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# *Deliberative Democracy and Minorities*

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## **Abstract**

*This article examines the contribution that international law can make to the recognition of minority interests and preferences through a deliberative understanding of democracy. The deliberative model conceives of democracy as a free association of equal citizens who engage in a rational discussion on political issues, presenting options and seeking a consensus on what is to be done. The concern here is with how the deliberative model accommodates ethno-cultural minority groups. The cardinal features of the deliberative model – equality, participation (i.e., inclusion) and consensus – are clearly attractive to hitherto marginalized groups. Like other minorities, ethno-cultural groups demand a recognition of their status as equal citizens, and effective representation in the deliberative and decision-making institutions and mechanisms of the state, notably national Parliaments. The pure deliberative model, outlined by Habermas in *Between Facts and Norms*, assumes that given sufficient time and goodwill, it is always possible to reach a consensus. On certain issues which affect ethno-cultural minorities, however, a consensus cannot be reached. Democratic deliberation on questions of ethno-cultural minority identity, this article argues, should not aim to establish uniform rules in all areas of public life, but to determine a constitutional arrangement that will guarantee the cultural security of the minority group. Where this can be established in common institutional and legal frameworks, this is to be preferred; where not, appropriate autonomy regimes should be introduced. Finally, the article considers the mechanisms through which this accommodation may be reached.*

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## 1 Introduction

This article examines the contribution that international law can make to the recognition of minority interests and preferences through a deliberative understanding of democracy. Simply put, the deliberative model conceives of democracy as a free association of equal citizens who engage in a rational discussion on political issues, presenting options and seeking a consensus on what is to be done. The concern here is with how the deliberative model accommodates the ethno-cultural minority group: a group of persons, predominantly of common descent, who think of themselves as possessing a distinct cultural identity (which includes religion and language differences) and who evidence a desire to transmit this to succeeding generations.<sup>1</sup> Such groups would include linguistic minorities (the Quebecois in Canada, for example), religious minorities (the Amish in the United States) and those groups whose collective identity differs from that of the majority/national culture. These differences may be profound, as in the case of the indigenous populations of Brazil, or difficult to identify for those outside the communities concerned, as with the Protestant and Catholic populations of Northern Ireland. What distinguishes all of these groups is that they manifest, albeit implicitly, a desire to maintain a collective identity which differs from a dominant societal culture. Culture in this context is not synonymous with particular practices, customs or manners of dress. It is a sense of communal self-identity that pervades almost every aspect of life,<sup>2</sup> including work and economic activity.<sup>3</sup> It is the traditions of everyday life.

The cardinal features of the deliberative model – equality, participation (i.e., inclusion) and consensus – are clearly attractive to hitherto marginalized groups. Like other minorities, ethno-cultural groups demand recognition of their status as equal citizens,<sup>4</sup> and effective representation in the deliberative and decision-making institutions and mechanisms of the state, notably national Parliaments. The pure deliberative model, outlined by Jürgen Habermas in *Between Facts and Norms*,<sup>5</sup> assumes that given sufficient time and goodwill, it is always possible to reach a

<sup>1</sup> The concern is not with those individuals and groups marginalized by the majority population and public authorities, often on the basis of visible but irrelevant differences (for example, African-Americans). Their demand is for recognition as equal members of the polity, and for the introduction of effective legislation on non-discrimination, including indirect and positive discrimination provisions and measures to deal with structural disadvantage.

<sup>2</sup> See Stavenhagen, 'Cultural Rights: A Social Science Perspective', in H. Niec (ed.), *Cultural Rights and Wrongs* (1998) 1, at 6; also Keller, 'Re-thinking Ethnic and Cultural Rights in Europe' 18 *OJLS* (1998) 29, at 36.

<sup>3</sup> Human Rights Committee General Comment 25 (57) on Article 27 ICCPR, adopted by the Committee at its 1510th Meeting, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 7. It is recognized, for example, that Sami cultural identity is based on reindeer husbandry: *Länsman et al v. Finland* (No. 1), Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992, 8 November 1994, para. 9.2.

<sup>4</sup> This can include a prohibition on hate propaganda, which contributes little to the 'protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged': Canadian Supreme Court, *R v. Keegstra* [1990] 3 S.C.R. 697. See, generally, Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed.) *Multiculturalism: Examining the Politics of Recognition* (1994) 25–73.

<sup>5</sup> J. Habermas, *Between Facts and Norms* (1996, trans W. Rehg).

consensus. On certain issues that affect ethno-cultural minorities, however, a consensus cannot be reached. Take the example of a proposed law on compulsory wearing of protective headwear on building sites. A consensus might emerge that the benefits of savings to the health services outweigh the interference in individual liberty. Where members of the Sikh community are included in the deliberation consensus is not possible. It is a fundamental tenet of the Sikh religion that men's headwear should consist exclusively of a turban. Democratic deliberation on questions of ethno-cultural minority identity, this article will argue, should not aim to establish uniform rules in all areas of public life, but to determine a constitutional arrangement that will guarantee the cultural security of the minority group. Where this can be established in common institutional and legal frameworks, this is to be preferred; where not, an appropriate autonomy regime should be introduced. The nature of the shared institutions and degree of autonomy will necessarily vary from case to case.

## 2 Deliberative Democracy

The emerging 'democratic norm' thesis in international law has been rightly criticized for focusing too heavily on institutional arrangements and the holding of competitive elections.<sup>6</sup> It appears to conceive of a thin model of democracy, whereby the function of government is to aggregate the preferences of individuals to find the decision that will be acceptable to most. In extreme versions, the role of the citizen is simply to determine who will hold power. The people do not actually rule in any obvious sense of the terms 'people' and 'rule', and democratic government becomes the rule of the elected politician.<sup>7</sup> This aggregative model is not conducive to realizing the interests and preferences of those minority groups with a high degree of solidarity and shared outlook, which find themselves permanently outvoted by the majority population.<sup>8</sup> Even if they are represented in decision-making processes, there is nothing to prevent the more powerful and numerous participants from ignoring them. No right of cultural security can be guaranteed. Yet the UN Declaration on Minorities and the UN Commission on Human Rights have both concluded that the issue of minorities can only be resolved 'within a democratic framework'.<sup>9</sup> A more inclusive model must then

<sup>6</sup> S. Marks, *The Riddle of All Constitutions* (2000), at 52. The basis of the emerging 'right to democratic government' is the internal aspect of the right to self-determination, and the human rights to freedom of political activity and to free and fair elections: Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46, at 52. See Wheatley, 'Democracy in International Law: A European Perspective', 51 *ICLQ* (2002) 225, at 227–235.

<sup>7</sup> J. Schumpeter, *Capitalism, Socialism and Democracy* (5th ed., 1976) 284–285.

<sup>8</sup> Members of the majority community, who will have a plurality of interests, will find themselves part of the majority on a particular issue, but not all. They will be disposed to compromise and to ensure the fairness of the outcomes as well as of the procedures of decision-making: Bellamy, 'Dealing with Difference: Four Models of Pluralist Politics', 53 *Parliamentary Affairs* (2000) 198, at 202–203.

<sup>9</sup> United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992, preamble. The United Nations Commission on Human Rights has concluded that the creation of the conditions for a democratic system of government are 'essential for the prevention of discrimination and for the protection of minorities': 'Ways

be conceived, one in which decisions are based not only on the counting of votes, but also on the sharing of reasons.

Democratic legitimacy depends upon the will of the people to their being governed by those in power.<sup>10</sup> Sovereignty lies with the people,<sup>11</sup> who rule on a basis of political equality.<sup>12</sup> The core democratic principles of equality and popular sovereignty are typically conceived to be antagonistic: the ‘rights of the individual’ versus the ‘will of the people’. This is not the case under the deliberative model of democracy. The citizen is seen as both the subject of the law and its author. The fact that *x* and *y* determine that some restriction should be placed in *z* does not make their decision right simply because they constitute a majority in a voting process that weighs each of their votes equally. Sometimes it is necessary that a decision is made. If *x*, *y* and *z* are walkers who come to a fork in the path they must go left or right. According to John Locke, the majority in a democracy have the right to determine policy, as it is necessary that the body politic should ‘move that way whither the greater force carries it’. The only alternative would be the consent of each individual, but ‘such consent is next impossible ever to be had’.<sup>13</sup> But if *x* and *y* determine that *z* should carry all the equipment and they should carry none then *z* not being treated as an equal in the relationship. Only if *z* agreed to the proposal would it be acceptable: a person cannot complain that their rights have been violated when they themselves have freely agreed to the interference in their liberty. Thus, according to Kant, for a law to be legitimate it must enjoy the ‘united and consenting will of all’.<sup>14</sup> Democracy, according to the deliberative model, is a system of government that gives each citizen a genuinely equal share in the exercise of power. Crucially, it requires that laws are introduced only where a consensus exists following public deliberation and reasoned argument between citizens as to what should be done.<sup>15</sup>

Seyla Benhabib has argued that deliberative democracy is not simply an additional theoretical model about how democracies should be constructed, but one that elucidates some aspects of the logic of democratic practices better than others, albeit in

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and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy’, adopted 7 March 1995, E/CN.4/RES/1995/60, preamble. See also the CSE Copenhagen Document, which provides that ‘questions relating to national minorities can only be satisfactorily resolved in a democratic political framework’: Copenhagen Meeting of the Human Dimension (1990) 29 ILM 1318, para. 30.

<sup>10</sup> S. J. Anaya, *Indigenous Peoples in International Law* (1996), at 82.

<sup>11</sup> Cohen, ‘Procedure and Substance in Deliberative Democracy’, in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 95, at 95.

<sup>12</sup> D. Held, *Models of Democracy* (1996), at 1. See, also, J. Crawford, *Democracy in International Law* (1994), at 4.

<sup>13</sup> J. Locke, *Two Treatises of Government* (1964) II, 96, at 350.

<sup>14</sup> I. Kant, *Metaphysical Elements of Justice* (1965), at 78, referred to in Habermas, ‘Popular Sovereignty as Procedure’, in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (1998) 35, at 45.

<sup>15</sup> Cohen, ‘Deliberation and Democratic Legitimacy’, in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (1997) 67, at 72.

imperfect form.<sup>16</sup> It is a model which finds implicit recognition in the judgments of national constitutional courts and international human rights bodies and one which sits more easily with the principle of equality and with the internal aspect of the right to self-determination, which requires that the government of a state be representative of all the people,<sup>17</sup> not simply a majority.<sup>18</sup> Recognizing the nature of democracy as deliberation not aggregation is not an argument for reconstructing liberal democracy, but for a different understanding of how it functions. For those international organizations committed to democratic rule, the Organization of American States,<sup>19</sup> the European Union,<sup>20</sup> the Organization for Security and Co-operation in Europe,<sup>21</sup> and the Commonwealth,<sup>22</sup> a deliberative understanding of democracy demands that member states do not simply concern themselves with the question as to whether free and fair elections have taken place, but also with issues of political equality, representation and regard for the views and interests of minorities.<sup>23</sup> The requirements of the deliberative model of democracy are outlined by Julia Black:

the equal and uncoerced participation of all. . . . All issues have to be open to question; all opinions voiced in conditions of equality and free from domination. Decision processes have to be conditioned by the desire of participants to reach agreement in the absence of coercion or threat of coercion. To this end each has to put forward reasons that others could reasonably accept, and seek acceptance for their reasons, and reject proposals on the basis that

<sup>16</sup> Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy', in Benhabib, *supra* note 11, 67, at 84.

<sup>17</sup> UN Declaration on Friendly Relations, GA Res. 2625 (XXV) 24 October 1970.

<sup>18</sup> As the European Court of Human Rights has pointed out, in a democracy the views of a majority will not always prevail: 'a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position': *Chassagnou and others v. France*, ECHR, Reports 1999-III, para. 112.

<sup>19</sup> The OAS has adopted an 'Inter-American Democratic Charter', which provides that 'The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it'. Article 1, OAS Inter-American Democratic Charter, adopted Lima, 11 September 2001, 40 ILM (2001) 1289. See also, *ibid.*, Article 19.

<sup>20</sup> The Treaty on European Union provides in Article 6 (1), that 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. Article 7 TEU sets out a procedure for the Council to determine the existence of a serious and persistent breach by a Member State of the principles on which the European Union is founded (as per Article 6(1)). See, generally, Neuwahl and Wheatley, 'The EU and Democracy – Lawful and Legitimate Intervention in Domestic Affairs of States?', in A. Arnall and D. Wincott (eds), *Legitimacy and Accountability in the European Union after Nice* (2002) 223–238.

<sup>21</sup> Participating States of the OSCE/CSCE have agreed to 'build, consolidate and strengthen democracy as the only system of government of our nations', and to 'co-operate and support each other with the aim of making democratic gains irreversible': CSCE Charter of Paris for a New Europe (1990) 30 ILM (1991) 190.

<sup>22</sup> The Harare Declaration of 1991 provided the basis for Nigeria to be suspended from the Commonwealth, and for Pakistan to be suspended from the Councils of the Commonwealth following military coups in those states.

<sup>23</sup> The Human Rights Committee has drawn attention to the close relationship of the right to self-determination (Article 1 ICCPR) and the rights of political participation (Article 25), equality (Article 26) and to cultural security (Article 27): *Diergaardt et al v. Namibia*, Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1996, 6 September 2000, para. 10.3.

insufficiently good reasons have been offered for them: the requirement of public reason. The only influence thus exercised is the force of the better argument.<sup>24</sup>

It is a model of democracy that potentially applies to all associations of free and equal individuals. This would include a group of housemates who must agree responsibilities for a variety of domestic tasks. There will be no obvious answer as to who should be responsible for what. An open, reasoned,<sup>25</sup> discussion amongst equal and uncoerced participants, the deliberative model argues, will produce a consensus as to what is to be done that is rational, fair and legitimate. The same point may be made about the heterogeneous or plural state. There are no universal values that we can look towards to tell us what policies should be introduced. No single normative principle of multiculturalism that a Court might apply to tell us how to respond to claims for cultural rights from different groups in different contexts.<sup>26</sup> This was made clear in *Société des Acadiens v. Association of Parents*, where the Canadian Supreme Court concluded that the language rights expressed in the Charter of Rights and Freedoms were matters of ‘political compromise’, and that judicial bodies ‘should pause before they decide to act as instruments of change with respect to [such] rights’.<sup>27</sup> Rational, fair and legitimate policies concerning minorities can only emerge from a process of democratic deliberation.

### ***A Democratic Deliberation***

The first requirement of deliberative democracy is an open political agenda to which all may contribute. Democracy is a system of government in which equal citizens determine the answer to the basic political question: ‘What ought we to do?’<sup>28</sup> It is a system of ongoing deliberation.<sup>29</sup> As noted by the Canadian Supreme Court in *Re Secession of Quebec*:

[A] functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, ‘resting ultimately on public opinion reached by discussion and the interplay of ideas’ . . . At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is

<sup>24</sup> Black, ‘Procuralizing Regulation: Part I’, 20 *OJLS* (2000) 597, at 609.

<sup>25</sup> The fact that an individual or group has an interest or a preference cannot itself be a reason. Participants must relinquish self-interested reasoning and look for arguments that others can find compelling.

<sup>26</sup> Bauböck, ‘Cultural Citizenship: Minority Rights and Political Community’, in B. Leiser and T. Campbell (eds), *Human Rights in Philosophy and Practice* (2001) 235, at 236.

<sup>27</sup> (1986) 1 SCR 567, paras 64–65.

<sup>28</sup> Habermas, *supra* note 5, at 158.

<sup>29</sup> See the decision of the ECHR in *Refah Partisi and others v. Turkey*, GC judgment 13 February 2003. *Refah* had obtained 22% of the votes in the general election of 1995, making it the largest political party in the Turkish Parliament. It came to power in coalition with the centre-right True Path (*Dogru Yol*) Party in 1996. On 16 January 1998 the Constitutional Court dissolved Refah. The Court of Human Rights noted that it had, in part, been dissolved because there was evidence that it wanted to apply sharia to the Muslim community in Turkey. The Court determined that sharia was the ‘antithesis of democracy’ in that it was based on dogmatic values, which were stable and invariable, and consequently at odds with the principles of pluralism and freedom of political debate that underlay the whole of the ECHR: para. 123.

predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.<sup>30</sup>

The original Athenian conception of democracy depended upon direct participation by citizens who engaged in 'proper discussion'. Decisions and laws rested on the force of better argument.<sup>31</sup> The United Nations' Commission on Human Rights has argued that democratic government requires the widest participation in the democratic dialogue by all sectors and actors of society in order to come to agreements on appropriate solutions to social, economic and cultural problems.<sup>32</sup> Deliberation is everywhere in the modern democratic state, it takes place at meetings of pressure groups, political parties, in universities, in the media, and innumerable places where individuals engage in communicative debate on political questions.<sup>33</sup> Through public deliberation, the German Federal Constitutional Court has concluded, political goals become clarified, and a public opinion emerges which forms the beginnings of political intentions.<sup>34</sup> There must be, within this public sphere, a tolerance for a wide diversity of political opinions and points of view. In a number of cases involving Turkey, the European Court of Human Rights has considered the extent of tolerance for political deliberation required of the democratic state:

[O]ne of the principal characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.<sup>35</sup>

Political debate may only be limited where it does harm to democracy itself.<sup>36</sup> Thus a political party may campaign for a change in the law on two conditions: (1) the means used to that end must be legal and democratic; and (2) the change proposed must itself be compatible with fundamental democratic principles.<sup>37</sup> Beyond this, any and all political programmes may be proposed and debated, 'even those that call into question the way a state is currently organised'.<sup>38</sup> Minority groups may participate in political deliberation through formally constituted political parties and organizations or as part of the general opinion- and will-formation in the public sphere. This is a right protected by the international human rights instruments, and includes the freedom to establish political parties specifically dedicated to the advancement of

<sup>30</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 68.

<sup>31</sup> Held, *supra* note 12, at 18.

<sup>32</sup> Human Rights Commission, Resolution 1995/60, *supra* note 9, preamble.

<sup>33</sup> Benhabib, *supra* note 16, at 73–74.

<sup>34</sup> *Brunner v. European Union Treaty* [1994] 1 CMLR 57, para. 41.

<sup>35</sup> *United Communist Party of Turkey and others v. Turkey*, ECHR, Reports 1998-I, para. 57.

<sup>36</sup> *Socialist Party and others v. Turkey*, ECHR, Reports 1998-III, para. 47.

<sup>37</sup> *Refah Partisi and others v. Turkey*, GC judgment 13 February 2003, para. 98.

<sup>38</sup> *Socialist Party and others v. Turkey*, ECHR, Reports 1998-III, para. 47.

minority interests and preferences.<sup>39</sup> The proposals of the group may be radical in nature, including autonomy<sup>40</sup> and even secession.<sup>41</sup> What emerges from this deliberative communication are the constitutional norms and legal rules that will dictate the political arrangement. They will differ from state to state, reflecting the outcomes of those societies' ongoing deliberations as to the best form of government suited to their particular circumstances in the light of current and past experiences.

### 3 Institutional Deliberation and Minorities

Although deliberation may occur anywhere in the public sphere in which individuals participate in opinion- and will-formation, it is only formal institutions that can legislate. It is not possible, even for those with sufficient time, for all interested parties to participate in deliberative and decision-making bodies.<sup>42</sup> Individuals are represented by others who ensure that their opinions, interests and preferences are taken into account.<sup>43</sup> The interests and preferences of members of the dominant cultural groups are likely to be well represented in both formal law-making bodies and in deliberation in the public sphere, for example, in the media. The same cannot be said of those individuals from minority and marginalized communities. Given that individuals from outside the group will not be capable of accurately reflecting the interests and preferences of those inside, barriers to participation must be removed

<sup>39</sup> In a democracy, it is assumed that political parties advance political ideas and values, not the interests of one ethnic group. Politics is about ideology, not identity. The existence of ethnic parties challenges this paradigm. That said, if the political system operates to exclude minority interests and opinions, the establishment of ethnic parties may be one of the few ways in which the issue of minorities can be forced on the political agenda. Indeed, the fact that ethnic parties exist is likely itself to be evidence of discrimination or oppression against the minority, rather than any nationalistic expression of identity. In Sri Lanka, for example, a direct link can be made between the introduction of laws that discriminated against Tamils and the establishment of ethnic-Tamil political parties: Tiruchelvam, 'The Politics of Federalism and Diversity in Sri Lanka', in Y. Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (2000) 197, at 198.

<sup>40</sup> *United Communist Party of Turkey and others v. Turkey*, ECHR, Reports 1998-I, para. 55.

<sup>41</sup> *Case of Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, ECHR judgment of 2 October 2001, para. 97.

<sup>42</sup> The right to participate in the conduct of public affairs is protected by Article 25 ICCPR. There will only be a violation where an individual is 'unreasonably' restricted in their right to take part. In *Mikmaq tribal society v. Canada*, the group had been excluded from the constitutional conference in Canada, although other representatives of aboriginal peoples, as well as the elected leaders of the federal and 10 provincial governments, had been invited to take part in the deliberations on aboriginal matters. The Committee determined that Article 25 ICCPR could not be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs: *Mikmaq tribal society v. Canada*, HRC, Communication No. 205/1996, UN Doc. CCPR/C/43/D/205/1986, 3 December 1991, para. 6. The right of members of minorities to participate in public life is expressly recognized in Article 2, United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992; and in Article 15, Framework Convention for the Protection of National Minorities (1994) 34 ILM 351.

<sup>43</sup> I. M. Young, *Inclusion and Democracy* (2000), at 134.



and participation facilitated.<sup>44</sup> The principle of representative deliberation requires that ‘all tendencies, interests and feelings’ obtain representation within government.<sup>45</sup> At the most basic level, the civil service should reflect the population it serves, and any under-representation of minorities dealt with by effective non-discrimination measures. Further, there should be a proportionate representation of the plurality of identities within the state to appointed public office, including where possible the executive, or cabinet.<sup>46</sup> For minorities, these representatives serve as instruments of ongoing consultation between the government and the group; form part of a horizontally organized deliberative process; and make clear the full equality of members of the group in the polity.<sup>47</sup>

### A Legislatures

Elections in a democracy will determine the composition of one or more chambers of the national Parliament. They may further determine directly the identity of the Head of State (the ‘President’) or the Head of Government (‘Prime Minister’). Their primary purpose is not however to provide the electorate with the direct power to determine which persons hold which office. Elections function as mechanisms to guarantee every citizen the right to participate in a system of collective decision-making that ultimately determines policy, leadership and authority.<sup>48</sup> They provide the clearest expression of the will of the people,<sup>49</sup> functioning as markers of the prevailing balance of opinions and viewpoints.<sup>50</sup> The electorate does not simply elect a government to rule, but also an opposition to examine, challenge and test proposed government measures.<sup>51</sup> Democracy, as the Inter-Parliamentary Union’s Universal Declaration on Democracy notes, requires the existence of a Parliament in which ‘all components of society are represented and which has the requisite powers and means

<sup>44</sup> Gould, ‘Diversity and Democracy: Representing Differences’, in Benhabib, *supra* note 11, 170, at 177. See, for example, the Human Rights Committee’s General Comment on Article 25 ICCPR: ‘Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages’, General Comment 25 (57). Adopted by the Human Rights Committee. UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 12.

<sup>45</sup> Human Rights Commission, Resolution 1995/60, *supra* note 9, preamble.

<sup>46</sup> The Lund Recommendations (*infra* note 65) call for the allocation of cabinet posts to members of minorities, either by formal or informal understanding (Recommendation 6).

<sup>47</sup> Mansbridge, ‘What does a Representative Do? Communicative Settings of Distrust, Uncrystallized Interests, and Historically Denigrated Status’, in W. Kymlicka and W. Norman (eds), *Citizenship in Diverse Societies* (2000) 99, at 99–100.

<sup>48</sup> J. Waldron, *Law and Disagreement* (1999), at 233.

<sup>49</sup> Article 21(3) of the Universal Declaration on Human Rights: ‘The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections’: GA Res. 217A (III) 1948.

<sup>50</sup> J. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (2002), at 51.

<sup>51</sup> Benhabib, *supra* note 15, at 72.

to express the will of the people by legislating and overseeing government action'.<sup>52</sup> It is important, both for reasons of efficacy and legitimacy, that the legislature reflect, what the Canadian Supreme Court has called, 'the diversity of [the] social mosaic'.<sup>53</sup> This should not be problematic given that the members of the legislature will normally number many hundreds. Yet experience shows that many minorities, and certain majorities (women being the obvious example), are under-represented or excluded. If Parliaments are an important forum for deliberation, then as many interests, identities and perspectives as possible should be represented.

What is called for is not a legislature that mirrors society, but an end to the historical domination of some groups by others, which makes it difficult for disadvantaged groups to participate effectively in the political process. The focus of reform should be the removal of features that have resulted in lower representation of certain groups in the legislature than in the population.<sup>54</sup> The process thus appears neutral and is less likely to exacerbate inter-group tensions. Neither the International Covenant on Civil and Political Rights,<sup>55</sup> nor the regional covenants on human rights,<sup>56</sup> require the introduction of a particular electoral system. There must be regular elections, which are free and fair, with universal and equal suffrage, open to multiple parties, conducted by secret ballot, monitored by independent electoral authorities, and free of fraud and intimidation. Each vote must count equally, but there is no requirement that each vote should have equal effect in the determination of the outcome of political power. The key test for the validity of an electoral system, in the phraseology of the American Convention on Human Rights (1969), is that they are 'genuine', in the sense that they reflect accurately the will of the people, and protect the electorate from government pressure and fraud.<sup>57</sup> It is important that

<sup>52</sup> Adopted without a vote by the Inter-Parliamentary Council at its 161st session (Cairo, 16 September 1997) (reprinted 1 *Netherlands Quarterly of Human Rights* (2000) 127) para. 11. The IPU, established in 1889, is the world organization of parliaments of sovereign states. Over a hundred national parliaments are currently members: [www.ipu.org](http://www.ipu.org).

<sup>53</sup> *Reference re Prov. Electoral Boundaries* [1991] 2 S.C.R. (Sask.) 158. The Committee established under the Convention on the Elimination of Discrimination Against Women, in its General Comment (23) on 'Political and Public Life', notes: 'Policies developed and decisions made by [one section of the community – in this case "men"] alone reflect only part of human experience and potential. The just and effective organization of society demands the inclusion and participation of all its members': CEDAW, General Comment 23 on 'Political and Public Life', adopted 13 January 1997, para. 13.

<sup>54</sup> Mansbridge, *supra* note 47, at 109. One alternative is a system of microcosm representation, in which those selected, normally by lottery, represent their group and thus the social diversity: *ibid.*, at 105.

<sup>55</sup> Article 25.

<sup>56</sup> Article 3 of the First Protocol, of the European Convention on Human Rights (1952); Article 23(1), American Convention on Human Rights (1969); and Article 13(1), African Charter on Human and Peoples' Rights (1981).

<sup>57</sup> Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992) 539, at 557.

minorities are not excluded, either by unjustifiably denying them citizenship,<sup>58</sup> or erecting artificial barriers to participation.<sup>59</sup>

The extent to which a state adopts measures to promote a greater representation of minorities is a matter of discretion,<sup>60</sup> as it balances the desirability of a more representative legislature with the need to ensure the emergence of a sufficiently clear and coherent political will.<sup>61</sup> The exact mechanisms used will depend on the political context and institutional experience of the state concerned. No preference is expressed in the human rights instruments for proportional or majority system of voting,<sup>62</sup> or the introduction of special measures to facilitate minority participation. Where the legislature does not represent the society, however, and unless there is clear evidence that this position is changing, the state should consider measures to facilitate a more representative body. These might include one or more of the following: quotas in electoral lists, reduction in the quorum for registration of a party, privileged funding for minority parties, lowered thresholds for entering Parliament,<sup>63</sup> or reserving seats for representatives of minorities.<sup>64</sup> Such measures can appear problematic in advance of their introduction, but may quickly become accepted subsequently.<sup>65</sup> The most effective measures will be those that relate to the design of the electoral system. The 'Lund Recommendations', adopted by a group of international experts, on 'Effective Participation of National Minorities in Public Life',<sup>66</sup> argue that preference should be

<sup>58</sup> See, for example, the denial of citizenship to many ethnic-Russians in certain states of the former Soviet Union: Aasland and Flotten, 'Ethnicity and Social Exclusion in Estonia and Latvia', 53 *Europe-Asia Studies* (2001) 1023.

<sup>59</sup> See *Ignatane v. Latvia*, HRC, Communication No. 884/1999, UN Doc. CCPR/C/72/D/884/1999, 31 July 2001, para. 7.4.

<sup>60</sup> See, for example, CEDAW, General Comment 23 on 'Political and Public Life', adopted 13 January 1997, para. 15. A report by the Venice Commission concluded that the participation of persons from minorities in public life through elected office results not so much from the application of rules peculiar to minorities, as from the implementation of general rules on electoral law, albeit adjusted, where required, to increase the chances of success by candidates from minority groups: European Commission for Democracy Through Law, 'Electoral Law and National Minorities', Council of Europe Doc. CDL-INF (2000) 4.

<sup>61</sup> *Case of Mathieu-Mohin and Clerfayt*, ECHR (1987) Series A No. 113, para. 54.

<sup>62</sup> Fox, *supra* note 57, at 556. Although the exercise of that choice cannot remove the right to vote itself: see, *Matthews v. United Kingdom*, ECHR, Reports 1999-I, para. 64.

<sup>63</sup> In Mauritius, in addition to those elected from multi-member constituencies, four seats in the National Assembly are allocated by an electoral commission to the highest-polling unsuccessful candidates belonging to under-represented ethnic groups: 'Integrative Approaches to the Accommodation of Minorities': paper prepared by Hadden and Maoláin for the Working Group on Minorities (Seventh Session, Geneva, 14–18 May 2001) UN Doc. E/CN.4/Sub.2/AC.5/2001/WP.6.

<sup>64</sup> Reserved seats for minorities are provided in Venezuela, Romania, Ethiopia, India, Jordan, Niger, Slovenia, Colombia and Croatia: Hadden and Maoláin, *ibid.*

<sup>65</sup> There is, for example, no great controversy in British public life regarding the over-representation, in relation to population, of Scots and Welsh Members in the UK's Westminster Parliament. Whether this remains the case in the post-devolution era is a moot point.

<sup>66</sup> The Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999) <http://www.osce.org/hcnm/documents/recommendations/lund/index.php3>. The proposals were drawn up under the auspices of the Foundation on Inter-Ethnic Relations, a non-governmental organization established in 1993 to carry out specialized activities in support of the OSCE High Commissioner on National Minorities. John Packer has argued that they represent an 'authoritative interpretation of the relevant international standards' on political participation and minorities: Packer,

given to those that will produce the most representative government. Except where territorially concentrated, when single-member districts will facilitate minority representation,<sup>67</sup> systems of proportional representation are likely to be the most advantageous.<sup>68</sup>

Once in Parliament, members of minority communities must play an effective role. In addition to participating in Parliamentary debates, they should have an important part to play in those committees dealing with minority issues, whether the relevant committee deals with broader issues such as human rights, constitutional questions, or the administration of government. Although not exclusively composed of members representing minority groups, it is sensible that an individual from one of the minority groups chairs the relevant committee.

#### 4 The Problem of Consensus

Implicit in the deliberative model is that consensus on uniform rules is always hypothetically possible. It is recognized that in reality, on many issues, this is unlikely. As a non-decision amounts to an implicit one in favour of the status quo, there must be a positive decision from the participants. If, following reasoned public debate, a majority determines that *A* is the right thing to do, then there is a presumption that this conclusion is rational and thus legitimate.<sup>69</sup> The decision provides a fallible, but reasonable, basis for a common practice until further notice.<sup>70</sup> This is the justification for majority rule in a democracy.

In the deliberative model developed by Habermas, the individual approximates to the liberal ideal of the autonomous self.<sup>71</sup> She is able to give reasons for her actions, critically reflect on her own beliefs and, when exposed to a better argument, is willing to change her opinions.<sup>72</sup> But individuals cannot easily reject that part of their identity conditioned by membership of a social group.<sup>73</sup> Certain core beliefs are non-negotiable. Nor is the state neutral in respect of cultural identity. In every state there will be one dominant culture, often associated with the majority ethno-cultural

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‘The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life’, 11(4) *Helsinki Monitor* (2000) 29, at 41. The text of the Lund Recommendations appear as an annex to the article. See also OSCE/ODIHR ‘Guidelines to Assist National Minority Participation in the Electoral Process’, adopted Warsaw, January 2001.

<sup>67</sup> So-called ‘minority-majority’ constituencies: Brockington *et al.*, ‘Minority Representation under Cumulative and Limited Voting’, 60 *Journal of Politics* (1998) 1108, at 1109. New Zealand electoral boundaries for multi-member Parliamentary constituencies are drawn up with the interests of Maori communities in mind: Hadden and Maoláin, *ibid.*

<sup>68</sup> Lund Recommendation 9. Norris, ‘Ballots not Bullets: Testing consociational theories of ethno conflict, electoral systems, and democratisation’ in A. Reynolds (ed.) *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (2002) 206.

<sup>69</sup> Benhabib, *supra* note 16, at 72.

<sup>70</sup> Habermas, *supra* note 5, at 306.

<sup>71</sup> Van Mill, ‘The Possibility of Rational Outcomes from Democratic Discourse and Procedures’, 58 *Journal of Politics* (1996) 734, at 736.

<sup>72</sup> Rawls, ‘The Idea of Public Reason Revisited’, in J. Rawls, *The Law of Peoples* (1999) 138–139.

<sup>73</sup> Oquendo, ‘Deliberative Democracy in Habermas and Nino’, 22 *OJLS* (2002) 189, at 217.

group, which will shape the context for and content of political deliberation. The dominant culture will express itself around symbolic questions of state identity: the name of the polity, its flag, national anthem, public holidays, received history, the use of public languages and questions of education policy.<sup>74</sup> On many of these issues it will simply not be possible for members of the majority and minority communities, through rational deliberation,<sup>75</sup> to agree on the name of the state, or the design of its flag, etc. Where, for example, it is agreed that there should be one official language, members of each community will argue for it to be their own. Only where the minority agrees to use the majority language in public life is consensus on a single uniform rule possible. This constitutes an agreement to (at least partial) voluntary assimilation, which is likely to be accompanied by a more multicultural sense of national identity.<sup>76</sup>

No group may be forced to assimilate.<sup>77</sup> Experience demonstrates that recent immigrant groups may be willing to accept voluntary assimilation into a culture that is prepared to some degree to accommodate their distinctive identity, practices and beliefs. Long established minorities, whose cultural traditions may pre-date the establishment of the state of which its members now find themselves citizens, are unlikely to accept assimilation into the dominant culture. Where there is no consensus, the deliberative model tells us that majority rule is acceptable. In this case, however, the legitimacy basis of majority rule is not present. Even if reasoned debate is possible, there could never be a consensus. The fact that a majority agrees on policy choice A (a uniform rule that will inevitably reflect their interests and preferences) cannot create a presumption of rationality and legitimacy. On issues where there can be no consensus between majority and minority communities, the purpose of deliberation is not to agree universal principles, but to recognize the differences and similarities of the respective communities in order that some form of agreement can be reached which accommodates the differences in appropriate institutions and similarities in shared ones.<sup>78</sup> The point is made in the Lund Recommendations, which contend that it is essential for the authorities to recognize 'the need for central and

<sup>74</sup> The break-up of Czechoslovakia can in part be traced to the refusal by the national Parliament to insert a hyphen into the state name: Czecho-Slovakia: J. Levi, *The Multiculturalism of Fear* (2000), at 154–156.

<sup>75</sup> The requirement of rational deliberation has been criticized for forcing ethno-cultural groups to enter deliberation on the terms of the liberal state. It is the case that rational discourse derives from the ruling institutions of the West – scientific debate, modern parliaments and courts – and that these are male-dominated institutions which reflect the interests of the dominant cultural group in all states (Young, 'Communication and the Other: Beyond Deliberative Democracy', in Benhabib, *supra* note 11, 120, 123). But what is required is not analytical deliberation but political discourse, including personal or collective narratives, rhetoric or intuitive argument, that makes the case for what should be done. This may include expressions of hurt or anger about past grievances, or demands for the telling of stories not reflected in the state nation-building myth. The only limits are those that derive from the principles of deliberative democracy – uncoerced discussion on a basis of political equality. Law-making bodies must, however, approximate to the ideal of rational, disinterested debate, in order to articulate general statements consonant with the rule of law: Benhabib, *supra* note 16, at 83.

<sup>76</sup> Kymlicka describes multiculturalism as the 'flipside' of citizenship: Kymlicka, 'Western Political Theory and Ethnic Relations in Eastern Europe', in W. Kymlicka and M. Opalski (eds), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (2001) 13, at 36.

<sup>77</sup> This is made clear by Article 27, ICCPR.

<sup>78</sup> J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995) 131.

uniform decisions in some areas of governance together with the advantages of diversity in others'.<sup>79</sup>

### *A Shared Institutions and Autonomy Regimes*

The right of cultural security for minorities, implicit in all human rights instruments, is made clear in Article 27 ICCPR,<sup>80</sup> and in the UN Declaration on Minorities.<sup>81</sup> For many groups it can be achieved without the introduction of separate legal or political institutions. State funding for cultural associations, the provision of public services in the minority language and positive recognition by public authorities of members of the group may suffice. The nature and extent of the positive measures required to protect and promote a particular group's identity cannot be discerned from the international instruments on minorities. The language of the UN Declaration on Minorities is opaque and often exhortatory.<sup>82</sup> The provisions of the one legally binding instrument specifically dedicated to minorities, the Council of Europe's Framework Convention on National Minorities, are struck through with conditional clauses and vague formulations.<sup>83</sup> Measures to accommodate ethno-cultural identity within shared institutions will emerge only, it would seem, through democratic deliberation, not the application of abstract legal norms and principles.

Where it is not possible to accommodate difference in shared institutions, separate legal and political regimes may be needed. These regimes of autonomy, which protect certain customs, practices and societal structures from government interferences,<sup>84</sup> may be personal, cultural or territorial in nature. Regimes of personal, or individual, autonomy build on the wide private sphere afforded to all individuals in a democracy to provide an exemption, for members of the group only, from the application of general laws.<sup>85</sup> Cultural autonomy relates to self-government by the minority over specific aspects of life, but within a territory over which the minority group does not

<sup>79</sup> Lund Recommendation 15.

<sup>80</sup> The Human Rights Committee has noted that Article 27 is 'directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned': General Comment on Article 27, *supra* note 3, para. 9. It is not always clear which interferences by the state will constitute a violation of Article 27. See, for example, *Åärelä and Näkkäläjärvi v. Finland*, HRC, Communication No. 779/1997, UN Doc. CCPR/C/73/D/779/1997, 7 November 2001, para. 7.5.

<sup>81</sup> Article 1(1), UN Declaration on Minorities.

<sup>82</sup> For example, states '*should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue*': Article 4(3) (emphases added).

<sup>83</sup> See, for example, 'In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities': Article 10(2), Framework Convention for the Protection of National Minorities 34 ILM (1994) 351.

<sup>84</sup> Hannum and Lillich, 'The Concept of Autonomy in International Law' 74 *AJIL* (1980) 858, at 883.

<sup>85</sup> Examples, in the United States, include exemption from the use of ceremonial wine by Catholics and Jews during prohibition, the religious use of peyote (a prohibited narcotic in many states) by American Indians, and mandatory schooling laws for Amish populations: Levi, *supra* note 74, at 128–129.

enjoy legislative or regulatory autonomy.<sup>86</sup> A minority education board might, for example, be established with the authority to determine the language(s) of instruction or content of the curriculum in those state schools where a preponderance of the students come from the minority population.

Territorial autonomy involves the granting of separate powers of internal administration, to whatever degree, to regions possessing some ethnic or cultural distinctiveness, without those areas being detached from the state.<sup>87</sup> It provides political and governmental authority over the region to which power is devolved, and can be understood as 'independence of action on the internal or domestic level'.<sup>88</sup> Territorial autonomy is, according to Kymlicka, the most effective way of accommodating sub-state nations, what he terms, 'national minorities':<sup>89</sup> groups that formed complete and functioning societies on their historic homeland prior to being incorporated into a larger state.<sup>90</sup> The experience of Western liberal democracies, particularly in Canada, Spain, Belgium and Switzerland, is that territorial arrangements, variously referred to as multinational federations, quasi-federal autonomy, or extensive self-government regimes, have proved the most effective method for the accommodation of two or more societal cultures.<sup>91</sup> Kymlicka's use of the term 'national minority' is perhaps unhelpful. In Europe, it has a particular connotation with those populations which, through arbitrary changes in international borders, now find themselves a distinct ethno-cultural minority,<sup>92</sup> often sharing that identity with the titular majority population of a neighbouring state.<sup>93</sup> Whilst the expression 'national minority' is used in the instruments of the Organization for Security and Co-Operation in Europe, and the Council of Europe, which has adopted a Framework Convention for the Protection of National Minorities, states and, in particular, the Advisory Committee established under the Framework Convention,<sup>94</sup> do not recog-

<sup>86</sup> Hannum and Lillich, *supra* note 84, at 883. For the limits of cultural autonomy, see *Refah Partisi and others v. Turkey*, GC judgment 13 February 2003, paras 117–119.

<sup>87</sup> J. Crawford, *The Creation of States in International Law* (1979), at 211–212.

<sup>88</sup> Hannum and Lillich, *supra* note 84, at 860.

<sup>89</sup> Kymlicka, *supra* note 76, at 19.

<sup>90</sup> *Ibid.*, at 23.

<sup>91</sup> *Ibid.*, at 25. States with a high degree of devolved authority, exemplified, but not restricted to, federal states, have traditionally been seen as weak and unstable. Critics point to the simple fact that of the states of the former Soviet Empire, six were unitary and three were federal, organized by reference to ethno-cultural identity – the Soviet Union itself, Yugoslavia and Czechoslovakia. The six have since become five, following the reunification of Germany; the three are now 23.

<sup>92</sup> J. Sigler, *Minority Rights* (1983), at 7–8.

<sup>93</sup> This concept of a 'national minority' has found some support in the United Nations Working Group on Minorities, where it was suggested that a national minority was 'a minority in one country but which formed the majority in the mother country': UN Doc. Document E/CN.4/Sub.2/1998, paras 44–46, quoted by José Bengoa, 'Existence and Recognition of Minorities', UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.2, 3 April 2000, at footnote 5.

<sup>94</sup> Article 26, Framework Convention for the Protection of National Minorities 34 ILM (1994) 351. For the reports and activities of the ACFC see: <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/AdvisoryCommittee/Toc.htm>.

nize such a restrictive understanding of the term.<sup>95</sup> The term ‘national minority’ found in the European instruments, appears not dissimilar to that of ‘minority’ under Article 27 ICCPR: citizens who conceive of themselves as members of ethno-culturally distinct minority groups within the state.<sup>96</sup>

No right of territorial autonomy, or any other form,<sup>97</sup> exists for (national) minorities in international law. With notable exceptions autonomy has not featured in the international instruments concerning minority groups.<sup>98</sup> A stronger argument may be made for groups which may be classed as ‘peoples’,<sup>99</sup> and which possess a right of self-determination: the right to have their distinct character reflected in the institutions of government under which they live.<sup>100</sup> A number of states draw a specific connection between the issue of self-determination and autonomy.<sup>101</sup> A right

<sup>95</sup> Indeed, if such an understanding had been intended then it should be possible to produce a finite and definitive list of those groups covered by the FCNM. In drafting the Framework Convention, it was decided to adopt a pragmatic approach, based on a recognition that no definition capable of mustering general support of all Council of Europe member states could be achieved: Explanatory Report on the Framework Convention for the Protection of National Minorities, Council of Europe H(94)10, Strasbourg, November 1994, para. 12.

<sup>96</sup> The Human Rights Committee, in its General Comment, concluded that the individuals designed to be protected by Article 27 need not be citizens of the State party, nor even permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of their rights under Article 27: General Comment on Article 27, *supra* note 3, paras. 5.1 and 5.2. That said, only citizens enjoy rights of political participation: see, Article 25, ICCPR and Article 16, ECHR.

<sup>97</sup> See, *Singh Bhinder v. Canada*, HRC, Communication No. 208/1986, UN Doc. CCPR/C/37/D/208/1986, 28 November 1989, 208/1986.

<sup>98</sup> Article 11 of the Council of Europe’s Parliamentary Assembly’s Recommendation 1201 provides: ‘In the regions where they are in a majority the persons belonging to a national minority *shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state*’ (emphasis added). The Heads of State and Government of the Council of Europe rejected the proposed minority rights protocol to the ECHR. With the demise of Recommendation 1201, the Council of Europe promulgated the Framework Convention for the Protection of National Minorities, 1995. It contains no provision on autonomous government: see G. Gilbert, ‘Autonomy And Minority Groups – A Legal Right in International Law?’, UN Doc. E/CN.4/Sub.2/AC.5/2001/CRP.5, 5 March 2001, n. 63 *et seq.* and accompanying text. Cf. Paragraph 35, CSCE Copenhagen Document, 11 *HRLJ* (1990) 232, although the participating states merely ‘note the efforts undertaken to protect and create conditions for the promotion of the identity of certain national minorities by establishing, as one of the possible means to achieve these aims, specific local or autonomous administrations corresponding to the specific historical and territorial circumstances of these minorities’ (emphasis added). See, also, Article 31, Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2 (1994). See, Foster, ‘Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples’, 12 *EJIL* (2001) 141.

<sup>99</sup> Consider the determination of the Canadian Supreme Court in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217: ‘It is clear that “a people” may include only a portion of the population of an existing state’ (para. 124).

<sup>100</sup> Brownlie, ‘The Rights of Peoples in Modern International Law’, in J. Crawford (ed.), *The Rights of Peoples* (1988) 1, at 5.

<sup>101</sup> In reports to the Human Rights Committee on the right to self-determination under Article 1 ICCPR, Australia talks about the ‘large measure of self-government’ afforded to Norfolk Island (Third Periodic Report, UN Doc. CCPR/C/AUS/98/3, para. 27); Sudan provides information on the arrangements in relation to southern Sudan (Second periodic report, UN Doc. CCPR/C/75/Add.2, paras 7–23, *passim*); Spain on the ‘State of Autonomies’ under the 1978 Constitution (Fourth Periodic Report, UN Doc.



of autonomy does not however follow from the recognition of the group as a people: 'self-determination is a right, autonomy is not; autonomy is essentially a gift by the State ... [it] may be a good idea, but it does not flow freely from the sources of international law as an obligation on States'.<sup>102</sup> There are then no specific international norms on multiculturalism that can inform public authorities, or the international community, of the precise nature and scope of the autonomy regime necessary to ensure the cultural security of ethno-minority groups within the state in a particular case. Each solution is context specific and cannot be determined in the absence of participation by members of the minority community.

## B Consultation

The Flensburg Proposals, drawn up by a group of international experts, note that it is essential that decision-makers proactively consult members of minorities to be affected by decisions, and create opportunities for them to participate effectively in the process.<sup>103</sup> The importance of consultation is reflected in the UN Declaration on Minorities<sup>104</sup> and in the Framework Convention on National Minorities.<sup>105</sup> International human rights bodies demonstrate a particular concern that the principle of deliberative inclusion has been given effect, and that a majority decision has resulted from reasoned public debate and not the aggregation of preferences and interests. In considering complaints by minority groups, the Human Rights Committee has paid particular attention to the extent to which the interests or preferences of the minority have been taken into account. In *Länsman et al. v. Finland* (No. 2), the Committee, in determining that there had been no violation of Article 27 ICCPR, noted that the Muotkatunturi Herdsmen's Committee had been consulted in the process of drawing up the logging plans and had 'not react[ed] negatively'. There was clear evidence that the authorities had gone through a process of weighing the minority's interests against that of the general economic interest.<sup>106</sup> In *Mahuika et al. v. New Zealand*, the state had undertaken a process of consultation in order to secure broad Maori support to a nation-wide settlement on the regulation of fishing activities. Significantly, the proposals brought forward by Maori communities and organizations had clearly

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CCPR/C/95/Add.1, paras 3–7); Uzbekistan on the autonomous Republic of Karakalpakstan (Initial Report, UN Doc. CCPR/C/UZB/99/1, para 61); and Finland information in respect of the Åland Islands (Fourth Periodic Report, UN Doc. CCPR/C/95/Add.6, paras. 7–10). The United Kingdom report argues that devolution 'represents an opportunity for the people of Northern Ireland, Scotland and Wales to have their own democratically elected and powerful assemblies, whilst maintaining the close links which have existed for centuries within the United Kingdom': Fifth Periodic Report, UN Doc. CCPR/C/UK/99/5, para. 11.

<sup>102</sup> Thornberry, 'Self-Determination and Indigenous Peoples: Objections and Responses', in P. Aikio and M. Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (2000) 39, at 56 (footnotes omitted). See, also, Shaw, 'Peoples, Territorialism and Boundaries', 8 *EJIL* (1997) 478, at 489.

<sup>103</sup> Proposals of The European Centre for Minority Issues Seminar, 'Towards Effective Participation Of Minorities', UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.4, 5 May 1999, paras 12 and 16.

<sup>104</sup> Article 2(3).

<sup>105</sup> Article 15.

<sup>106</sup> *Länsman et al. v. Finland* (No. 2), HRC, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995, 22 November 1996, para. 10.5.

affected the design of the final settlement, which was only enacted following evidence of substantial Maori support.<sup>107</sup> By engaging in a process of consultation before proceeding to legislate, and paying specific attention to the sustainability of Maori fishing activities, New Zealand, the Committee decided, had not interfered with Maori rights protected by Article 27 ICCPR.<sup>108</sup> Where the minority views have not been taken into account, the Committee has been more willing to determine a violation of the International Covenant. In *Hopu and Bessert v. France*, the authors complained that the construction of a hotel complex would destroy their ancestral burial grounds, constituting an unjustified interference in the right to respect for family life.<sup>109</sup> The Committee accepted that cultural traditions should be taken into account when defining the term ‘family’, and noted that the relationship between the applicants, who were Polynesian inhabitants of Tahiti, and their ancestors was an essential element of their identity and continued to play an important role in their family life. It determined that there was ‘nothing in the information before [it to show] that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex’. The Committee therefore concluded that there had been an arbitrary interference with the authors’ right to family and privacy.<sup>110</sup> Whilst Article 27, ICCPR provides a right of deliberative inclusion for minorities where their right to cultural security is threatened, the right to ‘enjoy their own culture’ is not lost by the fact of political participation. The right to cultural security remains the primary right of minorities expressed in the article.

The fact of minority inclusion will not *ipso facto* render the adopted policy lawful and legitimate. The right of political autonomy is understood to involve not only the right to participate in the political deliberation,<sup>111</sup> but a right to determine whether that law should in fact be adopted. The fact that German Jews enjoyed the right to vote in the 1930s could not in any way be said to bind them to the decisions of an elected government with majority support determined to seek their destruction.<sup>112</sup> Democratic theory must recognize that legitimacy is dependent upon the degree of consensus that exists following public deliberation and reasoned argument between citizens as to what should be done.<sup>113</sup> Each law does not have to rely on the actual consent of concerned citizens. Legitimacy depends upon the degree to which each

<sup>107</sup> *Mahuika et al v. New Zealand*, HRC, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993, 15 November 2000, para. 9.6.

<sup>108</sup> *Ibid.*, para. 9.8.

<sup>109</sup> Articles 17 and 23 ICCPR.

<sup>110</sup> *Hopu and Bessert v. France*, HRC, Communication No. 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997, para. 10.3.

<sup>111</sup> The ‘great right of every man’ is the ‘right of having a share in the making of the laws’: Cobbet, from *Advice to Young Men and Women, Advice to a Citizen* (1829), quoted in Waldron, *Law and Disagreement* (1999), at 232.

<sup>112</sup> Marks, *The Riddle of All Constitutions* (2000), at 101.

<sup>113</sup> Cohen, ‘Deliberation and Democratic Legitimacy’, in J. Bohman and W. Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (1997) 67, at 72.

individual could have or would have consented to a particular regulation.<sup>114</sup> As Amy Gutmann explains, Nazi policies were illegitimate because they could never have been accepted by those Jewish and other individuals whose destruction they proposed.<sup>115</sup>

Interferences in individual liberty must both have a reasoned justification and follow evidence of some collective consideration of the issue,<sup>116</sup> particularly with those likely to be affected by the proposed measure. The rights of individuals expressed in human and minority rights instruments limit the application of general rules with majority support adopted following full and effective deliberation on the particular issue.

### C Consultative Bodies

Having established the importance of the principle of deliberative inclusion, it is necessary to consider the mechanisms through which it might be implemented. It is possible to conceive of deliberative procedures that do not rely on representatives. The Alaska Native Review Commission visited 60 villages and numerous fishing camps in rural Alaska, allowing 1,450 of the 60,000 Alaskan Native population to speak, providing them with information and debating with witnesses.<sup>117</sup> In the majority of cases, for reasons of time and organizational difficulty, this will not be appropriate and states will be required to establish 'advisory or consultative bodies' to serve as channels for dialogue between governmental authorities and minorities.<sup>118</sup> These bodies provide an essential mechanism through which the principle of deliberation can be incorporated in the constitutional structures of the state, although the particular design will depend upon the state/minority relationship and the constitutional arrangements currently in place. The form of the body is not crucial.<sup>119</sup> It may

<sup>114</sup> Føllesdal, 'Indigenous Minorities and the Shadow of Injustice Past', 7 *International Journal on Minority and Group Rights* (2000) 19, at 28.

<sup>115</sup> Amy Gutmann, 'The challenge of multiculturalism in political ethics', 22 *Philosophy and Public Affairs* (1993) 171, at 190.

<sup>116</sup> At its simplest, deliberative democracy is conceived as any process for 'communication and for raising and collectively considering issues': National Research Council of America, *Understanding Risk* (1996), referred to in Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach', 21 *OJLS* (2001) 415, at 428.

<sup>117</sup> J. Dryzek, *Discursive Democracy* (1990) 127.

<sup>118</sup> Lund Recommendation 12. See also the Flensburg Proposals, *supra* note 103, at para. 12. Eide, 'Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Sub.2/AC.5/2001/2, 2 April 2001, para. 48.

<sup>119</sup> In Croatia there exists a Council of National Minorities. Its aim is to permit 'an open dialogue between national minorities and the Government'. The Council considers the implementation of policy affecting minorities. It forwards its opinions and suggestions to the Croatian Parliament and Government for consideration. In Denmark there is a Liaison Committee Concerning the German Minority. Its function is to ensure effective communication between the German minority population and the Danish Government and Parliament, and to negotiate on issues of interest to the minority. In Estonia, a Presidential Roundtable on National Minorities was founded in 1993. Amongst its purposes is the promotion of 'dialogue and mutual understanding between the different ethnic groups residing in Estonia'. In the Slovak Republic, members of all 11 national minorities are proportionally represented in an advisory Council of the Government of the Slovak Republic for Minorities. This is an advisory body to the Government. In Ukraine there exists a 'Council of the Representatives of Public Associations of

be standing or ad hoc, independent or attached to the legislative or executive branch of government. The key point is that it should as far as possible mirror the ideal of deliberative democracy and it thus ‘makes deliberation possible’.<sup>120</sup> Issues such as the design of the welfare state or overall levels of public spending will not normally be considered within these consultative bodies; only where a proposed measure affects the minority culture is a requirement of institutional deliberation introduced.

Whatever institutional structures are established, in the absence of a clear consensus on what is to be done, a decision must be reached and the potential, in the minority’s mind, of a tyranny of majority rule remains. Careful consideration should be given to how the consultative body might function. The Flensburg Proposals conclude that consultative bodies might be given more political weight, even powers of legislative initiative and suspensive veto over legislation affecting minority communities.<sup>121</sup> Where they mirror the deliberative ideal of free and uncoerced deliberation, the recommendations of consultative bodies should not be subject to revision, excepting for technical amendments, by the government. The relevant public authority, Parliament or ministry, should either implement the recommendations in their entirety, or reject them (with clear implications for the legitimacy of alternative government measures adopted on minority issues). In determining the membership of the body, the state must balance the requirement of inclusiveness with the need to establish effective deliberation. In certain cases it might be possible to hold democratic elections amongst those registering as members of the minority to determine who will represent the group.<sup>122</sup> In many cases the state will simply appoint to the body members of the minority elite, or community leaders, or their nominees. There is then a particular requirement that these bodies remain open to representations from the wider public sphere. Neither the state nor minority members are able to represent the diversity of interests and perspectives from within their respective communities. Individuals with similar backgrounds often have different interests or opinions, or different goals and projects.<sup>123</sup> There is no essential trait that binds every member of any social group together in common interest.

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National Minorities’. This body works under the auspices of the State Committee of Ukraine on Nationalities and Migration, which enjoys primary responsibility for the settlement of inter-ethnic disputes. The purpose of the Council is to contribute to legislation and other developments on issues of importance to members of the national minority groups of Ukraine. In Hungary a Roundtable of Minorities was established during the preparatory stages of the Minorities Act for the purpose of consultation with state authorities. Its role diminished following the full development of the minority self-government system, as the national self-governments of minorities took over the role of negotiation partners with the Government.

<sup>120</sup> Cohen, *supra* note 15, at 79.

<sup>121</sup> Flensburg Proposal 9.

<sup>122</sup> See, for example, the elected Sami Parliament of Nordic countries. The Finnish Sami Parliament enjoys a right to participate in public decision-making with the authorities: Myntii, ‘The Nordic Sami Parliaments’, in P. Aikio and M. Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (2000) 203, at 207.

<sup>123</sup> Young, *supra* note 43, at 137.

## 5 Conclusion

The deliberative model is a pure form of participatory democracy:<sup>124</sup> all members of the community must reach an agreement as to the form of their particular accommodation. A more explicit recognition of the deliberative nature of democracy would require greater efforts to facilitate the inclusion of marginalized groups and the establishment of consultative bodies to deliberate with members of ethno-cultural minorities on their particular interests and preferences. That said, governments must govern and the deliberative model does not recognize any right of veto for minorities. The value of a deliberative understanding of democracy for minorities is not that it necessarily affords minorities a share of political power, but that it requires that individuals belonging to minority groups are recognized as equal, albeit culturally distinct, members of the polity with a right to be included in the decision-making process. As a minimum, this will allow members of ethno-cultural groups to bring issues onto the political agenda, correct factual errors and ensure that their interests and perspectives are recognized within the process. More significantly, given that the purpose of the deliberation is to seek a consensus on minority policies and that self-interested arguments are not permitted, the outcome of the procedure is likely to be different from the results of the aggregation of individual preferences.<sup>125</sup> Government policy on minorities will be fairer and enjoy a greater degree of legitimacy in the eyes of both majority and minority populations promoting a greater degree of justice and internal and external peace and security, as differences are channelled into democratic institutions and mechanisms and resolved without recourse to violence.

<sup>124</sup> Van Mill, *supra* note 71, at 738.

<sup>125</sup> Cohen, *supra* note 15, at 75.