

1. The Issue of National Minorities: An Old Problem in the New Europe

1.1 Problem Analysis: Peoples, States, Minorities, or: Ethnicity and the Nation-State

Between the Atlantic and the Urals live 768 million Europeans whose ethnic distribution does not correspond with Europe's political division into states. Because there are over one hundred peoples, large and small, in Europe, but only forty-seven states. That means that there are twice as many peoples as states, or half as many states as peoples!

This is where the idea of nation-state that was developed in the nineteenth century with its principle "one nation [that is, one people], one state" comes into play, and its practical implementation has been linked many times to the attempt to artificially resolve the existing quantitative discrepancy between peoples and states in Europe. In this way, although it proved to be fiction, states were supposed to come into being with ethnically homogeneous populations such that national borders and the borders of the settlements of the various peoples would be brought into concordance. However, this equation, according to which the nation-state was regarded as the constant and the ethnic reality as the variable, could never work, as we now know.

Ethnic "cleansing" in all of its variations, from tolerated or intentional assimilation, infiltration, or exchange of populations to deportation and mass expulsion to even the diminution of the size of peoples through ethnocide and genocide, was and is the logical conclusion of this mistaken starting point. Although this is a crime against humanity, it has nevertheless been tolerated in the politics of appeasement as the putative necessary price for stability and peace, both in the 1930s with respect to Hitler's Germany and in the 1990s with respect to demands for a Greater Serbia.¹

The increase in the number of states (i. e., nation-states) was a further strategic approach toward dealing with the problem without, however, really solving it. It was especially given expression after the First World War, when eight new states came into being.² More recently, it took on a new impetus

1 It was not until 1999, on the occasion of the Kosovo crisis, that an international governmental organization — that is, NATO — halted such crimes with armed force. For the first time in the history of international law, this took place with reference to the principle (which qualified national sovereignty) "human rights as a matter of direct and legitimate international concern" (see KSZE 1991b, Preamble, Par. 9; KSZE 1992b, Point 8).

2 Czechoslovakia, Estonia, Finland, Ireland, the Kingdom of Serbs, Croats, and Slovenes (later Yugoslavia), Latvia, Lithuania, and Poland. Austria and Hungary were not newly

starting from 1991–1992, as in fact sixteen of the current forty-seven states of Europe are either new or else have been recreated since that time.³ For understandable reasons, though, the number of states in Europe cannot continue to arbitrarily increase. Above all else, the arithmetic increase in the number of states is linked to a nearly exponential increase in the number of minorities or ethnic groups.⁴ The number of minorities has thus not diminished through the increase in the number of states; on the contrary, it has even increased considerably. Thus in Europe — that is, from the Atlantic to the Urals — there are currently already 360 larger or smaller minorities,⁵ with a total of 107 million members, which corresponds to one seventh of all Europeans.

Most of the thirty-eight states of Europe that are relevant to minorities are still structured as nation-states in spite of the fact that they are not ethnically homogeneous and in reality are multinational states with traditional ethnic groups or national or ethnic minorities whose share of the population ranges from a few percent up to as high as 48 % (such as Montenegro). Ethnic homogeneity in a state, such as in Iceland or San Marino, is therefore the exception which is limited to a few small states and in no way represents the rule.

The ensuing relationship of tension between the organizational model of the nation-state and the sociological phenomenon of ethnicity⁶ delineates an important point which, under the conventional term “*national minorities conflict*”, has continuously influenced European development up to the present.

This relationship of tension can be toned down first and foremost when the existing ethnic-cultural actualities are viewed as the constant while the

created, but rather both successor states to the former Habsburg double monarchy have become independent subjects of international law.

3 Belarus (1991), Bosnia and Herzegovina (1992), Estonia (1991), Croatia (1991), the Czech Republic (1993), Kosovo (2008), Latvia (1991), Lithuania (1991), Macedonia (1991), Moldova (1991), Montenegro (2006), the Russian Federation (1992), Serbia (2006), Slovakia (1993), Slovenia (1991), and Ukraine (1991).

4 The term “*national minority*” is broadly used here as synonymous with the terms “ethnic group/minority”.

5 Including small peoples without their own state.

6 *Ethnicity* should be understood here as the ethnic identity or sense of belonging of a person, that is, the identification with the language or culture of a people. In this respect, ethnicity is an instrument of social orientation that is politically indifferent but socially indispensable. Every person possesses ethnicity and also has the right to it, although in most cases this only becomes known to him or her when it is brought into question. Ethnicity can also be exaggerated or understated, and both even to an extreme. Making ethnicity absolute drives *nationalism*, which is to be understood as a collective egoism which withholds from others that which one claims for oneself (example: “Wherever a Serb lives is Serbia... or: “Wherever a German lives is Germany...””). The opposite position is represented in *national nihilism*, which views ethnicity only as an artificial instrument of the class struggle with which capitalism wishes to splinter the unity of the proletariat or to hinder its successful internationalization.

political organization of states is treated as the variable. The latter is thus to be revised, and the real necessities of the former are to be adapted to. The “nation-state” in the form of the mononational state was a fatal mistake of history. As the most current model for the political organization of states in Europe it has been overtaken, both in theory and in practice.

Polyethnic populations require multinational states. This insight is the indispensable precondition for a reform of the states with the goal of overcoming national conflicts between ethnically heterogeneous segments of populations of differing size through integration, enabling them to live together peacefully within a state as partners with equal rights. It is only in this way that the security risk posed for Europe by conflicts between nationalities can be eliminated in a lasting manner.

It is no accident that the CSCE summit in Paris in November 1990 declared human rights, democracy, and the rule of law as the supreme maxims for the construction of the new Europe.⁷ The kind of state resulting from this is a democratic state under rule of law which is not of a national type, but a *multinational* one.

1.2 Ethnicity and Democracy

Ethnicity and democracy⁸ are the fundamental cornerstones in another area of conflict that is in a close historical and factual connection with the problem of nation-states. Herein also lies a dilemma which has been handed down as an unresolved problem area and consequently as a burden from the nineteenth century without the solution of which there can be no new Europe.

To address the point immediately: ethnicity and democracy are not irreconcilable opposites, but on the contrary are extremely compatible with each other and in practice also very amicable.

The dilemma between ethnicity and democracy did not first arise in 1989, just as the myth of the awakening of peoples in the nineteenth century, discounted as middle-class or bourgeois, is not only a product of German romanticism but is based upon a reality which is logically explicable. The year 1789 saw an end to the legitimization of power or of sovereignty “by divine

⁷ KSZE 1990a.

⁸ In *political sociology*, “democracy” is understood to be an exercise of rule by a combination of competing groups that tend toward alternating leadership, on behalf of and under the control of the people (Stammer/Weingart 1972, 95). See also the *national law* definition of “democracy”, according to which “the exercise of any state power requires democratic legitimation and thus — in an ‘uninterrupted chain of democratic legitimation’ — must be traceable back to the people [authors’ note: as sovereign]...In this sense, democracy is the ‘rule of the people’” (translation from the original German text of Degenhart 1988, 1).

right” and a beginning of the age of democracy. This legitimized the sovereignty, and thus the exercise of rule, as emanating from the people, whereby “the people” is understood as a community of citizens (*demos*) and not as an ethnic community (*ethnos*). Now, however, *demos* is concretely linked to *ethnos*. Because the “citizens” as concrete people are French, English, Russians, Germans, Italians, and so on. The disregard of this “minor” difference between *demos* and *ethnos* had serious consequences in that in many cases it led to ethnocracies rather than democracies. In a political legacy of the era of the nation-state, this always occurred against the background of Europeans being divided into the two categories of either “national majority” or “national minority”. This made it possible for the eponymous ethnic community (titular nation) of a state as the national majority to exploit its numerical dominance, which resulted in the suppression of the smaller ethnicities, that is, the national minorities.

1.3 The Discrimination Dilemma of Democracy and the ECHR System

Even without the intentional repression of ethnic groups, they are confronted with the problem which the “law of majority rule” brings with it: in a democracy, this serves as the final authority for the legitimate acquisition of power. It decides which of the forces that, in the open competition for power, attempt to gain state leadership are to be legitimized for the formation of the government or the opposition. A minority or ethnic group whose numerical strengths are by nature always less than those of the remaining population in the state cannot really freely compete under these compulsory preconditions in the formation of the power for the leadership of the state. By definition, they remain excluded from the very outset.

It is, in fact, in the nature of human rights that they are universal, that they are inalienable, and that their validity cannot be linked to numerical strength. Nevertheless there exists in Europe – not excluding the ECHR states parties – a significant difference as a result of numerical strength. It is just not the same when two parties do the same thing: one can express one’s ethnicity as identification with the language and culture of one’s people without any problem, even unconsciously, such as through the use of his or her native language in everyday life, provided that he or she belongs to a national majority. On the other hand, someone else who is a member of a minority must, with the same undertaking, surmount numerous difficulties. That which to the first person can be taken for granted as just falling in his or her lap must by the other often be won only with personal sacrifices and risks, in the event that it is even possible at all. The ECHR System does not automatically guarantee both of them the same protection.

Although the problem of minorities in this respect is therefore inherent in the system, its solution is nevertheless not to be found in the abolition of the system but rather is to be sought in its correction. Such a solution is possible through comprehensive measures of the *positive (above all else supportive) protection of minorities* within the framework of democracy, human rights, and the rule of law, fully conforming to the goals of the CSCE Charter of Paris for a New Europe.

It also needs to be taken into consideration that the process of democratization has two essential aspects, of which the first is generally known but the second is all too often overlooked. The first is the individual component, inasmuch as the person as individual is emancipated from being the object of power of the authoritarian state to the subject of power of the democratic state under the rule of law, that is, from an underling to a citizen. The second has to do with the group component, inasmuch as the person as a rule possesses ethnicity as a result of his or her social nature, that is, he or she is ethnically identifiable and belongs to a concrete ethnic community. The freedom and equality of individuals consequently also postulates the freedom and equality of peoples or ethnic communities over the short or long term. This is also where the above-formulated requirement of multinational states comes full circle.

It is thus no accident that the citizens' revolution of 1789 was followed somewhat more than a century later, in 1918, with the proclamation of the right of self-determination and the revolution of the peoples. Like most revolutions, however, the latter was able to only partially achieve its ideals.

1.4 The Redistribution of Power as the Heart of the National Minorities Issue

The problem of the redistribution of power lies at the vertex of the relations between states and national minorities. Because the granting of rights of protection to national minorities means that the states must relinquish certain positions of power, while conversely the minorities gain new positions of power as a result of specific rights of protection.

A situation of contrary interests consequently exists between states and minorities because it has to do with positions of power which each of the two parties maintains and which neither of the two parties wants to relinquish. Furthermore, it apparently deals with a clash of interests which is asymmetrical, that is, instituted one-sidedly at the cost of the states and to the benefit of the national minorities. This is precisely what makes the solution of the minorities issue so difficult and what often ends in conflicts being settled violently, as has been shown by the events in the former Yugoslavia, in the Caucasus including Chechnya, and in Ukraine, as well as with the issues of the Palestinians and Kurds.

Nevertheless, the process of redistributing power addressed here is in reality not as one-sided as it may appear at first glance. It is indeed correct that in the area of the protection of minorities it is the national minorities which make the demands and the states which have the demands made upon them. But it is just as correct that by relinquishing positions of power, the states receive stability and peace and under certain circumstances can even achieve added economic value,⁹ while conversely the national minorities, with the assumption of new positions of power, also take on the responsibility for some of the active running of the state — whereby this responsibility is then taken on to a special degree if the national minority is granted a state-constituent position.

Furthermore, in an age of democracy, human rights, and the rule of law, many European states have no chance, when viewed in the middle to long term, of evading the requirement of the protection of national minorities and the redistribution of power associated with it. On the other hand, the national minorities have just as little chance of accomplishing the protection of their minority rights against the will of their national majorities which are always numerically superior.

From this, it follows that in every case, cooperation is more reasonable than conflict. Because the reasons of state and the reasons of the minorities each have to represent their legitimate interests, in between which a reasonable balance is to be sought and also to be found. Cooperation offers better possibilities for this than does conflict. That means that all those involved would do well to seek national partnership in place of national confrontation.

1.5 The Current Situation of the National Minorities Issue

From the perspective of the minorities in Europe, it can be said that only a portion of them enjoy legal protection to such an extent that their existence is not directly endangered. For long-term survival, however, more than this is required. Moreover, insufficient or even a lack of the legal protection of minorities carries the danger of substantial potential for conflict. This has also clearly been shown by the separatist tendencies in Scotland, Catalonia, and Ukraine.

More than four fifths of the minorities in Europe have fewer than 300,000 members, and most of them do not think of having their own viable state or revising existing international borders. This could change rapidly, however, if for lack of minority protection they were exposed to incessant and existence-threatening discrimination. In that event, increasing separatism

⁹ For further details on this, see the chapter “Minority Protection and Economics” in Part III of this Handbook.

and border revisionism are the foreseeable results. The case of Kosovo is an example of this. Other cases which are not directly comparable to Kosovo but are still impressive are the independence referendums or public opinion polls of 2014 in Scotland, Catalonia, and Ukraine.

In the United Kingdom, the devolution legislation of 1998 was not capable of loosening the centralism of London in Scotland, Wales, and Northern Ireland to such an extent that the independence movement in Scotland was pulled out of its breeding ground. On the contrary, the demands by the Scots for more participation in the formulation of their specifically Scottish needs grew faster than the concessions which devolution was capable of granting. The result was the independence referendum in Scotland on September 18, 2014 which, although it was rejected by more than half of the Scots, was able to nevertheless demonstrate a considerable number of supporters with nearly 45 % of the vote.

For a quarter century, namely from 1979 to 2006, Spain and Catalonia got along with the first autonomy statute for Catalonia. With the reform of this statute in 2006, it turned out that the clocks in Madrid were ticking substantially slower than those in Barcelona. The reform statute was subjected to an application for judicial review with the Spanish constitutional court, which led to the court declaring in 2010 that a total of fourteen articles of the statute were invalid, and for another twenty-seven provisions, a restrictive interpretation was provided that conformed to the constitution.¹⁰ No small number of observers viewed this to be a significant step backwards for Catalan self-government, in particular in the area of language, but the decision showed above all else “the limits of the decentralization of the Spanish state.”¹¹ The subsequent growth of the independence movement in Catalonia has in many cases been considered to be a reaction to the excess of centralism in Madrid. It then came down to the *public opinion poll on the independence of Catalonia* on November 9, 2014. There had previously been several attempts on the part of Catalonia to create a legal basis for a plebiscite (a referendum on independence) or a (non-binding) public opinion poll which failed due to corresponding decisions by the Spanish constitutional court. And the alternative survey, which in the end was called a “citizen participation process on the political future of Catalonia” was halted by the court in the face of a

10 The applicant had challenged the constitutionality of 114 out of the 223 articles that made up the autonomy statute. For further details on this, see López Bofill 2012, 107–113.

11 According to López Bofill 2012, 113. In that regard, also see Arraiza 2013, 101–118. With regard to the role that was played within this context by the ambiguity of the term *nation* (state, people) and its different interpretations in Madrid (nation = state) and Barcelona (nation = people), see the chapter “The Minorities Issue in Europe” in Part III of this Handbook.

complaint by the Spanish government which, however, did not prevent the Catalan government from nevertheless carrying it out. Within that context, approximately 80 % voted for Catalonia's independence from Spain, but only about one third of those entitled to vote participated in the election, as a result of which the high result is to be viewed in relative terms. Nevertheless, this vote obviously implies an urgent need for action and negotiations.

As a further case, Ukraine drew the attention of Europe in the spring of 2014. It is well known that in the eastern districts of the country and in Crimea, Ukraine has an extraordinarily high number of Russian-speakers.¹² The polarizing linking between party politics and minority policy proved to be especially dire there. Thus the governments of the country that were close to Moscow tended to behave in a "minority-friendly" manner toward the Russian-speakers, while the more Western-oriented governments displayed clearly less sensitivity and openness in that respect, in any case when what was concerned was a federalization and a desire for autonomy for Eastern Ukraine.¹³ On the whole, with regard to minority policy, Kyiv had repeatedly provided the government of Russia under Vladimir Putin with pretexts.¹⁴ Russia thereupon annexed Crimea in February and March 2014 and at the same time began to latently or openly support the separatists in Eastern Ukraine. In a survey (a "referendum") on May 11, 2014 — which, according to the OSCE (and others) was in the end illegitimate — the question of whether the state independence of the "People's Republic of Donetsk" and the "People's Republic of Lugansk" should be supported was answered with 90 % "Yes" according to the pro-Russian separatists in Donetsk with voter turnout of 75 % and in Luhansk/Lugansk with over 80 % voting "Yes" with voter turnout of nearly 96 %. Both in the case of Crimea¹⁵ and for Eastern

12 Within that context, the number of Russian-speakers is not limited just to the (ethnic) Russians, since among ethnic Ukrainians and members of minorities in Ukraine, there is a relatively high share of people for whom Russian is the main language.

13 This is in keeping with the attempt that was made immediately after the fall of the Moscow-aligned Yanukovich government in February 2014 to once again abolish the new Ukrainian language law. The language law had been introduced in 2012 without a parliamentary debate and had further improved the status of Russian which had also already previously been relatively well ensured, and it did so partly at the expense of Ukrainian (in that regard, see Venice Commission 2011). The attempt to abolish that law (once again, without debate) caused many Russian-speakers to fear the worst from the new government, with or without justification.

14 Thus, for example, by the announcement of the pro-Western Ukrainian Prime Minister Yatsenyuk of March 18, 2014 to *decentralize* Eastern Ukraine within the framework of a new constitution and to provide it with more responsibilities. As a result of this, *the demands for federalization* by the Russian-speakers, which was classified by Kyiv during this phase as a threat to its own sovereignty, received a clear rejection.

15 Here, as well, a "referendum" was carried out on March 16, 2014.

Ukraine, the right of self-determination of the peoples — understood here as the right of secession — which was demanded by the Russian president was in fact lacking any basis from the point of view of international law. Nevertheless, it is to be recognized that Kyiv had not made use of the opportunity for the *lasting integration* of the Russian-speaking minority — which, in view of its size (over eight million) and settlement structure, could have been realized above all else through a *federalization* of the country, but at minimum through reasonable forms of *autonomy* — and thus had played into the hands of the great power interests of the neighboring titular nation (Russia). The consequences have been and continue to be grave: just in the first five months, the battles in Eastern Ukraine led to around four thousand dead and a threat to the stability of all of Europe.

In conclusion, it is worthwhile to once again emphasize the following: it was and is a fiction that democracy and human rights automatically settle the national minorities issue. Such automatism does not exist in reality. Europe now “exports” democracy and human rights to the whole world — and along with them the national minorities issue. In order to keep the security risk that is associated with the minorities conflict within limits throughout the world, this also places Europe under a special obligation to offer the key to the solution. But the key to the solution of the problem can only consist of the prevailing system of human rights, democracy, and the rule of law in Europe being supplemented by an *efficient system of the protection of minorities*.

2. European Protection of Minorities within the Framework of Human Rights, Democracy, and the Rule of Law

Human rights, democracy, and the rule of law form the fixed coordinate system within which an efficient system of minority protection in the interest of a solution to the problem of national minorities in the new Europe can range.¹⁶

General international approaches at a protection of minorities on the level of human rights are found, among other places, in the prohibition against discrimination in Art. 14 of the European Convention on Human Rights (ECHR)¹⁷ and in the individual, especially cultural rights of protection in

¹⁶ See KSZE 1990a.

¹⁷ Also see Art. 21 of the Charter of Fundamental Rights (CFR), which became binding through the Treaty of Lisbon (Art. 6, Sec. 1 TEU) which for the first time binds the bodies, institutions, and member states of the EU to a prohibition of discrimination that is specific to minorities and (minority) languages in the implementation of Union law (see Art. 51 of the CFR).