and Slovakia) ratified in the following years. Not only was the states' compliance with the standards established in the Framework Convention monitored by the CoE (thus granting it significant power over the states), but it was also recognised and used by both the HCNM and the EU as the definitive international standard on minority protection and rights. The fact that the Convention was a Framework Convention and somewhat loosely worded gave the CoE's Advisory Committee on the FCNM great discretion to interpret its standards and whether states lived up to them. In fact, it was the Advisory Committee's reports on state compliance with the FCNM, issued 1999-2001, which were picked up by the EU and which granted the FCNM its importance (Council of Europe 2000; 2001).

When the CoE issued its first reports on the two states' implementation of the Framework Convention in 2000 and 2001, the HCNM's and the EU's reliance on the document had already led to an increased convergence between the organisations, especially concerning the definition of contested rights. As Antje Wiener (2004) has argued, international norms are defined in the practice of international actors rather than being constant and clear, and the interpretation of the FCNM by the Advisory Committee is a case of the interpretation of vaguely defined norms in practice. Yet, the FCNM stops short of advocating power-sharing. Hence, although I will argue that the establishment of the FCNM created a basis for cooperation between the organisations and explains the more basic parts of the shared norms, it cannot explain the emphasis on power-sharing.

The convergence between the organisations was also due to other factors than the emergence of the FCNM. First and foremost the growing cooperation between the organisations, which had started to hold increasingly frequent meetings from the late Nineties and on, especially in the context of EU enlargement. In the beginning of the accession process, the EU had little experience with national minority policies and therefore asked the HCNM and the CoE to provide input for the assessments of the states' policies (Interview with former employee in the Romania Desk of DG Enlargement 2005). Thus, over time, meetings twice a year with the HCNM and CoE minority experts influenced the outlook of the EU.

Secondly, I will argue that also the relations of power between the organisations have mattered. These, I will argue, are best understood as a kind of exchange between the organisations. The Council of Europe and the High Commissioner had moral authority stemming from being seen as not having any self-interest and being guardians of international norms, as well as expertise authority stemming from being recognised as experts on the field.¹⁰ These kinds of authority meant that they had the symbolic power (in the Bourdieuan sense) to define the norms for treatment of national minorities and the measuring of Romania's and Slovakia's Hungarian minority policies according to these norms (Thio 2003: 129-30). However, I will argue that this power would be worth very little if the EU had not recognised their authority and used their definition of the norms and their assessments of the states. This way the Council of Europe and the High Commissioner obtained increased leverage over the states, as they could point to the EU's adoption of their assessments and argue that if the Romanian or Slovak governments did not follow their recommendations, their chances of EU membership would be diminished. On the other hand, the EU lacked both the expertise and the moral authority (as it was not seen as a disinterested party) to define the norms and assess the compliance with them. Thus it also needed the Council of Europe and the High Commissioner in order to exercise its leverage fully over the Romanian and Slovak governments.

This explains why, as Judith Kelley (2004a; 2004b) has pointed out, the recommendations of the CoE and the HCNM did not demonstrate more important effects until after beginning of the EU accession process. Yet whereas Kelley just sees this as a proof that the HCNM and the CoE do not have much power (as they have not affected the minority policies of the

¹⁰ Barnett, M. and Finnemore, M. (2004). *Rules for the World – International Organizations in Global Politics*. London: Cornell University Press..

Romanian and Slovak governments), I will argue that these organisations have mattered as they have shaped as well as made the EU's policy possible. Thus they have had an effect on the Hungarian minority policies of Romania and Slovakia, although an effect which required the existence of EU conditionality. In this way, EU enlargement played the role of catalyst not only for a number of concrete changes in Romania and Slovakia, but also in the establishment of a consensus among the EU, the CoE and the HCNM. It is unlikely that the CoE and the HCNM would have worked so closely together had they not been brought together by the EU.

A third additional factor in the growing convergence between the organisations, which had little to do with the Framework Convention on the Protection of National Minorities but which says a lot about an increasingly shared understanding of how minority issues should be handled was the issue of minority participation in government. The Hungarian parties' participation in the governments of Romania (1996) and Slovakia (1998) were as mentioned highly welcomed by all the EU and resulted in the participation of minority parties in government becoming part of the ideal of the three organisations (Brusis 2003). This meant that there was a strong pressure on all political parties to continue having the Hungarian party involved in governing, even if the government changed and did not necessarily have to rely on the Hungarian party's votes, as it was the case after the Romanian elections in 2000¹¹. Whereas the previously mentioned causal factors are best understood as 'top-down' as they emerged on the level of the European organisations and influenced the situation in Romania and Slovakia, this causal factor has been 'bottom-up', in that developments in Romania and Slovakia influenced the ideals held by the European organisations.

A Wider Perspective: Other Countries and Post-Enlargement Developments

The cases of the Hungarian minorities in Romania and Slovakia provided a lens with which to look into the norms promoted by the three organisations. The question is, to which degree are these findings valid for other cases? As the policies of the three organisations to a large degree were context-dependent, and that the context differed significantly on several dimensions, it can be difficult to compare. Many other countries with significant national

¹¹ After the 2000 elections in Romania, the winning PDSR party made an agreement with the UDMR (the party representing the Hungarian minority, which was renewed each year. According to this agreement, the UDMR would vote for the government on all important issues in return for government support for legislation proposed by the UDMR. The PDSR could also have chosen to cooperate with the nationalist Greater Romania Party, a previous coalition partner, but chose to work with the UDMR.

minorities differed on one or more variables, such as ethnic war (Macedonia, Kosovo, Bosnia among others) or the presence of a powerful neighbour (the Baltics).

If we look at the most similar case, namely Bulgaria, a somewhat similar picture appears. In the case of Bulgaria, the EU has also increasingly relied on the FCNM and the FCNM Advisory Committee in order to define what the ideal minority policy should look like in practice (Rechel 2008: 174-7). The EU has also reacted positively to the participation of the Movement for Rights and Freedoms, a party representing the sizeable Turkish minority¹² in government, which indicates an emphasis on power-sharing (Brusis 2003). Unlike the cases of Romania and Slovakia, the HCNM did not issue any recommendations on the situation of minorities in Bulgaria, and this makes direct comparison hard to establish.

When it comes to the West Balkans, there has, according to Pieter van Houten and Stefan Wolff (2008), been a general pattern in the organisations' responses to the situations in the various countries. Yet in the case of the West Balkans, the organisations have not converged to the same degree as in the cases of Romania and Slovakia. All three organisations have promoted (individual) national minority rights, often in the shape of the FCNM (Van Houten and Wolff 2008: 25-7). However, whereas the CoE has stuck to this rather cautious position, the HCNM and the EU have promoted power-sharing, and in the case of Bosnia, the EU have done so more actively than the HCNM. With the exception of Bosnia and the Dayton agreement, the organisations have made an effort to avoid territorial solutions and only accepted such solutions when they seemed unavoidable (Kosovo). The Dayton agreement was written in 1995 with the involvement of the US, and it is possible to argue that the organisations have since (among others from the experience from post-war Bosnia) 'learned' that territorial solutions were counterproductive.

Altogether, I will argue that, at least from a cursory overview, the way in which the organisations have acted in regard to the Hungarian minorities in Romania and Slovakia fits into a broader pattern. The FCNM constituted the basic level of minority protection advocated by the organisations, but whenever the situation allowed it, the organisations, especially the EU but also the HCNM, would push for power-sharing.

¹² As the Bulgarian constitution forbids ethnically-based parties, the Movement for Rights and Freedoms, does not officially represent any ethnic group or minority, but is nevertheless recognised as a de facto Turkish minority party.

Conclusion

My argument is that although differences have existed between the organisations, they have framed minorities and their role in society in a similar way, a frame which has informed their treatment of the Hungarian minority issue. This led them to suggest minority policies which are best understood in terms of consociationalism 'light'. The shared understanding seems to have emerged in the late Nineties, to a certain degree due to the introduction of the Framework Convention, but also the frequent meetings, exchange of power, and interaction between actors from the three organisations have played a role. Due to this shared understanding, the organisations would suggest similar solutions and work towards the same goal, irrespective of whether they were arguing the issue from a security or justice perspective.

Consociationalism light entailed a large degree of power-sharing based on notions of ethnic groups as unitary entities, but at the same time clearly avoided endorsing calls for territorial autonomy. Although the organisations did not outright recommend institutionalisation of power-sharing, it can be argued that such an institutionalisation is taking place in Romania, where the UDMR still forms part of the government, whereas in Slovakia the SMK was not included in the government formed after the 2006 elections.

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Minority participation in public life: the case of Greece

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Abstract

This article examines Greece's stance towards minorities in the light of the recent UN Report of the Independent Expert on Minority Issues regarding her mission to Greece. The epicentre of the paper is the jurisprudence of the European Court of Human Rights in minority cases against Greece in which minority participation in public life and Article 11 of the European Convention on Human Rights are involved. The article concludes by supporting the idea of the necessity for a change of the current position maintained by Greece as regards the Macedonian and Turkish minorities living in Greece.

1. Introduction

On 18 February 2009 Gay McDougall, the UN Independent Expert on minority issues, submitted to the Human Rights Council her Report regarding her mission to Greece.¹ In the Report's 'Conclusions and Recommendations' section, she found that Greece's interpretation of the term 'minorities' was too restrictive to meet current standards and that the government should retreat from the dispute over whether there is a Macedonian minority or a Turkish minority and place its full focus on protecting the rights to self-identification, freedom of expression and freedom of association of those communities. She also called upon Greece to comply with relevant judgments of the European Court of Human Rights (hereinafter, 'ECtHR' or 'Court') and afford the requisite standard of protection to minorities pursuant to international law.²

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¹ UN Human Rights Council, *Report of the Independent Expert on Minority Issues, Gay McDougall: addendum: mission to Greece (8-16 September 2008)*, 18 February 2009. A/HRC/10/11/Add.3., www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.11.Add.3.pdf, (10 July 2009).

² *Ibid.*, paras. 81 and 90.

The aim of the current paper is to examine the political participation of these two minorities in Greece. For the purposes of this paper ‘political participation’ is understood in a broad manner, encompassing participation in the common domains of public life through the medium of associations and political parties. A central point of reference is the jurisprudence of the ECtHR which emanates directly from this geographical and conceptual framework. The paper does not intend to discuss all aspects of the minority issue within the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but will try to sketch out the contemporary issues surrounding it, with a particular focus on Greece. Setting matters in historical perspective assists the examination of Greece’s stance.

Starting from the interwar period I will take a ‘snapshot’ of the League of Nations’ minority protection arrangements and describe its main features and Greece’s position within it. This will be followed by a brief presentation and commentary on three judgments of the ECtHR which cover a ten year time-span, from 1998 to 2008. The discussion will centre on Articles 11 (freedom of assembly and association) and 14 (prohibition of discrimination). It is these two Articles which contain the two main features of interest: the freedom of association as a “political” right and the prohibition of discrimination on the grounds of association with a national minority.

The last part of this paper will lend support to the idea that there are interpretative tools available to the ECtHR to tackle minority issues. Against this backdrop, I will argue that Greece’s current perception for and stance towards minorities is no longer sustainable for a series of legal and political reasons and that a radical change in its policies is needed.

2. The heritage of the League of Nations

Greece's attitude towards minorities has closely followed that of the international (legal and political) community: a highly changeable amount of attention being spent on this thorny issue. Notwithstanding the high homogeneity of its population, the Greek State has since its independence in 1830 dealt, in different historical periods, with minorities living within its borders. Minorities were, and continue to be, perceived by the State as a problem by definition. This is quite understandable in light of the various political turbulences, border resetting and irredentism in the Balkan Peninsula for most part of the 20th century.

An institutionalized system of minorities' protection was meticulously set up within the League of Nations. The system imposed in a unilateral fashion obligations on the defeated, with the exemption of Germany. This system bore some interesting characteristics: it consisted of several types of instruments; there were provisions which contained the most far-reaching measures concerning obligations of the States in relation to educational and cultural affairs; provisions that were addressed to all inhabitants of the State; other provisions that were aimed at some individuals in particular, such as, 'nationals' who belonged to racial, religious, or linguistic minorities; provisions relating to the Jewish community as a whole; and, provisions conferring rights upon specific minority organizations.³

Greece had the peculiarity of being on the winners' side, but due to its subsequent conflict with Turkey, in the aftermath of World War I, it found itself on the same side with states upon which obligations towards minorities were imposed. Added to the Treaty of Sèvres of 1920, it was also part of the Treaty of Lausanne of 1923. The

³Meijknecht, A. (2001). *Towards international personality: the position of minorities and indigenous peoples in international law*. Antwerp, Intersentia., pp. 123-128.

two treaties regulated, *inter alia*, the protection of the Muslim and non-Muslim minorities remaining in their respective territories.⁴

The League's overall system of minorities' protection did not prove to be viable for several reasons. One of the most prominent ones was the revisionist stance of states which had assumed obligations *vis-à-vis* minorities who felt that the system was overly onerous for them. By 1934 the concerted dispute of the system by these states had brought the system to its limits, after it had been politically manipulated by them.⁵ Greece's concerns and fears, exacerbated by the overwhelming number of complaints lodged against it by minority groups, led Greece to assess the system as detrimental to its national interests and joined Germany, Poland, Romania, Czechoslovakia and Yugoslavia in disputing it. It is my hypothesis, to which I will turn to later in this paper, that along with the political developments in the subsequent years, Greece's negative experience with the League's system is still casting a heavy shadow on its perceptions regarding minority issues. In other words, Greece's current stance on minority issues is prefigured by the political choices made during the interwar period.

What then remains of the League of Nations? Only two international instruments which fit rather awkwardly in today's world: the Treaty of Lausanne and Finland's statement for the Åland Islands.⁶ The former has become a *mantra* for the official position of Greece in relation to its obligations towards the Muslim minority of western Thrace. It constitutes the foundation of an extremely formalistic argument for the non-recognition of other minorities. For Greece, the existence of minorities is contingent upon their recognition

⁴ Divane, L. (1995). Hellada kai meionotetes: to systema diethnous prostasias tes koinonias ton ethnon. Athena, Nephelē., p. 63.

⁵Tsitselikes, K. and D. Christopoulos (1997). To meionotiko phainomeno sten Hellada: mia symvole ton koinonikon epistemou. Athena, Ekdoseis Kritike., p. 194. Divane, *supra* note 4, p. 48.

⁶ Study of the legal validity of the undertakings concerning minorities, UN DOC E/CN.4/367. <http://documents-ddsny.un.org/doc/UNDOC/GEN/GL9/006/98/pdf/GL900698.pdf?OpenElement>, (17 July 2009).

through treaty law, which effectively means that the only minority recognized in Greece is the Muslim one. This point is closely related to the consistent denial of Greek courts to accept the use of the word “Turkish” and its derivatives for the determination of the character of certain members of the Muslim minority and also for banning the use of the word “Macedonian” since this bears an ethnic connotation related to the claims made by the Former Yugoslavian Republic of Macedonia.

This, in turn, brings me to the discussion of three relevant judgments of the European Court of Human Rights. Their connecting factor is that they expose to judicial scrutiny the Greek stance towards these two minorities. This exposure has been achieved through complaints lodged under Article 11 of the European Convention on Human Rights (ECHR), which provides for the right to peaceful assembly and association with others (subject to its notorious triple test of its second paragraph).

3. ECtHR Case law

In *Sidiropoulos v Greece*⁷ the applicants lodged an application under Articles 6, 9, 10, 11 and 14 against Greece based on its refusal to allow the registration of a non-profit association named “Home of Macedonian Civilisation”, whose object was the cultural development of the inhabitants of the region. Greek courts had justified the refusal on the basis that the purpose of the use of the term “Macedonian” was to dispute the Greek identity of Macedonia and its inhabitants and from which they inferred an intention on the part of the organisation’s founders to undermine Greece’s territorial integrity.⁸ The ECtHR examined the alleged violation of Article 11 and found a violation. It rejected Greece’s submissions, and concluded that:

“Territorial integrity, national security and public order were not threatened by the activities of an association whose aim was to promote a region’s culture, even supposing that it also aimed partly to promote the culture of a minority; the existence

⁷ *Sidiropoulos and Others v. Greece*, 10 July 1998, ECHR, (no. 57/1997/841/1047).

⁸ *Ibid.*, par. 11.

of minorities and different cultures in a country was a historical fact that a “democratic society” had to tolerate and even protect and support according to the principles of international law.”⁹

An aspect of the judgment which often escapes attention is the Court’s passing reference to the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November 1990 which allow the formation of associations aiming to protect cultural and spiritual heritage. The Court usually refrains from taking into consideration other international instruments when called to decide upon an alleged violation. In light of this, it is somewhat odd that it chose to refer to ‘soft law’ instruments, adopted outside the framework of the Council of Europe to enhance its judgment.

*Ouranio Toxo v Greece*¹⁰ was another judgment handed down by the Court which also related to the Macedonian minority. The case was brought before the Court by a political party which took part in elections with the declared aim to defend the Macedonian minority residing in Greece.¹¹ Its headquarters were ransacked by the town’s inhabitants following the affixture of a sign which bore the name of the party in Greek and Macedonian languages. The central complaint under Article 11 was that the acts directed against the party, the participation of the clergy and municipal authorities in the said acts and the inactivity of the police to stop the ransacking constituted interference with the freedom of association. Additional allegations under Articles 6, 8, 10 and 14 were also included. The Court, in finding a violation of Article 11, reiterated the abovementioned passage in *Sidiropoulos* and added:

“The emergence of tensions is one of the unavoidable consequences of pluralism, that is to say the free discussion of all political ideas. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing political groups tolerate each other [...]

⁹ *Ibid.*, par. 41.

¹⁰ *Ouranio Toxo and others v. Greece*, 20 October 2005, ECHR, (Appl. no. 74989/01).

¹¹ The party took part in the elections for the European parliament of 1999 and 2004. It received 0,08 per cent and 0,10 per cent of the ballots. www.ypes.gr/ekloges/content/gr/europ_fr.htm, (18 July 2009).

The Court considers that the role of State authorities is to defend and promote the values inherent in a democratic system, such as pluralism, tolerance and social cohesion. In the present case, it would have been more in keeping with those values for the local authorities to advocate a conciliatory stance, rather than to stir up confrontational attitudes.»¹²

The acknowledgment of the Court that amongst the aims of the party is the defence of the Macedonian minority living in Greece is cryptic.¹³ This statement lends itself to divergent interpretations since it can be construed as an implicit recognition of collective rights. The categorical acceptance as to the existence of a Macedonian minority in conjunction with its representation by the political party seems to offer a strong argument towards this direction.

The third and more recent judgment is the case of *Tourkiki Enosi Xanthis and others v Greece*.¹⁴ The applicants lodged an application under Articles 6, 9, 10, 11 and 14 of the ECHR following the dissolution by court decision of the association, the Turkish Union of Xanthi. The national court had held that because the use of the adjective “Turkish” was contrary to public order, the association was to be dissolved. The sole minority recognised by the Greek State in the region is the Muslim one. The Court considered Art. 11 as *lex specialis* to Art. 9 and 10 and found:

« La Cour estime qu’il ne lui appartient pas d’évaluer le poids accordé par l’Etat défendeur aux questions relatives à la minorité musulmane en Thrace occidentale. Elle ne considère pas pour autant que seuls le titre et l’emploi du terme « turc » dans les statuts de la première requérante suffisaient, dans le cas d’espèce, pour conclure à la dangerosité de l’association pour l’ordre public. [...] En effet, la Cour estime que, à supposer même que le véritable et unique but de l’association était de promouvoir l’idée qu’il existe en Grèce une minorité ethnique, ceci ne saurait passer pour constituer à lui seul une menace pour une société démocratique ; cela est d’autant plus vrai que rien dans les statuts de l’association n’indiquait que ses membres prônaient le recours à la violence ou à des moyens antidémocratiques ou anticonstitutionnels.»¹⁵

3.1. Article 11 - Guarantee of political participation

Article 11 of the ECHR is central to the analysis and discussion of these three judgments. It constitutes the cornerstone of every

¹² Paras. 40 and 42 of the judgment.

¹³ *Ibid.*, par. 41.

¹⁴ *Affaire Tourkiki Enosi Xanthis et autres c. Grèce*, 27 March 2008, ECHR, (*Requête n° 26698/05*).

¹⁵ *Ibid.*, paras. 51 and 53 of the judgment.

democratic society and thus its importance can hardly be overstated.¹⁶ Greece's persistent stance of refusing to register associations or failure to afford the necessary protection to political parties strikes at the heart of democratic values. At the same time it constitutes a violation of the right to self-identification for the members of such minorities. It deprives them of access to public life in a manner and under an identity that they themselves could have chosen. More importantly it dictates the conditions of self-perception to the individual members and their collective unions. For the Turkish minority, only its religious aspect is accepted to figure in the public domain, whereas the right to collective identification as 'Turkish' is banned. At a more extreme level, the existence of a Macedonian minority is denied altogether.

The two minorities find themselves in a disadvantageous position. State interference with their associations and parties is equivalent to negating the minorities' actual identity and existence.¹⁷ Minorities are thus deprived of their access, as collective entities, to the public common domain. Greece aligns itself with the position that it is for the states to determine in the first place whether a minority exists.¹⁸ However, this position cannot be accepted since it leads to the absurdity of denying the individual right to self-determination and publicly manifest this identity in collectiveness with others.

Article 11 can serve as a vehicle to advance the idea of collective rights of groups. For Article 11 to provide the full range of its capacity as a guarantor of political liberties, a shift in its interpretation from the ECtHR is needed. It is unduly legalistic to rely on the external form of the association as a legal entity and not acknowledge that its existence is not an end itself but it is the means for the promotion of various aims which are vital for a minority. The

¹⁶Hillgruber, C. and M. Jestaedt (1994). The European Convention on Human Rights and the protection of national minorities, Verlag Wissenschaft und Politik., p. 47.

¹⁷Thio, L.-a. (2005). Managing Babel: the international legal protection of minorities in the twentieth century. Leiden; Boston, Martinus Nijhoff Publishers., p. 7.

¹⁸Weller, M. (2005). The rights of minorities in Europe: a commentary on the European Framework Convention for the Protection of National Minorities. Oxford; New York, Oxford University Press., p. 633.

primary aim of the ECHR is the protection of the individual, but certain articles cannot be understood solely as a summation of individual rights. The context of group activities and wills is needed for the rights to be practical, effective and meaningful.¹⁹ Article 11 bears a double genre/identity which is amenable for invocation by both individuals and groups. The crux of this idea is the existence of a continuum of rights. An individual right to create an association with others loses its individuality the moment the will and purpose of the individuals is expressed. It is thus transformed into a right borne by a further bearer: the association itself, and in the context of this paper a minority group. This is a view which is not endorsed by the ECtHR's jurisprudence and scholars, as the following section on Article 14 illustrates.

3.2. Rusty and unused: Article 14

Although in the aforementioned cases the applicants advanced explicit arguments as to the minority contours of their rights, the Strasbourg Court refrained in all three cases to examine the alleged violation of Article 14 which prohibits discrimination on the basis of association with a national minority in the enjoyment of *Convention* rights. Critics of this approach advance the idea that the main feature of the Court's related jurisprudence remains insensitive to minority rights,²⁰ whereas others have argued that "it would be an exaggeration to state that the supervisory mechanism of the convention is completely insensitive to the minority issue."²¹

Article 14 included the only reference in the ECHR architecture to minority rights until 2005, when Protocol 12 to the

¹⁹ Hadden, T. (2000). "The pendulum theory of individual, communal and minority rights." 3:1 *Critical Review of International Social and Political Philosophy*, p. 78.

²⁰ Scheinin, M. (2003). Minority rights: additional rights or added protection. Human rights and criminal justice for the downtrodden : essays in honour of Asbjørn Eide M. Bergsmo. Leiden, M. Nijhoff., p. 498.

²¹ Henrard, K. (2000). Devising an adequate system of minority protection: individual human rights, minority rights, and the right to self-determination. The Hague; Boston, M. Nijhoff., p. 85.

ECHR came into force.²² The Court's circumspect approach may well be attributed to its lack of willingness to engage in a matter which may potentially have political repercussions. From a legal point of view, one has to be mindful that the ECHR was not promulgated with a view to tackling minority issues. At the time of its drafting the international community had elbowed aside any public discourse on minorities. Indeed, the lack of international consensus even on its basic understandings of minorities, as well as the superseding of nationalistic antagonisms by the East-West divide, rendered the question not topical. Instead, the focus had shifted to the protection of individual rights. Against this backdrop, Article 14's application until today appears as a missed opportunity: since it had been the only instance where 'minority' appeared in the text of the Convention, it ought to have been understood and applied in such a manner as to promote actively the protection of minority rights.

A free-standing non-discrimination clause was introduced by Protocol 12 stipulating: "The enjoyment of any right set forth by *law* shall be secured without discrimination on any ground such as [...] association with a national minority [...]". However, it is still too early to draw any conclusions as to the Protocol's impact on the complexion of the ECHR, all the more so for minority protection, due to its recent entry into force and the limited number of countries that have ratified it. What way ahead then?

4. Back to the future: a method of interpretation from the past

It is submitted that a two-prong approach to minorities' issues is more plausible. On the one hand it must be recognized that the ECHR has its limits:

"[...] the current set of individual human rights enshrined in the ECHR and the concomitant interpretation of these rights is generally not far reaching to address

²² ETS 177 – Convention for the Protection of Human Rights (Protocol No. 12), 4.XI.2000, entered into force on 1 April 2005. www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=177&CM=8&DF=3/19/2009&CL=ENG, (19 July 2009).

(appropriately) the needs and wishes of minorities regarding the protection and promotion of their separate identity.”²³

This is not to suggest that these limits have been reached – on the contrary, the Court has been able to read the ECHR rights in the light of current developments. It regards it as a ‘living instrument’ and also adopts a dynamic interpretation of the rights therein.²⁴ It is submitted that the Court can still accommodate the claims of minorities using these two interpretative tools.

On the other hand, the ECtHR cannot but observe developments in international law and especially within the context of the Council of Europe. The adoption and entry into force of the Framework Convention for the Protection of National Minorities (FCNM) has been a major development.²⁵ It is of particular relevance to the topic of this paper to refer to Article 15 of the FCNM which requires States to create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them. A cross-fertilisation of the ECtHR’s judgments and a reading of the articles enshrined in the ECHR in the light of the FCNM provisions and spirit can expand the hermeneutic horizons of the ECHR. It must be also noted that this has already been the subject of some attention (and controversy) for the Court:

“We must pay attention to the changing conditions in Contracting States and give recognition to any emerging consensus in Europe as to the standards to be achieved. [...] There is an emerging consensus amongst the member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see paragraphs 55-67 of the judgment, in particular the Framework Convention for the Protection of National Minorities), not only for

²³ Henrard, *supra* note 21, p. 63.

²⁴ As regards the ‘living instrument’ assessment *see*: Tyrer v. United Kingdom (Appl. 5856/72) and Loizidou v. Turkey (Appl. no 15318/89) (preliminary objections). As regards the ‘dynamic interpretation’ the reader is directed to case-law proving the changing attitudes towards homosexuality, children born out of wedlock and transsexuals.

²⁵ CETS No.: 157 - Framework Convention for the Protection of National Minorities, Adopted on 1/2/1995, entered into force 1/2/1998. www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=157&CM=8&DF=3/19/2009&CL=ENG., (18 July 2009).

the purpose of safeguarding the interests of the minorities themselves but also in order to preserve a cultural diversity of value to the whole community.”²⁶

This emerging consensus can further be traced within other documents such as the UN Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities²⁷ and the Lund Recommendations on the effective participation on national minorities in public life.²⁸ This proliferation of binding and non-binding instruments leads to the consideration of whether there is a general customary norm in relation to the protection of minorities in international law. Rozakis has asserted that:

“Whilst the international community has helped to set new norms and has thus ‘internalised’ the concern over minorities, its customary rules of protection remain ambivalent. It requires the international community to reconcile this discrepancy.”²⁹

Although this is not the theme of this paper, it is contended that the adoption of the FCNM as well as the abovementioned proliferation of standard-setting suggest that there may be a gradual move towards the formation of customary law in the field. Notwithstanding this, political pressure on ‘persistent objectors’ to the FCNM, as Greece, will continue to mount in order to provide credible reasons for their denial to join the mainstream of the international community. And this pressure may prove to be a catalyst for a change of this kind in the future.

As a final comment, it is emphasized that the international legal landscape is changing. Following the fall of communist regimes in Eastern Europe, States in the region were once again confronted with the problems that were lying dormant (or suppressed) for nearly 50 years. Minorities have become once again a priority on the agenda and

²⁶ *Chapman v. UK*, 18 January 2001, ECHR, (Appl. no. 27238/95), Joint dissenting opinion of judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, par. 3.

²⁷ G.A. RES. 47/135, 47 U.N. GAOR Supp. (No.49) AT 210, U.N. DOC. A/47/49 (1992), 18 December 1992.

²⁸ Lund Recommendations on the effective participation on national minorities in public life, www.osce.org/documents/hcnm/1999/09/2698_en.pdf, (18 July 2009).

²⁹ Rozakis, C. (1996). The international protection of minorities in Greece. *Europe in change. Greece in a changing Europe: between European integration and Balkan disintegration?* K. Featherstone and K. Ifantis, Manchester University Press., p.109.

legal regulation is called for. New instruments, of divergent legal nature and binding force, have been put in place. The Council of Europe, already at the forefront of human rights developments with the ECHR, devised a new mechanism, the FCNM, to deal efficiently with minorities. States (and their omnipresent sovereignty) still remain the determinant factors in this process of standard setting. However, the underlying catalyst of this process is change.

4.1. Reasons for considering change

Greece is already lagging behind the current developments in minorities' protection, doing so by burying its head in the sand. It continues to view their claims as politically motivated, attributed to the irredentist and revisionist policies of its neighbouring countries.³⁰ It is submitted that Greece must reconsider its practice and strive for a comprehensive protection of minority rights, which will bring it in line with the current state of affairs, at least at the ECHR level. In this regard, domestic courts have an important role. There are several arguments that advocate for such a change.

First, Greece is a State Party to the ICCPR which includes Article 27, referring to ethnic minorities. Hence, it is already bound and obliged to respect one of the core international human rights' instruments.

Second, the interpretation given to the ECHR by the Court in relation to minorities may not be as progressive as mainstream human rights jurists might have expected, but the fact remains that its attitude is changing. The three cases discussed previously are termed in a resonant manner that cannot be simply ignored.

Third, there is a fundamental disregard of one of the first authoritative references to minorities by the Permanent Court of

³⁰ *Supra* n. 1, paras. 13 and 41. Further on the position of Greece: <http://www.mfa.gr/www.mfa.gr/en-US/Policy/Geographic+Regions/South-Eastern+Europe/Balkans/Bilateral+Relations/FYROM/FYROM+-+THE+NAME+ISSUE.htm> (Accessed 17 March 2010)

International Justice. In *Minority Schools in Albania* it unequivocally stated that the existence of a minority does not turn on state recognition, as this entails a question of fact.³¹ Ironically, what was at stake in this Advisory Opinion was the dispute over the existence and education rights of the Greek minority residing in Albania. This point brings to the surface a basic, diachronic contradiction of Greece's stance towards minorities. As long as Greece domestically interprets in the narrowest sense the rights accorded to them (or even, violates them), it cannot credibly argue in favour of the rights of Greek minorities residing in other countries.

Fourth, in relation to the FCNM, it is recalled that Greece has signed, but not ratified it.³² As a signatory, Greece is bound by Article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat the object and purpose of the FCNM.³³ In persisting to refuse the registration of associations of minorities,³⁴ Greece is clearly acting in stark contravention to Article 15 which, as mentioned above, relates to political participation of minorities.

5. Conclusion

Human rights literature has largely analysed minority issues from the prism of yet another problematic area of law. This author takes a different stance as he regards these issues as challenging opportunities for further expansion of international and human rights law. The

³¹Advisory Opinion, (1935) PCIJ Ser. A/B. www.worldcourts.com/pcij/eng/decisions/1935.04.06_albania/, (21 July 2009).

³²www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=8&DF=3/20/2009&CL=ENG.., (24 July 2009).

³³Vienna Convention on the Law of Treaties, www.untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, (20 July 2009).

³⁴ Apart from this refusal, another problem has arisen which seriously undermines the effectiveness of the ECHR: "Despite the finding of a breach of Article 11 ECHR in *Sidiropoulos*, the association 'Home of Macedonian Civilisation' did not manage to have its statute registered by domestic courts because it did not succeed in finding a lawyer willing to take care of legal formalities", www.juristras.eliamep.gr/wp-content/uploads/2008/09/greece.pdf, (24 July 2009).

examples of the examination of the customary nature of certain norms, the innovative provisions found in several instruments and the evolving jurisprudence of bodies, notably the ECHR, illustrate this.

Interested groups have opted in certain instances for strategic litigation before the ECHR in order to assert their rights.³⁵ At the same time political participation for minority groups can be upheld through a judicial process, as exemplified by the three judgments discussed above.³⁶ On the reverse side of the coin is the minority-conscious approach to the Convention which has not yet been fully explored. The Court should not continue to examine applications with ‘minority colour-blindness’. Instead, it must place them in the overall context from which they emanate and refrain from excessive deference to States. In this way, it can provide for meaningful solutions and positively contribute to setting arrangements which promote integration and cultural diversity *lato sensu*.

However, the ECHR is not the only option for minority protection in Europe. Notwithstanding the programmatic nature of the FCNM, it has set a new benchmark and “no real alternative has emerged to challenge [its] role as the most far-reaching European standard for the protection of national minorities.”³⁷

In addition to the aforementioned, a body of ‘soft law’ instruments has emerged in the last two decades which suggests the existence of a common consensus in the international community with regard to minorities. Progress is slow, but one must be mindful of the fact that the overall legal situation has advanced more in the last 20 years than it has done in the past two centuries.

³⁵ See for example: *D.H. and others v. the Czech Republic*, 13 November 2007, ECHR, (Application no. 57325/00).

³⁶ Gilbert, G. (2002). "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights." *Human Rights Quarterly* 24. p. 778.

³⁷ Jurado, E. and A. Korkeakivi (2006/7). "Completing the First Decade of Monitoring: Latest developments under the Framework Convention for the Protection of National Minorities." *European Yearbook of Minority Issues* 6., p. 386.

This fundamental change cannot be disregarded by international actors, and most significantly States. Greece has long kept an intransigent attitude, failing to acknowledge the changing realities. A long standing fear of “Otherness” and of nationalistic contestations with neighbouring countries has created a tradition of institutionalized ‘single-mindedness’ when reflecting upon such issues. This paper has traced back to the League of Nations’ era the roots of Greece’s unaltered position on minority protection. The long standing statist perceptions of bureaucratic establishments are not responsive to changes that seem to dispute sovereignty as the sole source of legitimacy. It is evident that even the most elaborate and comprehensive minority protection system may not accomplish to stop aggressive forms of minority rights vindication. It is equally evident, however, that negating minority rights will almost certainly provoke it.

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Human Rights, Anthropology and Securitization: Reclaiming Culture

Sean Goggin*

I. Introduction

In Raymond Williams's renowned adage, culture is "one of the two or three most complicated words in the English language".¹ Within a legal setting,² the rhetoric on culture goes beyond a purely abstract significance to potentially having tangible ramifications, in particular for minority and indigenous groups.³ In a human rights context this is certainly the case. While international human rights standards articulate numerous references to 'culture' in the sense of its broad anthropological usage,⁴ thinking in that area is still at an embryonic stage and is "confusing rather than illuminating".⁵ For human rights lawyers this is equally frustrating and regrettable, given the norm's undoubted potential.

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¹ R. Williams, *Keywords* (Fontana Press, London, 1998), at 76. Rodolfo Stavenhagen describes three well established definitions of culture: the "accumulated material heritage of human kind"; a "process of artistic and scientific creation"; and the classic anthropological view of culture as a "total way of life". The essay focuses on the final approach. R. Stavenhagen, "Cultural Rights: A Social Science Perspective", in A. Eide *et al.* (eds.), *Economic, Social and Cultural Rights* (Martinus Nijhoff, Dordrecht, 2001), at 88.

² On the subject of culture and human rights, see generally L.S. Bell, "Introduction: Culture and Human Rights", in L.S. Bell *et al.* (eds.), *Negotiating Culture and Human Rights* (Columbia University Press, New York, 2001); J.K. Cowan *et al.*, "Introduction" in J.K. Cowan *et al.* (eds.), *Culture and Human Rights: Anthropological Perspectives* (Cambridge University Press, Cambridge, 2001); Y.M. Donders, *Towards a Rights to Cultural Identity?* (Intersentia, Antwerp, 2002). See R. Stavenhagen, "The Right to Cultural Identity" in Berting *et al.* (eds.), *Human Rights in a Pluralistic World* (Meckler Westport, London, 1990); J.H. Burgers, "The Rights to Cultural Identity" in Berting *et al.*, *ibid.*; J. Almqvist, *Human Rights, Culture and the Rule of Law* (Hart, Oxford, 2005); X. Li, *Ethics, Human Rights, and Culture: Beyond Relativism and Universalism* (Palgrave MacMillan, 2006); I. Schulte-Tenckhoff, "The Rights of Persons Belonging to Minorities to Enjoy their Own Culture", UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.7 (1997); E. Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff, Leiden, 2007); Stavenhagen, *supra* note 1; E. Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Brill, Leiden, 2007).

³ On the matter of legal consequences see M. Beukes, "The International Dimension of Culture", 20 *South African Yearbook of International Law* (1995), 126-143.

⁴ Article 27 of the Universal Declaration on Human Rights recognizes the right to cultural life. Article 15 of the International Covenant on Economic Social and Cultural Rights expresses the right to participate in cultural life. The Convention on the Rights of the Child addresses the rights of minority children to their own culture. Adalsteinsson and Thorhallson, based on a study of the *travaux preparatoires*, have highlighted what they refer to as a "high culture" approach in the drafting of Article 27 of the Universal Declaration of Human Rights. See R. Adalsteinsson and P. Thorhallson, "Article 27" in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights* (Kluwer, Dordrecht, 1999).

⁵ Beukes, *supra* note 3, at 142.

Against this challenging legal landscape, culture has again returned to the political frontlines. The hostile post-9/11 atmosphere has seen the emergence of the concept as a marked feature of the securitization debate, with some Western states reconfiguring notions of national identity.⁶ In Britain, for example, Tony Blair marked the attacks in London by reassessing the very concept of British cultural identity. These have been ‘top-down’ state-led abstractions, with minorities scarcely involved. Following the monumental ethnic victories of the 1960s, is it possible that we are witnessing the beginnings of a redrawing of the culture map? Of course for states, the place of ‘the other’ has been an eternally delicate matter, what with its perceived complications for the national vision. Thus, the question is: how do we progress from here?

The article is aimed at the chasm between the current needs of minorities in this hostile setting and the uncertain character of the normative protection of culture. The discourse from anthropology has rightly highlighted the value of its field-based theory for human rights law.⁷ The author strongly echoes this sentiment, as its thinking is ‘grounded’ in the day-to-day life of communities, captured through the eyes of the reflexive anthropologists who typically spend substantial periods of time living among their subjects. In the context of the ongoing and intense cultural dialogue the time is ripe for cold reflection, particularly in terms of the legal protection of culture. With a view to bringing an element of clarity to the murky area of culture, the author suggests a model for human rights law based on a fusion of classic and contemporary thinking. Because the configuration is thought to capture the necessary scope of legal protection (i.e. what the law must protect), its application is likely to result in enhanced protection for the rights of minorities and indigenous groups. Thus far, there has been strikingly sparse engagement by anthropologists in the broad debate on culture and multiculturalism.⁸ It seems timely to address this unfortunate lacuna.

⁶ A number of prominent examples are cited here. On the situation on Europe, see L. Fekete, “Anti-Muslim Racism and the European Security State”, 46 *Race and Class* (2004), 3-29; on the secularization measures in France, see generally E. Thomas, “Keeping Identity at a Distance: Explaining France’s new Legal Restrictions on the Islamic Headscarf”, 29 *Ethnic and Racial Studies* (2006), 237-259; on Australia, see B.R. Vaughn, “Australia’s Strategic Identity Post-September 11 in Context: Implications for the War against Terror in Southeast Asia”, 26 *Contemporary Southeast Asia* (2004), 94-115. For an anthropological critique of the current events, see M. Mandani, “Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism”, 104 *American Anthropologist* (2002), 766-775.

⁷ J.K. Cowan, “Cultural and Rights after Culture and Rights”, 108 *American Anthropologist* (2006), 9-24.

⁸ S.D. Scott, “Culture in Political Theory”, 31 *Political Theory* (2003), 92-115, at 94-95.

To that end, the article considers, in the first section, the contemporary, post-9/11 significance of culture. It then examines the classic ‘total way of life’ model and its relevance for legal process, before turning to the distinctive meaning/behaviour schools, again out of empathy with the new legal setting. In the fourth section, the paper considers the ‘new approaches’ that have emerged within anthropology since the 1970s, including a more dynamic understanding of culture that argues for amalgamation with the classic school. The fifth section goes on to examine the issues that arise from the role of the anthropologist, while the sixth section considers the controversial question of cultural relativism. Finally, the author addresses the crucial matter of the cross-disciplinary transference of the model to a legal context.

II. The (Re)Politicization of Culture

The new millennium has witnessed the extraordinary return of culture (if ever it vanished) to the political centre-stage.⁹ For states, the debate surrounding the place of ‘the other’ has been a perennially sensitive one, and one that has been revisited in recent years. The situation has been gravely accentuated, if not entirely provoked, by the current ‘war against terror’ and the harsh ramifications of this for minority communities.¹⁰ Under a veil of securitization, we are witnessing a fundamental reassessment of state—minority relations and national identity. In many Western states the multiculturalism debate is firmly back on the table. For minority communities touched by this unfortunate trend, this is a troubling time.¹¹ McGoldrick captures this mood as follows:

A series of events and issues have combined to put the concept of multiculturalism back at centre stage in Western states. These include the attacks on the United States on 11 September 2001 and the securitisation measures taken in response by many states around the world. It has been alleged that many of these measures have disproportionately affected particular cultural groups and have weakened the degrees of respect and tolerance accorded to them by other groups. Secondly, there is the rise of religious fundamentalism, particularly when allied to political Islam. The war on terrorism and controlling extreme religious groups are daunting challenges that attract

⁹ McGoldrick addresses this in terms of human rights. D. McGoldrick, “Multiculturalism and its Discontents”, 5 *Human Rights Law Review* (2005), 27-56.

¹⁰ On the question of human rights and the ‘war on terror’, see P. Hoffman, “Terrorism and Human Rights”, 26 *Human Rights Quarterly* (2004), 932-955; R. Foot, “Collateral Damage: Human Rights Consequences of Counterterrorist Action in the Asia-Pacific”, 81 *International Affairs* (2005), 411-425.

¹¹ On the growing right-wing and anti-diversity trend among states, see V. Stolcke, “Cultural Fundamentalism”, in *World Culture Report 2000: Cultural Diversity, Conflict and Pluralism* (UNESCO Publishing, Paris, 2000).

much political and legal attention. However, the real practice of multiculturalism is found in the way hundreds of aspects of daily life are resolved. Among the practical issues are the application of personal religious laws concerning families, children and property, the application of employment and health and safety law to religious groups, the dissolution of Islamic political parties (for example, in Turkey), the regulation of Islamic clothing in the workplace or in educational facilities (for example, the hijab (headscarf)/jilbab debate in France, Germany, the UK, Turkey and many other countries)[...] and the control of burials (for example, in Switzerland). Another interesting case study is the multicultural arrangements that came out of the Good Friday/Belfast multiparty agreement in Northern Ireland, where one of the subsequent legal consequences was the amendment of the Irish constitution to “recognize diversity of identities and traditions”.¹²

Britain, in many ways, exemplifies these cultural challenges, as it has been such an intense focus for many of these issues.¹³ At the very least it may be said of Britain that it currently has a ‘strained’ relationship with its minority groups and in particular with its Muslim communities. In December 2006, Tony Blair delivered a controversial speech on multiculturalism in Britain, focusing on the theme of common British values in what was in essence a reassessment of British identity:

But this is, in truth, not what I mean when I talk of integration. Integration, in this context, is not about culture or lifestyle. It is about values. It is about integrating at the point of shared, common unifying British values. It isn’t about what defines us as people, but as citizens, the rights and duties that go with being a member of our society.

Christians, Jews, Muslims, Hindus, Sikhs and other faiths have a perfect right to their own identity and religion, to practise their faith and to conform to their culture. This is what multicultural, multi-faith Britain is about. That is what is legitimately distinctive.

But when it comes to our essential values – belief in democracy, the rule of law, tolerance, equal treatment for all, respect for this country and its shared heritage – then that is where we come together, it is what we hold in common; it is what gives us the

¹² McGoldrick, *supra* note 9, at 29-30.

¹³ See generally T. Abbas, “Muslim Minority in Britain: Integration, Multiculturalism and Radicalism in the Post-7/7 Period”, 28 *Journal of Intercultural Studies* (2007), 287-300. See the report by the Commission on British Muslims and Islamophobia, “Islamophobia: Issues, Challenges and Action” (Trentham Books, Stoke on Trent, 2004).

right to call ourselves British. At that point no distinctive culture or religion supersede our duty to be part of an integrated United Kingdom.¹⁴

Put simply, Blair wants cultural diversity but common values.¹⁵ This is evidently to assume that culture and values are distinct concepts. Terry Eagleton rightly sees the issue as a cultural one:

Tony Blair believes in a common culture [...] It is just that what Blair means by a common culture is that everyone should share his values so that they won't bomb tube stations. In fact, no cultural value is ever extended to large groups of newcomers without being changed in the process. This is why the Blair project is wet behind the ears as well as culturally supremacist. There is no assumption in Downing Street that such values might be challenged or transformed in the process [...]

A truly common culture is not one in which we all think alike, or in which we all believe that fairness is next to godliness, but one in which everyone is allowed to be in on the project of cooperatively shaping a common way of life.¹⁶

Culture, however, is not a state policy, but a process that emerges substantially and is propagated by the people.¹⁷ At its heart, the Blairian vision is a 'top-down' state construct which fails to address the actual circumstances of minority groups.¹⁸ Neither are minorities involved in this defining process. For many cultural communities, in Britain and beyond, this is a worrying time. Culture is returning to the arms of the state. The challenge for human rights is to offer guidance in this critical matter.¹⁹

¹⁴ "The Duty to Integrate: Shared British Values, 6 Dec. 2006, at <www.number10.gov.uk/output/Page10563.asp> (accessed 14 Sept. 2009)

¹⁵ See A. Føresdal, "The Problem of Defining the 'Good' in Pluralistic Societies" in *World Culture Report 2000: Cultural Diversity, Conflict and Pluralism* (UNESCO Publishing, Paris, 2000).

¹⁶ T. Eagleton, "Those in Power are Right to See Multiculturalism as a Threat", *The Guardian*, 21 February 2007.

¹⁷ The issue is closely related to the problems surrounding recognition for minorities. See J. Bengoa, "Existence and Recognition of Minorities", Working Paper for the Working Group on Minorities, E/CN.4/Sub.2/AC.5/2000/WP.2 (2000). On a recent Irish controversy on the question of ethnicity, see D. Keane, "International Law and the Ethnicity of Irish Travellers", 11 *Washington and Lee Race and Ethnic Ancestry Law Journal* (2005), 43-60.

¹⁸ As Stamatopoulou describes it: the "culturalization of political life and rhetoric". Stamatopoulou, *supra* note 2, at 8.

¹⁹ Sieghart reminds us that human rights is a superior standard: "... there is now a superior international standard established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign States ...". P. Sieghart, *The International Law of Human Rights* (Clarendon Press, New York, 1983), at 15.

III. 'Total Way of Life' Approach and Human Rights Law

The greatest contribution of anthropology to academia has perhaps been the remarkable insight it has brought to our understanding of the group.²⁰ All of this emanated from the pioneering spirit of Tylor's holistic approach to culture, the seminal inquiries of which marked the outset of anthropology's interest in groups.²¹ His definition proposed what is now commonly termed the 'total way of life' approach:²²

Culture or Civilization, taken in its wide ethnographic sense is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society. The conditions of culture among the various societies of mankind, in so far as it is capable of being investigated on general principles, is a subject apt for the study of laws of human thought and action.²³

For Tylor, culture is a totality; it is both behaviour and meaning and it is socially acquired. These concepts have been the pillars on which anthropology has grounded its understanding of culture. As noted below, all retain some currency today, albeit to varying degrees. It is in this sense that we speak of 'a culture' as synonymous with a group. This is anathema to many anthropologists who reject this as an outmoded and simplistic interpretation (again, see below). Within anthropology, culture is a highly contested matter. However, for law it retains a distinct value. Fundamental to Tylor's approach was its application to field work. The 'total way of life' model was an attempt by anthropology to represent the cumulative lifestyle that confronted the ethnographer in the course of field research. Rather than an analytical

²⁰ For general introductions, see for example A. Kuper, *Culture: The Anthropologist's Account* (Harvard University Press, Cambridge, 1999); T.H. Eriksen, *Small Places, Large Issues: An Introduction to Social and Cultural Anthropology* (Pluto Press, London, 2001); R.M. Keesing, *Cultural Anthropology: A Contemporary Perspective* (Holt, Rinehart and Winston, New York, 1981). For current anthropological understandings, see M. Harris, *Theories of Culture in Post-Modern Times* (Altamira Press, London, 1999).

²¹ See primarily what is generally regarded as the first anthropology textbook: E.B. Tylor, *Primitive Cultures* (Harper Torch, New York, 1871). See also E.B. Tylor, *Anthropology* (University of Michigan Press, Ann Arbor, 1881).

²² See Huntington's critique: "Anthropologists, perhaps most notably Clifford Geertz, have emphasized culture as 'thick description' and used it to refer to the entire way of life of a society: its values, practices, symbols, institutions and human relationships ... if culture includes everything it explains nothing. Hence we define culture in purely subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society". S.P. Huntington, "Cultures Count", in S.P. Huntington and L.E. Harrison (eds.) *Culture Matters* (Basic Books, New York, 2000), at xv.

²³ Tylor, *supra* note 21, at 1.

approach, early anthropologists focused simply on recording the observable life before their eyes.²⁴

For the equality philosophy of human rights, Tylor's approach reveals a number of notable aspects. His definition marked a uniquely egalitarian approach to culture and his approach was revolutionary within the social sciences, breaking down as it did the distinction between 'high' and 'low' culture that came from early Victorian society and scholarship.²⁵ The Victorians thought of culture in an elitist 'high culture' sense.²⁶ Tylor's thinking was inspired by the pomp of Victorian Britain, and his response was the study of distinct exotic groups that he regarded as an antidote to this cultural arrogance. Accordingly, his vision stressed the equality of cultures.²⁷ Over a century later, international law would articulate a similar attitude.²⁸ Thus, just as British and African cultures are taken as equal, so too are cultural groups within states. Importantly, this applies to the relationship between minority and majority communities. This egalitarian quality has persisted throughout the evolution of the discipline, and cultural communities are not judged comparatively. Secondly, equality applies as between cultural elements, i.e. the individual facets that compose a total culture. Tylor was engaged with the everyday lives of his subjects. The act of playing football is as relevant to the anthropologist as the creation of a piece of art. As Raymond Williams would later comment, "culture is ordinary".²⁹

Anthropology's cumulative ethos is tellingly illustrated by Clifford Geertz's "thick description", as he would later describe it.³⁰ Attempting to demystify the roots of anthropological research, Geertz cites an informative (unedited) passage from his field notebooks, "quoted raw" as he himself puts it:

²⁴ As noted by Evan-Pritchard, one of anthropology's pioneering fieldworkers: "... culture was for them something concrete. They thought of exogamy, tokenism, matriliney, ancestor worship, slavery and so forth as customs – things – and it was an enquiry into these customs or things that they regarded themselves as pursuing". E. Evan-Pritchard, *Social Anthropology* (Cohen and West, London, 1951), at 40.

²⁵ On Victorian anthropology, see generally G.W. Stocking, *Victorian Anthropology* (Free Press, New York, 1987).

²⁶ Most notably, this included Matthew Arnold who viewed culture as the "best that has been said and thought in the world". M. Arnold, *Culture and Anarchy: an Essay in Social and Political Criticism* (Smith Elder, London, 1869), at viii.

²⁷ Tylor, *supra* note 21, at 6-7.

²⁸ UNESCO Declaration on the Principles of International Cooperation, adopted 4 November 1966, Art. 1(1).

²⁹ R. Williams, "Culture is Ordinary", in N. McKenzie (ed.), *Conviction* (MacGibbon and Kee, London, 1958).

³⁰ C. Geertz, *The Interpretation of Cultures* (Basic Books, New York, 1973), Ch. 1.

The French [the informant said] had only just arrived. They set up twenty or so small forts between here, the town, and the Marmusha area up in the middle of the mountains, placing them on promontories so they could survey the countryside ...

One night when Cohen (who speaks fluent Berber), was up there, at Marmusha, two other Jews who were traders to a neighbouring tribe came by to purchase some goods for him. Some Berbers, from yet another neighbouring tribe, tried to break into Cohen's place, but he fired his rifle in the air ...

So the sheikh, the Jew and a small company of Marmushans went off ten or fifteen kilometres up into the rebellious area where there were of course no French ...³¹

There is a sense from Geertz's piece that, as an ethnographer, in his work he is not contemplating what is or what is not culture, rather he is freely engaging with all aspects of his subject community. This is the essence of the 'total way of life' approach. Geertz points to this base data to illustrate that anthropological research is "thick", i.e. it is detailed and substantial.³² In so doing he reveals the empirical heart of anthropology. This is what the anthropologist does: living amongst his subjects, he observes, interviews on and records their everyday lives. Living as a group member over prolonged periods of time, he is exposed to group life in a remarkably intimate manner. This is the source from which anthropological thinking emanates. Its cultural theory is empirically tested. As Kuper rightly notes, "... their experiments offer the most intriguing and satisfactory test of the value – and perhaps the validity – of cultural theories".³³ By contrast, many of our solutions to cultural issue are normative in their nature, visions of culture as it should be.³⁴ Anthropology captures culture as it is. Tylor's formulation came at a time when anthropology was focused on 'primitive groups', typically remote tribal groups to which the colonies provided ready assess.³⁵ For legal process, the model is a timeless one; anthropology and human rights are after all united in seeking to address living groups. For the lawyer (as for the anthropologist) the 'total way of life' approach is perhaps best understood, functionally, as addressing the respective group under their gaze.

³¹ *Ibid.*, at 7-8.

³² *Ibid.*, at 9.

³³ Kuper, *supra* note 20, at x.

³⁴ Notably, see for example W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995); W. Kymlicka, *Liberalism, Community and Culture* (Clarendon Press, Oxford, 1989).

³⁵ See for example G.D. Berreman, "Is Anthropology Alive? Social Responsibility in Social Anthropology", 9 *Current Anthropology* (1968), 397-402; E. Said, "Representing the Colonized: Anthropology's Interlocutors", 15 *Critical Inquiry* (1989), 205-225.

IV. Culture as Behaviour/Meaning

Anthropology is marked by a rudimentary disagreement in its reading of culture.³⁶ Since the 1950s and 1960s, it has evolved from a focus on behaviour to a more abstract notion of culture as an attribute of ideas or a configuration of both.³⁷ Within the broad discourse of human rights, this split has recently proved controversial, provoking a stern warning from Cowan:

The tendency of political philosophers in this debate to use the word culture to refer to a minority group is infuriating to anthropologists, most of whom insist on the importance of distinguishing the ‘culture’ concept as an ideational realm – or, at least, a realm in which ideas and practices are coherently linked – instead of seeing ‘culture’ as synonymous with ‘society’ or ‘social groups’ (including minority groups). It certainly creates conceptual confusion in cross-disciplinary readings.³⁸

Although Cowan does not expressly mention human rights thinking, his caveat is clearly concerning. Clarity on the matter, particularly among legal practitioners, is clearly of benefit.

The idealist philosophy is concerned with viewing culture as an attribute of ideas. The approach is based on the notion that culture consists of the ideas and meaning behind behaviour and not behaviour itself. As Keesing observes in exemplary fashion:

³⁶ This was illustrated by a renowned 1952 review of anthropology’s approaches to culture: “Culture consists of patterns, explicit and implicit of and for behaviour acquired and, transmitted by symbols, constituting the distinctive achievements of human groups, including their embodiment in artefacts; the essential core of culture consists of traditional (i.e., historically derived and selected) ideas and especially their attached values; culture systems may, on the other hand, be considered as products of action, on the other as conditioning elements of further action”. A.L. Kroeber and C. Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Vintage, New York, 1952), at 181.

³⁷ See generally S.B. Ortner, “Theory in Anthropology since the Sixties”, 26 *Comparative Studies in Society and History* (1984): 126-166, at 127-132; P. Rabinow and W.M. Sullivan, “The Interpretive Turn: Emergence of an Approach” in P. Rabinow and W.M. Sullivan (eds.) *Interpretive Social Science: A Reader* (Berkeley, University of California Press, 1979). For prominent contributions to the school see, for example, V. Turner, “Symbolic Studies”, 4 *Annual Review of Anthropology* (1975), 145-161; V. Turner, *The Forest of Symbols* (Cornell University Press, Ithaca, 1967); V. Turner, *The Ritual Process* (Chicago, Aldine, 1969); M. Douglas, *Purity and Danger* (Routledge and Kegan Paul, London, 1966).

³⁸ Cowan, *supra* note 7, footnote 8.

... we will use 'culture' to refer to systems of shared ideas, to the conceptual designs, the shared system of meaning, that underlie the way in which a people live. Culture, so defined, refers to what humans learn, not what they do and make.³⁹

The result for anthropology has been a tension in the discipline between an ideational and a realist/materialist approach to culture. David Bidney describes the debate as follows:

Realists as a group tend to conceive culture as an attribute of human social behaviour and usually define culture in terms of acquired habits, customs and institutions ... idealists tend to conceive culture as an aggregate of ideas in the mind of individuals.⁴⁰

Nor is the division an obvious one among many anthropologists who view culture as consisting of both ideas and the activities arising from those ideas.⁴¹

It may be noted that the division is still ambiguous. First, behaviour remains a concern for the ideational anthropologist. Notwithstanding the theoretical distinction between ideas and behaviour, research is still focused on the behaviour of subjects, albeit in an attempt to come to some understanding of the mental aspects of the process. Second, in a sense, behaviour is the outward expression of a process that engages both meaning and behaviour. As Geertz, himself a staunch ideationalist, concedes, "culture this acted document, thus is public, like a burlesque wink or mock sheep raid. Though ideational, it does not exist in someone's head; though unphysical it is not an occult entity".⁴² In the context of the legal process, protecting the mental aspects of culture is evidently beyond its innate scope. While law does on occasion take account of certain mental aspects – for example in the criminal law concept of *mens rea* – these are auxiliary questions of legal process and do not aim to substantially protect. A parallel may be drawn with the realm of intellectual property rights. In a sense the term is oxymoronic: although it claims to protect 'intellectual' property, in reality it protects the physical manifestations of the process. The legal process must (and can) function within the tangible behavioural element of culture, and in this sense reveals a fundamental compatibility with anthropology.

³⁹ Keesing, *supra* note 20, at 139.

⁴⁰ D. Bidney, *Theoretical Anthropology* (Transaction, New Brunswick, 1996).

⁴¹ See, for example, D. Bidney, "The Concept of Cultural Crisis", 48 *American Anthropologist* (1946), 534-552, at 535.

⁴² Geertz, *supra* note 30, at 10.

V. Contemporary Anthropology

Largely since the 1970s, anthropology's 'post-modern turn' has witnessed revolutionary changes via a paradigmatic shift in its theoretical understandings.⁴³ The critique largely followed the more fluid social dynamics of globalization, and prompted anthropologists to rethink their dated and static understandings of culture in favour of a more dynamic approach.⁴⁴ Within this crusade was a robust criticism of anthropology's classic 'total way of life' approach to culture,⁴⁵ with commentators even suggesting a radical and complete abandonment of the concept.⁴⁶ Why then is the concept still a viable one in the context of human rights law?

Anthropologists were reacting to its dated paradigm. Susan Wright reflects five characteristics defining the 'old' anthropology:

- i. Cultures are 'bounded small scale' entities.
- ii. A culture is a collection of 'defined characteristics'.
- iii. These characteristics are 'unchanging in balanced equilibrium of self-reproducing'.
- iv. A culture involves an 'underlying system of shared meaning'.
- v. Members of cultures are homogenous.⁴⁷

However, once anthropology evolved from its obsession with 'pure' homogenous culture (if this even exists), in the guise of remote tribal groups, to addressing the contours of contemporary multicultural life, its theories also began to evolve. This transformation is captured by Preis:

... rapid changes in the modern world have forced anthropologists to rethink their disciplines fundamentally 'relativistic' position, and most importantly, its underlying

⁴³ A number of anthropologists have proposed the 'new understandings' of human rights. Prominently, see the volume by Cowan *et al.*, *supra* note 2.

⁴⁴ See generally A.P. Vayda, "Actions, and Variations and Change: The Emerging Anti-Essentialist View in Anthropology" in R. Borofsky (ed.) *Assessing Cultural Anthropology* (McGraw-Hill, New York, 1994; Wright provides a useful summary of both schools. S. Wright, "The Politicization of 'Culture'", 14 *Anthropology Today* (1998), 7-15.

⁴⁵ For a comprehensive overview of this debate, see generally C. Brumann, "Writing for Culture", 40 *Current Anthropology* (Supplement) (1999), 1-27. For an analysis of the perceived flaws, see R. Brightman, "Forget Culture: Replacement, Transcendence, Relexification", 10 *Cultural Anthropology* (1995), 509-546. L. Abu-Lugho, "Writing against Culture" in R.G. Fox (ed.) *Recapturing Anthropology: Working in the Present* (School of American Research Press, Santa Fe, 1991).

⁴⁶ See, for example, Abu-Lugho, *supra* note 45; F. Barths, "A personal View of Present Tasks and Priorities in Cultural and Social and Anthropology", in Borofsky, *supra* note 44.

⁴⁷ Wright, *supra* note 44, at 8.

assumption of ‘culture’ as a homogenous, integral and coherent unity... In order to capture this more fluid character of present-day relationships between centre and peripheries and the realisation that cultural flows are no longer territorially bounded, notions like ‘creolization’, ‘hybridity’ and ‘cultural complexity’ have emerged in anthropological vocabulary.⁴⁸

The critique was, in essence, a concerted attempt by anthropologists to emerge from their outmoded paradigm to embrace the realities of the modern world. A similar outlook from human rights would be a significant step towards establishing itself as a viable forum for minority and indigenous groups.⁴⁹ This tentatively suggests that classic and contemporary thinking are in opposition. As Preis observes, “[a] major implication of these perspectives is that ethnography is no longer defined as the interpretation of distinct, ‘whole’ ways of life, but rather as a series of specific dialogues, impositions, and inventions”.⁵⁰ So how can human rights address this paradox? The discourse recently witnessed a significant contribution on the matter. Li proposed a cultural framework for human rights emphasizing the ‘classic’ anthropological school.⁵¹ For the legal requirements of human rights, an amalgamation was regarded as a more viable approach: a model grounded in the tangible, socially acquired behaviour and group concept that simultaneously embraces the openness of the modern world. Anthropology’s new message, and a welcome one for human rights, is to accept culture as we find in all its complexity.

VI. Culture is a Representation

One of the criticisms to which this essay stands open concerns the role of the anthropologist. Within anthropology itself, robust opposition has formed against its claim to objectivity,⁵²

⁴⁸ A.B.S Preis, “Human Rights as Cultural Practice: An Anthropological Critique”, 18 *Human Rights Quarterly* (1996), 286-315, at 288-9.

⁴⁹ It should be noted that inconsistencies with the new understandings within the human rights forum have been highlighted. For a useful introduction to this issue, see generally Wright, *supra* note 44. See S.E. Merry, “Human Rights and the Demonization of Culture”, 26 *Political and Legal Anthropological Review* (2003), 55-76.

⁵⁰ *Ibid.*, at 298.

⁵¹ X. Li, *Ethics, Human Rights and Culture: Beyond Relativism and Universalism* (Palgrave Macmillan, New York, 2006), at 9-14.

⁵² Prominently see J. Clifford and G.E. Marcus, *Writing Culture: The Poetics and Politics of Ethnology* (University of California Press, Berkeley, 1986); R. Rosaldo, *Culture and Truth: The Remaking of Social Analysis* (Beacon Press, Boston, 1989); R. Wagner, *The Invention of Culture* (University of Chicago Press, Chicago, 1981).

including its holistic reading of culture.⁵³ While it is evident that the anthropological methodology it is not a native account of culture, in recent years the objectivity of the discipline has come into question. Much of this post-modern critique was provoked by certain presumptions that existed in terms of scientific (or at least social scientific) objectivity.

In 1981 a profound and influential polemic from Roy Wagner questioned anthropology's claims to, and indeed very capacity for, absolute objectivity:

... it is necessary for a research worker to be as unbiased as possible in so far as he is aware of his emotions, but we often take our own cultures more basic assumptions for granted that we are not even aware of them. Relative objectivity can be achieved through discovering what these tendencies are 'Absolute' relativity would require that the anthropologist have no biases, and hence no culture at all.⁵⁴

What Wagner rightly acknowledged was the inherent cultural disconnect between anthropologist and subject. This is a valid position: it is unreasonable to expect the anthropologist to cast aside his human make-up and operate in a cold 'objective' scientific manner dismissive of his own cultural background. This led Wagner to the reasonable thesis that, "[w]e might say that the anthropologist actually 'invents' the culture he believes himself to be studying, that the relation is more real for being his particular acts than the things to which it 'relates'".⁵⁵

Wagner's arguments did not go unheeded, provoking a degree of reflection within anthropology over its previous presumptions of objectivity. Capturing this mood, in 1989, Rosaldo writes:

... a sea change in cultural studies has eroded once-dominant conceptions of truth and objectivity. The truth of objectivism – absolute, universal and time-less – has lost its monopoly status. It now competes, on almost equal terms, with the truths of case studies that are embedded in local contexts, shaped by local interests and colored by local perceptions ... Such terms as objectivity, neutrality, and impartiality refer to subject positions once endowed with great institutional authority, but they are arguably

⁵³ R.J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Duke University Press, Durham, 1998), at 34-35.

⁵⁴ Wagner, *supra* note 52, at 2.

⁵⁵ *Ibid.*, at 4.

neither more nor less valid than those of more engaged, yet equally perceptive, knowledgeable social actors.⁵⁶

What Rosaldo highlights is the growing acknowledgement of the influence of the ethnographer on field work.

What are the implications for human rights? It should firstly be highlighted that anthropology's 'human' dimension is also its forte. As Eriksen writes:

... anthropology has its distinctive character as an intellectual discipline, based on ethnographic field work, which tries simultaneously to account for actual cultural variation in the world and to develop a theoretical perspective on culture and society.⁵⁷

What Eriksen alludes to is the inherent connection between field-work and theoretical anthropology: theories are based on the experience of a reflexive researcher living in the cultural environment of his subjects (frequently for years at a time). Anthropology theory thus paradoxically contains elements of two apparent opposites: the local and the universal. What the current criticism correctly highlights is that anthropological theory is not without its flaws; however, perfect objectivity is perhaps an unrealistic aspiration in such a person-orientated methodology, and it is nonetheless a highly valuable model.

VII. Philosophical Gulf between Anthropology and Human Rights

Traditionally, the greatest philosophical gulf to a union of human rights and anthropology has been the thorny issue of cultural relativism.⁵⁸ In a rights-based approach to culture this manifests itself in terms of the questions of limitations. How do we limit a right to culture? In the debate on cultural relativism opponents of the philosophy typically cite acts such as

⁵⁶ Rosaldo, *supra* note 52, at 21.

⁵⁷ Eriksen, *supra* note 20, at 5.

⁵⁸ On human rights and cultural relativism, see Iovane's comprehensive review of the issue. See generally, M Iovane, "The Universality of Human Rights and the International Protection of Cultural Diversity", 14 *International Journal on Minority and Group Rights* (2007), 231-262. See J. Donnelly, "Cultural Relativism and Universal Human Rights", 6 *Human Rights Quarterly* (1984), 400-419; A. B. Fields and W.-D. Narr, "Human Rights as a Holistic Concept", 14 *Human Rights Quarterly* (1992), 1-20; W.E. Washburn, "Cultural Relativism, Human Rights and the AAA", 89 *American Anthropologist* (1987), 939-943; M.J Perry, "Are Human Rights Universal? The Relativist Challenge and Related Matters", 19 *Human Rights Quarterly* (1997), 461-509.

female genital mutilation and honour killings⁵⁹ as occurrences that may be justified on cultural grounds.⁶⁰

The Foundations of Cultural Relativism

The question of limits is hugely complicated by the philosophical gulf that exists historically between the disciplines. In 1948 the Universal Declaration of Human Rights proclaimed the goal of universality.⁶¹ As Zechenter rightly observes, “[u]niversalism, thus, is at the root of modern human rights law”.⁶² Despite this explicit ethos, the discourse of human rights scholars had focused largely on the extent to which human rights should take local cultural circumstance into consideration in the implementation of norms.⁶³ Any lingering debate was resolved at the World Conference on Human Rights in Vienna in 1993, which asserted the primacy of human rights standards:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁶⁴

⁵⁹ The United Nations estimates that approximately 5,000 women are killed annually through honour killings. UNFPA, “State of World Population 2000: Lives Together, Worlds Apart: Men and Women in a Time of Change” (2000), Available at: <http://www.unfpa.org/swp/2000/english/>, Accessed 19.11.2009. This is a significant theme of the prominent volume edited by Okin. S.M. Okin (ed.), *Is Multiculturalism Bad for Women?* (Princeton University Press, Princeton, 1999).

⁶⁰ However scholars have nonetheless defended the dogma of relativism; see, for example, E. Hatch, “The Good Side of Relativism”, 53 *Journal of Anthropological Research* (1997), 371-381; K. Boulware-Miller, “Female Circumcision: Challenges to the Practices as a Human Rights Violation”, 8 *Harvard Women’s Law Journal* (1985), 155-177; R.B. Edgerton, “Traditional Beliefs and Practices: Are Some Better than Others?”, in L.E. Harrison and S.P. Huntington (eds.), *Culture Matters* (Basic Books, New York, 2000); M. Parker, “Rethinking Female Circumcision”, 65 *Africa* (1995), 506-523; H. Montgomery, “A Case Study of Child Prostitution in Thailand”, in Cowan *et al.*, *supra* note 2; T. Asad, “On Torture, or Cruel, Inhuman and Degrading Treatment”, in W. Richard (ed.) *Human Rights, Culture and Context* (Pluto Press, London, 1997).

⁶¹ “... a common standard of achievement for all peoples and all nations ... to secure their universal and effective recognition and observance ...”. UN Doc., GA Res 217. A (III) (1948), Preamble.

⁶² E.M. Zechenter, “In the Name of Culture: Cultural Relativism and the Abuse of the Individual”, 53 *Journal of Anthropological Research* (1997): 319-347, at 320.

⁶³ Prominently, see A.A. An-Na’im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992); however, see J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 2003).

⁶⁴ Vienna Declaration and Programme of Action, U.N Doc. A/CONF.157/24 (1993), Para. 5.

From a human rights vantage the discussion seems closed with states accepting the general principle of the universality of human rights.

By contrast, from its inception, anthropology has supported a cultural relativist ethos.⁶⁵ In effect, this meant that cultures were seen to establish their own moral standards,⁶⁶ premised on the dogma that “any society or culture, when all is said and done, can only be understood on its own terms”.⁶⁷ The extraordinary clash with human rights is obvious. Thus, anthropology has been, and continues to be, extremely cautious in judging other cultures and in particular what it perceives as a European-derived model of standards.⁶⁸ The outset of the human rights regime thus provoked an outcry from anthropologists.⁶⁹ However, recent years have borne witness to a softening of rhetoric: a number of anthropologists, struggling to reconcile the discipline’s relativist stance with mechanisms for dealing with human rights violations, have proposed compromised solutions.⁷⁰ In 1999, the American Anthropological Association issued a position document that reflected a thawing in its relativist position:⁷¹

As a professional organization of anthropologists, the AAA has long been, and should continue to be, concerned whenever human difference is made the basis for a denial of basic human rights, where ‘human’ is understood in its full range of cultural, social, linguistic, psychological, and biological senses.⁷²

For human rights law, the issue is more clear-cut: human rights standards are the ‘bottom line’ for cultural behaviour and divide the permissible from the non-permissible. Nonetheless,

⁶⁵ See V.E. Spiro, “Cultural Relativism and the Future of Anthropology”, 1 *Cultural Anthropology* (1986), 259-286.

⁶⁶ Much of this thinking can be traced to the pioneering work of Franz Boas who stressed the importance of understanding cultures in their own contexts. See, for example, F. Boas, *The Mind of Primitive Man* (MacMillan, New York, 1911).

⁶⁷ Eriksen, *supra* note 20, at 257.

⁶⁸ See A. Pollis and P. Schwab, “Human Rights: A Western Concept with Limited Applicability in Human Rights: Cultural and Ideological Perspectives”, in A. Pollis and P. Schwab (eds.), (Praeger, New York, 1979); A. Pollis, “Cultural Relativism Revisited”, 18 *Human Rights Quarterly* (1996), 316-344; R. Pannikar, “Is the Notion of Human Rights a Western Concept?”, 30 *Diogenes* (1982), 75-102.

⁶⁹ See the statement by the American Anthropological Association. The Executive Board, American Anthropological Association, Statement on Human Rights, 49 *American Anthropologist* (1947), 539-543. See J. Steward, “Comments on the Statement on Human Rights”, 50 *American Anthropologist* (1948), 351-352.

⁷⁰ A.D. Renteln, “Relativism and the Search for Human Rights”, 90 *American Anthropologist* (1988), 56-71; A.D. Renteln, *International Human Rights: Universal versus Relativism* (Sage, Newbury Park, 1990); W.P. Handwerker, “Universal Human Rights and the Problems of Unbounded Cultural Meaning”, 99 *American Anthropologist* (1997), 799-809.

⁷¹ This is challenged by Engle who questions the extent of this change. See K. Engle, “From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999”, 23 *Human Rights Quarterly* (2001), 536-560, at 537.

⁷² American Anthropological Association, Declaration on Anthropology and Human Rights (1999).

cultural relativism has arguably been the most significant factor in the limited involvement of anthropology in human rights. In the view of the author, both disciplines appear, at a certain level, to be compatible: human rights law provides standards by which anthropology's holistic approach can be limited. However, this is somewhat ironic given the continued hostility.

VIII. Legal Application of the Approach

Clearly the proposed approach was not developed with legal protection in mind. Rather it was developed for, and by, the nuances of ethnographic field research. How, therefore, does the concept transfer to a legal setting?

A notable critique of the 'total way of life' approach was recently put forward by Terry Eagleton. Criticizing its breadth, he observes on the model that it involves too much: "covers everything from hairstyles and drinking habits to how to address your husband's second cousin".⁷³ Although Eagleton's remarks do not extend to the legal protection of culture they are clearly pertinent. Banal as they may be, these are all likely aspects of group life. This illustrates a fundamental difficulty with the cross-disciplinary theoretical exchange proposed by the author. Anthropology tells us that, according to its all-embracing approach, this is culture. Extending Eagleton's sentiment, is it reasonable that a minority member be entitled to go to court and claim protection for his hairstyle because this is an aspect of his culture? However, the 'total way of life' approach is conceived here as having an entirely different function. It should first be recalled that the goal of this article was to advance a viable representative model for human rights law. It is suggested that one of the benefits of such a model is that it allows us to view the issue in the context of objects of legal protection: i.e. this is what law must protect.⁷⁴ A telling illustration is China's longstanding dispute with Tibet.⁷⁵ The state has offered what seems to be a very limited cultural policy with the goal of protecting the broad Tibetan culture.⁷⁶ A reasonable methodology is that actions that have a

⁷³ T. Eagleton, *The Idea of Culture* (Blackwell Manifestos, Oxford, 2000), at 32.

⁷⁴ See Renteln's approach to culture and law, A.D. Renteln, *The Cultural Defence* (Oxford University Press, Oxford, 2004).

⁷⁵ This is disputed by Sautman. B Sautman, "Cultural Genocide and Tibet", 38 *Texas International Law Journal* (2003), 173-246.

⁷⁶ "The Chinese government has always respected and valued the traditional culture of ethnic minority groups. It has allocated large sums of money for the protection and maintenance of historical relics and sites of ethnic minority-groups. Between 1989 and 1994 the government invested 53mn yuan to completely renovate the

substantive effect on culture are separated from less vital activities. This echoes Stamatopoulou's approach in her recent study on cultural rights.⁷⁷ This is a case-specific approach to culture that does not *prima facie* dismiss an element of culture from protection without first considering its specific circumstances. In a sense, this configuration is already evident within the human rights forum. The Human Rights Committee, quantitatively speaking the body with the most voluminous jurisprudence on the subject, has been protecting cultural groups from outside threats to their cultural existence and has applied this filtering system.⁷⁸ Heretofore, its cultural thinking has been largely related to indigenous groups and reveals a highly traditional focus, which calls into question its relevance in the modern world. The discourse on the intersection of law and culture has witnessed an inquiry into the intrinsic capacity of the legal process to protect culture, to which the obvious retort is that this *is* occurring in human rights law.⁷⁹

Second, the lesson from contemporary anthropology is that legal practitioners must acknowledge the cultural realities of contemporary life, including indigenous groups. The absence of such reasoning was poignantly illustrated in the recent *Yorta Yorta*, which, in the author's view, was rejected on the basis of a highly static and restrictive reading of culture.⁸⁰ That decision was to have profound ramifications for the long struggle of indigenous Australians in securing land rights, signally a 'reeling in' of the landmark *Mabo* case.⁸¹ Canadian jurisprudence has recently seen a related controversy: in *R v. Van der Peet*, the Canadian Supreme Court upheld the appellant's conviction for commercially selling salmon, based on a highly restrictive 'integral to a distinctive culture' test, which was regarded as the basis for establishing an aboriginal right.⁸² The test required claimants to prove that the

world-famous Potala Palace in Tibet and finished 111 projects. This is the biggest renovation of the Potala Palace since it was constructed early in the Qing dynasty in the mid-17th century. In 1991 the government invested more than 30m yuan and provided manpower and material for the renovation of the Kumbum Monastery, a Tibetan Buddhist establishment in Qinghai". Chinese State Council, White Paper on Human Rights (1995).

⁷⁷ Stamatopoulou, *supra* note 2, at 112-5.

⁷⁸ See for example *Lovelace v. Canada*, UN Doc. CCPR/C/OP/1 (1995); *Kitok v. Sweden*, UN Doc. CCPR/C/33/D/197/1985 (1988); *Lubicon Lake Band v. Canada*, UN Doc. CCPR/C/38/D/167/1984 (1990);

⁷⁹ See for example *Äärelä and Näkkäläjärvi v. Finland*, CCPR/C/73/D/779/1997 (2001); *Länsman v. Finland*, UN Doc. CCPR/C/83/D/1023/2001 (2005).

⁸⁰ *Members of the Yorta Yorta Aboriginal Community v. Victoria* [2002] HCA 58. See G. McIntyre, "Native Title Rights after *Yorta Yorta*", 9 *James Cook University Law Review* (2003), 268-330.

⁸¹ *Mabo and Others v. Queensland*, 23 HCA [1992]. See G. Nettheim, "The Mabo Response in Australia: Reconciliation or Continuing Conquest?", 10 *Anthropology Today* 8 (1994), 8-11.

⁸² *R v. Van der Peet*, 2 SCR [1996]. See generally R.L. Barsh and J.Y. Henderson, "Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand", 42 *McGill Law Journal* 993 (1997), 3-19; M. Murphy, "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?", 34 *Canadian Journal of Political Science* 109 (2001), 109-129.

relevant practice was integral to group life prior to European contact. Regrettably, the case rolled back the far more dynamic and contemporary approach taken by the Court in *R v. Sparrow*.⁸³ Again, the case was a substantial hurdle in the already difficult struggle of indigenous communities to secure rights.

IX. Conclusion

The culture question is one of the most profound and challenging issues facing humanity today. In the hostile post-9/11 atmosphere, some minorities are under enormous pressure in terms of their very place in society. Under the call of securitization, the period has witnessed a reassessment of fundamental notions of national identity in some states. Of course, this has been a government-led initiative with minorities largely voiceless. This article has focused broadly on the human right system as a potential solution to this profound dilemma, and in particular on nuances within the legal process. Minority cultural identity is an established concern of human rights law, but it is gravely disadvantaged because it is at such a formative stage. Nonetheless, the overwhelming majority of states have recognized the rights of minorities to their own cultural identity, and have acceded in parallel to legal obligations.

Through the model it has advanced, this article has sought to clarify the regrettable lacuna in offering guidance to legal practitioners in this crucial and complex area. Much of the theoretical knowledge was gleaned from anthropology, academia's specialist in questions of culture. Anthropology is a wonderful source for cultural models as its theoretical life is informed by the experiences of reflexive field workers who commit to substantial periods of study while living among their subjects. Its theory is at once universal and local, and it is grounded in real-life communities. Through its application, this article has sought to capture a viable representative model for human rights law; put simply, this is what law must protect.

The holistic 'total way of life' approach is one that is synonymous with anthropology's traditional focus on the group: culture is everything. For human rights law, mandated to address (minority) groups, the model is equally applicable. This article sought to capture the

⁸³ "The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner". *R v. Sparrow* 1 SCR [1990], at 1075. See generally M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v. Sparrow*", 29 *Atlanta Law Review* (1991), 498-517.

tangible, behavioural elements of the cultural process that might be addressed by legal practitioners. Equally vital are the new approaches of contemporary anthropology. These have centred on a dynamic understanding of culture, invoked by anthropology as a means of embracing the modern world. In parallel with this post-modern turn, human rights must also acknowledge the realities of the modern globalized world in all its cultural complexity. The proposed model is a fusion of the 'classic' and 'contemporary' schools, one that is grounded in the tangible notion of the group while acquiescing to contemporary life. The human rights discourse has heard recent calls for a cultural model focusing on the classic approach, but some question its relevance to the contemporary world. However, anthropology's greatest lesson to human rights is perhaps that it must acknowledge and seek to protect that which it encounters in the living communities before its eyes.

“Root Causes”:
The Inversion of Causes and Consequences in Civil War

Christian K. Højbjerg¹

Introduction

It appears as something of a paradox in the social sciences of culture, such as anthropology which is the discipline I represent in these pages, when scholars refuse vehemently to consider the role of culture in causing and sustaining organised, violent conflict². One major reason for disclaiming culture as a causal mechanism in the outbreak and course of armed conflicts resides in the fact that anthropologists and others take pains to dissociate their approach to culture from the so-called culturalist explanations of the many small, new wars in the post-Cold War era. A number of political scientists and some journalists writing for a larger audience have thus become interested in the impact of culture on political life, including in particular organised, armed conflict (e.g. Chabal and Daloz 1999, Ellis 1999, Huntington 1993, Kaldor 2004, Kaplan 1994). On the other hand, anthropologists are in general wary of providing explanations of cultural and social phenomena and conceive instead of their science as semiotics, preoccupied with questions of meaning and sense-making. Among those few who actually address the issue of causal mechanisms in connection with social violence, the untenable idea that the epiphenomenon of culture can be seen as causal is replaced by notions of rational choice among individual actors (pursuing maximal interests, sometimes through the deliberate ‘use’ of culture) and the role of social institutions, including intergenerational tensions and class conflict.

I sympathize with the view of those scholars who discard culturalist explanations of human behaviour as long as the critical issue of culture’s motivational

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² Funding for recent fieldwork mentioned in this article has been granted by The Danish Council for Development Research (FFU). I am grateful to the anonymous reviewer and the participants at “The Roots of Civil War and Conflicts...” conference at Alston for their constructive comments on an earlier version of this article. Thanks also to the Upper Guinea Coast research group at the Max Planck Institute for Social Anthropology, Halle/Saale, for providing me with ideal working conditions to write this article.

force and implications for human behaviour remains unaddressed in terms of underlying cognitive and psychological processes (Højbjerg 2007). However, the argument of this article is based on the idea that the refusal to consider the impact of ‘culture’ on collective violence and war contains the risk of throwing out the baby with the bathing water. Causes of war are very often blurred. War is profitable to many actors who may have different interests. Take, for instance, the constantly reoccurring rebel insurgency in eastern DR Congo. To the people involved and many commentators alike it is not always clear what is at stake. Is it a competition for resources and gains, ethnic tensions, or a proxy war waged by one or more neighbours of the DR Congo? Not only are causes of war blurred. It is also difficult to disentangle the causes and effects of war. Thus, the ethnic enmity that many commentators depict as the reason of armed confrontations may just as well be seen as a product of the conflicts. As shown by Kalyvas, it is also worth recalling that actions and motivations of combatants in civil war rarely resonate unambiguously with a general ideological program orchestrated by supralocal elites. Top-down run group goals that make use of social violence always intersect with local feuds, personal revenge and sheer opportunism (Kalyvas 2003, cf. Hoffman 2007:647-648).

The apparent confusion of causes and consequences of conflict, especially in connection to the so-called ‘new wars’, has not prevented contemporary analysts of war to craft a number of broad brush explanations of the proliferation and nature of violent conflicts at the end of the Cold War and beyond into the twenty-first century. Such general explanations of the new, small wars privilege either one or a combination of factors that relate to resource scarcity and population pressure, clash of cultures, and global political economy. General insight into the nature of new wars is, however, often gained at the expense of adequate attention for their social and cultural context. I here apply the term context both in the sociological sense as reference to the actors planning and carrying out war (Richards 2005a) and in the sense of cultural ideas and practices associated with violence, identity construction and notions of belonging. It is characteristic of anthropology’s contribution to an understanding of collective conflict and civil war in an era of globalisation that it privileges a bottom-up approach; that is, a ‘grounded’ account of the background and scale of conflict which differs from most ‘broad brush’ explanations and large-scale comparative analyses (e.g. Englund 2005).

This contextual alternative to mono-causal explanations of war allows for a better grasp of the social dimensions of war, and of the agency of the war-affected in re-inventing peace.

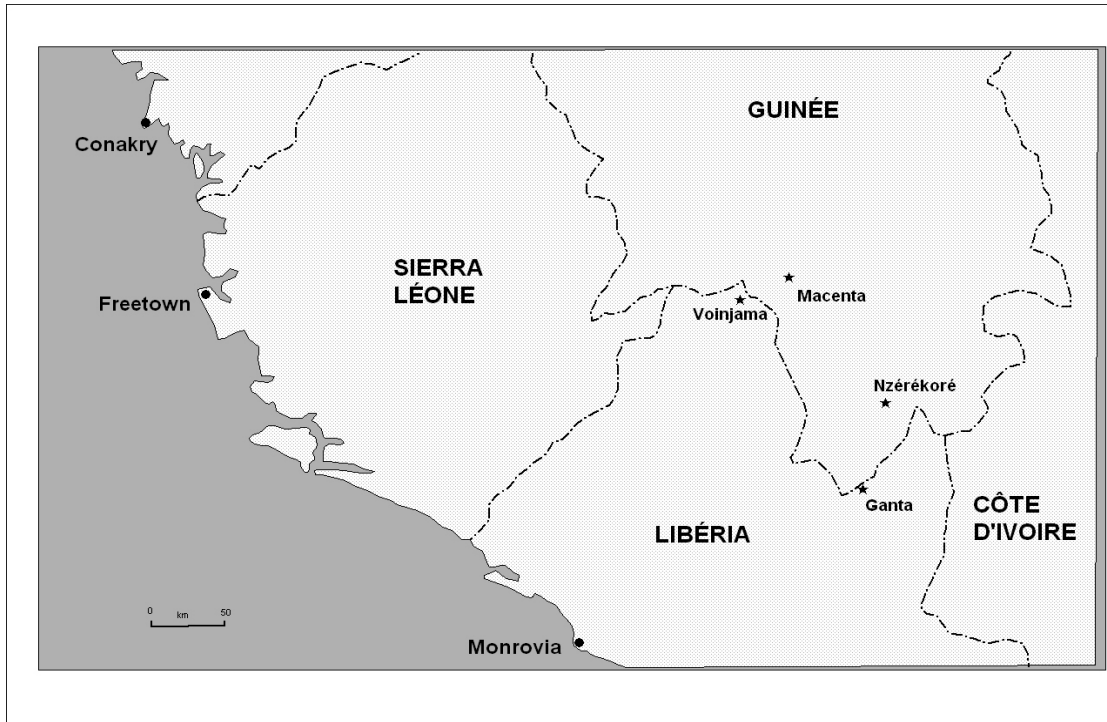
Much attention has also been paid to the cultural, symbolic aspects of violence in order to understand how both victims and perpetrators make sense of, cope with and justify otherwise incomprehensible acts (e.g. Appadurai 1998, Hoffman 2006). As mentioned, this kind of research is interpretive rather than explanatory in orientation. It may rightly be argued that a focus on the micro-level of war entails the risk of blurring causes and effects and of losing sight of the 'real issues' and the broader picture. Yet it is at the same time a matter of debate whether sweeping explanations of the nature of small, new wars actually risks misconstruing the complexity of the subject under study. As suggested by a number of anthropologist and political scientists of war and political violence it is rather a question of striking a balance between, on the one hand, macro-level politics and political economy, including the effects of globalisation, and, on the other, micro-level dynamics that influence the course of violent conflict at a local level (e.g. Ferguson 2008, King 2004, Reno 2007). It appears futile also to discuss causes of war without a clear notion of the scaling of war. Thus, so-called new, small wars are closely linked up with international political economy (e.g. Mantz 2008, Reno 2001), they are usually part of a regional conflict rather than being circumscribed within national boundaries (e.g. Ero and Ferme 2002), and all of them claim legitimacy in opposition to a centralised, national power and feed on local grievances. Besides the problem of scale and nature of explanation, the notion of new war itself to designate the rash of armed conflict in the post-Cold War era has become object to a long series of criticism over the last five to ten years (e.g. Cramer 2006, Reyna 2008, Richards 2005a).

In this article focus is on the consequences of armed conflict, rather than on the causes in the sense of first instances. While the reasons for waging war often are many and blurred, the consequences are more clearly identifiable. Local identities and oppositions between neighbouring groups are typically enhanced and new power complexes emerge. On the background of a discussion of current explanations of civil war, I argue for the relevance of adopting an analytical approach that pays special attention to the social and cultural dimensions of war and unstable post-conflict

situations. With reference to a war within the civil wars that ravaged the Upper Guinea coastal and forest region from 1990 to 2003 I am going to address the issue of how group identities and oppositions become enhanced during protracted conflict and, then, in the aftermath of war risk generating further armed violence. This is the scenario of consequences of war turning into causes of war. Policy makers and external peace makers are highly aware of this risk and, as I am now going to show, they act accordingly.

Culture War

Nowadays the official ending of civil war entails the intervention of a host of NGOs and international agencies that engage in peace-keeping and state-building activities as well as in community based conflict resolution. Except for the most basic infrastructure, such as roads, medical centers and schools, the economic and material support intended to improve a war-affected population's living conditions only follow at a later stage, since donor agencies consider peace and security as a prerequisite for development. Two years after the belligerent parties in the Liberian civil war (1990-2003) signed the peace accord in 2003 I had the opportunity to attend an official peace-building workshop in the administrative center of Voinjama, a town in the remote area of the Liberian hinterland close to the border of neighbouring Guinea (see map below). Before and after the war two 'distinct' peoples, the Loma and the Mandingo (or Manya) have been coexisting peacefully in this border region. Large parts of the town of Voinjama had been entirely destroyed as a result of fourteen years of war interrupted by shorter or longer periods of relative peace. When I visited the place for the first time in 2005, internally displaced refugees and refugees in exile in neighbouring Guinea were slowly and hesitantly returning in small numbers; the main public school and one medical clinic had been reconstructed by UN agencies; two renovated, religious buildings, a church and a mosque, clearly illustrated the importance of religion in this initial phase of community reconstruction. Amidst ruins, partly repaired houses and the few renovated public buildings, lay the fenced and heavily guarded military camp of the Pakistani UN peace-keeping force.



Map of the border region between Liberia and Guinea and with town names mentioned in the article

Both local and international NGOs plan and coordinate peace-building workshops in war-affected communities. The workshops occur quite frequently and despite being initiated and led by outsiders, the organizers profess a sort of bottom-up philosophy which is meant to induce a perception of ownership among the participants to the ideas processed and the decisions made during the course of the event. In the case mentioned here the performance of a NGO-run conflict resolution initiative was a relatively formalized event, involving ecumenical prayer, collective singing, opening and closing speeches and so on. Peace workshops should not be compared to ritual events in a strict sense, though. It is not uncommon to observe participants engage in open dispute during the peace-building sessions which make them rather resemble institutionalised exchanges of political opinion. In the area I refer to here, properly ritualized, peace-making efforts are instead locally organized events that involve one or more warring factions and occur without the participation of any external actors.

The peace-building workshop that took place in the town of Voinjama in early June 2005 was an all-day event, interrupted only by a much awaited free lunch. It

may be of interest to note that a local, evangelical church was used to host the meeting, even though the members of one of the two participating groups were Muslim. A national NGO (LCIP), supported by the American development agency USAID, was responsible for the workshop and the participants comprised what the organizers defined as “community facilitators” from among the two major ethnic groups living in town and the surrounding area. In this case the term ‘community facilitators’ was a euphemism for a local elite that consisted of political actors appointed by the government, religious leaders and traditional chiefs, representatives of the elders, the women, the youth, and the ex-combatants. According to the organisers, the workshop was intended to fulfill two related objectives that one may choose to see as constituting a collective catharsis. The first objective was to relieve tensions between the two opposed ethnic groups by making them identify conflict causes and solutions in public and in common. The second objective of the meeting was meant to prepare for cleansing rituals to be carried out at selected sacred sites by each group separately. Here the aim was stated as “cleaning our hearts for animosity towards opposite groups and against people from one’s own group.”

As I will return shortly to some of the consequences of the armed conflict for intercommunal relationships, I jump straight to the main causes of armed conflict as they were perceived by the workshop participants. As it appears from the “conflict tree” (see photo below) that the facilitators used as a working tool in the peace meeting to illustrate causal relationships, the “root causes” of the civil war implied the role of the “book people”, “tribalism”, “lack of respect for cultural heritage”, “lack of respect for elders”, “kinship”, and finally the issue of “citizenship”. While both Mandingo and Loma agreed on the negative effects for intercommunal relations of so-called educated people and ethnic identity formation, they differed in their emphasis on other aspects that clearly mirrored the present circumstances of each group taken separately. For instance, the Loma would express their frustrations concerning the Muslim Mandingos’ disrespect of their traditional religious practices and the Mandingo were equally heard complaining of their stigmatized identity as being “Guineans” rather than Liberians. The local perceptions of the major causes of civil war can be rendered as referring to the role of educated community leaders and state authorities; ethnic differences; the recognition of norms and values associated with traditional, secret societies and Islam; generational

conflict; inter-marriage between the opposed groups; and the claim of some Mandingos to be recognized as citizens of the Liberian nation. Ironically, one of the workshop coordinators promptly refused to recognize the issue of citizenship as to be of any relevance in the present case. As mentioned, this attitude went against the foundational didactical principle of acknowledging the participants' right to define problems and solutions.



NGO agent visualizing a local 'conflict tree'

Before considering in further detail the issues raised by members of the conflicting parties, I would like to point out one conspicuous aspect of the causes of conflict mentioned. With one or two exceptions that suggest an explicit dimension of power; that is, the elders versus youth and the role of the ‘book people’, the depicted “root causes” of conflict refer first of all to matters of culture and in particular to *cultural difference*. There is no mentioning here of the major conflict generating factors evoked by other external observers, such as competition over resources, including diamonds, or access to land in rural areas or in commercial centers. Nor is there any allusion to long-term exploitation and domination by a state-supported, local elite, or by some traditional, gerontocratic political culture. To evoke the role of the “book people” may suggest popular resentment towards political leaders, though it is unclear whether the category refers to the ‘black colonialism’ of the descendants of the Americo-Liberian settler elite who ruled the country of Liberia for more than a century, to the subsequent, oppressive ‘indigenous regime’ of Samuel Doe that preceded the outbreak of war, or to any educated peoples associated with one faction or another during the fourteen years of civil war.

In the present case there seems to be clear evidence that local victims and perpetrators of armed conflict perceive of the lack of respect for cultural differences as a major factor causing and perpetuating war between neighbours. This local viewpoint on the cause of a contemporary conflict sounds almost too familiar. It reflects the way media in the North usually represent civil wars in the global South. Moreover, it sustains the famous theses by Kaplan (1994) and Huntington (1993) that explain the nature and origins of wars in the twenty-first century in terms of culture clashes. The analyses of Kaplan and Huntington have been subject to much debate. Critics have among other things questioned the notion of culture (and civilization) employed in these culturalist approaches to conflict and which conceive of culture as a bounded, essentialised and homogenous entity. In contrast, anthropologists and others have long since employed a more pragmatically defined notion of culture as differentiated, negotiable and subject to politicized manipulation. Critics also raise the essential question as to how culture can be causal and which may also be addressed to a majority of students of culture, including anthropologists, who tend to take agency and culture’s impact on human behaviour for granted. In addition, one should not forget to apply a methodological skepticism and not

take the word of one's subjects of study, the victims and perpetrators of war, at face value. On the other hand, it would be analytically misleading (and morally unjustifiable) to disregard local representations of conflict. Even if the perception of cultural difference may not be the primary cause of conflict outbreak, significant differences in language, religion, marriage practices, etc. that are important for identity construction may be enhanced during times of conflict and thus become critical for the perpetuation of conflict. As already suggested, the cultural competition thesis is not the only prevalent model of explanation of protracted West African armed conflicts. Most scholars are critical of the culturalist approach and have instead associated the 'root causes' of civil war with 'crisis of youth' (e.g. Hoffman 2006 and Richards 2005b), so-called 'failed states' and general political economy (e.g. Reno 2001, Sawyer 2004), and 'greed *and* grievances' (e.g. Keen 2005).

New Wars and Root Causes

For some time a metanarrative about the new world order has served to explain the proliferation of wars in the global South. As the story goes, the end of the Cold War put an end to the super powers' monopoly of violence which frequently manifested as the waging of proxy wars in the worlds periphery. Undemocratic regimes ceased to receive financial and logistic, military support. During the same period international donor agencies imposed structural adjustment programs that reduced state control of the economy and affected state sovereignty. By the same token the living conditions of impoverished populations decreased even further while their numbers were increasing. Western donor countries moreover required political reforms in response to development aid. Along with economic and political reform, the expanding, economic globalization facilitated privatization processes which put an increasing pressure on state authority in many African states and elsewhere; a process that also created new opportunities for 'privatised states'. More generally, the neoliberal, post-Cold War world order is held to have caused the erosion of the state and state sovereignty. Incapable of controlling their territories, weak states then withdraw or collapsed. A rash of small wars irrupted in the interzones between failed nation states in Africa, the Balkans and other parts of the

former communist world. In this new era inter-state wars were replaced by intra-state wars in ‘ungoverned zones’ (e.g. Engel and Mehler 2005; Richards 2005a; Reno 2003).

The realisation that the new wars represented a security threat to the world as a whole soon entailed new forms of intervention in the war-affected regions, especially by UN-led peace-keeping missions, which are sometimes preceded sometimes succeeded by a host of humanitarian agencies and INGOs. Some commentators have questioned the effectiveness of these intervention forces and suggest that rather than serving to put an end to wars, they may produce a reverse effect (e.g. Duffield 2001). On the other hand, international military intervention efforts to stop armed conflict and sustain peace within recognized boundaries signals a consensus that the state has not withered away. International political culture demands that states continue to be territorially based (e.g. R.B. Ferguson 2003; Kapferer 2004, see also Ferguson 2006:39). Mentioned in passing, it is likely that the above metanarrative about neoliberal global (dis)order will be going through revision in light both of the recent military intervention of one nation-state, Russian, into another, Georgia, and the outbreak of the current global, financial crisis.

I shall leave aside the question whether Twenty-first century wars are really new in the sense of being unprecedented (Kaldor 2004), or whether they rather resemble the low-intensity, non-state wars fought in pre-Westphalian Europe (Reyna 2008). For the purpose of this paper, it suffices to indicate how a majority of commentators explain the nature of contemporary, non-state armed conflict. According to the anthropologist Paul Richards, for instance, three kinds of explanation of ‘new war’ emerged during the 1990s. He labels them as ‘Malthus with guns’, ‘the new barbarism’, and the ‘greed not grievance’ debates. The first, exemplified by the political scientist Homer-Dixon, favours the explanation of violence in developing countries as a consequence of resource scarcity and competition over resources; the second, exemplified by Kaplan and Huntington’s famous thesis concerning culture competition, explains new war in terms of endemic hostilities between peoples endowed with immutable, bounded cultural identities; the third mode of explanation, exemplified by the work of the geographer Le Billon (e.g. 2001) and the economist Collier (e.g. 2004), see internal wars as a result mainly of economic considerations (Richards 2005a: 6-11). In their effort to simplify even further the dominant readings that have emerged about the ‘root causes’ of violent conflict in

Africa, the political scientists Engel and Mehler identify two major lines of argument. One concentrates on ethnicity and identity (basically, but not exclusively, the ‘grievance’ argument) and the other focuses on the political economy of conflict (basically, but not exclusively, the ‘greed’ argument) (2005:90). Thus, while there may not be a consensus on the reasons behind the emergence of the ‘new wars’, most explanations converge on the point of construing such violent conflicts as apolitical (Cramer 2007:76, Hoffman 2006:12, Kaldor 2004, Richards 2005b:573). To reject the political subjectivity of armed actors is a questionable assertion that rests on a narrow definition of the political from a state-centred perspective.

I agree with Richards’s objection to the notion of ‘new war’ as a “mindless response” to resource scarcity and population pressure, cultural competition, or trans-boundary political economy. None of these arguments, says Richards, “offers a convincing explanation of why war happens when and where they do, offering only an explanation how war is intensified or prolonged (...) [W]ar does not break out because conditions happen to be ‘right’, but because it is organised (...) [W]ar is inescapably sociological.” (Richards 2005a:4; see also R.B. Ferguson 2008:42-43). I part company, however, with Richards’ alternative sociological explanation of war in the Mano River region in West Africa as a product of rural youth’s grievances against ‘customary’ chiefs and local elders (Richards 2005b:586; Chauveau and Richards 2008). Although it is presented as “Emile Durkheim’s theory of civil war” because of its association of an alleged forced division of labour and revolt of farm slaves, this explanation reads more like a classical Marxist description of an alleged class conflict in West African lineage-based societies. There are two reasons for objecting to Richards’ conceptualisation of the recent civil wars in Sierra Leone and Liberia as well as beyond in Guinea and Cote d’Ivoire. First, as mentioned by another critique of Richards’ analysis, the empirical evidence sustaining his thesis appears inadequate and the interview-based methodological approach to be of limited value (Fanthorpe 2005). Second, ethnographic data that I have gathered in rural and semi-urban communities in northwestern Liberia and southeastern Guinea also does not lend credit to the notion of civil war in the Mano River region essentially as a revolt of an exploited and disillusioned rural youth. Neither in the past nor at present does competition over agrarian resources appear to have constituted a major

cause of war. This second point does not preclude, however, that Richards' Marxist-Durkheimian analytical framework applies to specific parts of war-torn West Africa, such as the Sierra Leone Hinterland, but I raise doubts about the general value of this approach. My questioning of Richards' view on the West African subregional conflict does not mean that I do not consider the impact of local grievances and rather have a preference for the 'greed, not grievance' explanatory model, which has gained currency in connection with this West African war zone. In accordance with this model 'blood diamonds' constitutes the simplified, popular image of the driving force behind the conflict.

As a matter of fact, many students of conflict in the area I refer to, especially among political scientists, seek to strike a balance between the greed and grievance perspective. William Reno and David Keen are among the best known analysts who take account of both predatory behaviour of armed groups, international political economy, and the political revolt and popular grievances that constitute the complexity of the interconnected civil wars in Sierra Leone and Liberia (Keen 2004, Reno 2001, 2007, Richards 1996). R.B. Ferguson suggests the neologism 'identerism' to depict the so-called identity-linked new wars for which we possess no general term. In opposition to "some current explanatory divides that stress either self-interest or identity issues (sometimes framed as 'greed vs. grievance'), 'identerism' highlights the point that practical interests and self-identities are very commonly fused into one (...) Calling a conflict 'identerest' creates a question of identities and interests that must be answered..." (Ferguson 2008:43). The anthropologist Günther Schlee, a specialist on conflict in east African pastoral societies, proposes a theory of conflict that also intends to move beyond the analytical dichotomy between greed and grievance (Schlee 2004). Schlee acknowledges the importance of resource-orientated, economically or ecologically inspired theories that account for conflicts caused by the competition for resources and gains. Notwithstanding, the issue of identity work and group identifications that occur in situations of violent conflict is claimed to remain poorly understood. Who is fighting who and why is less evident than it appears and it cannot be explained alone by taking the legitimizing accounts of participants at face value. According to Schlee, "there are still deficiencies in our understanding of the ways in which people in specific conflict

situations may make and break alliances and which patterns of identifications they follow.” (2004:135)³.

There are clear merits to an approach to conflict analysis that builds on rational choice theory and theories of group identification. I have my doubts however, whether this integrated, explanatory model of conflict actually meets its own demands. Despite being action-centred the theory lacks a sustained notion of agency that helps understand the full rationale of people’s actions in situations of conflict. What is needed, I will argue, is a notion of agency that also takes in the motivational force of memories and emotions, rather than a notion which rests ultimately on people’s calculation of costs and benefits (including the unintended consequences of being passively included in or excluded from a given social unit) and the semantic constraints of social categories. New research on the means and ends of war, and on organised political violence in general, ought instead to proceed from a theoretical perspective that works toward articulating a micro level, which addresses questions of intentionality, memory, emotions and intersubjectivity, and a macro level, which focuses on structural conditions, social and cultural context.

Culture War Recontextualized

It is high time to return to the major themes of the peace-building meeting I reported at the beginning of this paper. My aim in the following is to suggest how intercommunal tensions, which I consider as a consequence of protracted, violent conflict, may in turn during so-called post-conflict time become causes for further, or sustain ongoing collective, violent interaction. In contrast to culturalist assumptions about the causal role of essentialised culture, the following section is meant to illustrate how under certain circumstances the epiphenomena of culture and second-order causes turn into first-order, or “root causes” of violent conflict.

The rural urban settlement that constitutes the empirical background of this article is situated in the northwestern hinterland of Liberia close to the border of Guinea. Located at the heart of a trouble-ridden region, between two nation-states, the town of

³ See also Kalyvas 2003 and King’s description of the ‘micropolitical turn’ in the study of social violence within the disciplines of comparative politics and international relations (King 2004).

Voinjama constitutes a typical border zone that affords a great variety of (un)regulated economical, political and military opportunities. This was the case to an even greater extent during the war characterised by a high frequency movement of people, both refugees and rebels, and illegal border transaction of goods, including arms and looted property, by entrepreneurial individuals, marauding rebels and government soldiers from both Liberia and Guinea. There are good reasons to conceptualise the protracted violent conflict that ravaged the area as part of a regional war without frontiers (Højbjerg 2008). On the other hand, the conflict dynamics in northwestern Liberia and across the border into southeastern Guinea are too complex to be seen as simply deriving from the general, subregional political deficiencies that sparked civil wars during the final decade of the twentieth century.

In the Voinjama area and beyond a minority of people labelled ethnically as Mandingo currently find themselves in an antagonistic relationship to an amalgam of ethnic groups (e.g. Loma, Mano, Gio, Kpelle, etc.) who refer to themselves as autochthonous. These ‘people of the land’ classify the Mandingo as “strangers from Guinea” and sometimes pejoratively as “Dingos”. Within a greater zone of Mandingo-autochthonous cohabitation conflict dynamics vary due to different historical trajectories of Mandingo migration and settlement patterns. For instance, the Mandingo in northeastern Lofa, who name themselves Manya, have long since been recognised as the guardians of their own territory. They are usually considered less “strangers” than the Mandingo in the adjacent Nimba County, who often refer to themselves as Konyanka, and who are looked upon as descendants of stranger traders. Ethnogenesis and the possible common origin of the Manya and Loma in the Voinjama/Macenta border region is a prominent issue among scholars as well as among local people, though it remains a moot point⁴. The question of origin is also prevalent among the inhabitants of Nimba County, but here identities have always been declared and ascribed in less ambiguous terms. Tensions mainly evolve around land rights and property relations, especially in urban centres and in diamond extraction areas. According to my own findings in both ethnically mixed and homogenous rural settings around Voinjama in northeastern Lofa county, access to cultivable land does not seem to constitute a major conflict cause,

⁴ See Højbjerg 2007: 80-88 for a discussion of Loma and Manya ethnogenesis.

except in cases where rice swamp cultivation has been introduced. In comparison, conflict over access to farm land represents a more urgent issue among the same groups of people in the adjacent and more densely populated areas in southeastern Guinea. From a more general perspective, then, intercommunal violent conflict in the Liberia-Guinea border region is comparable to other conflicts in the Upper Guinea forest area, which, according to Chauveau and Richards (2008) are triggered, or sustained by competition over agrarian resources. Having said that, it is important to recall that the present case does not imply the class-based violence reported in relation to adjacent regions by the mentioned authors. In addition, war did not occur spontaneously in the Liberian and Guinean hinterlands, but was obviously brought there from the outside world by the warlord and later president Charles Taylor who was heading a small rebel army composed of mercenaries recruited from several West African countries. Once the fighting between rebels and governments forces had begun, local peoples started adhering to Taylor's 'cause' and the war took on its own course during which causes and consequences, private motives and collective interests became blurred.

Metaphorical Kinship, Religion and Settler-Stranger Relationships

Over time the long-term conflict between co-existing Mandingo and Loma and other ethnic groups has also been nurtured by the symbolic dimensions of local culture that inform the relationship between co-existing ethnic groups. A key symbolic aspect of local culture that is often alluded to as a contemporary conflict cause concerns the general refusal among Mandingo to recognise the metaphorical use of matrilineal kinship to conceive of the relationship between Mandingo and various self-declared autochthonous peoples. The metaphor of matrilineal kinship embodies an entire political culture of alliance among groups of descent (lineages) that stand in hierarchical relationship to each other as landowning 'mother's brothers and latecoming sister's sons, or as wife-givers and wife-takers. Matrilineal alliance translates as perpetual kinship in the sense that the political organisation at any time ideally reflects a real or mythical exchange between a male landlord and male stranger. Affinal kinship between mother's brothers and sister's sons implies rights and obligations, both at the individual and at the community level, including deference, reciprocal support and ritual collaboration. Historically, matrilineal

alliance has at the same time been projected onto entire ethnic groups in the culture area comprising the forest region in Guinea, parts of Sierra Leone and Liberia. In that process the Mandingo (Manya and Konyanka) have been ascribed the status as latecoming ‘nephews’ or sister’s sons, and, as a consequence, as “allochthons” in relation to the landowning ‘uncles’ or mother’s brothers of Loma, Mano, Gio and Kpelle origin who claim “autochthony”.

Unsurprisingly, religious identity is another aspect of local culture that has nurtured long-term conflict between co-existing ethnic groups. This is notably the case in connection with the increased difference between a professed Mandingo Muslim identity and the power associations or secret, ritual institutions of those who consider themselves as autochthonous. Until the mid-twentieth century and in some cases later a majority of the Mandingo population on both sides of the Liberia-Guinea border still adhered to the widespread Manding power association known as Koma, or took part in the Poro ritual association of the co-existing Loma and Kpelle population. In the Nimba region further to the west Islam appears to have been anchored much longer and more firmly among the local Mandingo of Konyanka origin. In contrast to people’s relative tolerance and respect of religious differences in the past, the conflicting parties currently emphasise differences in religious traditions and sometimes stage them in an aggressive fashion with an ill-concealed political purpose (Højbjerg 2005, 2007). During the NGO-sponsored peace-building workshop reported in the first part of this article protagonists typically phrased the conflict cause as a lack of respect for each other’s cultures, implying that culture is synonymous with religious practice.

Objectification of Culture and Changing Politics of Neighbourliness

The intercommunal relationship I have just described reads as a progressive schismogenesis between so-called Mandingo “strangers” and “autochthonous” forest peoples. A formal, ritualized relationship of reciprocity and mutuality has been replaced by an antagonistic relationship expressed in terms of exclusive, ethnic and religious identities. As social scientists we have learned the importance of being wary of people’s self representations. If we apply this methodological skepticism to the present case, it follows that the Mandingo and the ‘forest people’s’ description of themselves and their

neighbours may not correspond entirely with the way these groups actually interact at different levels ranging from whole communities to the level of families and individuals. There is considerable evidence, though, suggesting that collective narratives about the 'Other' have informed in one way or another intercommunal relations, including violent events, in the conflict-ridden border area between Guinea and Liberia during the past two decades (Højbjerg 2009). Granted that I have provided a correct description of the change that is taking place in local conceptualizations of intercommunal relationships, it is relevant to ask whether we are witnessing an irreversible development, or if local strategies of co-existence suffice to cope with the problem of difference and polarization between neighbouring peoples?

My provisional answer to this question is of a double nature. On the one hand, there is little doubt that a majority of the population throughout the region wish to see an end to a long-term conflict, which obviously has no clear winners. Quite the contrary in fact, as losses and suffering has been immense among both sides of the conflicting parties. Therefore, many local initiatives have been taking place with the aim of reconciling neighbour enemies, often in the form of ritual and religious ceremony comprising adherents to different belief systems. Parallel to such spontaneous, local strategies exist the many top-down initiatives introduced by national, interfaith associations, political elites with local roots, the entire security and development aid industry involving the UN, humanitarian agencies, and NGO's, and finally the national governments, including the Truth and Reconciliation Commission in Liberia. There is no reason not to believe, on the other hand, that these peace-building initiatives do not have a positive impact on people's decision to return from exile and reconstruct their lives and accept the presence of neighbours who may have killed members of one's family and looted one's property.

Yet it is still premature to conclude about the prospects of future coexistence of previously warring factions in this part of the world. Political economy aside, one major reason that leads me to conclude in this cautious way relates to the widespread atmosphere of mistrust of the 'neighbour' that reigns underneath an official and political correct discourse about reconciliation and peaceful co-existence. In addition, the omnipresent rights discourse only enhances a collective sentiment of exclusive group

identities. Whether it is part of the project of peace-building and community reconstruction, or resulting from some other globalizing trend, community leaders indiscriminately profess, “We have the right to practice our culture”, or “They don’t respect our culture”. It is well known that once culture becomes an object of reflection and evaluation in essentialising terms, it is already an object of purposeful manipulation; sometimes with harmful results.

Conclusion

I began this article by noticing the paradoxical fact that students of culture are sometimes reluctant to consider the causal role of culture in collective armed conflict while a number of political scientists and others seem to have opted for the opposite perspective in their analysis of so-called ‘new wars’. This article has provided empirical evidence in the sense of local perceptions of conflict causes of the apparent importance of culture, and notably cultural difference, for the onset and continuation of civil war. However, cultural and social scientific analysis of social phenomena, such as civil war, should avoid perpetuating ‘essentialised’ local representations. Instead of taking them at face value, the role of science is to contextualize local knowledge and put it into perspective by studying how it is produced, distributed and cognized.

Against the dominant broad brush explanations of civil war and collective armed conflict I have argued that it is often most difficult to dissociate causes and consequences in ongoing ‘small wars’. If one looks for causes in a too narrow sense there is always a risk of misrepresenting the object of study and it may, furthermore, entail negative effects for peace-making interventions, reconciliation initiatives and community construction. People do not fight each other simply because they are culturally different, but cultural identities and notions of belonging is sometimes endowed with importance in the course of events and may serve consciously or unconsciously to inform collective action. Contrary to standard knowledge within and outside the social scientific study of culture we still do not possess sufficient insight into how ‘culture’ in the sense of ideas, memories and values affect violent collective action. This article has tried to respond to this demand by focusing simultaneously on the micro and the macro level of a particular case of ethnic enmity and civil war and on consciously held notions of conflict causes.

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