MINORITY GOVERNANCE IN AND BEYOND EUROPE

Celebrating 10 Years of the European Yearbook of Minority Issues

Edited by

TOVE H. MALLOY

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Foreword

On behalf of the editorial team, we are pleased and honored to present the special jubilee volume of the *European Yearbook of Minority Issues*. This volume is dedicated to the issuance of ten *Yearbooks* and is designed to emphasize and reflect its major achievements during the last decade.

The European Yearbook of Minority Issues was launched in the early 2000s as a unique multidisciplinary periodical with the view to provide a critical and timely review of contemporary developments in minority-related problems in Europe and beyond. Looking back, we believe that the *Yearbook*, as had been envisaged from its outset, has been combining analysis, commentary and documentation in relation to conflict management, international legal developments and domestic legislation affecting ethnic and national minorities.

The idea behind this jubilee volume is to celebrate the anniversary by issuing a collection of emblematic articles from the previous volumes, which are still relevant to date. The *Yearbook* authors have made many important contributions both to the theoretical understanding of minority issues and to the analysis of domestic and international legal and political developments. For a variety of reasons, the *Yearbook* has a limited audience, and the publishing team therefore wished to launch a volume, which would be easily accessible for scholars, students and policy-makers engaging in minority-related activities and interested in valuable insights concerning multiethnicity and cultural pluralism in Europe.

The choice the editors were to make was not an easy one, and the selection of 10 articles does not mean that all other contributions to the *Yearbook* do not deserve the same degree of attention. The editors exempted more than 250 excellently written academic articles that were published in the *Yearbook* during these last years. For obvious reasons, in this instance, the preference was given to theoretical articles and articles that address lasting normative and institutional developments at the pan-European level. Hence, the jubilee volume offers an academic lens that sharpens the reader's understanding where more academic thinking and political will is needed to advance the minority rights protection regime in Europe in the future and to continue the European path of integration. This volume gathers contributions dealing with several key fields in minority protection, namely, the theory and practical implications of power-sharing;

the dichotomy of 'old' and 'new' minorities; definitions of human rights viola-
tions; public institutions for minority protection and countering discrimination;
theoretical reflections on minority activism; political participation of minorities;
justifications of minority protection; the evolution of language rights; minori-
ties and the evolution of EU law; and Roma issues within the European Union.
There is no doubt that this compilation cannot cover all significant—be this
fundamental or topical—issues pertinent to minorities, but we hope that it will
serve as a valuable contribution to the most demanded scholarly literature in this
thematic area.

The article by Carmen Kettley "Power-Sharing and Ethnic Conflict: The
Consociational-Integrative Dichotomy and Beyond" (Vol. 1) addresses the issues
of institutional design in fragmented societies, which have become central for
the recent debates around democracy theory and conflict regulation. The author
points out that the broad and multi-layered notion of power-sharing coined by
Timothy Sisk is perceived as an overarching term for two basic approaches: con-
sociationalism and the so-called integrative approach. The former implies a com-
plex policy and institutional design which includes so-called grand coalitions
of different segments which serve as the given society's constituent elements;
segmental autonomy; veto power of the segments; and the principle of propor-
tionality which concerns representation and resource distribution. The model,
often closely associated with its pioneer Arend Lijphart, is subject to criticism
for the exaggeration of the role played by elites and negligence of segregation
patterns in societies at large. The integrative approach put forward by Donald
Horowitz envisages incentives for the creation of institutions and public move-
ments transcending ethnic dividing lines. In addition, this approach evokes crit-
icism because it ultimately contributes to institutionalization of ethnic divisions,
but it can also lead to majoritarian rule in disguise. Carmen Kettley argues that
the scholars should look at power-sharing from a broader perspective without
confining it to either of the basic approaches. Instead, researchers shall take into
account the entire multiplicity of the existing power-sharing arrangements, pay
due attention to exogenous factors, such as involvement of international organi-
zations that create incentives for interethnic cooperation, and integrate human
and minority rights polices into the analytical framework.

Asbjørn Eide's article "The Rights of 'Old' versus 'New' Minorities" (Vol. 2)
concerns the distinction between so-called 'old' and 'new' (or migrant) minori-
ties, which has become topical among scholars and practitioners in the recent
years. Although empirical evidence does not suggest any clear dividing line
between the two categories, political considerations and common wisdom back
this dichotomy. Besides, it can be grounded in political philosophy in the sense
that if 'old' minorities are the groups whose residence precede the given state's
independence, then they must be regarded as a part of the initial social contract,
while the groups having arrived later are not. Asbjørn Eide suggests looking
at the issue from a legal standpoint and summarizes the approaches embed-
ded in the modern international instruments pertinent to minority protection.
He argues that minority protection ought to be regarded as a derivative of the

human rights law, or a way to adjust the general human rights approach to the specific minority context. In this perspective, general human rights, such as the liberty of assembly and association, the right to free expression and so forth apply to all without distinctions on the grounds of ethnicity. What really matters is citizenship, because the so-called participatory rights stipulated in several international instruments can be legitimately restricted on the grounds of citizenship. However, the latter concerns the division between 'old' and 'immigrant' minorities indirectly. Asbjørn Eide also points out that there is no universal consensus of the scope and content of the so-called positive obligations of states, particularly with regard to culture and language, and nothing obstructs preferences for 'old' or 'traditional' minorities.

William A. Schabas focused on the recent developments around the trials in the International Criminal Tribunal for the former Yugoslavia (ICTY) in his article "'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (Vol. 3). In 2004, the ICTY Appeal Chamber concluded with some reservations that the crime of genocide had been committed on the territory of Bosnia and Herzegovina, and this decision prompted reexamination of where a dividing line between 'genocide' and 'ethnic cleansing' can be drawn. While 'genocide' is a clearly defined legal notion which has become a part of international human rights law, 'ethnic cleansing', which means persecution on ethnic grounds aiming at physical relocation of certain ethnicities, remains a journalistic term, although widely applicable in the vocabulary of international organizations. The author describes the recent controversies stemming from the narrow legal definition embedded in the UN Convention on Genocide of 1948 (implying that genocide is a crime committed with direct intent to physically exterminate a national, ethnic or religious group) and the need to adequately qualify the crimes against humanity committed during the recent armed conflicts which in fact amount to genocide. The case of *Krstic*, central for the author's analysis, which concerned the mass extermination of Muslim Bosnian men in Srebrenica, gave rise to legal arguments both in favor of and against the qualification of this crime as genocide. The ICTY ruling and the legal reasoning behind it did not clarify the distinction between genocide and ethnic cleansing, and the issue remains highly relevant.

The article by Andrea Krizsán "Ombudsmen and Similar Institutions for Protection against Racial and Ethnic Discrimination" (Vol. 4) analyses the operational patterns and potential opportunities of the relatively new institutions. The recent change in the international and EU law as well as in domestic legislations brought about the need to have independent public institutions for countering discrimination on a multiplicity of grounds. Among the new organizations forms are ombudsmen on racial and ethnic discrimination, of which many follow the working scheme introduced by Sweden that pioneered this development. Andrea Krizsán observes the existing models and lists the opportunities the institution of ombudsmen offers. Being a multi-functional body with a broad mandate, on discrimination issues, an ombudsman can consult individual victims; he or she may represent public interest in a court of justice

where private action may be inefficient or too burdensome for an individual; he or she may have more capacities for conducting monitoring and collecting information than any civil society actor can have; ombudsmen can carry out effective awareness raising campaigns targeting both the general public and the civil servant; the institution can coordinate action of other public institutions in charge of anti-discrimination and so forth. In general, the institution in question needs further development and analysis.

David Smallbone's article "Ethnic Minority Entrepreneurship, Diversity and Competiveness" (Vol. 5) concerns minority businesses and their potential input to social integration. The case-study addresses entrepreneurs of minority origin in the UK, particularly in London. The statistic data available show that people of minority origin who engage in business usually run small enterprises which are in their large part oriented at customers belonging to the same group or networks connecting them to their co-ethnics or countries of origin. However, minority businesses demonstrate a variety of patterns, and in many circumstances they transcend ethnic and racial boundaries and serve as a device for integration. This integrative effect multiplies when minority businesses bring input to the local communities' development or increase their attractiveness for tourism; positive outcomes can be also achieved through governmental supplier policies which are in their early stage in the UK and elsewhere in Europe.

Rainer Hofmann's article, "Political Participation of Minorities" (Vol. 6), is the annotated version of the first Annual Minority Rights Lecture held on 30 November 2006 at the Institute for Minority Rights in Bozen/Bolzano. The lecture elaborated on political participation practices as established by the Advisory Committee under the Council of Europe Framework Convention on National Minorities (FCNM), Article 15. While the necessity for effective political participation of minorities is widely accepted by the Council of Europe member states, it remains a major challenge to define to whom and under which conditions these rights shall apply as well as how they shall be implemented. An inclusive approach, as supported by the Advisory Committee and the HCNM, would favour the application of the FCNM, albeit on a differentiated right-to-right basis, to members of "old minorities" as well as "new minorities". As regards the application of Article 15 of the FCNM, the political participation of national minorities is based on individual and group rights, namely, the freedom of association, electoral rights such as the right to vote and the right to run for offices during elections, electoral mechanisms that safeguard the rights of minorities as well as consultation mechanisms and bodies such as binding co-decision procedures or *stricto sensu*. However, Hofmann underlines that the bottleneck for political participation of "new minorities" remains the possession of the citizenship that guarantees for all political rights to the individual. Political participation of "new minorities" as a collective body remains widely restricted to consultative mechanisms *stricto sensu* embedded in the governance systems of the Council of Europe member states.

"Shifts in the Multiple Justifications of Minority Protection", authored by Sia Spiliopoulou Åkermark (Vol. 7), resumes the historical justifications

for the existence of minority rights as international obligations of states. There are four raisons d´etre for minority rights, namely, peace and security, human dignity, protection of culture(s) and cultural diversity, democratic participation and democratic pluralism. These have evolved over time and are interconnected and mutually reinforcing. Minority rights as a guarantee for peace and security go back to the establishment of minority rights provisions of interstate peace treaties, in particular the post-World War I Paris Peace Treaties, as well as unilateral declarations of the states before the League of Nations that, at the same time, created the international dimensioning of today's minority rights regime. The League of Nations, as the first international body that safeguarded the rights of minorities, fostered the internationalization of minority rights and the more recent bilateralism of minority rights, as well as the establishment of the HCNM, both of which are a continuance for this international trend. More recently, under the FCNM, minority rights became explicitly embraced under the umbrella of international human rights law. The most recent development is the interpretation of minority rights as an inherent part of democratic participation based on citizenship rights that secure rights to the individual member of a minority group on the one hand and the representation of group interests on the other hand. These four justifications for minority rights shall be taken into account during the interpretation and implementation of legal norms to guarantee for minority protection its constant relevance and its potential for development.

Roberta Medda-Windischer's article "The European Convention on Human Rights and Language Rights: Is the Glass Half Empty or Half Full?" (Vol. 8) elaborates on the safeguarding of language rights under the prohibition of discrimination enshrined in Article 14 ECHR. It rules out the discrimination on the ground of language and of belonging to a national minority, in conjunction with the enjoyment of other provisions defined in the Convention. Medda-Windischer's contribution provides a timely overview of the evolution of case law and the interpretation of Article 14 by the Strasbourg Court regarding the use of minority languages in judicial proceedings as a prerequisite for effective participation in public life as well as political representation, of minority languages in the educational sector and in the media as well as of identity-related issues that *inter alia* regard the use of the minority language in the name-giving of persons and topography. Medda-Windischer demonstrates how the interpretation of the ECHR and its protocols in the jurisprudence of the Court became the main mechanism that fostered the applicability of the ECHR for safeguarding the rights of minority groups and in particular their language rights. Nevertheless, the case law also makes evident that the Court followed a conservative approach in regard to the protection and the advancement of the language rights regime in administration, in subnational assemblies as well as in the use of one's name in the form of the minority language. Also, the author finds that the Court remains hesitant in regard to the application of positive discrimination measures that could vent the rights of minorities and the use of their languages.

"Defining the Indefinable: A Definition of 'Minority' in EU Law" by Gulara Guliyeva (Vol. 9) is an avant-garde contribution of how the European Union may develop a wide framework definition of the term minority. In 1993, the European Union made the protection of minorities conditional in the frame of the Copenhagen accession criteria, thereby creating a double standard for the protection of minorities in the "new" and "old" EU member states. Also, Article 2 TEU states that minority rights are an inherent part of the EU's identity and Article 21(1) of the EU Charter of Fundamental Rights guarantees for equality and non-discrimination *inter alia* for members of a national minority, the European Union, and in particular, the European Court of Justice, remained silent on defining the concept of minority in the light of EU law. Guliyeva assesses various defining elements of minorities by drawing from the CCPR, the FCNM and member state practices thereby keeping an eye on the multifacetedness of minority groups in Europe. She elaborates on a wide needs-based minority concept that backs away from the established "labelling" of minority groups and argues that the needs-based approach creates flexibility and an inclusive approach for appropriate state action that assures minorities, be they "new" or "old", be included under the minority rights umbrella.

Peter Vermeersch's contribution, "The European Union and the Roma: An Analysis of Recent Institutional and Policy Developments" (Vol. 10), provides an overview of how the European Union institutions have responded to the "Roma issue" thereby elaborating on the increasing Europeanization of the various problems that Roma encounter in today's Europe. Vermeersch underlines the significance of the institutional developments, in particular, the Racial Equality Directive 2000/43/EC, the Copenhagen accession criteria, the Charter of Fundamental Rights and their reporting systems as well as the social inclusion agenda as part of the EU's 2020 agenda that helped to bring the situation of Roma to the attention of policy makers on the European and on the national level. At the same time, various European initiatives were implemented as responses to the rising xenophobia and populism *vis-à-vis* Roma in the member states of the European Union. Vermeersch underlines the consolidation of the "European Roma Summits" that function as a platform for the change of information and advisory boards between policy makers, Roma representatives and the wider advocacy community and the European Commission's Communication COM(2011)17 that calls for active dialogue with the Roma on the national and the European level. Furthermore, the European Union has been keen in promoting social inclusion on the local level with the help of EU funds. Nevertheless, despite the rise in awareness and responsiveness on the European level, Vermeersch warns that the Europeanisation of the "Roma issue" may curb the attention of the local, regional and national authorities who shall remain the main responsible actors for accommodating the Roma.

We are extremely grateful to a large number of individuals who have contributed to this volume; first and foremost the contributors to this volume. Special thanks are extended to all the general editors of the *Yearbook* since its inception Arie Bloed, Rainer Hofmann, Josef Marko, James Mayall, John

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*Carmen Kettley**

Power-Sharing and Ethnic Conflict: The Consociational-Integrative Dichotomy and Beyond**

We no longer lack basic data on ethnicity. We lack explanation – principles by
which to classify cases, depictions of the structure and texture of group rela-
tions, an understanding of patterns of conflict-explanation that would hold
cross-culturally. There is, in the main, too much knowledge and not enough
understanding, too much evidence chasing after too few categories.

Donald Horowitz[1]

I. Introduction

Power-sharing has become a fashionable theme in the study of institutional design
for multiethnic societies since the end of the Cold War. It has evolved out of an
equally fashionable debate on the applicability of the most advocated models of
institutional design in fragmented societies: the consociational democracy theory
and the integrative model of ethnic conflict regulation. Both models have become
the main approaches to power-sharing, although much too often the concept of
power sharing itself is either erroneously identified with consociationalism only,
or limited to defining an all-inclusive power-sharing executive.

However, in order for research on power-sharing to advance, it needs to
depart from explanations and normative prescriptions based on a single "grand
logic".[2] The complex nature of ethnic conflict and its destabilizing potential have
revealed that unidimensional or dichotomous approaches to institutional design
often fail to provide adequate explanations of more recent patterns of power-
sharing in countries experiencing various degrees of ethnic unrest. This paper

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    bridge, UK.
** An earlier version of this paper was presented at the Annual Convention of the Asso-
    ciation for the Study of Nationalities (ASN), Columbia University, New York, 4-7
    April 2001.
1   Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley, 1985), xi.
2   Bernard Hoffman and Robert Stockwell, "Institutional Design in Plural Societies:
    Mitigating Ethnic Conflict and Fostering Stable Democracy", paper prepared for the
    University of Messina Conference on The Political Economy of Institutional Devel-
    opment, 14-17 September 2000, at http:// www.democ.uci.edu/democ/papers/stock.
    htm#N_1_.

argues that power-sharing includes both consociational and integrative principles but represents more than the sum of the two models. Elite cooperation, electoral devices and autonomous powers may be initially sufficient to achieve political stability in ethnically divided societies. The question that arises, however, is whether this limited set of regulatory measures alone can ensure long-term political stability and a self-sustainable multiethnic polity. Any observer of the evolution of communal disputes throughout the world during the past decade would notice that ethnic conflict represents a process, the dynamics of which are influenced by both internal and external factors sometimes unrelated to the conflict itself. Hence, power-sharing should be seen as a flexible strategy, able to adapt to changing circumstances. Therefore, my contention is that productive research programmes on power-sharing need to integrate analyses of other determinants that are critical to the design and, ultimately, the success of any power-sharing project. Such determinants include, but are not limited to, the legal framework, the relationship between elites and the groups they represent, the dynamics of party politics, political culture, economic development and the complex role of exogenous factors.

The purpose of this paper is to indicate the possibilities for elevating the debate on power-sharing beyond the confines of the consociational-integrative divide. An in-depth critique of the consociational and integrative approaches to power-sharing is beyond the scope of this paper. However, the analysis below includes a brief overview of the most controversial issues raised by each approach. This overview aims to highlight the limitations as well as the contributions of consociational and integrative principles to expanding the meaning and the applicability of power-sharing, both as a concept and as a means of interethnic accommodation.

II. Political and Academic Responses to Ethnic Conflict

A. Political Responses

The salience and complexity of ethnic conflict, in particular of self-determination disputes, have constantly been acknowledged in recent years by both scholars and politicians. However, there is little agreement on what are the best political, social and legal means to balance the interests of minorities and majorities in multiethnic societies.

The option generally preferred by states is a system based on the liberal principles of equality and non-discrimination and on the operationalization of the individual rights discourse. Minorities claim that the liberal solution does not offer sufficient guarantees, in particular linguistic rights, for the preservation of ethnic identity. They request collective rights and autonomy in order to control their cultural reproduction.[3] Moreover, the content of the terms 'autonomy' and 'collective rights' remains highly controversial, hence difficult to negotiate, as there is little agreement on what concrete meanings should be ascribed to these terms.

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3   George Schöpflin, *Nations, Identity, Power* (London, 2000), 7, 65, 233.

Unlike secession and coercive practices, autonomy is seen as a less costly and less threatening mechanism of ethnic conflict management. Given its flexibility, both as a concept and as a tool, autonomy can be conveniently tailored to each specific case to which it is applied. It provides multiple possibilities from minimum competence to a broad range of powers short of full independence.[4] However, autonomy remains largely a political concept and it is unlikely that it will acquire the status of a 'right' in international law in the foreseeable future. It has therefore been argued that more emphasis should be placed on political participation and specific autonomous powers for minorities and on policies conducive to a genuine implementation of human rights norms.[5]

However, larger ethnic groups do not always limit their claims to autonomy. Provided that they do not agitate for secession, such groups also seek power, demanding some degree of control over the state itself. The more numerous minorities tend to organize themselves politically and to participate in regular electoral processes. By acting as political contenders, minorities do not limit their claims to individual participation in public life, but also seek organized access to central decision-making power. That is, minority groups seek to share power with the dominant majority.

B. Academic Responses

The issue of political stability in ethnically divided societies has generated a multitude of competing research programmes. There is little consensus, however, within the academic community as to which approach to ethnic conflict management would ensure greater chances for social peace and political stability. The theoretical frameworks proposed vary, ranging from the incompatibility theory of conflict regulation[6] and the control approach[7] to the conflict management approach[8] and

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4   See Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflict* (Washington, 1996). See also Hurst Hannum, *Autonomy. Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia, 1996).

5   Patrick Thornberry, "Images of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities", in Markku Suksi (ed.), *Autonomy: Applications and Implications* (The Hague, 1996), 121-4.

6   Michael G. Smith, "Pluralism, Violence and the Modern State", in Ali Kazancigil (ed.), *The State in Global Perspective* (Paris, 1986); John S. Furnival, "Colonial Policy and Practice", in John Stone (ed.), *Race. Ethnicity and Social Change* (London, 1977); and John S. Furnival, *The Netherlands India: A Study of Plural Economy* (Amsterdam, 1986). See also Alvin Rabushka and Kenneth Schepsle, "Political Entrepreneurship and Patterns of Democratic Instability in Plural Societies", 12(4) *Race* (1971), 462, 467, 470; and Rabushka and Schepsle, *Politics in Plural Societies: A Theory of Democratic Instability* (Columbus, Ohio, 1972).

7   Ian Lustick, "Stability in Deeply Divided Societies: Consociationalism versus Control", 31 *World Politics* (1979), 325-44.

8   See John Burton, *Conflict: Resolution and Provention* (New York, 1990); and id., "Unfinished Business in Conflict Resolution", in John Burton and Frank Dukes

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the power sharing approach.[9] From the perspective of institutional design, it has been agreed that the most feasible options for solving interethnic disputes remain policies that accommodate the demands of minority groups within the political institutions of the existing states.

During the Cold War era, political science developed two major normative models of political engineering for fragmented societies: the consociational theory and the integrative model of ethnic conflict regulation. These approaches to conflict management have become the most frequently advocated theoretical models of system design for fragmented societies. Consociational democracy theory and the integrative approach were originally developed in order to explain the types of institutional design in 'deviant' cases of fragmented, albeit stable, societies in Western Europe. It was also hoped that either model could assist the nation-building processes of plural[10] or deeply divided[11] societies in the new independent states formed as a consequence of decolonization.

In the post-Cold War era, consociationalism and integrative theory remain the most popular theoretical models of institutional design for multiethnic societies provided by political science. As both theoretical positions claimed universality in their application, the assumption was that either consociationalism or the integrative approach could be conveniently applied to Central and Eastern Europe and elsewhere, without these models requiring major alterations. Consequently, regions like Central and Eastern Europe were included in the 'basket' of plural/fragmented/deeply divided societies together with Switzerland, Belgium, Malaysia, Lebanon and South Africa. However, as has been acknowledged by Sisk:

> Which approach will contribute to success is highly dependent on the structure of ethnic relations, the specific patterns of ethnic politics in a given community, the historical development of a given conflict, the relationship between

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(eds.), *Conflict: Readings in Management and Resolution* (London, 1990), 328-36.

9   See Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, 1977); Horowitz, *Ethnic Groups in Conflict*; and Timothy Sisk, *Power Sharing and International Mediation in Ethnic Conflict* (New York, 1996).

10 The term 'plural society' was originally defined by Harry Eckstein as a society "where political divisions follow very closely, and especially concern lines of objective social differentiation, especially those particularly salient in a society". See Harry Eckstein, *Division and Cohesion in Democracy: A Study of Norway* (Princeton, 1966), 34. Building on Eckstein's definition, Lijphart calls such divisions 'segmental cleavages', thus defining a plural society as "a society divided by 'segmental cleavages' ... that may be of a religious, ideological, linguistic, regional, cultural, racial, or ethnic nature". See Lijphart, *Democracy in Plural Societies* ..., 3-4.

11 Horowitz indicates that deeply divided societies are those societies where "ethnic affiliations are powerful, permeative, passionate and pervasive". See Horowitz, *Ethnic Groups in Conflict*, 12. In addition, Sisk argues that "the hallmark of a deeply divided society ... is the presence of separate organisations that permeate and divide every aspect of society on the basis of identity". See Sisk, *Power Sharing* ..., 15.